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UNITED STATES COMPILED STATUTES

ANNOTATED

1916

EMBRACING THE STATUTES OF THE UNITED STATES OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE CLOSE OF THE FIRST SESSION OF THE 64TH CONGRESS

AND

DECISIONS CONSTRUING AND APPLYING SAME TO APRIL 1, 1916

INCORPORATING UNDER THE HEADINGS OF THE REVISED STATUTES THE SUBSEQUENT LAWS, TOGETHER WITH EXPLANATORY AND HISTORICAL NOTES

TEXT OF THE STATUTES COMPILED BY

JOHN A. MALLORY

ASSISTED BY EDITORIAL STAFF

ANNOTATIONS BY MEMBERS OF THE PUBLISHERS' EDITORIAL STAFF

IN 12 VOLUMES

VOLUME 9

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1917

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TABLE OF TITLES AND CHAPTERS

CONTAINED IN THIS VOLUME

TITLE LX

(CONTINUED)

Chap.		Sec.
2.	Trade-marks	9485
3.	Copyrights	9517

TITLE LXI

BANKRUPTCY

1.	Definitions	9585
2.	Creation of courts of bankruptcy and their jurisdiction	9586
3.	Bankrupt	9587
4.	Courts and procedure therein	9602
5.	Officers, their duties and compensation	9617
6.	Creditors	9639
7.	Estates	9645

TITLE LXII

NATIONAL BANKS

1.	Organization and powers	9657
2.	Obtaining and issuing circulating notes	9697
2A.	National currency associations	9729
3.	Regulation of the banking business	9744
3A.	Federal reserve banks	9785
4.	Dissolution and receivership	9806

TITLE LXII A

FEDERAL FARM LOANS 9835a

UNITED STATES COMPILED STATUTES ANNOTATED

1916

VOLUME 9

UNITED STATES COMPILED STATUTES ANNOTATED

1916

VOLUME 9

TITLE LX

PATENTS, TRADE-MARKS, AND COPYRIGHTS
(CONTINUED)

Chap.		Sec.
1.	Patents	9427
2.	Trade-marks	9485
3.	Copyrights	9517

CHAPTER TWO

Trade-Marks

Sec.

9485. Registration of trade-marks authorized; requisites of application therefor; fees and other requirements.

9486. Owners of trade-marks having manufacturing establishments in United States entitled to registration and protection of trade-marks on products of such establishments.

9487. Declaration accompanying application; verification thereof.

9488. Designation by foreign applicant of person on whom process or notice of proceedings may be served.

9489. Effect to be given to application where previous application has been filed in foreign country affording similar privileges to citizens of the United States; limitations, and restrictions on issue of certificates in such cases.

9490. Trade-marks which may be registered.

9491. Examination of application; publication of trade-mark; filing notice of opposition; issue of certificate of registration where no notice of opposition; refusal of application on examination.

9492. Notice to applicant of opposition; declaration of interference; examination of interference or opposition; grounds for refusal of registration.

9493. Appeal from decision of examiner to Commissioner of Patents.

9494. Appeal from decision of Commissioner of Patents to Court of Appeals of District of Columbia.

9495. Assignments of trade-marks.

9496. Certificates of registration and record thereof; copies of records, books, etc., and of certificates of registration, as evidence.

Sec.

9497. Duration of certificate of registration, and renewal thereof.

9498. Cancellation of registration; proceedings therefor.

9499. Fees.

9500. Application of R. S. §§ 4935, 4936, to trade-mark fees.

9501. Registration prima facie evidence of ownership; infringement, and recovery of damages therefor; treble damages.

9502. Jurisdiction of suits respecting trade-marks.

9503. Certiorari for review by Supreme Court of cases arising under act.

9504. Power of courts to grant injunctions; recovery of damages in addition to profits to be accounted for; treble damages; assessment of profits and damages.

9505. Order for destruction of infringing labels, etc.; service of injunction, and proceedings for enforcement thereof.

9506. Restrictions on actions for infringement.

9507. Suits involving interfering registered trade-marks.

9508. Existing rights and remedies for wrongful use of trade-mark preserved.

9509. Pending applications for registration; amendment and prosecution thereof.

9510. Damages from registration procured by false or fraudulent declaration or means; recovery.

9511. Regulations for proceedings for registration.

9512. Classes of merchandise for purpose of trade-mark registration.

9513. Articles imported, copying, or simulating, etc., trade-name or registered trade-mark, not admitted to entry.

Sec.
9514. Notice of registration to be affixed to trade-mark or to package inclosing article; notice of registration or of infringement requisite of recovery of damages.
9515. Construction of act; definitions.
9516. Time of taking effect of act; repeal; exception of certificates of registration issued under previous acts.

(R. S. §§ 4937–4947. Superseded.)

These sections, constituting chapter 2 of this Title of the Revised Statutes, authorized the registration of trade-marks by persons entitled to the exclusive use of a lawful trade-mark, or who intended to adopt and use any trade-mark for exclusive use within the United States, and provided remedies for infringement of registered trade-marks and for false registration, and authorized regulations for the transfer of rights to trade-marks. Its provisions were held by the Supreme Court to be unconstitutional, on the ground that a trade-mark was not an invention, discovery, or writing, within Const. art. 1, § 8, cl. 8, authorizing Congress to secure "to authors and inventors the exclusive right to their respective writings and discoveries," and that its provisions were not sustainable under Const. art. 1, § 8, cl. 3, giving Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," since the act was not thus limited, but was so framed as to apply to all commerce. Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550.

Provisions similar to those in the above-mentioned sections, but limited to trade-marks used in commerce with foreign nations or with the Indian tribes, were contained in the Trade-Mark Act of March 3, 1881, c. 138, 21 Stat. 502. This act was evidently intended as a substitute for these sections.

Act Aug. 14, 1876, c. 274, 19 Stat. 141, making punishable certain offenses against the provisions of this chapter of the Revised Statutes, was held to fall with it, and not to become operative under Act March 3, 1881, c. 138, mentioned above. United States v. Koch, 40 Fed. 250. That act is therefore omitted.

The Trade-Mark Act of Feb. 20, 1905, c. 592, post, §§ 9485, 9487–9511, 9513–9516, contained more comprehensive provisions than those of said Act March 3, 1881, c. 138, and may be regarded as superseding said act.

See notes to said Act Feb. 20, 1905, c. 592, § 1, post, § 9485.

§ 9485. (Act Feb. 20, 1905, c. 592, § 1, as amended, Act May 4, 1906, c. 2081, § 1, and Act Feb. 18, 1909, c. 144.) Registration of trade-marks authorized; requisites of application therefor; fees and other requirements.

The owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used; a description of the trade-mark itself shall be included, if desired by the applicant or required by the Commissioner, provided such description is of a character to meet the approval of the Commissioner. With this statement shall be filed a drawing of the trade-mark, signed by the applicant, or his attorney, and such number of specimens of the trade-mark as actually used as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of ten dollars, and otherwise complying with the requirements of this Act and such regulations as may be prescribed by the Commissioner of Patents. (33 Stat. 724. 34 Stat. 168. 35 Stat. 628.)

This was the first section of the Trade-Mark Act of 1905, entitled "An act to authorize the registration of trade-marks used in commerce with foreign

nations or among the several States or with Indian tribes, and to protect the same."

Sections 2–30 of the act are set forth post, §§ 9487–9511, 9513–9516.

This section, as originally enacted, contained, after the words "description of goods comprised in such class to which the trade-mark is appropriated," as a further clause, the words "a description of the trade-mark itself"; and to this clause was added, by the amendment of the section by Act May 4, 1906, c. 2081, § 1, cited above, the words "only when needed to express colors not shown in the drawing." Section 4 of said amendatory act of May 4, 1906, c. 2081, provided that the act should take effect July 1, 1906.

By further amendment of this section by Act Feb. 18, 1909, c. 144, last cited above, the whole of said clause previously amended was omitted, and after the sentence next following it was inserted the provision, "a description of the trade-mark itself shall be included, if desired by the applicant or required by the Commissioner, provided such description is of a character to meet the approval of the Commissioner," making the section read as set forth here.

This act superseded the Trade-Mark Act of March 3, 1881, c. 138, 21 Stat. 502, entitled "An act to authorize the registration of trade-marks and protect the same," and also Act Aug. 5, 1882, c. 393, 22 Stat. 298, entitled "An act relating to the registration of trade-marks." Section 30, of this act, post, § 9516, repealed all inconsistent acts and parts of acts, except so far as they might apply to certificates of registration issued under the Trade-Mark Act of March 3, 1881, c. 138, and Act Aug. 5, 1882, c. 398.

Said Trade-Mark Act of March 3, 1881, c. 138, was as follows:

"Be it enacted, &c. That owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with the following requirements:

"First. By causing to be recorded in the Patent Office a statement specifying name, domicile, location, and citizenship of the party applying; the class or merchandise and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated; a description of the trade-mark itself, with fac-similes thereof, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used.

"Second. By paying into the Treasury of the United States the sum of twenty-five dollars, and complying with such regulations as may be prescribed by the Commissioner of Patents.

"Sec. 2. That the application prescribed in the foregoing section must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration verified by the person, or by a member of a firm, or by an officer of a corporation applying, to the effect that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and fac-similes presented for registry truly represent the trade-mark sought to be registered.

"Sec. 3. That the time of the receipt of any such application shall be noted and recorded. But no alleged trade-mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as above mentioned or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers. In an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases.

"Sec. 4. That certificates of registry of trade-marks shall be issued in the name of the United States of America, under the seal of the Department of the Interior, and shall be signed by the Commissioner of Patents, and a record thereof, together with printed copies of the specifications, shall be kept in books for that purpose. Copies of trade-marks and of statements and declarations filed therewith and certificates of registry so signed and sealed shall be evidence in any suit in which such trade-marks shall be brought in controversy.

"Sec. 5. That a certificate of registry shall remain in force for thirty years from its date except in cases where the trade-mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this act at the time that such trade-mark ceases to be exclusive property elsewhere. At any time during the six months prior to the expiration of the term of thirty years such registration may be renewed on the same terms, and for a like period.

"Sec. 6. That applicants for registration under this act shall be credited for any fee, or part of a fee, heretofore paid into the Treasury of the United States with intent to procure protection for the same trade-mark.

"Sec. 7. That registration of a trade-mark shall be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy or colorably imitate any trade-mark registered under this act and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy.

"Sec. 8. That no action or suit shall be maintained under the provisions of this act in any case when the trade-mark is used in any unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or under any certificate of registry fraudulently obtained.

"Sec. 9. That any person who shall procure the registry of a trade-mark, or of himself as the owner of a trade-mark or an entry respecting a trade-mark, in the office of the Commissioner of Patents, by a false or fraudulent representation or declaration, orally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence thereof to the injured party, to be recovered in an action on the case.

"Sec. 10. That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed.

"Sec. 11. That nothing in this act shall be construed as unfavorably affecting a claim to a trade-mark after the term of registration shall have expired; nor to give cognizance to any court of the United States in an action or suit between citizens of the same State, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe.

"Sec. 12. That the Commissioner of Patents is authorized to make rules and regulations and prescribe forms for the transfer of the right to use trade-marks and for recording such transfers in his office.

"Sec. 13. That citizens and residents of this country wishing the protection of trade-marks in any foreign country, the laws of which require registration here as a condition precedent to getting such protection there, may register their trade-marks for that purpose as is above allowed to foreigners, and have certificate thereof from the Patent Office."

Said Act Aug. 5, 1882, c. 393, was as follows:

"Be it enacted, &c., That nothing contained in the law entitled 'An act to authorize the registration of trade-marks and protect the same,' approved March third, eighteen hundred and eighty-one, shall prevent the registry of any lawful trade-mark rightfully used by the applicant in foreign commerce or commerce with Indian tribes at the time of the passage of said act."

The Commissioner of Patents was authorized to make regulations for proceedings for registration of trade-marks under this act, by section 26 thereof, post, § 9511.

Provisions for the protection of trade-marks on foreign articles, etc., exhibited at the Panama-Pacific International Exposition were made by Act Sept. 18, 1913, c. 14, §§ 2–6, post, §§ 9525–9529.

Provisions for extension of time for filing applications for the registration of any trade-mark, print, or label were made by Act Aug. 17, 1916, c. 350, ante, §§ 9438a–9438c.

Notes of Decisions

1. Constitutionality of trade-mark legislation.
2. Construction of act in general.
3. What constitutes trade-mark.
4. Persons who may acquire trade-mark in general.
5. —— Aliens.
6. —— Residents of the Phillipines, Porto Rico, and Cuba.
7. —— Corporations and manufacturing companies.
8. —— Unincorporated associations of workmen.
9. Number of trade-marks.

10. Origin and adoption of mark or name.
11. Extent of rights acquired.
12. Abandonment and extinguishment.
13. Registration—Right to registration.
14. —— Application.
15. —— Effect of registration.
16. Treaties and international conventions.

1. Constitutionality of trade-mark legislation.—Act 1881, c. 138, superseded by this act, was held valid, as applying only to interstate commerce. Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 666; Brennan v. Emery-Bird-Thayer Dry Goods Co. (C. C. 1900) 99 Fed. 971, 973.

Congress had power under Const. art. 1, § 8, cl. 3, authorizing it to regulate foreign and interstate commerce and commerce with the Indian tribes, to enact the trade-mark laws. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

The monopoly given the owner of a trade-mark by the trade-mark laws is not forbidden by the Sherman Act or any other act of Congress. Coca-Cola Co. v. J. G. Butler & Sons (D. C. 1916) 229 Fed. 224.

The power of the general government does not extend to trade-marks under any express provision of the Constitution, but only so far as may be incidental to other subjects over which it has jurisdiction. Traiser v. J. W. Doty Cigar Co. (1908) 84 N. E. 462, 198 Mass. 327.

The power to regulate trade-marks finds its authority under the commerce clause of the federal Constitution. Oneida Community v. Oneida Game Trap Co. (1915) 154 N. Y. S. 391, 168 App. Div. 769, affirming judgment (1914) 150 N. Y. S. 918.

Legislation by congress upon the subject of trade-marks cannot be sustained under the power to legislate in favor of authors and inventors, nor under the power to regulate commerce, and Act July 8, 1870, on this subject, is unconstitutional. Leidersdorf v. Flint (C. C. 1878) Fed. Cas. No. 8,219.

The statute of 1870 concerning registration of trade-marks having been declared unconstitutional, in 1881 a valid statute was enacted, touching the same subject, which did not re-enact the penal statute of 1876, and made no reference thereto. Held, that the penal statute fell with that of 1870, and did not remain suspended, to become operative under the statute of 1881. U. S. v. Koch (C. C. 1889) 40 Fed. 250.

Act 1876, §§ 4, 5, prohibiting the infringement of trade-marks, and declaring any infringer punishable, was held unconstitutional, since a trade-mark is not an invention, discovery or writing within Const. art. 1, § 8, cl. 8, giving congress power to secure exclusive rights of authors and inventors to their respective writings or discoveries, nor is such legislation within the clause of the constitution giving congress the right to regulate commerce between the states, with foreign nations, and Indian tribes. U. S. v. Steffens (1879) 100 U. S. 82, 25 L. Ed. 550.

The original trade-mark act contained in R. S. §§ 4937–4947, was held unconstitutional because not confined to commerce over which congress had power to legislate. Id.

The act of Congress assuming to confer exclusive jurisdiction on federal courts in trade-mark cases has been pronounced unconstitutional. Smail v. Sanders (1889) 20 N. E. 296, 118 Ind. 105.

2. Construction of act in general.—The Trade-Mark Act of 1905 did not create trade-marks, but merely provided for their registration. In re Standard Underground Cable Co. (1906) 27 App. D. C. 320; In re Anti-Cori-Zine Chemical Co. (1909) 34 App. D. C. 191; Quaker City Flour Mills Co. v. Quaker Oats Co. (1915) 43 App. D. C. 200.

The registration of trade-marks is regulated entirely by statute, and creates no property rights which forbid either regulation or abolition by Congress. Stamatopoulos v. Stephano Bros. (1914) 41 App. D. C. 590.

The Trade-Mark Act creates no rights in a registered trade-mark, but merely provides evidence of the ownership of the right. Given v. New York Athletic Club (1914) 42 App. D. C. 558.

The validity of a trade-mark depends upon general principles and rules of law, and is not affected by its registration under this section. Planten v. Gedney (D. C. 1915) 221 Fed. 281, decree reversed (1915) 224 Fed. 382, 140 C. C. A. 68.

3. What constitutes trade-mark.—See notes under § 9490, post.

4. Persons who may acquire trade-mark in general.—Defendants' assignor invented a game to which he applied the name "Flinch," and, on the failure of one of the firms owning the business, its assets, including its trade-mark, were sold to complainant under a judicial sale. The original inventor, however, continued to manufacture and sell the game; and thereafter he transferred all his rights and ownership, including the trade-mark in the name of "Flinch," to defendants. Held, that complainant and its assignors, by simply making and selling the game, could not acquire a trade-mark in the name as against defendants. H. B. Chaffee Mfg. Co. v. Selchow (1905) 135 Fed. 1021, 68 C. C. A. 668, affirming judgment (C. C. 1904) 131 Fed. 543.

The right of exclusively using the word "Durham" in labels on smoking tobacco belongs to manufacturers in the town of Durham, N. C. Blackwell v. Dibrell (C. C. 1878) Fed. Cas. No. 1,475.

The trade-mark law gives no right by registration to any but owners of trade-marks. Brower v. Boulton (C. C. 1892) 53 Fed. 389.

One having the exclusive right to sell

in the United States a patented article made in a foreign country may adopt a trade-mark for such article, not used by the manufacturer, and is entitled to protection in its use in this country after the expiration of the patent, even as against the patentee. Hughes v. Alfred H. Smith Co. (D. C. 1913) 205 Fed. 302, decree affirmed (1913) 209 Fed. 37, 126 C. C. A. 179.

An official inspector of fish cannot claim property in his official brand as his private trade-mark. Chase v. Mayo (1876) 121 Mass. 343.

A jobber, buying his goods from one manufacturing them solely for him, according to his directions as to design, material, workmanship, etc., may create a valid trade-mark on the goods. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

The right to describe an article by the trade-mark or patented name passes to him who purchases the article from the inventor or his assignee while the patent is in force, and to the general public after the patent has expired, on the ground of the assumed dedication of the name. Edison v. Mills-Edisonia (N. J. Ch. 1908) 70 A. 191.

Where Elias Howe, Jr., gave a license to use his patented right or combination in the manufacture of sewing machines, plaintiff was entitled to adopt and appropriate the word "Howe" as a trade-mark for sewing machines made by him, as against the patentee. Howe v. Howe Mach. Co. (N. Y. 1867) 50 Barb. 236.

Any person or corporation capable of holding title to personalty may acquire the right to a trade-mark. Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

5. —— **Aliens.**—The provision in the treaty with Germany, that citizens of Germany shall enjoy in the United States "the same protection as native citizens," in matters of trade-marks, etc., does not prevent a citizen of Germany from acquiring by prior use in this country a trade-mark in a particular word, although, by the laws of Germany, words alone are not the subject of appropriation. J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co. (1896) 74 Fed. 222, 20 C. C. A. 402, affirming decree Kaiserbrauerei, Beck & Co. v. J. & P. Baltz Brewing Co. (C. C. 1895) 71 Fed. 695.

The fact that one is an alien does not affect his right of property in a trade-mark. La Croix v. May (C. C. 1883) 15 Fed. 236.

A foreigner can acquire the right to a common-law trade-mark in the United States only by its use on goods sold in this country. Walter Baker & Co. v. Delapenha (C. C. 1908) 160 Fed. 746.

6. —— **Residents of the Philippines, Porto Rico, and Cuba.**—The Philippine Islands not being organized territories of the United States as contemplated by section 3522, supra, the residents of those islands were not entitled to the privileges of the Trade-Mark Law of 1881, but are entitled to such privileges under this section. (1902) 23 Op. Atty. Gen. 634; (1904) 25 Op. Atty. Gen. 179; (1909) 27 Op. Atty. Gen. 623.

Porto Rico being an organized Territory of the United States, and the laws of the United States not locally inapplicable having been extended to that island, its residents are entitled to register trade-marks in the United States. (1902) 23 Op. Atty. Gen. 634.

Since the law in force in Cuba gives to citizens of the United States similar privileges to those given by our trade-mark law, Cuba is one of the countries with which we have reciprocal arrangements, and a person located there is entitled to register trade-marks under our law. Id.

7. —— **Corporations and manufacturing companies.**—A trade-mark may be appropriated by a manufacturing company as well as an individual, and pass with the property to their successors. Atlantic Milling Co. v. Robinson (C. C. 1884) 20 Fed. 217.

Where S. & Co. are to furnish the machinery and materials, and R. is to supply the supervising labor and skill, and a trade-mark which he is to defend, S. & Co. selling the ware, and receiving payment therefor, the profits to be divided, R. is a "manufacturer," within the meaning of the law of trade-marks. William Rogers Mfg. Co. v. Simpson (1887) 54 Conn. 527, 9 Atl. 395.

An insurance company, though not engaged in the manufacture of articles of commerce, is nevertheless entitled to protection in its use of a trade-mark. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (1908) 114 N. W. 609.

A corporation, a partnership, or individual may adopt a trade-name under which business can be transacted, actions prosecuted, and the title to property acquired and transmitted. Crompton v. Williams (1913) 103 N. E. 298, 216 Mass. 184.

A corporation lawfully using machines, the invention of an individual, has implied authority to use the name of the inventor for the purpose of truly and properly describing the machines. Edison v. Mills-Edisonia (N. J. Ch. 1908) 70 A. 191.

A corporation cannot acquire the name of one of its incorporators, and use it to deceive the public and to defraud others who have built up a business under the same name, on the ground that such is the true name of the incorporator. De Long v. De Long Hook & Eye Co. (1895) 89 Hun, 399, 35 N. Y. Supp. 509, affirming (1894) 10 Misc. Rep. 577, 32 N. Y. Supp. 203.

8. —— Unincorporated associations of workmen.—A number of workmen engaged in the same branch of industry, for mutual profit in the pursuit of their common vocation, may acquire a trade-mark to distinguish their workmanship from that of other persons. Schmalz v. Wooley (1898) 41 A. 939, 57 N. J. Eq. 303, 43 L. R. A. 86, 73 Am. St. Rep. 637, reversing decree (1898) 39 Atl. 539, 56 N. J. Eq. 649.

An unincorporated association of operatives employed by others in manufacturing a product may adopt a device for designating the articles manufactured by themselves, and are entitled to protection against fraudulent imitations. Strasser v. Moonelis (1888) 55 N. Y. Super. Ct. (23 Jones & S.) 197.

Where a union of employés adopted and registered a label to designate the product of the labor of the members thereof, it adopted it for the members of its various subordinate councils, within Labor Law N. Y. (Laws 1897, p. 466). Lynch v. John Single Paper Co. (1906) 101 N. Y. Supp. 824, 115 App. Div. 911.

The Cigar Makers' International Union of America, a voluntary, unincorporated association of workmen, organized "for promoting the mental, moral, and physical welfare of its members," but not engaged in the business of making or selling cigars, etc., is not a trader, and is not entitled to a trade-mark, either at common law, or under the provisions of this section. McVey v. Brendel (1891) 144 Pa. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 27 Am. St. Rep. 625, 13 L. R. A. 377.

9. Number of trade-marks.—A person is not necessarily limited to one trade-mark even on the same article. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

A manufacturer may be protected in the use of as many separate trade-marks as he first adopts and continuously uses, so that they clearly become to purchasers distinguishing marks of the goods he makes or sells. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

A manufacturer of a class of goods of different grades may use different trade-names, each of which indicates origin and ownership, and at the same time a particular grade of his goods. Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co. (1911) 185 Fed. 431, 107 C. C. A. 501.

A trade-mark for horseshoe nails is not invalid because the owner does not use it on all grades made by him, but he may have different trade-marks for different grades where the primary purpose of each is to indicate origin and not quality. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

A manufacturer of horseshoe nails which are put up and sold in packages and boxes and also sold and used loosely may adopt and use at least two trade-marks for the same grade of nails, one to be imprinted on the nail and the other on the packages and boxes containing them, even though such manufacturer has other trade-marks to indicate the same origin, but which incidentally indicate grade, and which he uses on other grades. Id.

Where complainant adopted two trade-marks which it used separately in its advertisements, the fact that both were jointly used on the wrapper of its manufactured article did not enable a competitor to use one of them alone. Enoch Morgan's Sons Co. v. Ward (1907) 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

That a manufacturer of cheese has a trade-mark used on all its products does not destroy its right to the exclusive use of a certain trade-name as applied to its cream cheese. International Cheese Co. v. Phenix Cheese Co. (1907) 103 N. Y. Supp. 362, 118 App. Div. 499.

An application for registration of a trade-mark, which used the following terms: "For Typographical Union Label: (Fac simile attached). For Allied Printing Trades Council Label: (Fac simile attached)"—there being nothing in the law prohibiting registration of more than one label by one application, showed an intention to register both labels. State v. Montgomery (1910) 106 P. 771, 56 Wash. 443.

10. Origin and adoption of mark or name.—See notes under § 9490, post.

11. Extent of rights acquired.—While the right to manufacture a patented article, and sell it under the old name is free to the world since the expiration of the patent, the new manufacturer must clearly identify his goods, and not engage in unfair competition, nor do anything which will tend to induce the public to purchase his goods under the belief that they are those it has been accustomed to purchase under the same name. Centaur Co. v. Neathery (1898) 91 Fed. 891, 34 C. C. A. 118.

In a suit for infringement of a trade-mark, objection to the validity of complainant's registration of the mark was not material where complainant had a common-law trade-mark in the device alleged to have been infringed. Capewell Horse Nail Co. v. Mooney (1909) 172 Fed. 826, 97 C. C. A. 248, affirming decree (C. C. 1909) 167 Fed. 575.

It is the right of the owner and not the infringer of a trade-mark to select and adopt it, and that he uses with it other words which he does not adopt as part of that trade-mark does not deprive him of the right to it. Layton Pure Food Co. v. Church & Dwight

Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

After one has acquired a trade-mark for baking soda, another may not acquire the same trade-mark for another member of the same class of goods, such as baking powder. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274.

A trade-mark may cover not only the physical article sold, but also the incorporeal right to render future service in connection with it. Searchlight Gas Co. v. Prest-O-Lite Co. (1914) 215 Fed. 692, 131 C. C. A. 626.

Under the common-law rule and the statute, a trade-mark on whisky applies both to straight and blended whiskies. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531, 141 C. C. A. 287.

A property right inhering in a trade-mark is perfected by its adoption and use, and a later appropriator is a trespasser, though the prior claimant had not extended his trade into the territory of the later appropriator. Theodore Rectanus Co. v. United Drug Co. (1915) 226 Fed. 545, 141 C. C. A. 301.

The right to a recorded trade-mark is limited to its use in connection with the articles particularly described in the filed statement. Osgood v. Rockwood (C. C. 1873) Fed. Cas. No. 10,605.

When plaintiff had for many years stamped all its products "Collins & Co.," including digging tools, the fact that it did not, before 1856, make a digging tool such as the shovel on which, in 1856, Ames & Sons put the mark "Collins & Co.," does not warrant the conclusion that that mark was not, in 1856, the mark of the plaintiff's trade in respect to such shovels. The Collins Co. v. Oliver Ames & Sons Corp. (C. C. 1882) 18 Fed. 561.

The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate. Atlantic Milling Co. v. Robinson (C. C. 1884) 20 Fed. 217, appeal dismissed Rowland v. Atlantic Mill Co. (1889) 10 Sup. Ct. 1073, 136 U. S. 648, 34 L. Ed. 549.

The appropriation of a word in a combination constituting a trade-mark does not preclude its use in all other combinations formed for the like purpose; therefore, plaintiff's trade-mark, "Pratt's Astral Oil," applied to refined petroleum, was not infringed by the use of the words "Standard White Astral Oil" to designate the defendant's refined petroleum. Pratt Mfg. Co. v. Astral Refining Co. (C. C. 1886) 27 Fed. 492, appeal dismissed Pratt Mfg. Co. v. Berry (1889) 10 Sup. Ct. 1072, 136 U. S. 647, 34 L. Ed. 550.

Trade-mark rights acquired in the United States either by registration or by the common law afford no protection against acts committed wholly in a foreign country. Vacuum Oil Co. v. Eagle Oil Co. (C. C. 1903) 122 Fed. 105.

A proprietor of a trade-mark does not lose his rights to the same in the United States because the French government seizes such proprietor's property, including his trade-marks, that it may find in France. Baglin v. Cusenier Co. (C. C. 1905) 156 Fed. 1015, order reversed (1905) 141 Fed. 497, 72 C. C. A. 555.

A valid trade-mark cannot be destroyed by proof of a custom to disregard trade-marks generally. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Where complainants adopted a red capsule in connection with certain specified labels and collocation to distinguish their product, their right to the use thereof was a property right which the courts would protect against infringement. Edward & John Burke, Limited, v. Bishop (C. C. 1910) 175 Fed. 167.

One cannot, by adoption of an arbitrary or fanciful name as a trade-mark, exclude others from using a geographical or descriptive name open to the public, on the ground that the latter name so closely resembles the former as to be calculated to mislead the purchasing public as to the origin, manufacture, or ownership of the article sold, or for any other reason. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557.

Complainant may maintain a suit for unlawful competition, without an exclusive right to any one element of the dress or packing of an article, if the ensemble has come to be a public guaranty of origin and quality. Howard Dustless Duster Co. v. Carleton (D. C. 1915) 219 Fed. 913.

Complainant is entitled to enjoin defendant's style of dress of a competing article, unless it discloses a differentiation from that previously adopted and by which the public has come to recognize complainant's product. Id.

The registration of trade-marks is regulated entirely by statute, and creates no property rights which forbid either regulation or abolition by Congress. Stamatopoulos v. Stephano Bros. (1914) 41 App. D. C. 590.

The permanency of trade-mark rights under the common law, whereby they were limited only to the period of their use, and ceased only with their abandonment, is preserved by the Trade-Mark Act of Congress, and registration thereunder amounts only to a record of existing trade-mark rights. Ewing v. Standard Oil Co. (1914) 42 App. D. C. 321.

The right of property in a trade-mark is not limited in its enjoyment by territorial bounds, but, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, the proprietor may assert and maintain his right wherever the common law affords

remedies for wrongs. Derringer v. Plate (1865) 29 Cal. 292, 87 Am. Dec. 170.

That a word used by plaintiff as a trade-mark, comes to suggest to some persons the idea of purity or healthfulness, does not make it common property, and deprive him of his trade-mark rights therein. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

Where a person has become the owner of the exclusive right to produce a play based on a character created in a book, and has adopted a name for such drama as his trade-mark, he has the exclusive right to produce, perform, and represent such drama under such title. Hopkins Amusement Co. v. Frohman (1902) 103 Ill. App. 613, judgment affirmed (1903) 67 N. E. 391, 202 Ill. 541.

A party purchasing part of a trade-mark, and adopting the balance, will be protected in his title to the former as well as the latter. Sohl v. Geisendorf (Ind. 1871) 1 Wils. 60.

Where one had a trade-mark on "Knickerbocker School Shoes," he was entitled to name his manufacturing company the "Knickerbocker Shoe Company." Burt v. Tucker (1901) 59 N. E. 1111, 178 Mass. 493, 52 L. R. A. 112, 86 Am. St. Rep. 499.

A trade-mark does not give the proprietor the right to control the sale by others of articles of his manufacture. Garst v. Hall & Lyon Co. (1901) 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631.

Where plaintiff compounded a dyspepsia cure, marking the boxes with the word "Rex," and filed such name as a trade-mark, and subsequently continuously used it as a trade-mark on such medicine, she thereby acquired an exclusive property right in the name. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

The fact that a manufacturer of condensed milk adopted as a trade-mark, before the enactment of laws forbidding the sale of cream containing less than 20 per cent. of butter fat, the term "evaporated cream" to designate his product, does not give him the right to sell such product as cream, evaporated or otherwise. State v. Tetu (1906) 107 N. W. 953, 98 Minn. 351, taxation of costs set aside (1906) 108 N. W. 470, 98 Minn. 351.

One who has appropriated a trade-mark, to distinguish his goods from other similar goods, has a property right in it, and a right that will be protected by injunction against infringement. Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co. (1890) 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313.

A privilege of monopoly in a certain trade-mark in a certain market does not carry a similar exclusive right to it in other markets, where it has been before used by others. Corwin v. Daly (1860) 20 N. Y. Super. Ct. (7 Bosw.) 222.

The right of a person to use his own name in his own business does not authorize him to lend or give his name to a corporation for the purpose of engaging in a business which has been conducted by others under precisely the same name. De Long v. De Long Hook & Eye Co. (1894) 10 Misc. Rep. 577, 32 N. Y. Supp. 203, judgment modified (1895) 89 Hun, 399, 35 N. Y. Supp. 509.

One who sells a preparation which could be used only by dentists cannot enjoin a dentist from using it, or advertising that he uses it, for the purpose for which it was intended, though the name under which it is sold is a valid trade-mark, where no restrictions were placed on its use. Sweezy v. McBrair (1895) 89 Hun, 155, 35 N. Y. Supp. 11.

Right to exclusive use of a trade-mark is limited to a use on a particular class of goods on which it has been actually used, others being entitled to use the identical mark or name in connection with the sale of different goods. Simplex Automobile Co. v. Kahnweiler (1914) 147 N. Y. Supp. 617, 162 App. Div. 480.

Where complainants used the word "simplex" in the sale of automobiles, defendant's use of the same name written in the same manner in connection with the sale of fire extinguishers could not constitute unlawful competition. Id.

A trade-mark covering a certain kind of nursery grown peach trees, in the absence of a restrictive contract, will not extend to the reproductions thereof after sale, and render the general dealing therein by the purchasers unlawful. Rannells v. Albaugh (1905) 27 Ohio Cir. Ct. R. 742.

The trade-marks "Crown," used in connection with soda crackers, and "Jamestown," with a kind of cake known as "drops," is not infringed by the use of "Crown" in connection with gingersnaps and of "Jamestown" in connection with "jumbles"; a kind of cake four or five times as large, and having a hole in the center as large as a "drop." The right to claim a trade-mark is coextensive only with the use made thereof. Virginia Baking Co. v. Southern Biscuit Works (Va. 1910) 68 S. E. 261.

12. Abandonment and extinguishment.—See notes under §§ 9490, 9506, post.

13. Registration—Right to registration.—The right to register the word "Quaker," as applied to flour, cannot be predicated upon previous use of the words "Quaker City," as applied to that product. Thermogene Co. v. Thermozine Co. (D. C. 1915) 225 Fed. 446.

A sale of a case of liquor labeled with a certain device by a state commissioner in Canada is not authorized by Act S. C. Dec. 24, 1892; and the state

is not thereupon entitled to have the device registered as a trade-mark. Seymour v. U. S. (1894) 2 App. D. C. 240.

The proprietor of an article may secure a trade-mark right to a name, if the article so branded is actually vendible and on the market, and the proprietor intends to continue its production and sale. Breitenbach v. Rosenberg (1911) 37 App. D. C. 102.

No cause for refusing to register a trade-mark upon opposition is afforded by the fact that the applicant has made a tentative sale of the mark dependent upon registration, and has discontinued its use without intent to abandon it. B. Fisher & Co. v. Knickerbocker Mills Co. (1914) 42 App. D. C. 570.

14. —— **Application.**—The description of a trade-mark for wire rope as "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be the subject of registration. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (1906) 26 Sup. Ct. 425, 201 U. S. 166, 50 L. Ed. 710, affirming decree (1904) 134 Fed. 571, 67 C. C. A. 418.

Where a trade-mark is claimed for paints generally, it is sufficient to specify paints as the class of merchandise, without specifying any description of paints. Smith v. Reynolds (C. C. 1872) Fed. Cas. No. 13,098.

In the case of a trade-mark owned by a firm, it is not necessary to record the name of each individual partner, and his place of residence, under Act July 8, 1870, § 77. Id.

When registration of a trade-mark is claimed under this section, it should clearly appear in the application that every condition precedent has been fully complied with. In re A. G. Spalding & Bros. (1906) 27 App. D. C. 314.

The refusal of registration of a trade-mark on the ground that the registrant has described his mark in too broad and too indefinite terms merely deprives the registrant of the benefits conferred by the registration act, not of any property right which he may have acquired by the actual use of a good trade-mark. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (1911) 36 App. D. C. 451.

Where the matter in issue was the application of the applicant's mark to any of the goods named in his application, all of which possessed the same descriptive qualities as the goods to which previous and similar marks were applied, the filing of an amended application canceling the words "cocktails and punches" does not operate to terminate interference and opposition proceedings which have been instituted. In re Boston Wine & Spirits Co. (1912) 39 App. D. C. 421.

15. —— **Effect of registration.**—The registry of a trade-mark, its essential feature being the representation of a red anchor in an oval space, is not proof of intention to adopt a trade-mark consisting of the word "anchor" and the symbol of an anchor, irrespective of color and surroundings. Richter v. Reynolds (1893) 59 Fed. 577, 8 C. C. A. 220, affirming Richter v. Anchor Remedy Co. (C. C. 1892) 52 Fed. 455.

Rights acquired by use of descriptive words as a trade-mark for more than 10 years before 1905 are perfected by registration under this section. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531.

Registration under the federal trade-mark act is not actual or constructive notice, though it tends to give notice. Theodore Rectanus Co. v. United Drug Co. (1915) 226 Fed. 545, 141 C. C. A. 301.

Act 1881, c. 138, § 10, held to preserve all the common-law rights of citizens and foreigners, and supplies additional means of securing protection for trade-marks, instead of limiting any of the rights which existed prior to its passage. Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 668.

The owner of a trade-mark acquires the same by acts wholly independent of the registration thereof, and registration is not even necessary to entitle him to protection in a civil proceeding, although it is necessary to secure the protection of the penal statute. U. S. v. Braun (D. C. 1889) 39 Fed. 775, 776.

That registration of trade-mark was secured on ex parte application and on applicant's statement as to use held not to constitute fraud, vitiating the registration. Planten v. Gedney (D. C. 1915) 221 Fed. 281, decree reversed (1915) 224 Fed. 382, 140 C. C. A. 68.

The trade-mark statute did not constitute a contract binding the government to protect a party in the exclusive use of his trade-mark. Woodman v. U. S. (1879) 15 Ct. Cl. 541.

Where it is stated that the applicant has continuously used the mark for more than 10 years, but there is no averment of exclusive use, the application will be deemed to be one for the registration of a technical trade-mark. Carter Medicine Co. v. Barclay (1910) 36 App. D. C. 123.

The recordation in the patent office of a pretended trade-mark confers no additional value to the same. Scott v. Sewell (La. 1884) 2 McGloin, 7.

The recording of a name as a trade-mark of itself has no effect whatever in giving the name the quality of a trade-mark, if it was not already such according to the trade-mark law. Oakes v. St. Louis Candy Co. (1898) 48 S. W. 467, 146 Mo. 391.

The registration of a word as a trade-

mark by the United States patent office is not conclusive upon state courts as to the applicant's right to registry or the validity of the trade-mark. Buffalo Rubber Mfg. Co. v. Batavia Rubber Co. (1914) 153 N. Y. S. 779, 90 Misc. Rep. 418.

16. Treaties and international conventions.—The treaty of 1871 between the United States and Germany, which provides that, with regard to the marks of labels of goods, or of their packages, the citizens of Germany shall enjoy in the United States the same protection as native citizens, does not give to a citizen of Germany who has acquired the right to a trade-mark in that country a similar right to the trade-mark in the United States. Richter v. Reynolds (1893) 59 Fed. 577, 8 C. C. A. 220.

The provision in the treaty with Austria that, if a trade-mark has become public property "in the country of its origin," it shall be equally free in the territory of the other contracting party, does not prevent the appropriation in this country, by prior use here, of a word which is not the subject of appropriation under the laws of Austria. J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co. (1896) 74 Fed. 222, 20 C. C. A. 402, affirming decree Kaiserbrauerei, Beck & Co. v. J. & P. Baltz Brewing Co. (C. C. 1895) 71 Fed. 695.

Citizens of Canada, who have a place of business in the state of New York, where they make and ship articles for sale in the United States, are within the international convention of March 20, 1883, for the protection of industrial property. Kerry v. Toupin (C. C. 1894) 60 Fed. 272.

A declaration by a French citizen for infringement of a trade-mark, which fails to allege that he has deposited a copy of his trade-mark, as required by the convention between the United States and France, is fatally defective. Lacroix v. Escobal (1885) 37 La. Ann. 533.

Under the provisions of this section, as formerly enacted, a French alien is entitled to protection of a trade-mark registered here. Societe Anonyme de la Distillerie de la Benedictine v. Micalovitch (Ohio, 1887) 18 Wkly. Law Bul. 362.

The articles of the convention between France and this country of 1869 meant merely that citizens of the United States should deposit duplicate copies in Paris to secure rights in France, and that French citizens need only deposit their trade-marks in Washington to secure their rights in this country. Id.

Cited without definite application. McLean v. Fleming (1877) 96 U. S. 245, 248, 24 L. Ed. 828; U. S. v. Seymour (1894) 14 Sup. Ct. 871, 153 U. S. 353, 38 L. Ed. 742; Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 272, 273, 179 U. S. 665, 45 L. Ed. 365; Hennessy v. Richardson Drug Co. (1903) 23 Sup. Ct. 532, 533, 189 U. S. 25, 47 L. Ed. 697; Warner v. Searle & Hereth Co. (1903) 24 Sup. Ct. 79, 80, 81, 191 U. S. 195, 48 L. Ed. 145; Howard v. Illinois Cent. R. Co. (1908) 28 Sup. Ct. 141, 152, 207 U. S. 463, 52 L. Ed. 297; Burt v. Smith (1895) 71 Fed. 161, 162, 17 C. C. A. 573; Coffman v. Castner (1898) 87 Fed. 457, 466, 31 C. C. A. 55 (affirmed [1900] 20 Sup. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021); Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (1908) 163 Fed. 977, 90 C. C. A. 195 (affirmed [1911] 31 Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536); G. Heilman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133; Thaddeus Davids Co. v. Davids (1912) 192 Fed. 915, 114 C. C. A. 355; Diederich v. W. Schneider Wholesale Wine & Liquor Co. (1912) 195 Fed. 35, 115 C. C. A. 37; Luyties v. Hollender (C. C. 1884) 21 Fed. 281; Schumacher v. Schwencke (C. C. 1886) 26 Fed. 818; Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 666; Kelley v. Great Northern Ry. Co. (C. C. 1907) 152 Fed. 211; Thaddeus Davids Co. v. Davids (C. C. 1908) 165 Fed. 792 (reversed [1910] 178 Fed. 801, 102 C. C. A. 249); Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C. 1910) 181 Fed. 974; John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557; Garnier v. Rossman (D. C. 1912) 195 Fed. 175; De Nobili v. Scanda (D. C. 1912) 198 Fed. 341.

§ 9486. (Act May 4, 1906, c. 2081, § 3.) Owners of trade-marks having manufacturing establishments in United States entitled to registration and protection of trade-marks on products of such establishments.

Any owner of a trade-mark who shall have a manufacturing establishment within the territory of the United States shall be accorded, so far as the registration and protection of trade-marks used on the products of such establishment are concerned, the same rights and privileges that are accorded to owners of trade-marks domiciled within the territory of the United States by the Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes,

and to protect the same," approved February twentieth, nineteen hundred and five. (34 Stat. 169.)

This section was part of an act entitled "An act to amend the laws of the United States relating to the registration of trade-marks."

Section 1 of the act amended section 1 of the Trade-Mark Act of 1905, and is incorporated in said section as set forth ante, § 9485.

Section 2 of the act is set forth post, § 9512.

Section 4 of the act provided that the act should take effect July 1, 1906.

See note to said Act Feb. 20, 1905, c. 592, § 1, ante, § 9485.

Notes of Decisions

Priority of use.—Priority of use in general, see notes under § 9490, post.

Use by a foreigner in his own country of trade-mark registered there gives no common-law right to such trade-mark in the United States, as against a domestic firm which had an established business under a similar trade-mark, adopted in good faith, before he had sold any goods in this country. Richter v. Anchor Remedy Co. (C. C. 1892) 52 Fed. 455, decree affirmed Same v. Reynolds (1893) 59 Fed. 577, 8 C. C. A. 220.

Succession or inheritance.—Where a trade-mark is used by a manufacturer in England and also by a firm in the United States in which he is a partner, when the English manufacturer retired from the United States firm, the right to use it passed to his successors here as part of the business, and he will not be allowed to use it in this country in a separate business of the same sort. Batcheller v. Thomson (C. C. 1898) 86 Fed. 630.

§ 9487. (Act Feb. 20, 1905, c. 592, § 2, as amended, Act Feb. 18, 1909, c. 144.) Declaration accompanying application; verification thereof.

The application prescribed in the foregoing section, in order to create any right whatever in favor of the party filing it, must be accompanied by a written declaration verified by the applicant, or by a member of the firm or an officer of the corporation or association applying, to the effect that the applicant believes himself or the firm, corporation, or association in whose behalf he makes the application to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, has the right to use such trade-mark in the United States, either in the identical form or in such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce among the several States, or with foreign nations, or with Indian tribes, and that the description and drawing presented truly represent the trade-mark sought to be registered. If the applicant resides or is located in a foreign country, the statement required shall, in addition to the foregoing, set forth that the trade-mark has been registered by the applicant, or that an application for the registration thereof has been filed by him in the foreign country in which he resides or is located, and shall give the date of such registration, or the application therefor, as the case may be, except that in the application in such cases it shall not be necessary to state that the mark has been used in commerce with the United States or among the States thereof. The verification required by this section may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, chargé d'affaires, consul, or commercial agent holding commission under the Government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States. (33 Stat. 724. 35 Stat. 627.)

This section and the twenty-four sections next following were part of the Trade-Mark Act of 1905, first cited above.

See notes to section 1 of the act, ante, § 9485.

The amendment of this section by Act Feb. 18, 1909, c. 144, last cited above

consisted in striking out, in the first clause, after the words "has the right to," the words "such use," and inserting instead thereof the words "use such trade-mark in the United States," making the section read as set forth here.

Notes of Decisions

Priority of use.—Priority of use in general, see notes under § 9490, post.

Under this section, which requires proof of use of a trade-mark, the use of a label prior to its registration as a trade-mark does not constitute a publication which invalidates the trade-mark. G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133.

Declaration.—Sufficiency of evidence of the filing of the declaration under oath as to the right to a trade-mark, under Act July 8, 1870, § 77. Smith v. Reynolds (C. C. 1872) Fed. Cas. No. 13,097.

Manufacturers of chewing gum filed their declaration as follows: "Our trade-mark consists in the arbitrary word 'Sappota.' This has generally been arranged * * * in ornamental block letters, printed in pink, gradually increasing in depth of color from the letter 'S' to the letter 'A,' on an inclined line, and in connection with the word 'Tolu.' Above the right-hand part of the words 'Sappota Tolu' is the word 'Adams,' and below the left-hand part are the words 'Chewing Gum;' but other forms of type may be employed, or it may be differently arranged or colored, or the words 'Tolu,' 'Adams,' and 'Chewing Gum' may be omitted or changed at pleasure, without materially altering the character of our trade-mark, the essential feature of which is the word 'Sappota.'" Held, that the trade-mark was confined to the name adopted, with the form and color of the letters used in the printed label on the inside of the lid of the paper box, and that it could not be broadened so as to cover the whole box, with all its ornaments and forms of putting up the gum, and the colors used in such decorations. Adams v. Heisel (C. C. 1887) 31 Fed. 279, appeal dismissed (1890) 11 Sup. Ct. 1014, 140 U. S. 667, 35 L. Ed. 594.

Affidavits in support of an application for registration of a word, which only state what impression the word makes on affiants' minds, are not convincing even if relevant. In re National Phonograph Co. (1907) 29 App. D. C. 142.

Mandamus to compel registration.—Under the provisions of this section as formerly enacted, mandamus will not lie to compel the commissioner of patents to register, as a trade-mark, the words "Ever Ready," after registration has been refused by him on the ground that the words were descriptive merely of the qualities or characteristics of the articles manufactured. U. S. v. Duell (1901) 17 App. D. C. 471.

§ 9488. (Act Feb. 20, 1905, c. 592, § 3.) Designation by foreign applicant of person on whom process or notice of proceedings may be served.

Every applicant for registration of a trade-mark, or for renewal of registration of a trade-mark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, as hereinafter provided for, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade-mark of which such applicant may claim to be the owner, brought under the provisions of this Act or under other laws of the United States, may be served, with the same force and effect as if served upon the applicant or registrant in person. For the purposes of this Act it shall be deemed sufficient to serve such notice upon such applicant, registrant, or representative by leaving a copy of such process or notice addressed to him at the last address of which the Commissioner of Patents has been notified. (33 Stat. 725.)

See notes to section 1 of this act, ante, § 9485.

§ 9489. (Act Feb. 20, 1905, c. 592, § 4.) Effect to be given to application where previous application has been filed in foreign country affording similar privileges to citizens of the United States; limitations, and restrictions on issue of certificates in such cases.

An application for registration of a trade-mark filed in this country by any person who has previously regularly filed in any foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States an application for registra-

tion of the same trade-mark shall be accorded the same force and effect as would be accorded to the same application if filed in this country on the date on which application for registration of the same trade-mark was first filed in such foreign country: Provided, That such application is filed in this country within four months from the date on which the application was first filed in such foreign country: And provided, That certificate of registration shall not be issued for any mark for registration of which application has been filed by an applicant located in a foreign country until such mark has been actually registered by the applicant in the country in which he is located. (33 Stat. 725.)

See notes to section 1 of this act, ante, § 9485.

The certificate of registration of a trade-mark previously registered in a foreign country ceases to be in force when the trade-mark ceases to be protected in such foreign country, by a provision of section 12 of this act, post, § 9497.

Notes of Decisions

Treaties and international conventions.—Under article 6 of the convention of March 20, 1883 (25 Stat. 1376), for the protection of industrial property, providing that every trade-mark regularly deposited in the country of origin shall be admitted to deposit and so protected in all other countries of the Union thereby constituted, the owner of a trade-mark registered in France was entitled to protection in this country, whether or not such mark would have been allowed under the laws of this country. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

Failure to file application in time.—The word "Vichy," used in connection with mineral waters, and derived from the locality in France where the waters are obtained, is a trade-name, within the meaning of the industrial property treaty with France of 1883, and as such is entitled to protection in the United States, though it has not been deposited as required by the treaty in the case of trade-marks. La Republique Francaise v. Schultz (C. C. 1893) 57 Fed. 37.

The failure of a foreign applicant for a trade-mark to file his application in the United States within four months after the application in the country in which he is located, merely deprives him of the benefit of the date of the foreign application. Deitsch Bros. v. Loonen (1912) 39 App. D. C. 114.

§ 9490. (Act Feb. 20, 1905, c. 592, § 5, as amended, Act March 2, 1907, c. 2573, § 1, Act Feb. 18, 1911, c. 113, and Act Jan. 8, 1913, c. 7.) Trade-marks which may be registered.

No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

(a) Consists of or comprises immoral or scandalous matter.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: Provided, That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant: Provided, That trade-marks which are identical with a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed,

impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: Provided further, That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: Provided further, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof. (33 Stat. 725. 34 Stat. 1251. 36 Stat. 918. 37 Stat. 649.)

See notes to section 1 of this act, ante, § 9485.

This section, as originally enacted, was as follows:

"No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter;

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation; Provided, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: Provided further, That no portrait of a living individual may be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act."

It was amended by Act March 2, 1907, c. 2573, § 1, cited above, to read as follows:

"No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter.

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State, or municipality, or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem: Provided, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: Provided further, That no portrait of a living individual may be

registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act."

It was further amended by Act Feb. 18, 1911, c. 113, also cited above, to read as follows:

"No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter.

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State, or municipality, or of any foreign nation or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem: Provided, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: Provided, further, That no portrait of a living individual may be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: Provided further, that nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof."

It was again amended by Act Jan. 8, 1913, c. 7, last cited above, to read as set forth here.

No action or suit is to be maintained under this act in any case when the trade-mark is used in unlawful business, or when any article is injurious in itself, or when the mark has been used with the design of deceiving the public in the purchase of merchandise, or upon any certificate of registration fraudulently obtained, by section 21 of this act, post, § 9506.

Notes of Decisions

1. Operation, validity, and effect of trade-mark legislation in general.
2. Constitutionality of proviso.
3. Construction of section in general.
4. Trade-marks and trade-names—Nature of trade-marks in general.
5. —— Trade-names in general.
6. Specific devices, names, marks, or words as subject to use as trade-marks.
7. Arbitrary or descriptive character of marks or words—In general.
8. —— Words or terms descriptive generally of a business or class of business.
9. —— Words or devices indicating origin or ownership of article.
10. —— Description or character of article in general.
11. —— Description or character of specific articles.
12. —— Quality.
13. Devices and symbols.
14. Numerals.
15. Letters of the alphabet.
16. Fictitious or fanciful names in general.
17. —— Specific names.
18. Geographical names in general.
19. —— Specific names.
20. Names of persons, firms, or corporations.
21. Names of books or other publications.
22. Marks or names of places of business.
23. Marks or names used on signs.
24. Names of patented articles.
25. Names of copyrighted works.
26. Marks or names of places of business.
27. Form of articles or packages.
28. Color of articles, packages, wrappers, or labels.
29. Combinations.
30. Novelty of mark or name.
31. Similarity and infringing character of marks or names, and deception of public—In general.
32. —— Knowledge or intent.
33. —— Imitation.
34. Use of trade-mark or trade-name for different goods.
35. Right to use same name.
36. Priority of use.
37. Abandonment and extinguishment.
38. Nature of property.
39. Extent of rights acquired.
40. Subject-matter of trade-mark.
41. Persons who may acquire trade-marks.

42. Number of trade-marks.
43. Origin and adoption of mark or name.
44. Mode of affixing mark or name.
45. Extent and continuance of use.
46. Foreign trade-marks and trade-names.
47. Extent of rights acquired.
48. Evidence—Presumptions and burden of proof.
49. —— Weight and sufficiency.

1. Operation, validity, and effect of trade-mark legislation in general.—The provision of Const. art. 1, § 8, cl. 8, for securing "to authors and inventors the exclusive right to their respective writings and discoveries," does not apply to trade-marks. U. S. v. Steffens (1879) 100 U. S. 82, 25 L. Ed. 550.

The legislation of congress in regard to trade-marks is not limited to their use in "commerce with foreign nations, and among the several states, and with the Indian tribes," but embraces all commerce, including that between citizens of the same state. Id.

The registry of a trade-mark confers no property rights similar to those acquired under the patent or copyright laws, but merely brings pre-existing rights which the proprietor may have at common law within the cognizance of federal courts in cases wherein it is alleged in the pleadings that such trade-mark is used in connection with commerce with foreign countries or Indian tribes. Sarrazin v. W. R. Irby Cigar & Tobacco Co. (1899) 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; La Croix v. May (C. C. 1883) 15 Fed. 236.

Caution should be exercised in extending either the class of marks or phrases which may be used as technical trade-marks or in giving too broad a construction to a valid trade-mark. Sprigg v. Fisher (D. C. 1915) 222 Fed. 964.

Protection given by law to trade-marks held intended to protect the owner, and to protect the public from deception. Coca-Cola Co. v. J. G. Butler & Sons (D. C. 1916) 229 Fed. 224.

The copyright laws of the United States do not apply to trade-marks. Wormser v. Shayne (1904) 111 Ill. App. 556.

The use of a trade-mark does not necessarily import that the articles on which it is used are manufactured by the user; but it may be that they are manufactured for him, that he controls their production, or even that they pass through his hands in the course of trade, and that he gives to them the benefit of his reputation or name and business style. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75, 23 L. R. A. (N. S.) 1150.

No rights are acquired by the filing of a label in the United States Patent Office, as against any person doing business in the same state, since Congress has no power to legislate with respect to trade-marks so far as concerns commerce within the boundaries of a state. Perlberg v. Smith (1905) 62 A. 442, 70 N. J. Eq. 638.

The law of trade-mark is of recent origin, and may be comprehended in the proposition that the dealer "has a property in his trade-mark." Clark v. Clark (N. Y. 1857) 25 Barb. 76.

The right to the use of any word or figure as a part of a trade-name or trade-mark is a privilege that must be exercised with regard to the rights of others as property rights are enjoyed. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

2. Constitutionality of proviso.—The provision of this section that nothing therein shall prevent registration of any mark used by the applicant or his predecessor, etc., for ten years next preceding the passage of that act, is not unconstitutional. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73; Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 153.

3. Construction of section in general.—The last proviso of this section is ineffective when applied to technical trade-marks entitled to registration, irrespective of the length of use. Thaddeus Davids Co. v. Davids (1910) 178 Fed. 801, 102 C. C. A. 249, reversing (C. C. 1908) 165 Fed. 792.

The provision of this section is not limited to technical trade-marks, and a word used exclusively for ten years may be registered under that provision even though it is a descriptive word. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

This section provides a period of time during which an applicant making exclusive use of even a descriptive phrase as a trade-mark may have the same registered, and it will be assumed that the phrase has acquired a secondary meaning, though any one may meet the presumption by proof that it has not in fact acquired any secondary meaning. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

This section, providing that "nothing herein shall prevent the registration of any mark" which has been for 10 years in the exclusive use of the applicant, applies only to marks which are not technical trade-marks, and the registration of which is not prohibited elsewhere in the section. In re Cahn, Belt & Co. (1906) 27 App. D. C. 173.

In prohibiting registration of marks consisting of words and devices descriptive of the goods with which they are used, or of the character of such goods, this section is declaratory of existing law. In re National Phonograph Co. (1907) 29 App. D. C. 142.

The last proviso of this section was not intended to provide for the registration of technical trade-marks, but permitted the registration of marks not in either of the classes prohibited by the section, if such marks were in actual and exclusive use as a trade-

mark for 10 years next preceding the passage of the act. Wm. A. Rogers v. International Silver Co. (1907) 30 App. D. C. 97.

A mark which cannot be appropriated and registered as a technical trade-mark because it consists of words descriptive of the goods with which it is used may nevertheless be registered under this section, if the mark has been actually and exclusively used by the applicant for 10 years next preceding the passage of the act. Battle Creek Sanitarium Co. v. Fuller (1908) 30 App. D. C. 411.

Under this section, the user of a mark which was not susceptible of registration as a technical trade-mark would have no right during such 10 years' period to exclude another from using the word; and therefore an application for registration of such a mark will be refused on the ground that the applicant's use of the word during the 10-year period was not exclusive, if it appears that during that time another was also using the word as a trade-mark upon the same class of goods. Worster Brewing Corp. v. Rueter & Co. (1908) 30 App. D. C. 428.

The provision of this section prohibiting the registration of any mark which is "merely a geographical name or term" is simply declaratory of the common law. McIlhenny v. New Iberia Extracts of Tabasco Pepper Co. (1910) 34 App. D. C. 430.

4. Trade-marks and trade-names—Nature of trade-marks in general.—A trade-mark is a distinctive mark of authenticity, through which the products of particular manufacturers or vendible commodities of particular merchants may be distinguished from those of others, and may consist in any symbol or form of words; but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, no sign or form of words can be appropriated which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365.

For other definitions of "trade-mark," see Blackwell v. Dibrell (C. C. 1878) Fed. Cas. No. 1,475; Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707; Hostetter v. Fries (C. C. 1883) 17 Fed. 620; Davis v. Davis (C. C. 1886) 27 Fed. 490, 491; Galena-Signal Oil Co. v. W. P. Fuller & Co. (C. C. 1906) 142 Fed. 1002; Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157; Hughes v. Alfred H. Smith Co. (D. C. 1913) 205 Fed. 302; United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456; Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204; Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 Pac. 913; In re American Circular Loom Co. (1906) 28 App. D. C. 446; Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696; Metcalfe v. Brand (1887) 86 Ky. 331, 5 S. W. 773, 9 Ky. Law Rep. 801, 9 Am. St. Rep. 282; Handy v. Commander (1897) 22 So. 230, 49 La. Ann. 1119; Rogers v. Taintor (1867) 97 Mass. 291; Smith v. Imus (1885) 24 N. W. 830, 57 Mich. 456 (rehearing denied Same v. Walker [1886] 26 N. W. 783, 57 Mich. 456); Helmbold v. Helmbold Mfg. Co. (N. Y. 1877) 53 How. Prac. 453; Ball v. Broadway Bazaar (1909) 87 N. E. 674, 194 N. Y. 429 (reversing judgment [1907] 106 N. Y. S. 249, 121 App. Div. 546); E. T. Fraim Lock Co. v. Shimer (1910) 43 Pa. Super. Ct. 221; Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

What may be adopted as trade-marks in general. McLean v. Fleming (1877) 96 U. S. 245, 254, 24 L. Ed. 828.

It is not essential to a valid trade-mark that its use shall have been long continued, or that the article on which it is used should be widely known, or should have attained great reputation. It is sufficient if the article with the mark upon it has become actually a vendible article in the market, with intent by the proprietor to continue its production and sale. Kathreiner's Malzkaffee Fabriken Mit Beschrænkter Haftung v. Pastor Kneipp Medicine Co. (1897) 82 Fed. 321, 27 C. C. A. 351.

To constitute a commercial or trade designation, as contradistinguished from a descriptive term, the words, it would seem, must be used in commerce in an unvarying or stereotyped order. Field v. U. S. (1898) 90 Fed. 412, 33 C. C. A. 138.

To constitute a trade-mark, the mark or symbol used must be designed, as its primary purpose, to distinguish each of the articles to which it is affixed from like articles produced by others. If it is originally adopted for some other purpose, such as to designate the size, shape, and capacity of the article, so that any office it may perform as a designation of origin is merely incidental, no trade-mark right is acquired. Deering Harvester Co. v. Whitman & Barnes Mfg. Co. (1898) 91 Fed. 376, 33 C. C. A. 558 (affirming decree [C. C. 1897] 86 Fed. 764); Newcomer & Lewis v. Scriven Co. (1909) 168 Fed. 621, 94 C. C. A. 77 (writ of certiorari denied J. A. Scriven Co. v. Newcomer [1909] 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065).

That an ornamental device was stamped on a single edition of an author's works published in this country, without any notice that it was intended as a trade-mark, and that a similar device was printed some years before on a few volumes of his works published in India, in connection with the publisher's name, while other editions printed in this country and in England

were without it, does not entitle it to protection as a trade-mark. Kipling v. G. P. Putnam's Sons (1903) 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873.

It is not necessary to the validity of a trade-mark or trade-name that it shall be utterly devoid of aptitude, but it is enough that it leaves open to every one all words that are really descriptive of quality or character. Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506.

The gist of a trade-mark is its association in the public mind with a product; it being the identifying mark of a trade. Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, reversing decree Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, and writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

A trade-mark signifies anything that has become in time adopted as the prima facie means of detecting the goods, wares, or properties of certain proprietors. Washington Medalion Pen Co. v. Esterbrook (C. C. 1869) Fed. Cas. No. 17,246a.

Trade-marks are an entirety, and are incapable of exclusive use at different places by more than one independent proprietor. Manhattan Medicine Co. v. Wood (C. C. 1878) Fed. Cas. No. 9,026.

A trade-mark is a mark by which the wares of the owner are known in trade; its object being, first, to protect the party using it from competition with inferior manufactures, and, second, to protect the public from imposition. Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707.

A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article. Hostetter v. Fries (C. C. 1883) 17 Fed. 620.

The term "mark" in the trade-mark law implies form rather than color, and it consists of some peculiar name, symbol, figure, letter, or device whereby one manufacturer distinguishes his goods from like goods sold by other persons. Fleischmann v. Starkey (C. C. 1885) 25 Fed. 127, 129.

Trade-marks may be characteristic of personal proprietorship as asserting to the public that some particular person has given his special skill to the production or selection of the articles covered, or trade-marks may designate some particular place of origin. Hill v. Lockwood (C. C. 1887) 32 Fed. 389, 393.

Act March 3, 1881, c. 138, providing for the registration of trade-marks, presupposes the existence of a valid trade-mark, which may be registered on compliance with the requirements of the law. Edison v. Thomas A. Edison, Jr., Chemical Co. (C. C. 1904) 128 Fed. 1013.

A trade-mark merely distinguishes and designates the business in which it is used, and it is the business which is to be protected, and not the trade-mark as a mere collocation of words or symbols. Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin (C. C. 1909) 171 Fed. 125, decree affirmed Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin (1910) 183 Fed. 22, 105 C. C. A. 314.

The owner of a trade-mark proper has an exclusive right to its use in connection with articles for which it was appropriated, and to which it has been applied, and a mark under which no such exclusive right can exist in the owner or appropriator cannot constitute a trade-mark proper. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557.

A trade-mark serves to protect the owner from unfair competition, and the public from being deceived and it is the design appearing upon the goods, and not the specifications filed in the patent office, that affects the public mind and protects the trade of the owner. Peter Schoenhofen Brewing Co. v. Maltine Co. (1908) 30 App. D. C. 340, 346.

Two trade-marks may be said to be appropriated to merchandise of the same descriptive properties, within the meaning of the trade-mark act, when the general and essential characteristics of the goods are the same. The test is whether there is such a sameness in the distinguishing characteristics of the goods as to be likely to mislead the general public. If there is, only one mark should be registered. Phoenix Paint & Varnish Co. v. John T. Lewis & Bros. (1908) 32 App. D. C. 285.

The trade-mark act is intended to limit the selection of marks for registration to mere arbitrary words or designs, the value of which will consist alone in their becoming fixed in the public mind through continued use on the goods of the owner, and not to permit marks to be registered which are such as will in themselves enhance the sale or value of the article to which they are applied. In re Central Consumers Co. (1909) 32 App. D. C. 523.

Whether a mark is or is not registerable as a trade-mark, because of alleged similarity to another, depends upon the special facts and circumstances of the case. Lang v. Green River Distilling Co. (1909) 33 App. D. C. 506.

For trade-mark purposes, there is no difference between inner and outer tubes of tires. Goodyear Tire & Rubber Co. v. Republic Rubber Co. (1915) 43 App. D. C. 275.

A trade-mark may consist of a name or a device, or a peculiar arrangement of words, lines, or figures, or any

peculiar mark or symbol not theretofore in use, adopted and used by one to designate goods as those which he manufactures or sells. It may be put either upon the article itself, or its case, covering, or wrapper, and is assignable with the business. Metcalfe v. Brand (1887) 86 Ky. 331, 5 S. W. 773, 9 Ky. Law Rep. 801, 9 Am. St. Rep. 282.

A trade-mark is a name, sign, or symbol which indicates or certifies that a given article or commodity is in reality what it claims or purports to be, and, while in a qualified sense it is property in the hands of its owner, it has no intrinsic value, being merely a certificate of the truth. Commonwealth v. Kentucky Distilleries & Warehouse Co. (Ky. 1909) 116 S. W. 766.

Where one transfers the right to use his trade-mark and formula without transferring the place of manufacture, or plant used, or the good-will of the business, and there is no exclusive right to manufacture the medicine in any one, and there is nothing in the trade-mark to indicate that the medicine comes from a particular manufactory, the only effect of the trade-mark is to indicate a class of goods which any one who knows how may manufacture. Chadwick v. Covell (1890) 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Covell v. Chadwick (1891) 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625.

The office of a trade-mark is to point out distinctly the origin or ownership of the article; and, unless it does so indicate the ownership or origin, neither the person who has adopted the mark or device can be injured by its appropriation by others, nor can the public be deceived. Oakes v. St. Louis Candy Co. (1898) 146 Mo. 391, 48 S. W. 467.

To entitle one to restrain the use of a trade-name, he must show that he made use of it in a manner such as to reasonably apprise the public that he intended it as a distinctive appellation for his trade or place of business. Chadron Opera House Co. v. Loomer (1904) 99 N. W. 649, 71 Neb. 785.

Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinquish the goods that he manufactures or sells by a peculiar mark or device, in order that they may be known by his mark in the market and that he may thus secure the profits which their superior repute as his may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

A trade-mark is not necessarily limited to a device or name used, such as "Sapolio," but may consist of any marks, forms, or symbols which serve to designate the true ownership of the article, including the form of the package. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1881) 23 Hun, 632.

A trade-mark may be wholly exclusive, or of a lesser degree of exclusiveness. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

Where manufacturers adopted the word "Excelsior" to indicate certain felt pads manufactured by them, and also a distinctive label having on it "Excelsior Felt Pads," the fact that their name was not on the label, or that they manufactured the goods for sale by retail dealers, cannot prevent them from acquiring a trade-mark in the name and label adopted. Volger v. Force (1901) 71 N. Y. S. 209, 63 App. Div. 122.

A trade-mark has been defined to be one's commercial signature. Star Co. v. Wheeler Syndicate (1915) 155 N. Y. S. 782.

To constitute a symbol or device a trade-mark, it is not necessary that the name or place of business of the manufacturers should appear thereon. Peurrung v. Compton (1892) 6 Ohio Cir. Ct. R. 483.

A trade-mark capable of an exclusive use must be such as will identify the article to which it is affixed, and distinguish it from others. Phalon v. Wright (Pa. 1864) 5 Phila. 464.

A trade-mark is an arbitrary symbol affixed by a manufacturer or merchant to a vendible commodity, the purpose of which is to guaranty the genuineness of the product and to protect both purchaser and vender. Gowans v. Ahlborn Bros. (Pa. 1886) 4 Kulp, 31.

Whether one claiming a right to a trade-mark could register it in foreign countries under their laws is immaterial, but the question is whether his claim is in harmony with the law of the United States, and the court will not decide what trade-marks exist or do not exist in foreign countries. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

5. —— **Trade-names in general.**—The rules applying to the protection of trade-marks also apply to protect exclusive trade-names. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

A "trade-mark" has reference to the thing sold, while a "trade-name" embraces both the thing sold and the individuality of the seller. Eastern Outfitting Co. v. Manheim (Wash. 1910) 110 P. 23.

A "trade-mark" or "trade-name" is some symbol by which one man's manufacture is differentiated from another's, and all that is needed for a valid trade-name is that it indicate the manufacture of the owner, whether there are other manufacturers or not. R. Guastavino Co. v. Comerma (C. C. 1910) 180 Fed. 920.

A trade-name may be such as indicates the purpose of the association, or may be arbitrary or fanciful, and such words or phrases are deemed "arbitrary" or "fanciful" when they do not by their usual and ordinary meaning denote the purposes of the association, but come to indicate their purpose by application and association. Creswill v. Grand Lodge K. P. of Georgia (1910) 67 S. E. 188, 133 Ga. 837.

"Trade-names" are names used in trade to designate a particular business, considered somewhat as an entity, or the place at which it is located, or the particular class of goods, but trade-names are not technically trade-marks. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

Nonexclusive trade-names are names which are publici juris in their primary sense, but which in a secondary sense indicate the goods or business of a particular trader; trade-names being acquired by adoption and user and belonging to the one first using them and giving them a value. Id.

A "trade-name" is a word or phrase by which a business enterprise, or specific article of merchandise from a specific source, is known to the public, and when applied to merchandise is generic or descriptive, and hence not susceptible of appropriation as a trade-mark. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

A trade-name relates to a business and its good will, rather than to a vendible commodity. Ball v. Broadway Bazaar (1909) 87 N. E. 674, 194 N. Y. 429.

A trade-mark designates an article of commerce, is affixed thereto, accompanying the article, and may be infringed anywhere; while a trade-name applies to a business, and is, as a rule, local, the proprietor having an exclusive right to the name in his locality only. Ball v. Broadway Bazaar (1907) 106 N. Y. S. 249, 121 App. Div. 546.

The name "Liebig," as applied to extracts of meat, has been in common use in this country for many years to designate preparations supposed to have been made by Liebig's process, and is common property, which no longer designates, if it ever did, the product of a particular manufacturer. Liebig's Extract of Meat Co. v. Liebig Extract Co. (C. C. 1909) 172 Fed. 158, decree reversed (1910) 180 Fed. 688, 103 C. C. A. 654.

6. Specific devices, names, marks, or words as subject to use as trade-marks.—A plain metallic horseshoe, with no letters on it, is not a label. Lorillard v. Drummond Tobacco Co. (C. C. 1882) 14 Fed. 111.

A peculiar method of arranging soap in a box is not a trade-mark which can be legally registered. Davis v. Davis (C. C. 1886) 27 Fed. 490, 491.

Where plaintiffs designed a picture for labels for cigar boxes, and delivered to the librarian of congress a description of the picture by the title of "Nosegay," which the librarian duly recorded, it was held that this was an attempted evasion of Act June 18, 1874, § 3, providing that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizing them to be registered as trade-marks, and that plaintiffs' design could not be protected as a copyright. Schumacher v. Wogram (C. C. 1888) 35 Fed. 210.

The device of a book on circulars and advertisements, with the words "Webster's Dictionary" printed thereon, is not sufficiently arbitrary to constitute a valid trade-mark. Merriam v. Famous Shoe & Clothing Co. (C. C. 1891) 47 Fed. 411.

A manufacturer of a single article who uses upon his packages a large number of different names, to designate difference in quality, shape, or size, or merely to meet the whims of customers, and which tend to produce confusion, rather than certainty, as to origin, cannot be protected in the exclusive use of such names as trade-marks. Albany Perforated Wrapping-Paper Co. v. John Hoberg Co. (C. C. 1900) 102 Fed. 157.

Where a manufacturer gave the name of the patentee, the date of the patent, and also an arbitrary name to the article, but not its own name as manufacturer, so that such arbitrary name merely identified the article with the patent, such marking did not constitute a trade-mark, but, on the expiration of the patent, another manufacturer has the right to mark the article with the same or a similar name, where it places thereon its own name as manufacturer, marked with sufficient prominence to clearly distinguish the article from those made by the original manufacturer. B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co. (C. C. 1901) 112 Fed. 144, decree affirmed (1902) 118 Fed. 1014, 56 C. C. A. 596.

A representation of a star cannot by its own meaning indicate the origin or ownership of such an article as lubricating oil, nor in view of its general use as a symbol can it be appropriated as a trade-mark except in connection with other devices or words such as to render the whole characteristic. Galena-Signal Oil Co. v. W. P. Fuller & Co. (C. C. 1906) 142 Fed. 1002.

Uncopyrighted post cards are not entitled to protection as trade-marks either singly or collectively, as they do not identify and distinguish the product of the manufacturer, but constitute the product itself. Bamforth v. Douglass Post Card & Machine Co. (C. C. 1908) 158 Fed. 355.

The fact that a trade-mark for a horseshoe nail is cut or stamped into the nail itself does not affect its validity. Capewell Horse Nail Co. v. Mooney (C.

C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

That a mark imprinted on a horseshoe nail may add to its appearance does not prevent it from being appropriated as a trade-mark. Id.

A check figure impressed on the under or beveled face of the heads of horse nails, or on pictures thereof on packages, containing the same, as an arbitrary mark to designate the product of a certain maker, is a legitimate trade-mark. Id.

The manufacturers of a peculiar style of type, unpatented, which is marketable only on account of its utility, cannot restrain another from producing type of the same character. Keystone Type Foundry v. Portland Pub. Co. (C. C. 1910) 180 Fed. 301, decree affirmed (1911) 186 Fed. 690, 108 C. C. A. 508.

The representation of a star as a mark for beer has become publici juris, so as to destroy the right of its registration as a trade-mark. Star Brewery Co. v. Val Blatz Brewing Co. (1911) 36 App. D. C. 534.

The mark "Deacon Brown," printed in script type is not registerable as a trade-mark for beverages, being the name of an individual, and not printed in a particular or distinctive manner. In re Artesian Mfg. Co. (1911) 37 App. D. C. 113.

Labels for shoes bearing the words "Boy Scouts," in conjunction with figures representing boys in scout uniform, cannot be registered as trade-marks. In re Excelsior Shoe Co. (1913) 40 App. D. C. 480.

A generic term may be used as a trade-name or a part of a corporate or firm name, unless its use is reasonably certain to bring about unfair competition, in which case its use will be enjoined. Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (1911) 134 S. W. 877, 142 Ky. 523, judgment modified (1911) 136 S. W. 154, 143 Ky. 216.

A mere mark or symbol which can be used by one with as much propriety as another cannot become a trade-mark. Scott v. Sewell (La. 1884) 2 McGloin, 7.

A union label or symbol, not indicating by what persons the articles are made, but only that they are made by some member of one of such unions, the right to use the device belonging equally to each of all the members, and continuing only while the person remains a member, is not a legal trade-mark. Weener v. Brayton (1890) 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Cigar Makers' Protective Union v. Conhaim (1889) 40 Minn. 243, 41 N. W. 943, 3 L. R. A. 125, 12 Am. St. Rep. 726.

Adoption and use of a name or device adapted to point out the true source or origin of the manufactured article, gives a property interest therein which the courts will protect. Filley v. Fassett (1869) 44 Mo. 168, 100 Am. Dec. 275.

The phrase "What is it?" is not an original, arbitrary name, so as to entitle the user to be protected in the exclusive use thereof. Oakes v. St. Louis Candy Co. (1898) 48 S. W. 467, 146 Mo. 391.

A trade-mark exists in the title of a newspaper. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

The brands used by a miller are quasi trade-marks and are objects of the law's protection on analogous principles. Sessinghaus Milling Co. v. Hanebrink (Mo. 1912) 152 S. W. 354.

Labels are protected as trade-marks. Wirtz v. Eagle Bottling Co. (1892) 50 N. J. Eq. (5 Dick.) 164, 24 Atl. 658.

Injunction will lie at the suit of a physician to restrain the unauthorized use of a fac simile of his signature in advertising a medicine. Mackenzie v. Soden Mineral Springs Co. (1891) 27 Abb. N. C. 402, 18 N. Y. Supp. 240.

7. Arbitrary or descriptive character of marks or words—In general.—"Tycoon," as applied to tea, held not subject to appropriation; it appearing that the word was in common and general use. Corbin v. Gould (1890) 10 Sup. Ct. 312, 133 U. S. 308, 33 L. Ed. 611.

Registration of the words "Old Crow" as a trade-mark in connection with whisky held valid under this section. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531.

The word "Eureka," first used in a compounded fertilizer, will be protected. Alleghany Fertilizer Co. v. Woodside (C. C. 1871) Fed. Cas. No. 206.

The word "Centennial" is general property, and cannot be used for a trade-mark. Hartell v. Viney (C. C. 1876) Fed. Cas. No. 6,158.

A name alone is not a trade-mark when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing made or sold; but the mark should distinguish the production from other productions of the same article. Hostetter v. Fries (C. C. 1883) 17 Fed. 620; Leclanche Battery Co. v. Western Electric Co. (C. C. 1885) 23 Fed. 276.

Arbitrary terms, such as "Tin Tag" or "Wood Tag," branded upon or given to goods to distinguish them, may constitute valid trade-marks, but the person so using them would have no right to the exclusive use of tin or wood as a material to designate the goods. Lorillard v. Pride (C. C. 1886) 28 Fed. 434.

Proper designation of an article cannot be appropriated as a trade-mark; and it is quite immaterial who gives the proper name to a new article. Colgan v. Danheiser (C. C. 1888) 35 Fed. 150, 151.

The words "Social Register," applied to a list of persons resident in a certain locality, compiled with reference to personal and social standing, constitute a valid trade-mark, and their use by the publisher of a competing list will be

restrained. Social Register Ass'n v. Howard (C. C. 1894) 60 Fed. 270.

The word "Continental" is a generic term, the right to use which cannot be exclusively appropriated by any individual or corporation. Continental Ins. Co. v. Continental Fire Ass'n (C. C. 1899) 96 Fed. 846.

The word "Holeproof," as a trademark for hosiery, is not invalid as descriptive where it has acquired a secondary meaning as designating the product of a particular maker. Holeproof Hosiery Co. v. Wallach Bros. (C. C. 1911) 190 Fed. 606, decree modified (1911) 192 Fed. 534, 112 C. C. A. 655.

Word "Wearever," stamped on aluminum ware, though expressive of durability, held also distinctive, and entitled to protection under this section. Aluminum Cooking Utensil Co. v. National Aluminum Works (D. C. 1915) 226 Fed. 815.

The rule that words or phrases in common use and indicating the character, kind, quality, and composition of the thing may not be appropriated by any one to his exclusive use as a trademark is recognized in Civ. Code Cal. § 991. Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 P. 913.

A descriptive term of a foreign language cannot be adopted as a trademark. Id.

Under this section the word "Success" is not registerable as a trademark, when "not written, printed, impressed, or woven in some particular manner," on the application of a corporation, the corporate name of which is "the Success Company," even though the word is the subject of a technical trade-mark. In re Success Co. (1910) 34 App. D. C. 443.

The word "cream" is registerable as a technical trade-mark for baking powder. International Food Co. v. Price Baking Powder Co. (1911) 37 App. D. C. 137.

Terms which designate merely the name, quality, kind, size, number, or elements of an article, or have become its proper appellation, or that merely describe it or direct the mode of its use, or purely generic or geographical terms, and the necessary and common uses in which the English language and Arabic numerals are employed by the people to express the truth, their ideas, and feelings, are common property, which all may use, but which none can appropriate exclusively to himself as a trade-mark. Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

"Vienna Bread" being a known article of bread, no person can acquire by use an exclusive right to use the same as a trade-mark. Snodgrass v. Welle (1882) 11 Mo. App. 590.

A name may be protected as a trademark only when used merely as indicating the true origin or ownership of the article, never where it is used to designate the article itself, and has become, by adoption and use, its proper appellation. Hence, all who have an equal right to manufacture and sell the article have an equal right to designate it, and sell it by its appropriate name, the name by which alone it is distinguished and known, provided each person is careful to sell the article as prepared and manufactured by himself and not by another. Fetridge v. Wells (N. Y. 1857) 13 How. Prac. 385, 4 Abb. Prac. 144.

Where a water was not an artificial production, and there was nothing in the mode of bottling it for sale nor the mode of sale originating with the plaintiff or the former owners which the word "Congress" defined, designated, or implied, plaintiff had no exclusive right to the use of that word in connection with such business or in connection with the words "Water" or "Spring Water." Congress & Empire Spring Co. v. High Rock Congress Spring Co. (N. Y. 1867) 57 Barb. 526.

A dealer in salt fish cannot maintain an exclusive claim to the use of the term "Desiccated Codfish" as a trademark. It is only by the prefix of some other word, not previously applied in that connection and not essential to the truthful designation of the article produced, that he can be protected in its exclusive use. Town v. Stetson (N. Y. 1868) 5 Abb. Prac. (N. S.) 218; Id. (N. Y. 1869) 3 Daly, 53.

The words "Established 1780," or "Established A. D. 1780," which have been conspicuously displayed and used by a drug house for a great number of years, are the proper subject of a trade-mark, and the use thereof will be protected in equity. Hazard v. Caswell (N. Y. 1878) 57 How. Prac. 1.

Use of the word "Alderney" in connection with the manufacture of oleomargarine, being entirely arbitrary and in no respect descriptive of the article, will be protected as a trade-mark. Lauferty v. Wheeler (N. Y. 1882) 11 Abb. N. C. 220.

Cardboard on which pictures of animals, birds, and other objects were printed, was cut into strips, and constituted games or puzzles, to which the terms "Sliced Animals," "Sliced Birds," or "Sliced Objects" were applied. Held, that these were arbitrary words, and might be protected as trade-marks. Selchow v. Baker (N. Y. 1883) 11 Daly, 353.

The use of the word "Ideal," as applied to fountain pens, constitutes a valid trade-mark. Waterman v. Shipman (1891) 130 N. Y. 301, 29 N. E. 111, reversing (1889) 55 Hun, 611, 8 N. Y. Supp. 814.

Evidence showed that plaintiff's letter file was labeled with a circle inclosing the words, "The Improved, Best, Favorite, Cheapest Letter and Invoice File." Defendants' label was on a plain sheet of different color from plaintiff's and contained only the words, "The Favorite Letter and Invoice File," and was entirely different in design and

appearance from plaintiff's. Held, that the word "Favorite" is not subject to exclusive appropriation as a trade-mark. Cooke & Cobb Co. v. Miller (1900) 65 N. Y. S. 730, 53 App. Div. 120, 8 N. Y. Ann. Cas. 58, judgment affirmed (1902) 62 N. E. 582, 169 N. Y. 475.

A manufacturer has no such exclusive right to the use of a common English word or combination of words as entitles him to debar all others from use of the same as a trade-mark, in the absence of fraud or intent to deceive. Barrett Chemical Co. v. Stern (1903) 68 N. E. 65, 176 N. Y. 27, reversing judgment (1902) 76 N. Y. S. 1009, 71 App. Div. 616.

The word "Domestic," either alone or in connection with the words "Salt Rising Bread," is the proper subject of a trade-mark, the piracy of which will be enjoined. Smith v. Kernan (Ohio, 1880) 5 Wkly. Law Bul. 145.

The commercial name of an article which every person has the right to make and sell, such as "Borax Soap," cannot be appropriated as a trade-mark. Drydroppel v. Young (Pa. 1880) 37 Leg. Int. 397.

The word "Diamond" and the figure of a diamond having been used for many years on rasps and files, and the word always having been employed in connection with some other words, such word cannot be appropriated as a trade-mark. Barnett v. Kent (Pa. 1880) 8 Wkly. Notes Cas. 355.

The word "nickle" or "nickel," when used by one who does not buy or sell nickel, and whose wares are not as a rule sold for a nickel (five cents), is not a term descriptive of such business; and hence an exclusive right to use such word in that connection may be acquired. Duke v. Cleaver (1898) 46 S. W. 1128, 19 Tex. Civ. App. 218.

The word "Marvel" may be appropriated as a trade-mark to designate the output of a certain mill. Listman Mill Co. v. William Listman Milling Co. (1894) 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

8. —— Words or terms descriptive generally of a business or class of business.—Terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in, cannot be exclusively appropriated by any one as a trade-mark. Choynski v. Cohen (1870) 39 Cal. 501, 2 Am. Rep. 476.

The term "International Banking ing Company" is not capable of exclusive appropriation as a firm name or trade-mark, for it is a generic term, descriptive of a class of business. Koehler v. Sanders (1890) 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576, affirming (1888) 48 Hun, 48.

The mere description of a kind of business, or quality or class of goods sold, by words in common use, such as "Misfit Parlors," does not constitute a trade-name for which the first proprietor can obtain protection. Cohn v. Kahn (Ohio, 1882) 8 Wkly. Law Bul. 154.

9. —— Words or devices indicating origin or ownership of article.—A sign, symbol, word, or device which does not indicate origin or ownership of articles manufactured or sold is not a legal trade-mark. Burton v. Stratton (C. C. 1882) 12 Fed. 696; Godillot v. Hazard (N. Y. 1875) 49 How. Prac. 5; Ferguson v. Mills (Pa. 1869) 7 Phila. 253.

The owner of a natural mineral water, who has applied to it a conventional name, by which it has become generally known, and under which it has been extensively sold, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article. Northcutt v. Turney (1897) 41 S. W. 21, 101 Ky. 314, 19 Ky. Law Rep. 483; Congress & E. Spring Co. v. High Rock Congress Spring Co. (1871) 45 N. Y. 291, 6 Am. Rep. 82.

Words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but which are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark. Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365.

The phrase "Syrup of Figs," adopted to designate a medical preparation, and which has become known to the public by such name, indicates the origin of the preparation, rather than its quality or nature, and constitutes a valid trade-mark. Improved Fig Syrup Co. v. California Fig Syrup Co. (1893) 54 Fed. 175, 4 C. C. A. 264, affirming judgment and order California Fig Syrup Co. v. Improved Fig Syrup Co. (C. C. 1892) 51 Fed. 296.

The words "Merrie Christmas," printed on or woven in ribbons at intervals, are not the subject of a trade-mark, the words being an integral part of the ribbon, which was evidently designed for use in tying Christmas packages, and not merely a mark to identify the manufacturer. Smith v. Krause (1909) 166 Fed. 1021, 91 C. C. A. 218, affirming decree (C. C. 1908) 160 Fed. 270.

A name, to constitute a valid trade-mark, must point distinctly to the origin or ownership of the commercial article to which it is attached, either in meaning or by association, and must be of such a nature as to permit of exclusive appropriation by one person. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment (D. C. 1912) 197 Fed. 476.

A label, bearing the head of an elk, with the word "Elk" in large letters, together with the words "Patented by

the Elk Cigar Factory, June 15, 1875," sufficiently indicates origin and ownership to be a valid trade-mark. Lichtenstein v. Goldsmith (C. C. 1889) 37 Fed. 359.

The words "Warren Hose Supporter," when used in connection with a cut of a hose supporter engaged with a stocking, and placed, as labels, on boxes containing hose supporters, they are sufficiently arbitrary to fairly denote the origin of the goods, and entitled to protection as a trade-mark. Frost v. Rindskopf (C. C. 1890) 42 Fed. 408.

A trade-mark need not show on its face the origin, manufacture, or ownership of the article to which it is applied. It is sufficient that by association in trade it has acquired with the public an understood reference to such origin, etc. Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C. 1894) 94 Fed. 651, 656.

A trade-mark, "Steel Shod," in connection with a symbol, is not infringed by the words "Steel Clad" alone, stamped on shoes having the soles quilted with steel wires; such words being descriptive merely, and not subject to appropriation as a trade-mark. Brennan v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1900) 99 Fed. 971.

The word "Hygeia," used as a distinguishing name for such length of time as to identify the produce of a particular manufacturer, may become a valid trade-mark. Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C. 1906) 144 Fed. 139, decree affirmed Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506.

If one had originally two or more purposes in adopting a particular mark, one being to indicate the quality and origin, and the goods bearing this mark, and by reason thereof, had come to be known as the goods of that manufacturer, irrespective of grade or quality, he may adopt such mark as a general trade-mark to indicate origin solely; no other person having adopted or used it. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

Under this section, doubtless a mark primarily intended to suggest origin or ownership, and only secondarily descriptive or suggestive of quality, is registerable. In re Anti-Cori-Zine Chemical Co. (1909) 34 App. D. C. 191.

Where the name of a manufacturing corporation designates the origin and ownership of goods, it will be protected in the use of its name to the same extent and on the same principle that individuals will be protected in the use of trade-marks. Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co. (1870) 37 Conn. 278, 9 Am. Rep. 324.

The word "Hygeia," to designate products of artificial and distilled water and beverages made therefrom is entitled to protection; such word not being merely descriptive of the goods, but as indicative of their origin. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1900) 45 A. 957, 72 Conn. 646, 49 L. R. A. 147.

The name "Blue Lick Water," having been used for more than a century to designate the water of certain springs, is a good trade-name, in the hands of lessees of said springs, as against owners of an artesian well near Louisville. Parkland Hills Blue Lick Water Co. v. Hawkins (1894) 95 Ky. 502, 26 S. W. 389, 44 Am. St. Rep. 254.

A trade-mark is not necessarily defective because it does not indicate the origin or ownership of the article. Insurance Oil Tank Co. v. Scott (1881) 33 La. Ann. 946, 39 Am. Rep. 286.

Any words, letters, figures, marks, or devices, or combinations of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, and not merely as descriptive of quality or ingredient only, or as a geographical name without any secondary signification, must be recognized as a valid trade-mark. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

Where the word "Sunshine" has been appropriated by a manufacturer to indicate the origin of the goods and the identity of the manufacturer, he acquires a valid trade-mark, which the law will protect from infringement. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437.

The words "Vegetable Anondyne Liniment" cannot be utilized as a trade-mark, they being merely descriptive of the character or ingredient of the article. J. R. Watkins Medical Co. v. Sands (1901) 86 N. W. 340, 83 Minn. 326.

Any contrivance, device, or other thing may be a trade-mark which is adopted to point out the true source and origin of the goods to which the mark is applied; but it must not be merely descriptive of the style, quality, or character of the goods themselves. Filley v. Fassett (1869) 44 Mo. 168, 100 Am. Dec. 275.

One has a right to the exclusive use of marks, forms, or symbols appropriated by him for the purpose of pointing out the true origin or ownership of an article manufactured by him, but not for the simple purpose of naming or describing the quality of the goods. Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co. (1890) 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313.

Where one marked all of the shoes

he sold "Eagle Shoes," though the name did not indicate any particular brand or make of shoes, he is not entitled to protection in the use of the name. Perlberg v. Smith (1905) 62 A. 442, 70 N. J. Eq. 638.

Names having a definite and established meaning, and not indicating ownership, origin, or something equivalent, cannot be appropriated by one person to the exclusion of their similar use by others. Corwin v. Daly (1860) 20 N. Y. Super. Ct. (7 Bosw.) 222.

The word "Congress" is a proper trade-mark for water from a spring first known as and named "Congress Spring," of peculiar medical and curative properties possessed by no other spring. Congress & Empire Spring Co. v. High Rock Congress Spring Co. (1871) 45 N. Y. 291, 6 Am. Rep. 82.

Where manufacturers have used the word "Excelsior" to indicate certain felt pads manufactured by them, and have adopted a label having on it "Excelsior Felt Pads," and the pads have become known to the trade by the name and label adopted, they have a valid trade-mark both in the name and the label. Volger v. Force (1901) 71 N. Y. S. 209, 63 App. Div. 122.

The word "Excelsior" as applied to stoves and ranges is not a valid trade-mark, since it cannot perform the office to designate or point out the manufacturer. Sheppard v. Stuart (Pa. 1879) 7 Wkly. Notes Cas. 498.

The trade-mark, to entitle one to its exclusive use, must designate the true ownership or origin of the goods, and hence the device of a drum on boxes containing paper collars to describe a collar known to the trade as the "Drum Collar" cannot be appropriated as a trade-mark. White v. Schlect (Pa. 1880) 9 Wkly. Notes Cas. 77.

The name of "Roger Williams Long Cloth" may be appropriated by a manufacturer to distinguish his cloth from that of the same general description manufactured by others. Barrows v. Knight (1860) 6 R. I. 434, 78 Am. Dec. 452.

The court properly refused to charge that because plaintiff's trade-mark did not denote the origin or ownership of the goods designated thereby it could not be the subject of piracy, since the case was tried on the theory that the trade-mark of plaintiff was not a trade-mark proper, but a device used to distinguish his goods, which is the subject of piracy. Goodman v. Bohls (1893) 3 Tex. Civ. App. 183, 22 S. W. 11.

A name for a mineral spring of valuable medicinal qualities may be a trade-mark, provided it is one adopted to indicate origin or ownership, and not a generic or geographic name, or a description of the article by its qualities. Thus "Bethesda" may be protected as a trade-mark of a spring. Dunbar v. Glenn (1877) 42 Wis. 118, 24 Am. Rep. 395.

10. —— Description or character of article in general.—Words in common use, merely descriptive of the character or composition of the article to which they are applied, cannot be exclusively appropriated and protected as a trade-mark. Hostetter v. Fries (C. C. 1883) 17 Fed. 620; Wilcox & Gibbs Sewing-Mach. Co. v. Gibbens Frame (C. C. 1883) 17 Fed. 623; Leclanche Battery Co. v. Western Electric Co. (C. C. 1885) 23 Fed. 276; Trask Fish Co. v. Wooster (1888) 28 Mo. App. 408; Wolfe v. Burke (N. Y. 1873) 7 Lans. 151, reversed (1874) 56 N. Y. 115; Marshall v. Pinkham (1881) 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

Words, marks, or symbols used simply to describe the quality kind, or nature of the article cannot be appropriated as a trade-mark. Improved Fig Syrup Co. v. California Fig Syrup Co. (1893) 54 Fed. 175, 177, 4 C. C. A. 264.

One cannot make an exclusive appropriation of words or marks upon his goods, which simply indicate their superiority, or popularity, or universality in use, and no more. Proctor & Gamble Co. v. Globe Refining Co. (1899) 92 Fed. 357, 34 C. C. A. 405.

The long-continued exclusive use of a trade name, although primarily intended to be descriptive of the quality of a product, entitles the user to protection against its unnecessary adoption and use by another which is calculated to deceive purchasers. Fuller v. Huff (1900) 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332.

Where descriptive word had acquired secondary meaning, as referring to salt made by complainant, held, that it was immaterial what it originally meant in connection with salt. Diamond Crystal Salt Co. v. Worcester Salt Co. (1915) 221 Fed. 66, 137 C. C. A. 16.

Descriptive words may acquire a secondary significance and in that meaning are the subject-matter of ownership to be protected against unfair competition. Standard Paint Co. v. Rubberoid Roofing Co. (1915) 224 Fed. 695, 140 C. C. A. 235.

The use of a term by complainant in a manner calculated to mislead the public as to the components or nature of the article will not be tolerated. Ginter v. Kinney Tobacco Co. (C. C. 1882) 12 Fed. 782.

Anything descriptive of the properties, style, or quality of an article merely is open to all. Wilcox & Gibbs Sewing-Mach. Co. v. The Gibbens Frame (C. C. 1883) 17 Fed. 623.

Terms which are descriptive of products, and identify the article rather than the manufacturer, cannot be appropriated as trade-marks. New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co. (C. C. 1900) 99 Fed. 85.

A patentee cannot, by using a word which is descriptive only, acquire the

exclusive right to use such word as against another maker of a device which does not infringe his patent, of which the word is equally descriptive. Seeger Refrigerator Co. v. White Enamel Refrigerator Co. (C. C. 1910) 178 Fed. 567.

A generic word, which must necessarily be used in describing that article, cannot be appropriated as a trade-mark, and registration thereof confers no rights. U. S. v. Braun (D. C. 1889) 39 Fed. 775, 776.

Words descriptive of character or quality of product, or which others may employ with equal truth and equal right, may not be appropriated as trade-marks. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

Relief will be awarded against the use of words which have acquired a secondary signification, by limiting their use by others to their primary sense. Id.

A word in its early use may be neither descriptive, nor denote quality, but, by constant and repeated use and application to a particular product, it may become descriptive of the goods, and also denote their quality. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co. (1908) 31 App. D. C. 223.

Peculiarities in printing cannot make a word registerable that would be otherwise unregisterable because descriptive. H. W. Johns-Manville Co. v. American Steam Packing Co. (1909) 33 App. D. C. 224.

The trade-mark act of 1905 did not create trade-marks, but merely provided for their registration; and it prohibits the registration of a mark which is merely descriptive of the goods or quality of the goods with which it is used. In re Anti-Cori-Zine Chemical Co. (1909) 34 App. D. C. 191.

A mark will not be sustained at common law as a trade-mark, where it suggests neither origin, manufacture, nor ownership, but is suggestive of the quality of the goods upon which it is stamped, and was evidently selected for that reason, and no other. Id.

Beverages, the only real difference between which is that there is less alcohol in one than in the other, are of the same descriptive properties, within the meaning of the trade-mark statute. In re Independent Breweries Co. (1912) 39 App. D. C. 118.

An applicant for the registration of a trade-mark which has been refused upon the ground of descriptiveness cannot, by an amendment disclaiming the descriptive features, obtain registration of a mark which he is not shown ever to have used, and which is merely a skeleton of the real mark. In re Motz Tire & Rubber Co. (1913) 40 App. D. C. 487.

A mere general description, by words in common use, of a kind of article, or of its nature or qualities, cannot of itself be the subject of a trade-mark. Gilman v. Hunnewell (1877) 122 Mass. 139.

No one can acquire the exclusive right to use words properly descriptive of the nature of the business. Rodseth v. Northwestern Marble Works (1915) 152 N. W. 885, 129 Minn. 472.

A descriptive word may not be exclusively appropriated as a trade-mark or a trade-name, and the party suing to restrain the use of such word may obtain relief only on the ground of unfair competition. A. J. Reach Co. v. Simmons Hardware Co. (Mo. App. 1911) 135 S. W. 503.

A monopoly of an article of general consumption by the employment of descriptive words as a trade-name cannot be acquired. McGrew Coal Co. v. Menefee (1912) 144 S. W. 869, 162 Mo. App. 209.

Names which are generic, or merely descriptive of an article of trade, of its qualities or characteristics, cannot be employed as trade-marks or trade-names. Esselstyn v. Holmes (1911) 114 P. 118, 42 Mont. 507.

There may be an exclusive right in names expressing qualities or attributes if such names form part of a device peculiar to the manufacturer or vendor of the article. Corwin v. Daly (1860) 20 N. Y. Super. Ct. (7 Bosw.) 222.

A manufacturer cannot obtain an exclusive right to adopt as a trade-mark a phrase of a foreign language, fairly describing the manufactured article. Roncoroni v. Gross (1904) 86 N. Y. S. 1112, 92 App. Div. 221.

II. —— Description or character of specific articles.—The name "elastic seam," as applied to drawers having a strip of elastic material inserted in the seams, is descriptive merely, and cannot be monopolized as a trade-mark. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. (1908) 165 Fed. 639, 91 C. C. A. 475 (writ of certiorari denied J. A. Scriven Co. v. Rice-Stix Dry Goods Co. [1909] 29 Sup. Ct. 692, 212 U. S. 582, 53 L. Ed. 660, and appeal dismissed [1911] 32 Sup. Ct. 518, 223 U. S. 708, 56 L. Ed. 622); Newcomer & Lewis v. Scriven Co. (1909) 168 Fed. 621, 94 C. C. A. 77 (writ of certiorari denied J. A. Scriven Co. v. Newcomer [1909] 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065); Scriven v. North (C. C. 1903) 124 Fed. 894 (decree modified [1904] 134 Fed. 366, 67 C. C. A. 348).

The word "Matzoon," which has been for centuries in Armenia the name of an article of food or diet prepared from sterilized and fermented milk cannot be appropriated as a trade-name by the person who introduced the article and the name into this country. Dadirrian v. Yacubian (1900) 98 Fed. 872, 39 C. C. A. 321 (affirming decree [C. C. 1898] 90 Fed. 812); Id. (C. C. 1896) 72 Fed. 1010.

The word "Spearmint," as applied to

chewing gum, is descriptive of the flavor, open to every manufacturer who uses such flavor, and cannot be appropriated as a trade-mark. William Wrigley, Jr., & Co. v. Grove Co. (1910) 183 Fed. 99, 105 C. C. A. 391; William Wrigley, Jr., Co. v. Grove Co. (C. C. 1908) 161 Fed. 885.

The word "Royal," as applied to baking powder, is not descriptive. Royal Baking Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376; Same v. Sherrill (N. Y. 1880) 59 How. Prac. 17.

One first mining coal in the "Lackawanna Valley" cannot exclusively appropriate the term "Lackawanna Coal," for such product; it being in fact and in its generic character properly so designated, although more properly described when specifically spoken of as "Scranton Coal" or "Pittston Coal," and usually so called. Delaware & H. Canal Co. v. Clark (1871) 80 U. S. (13 Wall.) 311, 20 L. Ed. 581.

The words "La Favorita" are a valid trade-mark, as applied to a grade of flour selected by those who have acquired the right to use the term. Menendez v. Holt (1888) 9 Sup. Ct. 143, 128 U. S. 514, 32 L. Ed. 526, affirming decree Holt v. Menendez (C. C. 1885) 23 Fed. 869.

The terms "Goodyear Rubber Company," and "Goodyear's Rubber Manufacturing Company," and other similar terms, are not capable of exclusive appropriation as a trade-mark; "Goodyear Rubber" being descriptive of a well-known class of goods produced by the process known as "Goodyear's Invention." Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co. (1888) 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535, reversing decree Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co. (C. C. 1884) 21 Fed. 276.

The word "Columbia," not intended to indicate origin, manufacture, or ownership, but merely to designate a class or grade, is not a valid trade-mark. Columbia Mill Co. v. Alcorn (1893) 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

The word "Ruberoid" is descriptive, not indicative of origin or ownership, and therefore not subject of a trade-mark. Standard Paint Co. v. Trinidad Asphalt Mfg. Co. (1911) 31 Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (1908) 163 Fed. 977, 90 C. C. A. 195.

The words "The American Girl" are a subject of exclusive appropriation as a trade-mark for women's shoes. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 36 Sup. Ct. 269.

The word "Instantaneous" is not a valid trade-mark, as applied to a preparation of tapioca which is distinguished from other preparations of that article by its adaptability for immediate use, without the preliminary soaking. Bennett v. McKinley (1895) 65 Fed. 505, 13 C. C. A. 25.

The words "Syrup of Figs" or "Fig Syrup," being descriptive, cannot become a trade-mark for a laxative syrup in which the active medicinal property is the juice of the fig. California Fig Syrup Co. v. Frederick Stearns & Co. (1896) 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56, affirming (C. C. 1895) 67 Fed. 1008.

The word "Royal" is capable of use as a trade-mark for baking powder, where applied to one's whole product, and not to distinguish a particular grade of the goods. Raymond v. Royal Baking-Powder Co. (1898) 85 Fed. 231, 29 C. C. A. 245, affirming Royal Baking-Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376.

The words "Steel Shod," applied to boots or shoes whose soles are studded with steel nails, are essentially descriptive, and cannot be exclusively appropriated as a trade-mark. Brennan v. Emery-Bird-Thayer Dry-Goods Co. (1901) 108 Fed. 624, 47 C. C. A. 532.

The word "standard," as applied to scales, is descriptive, and cannot be appropriated to designate a scale of a particular make, either alone or in connection with the word "computing." Computing Scale Co. v. Standard Computing Scale Co. (1902) 118 Fed. 965, 55 C. C. A. 459.

The word "computing," as applied to the class of scales which indicate the price of the article weighed, is aptly descriptive of such function, and cannot be appropriated as a trade-mark, to the exclusion of other makers, of whose scales it is equally descriptive. Id.

The word "Carroms," as applied to a game played with disks on a board, in which the object is to pocket the disks, is not so descriptive of the board or the games played thereon as to preclude its appropriation as a trade-mark therefor. Ludington Novelty Co. v. Leonard (1903) 127 Fed. 155, 62 C. C. A. 269, affirming decree (C. C. 1902) 119 Fed. 937, and writ of certiorari denied (1905) 25 Sup. Ct. 797, 197 U. S. 620, 49 L. Ed. 909.

The adoption of the term "Whirling Spray" as the trade-name for a syringe, where it is distinctly descriptive of the mode of operation, does not deprive another manufacturer of a like article of the right to adopt and use the name "Whirlspray" therefor. Marvel Co. v. Pearl (1904) 133 Fed. 160, 66 C. C. A. 226.

One could not acquire a trade-mark in the word "muffler," so as to preclude the use of the word "mufflet" by another, such words being merely descriptive of the article. Hygienic Fleeced Underwear Co. v. Way (1905) 137 Fed. 592, 70 C. C. A. 553, reversing decree (C. C. 1904) 133 Fed. 245.

The words "Flare Front," as applied to automobile lamps, the shell of which

flares in front to inclose a large glass, are descriptive, and cannot be monopolized by a single manufacturer. Rushmore v. Manhattan Screw & Stamping Works (1908) 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269.

Complainant used a patented method of manufacture of men's drawers, using buff-colored material. He was not the first to use such color in like garments; and on the expiration of the patent he ceased to have a monopoly to the patented feature and to the use of buff-colored material as well. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. (1908) 165 Fed. 639, 91 C. C. A. 475, writ of certiorari denied J. A. Scriven Co. v. Rice-Stix Dry Goods Co. (1909) 29 Sup. Ct. 692, 212 U. S. 582, 53 L. Ed. 660, and appeal dismissed (1911) 32 Sup. Ct. 518, 223 U. S. 708, 56 L. Ed. 662.

A trade-mark, "Holeproof," used in the manufacture and sale of hosiery, is not objectionable as descriptive. Holeproof Hosiery Co. v. Wallach Bros. (1909) 172 Fed. 859, 97 C. C. A. 263, modifying order (C. C. 1908) 167 Fed. 373.

The word "Keepclean," as applied to tooth brushes, is descriptive, and is not, therefore, a proper subject of a valid trade-mark. Florence Mfg. Co. v. J. C. Dowd & Co. (1910) 178 Fed. 73, 101 C. C. A. 565, reversing decree Florence Mfg. Co. v. Dowd (C. C. 1909) 171 Fed. 122.

Where the word "Ideal," as applied to brushes, had been used for ten years by H. prior to the passage of Trade-Mark Act, he was entitled to register the same as a trade-mark without reference to whether it was or was not descriptive. Hughes v. Alfred H. Smith Co. (1913) 209 Fed. 37, 126 C. C. A. 179, affirming decree (D. C. 1913) 205 Fed. 302.

The words "always closed," as applied to a revolving door, are merely descriptive of the door in place and performing its proper functions, and cannot be monopolized as a trade-mark by one manufacturer. Van Kannel Revolving Door Co. v. American Revolving Door Co. (1914) 215 Fed. 582, 131 C. C. A. 650.

Complainant held to have a property right to the use of the word "Ruberoid," because it had acquired a secondary meaning as designating its roofing, and it would be protected. Standard Print Co. v. Rubberoid Roofing Co. (1915) 224 Fed. 695, 140 C. C. A. 235.

There can be no trade-mark in the name "Singer Sewing Machine." Singer Mfg. Co. v. Larsen (C. C. 1878) Fed. Cas. No. 12,902.

The term "Worcestershire Sauce" is generically applied to a certain kind of table sauce, and cannot be exclusively appropriated by persons residing in Worcestershire, England. Lea v. Deakin (C. C. 1879) Fed. Cas. No. 8,154.

The word "Parabola," used as the name of needles, not being descriptive of any particular quality, held a valid trade-mark. Roberts v. Sheldon (C. C. 1879) Fed. Cas. No. 11,916.

The term "Straight Cut" cannot be appropriated as a trade-mark, so as to preclude another from advertising cigarettes made of straight-cut tobacco. Ginter v. Kinney Tobacco Co. (C. C. 1882) 12 Fed. 782.

The word "Cresylic" in the name of a compound made from cresylic acid is descriptive of its quality, and will not be allowed as an exclusive trade-mark. Carbolic Soap Co. v. Thompson (C. C. 1885) 25 Fed. 625.

The words "Taffy Tolu," as applied to chewing gum, being descriptive, rather than indicative of origin, are not susceptible of appropriation as a trade-mark by one having no patent for the ingredients, or for the article itself. Colgan v. Danheiser (C. C. 1888) 35 Fed. 150.

The name "Acid Phosphate," applied to a medicinal preparation, with reasonable exactness describes the characteristics and qualities of the preparation for the purpose for which it is intended, and cannot be exclusively appropriated as a trade-mark. Rumford Chemical Works v. Muth (C. C. 1888) 35 Fed. 524, 1 L. R. A. 44, appeal dismissed (1891) 12 Sup. Ct. 987, 145 U. S. 652, 36 L. Ed. 848.

The words "Iron Bitters," being indicative of the composition of the article so called, cannot be claimed as a trade-mark. Brown Chemical Co. v. Frederick Stearns & Co. (C. C. 1889) 37 Fed. 360.

The words "indurated fibre," as applied to wares made of wood pulp, refer to ingredients, quality, and characteristics, and are not so arbitrary and fanciful as to authorize a preliminary injunction to protect them as a trade-mark. Indurated Fibre Co. v. Amoskeag Indurated Fibre-Ware Co. (C. C. 1889) 37 Fed. 695.

The manufacturer of an uncooked pudding, put up under the trade-mark name of "Puddine," cannot enjoin the maker of a similar preparation from using the word "Pudding" in describing it. Clotworthy v. Schepp (C. C. 1890) 42 Fed. 62.

The words "Cramp Cure" are descriptive of the purpose and character of the medicine, and cannot, therefore, be appropriated as a trade-mark by the manufacturers of a remedy for the disease. L. H. Harris Drug Co. v. Stucky (C. C. 1891) 46 Fed. 624.

The word "hygienic," as applied to underwear, cannot be monopolized under the guise of a trade-mark. Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. (C. C. 1894) 65 Fed. 424.

The word "Momaja," as applied to a blend of Mocha, Maracaibo, and Java

coffees, is not so far descriptive as to be objectionable as a trade-mark. American Grocery Co. v. Sloan (C. C. 1895) 68 Fed. 539.

"Saponifier," is not so descriptive, to ordinary purchasers, as to prevent its appropriation as a technical trade-mark for concentrated lye, especially where his right thereto has been acquiesced in for 35 years. Pennsylvania Salt Manuf'g Co. v. Myers (C. C. 1897) 79 Fed. 87, appeal dismissed Myers v. Pennsylvania Salt Mfg. Co. (1897) 82 Fed. 1003, 27 C. C. A. 683.

The word "air brush," being generic and descriptive, cannot be appropriated as a trade-mark for an instrument designed for the distribution of pigments by means of an air blast. Air Brush Mfg. Co. v. Thayer (C. C. 1897) 84 Fed. 640.

"Swan Down," as applied to a complexion powder, is not descriptive, so as to prevent its appropriation as a trade-mark therefor. Tetlow v. Tappan (C. C. 1898) 85 Fed. 774.

"Crystallized egg," being words in common use, cannot be appropriated as an exclusive trade-mark for egg meat preserved by secret process, though they may not indicate with clearness or accuracy the character of the goods. Lamont v. Leedy (C. C. 1898) 88 Fed. 72.

One dealing in prepared foods in the name of "Health Food Company" cannot enjoin the use of the name "Sanitarium Health Food Co."; the words "health food" being merely descriptive, and the prefix "Sanitarium" being sufficient to distinguish the names in trade. Fuller v. Huff (C. C. 1899) 99 Fed. 439.

The words "Celery Compound," while descriptive in character, may constitute a trade-mark, in connection with the representation of a head of celery, where by long use, not strictly in a descriptive sense, they have acquired a secondary meaning, as identifying the particular preparation of complainant. Wells & Richardson Co. v. Siegel, Cooper & Co. (C. C. 1900) 106 Fed. 77.

The word "Cascara," which is the name of a drug generally known, cannot be monopolized as a trade-name. Sterling Remedy Co. v. Gorey (C. C. 1901) 110 Fed. 372.

The word "Elastic" is not aptly descriptive of bookcases or filing cabinets, but is at most only suggestive of such feature, which does not preclude its appropriation as a trade-mark. Globe-Wernicke Co. v. Brown (C. C. 1903) 121 Fed. 185.

The words, "Be Sure and Work the Horse," standing alone, cannot be appropriated as a trade-mark for a gall cure where they are directive, and also descriptive of the characteristics of remedies which are more effective when such direction is followed. And a trade-mark in which such words are combined with a picture is not infringed by their use by another unless in connection with a similar picture. Bickmore Gall Cure Co. v. Karns Mfg. Co. (C. C. 1903) 126 Fed. 573, decree reversed Same v. Karns (1905) 134 Fed. 833, 67 C. C. A. 439.

The term "Gall Cure" cannot be monopolized as a trade-mark, standing alone, and when used as such in connection with a picture is not infringed by the use of the words as a part of the name of another remedy in conuection with another and distinctive picture. Id.

The word "Parcheesi" cannot be monopolized in the United States as a trade-mark for a game introduced from India, where it had long been known by a name similar in sound. Selchow v. Chaffee & Selchow Mfg. Co. (C. C. 1904) 132 Fed. 996.

The word "Bohemian," on bottles of beer, is a descriptive term, indicating that Bohemian hops are used, and cannot be monopolized as a trade-mark by a particular manufacturer. American Brewing Co. v. Bienville Brewery (C. C. 1906) 153 Fed. 615.

The word "stud," used to designate a belt fastener which is in fact a stud, is descriptive merely, and cannot be exclusively appropriated by a single manufacturer. Greene, Tweed & Co. v. Manufacturers' Belt Hook Co. (C. C. 1906) 158 Fed. 640.

The name "No Wash Up," as applied to a preparation for use on printing rollers and lithographing plates, is descriptive, and its use gives no right of action to enjoin its use as the name of a different preparation used for the same purpose, where the two are clearly distinguishable by their odor, the shape and appearance of the cans in which they are put up for sale, and by the labels, and there is no attempt by defendant to sell its product as that of complainant. Ault & Wiborg Co. v. Cheshire (C. C. 1909) 191 Fed. 741.

The words "Pork Roll" or "Roll of Pork," not registered, could not be the subject of a valid trade-mark, unless they were so well known and thoroughly recognized by the public for a sufficient length of time to be a distinctive use of the words. Taylor Provision Co. v. Gobel (C. C. 1910) 180 Fed. 938.

This section provides that the act shall not prevent registration of any mark used by the applicant or his predecessor, or by those from whom title to the mark is derived, in the commerce with foreign nations or among the several states or the Indian tribes which has been in actual and exclusive use as a trade-mark by the applicant or his predecessor for 10 years next preceding the passage of the act. Held that, where one used the trade-mark "Beats-All" for lead pencils since 1888, and in interstate commerce since before April 1, 1895, and on April 17, 1906, obtained registration of the mark, such registration gave to the words a secondary meaning, which made them

available as a proper trade-mark. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

Where the word "Nubia," as applied to cigarettes, acquired a distinct meaning that the cigarettes were made from Turkish tobacco, complainant was entitled to restrain defendant's use of the word "Nubias" for a similar purpose. Perkins v. Apollo Bros. (D. C. 1912) 197 Fed. 476.

"Coca-Cola" held merely suggestive of the elements of the compound, and not descriptive of its contents. Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 153.

The figure or symbol of a cow is generic and descriptive, and cannot be appropriated as a valid trade-mark for butter, cheese, and dairy products. Lawrence v. P. E. Sharpless Co. (D. C. 1913) 203 Fed. 762, decree affirmed P. E. Sharpless Co. v. William A. Lawrence & Son (1913) 208 Fed. 886, 126 C. C. A. 46.

The word "Ideal," as applied to a hair brush, is not descriptive in such sense as to preclude its use as a trade-mark. Hughes v. Alfred H. Smith Co. (D. C. 1913) 205 Fed. 302, decree affirmed (1913) 209 Fed. 37, 126 C. C. A. 179.

The use of the term "copperclad" in connection with steel wire coated with copper held descriptive, and to give complainant no exclusive right which would support a suit for unfair competition. Duplex Metals Co. v. Standard Underground Cable Co. (D. C. 1914) 220 Fed. 989.

"Beaded" held not descriptive as applied to shoe lace tips; they being properly described as corrugated and crimped, rather than beaded. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

The word "Teller" held a valid trade-mark for a recording safe for holding coin. Automatic Recording Safe Co. v. Bankers' Registering Safe Co. (D. C. 1915) 224 Fed. 506.

There can be no trade-mark in the term "vacuum tread" or "vacuum cup," as to tires, where the names are descriptive of the action of rubber cups on the surface of the tire. Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

"Thermogène," as applied to cotton wadding prepared to act as a counterirritant, held a word of precise description which could not be registered as a trade-mark. Thermogène Co. v. Thermozine Co. (D. C. 1915) 225 Fed. 446.

Such words as "norub" or "nodust" cannot be registered as a trade-mark, when merely descriptive, and not constituting a fanciful title. Van Zile v. Norub Mfg. Co. (D. C. 1916) 228 Fed. 829.

The words "circular loom," for conduits and coverings for electrical conductors, are descriptive, and a trade-mark therefor is not registerable. In re American Circular Loom Co. (1906) 28 App. D. C. 450.

An exclusive right to the use of words, letters, or symbols to indicate merely the quality of goods to which they are affixed cannot be acquired. While arbitrary words, adopted primarily as a mark to indicate origin or ownership, may sometimes, through long-continued and wide sale of the particular article, come to indicate quality also, and in such event the owner will not be debarred from their protection as a trade-mark, it must appear with certainty that at the time of adoption the mark was for the purpose of indicating origin, manufacture, or ownership, and not at all as descriptive of grade or quality. Id.

The words "Oriental Cream," used in connection with a cosmetical lotion, not a cream, but of a creamy appearance, are descriptive, and not arbitrary, within the meaning of the trade-mark law. In re Hopkins (1907) 29 App. D. C. 118.

The word "standard," as applied to phonographs, is a descriptive word, and cannot be registered as a trade-mark. In re National Phonograph Co. (1907) 29 App. D. C. 142.

The word "Sterling," when applied to any kind of goods, is descriptive of their quality, and is therefore not registerable as a technical trade-mark, although its exclusive use for 10 years prior to this act, will entitle the user of it to its registration under that act. Worster Brewing Corp. v. Rueter & Co. (1908) 30 App. D. C. 428.

The word "self-loading," as applied to cartridges, is not registerable as a trade-mark, being descriptive of a function of cartridges adapted to the use of self-loading guns. Winchester Repeating Arms Co. v. Peters Cartridge Co. (1908) 30 App. D. C. 505.

The words "Old Lexington Club," as applied to whisky, do not constitute a technical trade-mark, as the word "Club," has become a descriptive term, and the word "Lexington" is a geographical term. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co. (1908) 31 App. D. C. 223.

The word "asbestos," as applied to shoes made of leather and asbestos, is descriptive, and its registration as a trade-mark for that reason is prohibited. Johnson v. Brandau (1909) 32 App. D. C. 348.

The words "Mountain Dew," applied to whisky, are descriptive of the goods, and are therefore not registerable as a trade-mark. Charles Dennehy & Co. v. Robertson, Sanderson & Co. (1909) 32 App. D. C. 355.

Registration of the word "Nextobeer" as a trade-mark for a malt beverage containing 2 per cent. alcohol is properly refused on the ground that the mark is descriptive of character or

quality. In re Central Consumers' Co. (1909) 32 App. D. C. 523.

The word "Crystal" as applied to beer is descriptive of a characteristic or quality, and is therefore not registerable as a trade-mark. In re New South Brewery & Ice Co. (1909) 32 App. D. C. 591.

The words "Black Capsules" are descriptive, and not registerable as a trade-mark, when applied to transparent capsules containing medicine of a dark color, especially where the trade, and not the applicant, first used the words in describing the medicine. Planten v. Canton Pharmacy Co. (1909) 33 App. D. C. 268.

The word "Getwell," as applied to medicines, being descriptive of the goods to which it is applied, is not registerable as a trade-mark. It constitutes an advertisement, and not a trade-mark. In re Anti-Cori-Zine Chemical Co. (1909) 34 App. D. C. 191.

While the word "Navy" would not be registerable as a trade-mark for goods manufactured especially for use by the navy, it is not descriptive as applied to candy, which is not an essential part of navy supplies, and its proposed use does not suggest that the government has given its approval to the goods to which it is applied. In re National Candy Co. (1910) 35 App. D. C. 351.

Registration of the words "Black Caps" for medicine labels is properly refused, where this court refused registration of "Black Capsules" on the ground that they are descriptive, and "Black Caps" are understood in the trade as equivalent to "Black Capsules," and therefore to be descriptive. In re Safety Remedy Co. (1910) 35 App. D. C. 353.

"No sag," as a trade-mark applied to hand bags, held not registerable under this section. In re Freund Bros. & Co. (1911) 37 App. D. C. 109.

Where the most prominent feature in a mark is a figure representing a ball bearing, and which as accurately describes the articles to which the mark is applied as would the printed words "ball bearing," the mark is descriptive, and is not registerable. In re Schweinfurter Pracisions-Kugel-Lager-Werke Fichtel & Sachs (1912) 38 App. D. C. 279.

Registration of a mark consisting of the representation of a loving cup in connection with the word "Trophy" is properly refused on the ground that the mark indicates the applicant's goods have been recognized as of a superior quality by the presentation of a prize or trophy. In re Meyer Bros. Coffee & Spice Co. (1912) 38 App. D. C. 520.

Registration of a mark for canned fruits and vegetables, consisting of the word "Evergreen" over the representation of green string beans, and of a field of growing vegetables, is properly refused; the word "Evergreen," as used, being descriptive. Sears & Nichols Co. v. Brakeley (1912) 38 App. D. C. 530.

"Inter-phone," as a trade-mark for a telephone switching apparatus, indicates the use to which the goods bearing it are to be put, and so is not registerable as a trade-mark. In re Western Electric Co. (1912) 39 App. D. C. 420.

The word "Brilliant," to designate bright flour as distinguished from darker brands, and of a superior quality and considered of greater value, is descriptive, and not entitled to registration as a trade-mark. Sauers Milling Co. v. Kehlor Flour Mills Co. (1913) 39 App. D. C. 535.

Registration of trade-mark for tires should be denied for descriptiveness, when it consists in a perspective view of a clincher rim with a tire thereon; the word "Cushion" appearing across the end of a portion of the rim, and just below a perspective view of a portion of an automobile wheel passing over an obstruction so as to depress the tire. In re Motz Tire & Rubber Co. (1913) 40 App. D. C. 487.

A trade-mark, consisting of the words "Gold Bond Clothes" printed across the symbol and figures "$15.00," is rendered descriptive, both of the goods and of their character and quality, by the word "Clothes" and the symbol and figures "$15.00." In re Ochs (1914) 41 App. D. C. 519.

The word "electro," as applied to steel, is descriptive, implying that the product to which it is applied, is the product of an electrical furnace, and is therefore not registerable as a trade-mark. Electro Steel Co. v. Lindenberg Steel Co. (1915) 43 App. D. C. 270.

The words "Fireproof Oil" used to designate a peculiar brand of illuminating oil, being descriptive, cannot be appropriated to an exclusive use. Scott v. Standard Oil Co. (1894) 106 Ala. 475, 19 South. 71, 31 L. R. A. 374.

The words "Sarsaparilla and Iron" are generic terms, and cannot be appropriated as a trade-mark. Schmidt v. Brieg (1893) 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

That such generic terms do not in fact indicate the character, kind, or quality of the article does not give such persons the right to their exclusive use. Id.

The words "Kidney and Liver Bitters" are not the subject of a trade-mark; being merely descriptive. Spieker v. Lash (1894) 102 Cal. 38, 36 Pac. 362.

Though the Italian word "Tipo," meaning "type," may be capable of adoption as a trade-mark, the use of the word for wines as a part of the phrase "Tipo Chianti" is merely descriptive, and cannot be so adopted. Italian Swiss Colony v. Italian Vine-

yard Co. (1910) 110 P. 913, 158 Cal. 252.

Under Civ. Code Cal. § 991, the name "Los Angeles Van, Truck & Storage Company" could not be the subject of exclusive trade-mark, since it referred to the description of the business. Dunston v. Los Angeles Van & Storage Co. (Cal. 1913) 131 Pac. 115.

The question whether the word "Hygeia" had come to have a meaning descriptive of character and quality, so that it could not be used as a trade-mark, is for the court to determine. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

The word "Snowflake," as applied to bread or crackers, is a mere descriptive phrase of appearance or quality, and will not answer for a trade-mark. Larrabee v. Lewis (1881) 67 Ga. 561, 44 Am. Rep. 735.

Words descriptive of an effect to be produced by the article, as "Health Producing Corsets," cannot be used as trade-marks. Ball v. Siegel (1886) 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766.

The words "Svenska Snusmagasinet," meaning "Swedish snuff store," being merely descriptive of the business there carried on, cannot constitute a trade-name as against other Swedes engaged in the snuff business. Bolander v. Peterson (1891) 136 Ill. 215, 26 N. E. 603, affirmed (1890) 35 Ill. App. 551.

Right to the exclusive use of words, such as "cheese cutter," as a trade-name, which are merely descriptive, cannot be gained by prior use. Computing Cheese Cutter Co. v. Dunn (Ind. App. 1909) 88 N. E. 93.

The term "travelers' insurance" may properly be applied to that class of insurance business which specializes in the insurance of the lives of travelers, though the insurance company also has other branches of insurance. Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (1911) 134 S. W. 877, 142 Ky. 523, judgment modified (1911) 136 S. W. 154, 143 Ky. 216.

The term "travelers' insurance" is a generic term, the exclusive use of which as a part of the name of an insurance company cannot be acquired. Id.

The word "rye" cannot of itself be appropriated, but when used in connection with the word "Bonnie," even though that be a surname, the trade-mark becomes specific. Bonnie & Co. v. Bonnie Bros. (1914) 169 S. W. 871, 160 Ky. 487.

One cannot claim, as a trade-mark, the exclusive use of the word "Fruit" as applied to vinegar. Alden v. Gross (1887) 25 Mo. App. 123.

The right to use the trade-name "Electric Lump Coal" held not exclusive. McGrew Coal Co. v. Menefee (1912) 144 S. W. 869, 162 Mo. App. 209.

The French word "brassière," which means simply "brace," as applied to an article of women's wear, but includes the idea of "restraint" and "to be under constraint," is not subject to exclusive appropriation as a trade-mark for a combined corset cover and bust supporter, even by a manufacturer first so using it in the United States. Charles R. De Bevoise Co. v. H. & W. Co. (1905) 60 A. 407, 69 N. J. Eq. 114.

The adjective "nonfluid" and the noun "oil," when used in their proper sense, cannot be exclusively appropriated as a trade-mark since they are merely descriptive. New York & N. J. Lubricant Co. v. Young (N. J. 1910) 77 A. 344.

The words "wire glass," as applied to a special kind of glass, are merely descriptive, and where there is no showing that after expiration of the patents the name was generally used to designate complainant's product in distinction to that of other manufacturers, the words cannot be exclusively appropriated. Mississippi Wire Glass Co. v. Continuous Glass Press Co. (N. J. 1911) 81 A. 374.

The designation of complainant's products as "nonfluid oils" held to be descriptive and not a trade-name. New York & New Jersey Lubricant Co. v. O. W. Young (N. J. 1915) 94 A. 570.

The phrase "Ferro-Phosphorated Elixir of Calisaya Bark," applied to a medicine the principal ingredients of which were iron, phosphorus, and elixir of calisaya bark, will not be protected as a trade-mark. Caswell v. Davis (1874) 58 N. Y. 223, 17 Am. Rep. 233, reversing (1867) 35 How. Prac. 76, 4 Abb. Prac. (N. S.) 6.

The term "Cherry Pectoral" cannot be claimed as a trade-mark for a medicine, as the first word describes one of the ingredients and the word "Pectoral" the class of diseases for which the medicine is intended. Ayer v. Rushton (N. Y. 1877) 7 Daly, 9.

The words "Rye and Rock" form a description of the article, and therefore are not a trade-mark. Van Beil v. Prescott (1880) 46 N. Y. Super. Ct. (14 Jones & S.) 542, affirmed (1880) 82 N. Y. 630.

The words "Silicon" and "Electro-Silicon" are properly the subject of a trade-mark, not being, in a scientific sense, descriptive of the article thus designated, although silicon is one of its component parts. Electro-Silicon Co. v. Hazard (N. Y. 1883) 29 Hun, 369.

The words "Compressed Yeast" indicate the character and composition of an article, and are not the subject of a trade-mark. Fleischmann v. Newman (1888) 2 N. Y. Supp. 608, judgment affirmed Fleischman v. Same (1889) 51 Hun, 641, 4 N. Y. Supp. 642.

The word "Hygieniques," as applied to suspenders, is not descriptive, in the ordinary sense, and may become the subject of a valid trade-mark. Bailly v.

Nashawannuck Mfg. Co. (1890) 10 N. Y. Supp. 224.

The name "Bromo-Caffeine," applied to a preparation of bromide of potassium, caffeine, and other ingredients, is descriptive of the general characteristics and composition of the article, and a trade-mark cannot be acquired in such name. Keasbey v. Brooklyn Chemical Works (1893) 67 Hun, 648, 21 N. Y. Supp. 696, judgment reversed (1894) 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623.

Plaintiff sold soap marked: "B. T. Babbitt. Trade-Mark. Best Soap." Defendant sold soap marked: "B. T. Butler's. Trade-Mark. Best Soap." The size and shape of the cakes differed, the wrappers being of the same color and about the same size, but different in general appearance. Held, that no mark could be acquired in the words "Trade-Mark" or "Best Soap." Babbitt v. Brown (1893) 68 Hun, 515, 23 N. Y. Supp. 25.

Where plaintiffs called their mixture after the place it was made, and did not use the word "Angostura" as descriptive of the article till 1875, three years after its use by defendants, who testified that their article was so called from its chief ingredient, Angostura, or cusparia bark, plaintiffs had no trade-mark in the words "Angostura" or "Angostura Bitters." Siegert v. Abbott (1893) 72 Hun, 243, 25 N. Y. Supp. 590.

"Clinton Hematite Red," and "Metallic Clinton Paint," indicate a paint pigment made from Clinton hematite ore, and may not be exclusively appropriated as a trade-mark for such product. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

Plaintiffs adopted and used, as a trade-mark, the name "Filo-Floss," to designate their silk floss. Neither the word "filo" nor the combination "filo-floss" were used to designate any peculiar quality or character, except as it has come to be associated with the plaintiffs' manufacture. Held, that the words constituted a valid trade-mark. Rawlinson v. Brainard & Armstrong Co. (1899) 59 N. Y. S. 880, 28 Misc. Rep. 287.

The term "air-cell," used in connection with the manufacture of fireproof material, is descriptive merely, and hence not the subject of a valid trade-mark. New York Asbestos Mfg. Co. v. New York Fireproof Covering Co. (1899) 62 N. Y. S. 339.

The word "Favorite" in the label on a letter file, designating it as the best, favorite, and cheapest letter and invoice file, is not subject to exclusive appropriation as a trade-mark. Cooke & Cobb Co. v. Miller (1902) 62 N. E. 582, 169 N. Y. 475, affirming judgment (1900) 65 N. Y. S. 730, 53 App. Div. 120, 8 N. Y. Ann. Cas. 58.

The "Car Advertising Company," was not entitled to restrain defendant from using the name "New York City Car Advertising Company," the expression "car advertising" being a general term appropriately descriptive of the business. Car Advertising Co. v. New York City Car Advertising Co. (1907) 107 N. Y. S. 547, 57 Misc. Rep. 105.

"Chantecler," as the name of a play in which a barnyard fowl is represented by each part, is not of such a descriptive character as to preclude its exclusive appropriation. Frohman v. William Morris (1910) 123 N. Y. S. 1090, 68 Misc. Rep. 461.

The words "egg carrier and tray manufacturing company" are descriptive in their primary sense, and cannot be appropriated for the exclusive use of the manufacturer. Elbs v. Rochester Egg Carrier Co. (1912) 134 N. Y. S. 979.

The word "Security" on tires held not a valid trade-mark, being descriptive rather than calculated to show that they were those of a particular manufacturer. Buffalo Rubber Mfg. Co. v. Batavia Rubber Co. (1914) 153 N. Y. S. 779, 90 Misc. Rep. 418.

The name "Barlow's Indigo Blue," representing an article of bluing manufactured by a certain person, is a valid trade-mark. Wiltberger v. Walker (Ohio, 1883) 9 Wkly. Law Bul. 42.

The name "Simmons" cannot be appropriated as a trade-mark, when it has become descriptive of medicine prepared under a formula and is used by many people in connection with such medicines. C. F. Simmons Medicine Co. v. Mansfield Drug Co. (1893) 93 Tenn. (9 Pickle) 84, 23 S. W. 165.

The words "Liver Medicine," being purely descriptive, cannot be appropriated as a trade-mark. Id.

The use of the words "Microbe Killer" on a label does not constitute a trade-mark; they being in common use and of fixed meaning. Alff v. Radam (1890) 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

12. —— **Quality.**—A word used to distinguish a known quality of goods cannot be adopted as a trade-mark and appropriated by a single person as against a general public. Columbia Mill Co. v. Alcorn (1893) 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144 (affirming judgment [C. C. 1889] 40 Fed. 676); Adams & W. Mfg. Co. v. St. Louis Wire-Goods Co. (C. C. 1877) Fed. Cas. No. 72; Burton v. Stratton (C. C. 1882) 12 Fed. 696; Wilcox & Gibbs Sewing Mach. Co. v. Gibbens Frame (C. C. 1883) 17 Fed. 623; Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204; Sohl v. Geisendorf (Ind. 1871) Wils. 60; Gilman v. Hunnewell (1877) 122 Mass. 139; Smith v. Walker (1885) 57 Mich. 456, 24 N. W. 830; Snodgrass v. Welle (1882) 11 Mo. App. 590; Godillot v. Hazard (N. Y. 1875) 49 How. Prac. 5.

Letters or figures affixed to merchandise by a manufacturer for the purpose of denoting its quality only cannot be

appropriated by him to his exclusive use as a trade-mark—as the letters "A. C. A.," used on ticking. Amoskeag Mfg. Co. v. Trainer (1879) 101 U. S. 51, 25 L. Ed. 993; Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

Complainants have no trade-mark in the word "Tycoon" for a certain kind of tea, it appearing that the word was in common and general use, as descriptive of a certain class of teas, for many years before complainants' adoption of it. Corbin v. Gould (1890) 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611.

There can be no valid trade-mark in a word placed upon an article, not for the purpose of indicating origin, manufacture, or ownership, but merely as designating quality, class, grade, or style. Columbia Mill Co. v. Alcorn (1893) 14 Sup. Ct. 151, 152, 150 U. S. 460, 37 L. Ed. 1144, affirming judgment (C. C. 1889) 40 Fed. 676.

The word "Kaiser," used in connection with a brand of beer, is not indicative of class, grade, style, quality, or locality, and may therefore be lawfully appropriated as a trade-mark. J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co. (1896) 74 Fed. 222, 20 C. C. A. 402.

The word "Imperial" is so far a designation of quality as to be incapable of adoption as a trade-mark for beer. Showalter, Circuit Judge, dissenting. Beadleston & Woerz v. Cooke Brewing Co. (1896) 74 Fed. 229, 20 C. C. A. 405.

The word "Aluminum," as applied to an article of manufacture composed in part of that metal, cannot be monopolized as a technical trade-mark. American Washboard Co. v. Saginaw Mfg. Co. (1900) 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

The word "Queen," used to designate ladies' shoes, is not essentially one which signifies quality, so as to preclude its appropriation as a trade-name; nor does the addition of the word "Quality" to the name, after it has become identified with the goods of such manufacturer, deprive the owner of the right to injunction against the use by another of the word "Queen" as a name for similar shoes, where it appears that the sole purpose of the defendant in adopting it was to obtain the advantage of the reputation which complainant's goods had acquired under that name. Thomas G. Plant Co. v. May Co. (1900) 105 Fed. 375, 44 C. C. A. 534.

Where the general purpose of a trade-name is to identify the origin or ownership of the articles to which it is attached, the right to the exclusive use of such name is not affected by the fact that the words also denote quality, and carry with them a claim of excellence incident to the goods of such origin or ownership. Id.

The words "Stoga Kip," as applied to boots, indicate neither ownership nor origin, but quality, and are not the subject of valid trade-mark. Walker v. Reid (C. C. 1877) Fed. Cas. No. 17,084.

If the primary object of the trade-mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to debar the owners of protection, or make it the common property of the trade. Burton v. Stratton (C. C. 1882) 12 Fed. 696.

Where hay knives have been advertised and sold for years as "Lightning Hay-Knives," and the word "lightning" has been registered as a trade-mark by the manufacturers of these knives, they may enjoin the sale of "Lightning Pattern Hay-Knives"; the word "Lightning" not being merely descriptive of the quality or characteristics of the knives. Hiram Holt Co. v. Wadsworth (C. C. 1889) 41 Fed. 34.

The use of the word "Rose," in connection with the word "Vanilla," as a trade-mark, is no ground for enjoining a rival maker of similar products, containing those well-known flavors, from using those words in describing his goods. Clotworthy v. Schepp (C. C. 1890) 42 Fed. 62.

The word "Cottolene," designating a substitute for lard composed of cottonseed oil and the product of beef fat, is not so descriptive of the substance and quality of its component parts that it cannot be used as a trade-mark. N. K. Fairbank Co. v. Central Lard Co. (C. C. 1894) 64 Fed. 133.

While there can be no valid trade-mark as denoting quality when used merely to indicate grade, ingredients, or properties, there may be a valid trade-mark as indicating quality when used to indicate the merit or excellence of an article as associated with or coming from a certain source. Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651.

The words "Toothache Gum," to designate a preparation for the relief of toothache, designated quality, rather than the origin or ownership of the article, and were therefore not subject to appropriation as a technical trade-mark. Devlin v. McLeod (C. C. 1904) 135 Fed. 164.

Where the primary purpose in adopting an arbitrary mark was to indicate and identify the origin of the goods, one is not debarred from protection because it has incidentally come to indicate also their quality. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

In a trade-mark interference case involving the question of the prior use of the word "Eureka" as a trade-mark for pressing boards, the mark was not a grade mark merely, but a valid trade-mark. Case v. Murphey (1908) 31 App. D. C. 245.

The mark must denote origin or own-

ership of the goods, and not the kind or quality. Scott v. Sewell (La. 1884) 2 McGloin, 7.

Right to use words distinguishing known quality of article. Snodgrass v. Welle (1882) 11 Mo. App. 590.

A shoe dealer, who had selected certain shoes and applied the name "Delsarte" thereto, was not entitled to use such trade-mark for any kind of shoes it might make or sell, since its prior use of the word was to indicate the particular quality or character of the shoes selected by it, and not as a fancy name. Medlar & Holmes Shoe Co. v. Delsarte Mfg. Co. (1900) 46 A. 1089, 68 N. J. Eq. 706, affirmed (1905) 61 A. 410, 68 N. J. Eq. 706.

Where words such as "Galen," "Lake," "Cylinder," "Wayne," and "New York," were used by both plaintiff and defendant for designating quality only, and not to distinguish the goods of plaintiff from those of others, they were not subject to exclusive appropriation as a trade-mark. Stokes v. Landgraff (N. Y. 1853) 17 Barb. 608.

The term "Club House," as applied to certain gin, does not indicate ownership or origin, but is merely intended to imply a superior quality of gin, and hence is not susceptible of use as a trade-mark. Corwin v. Daly (1860) 20 N. Y. Super. Ct. (7 Bosw.) 222.

The words "Gold Medal" as a trade-mark do not indicate ownership or origin, but quality, and so they cannot be appropriated as a trade-mark. Taylor v. Gillies (1874) 59 N. Y. 331, 17 Am. Rep. 333, affirming (1874) 5 Daly, 285.

Plaintiff's predecessors had used the word "Royal" to indicate a flavoring extract of certain grade, and defendants afterwards applied the same designation to extracts which they manufactured. Held, that plaintiffs could not prevent defendants from using the word "Royal," which merely indicated the quality of the goods. Royal Baking Powder Co. v. Sherrell (1883) 93 N. Y. 331, 45 Am. Rep. 229.

The words "Maryland Club Whisky," arbitrarily chosen for a particular whisky and not in themselves indicating any particular kind, quality, or composition of whisky previously well known to the trade, are a proper subject for a trade-mark. Cahn v. Gottschalk (1888) 2 N. Y. Supp. 13, 14 Daly, 542.

The term "Black Package Tea" is not exclusively appropriable, since it manifestly refers either to the quality of the article or the color of the package in which it is sold. Fischer v. Blank (1893) 138 N. Y. 244, 33 N. E. 1040.

Words or names which describe the product or ware to which they are applied, by indicating its kind, quality or ingredients may not be exclusively appropriated as trade-marks therefor. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

The adoption of words descriptive of a kind of business, or quality and class of goods sold, such as the words "Misfit Parlors," does not constitute a trade-name, so as to entitle the person so adopting it to enjoin its use by a competitor. Cohn v. Kahn (1882) 8 Ohio Dec. 472, 8 Wkly. Law Bul. 154.

The word "Asepsin," newly coined and used as the name of a chemical salt obtained from the wintergreen plant, and alleged to contain antiseptic qualities, is a proper subject for trade-mark. Lloyd v. William S. Merrill Chemical Co. (Ohio, 1891) 25 Wkly. Law Bul. 319.

The doctrine that a name cannot be a trade-mark or trade-name only applies when the name is used to describe the kind or quality of the thing sold, and not the article of a particular maker or seller. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

13. Devices and symbols.—The insignia of the Carthusian monks—a globe, cross, and seven stars—with the words "Gde. Chartreuse" underneath, could be registered as a valid trade-mark, as could also a label bearing the inscription "Liqueur Fabriquée à la Gde. Chartreuse," with the same ecclesiastical symbols and a facsimile of the signature of a former procureur of the order. Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 672, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1908) 164 Fed. 25, 90 C. C. A. 499.

The symbol of the keystone of an arch is susceptible of exclusive appropriation as a trade-mark. Buzby v. Davis (1906) 150 Fed. 275, 80 C. C. A. 163, 10 Ann. Cas. 68.

An illustration of a crown used by brand, stencil plate, etc., upon vessels and labels for paints, may be a lawful trade-mark. Smith v. Reynolds (C. C. 1872) Fed. Cas. No. 13,098.

The word "Star," and the symbol of a star, adopted and used during many years to mark and designate one's goods, in combination with the words "Star Shirts," and other words describing the articles, constitute a valid trade-mark. Hutchinson v. Blumberg (C. C. 1892) 51 Fed. 829.

The use of a conventional diamond-shaped figure gives no trade-mark right in the word "Diamond," where the product has not been sold or become known under that name. Pittsburgh Crushed-Steel Co. v. Diamond Steel Co. (C. C. 1898) 85 Fed. 637.

The representation of a horse on packages of salve for galls or abrasions of the skin of horses and cattle is generic in character, and its registration as a trade-mark cannot give a monopoly, and exclude others from using any representation of a horse on medicine of the same character, but the exclusive right is limited to the representation of a horse of the same or substantially similar appearance, style, or position. Bickmore Gall Cure Co. v. Karns Mfg.

Co. (C. C. 1903) 126 Fed. 573, decree reversed Same v. Karns (1905) 134 Fed. 833, 67 C. C. A. 439.

That the eagle is the national emblem does not prevent its appropriation for use as a private trade-mark, especially when there is but slight resemblance in the figure of the eagle so used to that of the national emblem. U. S. v. Steffens (D. C. 1877) Fed. Cas. No. 16,384.

The use of the red cross symbol as a trade-mark, beginning prior to the year 1905, is not against public policy, in view of the proviso in this section declaring the use of such marks permissible if they antedated that year. Deitsch Bros. v. Loonen (1912) 39 App. D. C. 114.

The representation of a rim of a wheel with a tire thereon is not, even though the tire be disclaimed, registerable as a trade-mark, since no manufacturer should be prevented from representing to the public the manner in which his goods are used. In re Motz Tire & Rubber Co. (1913) 40 App. D. C. 487.

The emblems, particularly the lion, prescribed by British statutes for the certification of sterling silver by assay offices, are insignia of Great Britain, within the provision of this section denying registration to any mark comprising the flag or coat of arms or other insignia, or any simulation thereof, of any foreign nation. In re Gorham Mfg. Co. (1913) 41 App. D. C. 263.

An application for registration as a trade-mark of a winged foot, which before its adoption by the applicant, was for years a well-known emblem of an athletic club, is defeated by the enactment, during its pendency, of a statute prohibiting the registration of any distinguishing mark, character, or emblem adopted by any institution, organization, club, or society incorporated in any state prior to the date of adoption and use by the applicant. Given v. New York Athletic Club (1914) 42 App. D. C. 558.

Where one adopted the brands "O. F. C.," and "Carlisle," and later used an autograph signature in connection therewith as a test of genuineness, such script was no part of the trade-mark, and that it consisted merely of the symbol "O. F. C." and the word "Carlisle." George T. Stagg Co. v. Taylor (1894) 95 Ky. 651, 27 S. W. 247.

A paper carton constructed by superimposing on the cardboard carton blank, a sheet of waxed paper of the size and shape of the blank, so that, when folded, it will form a unit box, and bundle packages, may not be exclusively appropriated by a manufacturer as devised to mark and indicate its product. National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J. Ch. 1914) 91 A. 126.

A small metallic frame, containing a portrait fastened to a pin, is not a valid trade-mark, when so attached to and sold with a cigar as to be readily detached and used separately as a personal ornament, since an article having a distinct commercial value of its own cannot be made a trade-mark for another article by being attached to and sold with it. Hoeb v. Bishop (1889) 10 Ohio Dec. 595, 22 Wkly. Law Bul. 151.

The letter "K," inclosed with two circles, between which at the top was written the abbreviation "No.," and at the bottom the abbreviation "Yds.," with no indications of the origin or ownership of the goods manufactured, could not constitute a trade-mark. Ferguson v. Davol Mills (Pa. 1868) 2 Brewst. 314.

The design or emblem of a keystone slightly raised over the keyhole of an ordinary padlock may be adopted as a valid technical trade-mark. E. T. Fraim Lock Co. v. Shimer (1910) 43 Pa. Super. Ct. 221.

14. Numerals.—After the number "600" had long been used by manufacturers to indicate the number of degrees of heat at which oil had been subjected to fire test, and various letters had been used with it to indicate other qualities or grades or special uses, one manufacturer could not appropriate the symbol "600W" as a trade-mark, so as to exclude other manufacturers from using such numbers, either alone, or in combination with other letters of the alphabet. Vacuum Oil Co. v. Climax Refining Co. (1903) 120 Fed. 254, 56 C. C. A. 90, writ of certiorari denied (1903) 24 Sup. Ct. 846, 191 U. S. 574, 48 L. Ed. 308.

A series of numbers used by a manufacturer of labels in its catalogues, not primarily to indicate origin, but to designate the color, shape, and size of the label, each kind being given a different number, do not in themselves constitute good trade-marks. Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. (1905) 135 Fed. 625, 68 C. C. A. 263, writ of certiorari denied (1906) 26 Sup. Ct. 762, 201 U. S. 648, 50 L. Ed. 904.

Numerals, used to designate styles of shoes, rather than the manufacturer, cannot be made the subject of a trade-mark. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1908) 165 Fed. 413, 91 C. C. A. 363, writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 514, 53 L. Ed. 1063.

That a trade-mark was an ornamental device which added to the appearance of the article, and also came to represent quality, did not prevent it from operating as a valid trade-mark. Capewell Horse Nail Co. v. Mooney (1909) 172 Fed. 826, 97 C. C. A. 248, affirming decree (C. C. 1909) 167 Fed. 575.

A trade-mark in the symbol "½," as ordinarily printed, cannot be acquired for cigarettes made of two kinds of tobacco, half and half; but held, that plaintiff had acquired a right to it in a particular form, size, color, and style, under which it was registered. Kinney v. Allen (C. C. 1877) Fed. Cas. No. 7,826.

Where complainant had used certain

numerals long enough to convey to any one versed in the nomenclature of the trade a precise understanding of what goods were intended, when such numerals were used alone, disconnected from any intrinsic information, its right to their exclusive use as a trade-mark must be upheld. Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707.

Numbers constitute a lawful trade-mark when they indicate origin or proprietorship, and are used in combination with words and other numerals. Humphreys' Specific Homeopathic Medicine Co. v. Wenz (C. C. 1882) 14 Fed. 250.

Numerals used by a medicine company to identify specific remedies for various ailments are descriptive terms, and their use will not be protected as a trade-mark. Humphreys Homeopathic Medicine Co. v. Hilton (C. C. 1894) 60 Fed. 756.

Where the number 27, originally used to designate a particular kind of mattress, has come to designate in the trade any mattress of like kind or quality, other manufacturers who have the right to make such mattresses may designate them by that number without infringement. Smith & Davis Mfg. Co. v. Smith (C. C. 1898) 89 Fed. 486.

A numeral when combined with some other symbol may become a vital part of a valid trade-mark. Goldsmith Silver Co. v. Savage (D. C. 1914) 211 Fed. 751.

Figures indicating numbers, associated with the name of the manufacturer, upon labels of a certain form, color, and general arrangement, and so used by him to indicate his own manufacture, may form an important part of a trade-mark. Boardman v. Meriden Brittania Co. (1868) 35 Conn. 402, 95 Am. Dec. 270.

Numerals, arbitrarily selected, and used in combination with other devices to denote the origin of the goods, and not their quality, are a valid trade-mark; and a person may be restrained by equity from using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive, and does deceive, persons buying his goods. Lawrence Mfg. Co. v. Lowell Hosiery Mills (1880) 129 Mass. 325, 37 Am. Rep. 362.

The figures "523," on hosiery, in combination with a wreath and an eagle, used to denote grade and origin, are a valid trade-mark. Id.

Numbers used to designate the width of ribbon were the common property of the trade and not the subject of a trade-mark, but a series of arbitrary numbers used to indicate the precise color or shade of the ribbons was a proper subject of protection against unlawful competition. Corbett Bros. Co. v. Reinhardt-Meding Co. (N. J. Ch. 1910) 76 A. 243.

A manufacturer is entitled to protection of certain numbers selected arbitrarily to distinguish one pattern of goods from another. India Rubber Co. v. Rubber Comb & Jewelry Co. (1879) 45 N. Y. Super. Ct. (13 Jones & S.) 258.

One may appropriate an arbitrary number as a valid trade-mark, although not using it in connection with any word signifying ownership. Collins v. Reynolds Card Mfg. Co. (N. Y. 1879) 7 Abb. N. C. 17.

Arbitrary numbers may be appropriated to designate the styles of goods which one makes, but numbers already known to the trade and in use by others cannot be so appropriated. American Solid Leather Button Co. v. Anthony (1886) 15 R. I. 338, 5 Atl. 626, 2 Am. St. Rep. 898.

The number 888 used by a telephone company as a call for its Trouble Department is not a trade-mark or tradename so as to deprive another company, subsequently organized, of the right of using the same number as the call for its Trouble Department. Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co. (Utah, 1906) 88 Pac. 26.

15. Letters of the alphabet.—A trade-mark cannot be acquired in the letters "LL," as applied to sheetings, as those letters have been generally understood and used by different manufacturers for many years as signifying a particular grade or quality of sheetings. Lawrence Mfg. Co. v. Tennessee Mfg. Co. (1891) 11 Sup. Ct. 396, 138 U. S. 537, 34 L. Ed. 997; Lawrence Mfg. Co. v. Tennessee Mfg. Co. (C. C. 1887) 31 Fed. 776.

Letters or figures affixed to merchandise for the purpose of denoting quality only cannot be appropriated by one to his exclusive use as a trade-mark —as the letters "A. C. A.," used on ticking. Amoskeag Mfg. Co. v. Trainer (1879) 101 U. S. 51, 25 L. Ed. 993.

The mere use by defendants of their own firm initials, "B. & S.," upon articles sold by them, is not an infringement of a registered trade-mark for the two letters, "S. B.," arranged in that order. Burt v. Smith (1895) 71 Fed. 161, 17 C. C. A. 573.

Where one adopted and used various letters of the alphabet to designate the grade and quality of his crash, and such letters did not tend in any manner to designate ownership, they could not be made the subject of trade-mark. Stevens Linen Works v. William & John Don & Co. (1904) 127 Fed. 950, 62 C. C. A. 582, affirming judgment (C. C. 1903) 121 Fed. 171.

Letters, alone or in combination with name of manufacturer, used as a trade-mark for 10 years prior to this act, may be registered as a valid trade-mark. Planten v. Gedney (1915) 224 Fed. 382, 140 C. C. A. 68, reversing decree

(D. C. 1915) 221 Fed. 281, and decree amended (C. C. A. 1915) 228 Fed. 338.

A device, bearing the names of the proprietors of a patent medicine, the name of the medicine, the proprietors' place of business, the names of various diseases, etc., and consisting chiefly of a letter of the alphabet, nine times repeated, arranged in three vertical columns, separated by lines or bars, so as to form three groups of three B's each, this letter being the initial of the three words forming the name of the medicine, generic words belonging to the science, the whole so printed on the wrapper that, when it is placed around the package of the goods, each of the three sides will present to view one of these combinations of B's, is a label which the court will protect against infringement by other parties. Foster v. Blood Balm Co. (1887) 77 Ga. 216, 3 S. E. 284.

The specification of the trade-mark, as filed by T., was that it consisted of "the letters 'O. F. C.,' and is used with or without the words, 'Handmade Sour-Mash Whisky. E. H. T., Jr., Distiller.'" That filed by S., T.'s grantee, was "O. F. C., * * * in connection with the words, 'Handmade Sour-Mash Whisky. E. H. T., Jr., Distiller,'" but stated that some of these words might be omitted or transposed, "the essential feature * * * consisting of the letters 'O. F. C.'" The specification of trade-mark, as filed by the E. H. T., Jr., Co., S.'s grantee, was substantially the same as that filed by S. Held, that the symbol "O. F. C." alone constituted the trade-mark of the company. George T. Stagg Co. v. Taylor (1894) 95 Ky. 651, 27 S. W. 247.

A manufacturer of tickings who had been accustomed to designate quality by the letters "A. C. A." and "A. C." was not entitled to enjoin another manufacturer of tickings from designating the quality of his product with the same letters, but was entitled to enjoin the use in connection therewith of a trade-mark similar to that of the complaining manufacturer. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

The use of the leters "I. X. L.," having been used by many manufacturers to denote their wares, cannot now be appropriated as an arbitrary mark. Lichtenstein v. Mellis (1880) 8 Or. 464, 34 Am. Rep. 592.

16. Fictitious or fanciful names in general.—The inventor of a game, by giving it a distinct name, and selling it under such name, may obtain a trade-mark in the name, though he never copyrighted or patented the game. H. B. Chaffee Mfg. Co. v. Selchow (1905) 135 Fed. 1021, 68 C. C. A. 668, affirming judgment (C. C. 1904) 131 Fed. 543.

An author cannot acquire a right to the protection of his writings under an assumed name as a trade-name or trade-mark, and no pseudonym, however ingenious, novel, or quaint, can give one any more rights than he would have under his own name, or defeat the policy of the law that the publication of literary matter without protection by copyright has dedicated such matter to the public. The "Mark Twain" Case (C. C. 1883) 14 Fed. 728.

One cannot fashion a word not theretofore existing, and, by using it as a trade-mark or trade-name, exclude the use by another of an existing word in its meaning suitably adapted to the nature of the article to be sold, where the meaning of such word is quite distinct from the meaning suggested by the artificial word. Potter Drug & Chemical Corp. v. Pasfield Soap Co. (C. C. 1900) 102 Fed. 490, decree affirmed (1901) 106 Fed. 914, 46 C. C. A. 40.

A fanciful name for an article of merchandise may constitute a valid trade-mark. Lambert Pharmacal Co. v. Kalish Pharmacy (D. C. 1911) 219 Fed. 323.

That a trade-mark bears a fictitious name as the name of the manufacturer of the article does not affect the owner's right to protection, where it is not used with any fraudulent intent, and does not in fact deceive the public. Dale v. Smithson (N. Y. 1861) 12 Abb. Prac. 237.

17. —— Specific names.—The name "Hunyadi," being purely arbitrary and fanciful, as applied to medicinal waters, is the proper subject of a trade-mark. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

"No-To-Bac" is an arbitrary term, which may be appropriated as a trade-mark for a medicine designed to cure the tobacco habit. Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co. (1897) 80 Fed. 105, 25 C. C. A. 314.

The name "Hygeia" is used as a noun, and it may lawfully be appropriated as a trade-mark or trade-name to identify distilled water of a particular manufacturer. Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506, affirming decree Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C. 1906) 144 Fed. 139.

The word "Ruberoid" cannot be appropriated as a trade-mark for a roofing which is in the nature of soft, flexible rubber; such word not being a fanciful, arbitrary term, but merely a misspelling of "rubberoid," which is a common descriptive term, the use of which belongs to the public. Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (1908) 163 Fed. 977, 90 C. C. A. 195, decree affirmed Standard Paint Co. v. Trinidad Asphalt Mfg. Co. (1911) 31

Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536.

The term "Yankee," applied as the name or label upon soap, held to be a valid trade-mark. Williams v. Adams (C. C. 1879) Fed. Cas. No. 17,711.

The word "anti-washboard," as applied to a manufacture of soap, is suggestive rather than descriptive, and may be lawfully claimed as a trade-mark. O'Rourke v. Central City Soap Co. (C. C. 1885) 26 Fed. 576.

The word "Valvoline," compounded and used on packages of lubricating oils by plaintiffs, may be registered as a trade-mark, and the use thereof by defendant in the same manner will be enjoined, though defendant uses his own name in connection with the word. Leonard v. White's Golden Lubricator Co. (C. C. 1889) 38 Fed. 922.

The words "Cough Cherries," as applied to a confection, are sufficiently arbitrary and fanciful to be appropriated as a trade-mark. Stoughton v. Woodard (C. C. 1889) 39 Fed. 902.

The word "Celluloid," being a new and arbitrary word coined by plaintiff, and applied to goods of its manufacture, is a valid trade-mark, in the use of which plaintiff is entitled to be protected, though the term has become so generally known as to have been adopted by the public as the common appellative of the article to which it is applied. Celluloid Mfg. Co. v. Read (C. C. 1891) 47 Fed. 712.

The words "Fibre Chamois," used to designate a fabric used as interlining for dresses, constitute a valid trade-mark. American Fibre Chamois Co. v. De Lee (C. C. 1895) 67 Fed. 329.

The word "Club," as applied to a brand of cocktails, is an application of a common word to a commercial article in an arbitrary or fanciful sense to indicate origin or ownership, and is consequently appropriate as a trade-mark. Heublein v. Adams (C. C. 1903) 125 Fed. 782.

The name "Pepto-Mangan," as applied to a medicinal preparation, is apparently arbitrary and fanciful, rather than merely descriptive, and may be assumed to be one which may be lawfully appropriated as a trade-mark. M. J. Breitenbach Co. v. Spangenberg (C. C. 1904) 131 Fed. 160.

The word "radium" is not descriptive as applied to silk, and its exclusive use as a trade-mark on pieces of taffeta silk having a special soft finish, and its registry as a trade-mark for "silk dress goods in the piece," gives the proprietor the right to protection against its use by another. Eiseman v. Schiffer (C. C. 1907) 157 Fed. 473.

The trade-name "Virgin Leaf" was not synonymous with "Virginia Leaf," nor descriptive of the tobacco used, but was an arbitrary, fanciful name intended to denote the purity of the tobacco, and was therefore a valid trade-name. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

The word "Metropolitan," used on boxes of chocolates and bonbons, is an arbitrary and fanciful word, and constitutes a valid trade-mark, which is infringed by its use by another, in connection with other words giving the packages a similar appearance, in the same city and vicinity, where it has become identified by long use with the goods of the first user. Reymer & Bros. v. Huyler's (C. C. 1911) 190 Fed. 83.

The word "Abricotine," as applied to a cordial, is not descriptive, but a coined word, and a proper subject of trade-mark. Garnier v. Rossman (D. C. 1912) 195 Fed. 175.

The word "Bestyette" is sufficiently distinctive to constitute a valid trade-mark for waterproof capes and cloaks, but is not infringed by the use of the word "Veribest" by defendant on similar garments. New York Mackintosh Co. v. Flam (D. C. 1912) 198 Fed. 571.

The registered trade-mark "Roof Leak," used in connection with roof paint, was valid. Elliott Varnish Co. v. Sears, Roebuck & Co. (D. C. 1915) 221 Fed. 797.

"Cyclops" is a word in which the right of exclusive user for trade purposes may be created. Hainque v. Cyclops Iron Works (1902) 68 P. 1014, 136 Cal. 351.

The words "Insurance Oil" may be properly the subject of a legal trade-mark. Insurance Oil Tank Co. v. Scott (1881) 33 La. Ann. 946, 39 Am. Rep. 286.

"Eureka," as an arbitrary or fancy word, was available to one first adopting it for exclusive use as a trade-mark. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1906) 71 A. 1134, 71 N. J. Eq. 300, affirming decree (1905) 60 A. 561, 69 N. J. Eq. 159.

"Pride" is a good trade-mark for cigars, and its use by others than the original user will be restrained, although accompanied by distinctive labels. Hier v. Abrahams (1880) 82 N. Y. 519, 37 Am. Rep. 589.

One may appropriate the name "Alderney," as a trade-mark in connection with the manufacture of oleomargarine. Lauferty v. Wheeler (N. Y. 1882) 11 Daly, 194, 63 How. Prac. 488.

Plaintiffs invented certain puzzles or games to which they gave the names "sliced animals," "sliced birds," and "sliced objects." Held, that these names were arbitrary fanciful names and the proper subject of a trade-mark. Selchow v. Baker (N. Y. 1882) 64 How. Prac. 212.

The word "Sweet" as prefixed to "Caporal," in naming cigarettes, cannot be claimed as a trade-mark. Hornbostel v. Kinney (1885) 52 N. Y. Super. Ct. (20 Jones & S.) 41.

The words "Nickel-In," for a brand of cigars, being original, arbitrary, and fanciful, and not descriptive, are entitled to the protection given to trade-marks. Schendel v. Silver (1892) 63 Hun, 330, 18 N. Y. Supp. 1, judgment affirmed (1893) 139 N. Y. 644, 35 N. E. 206, and following Selchow v. Baker (1883) 93 N. Y. 59, 45 Am. Rep. 169.

"Bromo-Caffeine," a term not in general use when plaintiff applied it, and not descriptive of the articles used to make the medicine designated by it, is a valid trade-mark. Keasbey v. Brooklyn Chemical Works (1894) 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623, reversed (1893) 67 Hun, 648, 21 N. Y. Supp. 696.

The word "Matzoon," as applied to fermented milk, may be deemed a fanciful designation thereof, although an article of a similar nature, but different consistency, has been used in the extreme East under the name "Madzoon" or "Maadzoon." Dr. Dadirrian & Sons Co. v. Hauenstein (1902) 74 N. Y. S. 709, 37 Misc. Rep. 23.

The word "Monitor," as applied to steam boiler injectors, in no sense described the patented article nor the patentee, but was an arbitrary, fanciful word, and plaintiff was entitled to be protected in its use, besides which its use by defendant tended to deceive the public, so that injunction against such use of the word was proper. Nathan Mfg. Co. v. H. A. Rogers Co. (1909) 114 N. Y. S. 1033, 130 App. Div. 512.

The word "Lithogen," having been coined to represent and describe a particular artificial stone used for paving, is a valid trade-mark. Wehn v. Krause (Pa. 1878) 5 Wkly. Notes Cas. 272.

18. Geographical names in general.—Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trade-marks. Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878 (affirming decree Heller & Merz Co v. Shaver [C. C. 1900] 102 Fed. 882); Weyman v. Soderberg (C. C. 1901) 108 Fed. 63.

When properly descriptive, the use of geographical words in a business name will not be enjoined, in the absence of estoppel or actual fraud, or misleading of the public. Michigan Savings Bank v. Dime Savings Bank (Mich. 1910) 127 N. W. 364, 17 Detroit Leg. N. 526; A. J. Reach Co. v. Simmons Hardware Co. (Mo. App. 1911) 135 S. W. 503.

No one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such exclusive right as to prevent others dealing in similar articles from the district, from truthfully using the same designation. Delaware & H. Canal Co. v. Clark (1871) 80 U. S. (13 Wall.) 311, 20 L. Ed. 581.

The enhancement of the reputation of coal from a certain field by the careful inspection and grading thereof by the selling agents, who sell it under the name of the place where it is mined, gives them no exclusive right to such name as a trade-mark. Castner v. Coffman (1900) 20 Sup. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021, affirming decree Coffman v. Castner (1898) 87 Fed. 457, 31 C. C. A. 55.

It seems that if a manufacturer, producer, or dealer furnishes goods of such excellent quality, and builds up so extensive a trade, that his trade-name becomes a distinctive appellation of the locality where his business is pursued, he is not thereby prevented from having a trade-mark right in the name. Atwater v. Castner (1898) 88 Fed. 642, 32 C. C. A. 77, rehearing denied (1898) 90 Fed. 828, 32 C. C. A. 602.

There can be no trade-mark in one's name, or in a geographical name, or in a name descriptive of quality, and neither can be used for the purpose of perpetrating fraud affecting the public. Sterling Remedy Co. v. Spermine Medical Co. (1901) 112 Fed. 1000, 50 C. C. A. 657.

Geographical terms, and words in common use to designate a locality, a country, or a section of a country, cannot be monopolized as trade-marks. Allen B. Wrisley Co. v. Iowa Soap Co. (1903) 122 Fed. 796, 59 C. C. A. 54, affirming decree Allan B. Wrisley Co. v. Same (C. C. 1900) 104 Fed. 548.

A trade-mark cannot exist in the name of the city in which a thing is made, for any one is at liberty to go to the city and manufacture, and falsely designating the article made as coming from that city is a fraud only. New York & R. Cement Co. v. Coplay Cement Co. (C. C. 1891) 45 Fed. 212, denying rehearing (1890) 44 Fed. 277.

A right may be acquired to use a geographical name as a trade-name in connection with mineral springs by persons who own all of such springs, and the use of such name by others who obtain their waters elsewhere will be enjoined. La Republique Française v. Schultz (C. C. 1893) 57 Fed. 37.

The false use of a geographical name will not be allowed, when it is so used to promote unfair competition and to induce the sale of spurious goods. Collinsplatt v. Finlayson (C. C. 1898) 88 Fed. 693.

One cannot, by adoption of a purely geographical name, which carries with it the nature or quality of a natural product there yielded, exclude others from truthfully describing or employing terms indicative of such nature or quality. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557.

A geographical name, though available to a merchant as a trade-mark, cannot be protected from infringement by others, unless it has acquired a sec-

ondary meaning. Perkins v. Apollo Bros. (D. C. 1912) 197 Fed. 476.

A geographical name, by long-continued use on the goods as a trade-mark conveys to the public at once the origin of the product, and gives to the goods a significant designation forbidden by the statute; and such a name therefore cannot be registered as a technical trade-mark. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co. (1908) 31 App. D. C. 223.

The fact that a mark is geographical and descriptive does not preclude its registration under the ten-year clause of this section. Tim & Co. v. Cluett, Peabody & Co. (1914) 42 App. D. C. 212.

When a man manufactures his goods at a particular place, he may use the name of that place, in combination with other words, as a trade-mark, and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. El Modelo Cigar Mfg. Co. v. Gato (1889) 25 Fla. 886, 7 South. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Geographical names, in connection with other words, may sometimes acquire a secondary signification, indicative of the name of the producer or character of the product. Rome Machine & Foundry Co. v. Davis Foundry & Machine Works (Ga. 1910) 68 S. E. 800.

One may be protected in the use of a geographical name, if it is so employed in connection with other words of designation as to particularly identify a tradesman or his business. Dyment v. Lewis (1909) 123 N. W. 244, 144 Iowa, 509.

Plaintiff began business under the name of the "Robe & Tanning Company" at a suburb of Sioux City. Shortly afterwards orders and consignments began coming to him addressed "Sioux City Robe & Tanning Company," and continued to do so. He employed both names. His business extended over several states and was transacted by correspondence. He built up a lucrative trade under the name "Sioux City Robe & Tanning Company." Held, that equity would restrain another from engaging in the same business in the same place under the same name. Id.

A geographical name, as applied to a manufactured article, may acquire a secondary meaning, and thus become a valid trade-mark; but such a right will not be declared or protected, unless clearly shown. Metcalfe v. Brand (1887) 86 Ky. 331, 5 S. W. 773, 9 Ky. Law Rep. 801, 9 Am. St. Rep. 282.

Where it is uncertain whether a geographical word is used as an address or as the name of a manufactured article, and it is uncertain which, of two, first used it in the last-named way, neither party can appropriate the word to his exclusive use as a trade-mark. Id.

The name of a place may be selected as a trade-mark, and the natural product of a spring may be the subject of the protection afforded by it. Parkland Hills Blue Lick Water Co. v. Hawkins (1894) 95 Ky. 502, 26 S. W. 389, 16 Ky. Law Rep. 210, 44 Am. St. Rep. 254.

Where one used in advertising a geographical name indicative of the locality of his mine, preceded by numerals, and thereby established a reputation for a particular quality of sand, a rival may not adopt a similar trade designation, but may use the geographical name and designate the different grades by some other method than numerals. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

A geographical name may acquire a secondary meaning as the designation of a particular class of articles or the product of a particular manufacturer, and thus become entitled to protection against infringement as a trade-mark, or serve as the basis of a proceeding to prevent unfair competition. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

A trade-mark cannot be a mere designation of the name of a place. Smith v. Walker (1885) 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

No one can acquire the exclusive right to use the name of the place where his business is located. Rodseth v. Northwestern Marble Works (1915) 152 N. W. 885, 129 Minn. 472.

A hotel proprietor may acquire a right to the exclusive use of the name of a place in conjunction with the word "Inn" for the name of his hotel. Busch v. Gross (N. J. Ch. 1906) 64 A. 754.

Manufacturers at a certain village, the name of which has been used by them exclusively as a trade-mark for a number of years, have a property in the name of a trade-mark as against newcomers at the same place manufacturing a similar commodity. Newman v. Alvord (N. Y. 1867) 49 Barb. 588, affirmed (1872) 51 N. Y. 189, 10 Am. Rep. 588.

As a general rule the use by another of geographical names will not be enjoined; but where the intention in the adoption of the descriptive word is to intrench upon the previous use and popularity of another's trade-mark, the rule will not be applied. Lea v. Wolff (N. Y. 1873) 1 Thomp. & C. 626; Same v. Wolf (N. Y. 1873) 46 How. Prac. 157, 15 Abb. Prac. (N. S.) 1. CONTRA, see Lea v. Wolf (N. Y. 1872) 13 Abb. Prac. (N. S.) 389.

The name of a place or country may not be exclusively appropriated for a trade-mark against one offering for

sale a similar product or ware of the same place or country. It is only good against one using it for a product or ware not of such place or country. If it be used arbitrarily or fancifully, it is only good against one using it in the same way, and not against one using it truthfully, namely, in its actual meaning. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

Where the chief ingredient of a manufactured article derives its principal value in the market from the fact that it is the product of a particular locality, the use of the name of such locality as a part of the selling name of the article will not be enjoined. Gabriel v. Sicilian Asphalt Pav. Co. (1898) 52 N. Y. S. 722, 23 Misc. Rep. 534, affirmed (1899) 56 N. Y. S. 30, 44 App. Div. 633.

When a geographical name is not used to denote location, but in a fictitious sense to indicate ownership, it may be a good trade-mark. Drake Medicine Co. v. Glessner (1903) 67 N. E. 722, 68 Ohio St. 337.

Use of the name of a town as a trade-mark, after long use of the same by an older company in the same business, is not actionable, though used with malicious motives. Glendon Iron Co. v. Uhler (1874) 75 Pa. (25 P. F. Smith) 467, 15 Am. Rep. 599.

No exclusive use in a geographical name as a trade-mark can be acquired. Pocono Pines Assembly v. Miller (1910) 77 A. 1094, 229 Pa. 33.

A manufacturer has no such right of property in the name of the town in which its factory is carried on as to entitle it to restrain another manufacturer in the same place from using the name of the town to designate the location of his factory. Telephone Mfg. Co. v. Sumter Tel. Mfg. Co. (1902) 41 S. E. 322, 63 S. C. 313.

A geographical name cannot be used exclusively as a trade-mark. Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

19. —— Specific names.—The name "Chartreuse" is not a place name, but a French term denoting a Carthusian monastery, and is a proper subject of appropriation as a trade-mark. Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 671, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1908) 164 Fed. 25, 90 C. C. A. 499, which modified (C. C. 1907) 156 Fed. 1016.

Where the word "Waltham" had been originally used by plaintiff in a mere geographical sense, but had by long use come to have a secondary meaning as a designation of plaintiff's watches, another person would be enjoined against using the words "Waltham," or "Waltham, Mass.," upon plates of its watches, without some statement distinguishing them from watches made by plaintiff. American Waltham Watch Co. v. Sandman (C. C. 1899) 96 Fed. 830; American Waltham Watch Co. v. United States Watch Co. (1899) 53 N. E. 141, 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263.

"Columbia," being a geographical name, cannot be appropriated as an exclusive trade-mark. Columbia Mill Co. v. Alcorn (1893) 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

The use of the name "Pocahontas Coal" by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right to the use of the name for all the coal from that field, or deprive the mine owners of the right to use the same name. Castner v. Coffman (1900) 20 Sup. Ct. 842, 843, 178 U. S. 168, 44 L. Ed. 1021, affirming decree Coffman v. Castner (1898) 87 Fed. 457, 31 C. C. A. 55.

The geographical name "Elgin" cannot be registered as a lawful trade-mark, so as to give the Elgin Watch Company an exclusive right to its use as the name of watches manufactured by it in that place, although the secondary meaning acquired may be sufficient to entitle the Elgin Company to protection against use of the word in such a way as to constitute a fraud. Elgin Nat. Watch Co. v. Illinois Watch-Case Co. (1901) 21 Sup. Ct. 270, 179 U. S. 665, 45 L. Ed. 365, affirming decree Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237, which reversed (C. C. 1898) 89 Fed. 487.

The exclusive right to use the word "Vichy" to designate waters of the springs of a commune in France of that name belongs to the owner of such springs as against every one whose waters are not drawn therefrom, or, at least, from the same hydrographical region, which may be called generally the basin of Vichy. La Republique Francaise v. Saratoga Vichy Spring Co. (1903) 24 Sup. Ct. 145, 191 U. S. 427, 48 L. Ed. 247, affirming decree La Republique v. Saratoga Vichy Springs Co. (1901) 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830.

A geographical name, as the name "Green Mountain Grapes," applied to grapes and grapevines, the product of a stock originally obtained from the Green Mountains, cannot be appropriated as a trade-mark. Hoyt v. J. T. Lovett Co. (1895) 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44, following Delaware & H. Canal Co. v. Clark (1871) 13 Wall. 311, 20 L. Ed. 581, and Columbia Mill Co. v. Alcorn (1893) 14 Sup. Ct. 151, 150 U. S. 460, 37 L. Ed. 1144.

The word "Angostura," adopted in 1830 as a name for bitters then manufactured in Angostura, Venezuela, and continuously used since, and by which name the bitters have become widely known over the world, and which was registered as a trade-mark in the United States in 1881, is a valid trade-

mark. A. Bauer & Co. v. Siegert (1903) 120 Fed. 81, 56 C. C. A. 487.

The term "The American Girl," used to designate women's shoes, is a geographical and descriptive, rather than an arbitrary and fanciful, name, and is not the subject of a valid trade-mark. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1908) 165 Fed. 413, 91 C. C. A. 363, writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 514, 53 L. Ed. 1063.

Under this section, the word "Nubia," as applied to cigarettes, held not capable of registration as a trade-mark, and not subject to exclusive appropriation by any one as such. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment (D. C. 1912) 197 Fed. 476.

The words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval, held a valid trade-mark for a medical preparation known as "Hamburg Tea." Frese v. Bachof (C. C. 1876) Fed. Cas. No. 5,109.

"Montserrat" being the name of an island from which both parties import lime juice, complainants, in the absence of fraud, are not entitled to the exclusive use of the word, although their article may have acquired a high reputation for purity and strength, while that of defendant may be of an inferior quality. Evans v. Von Laer (C. C. 1887) 32 Fed. 153.

A manufacturer, who has for many years used as a trade-mark the geographical terms "Lamoille" and "Willoughby Lake," will be protected in their use as against one who does not carry on business in the districts so designated. A. F. Pike Mfg. Co. v. Cleveland Stone Co. (C. C. 1888) 35 Fed. 896.

The fact that Carlsbad is a geographical name does not prevent the city from having an exclusive right to the use thereof in connection with springs owned by it, which have this same name, and give it to their products. City of Carlsbad v. Kutnow (C. C. 1895) 68 Fed. 794.

The name "Vichy," as applied to mineral waters, is a geographical name, not a trade-mark or trade-name in a legal sense, and a suit against a defendant for applying the name to artificial waters can only be maintained on the theory of unfair competition. La Republique Francaise v. Schultz (1899) 94 Fed. 500; Same v. Saratoga Vichy Spring Co. (C. C. 1900) 99 Fed. 733.

Complainant used the name "Copenhagen" as a trade-mark, not to denote that the article sold was imported, but adopted to secure Scandinavian customers. Defendants bought for the purpose of sale several jars labeled "Kjobenhavn Snus," to indicate that it was imported, so as to likewise secure Scandinavian trade. Otherwise the jars and labels, and the smell, taste, appearance, and quality of the article did not resemble those of complainant. Held, that no right to a geographical name as a trade-mark proper could be acquired, but that, conceding that complainant had acquired such a right to use the word "Copenhagen," there was no infringement thereof, and no intent to unfairly compete with him, and his bill for injunction should be dismissed. Weyman v. Soderberg (C. C. 1901) 108 Fed. 63.

The word "French Tissue," as applied to a thin paper dressing for corns, originating in France, cannot be appropriated as a trade-mark; the first being broadly geographical, and the second descriptive of the texture of the paper. Draper v. Skerrett (C. C. 1902) 116 Fed. 206.

The name "La Carolina," as a trade-mark for cigars, is not invalid as either the name of an individual or a geographical name, and is infringed by the name of "La Coralina," used also for cigars. Havana Commercial Co. v. Nichols (C. C. 1907) 155 Fed. 302.

The "American Wine Company" cannot be exclusively appropriated as a trade-mark or trade-name, as it is broadly geopraphical. American Wine Co. v. Kohlman (C. C. 1907) 158 Fed. 830.

The word "Java," though geographical, having acquired a secondary meaning by its use in connection with face powders, was entitled to protection as used in the phrase "Poudre de Riz de Java," indicating a variety of perfumed face powder. Wertheimer v. Batcheller Importing Co. (C. C. 1911) 185 Fed. 850.

The term "Oriental" is a geographical term, and a mark consisting of the words "Oriental Cream," associated with an eagle holding a scroll in its beak," is therefore prohibited from registration by this section. In re Hopkins (1907) 29 App. D. C. 118.

Under the provisions of this section, not only is a name indicating a particular place prohibited, but also a name applying to a particular section of the globe, composed of a number of countries. The word "Orient" is a geographical name, and as such cannot properly be registered as a trade-mark. In re Crescent Typewriter Supply Co. (1908) 30 App. D. C. 324.

The contention by the applicant for the registration of a trade-mark consisting of a wreath inclosing the combination of the letters "ORENT" that the word used is not the word "Orient," but a mere arbitrary combination of letters, is untenable where his original specification stated that "the trade-mark consisted of the word 'Orient' inclosed in a wreath, the letters E and I of the word 'Orient' being printed as a monogram," and was amended on the suggestion of the Patent Office that the word "Orient" was a geographical term. Id.

"Tabasco" is a geographical name, and hence not registerable as a trade-mark as applied to pepper sauce by the

vendor of such goods. McIlhenny v. New Iberia Extracts of Tabasco Pepper Co. (1910) 34 App. D. C. 430.

The word "Orange" and the words "Orange Grove" are geographical, and are not subject to registration as technical trade-marks. H. Becker & Co. v. C. A. Gambrill Mfg. Co. (1912) 38 App. D. C. 535.

The word "Quaker City" is not registerable as a trade-mark because it is of such geographical signification as to bring it within the prohibition of the provisions of this section. Quaker City Flour Mills Co. v. Quaker Oats Co. (1915) 43 App. D. C. 260.

Under Civ. Code Cal. § 991, the name "Los Angeles Van, Truck & Storage Company," could not be the subject of exclusive trade-mark, since it referred to the place where the business was carried on. Dunston v. Los Angeles Van & Storage Co. (Cal. 1913) 131 Pac. 115.

Complaint to prevent the sale of butter as "Santa Ana Butter" is demurrable as showing that Santa Ana was a city in which butter in some quantity was produced, and hence that the words "Santa Ana Butter" were descriptive of the place of manufacture and could not be appropriated as a trade-mark under Civ. Code Cal. § 991. Los Angeles Creamery Co. v. J. R. Newberry Co. (Cal. 1913) 132 Pac. 289.

The custom of one manufacturer to brand or stencil under his name on his plows "Moline, Ill.," gives him no exclusive right to use those words. Candee v. Deere (1870) 54 Ill. 439, 5 Am. Rep. 125.

The Elgin Butter Company cannot, by using with its name the words "Proprietor of the Elgin Creamery," acquire such a property in the words "Elgin," "Butter," and "Creamery" that it can enjoin another from using such words, if the latter actually deals in butter manufactured at Elgin, and has not used the words fraudulently. Elgin Butter Co. v. Elgin Creamery Co. (1895) 155 Ill. 127, 40 N. E. 616, affirming (1893) 51 Ill. App. 231.

A manufacturer or vendor could acquire no exclusive right to use the words "Boston Wafers" as a trade-mark. C. A. Briggs Co. v. National Wafer Co. (1913) 102 N. E. 87, 215 Mass. 100.

Plaintiff, a manufacturer at Lawton, Mich., was not entitled at common law to a trade-mark in the name "The Lawton Mill," it appearing that such name was used indiscriminately to designate mills made at Lawton. Smith v. Walker (1885) 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

Plaintiff was not entitled to the exclusive use of the words "Owl Creek Coal" as a trade-name for coal mined in a district known as the Owl Creek coal field, in which there is competitive mining. Esselstyn v. Holmes (1911) 114 P. 118, 42 Mont. 507.

There can be no exclusive right to the use of the word "London" as a trade-name. Rosenthal v. Blatt (N. J. Ch. 1912) 88 A. 887.

The words "Maryland Club," being the name of an institution and not a place, the rule excluding the use of geographical names as trade-marks is not applicable. Cahn v. Gottschalk (1888) 2 N. Y. Supp. 13, 14 Daly, 542.

One who imports from the duchy of Brunswick a material known as "Asphalt Mastic," and sells the same as "Brunswick Asphalt," stamped "Vorwohle-Brunswick," and "Brunswick, G. & S. Germany," cannot prevent another, using asphalt coming from the same place, from selling it as "Brunswick Rock Asphalt." Gabriel v. Sicilian Asphalt Pav. Co. (1899) 56 N. Y. S. 30, 44 App. Div. 633, affirming judgment (1898) 52 N. Y. S. 722, 23 Misc. Rep. 534.

Under ten-year proviso of this section, the geographical name "Italian," used for a trade-mark for more than ten years before the passage of the act, held entitled to registration and protection. Julius Kayser & Co. v. Italian Silk Underwear Co. (1914) 146 N. Y. S. 22, 160 App. Div. 607.

The word "Oneida," as part of the registered trade-name "Oneida Community," held entitled to protection. Oneida Community v. Oneida Game Trap Co. (1915) 154 N. Y. S. 391, affirming judgment (1914) 150 N. Y. S. 918.

Where a corporation adopted the trade-mark "Glendon" on their iron, and the locality of their furnaces was afterwards made a borough by the name of "Glendon," a second company there located could lawfully use the same mark. Glendon Iron Co. v. Uhler (1874) 75 Pa. (25 P. F. Smith) 467, 15 Am. Rep. 599.

Where a large tract of land, on which there are many coal mines, owned and operated by different persons, has been known and recognized for many years as the "Sonman Survey," and a village, post office, telegraph office, and railroad station thereon are named "Sonman," and the coal from the mines is shipped and known as "Sonman Coal," that name cannot be applied exclusively to the coal mined on the tract by one operator as a trade-name. Appeal of Laughman (1889) 128 Pa. 1, 18 Atl. 415, 24 Wkly. Notes Cas. 465, 5 L. R. A. 599.

Where several were engaged separately, in mining and shipping coal from a large tract known as "Sonman," one of them could not enjoin a stranger from selling as "Sonman Coal" coal not mined on that tract. Appeal of Laughman (Pa. 1889) 2 Monag. 653.

20. Names of persons, firms, or corporations.—Infringement as dependent on right to use of name, see notes under § 9501, post.

Marks which, like ordinary surnames,

are not subject of exclusive appropriation as a common-law trade-mark, can be registered as trade-marks under this section, when in actual and exclusive use for ten years next preceding the passage of the act. Thaddeus Davids Co. v. Davids (1914) 34 Sup. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, reversing decree (1912) 192 Fed. 915, 114 C. C. A. 355.

Where a firm has for many years used the name of its predecessors in connection with its goods, such name, even if it could not be used as a trade-mark, is to be treated as a descriptive term, to the benefit of which they are entitled. Garrett v. T. H. Garrett & Co. (1896) 78 Fed. 472, 24 C. C. A. 173.

On the expiration of the copyright on the name "Webster," used in connection with dictionaries, the name became public property; though such name as applied to the dictionary published by the owner of the copyright had acquired a secondary meaning, indicating a particular book published and sold by such owner. G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, modifying decree Ogilvie & G. & C. Merriam Co. (C. C. 1907) 149 Fed. 858, and writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

The registration of a personal name had no validity as a registered trade-mark under Act 1881, c. 138. Thaddeus Davids Co. v. Davids (1910) 178 Fed. 801, 102 C. C. A. 249.

A corporation may adopt an individual surname as a trade-mark and is entitled to protection in its use, except as against persons of that name who have the right to use it in their own business. National Distilling Co. v. Century Liquor & Cigar Co. (1910) 183 Fed. 206, 105 C. C. A. 638.

Stockholders and officers of a corporation who do not even own a controlling interest therein cannot confer on it the right to use their surname as a trade-mark as against another dealer which has used the name as a trade-mark for many years. Id.

Right to use one's own name as descriptive of his goods cannot be taken from him, because it would incidentally injure a predecessor in business of the same name. Walter Baker & Co. v. Gray (1911) 192 Fed. 921, 113 C. C. A. 117, writ of certiorari denied (1912) 32 Sup. Ct. 528, 223 U. S. 732, 56 L. Ed. 634.

A personal name is not subject to exclusive appropriation as a trade-mark, even though registered as such. Borden Ice Cream Co. v. Borden's Condensed Milk Co. (1912) 201 Fed. 510, 121 C. C. A. 200, reversing order Borden's Condensed Milk Co. v. Borden Ice Cream Co. (D. C. 1912) 194 Fed. 554.

A corporation may acquire a property right in the use of a name, other than its original corporate name, as a trade-mark, or as incidental to the good will of a business, as well as an individual. Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co. (C. C. 1884) 21 Fed. 276, decree reversed Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co. (1888) 9 Sup. Ct. 166, 128 U. S. 598, 32 L. Ed. 535.

No manufacturer will be permitted to stamp upon or attach to his goods the name of another manufacturer. Goodyear Rubber Co. v. Day (C. C. 1884) 22 Fed. 44.

Plaintiff, having been a member of a firm which prepared an article bearing a trade-mark, and having purchased its business, may properly state on his labels that the article is prepared by such firm. Jennings v. Johnson (C. C. 1889) 37 Fed. 364.

The name "Coal Oil Johnny's Petroleum Soap," as applied to a soap to distinguish it from others, may constitute a valid trade-mark. Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C. 1899) 97 Fed. 781.

Giving the name "Remington" to a corporation engaged in making typewriters by two persons of that name, descendants of the original manufacturers, who had sold the right to use the name as applied to typewriters to plaintiff, such persons not being manufacturers of typewriters, nor having their own names put on the machines, was not a legitimate use of their natural right to use their name in their own business to the injury of the plaintiff. Wyckoff v. Howe Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, reversed Wyckoff, Seamans & Benedict v. Same (1903) 122 Fed. 348, 58 C. C. A. 510, and Howe Scale Co. v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 49 L. Ed. 972.

Where a family name has become a trade-mark applied to a manufactured article, descendants of the original manufacturer are entitled to use such family name only in connection with some distinguishing name or initial where the use of the surname alone would create unfair competition in trade. Von Faber v. Faber (C. C. 1903) 124 Fed. 603, decree reversed Von Faber-Castell v. Same (1905) 139 Fed. 257, 71 C. C. A. 383, writ of certiorari denied (1905) 26 Sup. Ct. 750, 199 U. S. 609, 50 L. Ed. 331.

Name of person of fame and distinction, other than the merchant putting the commodity on the market, held properly adopted as a trade-mark. Lambert Pharmacal Co. v. Kalish Pharmacy (D. C. 1911) 219 Fed. 323.

Under this section an ordinary family surname is not subject to appropriation as a lawful trade-mark. In re A. G. Spalding & Bros. (1906) 27 App. D. C. 314.

The word "Hoff" and the words "Leopold Hoff's," when applied to malt extracts manufactured by different concerns, are so nearly similar as to create

confusion in trade, and neither is registerable. In re Hoff (1909) 33 App. D. C. 233.

The surname "Oliver," displayed as an acrostic symbol and surmounted by the Christian name "Wm. J.," does not present the name in such a "particular or distinctive manner," within the meaning of this section, as to entitle it to registration. Oliver Chilled Plow Works v. Wm. J. Oliver Mfg. Co. (1913) 40 App. D. C. 125.

A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property; and the same rule applies to a corporation. Asbestone Co. v. Philip Carey Mfg. Co. (1914) 41 App. D. C. 507.

The name of a manufacturer or seller of an article may be used as a trade-mark. Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204.

The name of the maker of a medicine and other device in the form and contents of a label and wrapper, used to denote that the goods are made by him, is a proper trade-mark. Spieker v. Lash (1894) 102 Cal. 38, 36 Pac. 362.

A contention that "Nolan," being a family name, could not be used as a trade-name, so as to exclude its use by another of the same name, cannot be sustained, where such trade-name was used by defendant as "W. H. Nolan & Co., Successor to Nolan Bros., 10-12 Sutter Street," and all the name except the "Nolan Bros." was in inconspicuous characters, only visible for a short distance, so as to deceive the public into believing that it was complainant's place of business. Nolan Bros. Shoe Co. v. Nolan (1900) 63 P. 480, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346.

"Rogers Brothers" having long been used in connection with a business by persons of that name, and plaintiffs having contracted to make goods under Rogers' supervision, which goods were stamped, "1847, Rogers Bros. A. 1.," which stamp differed somewhat from any stamp previously used, petitioners acquired a lawful right to the use of such name as a part of their trade-mark. Merriden Britannia Co. v. Parker (1872) 39 Conn. 450, 12 Am. Rep. 401.

One cannot acquire the right of a trade-mark in the use of his own name to the exclusion of another person by the same name, and whose place of business is in the same place. El Modelo Cigar Mfg. Co. v. Gato (1889) 25 Fla. 886, 7 South. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

A corporation may, by user, acquire a right to a trade-name other than its corporate name in connection with goods manufactured and sold by it, and as descriptive of them; but such name is not a corporate name. Rome Machine & Foundry Co. v. Davis Foundry & Machine Works (Ga. 1910) 68 S. E. 800.

One may have a right in his own name as a trade-mark as against one of a different name, but cannot have such right as against a person of the same name, unless the latter uses a form of stamp or label so like that used by the former as to represent that his goods are of the former's manufacture. Gilman v. Hunnewell (1877) 122 Mass. 139.

When a medicinal preparation, not patented, has come to be known by the name of the original compounder, another person engaging in the manufacture cannot appropriate the name to his exclusive use as a proprietary trade-mark or trade-name. Watkins v. Landon (1893) 52 Minn. 389, 54 N. W. 193, 19 L. R. A. 236, 38 Am. St. Rep. 560.

A medical preparation may be used and manufactured by any one who lawfully and in good faith acquires knowledge of its composition, and that such preparation has become popularly known by the name of a certain person gives no exclusive right to any one to appropriate the name as a trade-mark. J. R. Watkins Medical Co. v. Sands (1901) 86 N. W. 340, 83 Minn. 326.

The name "Dr. Morse's Indian Root Pills," used as a name for a proprietary medicine, constitutes a proper trade-mark. Comstock v. White (N. Y. 1860) 18 How. Prac. 421, 10 Abb. Prac. 264.

No one can make a trade-mark of his own name and thus debar others, having the same name, from using it in their business. Wolfe v. Burke (N. Y. 1873) 7 Lans. 151; Meneely v. Meneely (1875) 62 N. Y. 427, 20 Am. Rep. 489, affirming (1874) 1 Hun, 367, 3 Thomp. & C. 540.

"Benedictine" is a valid trade-mark for liquor invented by and made from a recipe of the Benedictine monks, though used by an assignee of the original proprietor, whose name is employed in the labels, without disclosing the change of the proprietorship. Société Anonyme de la Distillerie de la Benedictine v. Micalovitch (1887) 10 Ohio Dec. 95, 18 Wkly. Law Bul. 362.

The name "Dr. Drake's German Croup Remedy," so called because the manufacturer obtained the formula from a German physician named Drake, is a good trade-mark. Drake Medicine Co. v. Glessner (1903) 67 N. E. 722, 68 Ohio St. 337.

The name of an inventor, discoverer, or manufacturer, may be employed as part of a trade-mark. The words "Dr. J. M. Lindsey's Improved Blood Searcher" are entitled to protection as a legitimate trade-mark. Fulton v. Sellers (Pa. 1867) 4 Brewst. 42.

Every man is entitled to use his own name in his business, provided it does not work a deception on the public or operate to the user's advantage over another. But if the intent is to gain

such advantage, or the effect is to deceive buyers, the use of the name will be enjoined. Wm. Rogers Mfg. Co. v. Rogers Mfg. Co. (Pa. 1883) 40 Leg. Int. 294.

One by the name of "Hoyt," engaged in the manufacture and sale of cologne, is not entitled to the exclusive use of the word "Hoyt's" as his trade-mark as against another person, also manufacturing cologne, of the same name. Hoyt v. Hoyt (1886) 43 Leg. Int. 151, 2 Pa. Co. Ct. R. 152.

M., having a recipe (not discovered or invented by himself, or protected by a patent) for the cure of rheumatism and other diseases, permitted various members of his family to manufacture the article, and sell it with a certain label attached (furnished by M.). Each one so engaged appeared to have had, by mutual agreement, some particular route or routes to which his sales were confined. After M.'s death, his widow continued for some years to manufacture the liniment, and then sold the material and paraphernalia of her business to plaintiff, one of M.'s sons. Held, that plaintiff had no exclusive right to manufacture said liniment, or to the use of said label or the name "Marshall" as descriptive of the article sold. Marshall v. Pinkham (1881) 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

The proper name of the manufacturer cannot be made a trade-mark, so as to prevent any other manufacturer of the same name from affixing such name to a similar article made and sold by him, where no unfair means are used to mislead purchasers. Id.

21. Names of books or other publications.—The publication of a series of stories entitled "Old Sleuth Library," and purporting to relate the adventures of a detective called "Old Sleuth," does not entitle the publisher to an exclusive right to the use of the word "Sleuth" in the titles of stories about detectives. Munro v. Tousey (1891) 129 N. Y. 38, 29 N. E. 9. CONTRA, see Munro v. Beadle (1890) 55 Hun, 312, 8 N. Y. Supp. 414, reversing judgment (1888) 2 N. Y. Supp. 314.

22. Marks or names of places of business.—Plaintiffs and their predecessors had conducted a saloon for 35 years under the name of "The Saratoga," and advertised under such name. Held, it had become a trade-name, rather than the name of the building or location, and plaintiffs were entitled to be protected in its use on their removal to another location. Dewitt v. Mathey (Ky. 1896) 35 S. W. 1113.

If one who uses the street or number as a part of his trade-mark has the exclusive use of the building indicated by the number, he may use it as a part of his trade-mark against persons who have no right to or interest in the building, but who use it in order to pirate on the one justly entitled to use it. Glen & Hall Mfg. Co. v. Hall (N. Y. 1871) 6 Lans. 158, reversed (1874) 61 N. Y. 226, 19 Am. Rep. 278.

Where a theater has long been known as "Booth's Theater," and so spoken of in leases, mortgages, etc., use of the name "Booth" will have become attached to the theater, and will be protected as in the nature of a trade-mark. Booth v. Jarrett (N. Y. 1876) 52 How. Prac. 169.

23. Marks or names used on signs.—A dentist, from long use in his business signs and advertisements of the words "Scientific Dentistry at Moderate Prices," does not become entitled to the exclusive use thereof. Cady v. Schultz (1895) 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

The use of signs of the same size, shape, and color as those used by complainant, the characteristics thereof not differing from those ordinarily appearing on business signs similarly placed, will not be enjoined. Id.

24. Names of patented articles.—When a patented article becomes known by a particular name, though an arbitrary one invented by the patentee, such name becomes public property on the expiration of the patent; and no trade-mark right exists therein, or can be acquired by subsequent use. Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605 (following Same v. Heinsfurter [1898] 84 Fed. 955, 28 C. C. A. 581, and Singer Mfg. Co. v. June Mfg. Co. [1896] 16 Sup. Ct. 1002, 163 U. S. 169, 41 L. Ed. 118 which affirms [C. C. 1889] 41 Fed. 208); Singer Mfg. Co. v. Larsen (C. C. 1878) Fed. Cas. No. 12,902; Same v. Stanage (C. C. 1881) 6 Fed. 279; Same v. Riley (C. C. 1882) 11 Fed. 706; Goodyear Rubber Co. v. Day (C. C. 1884) 22 Fed. 44; Gally v. Colt's Patent Firearms Mfg. Co. (C. C. 1887) 30 Fed. 118; Whann v. Whann (1906) 41 So. 38, 116 La. 690; Dover Stamping Co. v. Fellows (1895) 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448; State v. Thierauf (1902) 67 S. W. 292, 167 Mo. 429; Same v. Bick (1902) 67 S. W. 1101, 167 Mo. 272.

Where, during the life of a monopoly created by a patent, a name, by consent of the inventor, has become the identifying and generic name of the patent, this name passes to the public with the cessation of the monopoly created by the patent, and another may use the generic dedication, in all forms, with the fullest liberty. Singer Mfg. Co. v. June Mfg. Co. (1896) 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, affirming (C. C. 1889) 41 Fed. 208; Same v. Larsen (C. C. 1878) Fed. Cas. No. 12,902; Singer Mfg. Co. v. Stanage (C. C. 1881) 6 Fed. 279;

Same v. Riley (C. C. 1882) 11 Fed. 706; Goodyear Rubber Co. v. Day (C. C. 1884) 22 Fed. 44; Gally v. Colt's Patent Firearms Mfg. Co. (C. C. 1887) 30 Fed. 118; St. Louis Stamping Co. v. Piper (1895) 12 Misc. Rep. 270, 33 N. Y. Supp. 443.

When a patented article becomes known by a particular name, though an arbitrary one, such as "Castoria," such name becomes public property on the expiration of the patent; and no trade-mark right exists therein, or can be acquired by subsequent use. Singer Mfg. Co. v. June Mfg. Co. (1896) 16 Sup. Ct. 1002, 163 U. S. 169, 41 L. Ed. 118; Centaur Co. v. Heinsfurter (1898) 84 Fed. 955, 28 C. C. A. 581; Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605.

Plaintiffs obtained a patent for an embossed design which they placed on the ends of spools containing their thread. Held that, after the patent expired and the design became common property, they were not entitled to relief against defendants, who used a similar design on their spools on the ground of their prior monopoly. Coats v. Merrick Thread Co. (1893) 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, affirming (C. C. 1888) 36 Fed. 324, 1 L. R. A. 616.

The right to use the word "patent" as part of the name of an article for which a patent has been obtained ceases on the expiration of the patent. Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. (1901) 22 Sup. Ct. 68, 183 U. S. 1, 46 L. Ed. 49, reversing decree (1900) Rahtjen's American Composition Co. v. Holzappel's Composition Co. (1900) 101 Fed. 257, 41 C. C. A. 329.

Where a trade-mark antedated a patent relating to the article by more than two years, and the name, and not the patent, gave value to the article, the expiration of the patent did not terminate the exclusive right to use the trade-mark. Batcheller v. Thomson (1899) 93 Fed. 660, 35 C. C. A. 532, reversing decree (C. C. 1898) 86 Fed. 630.

"Rahtjen's Composition" has since 1869 been sold in the United States continuously by the authorized agents of the original manufacturers or their English licensees. In 1873 it was patented in England, but the patent lapsed in 1880 for nonpayment of dues. In 1883 defendant commenced the manufacture of the same paint in England, using the name of "Rahtjen's Composition," and since 1890 has sold its products in the United States. Held, that the expiration of the English patent did not affect the right to protection in this country in the exclusive use of the name which had, since its introduction here, constituted the trade-name of their product. Rahtjen's American Composition Co. v. Holzappel's Composition Co. (1900) 101 Fed. 257, 41 C. C. A. 329, decree reversed Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. (1901) 22 Sup. Ct. 6, 183 U. S. 1, 46 L. Ed. 49.

The patentee of a new product gave it the generic name of "Featherbone," by which name it became generally known. Held, on the expiration of the original patent, the public had the right to make the article and sell it by the name "Featherbone," and that such name could not be monopolized by the patentee as a trade-mark for his own manufacture. Warren Featherbone Co. v. American Featherbone Co. (1905) 141 Fed. 513, 72 C. C. A. 571.

Where complainant adopted the name "Vertical Top" which it used during the life of the patent, on its expiration the name, as well as the article, became free to the public, and complainant could not perpetuate its exclusive right thereto by registering it as a trade-mark. Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (1908) 161 Fed. 318, 88 C. C. A. 398.

Where the manufacturer of drawers under a patent designated them by the name "elastic seam," by which name they became known to the public, such name described the garment, and on the expiration of the patent others who thereby acquired the right to make the garment became also free to designate it by such name. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. (1908) 165 Fed. 639, 91 C. C. A. 475, writ of certiorari denied J. A. Scriven Co. v. Rice-Stix Dry Goods Co. (1909) 29 Sup. Ct. 692, 212 U. S. 582, 53 L. Ed. 660, and appeal dismissed (1911) 32 Sup. Ct. 518, 223 U. S. 708, 56 L. Ed. 622.

The owner of a patent cannot, by registering the name of the patentee, acquire the exclusive right to use the same as a trade-mark for such article after the patent has expired. Yale & Towne Mfg. Co. v. Worcester Mfg. Co. (1912) 195 Fed. 528, 115 C. C. A. 491.

On the expiration of a copyright or patent, the publisher or maker has the right to use the name if it has come to be a word of apt description, and by reason of its long and exclusive use it has come to be indicative of his product. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

A patentee cannot prevent another manufacturer from using the drawing of the patent, after it as expired, as descriptive of his goods, by registering the same as a trade-mark. Bristol Co. v. Graham (1912) 199 Fed. 412, 117 C. C. A. 644.

Where a patented article was designated by an arbitrary name by which it became known to the public, on the expiration of the patent other manufacturers have also the right to use the name, provided they prevent their product from being confused with that of the original maker. Yale & Towne

Mfg. Co. v. Ford (1913) 203 Fed. 707, 122 C. C. A. 12, affirming on appeal Same v. Restein (D. C. 1912) 196 Fed. 176.

The word "Ideal," as applied to hair brushes sold in the United States, held not to have acquired a generic meaning referring to patented brushes, so as to prevent its registration as a trade-mark as a specific word. Hughes v. Alfred H. Smith Co. (1913) 209 Fed. 37, 126 C. C. A. 179, affirming decree (D. C. 1913) 205 Fed. 302.

A licensee under a patent, who has adopted and used a distinctive trade-mark, does not lose his right to such trade-mark on the expiration of the patent. Searchlight Gas Co. v. Prest-O-Lite Co. (1914) 215 Fed. 692, 131 C. C. A. 626.

Rule that public may use generic name of patented article after the expiration of the patent held not to apply to trade-name of unpatented element of patented combination having no generic name. Buffalo Specialty Co. v. Van Cleef (C. C. A. 1915) 227 Fed. 391.

The words imprinted upon a patented article of manufacture are common property from the date of the expiration of the patent. Tucker Mfg. Co. v. Boyington (C. C. 1875) Fed. Cas. No. 14,229; Singer Mfg. Co. v. Larsen (C. C. 1878) Fed. Cas. No. 12,902; Filley v. Child (C. C. 1879) Fed. Cas. No. 4,-787.

The words "Fairbanks' Patent," used by Fairbanks & Co., held not a trade-mark; and another manufacturer will not be enjoined from using such words on scales made in imitation of Fairbanks' scales after the patents have expired. Fairbanks v. Jacobus (C. C. 1877) Fed. Cas. No. 4,608.

A person not connected with the Singer Manufacturing Company may make a Singer sewing machine, and sell it by that name, after the patents have expired, if he does not convey an intimation that such machine was made by that company. Singer Mfg. Co. v. Larsen (C. C. 1878) Fed. Cas. No. 12,-902.

After the expiration of a patent, no manufacturer of the patented article can appropriate the name, or the principal part of the name, of the patent as a trade-mark. Goodyear Rubber Co. v. Day (C. C. 1884) 22 Fed. 44.

Patent issued to George F. Weymouth, for a hay knife, having expired, the owners of such patent have no exclusive right to use the words "Weymouth's Patent" as a trade-mark, because it was the descriptive name by which the hay knife became known to the public. Hiram Holt Co. v. Wadsworth (C. C. 1889) 41 Fed. 34.

Distinctive labels long used on patented articles do not become free to the world on the expiration of the patent. Centaur Co. v. Killenberger (C. C. 1898) 87 Fed. 725.

"Rahtjen's Composition" having become a well-known article of commerce by that name through the expired English patent, so that the name has become descriptive of the article, rather than indicative of its origin, it is not actionable for another manufacturer to make a bid under specifications calling for the article by that name. Rahtjen's American Composition Co. v. Holzapfel's Compositions Co. (C. C. 1899) 97 Fed. 949.

Where an article made under a patent was made in a certain form and color and with certain ornamentation to distinguish it, the exclusive right to such form, color, and ornamentation ceased with the expiration of the patent. Allen v. Walton Wood & Metal Co. (C. C. 1910) 178 Fed. 287.

On the expiration of a patent, any one has the right to make and sell the patented article, and to use in connection therewith an arbitrary name by which it was known to the public, providing he takes proper care to prevent his own goods from being confused with those of the original manufacturer; and it is sufficient to somewhat change the name and add his own name and place of manufacture. Yale & Towne Mfg. Co. v. Restein (D. C. 1912) 196 Fed. 176.

Where the owner of a patent, granted to De Long, made and sold the patented article under the name "The De Long Hook and Eye," another manufacturer of the same article, after the expiration of the patent, held to have the right to use the name "De Long Hook" as descriptive of his product. De Long Hook & Eye Co. v. American Pin Co. (D. C. 1912) 200 Fed. 66.

Trade-marks held, under the evidence, to have become the identifying marks of a patented article, and on the expiration of the patent to have become free to the use of other makers of such article. Frank W. Whitcher Co. v. Sneierson (D. C. 1913) 205 Fed. 767.

The name of a patentee used as a mark or in advertising to designate the patented article cannot be monopolized as a trade-mark after the expiration of the patent. Yale & Towne Mfg. Co. v. Worcester Mfg. Co. (D. C. 1913) 205 Fed. 952.

Where the name "Jenkins" became so associated with the patented article that it was the generic designation of a particular class of valves, plaintiff, as successor of the patentee, could not prevent the use of such name to designate similar valves manufactured by others after the patent had expired. Jenkins Bros. v. Kelly & Jones Co. (D. C. 1914) 212 Fed. 328.

An opposition to the registration of the word "Monitor" as a trade-mark for steam boiler injectors and feeders,

on the ground that the word has been for many years applied to such injectors and has become descriptive of a patented article, is properly dismissed, where it appears that the applicant for registration for a long period of time has applied the word to many forms of injectors manufactured by it, and has used the word to indicate origin, and not as descriptive of any particular type of injector. Edna Smelting & Refining Co. v. Nathan Mfg. Co. (1908) 30 App. D. C. 487.

Upon the expiration of a patent, the right to manufacture the article passes to the public, and the monopoly cannot be prolonged by claim of a trade-mark descriptive of the article. Heaton-Peninsular Button Fastener Co. v. Independent Button Fastener Co. (1915) 43 App. D. C. 264, 267.

The right of defendants to the exclusive use of the word "Tabasco" as a trade-mark for pepper sauces expired in 1887 with the patent issued to their predecessor in 1870. New Iberia Extract of Tabasco Pepper Co. v. E. McIlhenny's Son (1912) 61 So. 131, 132 La. 149.

A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to a patented article. Dover Stamping Co. v. Fellows (1895) 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448.

Where the words "Marshall perfecting engine" were used merely to designate an engine manufactured under a patent and not as a trade-name, the exclusive right to the use of the words ceased on the expiration of the patent. Marshall Engine Co. v. New Marshall Engine Co. (1909) 89 N. E. 548, 203 Mass. 410.

A right to the exclusive use in a particular locality of a trade-name or sign may be acquired. Miskell v. Prokop (1899) 79 N. W. 552, 58 Neb. 628.

One having the right to manufacture a patented article may use the patent name of the article without being technically liable to an action for infringement of the rights of another manufacturer of the same article under the same patent. Waterman v. Shipman (1890) 55 Hun, 611, 8 N. Y. Supp. 814, judgment reversed (1891) 130 N. Y. 301, 29 N. E. 111.

The use of a name to indicate a patented article does not prevent the patentee from asserting that such name is a trade-mark. Waterman v. Shipman (1891) 130 N. Y. 301, 29 N. E. 111, reversing (1890) 55 Hun, 611, 8 N. Y. Supp. 814.

A word used as a generic name for a patented article and also as a trade-mark becomes public property on the expiration of the patent, and it cannot thereafter be registered under General Business Law N. Y. § 367, providing for the registration of trade-marks. Prest-O-Lite Co. v. Ray (1914) 147 N. Y. S. 138, 162 App. Div. 62 (reversing judgment [1913] 147 N. Y. S. 219); Same v. Brockner (1914) 147 N. Y. S. 147, 162 App. Div. 75.

Where a patented machine becomes known and identified in a trade by its shape and external appearance, after the expiration of the patent thereon, the patentee cannot prevent others from using the same shapes or models of identification in machines of the same kind manufactured and sold by them. Brill v. Singer Mfg. Co. (1884) 41 Ohio St. 127, 52 Am. Rep. 74.

Where a trade-mark antedated a patent relating to the article to which the trade-mark was applied by about 12 years, the expiration of the patent did not affect the trade-mark. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

25. Names of copyrighted works.—After expiration of copyright to the Webster dictionaries, the further use of the word "Webster" to designate dictionaries could not be acquired by registration as a trade-mark. G. & C. Merriam Co. v. Syndicate Pub. Co. (1915) 35 Sup. Ct. 708, 237 U. S. 618, 59 L. Ed. 1148, dismissing appeal (1913) 207 Fed. 515, 125 C. C. A. 177.

26. Marks or names of places of business.—The name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, and which a court of chancery will protect. Woodward v. Lazar (1863) 21 Cal. 448, 82 Am. Dec. 751.

By adoption of the name "Mechanics' Store" for his place of business, one may acquire a property right therein as a trade-name. Weinstock, Lubin & Co. v. Marks (1895) 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57.

To constitute a valid trade-mark words must denote the goods or property or particular place of business, and hence the words "Mammoth Wardrobe," used to designate a place where a large amount of clothing is kept for sale, cannot be appropriated as a trade-mark. Gray v. Koch (1871) 2 Mich. N. P. 119.

The phrase "New York Dental Rooms" may become a trade-mark to describe the place of business of a dentist doing business in St. Louis. Sanders v. Utt (1884) 16 Mo. App. 322.

A person may be protected in the exclusive use of his own name or that of a place, building, or other designation selected by him, and by use of which, in connection with his business, he has acquired for it a valuable good will. Esselstyn v. Holmes (1911) 114 P. 118, 42 Mont. 507.

27. Form of articles or packages.—The form of tobacco box in common use cannot be exclusively appropriated

as a package for the sale of a preparation designed to cure the tobacco habit. Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co. (1897) 80 Fed. 105, 25 C. C. A. 314.

One cannot create a monopoly by adopting a shape or form of product, and particularly when such product is one of general use. A. Y. McDonald & Morrison Mfg. Co. v. H. Mueller Mfg. Co. (1910) 183 Fed. 972, 106 C. C. A. 312, modifying decree H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co. (C. C. 1908) 164 Fed. 1001.

Where a certain form of frame for sewing machines has been so extensively used during the time they were protected by patents that the machines containing this feature came to be known in the trade thereby, after the expiration of the patents, the patentee cannot, by claiming such form or shape of frame as a trade-mark, prevent others from using such frames in sewing machines manufactured and sold by them. Wilcox & Gibbs Sewing-Mach. Co. v. The Gibbens Frame (C. C. 1883) 17 Fed. 623.

A party will be protected from the imitation of the packages peculiarly designed and shaped for the purpose of distinguishing his goods. Carbolic Soap Co. v. Thompson (C. C. 1885) 25 Fed. 625.

A peculiar method of arranging soap in a box is not a trade-mark which can be legally registered. Davis v. Davis (C. C. 1886) 27 Fed. 490.

A manufacturer of chewing gum cannot obtain a trade-mark for the form of the sticks in which the gum is made, nor for the peculiar shape and decoration of the boxes in which it is put up, nor for the manner in which the gum is arranged in the boxes. Adams v. Heisel (C. C. 1887) 31 Fed. 279.

No publisher has an exclusive right to the form and size into which a book may be cast. Merriam v. Famous Shoe & Clothing Co. (C. C. 1891) 47 Fed. 411.

To entitle one to protection in the exclusive use of the shape, colors, and general appearance of his packages and labels, it must appear not only that he was the first to use such dress for his goods, but that its use by him has been general, continuous, and exclusive, so that it has become a distinguishing mark of his products. Actiengesellschaft Vereinigte Ultramarine Fabriken, Vormals Leverkus, Zeltner & Consorten in Nurnberg, v. Amberg (C. C. 1900) 102 Fed. 551.

Prior use of a certain kind of box for particular goods gives no exclusive right to their use for that purpose, nor to a preliminary injunction against the use of similar boxes by another, unless the similarity is such as is likely to mislead and impose upon ordinary purchasers, so as to constitute unfair competition. Pfeiffer v. Wilde (C. C. 1900) 102 Fed. 658.

A trade-mark for toothpicks, consisting merely in the method of sealing the wrapper, by passing it between two wheels with corrugated faces, so as to produce a corrugated embossing thereon, will be canceled, since it involves an inherent element in the manufacture of the wrapper, which can be protected, if at all, only by having it patented as an invention. Herz v. Loewenstein (1913) 40 App. D. C. 277.

The form of a package cannot be appropriated, so as to exclude others from using packages of the same character. Enoch Morgan's Sons Co. v. Troxell (1882) 89 N. Y. 292, 11 Abb. N. C. 86, 42 Am. Rep. 294; Fleischmann v. Newman (1888) 2 N. Y. Supp. 608.

A G-shaped frame for a sewing machine, having certain mechanical advantages afforded by its form, and being a useful mechanical structure and an essential part of the sewing machine, could not be acquired as a trade-mark. Wilcox & Gibbs Sewing Mach. Co. v. Kruse & Murphy Mfg. Co. (1887) 3 N. Y. St. Rep. 590.

Plaintiff sold soap marked: "B. T. Babbitt. Trade-Mark. Best Soap." Defendant sold soap marked: "B. T. Butler's. Trade-Mark. Best Soap." The size and shape of the cakes differed; the wrappers being of the same color and about the same size, but different in general appearance. Held, that no trade-mark could be acquired in the form or size of the packages in which the soap was sold. Babbitt v. Brown (1893) 68 Hun, 515, 23 N. Y. Supp. 25.

Actual barrels, boxes and the like may not be appropriated for trade-marks for their particular size, style, or shape; but this has no reference to pictures or devices of them for labels or brands. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

The shape and arrangement of boxes containing washing bluing cannot constitute a trade-mark. Sawyer v. Meyer (Pa. 1875) 2 Wkly. Notes Cas. 197.

The mechanical arrangement of bottles in boxes can neither be claimed as an invention nor as a trade-mark. Hoyt v. Hoyt (1891) 143 Pa. 623, 22 Atl. 755, 29 Wkly. Notes Cas. 309, 24 Am. St. Rep. 575, 13 L. R. A. 343.

28. Color of articles, packages, wrappers, or labels.—Where one adopted a blue thread twisted into one of the strands of his rope as a trade-mark, which was the only practicable way of marking rope, such manufacturer was not entitled to restrain another manufacturer from using a thread of a different color. Dodge Mfg. Co. v. Sewall & Day Cordage Co., 142 Fed. 288.

The description of a trade-mark for wire rope as "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be the subject of registration as a trade-mark. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.

(1906) 26 Sup. Ct. 425, 426, 201 U. S. 166, 50 L. Ed. 710, affirming decree (1904) 134 Fed. 571, 67 C. C. A. 418.

Where tin tags of all colors, including yellow, of various sizes, had been used by tobacco manufacturers for several years, and a yellow tag similar to that used by complainant had been in use, without complainant's objection, by another for 10 years, the size and color of such tag was not of itself such a distinction as either complainant or defendant could appropriate as a trade-mark. Continental Tobacco Co. v. Larus & Bro. Co. (1904) 133 Fed. 727, 66 C. C. A. 557.

An alleged trade-mark, consisting simply of a colored strand in a wire rope, not restricted to any particular color, is invalid. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (1904) 134 Fed. 571, 67 C. C. A. 418, affirmed (1906) 26 Sup. Ct. 425, 201 U. S. 166, 50 L. Ed. 710.

As a rule, subject to certain exceptions, a color cannot be monopolized to distinguish a product. Diamond Match Co. v. Saginaw Match Co. (1906) 142 Fed. 727, 74 C. C. A. 59, writ of certiorari denied Saginaw Match Co. v. Diamond Match Co. (1906) 27 Sup. Ct. 776, 203 U. S. 589, 51 L. Ed. 330.

Color, except in connection with some definite arbitrary design, such as when impressed upon a circle, star, cross, or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade-mark. Newcomer & Lewis v. Scriven Co. (1909) 168 Fed. 621, 94 C. C. A. 77, writ of certiorari denied J. A. Scriven Co. v. Newcomer (1909) 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065.

The marking of sash cord with a series of spots arranged spirally about the circumference, each shaped in the form of a lozenge, being made in the ordinary process of machine braiding of sash cord by combining one colored strand with eleven undyed strands, not restricted to any particular color, does not constitute a valid trade-mark. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

The color of a label, apart from a name or device, cannot be the subject-matter of a trade-mark. Fleischmann v. Starkey (C. C. 1885) 25 Fed. 127.

Soap packed in a box, with alternate red and yellow wrappers, so as to produce a representation of a trade-mark of the same combination of colors, is not an infringement of that trade-mark. Davis v. Davis (C. C. 1886) 27 Fed. 490.

Neither the color, shape, nor material of a cigar band alone or in combination was sufficient to constitute a valid trade-mark, since it did not point to the source from which the goods on which the bands were used were derived. E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co. (C. C. 1905) 136 Fed. 866, decree affirmed (1905) 142 Fed. 160, 73 C. C. A. 378.

A registered trade-mark of "a red or other distinctively colored streak applied to or woven in a wire rope" is invalid, not only because there can be no valid trade-mark in color alone, but for the further reason that it contains no distinctive design, but attempts to monopolize the right to use any streak of any color, however produced in or applied to a wire rope. A. Leschen & Sons Rope Co. v. Macomber & Whyte Rope Co. (C. C. 1905) 142 Fed. 289.

Process of making checks on surface of cord by twisting in one yarn of markedly different color cannot be exclusively appropriated for trade-mark purposes. Samson Cordage Works v. Puritan Cordage Mills (C. C. 1911) 193 Fed. 274.

A color imparted to a fabric as the natural result of the use of the material of which the fabric is made cannot be the basis of a valid trade-mark. Samson Cordage Works v. Puritan Cordage Mills (D. C. 1912) 194 Fed. 573.

A trade-mark cannot be acquired in the use of color not connected with some symbol or design. In re American Circular Loom Co. (1906) 28 App. D. C. 446; In re L. E. Waterman Co. (1909) 34 App. D. C. 185.

Appellee sought registration of "a yellow stripe, of uniform width, spirally disposed around the surface" of the rope. This mark was similar to one long used by appellant, except that appellant's mark was colored red. Held, the marks were sufficiently alike to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (1911) 36 App. D. C. 451.

While color, generally speaking, is not a proper subject of a trade-mark, a rival dealer may not appropriate another's mark by merely changing its color. Id.

Where the wording on labels, though somewhat alike, bore noticeable differences, and the cuts and legends were of different colors, but the paper of both labels was of the same color, and the "directions for using" were alike, the defendant's label was no infringement of the plaintiff's trade-mark. Falkinburg v. Lucy (1868) 35 Cal. 52, 95 Am. Dec. 76.

Defendant's soap was sold in cakes of a somewhat different size and shape from those of the plaintiff, the wrappers being of the same color and about the same size, but different in general appearance. Held, that no trade-mark could be acquired in the color of the packages in which plaintiff's soap was sold. Babbitt v. Brown (1893) 68 Hun, 515, 23 N. Y. Supp. 25.

The owners of a trade-mark named "Omega Oil" manufactured a liniment

green in color, and for which green had been adopted as a distinctive mark. Defendants manufactured a green medicated soap, employed therein a small quantity of Omega Oil, and put the soap up in a green box and wrapper. Held, that defendants would not be restricted from using the green color in the soap or on the wrappers or the boxes, if the words constituting plaintiff's trade-mark were omitted from the soap. Omega Oil Co. v. Weschler (1901) 71 N. Y. S. 983, 35 Misc. Rep. 441.

29. Combinations.—After both pancreatin and pepsin had been discovered and named, and their effects as aids to digestion published to the world for several years, a manufacturer of a digestive preparation could not adopt "Pancreopepsine," as a trade-mark, and thereby prevent the use of such names, or a combination thereof, by other manufacturers of similar digestive preparations. Searle & Hereth Co. v. Warner (1902) 112 Fed. 674, 50 C. C. A. 321, decree affirmed Warner v. Searle & Hereth Co. (1903) 24 Sup. Ct. 79, 191 U. S. 195, 48 L. Ed. 145.

The words "The Star Shirt," and such words used with a star, and the device "The * Shirt," are a lawful trade-mark. Morrison v. Case (C. C. 1872) Fed. Cas. No. 9,845.

The words "homeopathic specifics," standing alone, cannot be appropriated as a trade-mark, but can be when used in connection with serial numbers. Humphreys' Specific Homeopathic Medicine Co. v. Wenz (C. C. 1882) 14 Fed. 250.

One will be protected from the imitation in color, design, style, and lettering, combined, of labels used to mark packages of his goods when placed on the market. Carbolic Soap Co. v. Thompson (C. C. 1885) 25 Fed. 625.

Where words used do not in themselves constitute an infringement, but their general arrangement and color are such that a purchaser might easily be deceived, an injunction will be issued to their use in a certain connection. Royal Baking-Powder Co. v. Davis (C. C. 1885) 26 Fed. 293.

The use of the name "Syrup of Red Spruce Gum," with figure of Indian against a background of spruce trees and waterfall, used 20 years, will be protected as trade-mark. Kerry v. Toupin (C. C. 1894) 60 Fed. 272.

The words "German Sweet Chocolate" ("German" being the name of an individual, which is adopted as an arbitrary designation, without geographical signification) is a valid trade-name. Walter Baker & Co. v. Baker (C. C. 1896) 77 Fed. 181.

The use of the compound name "Lithia-Vichy" on artificial mineral waters, with the words "Manufactured from Distilled Waters," inconspicuously under it, indicates that the article labeled is something different from the natural French Vichy waters, and the use thereof will not be restrained. La Republique Francaise v. Carl H. Schultz (C. C. 1902) 115 Fed. 196.

One manufacturing patented hooks and eyes is not entitled to appropriate the form of the cards on which the hooks were fastened, lettered horizontally between rows of hooks and eyes, in connection with and as a necessary corollary to its trade-mark. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C. 1902) 118 Fed. 938.

While the words "Social Register" may, in association, constitute a trade-mark, neither word alone can be so appropriated, and the fact that complainant published a book under the title "Social Register, Newport," does not entitle it to enjoin the use by defendant of the title "Newport Social Index" for a similar publication. Social Register Ass'n v. Murphy (C. C. 1904) 128 Fed. 116.

The name "White House" and the picture of the White House at Washington constitute a valid trade-mark and trade-name for coffees. Dwinell-Wright Co. v. Co-Operative Supply Co. (C. C. 1906) 148 Fed. 242; Id. (C. C. 1906) 155 Fed. 909.

A manufacturer of silverware may adopt for its trade-mark in this country a combination of devices of an anchor, lion, and the letter G, even though each of these is a hallmark used on English silver, and used in combination they would indicate to a buyer of English silver that the piece was sterling ware made in the city of Birmingham in 1831. Gorham Mfg. Co. v. Weintraub (C. C. 1910) 176 Fed. 927.

Where complainant used as trade-marks on the back of toothbrushes a star-inclosed "L" and the word "Comilo," and thereafter placed on the front of the handle a red cross and the legend "Red Cross Brush," the latter mark indicating brushes made by complainant, it was no objection that he had previously adopted and still used the marks on the back. Loonen v. Deitsch (C. C. 1911) 189 Fed. 487.

A mark registerable as a trade-mark cannot be made by combining two non-registerable words, such as "America" and "Strength." In re Meyer Bros. Coffee & Spice Co. (1908) 32 App. D. C. 277.

An exclusive right may be acquired to put up goods in a bronze-colored box of a certain size, having on top and one side a brown label of a certain shape, with printed inscription, and tied with an orange-colored string, though no trade-mark be claimed therein; and a right to the exclusive use of color alone cannot be appropriated. New England Awl & Needle Co. v. Marlboro Awl & Needle Co. (1897) 46 N. E. 386, 168 Mass. 154, 60 Am. St. Rep. 377.

A combination of a certain word with a peculiar size, shape, etc., of the product, first conceived and used by plaintiff, will be protected. George G. Fox

Co. v. Glynn (1906) 78 N. E. 89, 191 Mass. 344, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619.

A hotel proprietor may acquire a right to the exclusive use of the name of a place in conjunction with the word "Inn." for the name of his hotel. Busch v. Gross (1906) 64 Atl. 754, 71 N. J. Eq. 508.

The words "Conserves Alimentaires" with the coat of arms of the city of Paris, placed on packages, put up in Paris, of an article known as "Julienne," compounded of vegetables and used for making Julienne soup, may constitute a trade-mark to be protected. Godillot v. Hazard (1879) 44 N. Y. Super. Ct. (12 Jones & S.) 427, affirmed Same v. Harris (1880) 81 N. Y. 263.

A combination of words and figures or symbols may constitute a trade-mark, though some or each of the parts standing alone would not constitute a trade-mark, and could be used without infringement. In such a case it is the entire combination and setting which make the trade-mark. Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. S. 437, 23 Misc. Rep. 66.

One may adopt as a trade-mark a new combination of words, which up to that time have not been used in the trade or by the general public, and will be protected in their use as a trade-mark, although they may be suggestive of the general nature of the article to which they are applied. Rawlinson v. Brainard & Armstrong Co. (1899) 59 N. Y. S. 880, 28 Misc. Rep. 287.

While a manufacturer of a commercial article—like borax soap—can acquire no trade-mark in such name, he may combine such name with his own and thereby acquire a valid trade-mark in the combination, such as "Drydroppel's Borax Soap." Drydroppel v. Young (Pa. 1880) 27 Leg. Int. 397.

30. Novelty of mark or name.—It is not necessary that a device shall be absolutely new or novel, for use as a trade-mark. If it is new in its application to a particular merchandise, it is entitled to protection as such. William J. Moxley Co. v. Braun & Fitts Co. (1901) 93 Ill. App. 183.

Right to exclusive use of a trade-mark does not depend on novelty, invention, or discovery, but is founded on priority of appropriation. Handy v. Commander (1897) 22 So. 230, 49 La. Ann. 1119.

Marking or weaving complainant's name on the selvedge or margin of silk manufactured by it is but a method of marking one's name on his goods, and cannot be protected as a patented process or trade-mark, though complainant first introduced the method in this country. Stirling Silk Mfg. Co. v. Sterling Silk Co. (1900) 46 A. 199, 59 N. J. Eq. 394.

An inventor of a compound for a wood preserving paint called the product "Carbolineum," and continuously used it. The word was coined by the inventor, and was unknown when first used. Held, the word was not merely descriptive of the product, and was a valid trade-mark. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

A valid trade-mark may consist of some novel device, arbitrary character, or fancy word applied without special meaning, which by use comes to serve the same purpose. Id.

31. Similarity and infringing character of marks or names, and deception of public—In general.—Deception of public as barring action or suit for infringement, see notes under § 9506, post.

Deception of public as element of infringement, see notes under § 9501, post.

Deception of public as element of unfair competition, see notes under § 9508, post.

Infringement of trade-marks in general, see notes under § 9501, post.

32. —— Knowledge or intent.—Element of infringement, see notes under § 9501, post.

Element of unfair competition, see notes under § 9508, post.

In a doubtful case registration should not be granted, where it appears that, when the applicant adopted the mark, he knew of its prior adoption and use by another in connection with goods of the same general character and properties. Phœnix Paint & Varnish Co. v. John T. Lewis & Bros. (1908) 32 App. D. C. 285.

A trade-mark which so nearly resembles another known mark as to be likely to cause confusion will not be registered, and it is immaterial that the prior mark has never been registered, or that the applicant did not know of the existence or use of the prior mark. Seubert v. Santaella & Co. (1911) 36 App. D. C. 447.

33. —— Imitation.—Infringement in general, see notes under § 9501, post.

Unfair competition, see notes under § 9508, post.

Whether a claimed trade-mark is so descriptive of something else as to be deceptive must be decided as of the time of its adoption. Nashville Syrup Co. v. Coca Cola Co. (1914) 215 Fed. 527, affirming judgment Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

A prior deceptive use of a trade-name gave no right to claim such name as a trade-mark, as against complainant. W. A. Gaines & Co. v. Kahn (C. C. 1907) 155 Fed. 639, decree reversed Kahn v. W. A. Gaines & Co. (1908) 161 Fed. 495, 88 C. C. A. 437, writ of certiorari denied W. A. Gains & Co. v. Kahn (1908) 29 Sup. Ct. 682, 212 U. S. 572, 53 L. Ed. 656.

Complainant in 1891, adopted and commenced to use the word "Ceresota" as a trade-mark for its best grade of

flour. This trade-mark was registered on October 31, 1905, and in September, 1906, defendants began to use the word "Certosa" as a trade-mark for an inferior flour. Defendants applied for registration of the word "Certosa" as a trade-mark which was denied, but, notwithstanding this, used the word in competition with plaintiff in the sale of flour in interstate commerce. Held, that defendants' acts constituted unlawful competition, and an infringement of complainant's trade-mark. Northwestern Consol. Milling Co. v. William Callam & Son (C. C. 1910) 177 Fed. 786.

There is no such similarity between a trade-mark consisting of the words "Old Crow," accompanied by a picture of a crow, and one consisting of the words "Raven Valley," accompanied by a picture of three ravens in the dead limbs of a tree, as to justify refusing registration of the latter trade-mark. Gaines v. Knecht (1906) 27 App. D. C. 530.

A trade-mark for whisky, consisting of the words "Old Crow," accompanied by the picture of a crow, is not of sufficient similarity to a trade-mark consisting of the representation of a jay bird perched on the branches of a tree, and having upon each side the words "Old J.," and, underneath, the words "Old Jay Rye" to confuse the public or mislead purchasers exercising ordinary care. Gaines v. Carlton Importation Co. (1906) 27 App. D. C. 571.

A contention by one of the parties that the representations of the other party in the printed matter on his label are deceptive, is not supported by a chemical analysis of the contents of a labeled bottle, and the testimony of a physician to the effect that while the preparation would not, in his opinion, have all the effects claimed for it in such printed matter, its action would be good in some respects, and it was a good bitter. Schuster Co. v. Muller (1906) 28 App. D. C. 409.

A mixture of ground roots and bark, where the wrapper of the package containing it has directions how to make the bitters, is to be considered goods of the same descriptive property as bitters made from such roots and bark, and bottled. Id.

Whether two words claimed as trade-marks bear such close resemblance as will mislead and deceive the purchasing public may be determined on a demurrer to an opposition to an application for registration of one of the words. Hall & Ruckel v. Ingram (1906) 28 App. D. C. 454.

The word "Zodenta," for use on a dentifrice, does not so closely resemble the word "Sozodont," similarly used, as to be apt to deceive purchasers. Id.

There is no abuse of discretion in refusing to register the words "Chancellor Club" as a trade-mark for cocktails, upon the ground that the words would be confused in the mind of the purchasing public with the prior registered mark "Club Cocktails" for the same class of goods. In re S. C. Herbst Importing Co. (1908) 30 App. D. C. 297.

Where an applicant for registration of a trade-mark falsely states in his application the characteristics of goods to which the mark is appropriated, as shown by the labels on the packages and bottles on which the mark is used, and it appears that the applicant has used the mark under such false guise for a number of years, the application for registration is properly denied. Peter Schoenhofen Brewing Co. v. Maltine Co. (1908) 30 App. D. C. 340, 346.

The imitation of a trade-mark of a dealer, with partial additions, such as the public would not observe, does the same harm as an entire counterfeit; and registration of the imitation will be denied. Id.

A trade-mark, consisting of an Indian's head in profile, with the conventional feather headdress within a circle, held to so resemble another trade-mark showing the front view of an Indian's head with a similar headdress, and applied to the same product, as to be calculated to produce confusion in trade and therefore not to be registerable. In re Indian Portland Cement Co. (1908) 30 App. D. C. 463.

Under the provisions of this section the registration of the words "Old Lexington Club," as a trade-mark for whisky, will not be allowed, especially where the testimony shows that the corporate name of the applicant was derived from the mark sought to be registered. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co. (1908) 31 App. D. C. 223.

The marks "Old Lexington Club" and "Lexington Club," as applied to whisky are so nearly identical as to tend to confuse and mislead the public; and neither is therefore entitled to registration. Id.

Where evidence shows that applicant has been guilty of false and misleading statements on the labels, the mark will not be registered. Levy v. Uri (1908) 31 App. D. C. 441.

Re-registration of a trade-mark for lager beer, consisting of a six-pointed star with the letters "G. E." inscribed in the center, originally registered June 9, 1896, is properly refused, in view of the registration, September 5, 1893, by another party of a six-pointed star surrounded by two circles, having inscribed between the inner and outer circles the words, "The Celebrated Star Lager Beer," as the mark sought to be reregistered would tend to confuse the mind of the public with that of the registered mark of the other party. Ehret v. Star Brewery Co. (1908) 31 App. D. C. 507.

There is no conflict between a trade-mark consisting of the word "Victor,"

with the figure of a knight on horseback, waving aloft a standard, and a trade-mark applied to similar goods, consisting of the word "Victoria," with a medallion portrait of the late Queen Victoria, and surmounted by a crown suspended from a letter of the word above it; and in the absence of sufficient testimony showing the existence of actual confusion resulting from the use of the two marks, both are entitled to registration. Andrew McLean Co. v. Adams Mfg. Co. (1908) 31 App. D. C. 509.

Application for registration of a mark, for coffee, consisting of the word "Quaker," with the picture of a woman wearing a cap and apron, and carrying a tray with a cup on it, will be denied, when a picture of substantially the same design has been for many years used by another as a trade-mark for cocoa products used as beverages, and has been registered. Walter Baker & Co. v. Harrison (1908) 32 App. D. C. 272.

No person can legally adopt a trade-mark so resembling that of another when applied to the same class of goods as will mislead a purchaser buying with ordinary caution. Wayne County Preserving Co. v. Burt Olney Canning Co. (1908) 32 App. D. C. 279.

A trade-mark, consisting of the picture of a colonial military officer, accompanied by the words "Col. Willett," held not to be registerable because of its similarity to a registered trade-mark consisting of a bust portrait of Gen. Anthony Wayne in a colonial military uniform, and applied to the same kind of goods. Id.

The words "Green Ribbon," as applied to whisky, so resemble the words "Green River," already registered as a whisky trade-mark as to cause confusion to the public or to deceive purchasers; and registration is properly refused. Lang v. Green River Distilling Co. (1909) 33 App. D. C. 506.

Applicants for registration of a trade-mark, on the ground that they were in the exclusive use of it for ten years prior to the passage of this act, are not entitled to registration, where they used the mark on goods advertised and represented to be pure whisky, when in fact their product was a blend and compound. In re Wright (1909) 33 App. D. C. 510.

A trade-mark, consisting of the words "Wm. A. Rogers A. I.," followed by a horseshoe inclosing the letter "R," is not so deceptively similar to the mark "Wm. Rogers Mfg. Co.," and "Wm. Rogers & Son," as to justify rejecting an application for its registration, where it appears that both parties are entitled to use the word "Rogers." William A. Rogers, Limited, v. International Silver Co. (1910) 34 App. D. C. 413.

Registration of the words "Half Spanish," as applied to stogies and cigars, in the manufacture of which half of the tobacco used is not Spanish, is properly denied, as the words are deceptive, and would be likely to deceive purchasers. T. M. Kildow Cigar Co. v. George B. Sprague Cigar Co. (1910) 35 App. D. C. 345.

Registration as a trade-mark of the word "Autola" is properly denied, on the ground of its similarity to the word "Au-to-do," already registered. In re Wilcox & Co. (1910) 36 App. D. C. 107.

Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser ordinarily gives, and to cause him to purchase one article, supposing it to be the other. Seubert v. Santaella & Co. (1911) 36 App. D. C. 447.

Three marks for cigars "Optimates," "Optimo," and "La Optima," held to be so similar, not only in appearance, but in meaning and origin that they must be considered as the same in law. Id.

The word "Chologestin" so closely resembles the word "Chologen," used upon goods of the same general description, as to probably produce confusion in trade. Breitenbach v. Rosenberg (1911) 37 App. D. C. 102.

"Creo-Carbolin" is so similar to the registered mark of "Carbolineum" as to be likely to cause confusion or mistake in the mind of the public, and is therefore not registerable as a trade-mark. In re Barrett Mfg. Co. (1911) 37 App. D. C. 111.

A mark to be used on canned sardines is not registerable, where a mark has already been registered to be used on all kinds of canned fish, consisting of a like device, as the marks are so similar as to be likely to cause confusion in trade. In re John Braadland (1911) 37 App. D. C. 602.

A mark consisting of the word "Mammoth," associated with a picture of the head and shoulders of the prehistoric animal so called, is not so similar to a registered mark to be used on the same class of goods, consisting of the picture of two elephants in the attitude of a mother washing her child, as to be likely to create confusion in trade, and is therefore registerable. Summit City Soap Works v. Standard Soap Co. (1911) 37 App. D. C. 604.

A mark consisting of the representation of a vineyard, a herd of camels, and two men bearing a grape is so similar to one consisting of the picture of two men with dress similar to that in the other mark, and bearing a bunch of grapes between them, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers. Carmel Wine Co. v. California Winery (1911) 38 App. D. C. 1.

The words "Amber Bead" as a trade-mark for a beverage which is practically beer are deceptively similar to the word "Amber." In re Independent

Breweries Co. (1912) 39 App. D. C. 118.

A mark consisting of a circumferential band of red color contrasting with a yellow or gilt color on each side thereof, held to be anticipated by marks consisting of circumferential bands of uniform width and different colors, and therefore not subject to registration as a trade-mark. In re Eagle Pencil Co. (1912) 39 App. D. C. 361.

Registration of trade-mark for beer, consisting of the representation of a top, with the words "Gold Top," and the figure of a peacock with outspread tail, both printed upon the top, is properly denied on the grounds of its similarity to one already registered, consisting of the picture of a peacock, with the words "Ye Peacock Ale" immediately above. In re Reisch Brewing Co. (1912) 39 App. D. C. 445.

Two trade-marks may be said to be appropriated to merchandise of the same descriptive properties, within the meaning of the trade-mark act, when the general and essential characteristics of the goods are such that the use of similar marks would be likely to mislead the general public. If there is, only one mark should be registered. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484; G. & J. Tire Co. v. G. J. G. Motor Car Co. (1913) 39 App. D. C. 508.

An opposer of an application for the registration of a trade-mark has a right to rely, in the absence of anything in the record to the contrary, upon statements made under oath in the application respecting the date when the use of the trade-mark began. Sauers Milling Co. v. Kehlor Flour Mills Co. (1913) 39 App. D. C. 535.

Registration of a trade-mark consisting of a five-pointed star upon which is superimposed a circle containing the words "Lone Star," denied, because of its resemblance to trade-marks previously registered, one of which consisted of the words "The Star," and the other of a five-pointed star inclosed within a circle. In re E. C. Atkins & Co. (1913) 41 App. D. C. 238.

Two marks, that of the applicant consisting of a rhombic figure bearing the words, "Reuter's Little Pills for the Liver," and that of the opposer consisting of a square figure bearing the words, "Carter's Little Liver Pills," each figure being surrounded by words of similar import, would, if concurrently used, be likely to work such confusion and deception as to disentitle the applicant to the right of registration, where the opposer is entitled to priority. Barclay v. Carter Medicine Co. (1913) 41 App. D. C. 240.

A mark which, but for its omission of the words "Made in Ireland," would be identical with a mark previously adopted and registered abroad and used by licensees in this country, will not be registered on the application of one who adopted it as a mark for his goods for purpose of deception. Barrett v. Irish Industrial Development Ass'n (1913) 41 App. D. C. 244.

Asbestos tape for use as a friction facing for vehicle brakes, primarily to minimize overheating and wear, is so closely related in uses and characteristics to asbestos packing, including tape, as to prevent the registration for the former of a trade-mark whose similarity to a registered trade-mark for the latter is conceded. Woven Steel Hose & Rubber Co. v. Keasbey & Mattison Co. (1913) 41 App. D. C. 247.

Registration of the word "Mother's," as a trade-mark for macaroni, spaghetti, and vermicelli, will not be denied on the ground that it would be deceptive and confusing merely because it is already in use as a trade-mark for breakfast cereals. Quaker Oats Co. v. Mother's Macaroni Co. (1913) 41 App. D. C. 254.

The word "Pinozyme" not sufficiently similar to "Pèptenzyme" to warrant denying registration of the former as a trade-mark, in the absence of evidence of actual confusion, although the goods to which both marks are applied are similar. Waterbury Chemical Co. v. Reed & Carnrick (1913) 41 App. D. C. 256.

No such deceptive similarity exists between the words "Grandma's" and "Mother's" as warrants the denial, on opposition, of the registration of the former as a trade-mark for an article for which the latter has already been adopted by another person. E. A. Bromund Co. v. Columbia Wax Products Co. (1914) 41 App. D. C. 506.

The similarity of the words "Hydronon" and "Hydrocide" precludes the registration of the former as a trade-mark for bituminous paint, where the latter has already been registered for goods of the same descriptive properties. In re Barrett Mfg. Co. (1914) 41 App. D. C. 513.

Under the Trade-Mark Act, it is not necessary that actual confusion be shown on opposition; the mere probability of confusion as a result of the use of the mark by the respective parties being sufficient. Rookwood Pottery Co. v. A. Wilhelm Co. (1915) 43 App. D. C. 1.

A thermostatic steam trap used in connection with a steam car-heating apparatus, and a thermostatically operated relief valve upon an electrically heated hot-water boiler, are within the same general class, so as to require the denial, on opposition, of the registration, for the former of a word in use as a trade-mark for the latter. Simplex Electric Heating Co. v. Gold Car Heating & Lighting Co. (1915) 43 App. D. C. 28.

The trade-mark "B. V. D." is not so similar to "P. C. G." as to prevent the registration of the latter, where the

opposer has not shown possible damage to himself from the registration. B. V. D. Co. v. Potterf (1915) 43 App. D. C. 33.

The words "Beaded" and "Nu-B-Ded," as applied to metal tips for shoe and other laces, are sufficiently similar to be likely to cause confusion in trade when so applied. Barthels Mfg. Co. v. United Lace & Braid Mfg. Co. (1915) 43 App. D. C. 200.

The words "Imperator" and "Kaiser," as trade-marks applied to beer, although having a philological connection, are not so similar as to be likely to cause confusion in trade. Kaiserbrauerei Beck & Co. v. S. Liebmann's Sons Brewing Co. (1915) 43 App. D. C. 268.

One can distinguish the goods that he manufactures and sells by a peculiar label, and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose the article to which it is affixed is the manufacturer's. El Modelo Cigar Mfg. Co. v. Gato (1889) 25 Fla. 886, 7 South. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537.

34. Use of trade-mark or trade-name for different goods.—It is error to refuse to register as a trade-mark, as applied to kalsomine, the picture of a Dutchman, because of the registered trade-mark of another party, as applied to white lead, consisting of a Dutch boy. Muralo Co. v. National Lead Co. (1911) 36 App. D. C. 541.

An opposition to the registration of the word "Educator," as applied to salted, smoked, or canned fish, is properly dismissed, when based upon the registration of the same word as a trade-mark for crackers, biscuits, bread, and breakfast cereals. Johnson Educator Food Co. v. Sylvanus Smith & Co. (1911) 37 App. D. C. 107, writ of certiorari denied (1911) 32 Sup. Ct. 522.

Registration of a trade-mark for hairpins containing the word "Hump" is improperly denied, although it appears that the opposer has adopted and made prior use of the same word as a trade-mark for hooks and eyes, since the goods of the applicant and the opposer are not of the same descriptive properties. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484.

Registration of the trade-mark "G. J. G." inclosed in a triangular border, to be used on automobiles, is properly allowed over opposition, although it appears that the opposer has adopted and made prior use of the mark "G. & J." inclosed in a similar triangular border, as a trade-mark for rubber tires, since the descriptive properties of automobiles and rubber tires are not the same. G. & J. Tire Co. v. G. J. G. Motor Car Co. (1913) 39 App. D. C. 508.

Opposition to the registration of "Hydrox" as a trade-mark for peroxide of hydrogen held properly dismissed, although the same word has been employed by opponent as a mark for distilled and carbonated waters and certain soft drinks. Consumers Co. v. Hydrox Chemical Co. (1913) 40 App. D. C. 284.

Registration as a trade-mark for non-alcoholic grape juice, of a word already in use and registered as a trade-mark for lager beer, will not be denied on opposition, since the respective goods are not of the same descriptive properties. Peter Schoenhofen Brewing Co. v. John Sexton & Co. (1914) 41 App. D. C. 510.

The registration, for underwear, of a trade-mark identical with a registered mark for hosiery, will be denied. N. Wolf & Sons v. Lord & Taylor (1914) 41 App. D. C. 514.

Opposition to the registration, as a trade-mark for enamel paint, of a word in use as a trade-mark for pottery ware, will be dismissed, under the provisions of this section. Rookwood Pottery Co. v. A. Wilhelm Co. (1915) 43 App. D. C. 1.

Similarity between the enamel used by the opposer to produce the glaze finish on its pottery and the enamel paint, as a trade-mark for which registration of a word in use by the opposer is sought, does not bring the case within the prohibition of this section.

Since the manufacturer of thermostatically controlled electric heating apparatus may, at any time, manufacture electrically heated steam car heaters, a prior manufacturer of thermostatic steam traps will, on the other's opposition, be denied registration. Simplex Electric Heating Co. v. Gold Car Heating & Lighting Co. (1915) 43 App. D. C. 28.

A mark in use by one person as a general trade-mark for a general class of goods will not be registered for goods within that class which the opposer has not manufactured, or to which he has not directly applied the mark. Id.

35. Right to use same name.—One may not in the use of his name in business resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or of the article produced to the injury of another beyond that which results from the similarity of names. International Silver Co. v. Rogers (N. J. 1907) 67 A. 105 (reversing decree [1906] 63 A. 977); World's Dispensary Medical Ass'n v. Pierce (1910) 122 N. Y. S. 818, 138 App. Div. 401.

It was error to reject an application for the registration of a trade-mark for silver-plated ware consisting of the name "Rogers," and a device very similar to that of a rival, where both par-

ties are entitled to the use of the word, although some confusion may arise because of its common use. Wm. A. Rogers, Limited, v. International Silver Co. (1910) 34 App. D. C. 410.

The law does not prevent the use of the same mark by different persons, so long as the goods to which it is applied are so distinctive in class and quality as to forbid the probability of confusion in trade. G. & J. Tire Co. v. G. J. G. Motor Car Co. (1913) 39 App. D. C. 508.

A surname which has been associated for half a century with a certain manufacture is not entitled to registration as a trade-mark by a rival manufacturer, where he does not display the name so as to give such a distinctive impression to the eye of the ordinary observer as to outweigh the significance of the mere name. Oliver Chilled Plow Works v. Wm. J. Oliver Mfg. Co. (1913) 40 App. D. C. 125.

The registration of a corporate name by another as a trade-mark is forbidden by this section. Rookwood Pottery Co. v. A. Wilhelm Co. (1915) 43 App. D. C. 1.

36. Priority of use.—A firm commenced to use a trade-mark in 1883, and continued such use until its failure about 1890, and during the same time defendant used a similar name. On being sued for infringement, he promised to quit, but, the firm soon failing he did not. After the failure complainant's assignor, who had become a partner shortly before, appropriated the trade-mark as his own, and had the same registered. Held, that he was not the legal successor of the firm, and obtained no right from defendant's promise, but his right dated only from the time of his own use, later than defendant's. Deitsch v. George R. Gibson Co. (C. C. 1907) 155 Fed. 383; Deitsch v. Gibson (D. C. 1912) 198 Fed. 410.

Where the mode in which plaintiffs and their assignor packed their cigars under the trade-mark "La Normandi," the kind of boxes used, the number in a box, the number in each bunch, the particular color of ribbon, and the size and shape of the cigars, were old in the trade prior to the adoption of plaintiffs' trade-mark, and cigars thus made, and resembling plaintiffs', had been sold widely prior thereto, under the name "La Normande," the use of the words "La Normanda" will not be enjoined to protect plaintiff. Stachelberg v. Ponce (1888) 128 U. S. 686, 9 Sup. Ct. 200, 32 L. Ed. 569, affirming decree (C. C. 1885) 23 Fed. 430.

Complainants have no trade-mark in the word "Tycoon," as applied to a certain kind of tea, where the word was in common and general use, as descriptive of a certain class of teas, for many years before complainants' adoption of it. Corbin v. Gould (1890) 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611.

A valid trade-mark cannot be acquired in a word which has been previously appropriated and used by other parties as a brand for like goods. Columbia Mill Co. v. Alcorn (1893) 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, affirming (C. C. 1889) 40 Fed. 676.

The use of the name "Pocahontas Coal" by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right in such agents to the use of the name for all the coal from that field, or deprive the mine owners of the right to use the same name. Castner v. Coffman (1900) 20 Sup. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021, affirming decree Coffman v. Castner (1898) 87 Fed. 457, 31 C. C. A. 55.

In 1884, defendants, in ignorance of the former use of the word, adopted a certain trade-name, which they used until 1891, when complainant registered the name as a trade-mark. Held, that the use of the name by plaintiff's predecessors in 1873 was so transient and inconsiderable as to suggest mere experiment, and that the evidence of intention to appropriate it was repelled by the omission to use it until after its adoption by defendants. Brower v. Boulton (1893) 58 Fed. 888, 7 C. C. A. 567, affirming decree (C. C. 1892) 53 Fed. 389.

That one person, other than complainant, shipped coal marked "Pocahontas Coal, from the Browning Mines," does not show an interruption of public acquiescence in complainant's use of the name "Pocahontas," but rather, from the use of the qualifying words, supports complainant's exclusive use of the unqualified words. Atwater v. Castner (1898) 88 Fed. 642, 32 C. C. A. 77, rehearing denied (1898) 90 Fed. 828, 32 C. C. A. 602.

Expiration of the English patent did not affect the right to protection in this country in the exclusive use of a name which had, since its introduction here, constituted the trade-name of plaintiff's product. Rahtjen's American Composition Co. v. Holzappel's Composition Co. (1900) 101 Fed. 257, 41 C. C. A. 329, reversed Holzapfel's Compositions Company v. Rahtjen's American Composition Company (1901) 22 Sup. Ct. 6, 183 U. S. 1, 46 L. Ed. 49.

To entitle one to protection in the use of a trade-name, he must not only have been the first to use it, but must have established a business under it. Mere intention of using it gives no exclusive right therein as against one who actually uses it before he has carried his intention into practical effect. American Washboard Co. v. Saginaw Mfg. Co. (1900) 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

Complainant held entitled to protection in a trade-mark; it being the first

to use the title, and that it was so used exclusively by complainant and its licensees for such length of time as to give it a proprietary right therein. New York Herald Co. v. Star Co. (1906) 146 Fed. 1023, 76 C. C. A. 678, affirming order (C. C. 1906) 146 Fed. 204.

Neither complainant nor defendant held entitled to the exclusive use of the word "Globe" as a trade-mark for washing machines, where it had been in use by another manufacturer and his successors for some years before its adoption by either, and that such use continued for some years afterward. Dietz v. Horton Mfg. Co. (1909) 170 Fed. 865, 96 C. C. A. 41.

A member of a partnership which deals in bottled whisky, and uses as a trade-mark a distinctive label containing the surname of the partners, cannot also confer such right upon a corporation of which he is a stockholder and officer, but which has no connection with the business of the firm, as against another dealer which has used the same name as a brand and trade-mark for whisky for many years. National Distilling Co. v. Century Liquor & Cigar Co. (1910) 183 Fed. 206, 105 C. C. A. 638.

Complainants held not to have acquired the right to the exclusive use of the word "Princess" as a trade-mark for shirt waists, on evidence showing an extensive use of the word in connection with shirt waists by others throughout the country for several years prior to the earliest date of its use by complainants. Spiegel v. Zuckerman (1911) 188 Fed. 63, 110 C. C. A. 133, affirming decree (C. C. 1910) 175 Fed. 978.

Under this section and section 9501, post, the prima facie case made by the registration of a trade-mark, containing as a part thereof the word "Abricotine" in connection with cordials, was not overcome by the presence of the word "Abricotine" as applied to liqueurs in a French encyclopedia bearing a date subsequent to the date of the beginning of the ten-year period and more than 20 years after the original registration of complainant's French trade-mark; it not appearing that it was not complainant's product that placed the term in the encyclopedia. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

Where one had only a defensive right to use a trade-mark as against injunctive relief by another, the latter could register the trade-mark. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531.

Exclusive enjoyment of a trade-mark does not rest upon a right of property therein, but on its prior use and application in the manner in which it has been imitated and employed by defendant. Walton v. Crowley (C. C. 1856) Fed. Cas. No. 17,133.

An exclusive right to the title "Chatterbox," as a name for a series of juvenile books, is not defeated because of prior appropriation, by the publication, in 1852, for two successive months, of a monthly newspaper called "Chatteris Chatterbox," not intended for young people; nor by the publication, in 1807, in a volume called "Original Poems for Infant Minds," of a poem called "The Chatterbox"; nor by the publication, in 1861, of a book called "The Favorite Scholar," containing a prose story called "Little Chatterbox." Estes v. Worthington (C. C. 1887) 31 Fed. 154.

The first use of the trade-mark "Epicure" by complainants as a brand for packed salmon, and the establishment of a business thereunder, entitled them to protection against the use of it by defendants for salmon, though defendants had previously used it as a trade-mark for canned fruits and vegetables. George v. Smith (C. C. 1892) 52 Fed. 830.

The use of the word "Home" in connection with a make of sewing machine for over 25 years entitles the manufacturer to protection against one who puts the words "Home Delight" in a similar way on machines offered for sale by him. New Home Sewing Mach. Co. v. Bloomingdale (C. C. 1893) 59 Fed. 284.

Where the American Grocery Company began business at the former stand of one using, by right, the trade-mark "A. G.," and adopted a mark consisting of the letters "A. G. Co." in a monogram similar to plaintiff's it should be restrained from using such monogram. Godillot v. American Grocery Co. (C. C. 1896) 71 Fed. 873.

The exclusive right to the use of a trade-mark or device rests on such use as makes it point out the origin of claimant's goods, and must be early enough for that, but absolute priority, or invention, is not required. Tetlow v. Tappan (C. C. 1898) 85 Fed. 774.

The royal pharmacy in Munich having used the name "Liebig" for many years with the permission of Baron Liebig, the originator of the process of manufacture, his consent during the same time to the use of the name by the Liebig's Extract of Meat Company, Limited, cannot lay the foundation for a common-law right in the latter company to the exclusive use of such name as a trade-mark. Liebig's Extract of Meat Co. v. Libby, McNeill & Libby (C. C. 1900) 103 Fed. 87.

The registration of the name "Liebig's Extract of Meat" as a trade-mark could confer no exclusive right, where the article was previously known and sold under such name as a generic designation, and where the manufacturer had no trade-mark rights in the name in its own country. Liebig's Extract of Meat Co. v. Walker (C. C. 1902) 115 Fed. 822.

Use for many years of certain letters of the alphabet to indicate quality and size of one's product did not give him a trade-mark right in the letters

so as to preclude their use for similar purposes by other manufacturers. Stevens Linen Works v. William & John Don & Co. (C. C. 1903) 121 Fed. 171, affirmed (1904) 127 Fed. 950, 62 C. C. A. 582.

In 1892 complainants adopted, and have since used, the term "Club Cocktails." About 1892, and perhaps earlier, a limited quantity of bottled cocktails was put on the market under the name of "Outing Club Cocktails," but these goods made little or no impression on the trade and the use of the name was in the nature of an experiment, and was transitory and inconsiderable. In 1898 the manufacturer of the "Outing Club Cocktails" caused to be inserted in Mida's Register a label on which those words appeared, with the statement, "Used since 1894." Held, the evidence did not establish any commercial use of the word "Club," as applied to cocktails, sufficient to show an appropriation thereof as a trade-name prior to complainants' adoption thereof. Heublein v. Adams (C. C. 1903) 125 Fed. 782.

Where complainant's product was on the market, and known as "A. C. Pads" to the trade, a long time before defendant used the marks "A. C." on similar pads, defendant was not entitled to the exclusive use of the letters "A. C." by having subsequently registered such letters as a trade-mark. Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C. 1905) 139 Fed. 151.

Where a term has been used by plaintiff and his predecessors for many years, and has become well known in the trade as designating plaintiff's goods exclusively, complainant was entitled to protection in the exclusive use of the name "Old Crow" as designating its goods. W. A. Gaines & Co. v. Kahn (C. C. 1907) 155 Fed. 639, decree reversed Kahn v. W. A. Gaines & Co. (1908) 161 Fed. 495, 88 C. C. A. 437, writ of certiorari denied W. A. Gaines & Co. v. Kahn (1908) 29 Sup. Ct. 682, 212 U. S. 572, 53 L. Ed. 656.

One whose trade has been local for 30 years cannot, upon entering territory occupied by defendant for a like period, enjoin defendant's use there of a trade-name common to both. Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin (C. C. 1909) 171 Fed. 125, decree affirmed Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin (1910) 183 Fed. 22, 105 C. C. A. 314.

The right to the use of the name "Baltimore Club" as a trade-mark for rye whisky held to be in defendant on the ground of prior use, although both parties had used it continuously for many years, but in different localities. Id.

Registration of a trade-mark cannot confer title, if some other individual by prior adoption and use has acquired a common-law title. Id.

The word "cream," not previously used in that connection, may be adopted as a trade-mark for a superior brand of rolled oats; but its prior use by other manufacturers generally to denote the first quality, either alone or in combination in the term "extra cream," in which sense it had come to be understood in the trade, would preclude its exclusive appropriation as a trade-mark by any one manufacturer. Albers Bros. Milling Co. v. Acme Mills Co. (C. C. 1909) 171 Fed. 989.

"Liebig's Extract of Meat Company, Limited," an English corporation, held not entitled to restrain the "Liebig Extract Company," of New York, from using its own name in a competing business in this country; the defendant having adopted and continuously used the name since a time before complainant opened an office here on the same street. Liebig's Extract of Meat Co. v. Liebig Extract Co. (C. C. 1909) 172 Fed. 158, decree reversed (1910) 180 Fed. 688, 103 C. C. A. 654.

In a suit for trade-mark infringement, evidence held to show complainant's priority of adoption of the mark in question. Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, decree reversed Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

Where certain terms are synonymous in the trade, meaning arches made by complainant, and he has had exclusive user of such terms for nearly 30 years, such names could be used by him and protected as trade-names. R. Guastavino Co. v. Comerma (C. C. 1910) 180 Fed. 920.

Under the provisions of this section, any mark used for 10 years, although it could not have been the subject of a common-law trade-mark, becomes a valid trade-mark on its registration, and is entitled to the same kind and extent of protection as would be accorded to any other trade-mark. Thaddeus Davids Co. v. Davids (C. C. 1911) 190 Fed. 285, decree reversed (1912) 192 Fed. 915, 114 C. C. A. 355.

Complainant, having used the words "Coca-Cola" as a trade-mark in interstate commerce for 10 years prior to this act, and having registered it under this section, held entitled to the exclusive use of such word as a trade-mark. Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Prior use of the figure of a cow as a trade-mark on defendant's butter would not invalidate complainant's trade-mark of the figure of a cow to be used in connection with the sale of cheese, if it was otherwise valid. Lawrence v. P. E. Sharpless Co. (D. C. 1913) 203 Fed. 762, decree affirmed P. E. Sharpless Co. v. William A. Lawrence & Son (1913) 208 Fed. 886, 126 C. C. A. 46.

One having the exclusive right to sell

a patented article, who adopted and used exclusively for more than 10 years prior to 1905 a trade-mark indicating the origin of sale of such article in this country, held, on the expiration of the patent, entitled to its registration and to its protection from infringement by the English patentees. Hughes v. Alfred H. Smith Co. (D. C. 1913) 205 Fed. 302, decree affirmed (1913) 209 Fed. 37, 126 C. C. A. 179.

Complainant's predecessor in title having made previous use of the word "Rex" in connection with a proprietary medicine, complainant held entitled to restrain defendant's use of the same word in connection with medicinal preparations for similar use. United Drug Co. v. Theodore Rectanus Co. (D. C. 1913) 206 Fed. 570.

Use of a name during the life of the patent cannot be availed of after the patent has expired to make up the 10 years of actual and exclusive use necessary to authorize its registration under this section. National Lock Washer Co. v. Hobbs Mfg. Co. (D. C. 1914) 210 Fed. 516.

Where a retail dealer and his predecessors have conducted a business under a trade-name for 22 years in a city, another's use of the same name in the same business is an infringement. Nolan Bros. Shoe Co. v. Nolan (1900) 63 P. 480, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346.

In the interest of fair trade dealing, courts of equity will protect the one who has been first in the field doing business under a given name; but, where there is no fraud, no relief can be granted. Dunston v. Los Angeles Van & Storage Co. (Cal. 1913) 131 Pac. 115.

Where a person claimed under oath that he first used his trade-mark in September, 1891, he cannot maintain an action for an injunction and damages for infringement against one who adopted and used the same mark prior thereto. Hyman v. Solis Cigar Co. (1894) 4 Colo. App. 475, 36 Pac. 444.

A mark simulating the arms or seal of a state, although containing certain additions and variations, is not entitled to registration under this section, providing "that nothing herein shall prevent the registration of any mark" which has been in the "exclusive" use of the applicant for 10 years prior to the passage of the act. In re Cahn, Belt & Co. (1906) 27 App. D. C. 173.

Under section 9485, ante, and this section, an application for registration of a personal name as a trade-mark is properly refused, where it states the "class of merchandise" to be "athletic supplies," and the "particular description of goods comprised in such class" to be "implements, apparatus, and goods used in athletic games and sports," since new athletic games and sports are being invented every year, and it is impossible for the applicant to have used the name as a mark in connection with such newly invented games and sports for 10 years prior to the passage of the act. In re A. G. Spalding & Bros. (1906) 27 App. D. C. 314.

The term "actual use," as used in this section, should be strictly construed, and an applicant should not be permitted to register a word or name, unless he has actually used the mark for the required 10-year period. Id.

Congress has no power to declare what are, or what are not, lawful trade-marks, or to say that any alleged marks can be appropriated without a prior use. Id.

Where, on a question of priority of adoption and use, the testimony of S.'s witnesses, all parties in interest, is that, according to their best recollection, the trade-mark was used six, seven, eight, or nine years prior to 1898; while the testimony of M., both documentary and oral, clearly shows an adoption by him of the trade-mark in 1892 and a continuous use since that time—M. is entitled to an award of priority. Schuster Co. v. Muller (1906) 28 App. D. C. 409.

The sole use by the applicant of his name for 10 years was enough to constitute an exclusive use of the mark within the meaning of this section, and to entitle him to registration of the name as a trade-mark. Wm. A. Rogers v. International Silver Co. (1907) 30 App. D. C. 97.

An application for registration is properly denied where it appears that applicant was not the exclusive user of the words, but the opposer of the application had sold its product under the same name, which words accurately and properly described such product, and that the trade-mark of applicant, used during a part of such period of 10 years, did not itself contain such words, but that they appeared under a distinctive device, apparently to describe the contents of the applicant's package. Natural Food Co. v. Williams (1908) 30 App. D. C. 348.

An opposition to registration of the figure of a star, associated with the word "star," as a trade-mark for a brand of condensed milk, is properly dismissed where it appears that the original use of the device was on condensed milk ordered by the applicant from the opposer, a manufacturer, and so marked by the manufacturer in accordance with directions of the dealer, and that subsequent shipments to the dealer were so branded. Michigan Condensed Milk Co. v. Kenneweg Co. (1908) 30 App. D. C. 491.

Where an applicant for registration of the words "Poplar Log," or "Old Poplar Log," has shown to have used them many years prior to their use by the opposer of his application, and to have originated the brand of whisky known by that name, his application is properly granted by the commission-

er. Somers v. Newman (1908) 31 App. D. C. 193.

In a trade-mark interference case, use of the name on sample cards amounted to a trade-mark use, although it could not be affixed to the goods themselves and the dealers were the first to use the mark, and therefore entitled to registration, as against the manufacturers of the article. Case v. Murphey (1908) 31 App. D. C. 245.

The use of the word "asbestos," merely to designate machinery packing, for many years prior to the filing by another of an application for registration of the same word, made up of fancifully embellished letters, is sufficient to prevent its registration by the latter applicant under the 10-year clause of this section. H. W. Johns-Manville Co. v. American Steam Packing Co. (1909) 33 App. D. C. 224.

In a trade-mark interference, where two applicants are not entitled to registration, because of fraud practiced on the public by applying the mark to a blend, while advertising and selling the product as pure whisky, the third party is not entitled to registration on the ground that the compound and imitation whiskies of his opponents are not goods of the same descriptive qualities as pure whisky, and that, therefore, he must be said to have had the exclusive use of the mark, as all such products belong to a general class, and are merchandise of the same descriptive properties, within the meaning of that act. In re Wright (1909) 33 App. D. C. 510.

The one who is first to adopt a mark and actually use it on his goods, and not the one who first selects the mark with the intention of using it, is entitled to register it as a trade-mark. Illinois Match Co. v. Broomall (1910) 34 App. D. C. 427.

A junior user of a trade-mark in good faith, and without knowledge of its use by the prior owner, may, upon abandonment of the mark by the prior owner, acquire a property right in it. But if two or more persons are using the mark at the time of abandonment, with or without knowledge of its prior use, neither will be prior to the other in point of time, since neither can, in any event, date priority of use beyond the time when the prior owner surrendered title by the act of abandonment. Seubert v. Santaella & Co. (1911) 36 App. D. C. 447.

A decision of the Commissioner of Patents, sustaining an opposition to an application for the registration of a trade-mark, was reversed, where it appeared that the applicant adopted its mark without any intention of simulating the other mark, and that the opposer was not the originator of its mark, but copied it from another. Nestle & Anglo-Swiss Condensed Milk Co. v. Walter Baker & Co. (1910) 37 App. D. C. 148, writ of certiorari denied Walter Baker & Co. v. Nestle & Anglo-Swiss Condensed Milk Co. (1911) 32 Sup. Ct. 525.

In a trade-mark case in which a wine company established by its officers a use of the mark since 1895, a photograph, purporting to have been taken in that year, showing several barrels of its goods, upon the ends of which was stenciled a mark somewhat similar, but essentially different, it was held that the stenciling of the barrels might have been an experimental variation of the mark in question, and that the priority of the use claimed had been sufficiently shown. Carmel Wine Co. v. California Winery (1911) 38 App. D. C. 1.

Registration, for canned fruits and vegetables, of the word "Evergreen" over the representation of green string beans and a field of green growing vegetables, is properly refused under this section, where it is shown that within 10 years the use of the mark by applicant was not exclusive. Sears & Nichols Co. v. Brakeley (1912) 38 App. D. C. 530.

Whether there has been the actual trade-mark use by the applicant that is the condition of registration is a question solely for the consideration and determination of the Commissioner of Patents. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484.

An opposition to an application for the registration of a trade-mark held, because of prior use, properly dismissed. Alaska Packers' Ass'n v. Admiralty Trading Co. (1915) 43 App. D. C. 198.

While the use of a trade-mark in connection with accessory symbols or words still constitutes a use of the mark, whatever right an applicant for registration has acquired to the exclusive use of his mark must appear clearly from the use shown. Quaker City Flour Mills Co. v. Quaker Oats Co. (1915) 43 App. D. C. 260.

An opposition by the registrant of a trade-mark for a vehicle tire, located centrally of the tread portion thereof, to the application for the registration by another of a somewhat similar trade-mark for inner tubes helically disposed and applied on the surface of the tube, held properly dismissed. Goodyear Tire & Rubber Co. v. Republic Rubber Co. (1915) 43 App. D. C. 275.

Incandescent gas mantels and incandescent electric lamps are goods of the same descriptive properties, within the meaning of the Trade-Mark Act; and where the word "Mazda" has been registered as applied to such lamps, the word is not registerable by another who seeks to use it as a trade-mark for such mantels. Anglo-American Incandescent Light Co. v. General Electric Co. (1915) 43 App. D. C. 385.

One who is the original appropria-

tor of a trade-name, employs it in his business, advertises it, and establishes a reputation in connection therewith, acquires a right of property therein which will be protected by injunction. Wormser v. Shayne (1904) 111 Ill. App. 556.

A trade-mark becomes exclusive property only when one has, prior to any one else, appropriated and used it to indicate the origin, ownership, and quality of an article to which it is attached. Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

Where plaintiff for 20 years had used the brand "Waterfill & Frazier," defendants will be enjoined from using the same brand for the same business, though their firm is composed of persons named Waterfill and Frazier. Frazier v. Dowling (1897) 39 S. W. 45, 18 Ky. Law Rep. 1109.

Where two distilling concerns began the use of the same brand near the same time, and continued its use for 10 years, one whose prior right was not clear could not then enjoin use by the other, who had added greatly to its value by expending large sums of money in its advertisement. Old Times Distillery Co. v. Casey (1898) 47 S. W. 610, 20 Ky. Law Rep. 994, 104 Ky. 616, 42 L. R. A. 466, 84 Am. St. Rep. 480.

Plaintiff was authorized to use a certain trade-name. Defendant had, for many years previously, sold the product of plaintiff's predecessors under such trade-name. Held, he may not now use such name as applied to other than plaintiff's products. H. A. Williams Mfg. Co. v. Noera (1893) 158 Mass. 110, 32 N. E. 1037.

The exclusive right to a name, title, or device as a trade-mark is founded upon priority of appropriation. J. R. Watkins Medical Co. v. Sands (1901) 86 N. W. 340, 83 Minn. 326.

Where the maker of a certain kind of candy never attached or stamped his alleged trade-mark on the candy itself, but distinguished his candy merely by a display card bearing the trademark in his own show cases and windows, he acquired no rights to the trademark. Oakes v. St. Louis Candy Co. (1898) 48 S. W. 467, 146 Mo. 391.

There can be no exclusive ownership of words constituting a trade-mark apart from the use thereof to a vendible commodity, and the mark must have been affixed to the commodity a sufficient length of time to have obtained a reputation which identifies its manufacture. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

To entitle a party to restrain use of a trade-name, he must show with reasonable certainty that his adoption of the name was prior in time to that of his adversary. Chadron Opera House Co. v. Loomer (1904) 99 N. W. 649, 71 Neb. 785.

The complainant using the name "Eagle Shoes," could acquire no right in the name which would entitle him to enjoin its use by another person in the same city, who previously had conducted the "Eagle Shoe Store," and who afterwards published the fact that his store was not connected with any other. Perlberg v. Rosenstone (N. J. Ch. 1905) 62 A. 446.

One may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufactures, acquire a property therein as a trade-mark, for the invasion of which an action for damages will lie, and in the exclusive use of which he may have protection, when necessary by injunction. Stokes v. Landgraff (N. Y. 1853) 17 Barb. 608.

If plaintiffs were the first to use the word claimed by them as a designation of a particular style of goods made by them, and to have acquired a valuable interest in such designation, the defendant must be deemed estopped from using it for the same purpose. Merserole v. Tynberg (N. Y. 1868) 36 How. Prac. 14; Messerole v. Same (N. Y. 1868) 4 Abb. Prac. (N. S.) 410.

Where, for several years, others had used the figure claimed by plaintiff on the same article in various containers, plaintiff had no exclusive right to the use of the figure on tin packages; there being nothing either in the device itself or in the combination in which it was used giving plaintiff the exclusive right to the use of the same. Popham v. Wilcox (1874) 38 N. Y. Super. Ct. (6 Jones & S.) 274.

Though one discover or invent an article and give it a peculiar and distinctive name, if he permit another to appropriate it with that name and to put it forth to the public as his own, that other will become the proprietor of the name if he meets the other conditions prescribed by the law in such cases. Caswell v. Davis (1874) 58 N. Y. 223, 17 Am. Rep. 233.

One who long had printed in connection with his advertisements, a representation of a flag with stars on the upper and lower borders, is entitled to enjoin the use of the like arrangement of stars upon the representation of a flag by another person in the same business. Johnson v. Hitchcock (1888) 8 N. Y. Supp. 680.

Where a selling agent devised a label, not containing the principal's name, and not provided by him, and not stating that the article sold thereunder was the principal's, the trademark belonged to the agent, and after the termination of the agency the principal could not restrain its use by parties other than his agents. Société des Huiles d'Olive de Nice v. Rorke (1899) 52 N. E. 1126, 158 N. Y. 677, affirming judgment (1896) 39 N. Y. S. 28, 5 App. Div. 175.

Where a person in 1885 first gave commercial value to the name "Mat-

zoon," he is entitled to an exclusive property therein as a trade-name, and can restrain the use of it by others. Dr. Dadirrian & Sons Co. v. Hauenstein (1902) 74 N. Y. S. 709, 37 Misc. Rep. 23.

Where defendant was the first to use a certain trade-name for its cream cheese, continued to use the name for many years, created a demand for this brand of cheese, and had always successfully resisted any attempts by others to use the name, it acquired a right to its use to the exclusion of others. International Cheese Co. v. Phenix Cheese Co. (1907) 103 N. Y. S. 362, 118 App. Div. 499.

Where plaintiffs had printed and published and advertised very extensively a set of books designated as "Dr. Eliot's Five-Foot Shelf of Books," they were entitled to restrain defendants from advertising and selling a different set of books under the titles of "Dr. Eliot's Five-Foot Shelf of the World's Best Books" and "Dr. Eliot's Five-Foot Shelf of the World's Greatest Books." Collier v. Jones (1910) 120 N. Y. S. 991, 66 Misc. Rep. 97.

Where a firm adopts a name for its place of business, and thereafter removes from the building where it has used such name, it cannot enjoin a subsequent occupant of such premises, conducting a similar business, from using such name to designate its place of business. Mueller v. McDonough (1882) 8 Ohio Dec. 310, 7 Wkly. Law Bul. 65, reversed McDonough v. Mueller (1884) 12 Wkly. Law Bul. 204.

The appropriation as a trade-mark of the word "Samaritan" in one combination of words does not prevent its use as a trade-mark in any other combination. Appeal of Desmond (1883) 103 Pa. 126, 49 Am. Rep. 118.

Where one, selling through an agent, used a certain brand for many years, but not adopting it as an exclusive trade-mark, such agent could not later enjoin his former principal from using such mark. Miles Corson Co. v. Young (Pa. 1894) 29 Wkly. Notes Cas. 256.

In an action to enjoin the infringement of a trade-mark, whether plaintiff's predecessor in business had adopted the words as a trade-mark held a question for the jury. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

To restrain an unfair use of a trade-name, a plaintiff or his predecessor must have had a prior use of the name. Wright Restaurant Co. v. Seattle Restaurant Co. (1912) 122 Pac. 348, 67 Wash. 690.

A corporation that had used its corporate name in its business transactions for 10 years before plaintiff commenced doing business in that state cannot be held to have wrongfully used the name of plaintiffs. High Court of Wisconsin Independent Order of Foresters v. Commissioner of Insurance of Wisconsin (1897) 73 N. W. 326, 98 Wis. 94.

37. Abandonment and extinguishment.—Barring action or suit, see notes under § 9506, post.

Where a son is the first to adopt and use a trade-mark, and has not parted with his interest in it, he does not, by acquiescing in its use by his father jointly with him, forfeit his right to claim the trade-mark as his own property. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

If a partner acquires an interest in a trade-mark through its use during his membership in the firm, it ceases upon his withdrawal, in the absence of an agreement to the contrary, and remains with the partner who continues to conduct the business. Bluthenthal v. Bigbie (1907) 30 App. D. C. 118.

Where, prior to the passage of a law temporarily restricting, but not prohibiting, the sale of intoxicating liquors within a state, an applicant for registration of a trade-mark had acquired a property right in the mark, and during the life of such statute was engaged in the manufacture of whisky in the state, and engaged in interstate business, it cannot properly be said that during such period he abandoned the use of the mark so as to prevent its future registration. Hannis Distilling Co. v. George W. Torrey Co. (1909) 32 App. D. C. 530.

A grant by the patentee of a license to manufacture and sell under the patent, in return for royalties on the articles sold, is not an abandonment of the right to claim and register a mark used in connection with the patented article as a trade-mark. Mathy v. Republic Metalware Co. (1910) 35 App. D. C. 151.

The holder of a registered trade-mark for all kinds of canned fish, who has used it only on canned salmon, is entitled to oppose the registration of a similar mark to be used on canned sardines. Nonuser will not deprive the owner of protection against an infringer. In re John Braadland (1911) 37 App. D. C. 602.

Where one for five years wholly discontinued the use of a trade-mark, he will be held to have intended to abandon it, where it seeks to resume its use after a rival concern has established a good business under it. Levering Coffee Co. v. Merchants Coffee Co. (1912) 39 App. D. C. 151.

There was no such acquiescence by the applicant in its use by another as to disentitle him to registration upon opposition by the other, where the applicant, upon learning of the opposer's use, notified him to discontinue, and the opposer stated that such use had been inconsequential and had about

terminated. B. Fischer & Co. v. Knickerbocker Mills Co. (1914) 42 App. D. C. 570.

38. Nature of property.—The generic name of an article which is dedicated to the public by the expiration of the patent of the article cannot be withdrawn from public use by the former owners of the patent by its use as one of the constituent elements of a trade-mark. Singer Manuf'g Co. v. June Manuf'g Co. (1896) 16 Sup. Ct. 1002, 163 U. S. 169, 41 L. Ed. 118, reversing decree (C. C. 1889) 41 Fed. 208.

The interest of a partner in the firm's trade-marks is too intangible to be reached in equity at the suit of a judgment creditor. Taylor v. Bemis (C. C. 1864) Fed. Cas. No. 13,779.

A manufacturer is not deprived of his right to a common-law trade-mark by the registering of other additional trade-marks. Gorham Mfg. Co. v. Weintraub (D. C. 1912) 196 Fed. 957.

The exclusive right to a trade-mark is a species of property recognized by law. Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

No abstract right in a trade-mark exists; it being property only when appropriated and used to indicate the origin or ownership of the article to which it is applied. Avery v. Meikle (1883) 81 Ky. 73.

A trade-mark held not property, as such, until it has become associated with and is a part of the business with which it has been connected. Detroit Creamery Co. v. Velvet Brand Ice Cream Co. (Mich. 1915) 153 N. W. 664.

Mere adoption of a mark, and a public declaration that it has been so adopted, creates no right to the exclusive use of such mark, since no title arises until a thing is actually on the market, marked with such particular trade-mark. McVey v. Brendle (Pa. 1888) 5 Lanc. Law Rev. 350.

39. Extent of rights acquired.—See notes under § 9485, ante.

40. Subject-matter of trade-mark.—A valid trade-mark cannot be acquired in a word which has been previously appropriated and used by other parties as a brand for like goods. Columbia Mill Co. v. Alcorn (1893) 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, affirming (C. C. 1889) 40 Fed. 676.

The protection of a trade-mark cannot be obtained for an organic article, such as a species of grapevine, which, by the law of its nature, is reproductive, and derives its chief value from its innate vital powers, independent of the care or ingenuity of man. Hoyt v. J. T. Lovett Co. (1895) 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44.

The generic name of a thing is not the subject of a trade-mark. H. B. Chaffee Mfg. Co. v. Selchow (1905) 135 Fed. 1021, 68 C. C. A. 668, affirming judgment (C. C. 1904) 131 Fed. 543.

There cannot be a valid trade-mark in a cigar band, the only characteristics of which are that it is wider at one end than the other and that it is of a brown color with white lettering thereon. E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co. (1905) 142 Fed. 160, 73 C. C. A. 378, affirming decree (C. C. 1905) 136 Fed. 866.

Public policy prevents registration of marks consisting of immoral or scandalous matter, or simulating flags and coats of arms, and perhaps the same principle prevents registration of trade-marks simulating those used by others. Thaddeus Davids Co. v. Davids (1910) 178 Fed. 801, 102 C. C. A. 249.

Literary property in a book cannot be protected by a trade-mark, nor otherwise than by copyright. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 S. Ct. 73, 231 U. S. 346, 58 L. Ed. 262.

Neither the law of trade-marks nor trade-names can afford protection to detective stories, as such, whether published or not, and much less where neither title nor composition is pirated, and but a single common character is used by the alleged infringer. Id.

While a surname may not constitute the subject of a technical trade-mark, it may, by appropriation and exclusive use, acquire a secondary signification as denoting the product of a particular person, factory, or business which may become the subject of an exclusive right. Chickering v. Chickering & Sons (1914) 215 Fed. 490, 131 C. C. A. 538.

A barrel of peculiar form, dimensions, and capacity, irrespective of any marks or brands impressed upon or connected with it, cannot become a lawful trade-mark, or a substantive part of a lawful trade-mark. Moorman v. Hoge (C. C. 1871) Fed. Cas. No. 9,783.

There may be a valid trade-mark in a stick upon which carpets are rolled, and which presents a peculiar shape and appearance at the ends of the roll. Lowell Mfg. Co. v. Larned (C. C. 1873) Fed. Cas. No. 8,570.

An ornamented tin pail, given away on the sale of paper collars contained therein, held not a trade-mark. Harrington v. Libby (C. C. 1877) Fed. Cas. No. 6,107.

The use of Venetian red to seal up openings in boxes, no mark or design being impressed thereon, could not constitute a trade-mark, since as to both color and material it is one of the most common of all cements used for sealing up jars, bottles, cans, and similar packages. Sawyer v. Horn (C. C. 1880) 1 Fed. 24, 31.

No one, by using a particular material, as tin, paper, wood, or leather, as a label or tag for goods, can acquire an exclusive right in a popular designation applied by the public to such goods, as "Tin Tag," "Paper Tag," etc. Lorillard v. Pride (C. C. 1886) 28 Fed. 434.

There can be no valid trade-mark in a

piece of tin used as a tag for tobacco, regardless of its color, shape or inscriptions upon it, as tin is one of the common metals in use by the public for a very large variety of purposes. Id.

An application for a trade-mark stated that it consisted "essentially of the illustration of a boy in a position indicating suffering from cramps." Immediately below the figure of the boy were the words "Cramp cure," forming part of the expression, "Cramp cure for every ache or pain," but this descriptive matter might be altered or omitted at pleasure, without affecting the character of the trade-mark. Held, the trade-mark consisted in the design of the suffering boy, which the application stated to be the essential feature, and the words "Cramp cure" formed no part thereof. L. H. Harris Drug Co. v. Stucky (C. C. 1891) 46 Fed. 624.

Nothing can legally be appropriated as a trade-mark which, aside from superiority in excellence, popularity, or cheapness of the article bearing it, would practically confer upon him a monopoly in the production or sale of like articles. Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651.

"Rischon-le-Zion" is the name given to a tract of land in Palestine devoted to the raising of grapes and the production of wines and brandies; agencies were established under the name of the "Carmel Wine Company," "Carmel" being the name of a mountain in Palestine where no grapes or wine are produced. Held, that such names might properly be adopted as trade-marks for such particular products. Jewish Colonization Ass'n v. Solomon & Germansky (C. C. 1907) 154 Fed. 157.

A family surname is not the subject of a valid trade-mark as against others of the same name. Thaddeus Davids Co. v. Davids (C. C. 1908) 165 Fed. 792, decree reversed (1910) 178 Fed. 801, 102 C. C. A. 249.

A check figure, formed of intersecting lines impressed on the beveled face beneath the heads of horseshoe nails, held a valid trade-mark and infringed. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

The word "Union" cannot be exclusively appropriated as a trade-mark for tobacco packages. American Tobacco Co. v. Globe Tobacco Co. (C. C. 1911) 193 Fed. 1015.

Spots on cordage made by the use of colored strands when it is woven cannot be made the subject of a trade-mark. Samson Cordage Works v. Puritan Cordage Mills (D. C. 1912) 194 Fed. 573.

A trade-mark stamped by an American manufacturer on silverware held not invalid because the emblems composing it were previously used as English hall-marks. Gorham Mfg. Co. v. Weintraub (D. C. 1912) 196 Fed. 957.

Black rectangular figure, upon which words of registered trade-mark were placed, held no part of the trade-mark. Planten v. Gedney (D. C. 1915) 221 Fed. 281, decree reversed (1915) 224 Fed. 382, 140 C. C. A. 68.

A business sign with a row of beer barrels painted on it, with the letters "P. B." on the heads, the words "Depot of the Celebrated" above, and the words "Philadelphia Beer" below, cannot be protected as a trade-mark per se. Eggers v. Hink (1883) 63 Cal. 445, 49 Am. Rep. 96.

Under the express provisions of this section, a pictorial simulation of the arms and seal of a state, though containing certain additions and variations, is not entitled to registration as a trade-mark. In re Cahn, Belt & Co. (1906) 27 App. D. C. 173.

Under the provisions of this section, a mark, which simulates the seal of the Department of Justice, and also the great seal of the United States, is not entitled to registration. In re William Connors Paint Mfg. Co. (1906) 27 App. D. C. 389; In re American Glue Co. (1906) 27 App. D. C. 391.

Under the provisions of this section, no person has a vested right to register as a trade-mark a simulation of the great seal of the United States, no matter how long he has used such mark in the past. In re American Glue Co. (1906) 27 App. D. C. 391.

A trade-mark consisting of a section of a tube having a sparkling or mottled appearance upon its outside surface, caused by the impression thereon of flakes of mica, is not registerable. In re American Circular Loom Co. (1906) 28 App. D. C. 446.

A trade-mark does not apply to other articles of merchandise not of the same descriptive properties as those to which it has been attached or affixed. Consumers Co. v. Hydrox Chemical Co. (1913) 40 App. D. C. 284.

A circular or O-shaped film having distinct edges, on the back of a spoon bowl, being functional, in that it prevents wear of the contact point, is not subject to registration as a trade-mark. In re Oneida Community (1913) 41 App. D. C. 260.

Every one is at liberty to adopt any symbol or device, not previously appropriated, which will distinguish his product from articles of same general nature sold or manufactured by others. Handy v. Commander (1897) 22 So. 230, 49 La. Ann. 1119.

Any word or device that has for its principal object to identify the owner of specific goods prepared and sold by him, may constitute a valid trade-mark. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

A corporation manufacturing wire glass has no exclusive right to use therein wire with a particular mesh, where the idea as to the construction of the glass and the use of that form of mesh is not original with it or its predeces-

sors, and it has no patent thereon. Mississippi Wire Glass Co. v. Continuous Glass Press Co. (N. J. Ch. 1911) 81 A. 374.

The law of trade-marks applies to natural and spontaneous products, as well as artificial, which are made the subject of commerce. Congress & Empire Spring Co. v. High Rock Congress Spring Co. (N. Y. 1871) 10 Abb. Prac. (N. S.) 348.

The secret of manufacture contains no such property that an article can be protected by the use of a trade-mark. The property and right to protection is in the device or symbol to designate the goods, and not in the article manufactured. Godillot v. Hazard (N. Y. 1875) 49 How. Prac. 5.

A particular process of manufacture may be owned, or a particular mark or name, designating the manufacturer, may, by use become the subject of protection, but not words and phrases in common use describing truly an article offered to the public. Helmbold v. Helmbold Mfg. Co. (N. Y. 1877) 53 How. Prac. 453.

A wrapper coated with tinfoil, and having around the edge a blue paper band with gilt letters thereon, constitutes a proper trade-mark. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1881) 23 Hun, 632, reversed (1882) 89 N. Y. 292, 42 Am. Rep. 294.

A mere idea, represented by a figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be the subject of a trade-mark. Enoch Morgan's Sons Co. v. Troxell (1882) 89 N. Y. 292, 11 Abb. N. C. 86, 42 Am. Rep. 294, reversing (N. Y. 1881) 23 Hun, 632.

While the language descriptive of the character or quality of cigars or the workmen by whom they were made, was not the subject of a trade-mark, in other respects, the label of the Cigar Makers' Union contained features making it effective as such. People v. Fisher (1889) 50 Hun, 552, 3 N. Y. Supp. 786.

Law protecting trade-names of any beverage, medicine, perfumery, or mixture, put up in any vessel or receptacle, did not include in the term "mixture" acetylene gas stored in a receptacle. Prest-O-Lite Co. v. American Auto Supply Co. (Mun. Ct. N. Y. 1913) 147 N. Y. Supp. 150.

A manufacturer of horseshoe nails coated them with bronze for the sole purpose of making them popular. Held, there was no trade-mark in the bronzed nail, and a bill would not lie to restrain defendant from making such nails. Putnam Nail Co. v. Dulaney (1891) 140 Pa. 205, 21 Atl. 391, 27 Wkly. Notes Cas. 360, 23 Am. St. Rep. 228, 11 L. R. A. 524 affirming (1890) 8 Pa. Co. Ct. R. 595.

41. Persons who may acquire trade-marks.—See notes under § 9485, ante.

42. Number of trade-marks.—See notes under § 9485, ante.

43. Origin and adoption of mark or name.—It is only the actual use of a mark, device, or symbol by the dealer which entitles him to, and gives him the right to be protected in, the enjoyment of it as a trade-mark. Blackwell v. Armistead (C. C. 1872) Fed. Cas. No. 1,474; William Rogers Mfg. Co. v. Rogers & S. Mfg. Co. (C. C. 1882) 11 Fed. 495; Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707; Shaver v. Shaver (1880) 54 Iowa, 208, 6 N. W. 188, 37 Am. Rep. 194.

Where the discoverer of a certain vine sold a few cuttings under a certain trade-mark, and his customers used the same mark for it, plaintiff using it four years after first obtaining his cuttings did not show priority of adoption and use of the alleged trade-mark, though the discoverer, at the time he sold the cuttings to them, had agreed not to sell to any others, and had informed complainants that no vines had been sold which would interfere with them. Hoyt v. J. T. Lovett Co. (1895) 71 Fed. 173, 17 C. C. A. 652, 31 L. R. A. 44.

Plaintiffs made for several years a kind of beer, to which they gave the name "Kulmbacher," and afterwards two other grades of beer, to one of which they gave the name "Imperial." On each case of Imperial beer, designed for export, that name was on the label, with plaintiffs' name, and the coat of arms and name "Empire Brewery" were printed in the corner of the label, with the words "Trade-Mark." Held, that plaintiffs had not adopted the word "Imperial" as a mark of origin or ownership, and were not entitled to protection in its use as a trade-mark. Beadleston & Woerz v. Cooke Brewing Co. (1896) 74 Fed. 229, 20 C. C. A. 405.

Where at least 15 years prior to complainants' appropriation of a flour trade-mark containing the words, "White Swan" and the picture of a swan floating on water such words had been quite generally used, and the picture of the swan, etc., had been adopted and used by at least two other firms, complainants were not entitled to claim that they were the originators of the brand, though they changed the arrangement of the marks and picture in immaterial respects. Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76.

The words "XX Century Fire Pot," used to designate a patented fire pot both by complainant and another concern, each of which made and sold furnaces or stoves containing such fire pot, cannot be protected as a trade-name of complainants. Germer Stove Co. v. Art Stove Co. (1907) 150 Fed. 141, 80 C. C. A. 9.

One adopting a trade-mark held re-

quired to bring it to the attention of the public, and thereby prevent others from adopting it. Theodore Rectanus Co. v. United Drug Co. (1915) 226 Fed. 545, 141 C. C. A. 301.

The owner of goods is entitled to the exclusive use of a trade-mark devised and applied by him, although he is not himself the manufacturer, and the name of the manufacturer is used as a part of the trade-mark. Walton v. Crowley (C. C. 1856) Fed. Cas. No. 17,133.

Where complainants were the first to adopt and use as a mark for their product tin tags variously colored, with the name of their brand and their own name stamped thereon, they had the right to the device as a trade-mark; the public having come to know their tobacco by the tags of their peculiar color, shape, and size. Lorillard v. Wight (C. C. 1883) 15 Fed. 383.

A. adopted, in 1878, the name of "Kaiser," as a trade-mark for natural mineral water, and used it in foreign commerce. For many years prior thereto mineral water known as "Kaiser spring," "Kaiser fountain," had been sold in various places in Europe, with the addition of the name of the place where the spring from which the water was obtained was located. Held, the word "Kaiser" was not a valid trade-mark, as other parties had acquired and exercised the right to use it. Luyties v. Hollendeer (C. C. 1887) 30 Fed. 632.

Where a word is coined and used as a trade-mark on articles manufactured from a certain substance, the fact that such word subsequently becomes the common appellative of such substance cannot impair the rights acquired in the word, and, while others can use it to designate the product, they cannot apply it in any way as a trade-mark. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1887) 32 Fed. 94.

Complainant had placed on the face of the head of one of its several brands of nails a common form of check pattern, adopted as an ornamentation, and as a distinguishing mark of complainant's make, but public attention was not called to it in advertisements, nor upon its cartons or boxes which displayed its registered trade-mark and other matters of information. Held, such use alone did not constitute the marking a trade-mark, in the absence of clear proof that it was adopted and used as such, or that it had become associated in the mind of the public with complainant's make of nails. Capewell Horse Nail Co. v. Putnam Nail Co. (C. C. 1905) 140 Fed. 670.

The right to a trade-mark does not depend upon any particular period of user, but once it is adopted in good faith and used, the right thereto inures, and will prevail against any subsequent user. Walter Baker & Co. v. Delapenha (C. C. 1908) 160 Fed. 746.

Where the same trade-mark is used by different persons in the same line of business, and operating partly at least in the same territory, the exclusive use is awarded to him who first devised and used the same, provided he asserts his rights without laches. Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin (C. C. 1909) 171 Fed. 125, decree affirmed Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin (1910) 183 Fed. 22, 105 C. C. A. 314.

That a truly descriptive name has first been applied by one to an article manufactured, produced, or sold by him, and that such term has acquired by association a secondary meaning pointing to origin or ownership, will not preclude others having a right to manufacture, produce, or sell articles of the same kind from fairly applying to them such truly descriptive name. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557.

Registration of a trade-mark is grantable only to the one first to adopt and use the mark as provided by law. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

Where a company manufacturing playing cards advertises in connection with its regular trade-mark, one of its many brands of cards as "stage" cards, which are copyrighted, the word "stage" is to be considered as a descriptive word, used for the purpose of indicating style, class, and grade, and does not prove user of the name as a trade-mark to indicate origin and ownership. United States Playing Card Co. v. C. M. Clark Pub. Co. (1907) 30 App. D. C. 208.

Registration of the word "Phœnix" as a trade-mark for ready mixed paints, stains, Japans, and varnishes is properly refused, where it appears that another applicant has adopted and made prior use of the same word as a trade-mark for paint colors and paste paints; the goods of both applicants being of the same descriptive properties. Phœnix Paint & Varnish Co. v. John T. Lewis & Bros. (1908) 32 App. D. C. 285.

Registration of the words "Mountain Dew," as applied to whisky is properly denied when it is shown that during the 10 years preceding the passage of the act other manufacturers of whisky have sold large quantities of whisky so branded, and advertised the brand in trade periodicals and agents' price lists. Charles Dennehy & Co. v. Robertson, Sanderson & Co. (1909) 32 App. D. C. 355.

In case of a technical trade-mark, the party first to adopt and use the mark is entitled to registration; in case of a nontechnical mark, the applicant, although the first to adopt and use the mark, is not entitled to registration if an opposer has used it prior to the ter-

mination of the 10-year period. Carter Medicine Co. v. Barclay (1910) 36 App. D. C. 123.

Although certain letters and numerals may have come to indicate the origin or ownership of appellants' plows, as they did not appropriate them by adoption, use, or claim as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose. Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

A property right may be acquired in devices, emblems, and title-pages of an almanac by adoption and use. Robertson v. Berry (1879) 50 Md. 591, 33 Am. Rep. 328.

Where one used the word "Knickerbocker" on shoes manufactured by him, for two years, but not to designate any particular style, and also used other names, but most of which were used for the special goods of particular manufacturers, defendant was not prevented thereby from acquiring a trade-mark in the word by the course of his business. Burt v. Tucker (1901) 59 N. E. 1111, 178 Mass. 493, 52 L. R. A. 112, 86 Am. St. Rep. 499.

It seems that the right to use a word as a trade-mark does not depend on originality even as against the originator of the peculiar use. Id.

Plaintiff was incorporated in 1887 under the name of the "Northwestern Knitting Company," and has since engaged in the business of knitting underwear and disposing of it under its corporate name. Fifteen years later defendant opened a factory for the manufacture of knit sweaters and heavy knit underwear, adopting the name "Northwestern Knitting Mill." Held that, by a prior adoption of the name and its continued use for such a length of time, plaintiff acquired trade-mark rights therein. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

Where a voluntary association of cigar makers, which puts no goods in the market, adopts a name to distinguish cigars made by any of them, but has not applied the name to any commodity of which it is the owner, or in which it trades, and which is in the market with the name attached, it acquires no trade-mark in the name. Schneider v. Williams (1888) 44 N. J. Eq. (17 Stew.) 391, 14 Atl. 812.

A picture placed on the first number of a series of books, as a frontispiece, where it did not appear that it was intended to be a trade-mark or a symbol, and was spoken of as an illustration, had not been adopted as a trade-mark so as to entitle plaintiff to a property right therein. Munro v. Smith (1890) 55 Hun, 419, 8 N. Y. Supp. 671, reversing judgment (1888) 2 N. Y. Supp. 313.

Where the designer and manufacturer of a certain cigar label had sold the same label to other cigar manufacturers before it was adopted by plaintiff as a trade-mark, plaintiff is not entitled to its exclusive use. Wagner v. Daly (1893) 67 Hun, 477, 22 N. Y. Supp. 493.

The right to use a particular name as a trade-name belongs to him first appropriating and using it in connection with a particular business. Rosenburg v. Fremont Undertaking Co. (Wash. 1911) 114 Pac. 886.

The right to a trade-mark depends on priority of appropriation and has been long recognized by both law and equity courts, and registration under the acts of Congress neither creates nor destroys rights in trade-marks. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

44. Mode of affixing mark or name.—Evidence held not to establish the claim that complainant, a manufacturer of electric lamps, affixed its trade-mark to the inside of the stem for the purpose of enabling it to prevent others from remaking and reselling such lamps after they were burned out, but to show that such location was selected for legitimate trade-mark purposes. General Electric Co. v. Re-New Lamp Co. (C. C. 1904) 128 Fed. 154.

45. Extent and continuance of use.—Limited sales of medical preparations in this country by a foreign manufacturer, upon special orders do not amount to use in such circumstances as to publicity and length of use, as show an intention to adopt a symbol placed upon such preparations as a trade-mark. Kohler Mfg. Co. v. Beeshore (1893) 59 Fed. 572, 8 C. C. A. 215 (affirming [C. C. 1892] 53 Fed. 262); Richter v. Reynolds (1893) 59 Fed. 577, 8 C. C. A. 220, affirming Kohler Mfg. Co. v. Beshore (C. C. 1892) 53 Fed. 262, and Richter v. Anchor Remedy Co. (C. C. 1892) 52 Fed. 455.

Intermittent sales of goods at long intervals under a certain name, not such use as to give a right to a trade-mark, as against a later but innocent and uninterrupted use of the same name by others through several years, building up an extensive business. Levy v. Waitt (1894) 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190, affirming (C. C. 1893) 56 Fed. 1016.

The common-law right to the exclusive use of a word, symbol, or device as a trade-mark is not given merely by its adoption as such, but it must also have been used for such a length of time, and under such circumstances, as to identify the goods in connection with which it is used to the trade as those of a particular manufacturer or dealer as distinguished from those of other manufacturers or dealers. Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. (1901) 113 Fed. 468, 51 C. C. A. 302.

A pharmacist in New York City for 20 years made and sold a liquid prepa-

ing Co. v. Burt Olney Canning Co. (1908) 32 App. D. C. 279.

Where the attention of the applicant for registration of the words "Our Worth" is called to the prior registration of the word "Worth" for goods of the same descriptive qualities, the burden is on the applicant to show either that he was the first to adopt and use the mark, or that its use had been abandoned by the party who had registered it. In re Nash Hardware Co. (1909) 33 App. D. C. 221.

Where it appears that the applicant for registration of "Hoff" as a trade-mark for malt extract, on the ground that he had exclusive use of the mark for 10 years preceding the passage of this section, within such 10-year period procured a decree against a rival concern, reciting the sale by it of malt extract under that name, and enjoined it from using the name, and the applicant offers no proof of his exclusive use, but stands upon the statement of such use made in the affidavit filed in support of his application, registration is properly refused. In re Hoff (1909) 33 App. D. C. 233.

In proceedings to register a nontechnical trade-mark, the burden of proving by clear and convicting evidence that the applicant has had the sole use of the mark to the exclusion of all others for 10 years next preceding the passage of this section is upon applicant. Id.

Where an application for registration of a trade-mark is regular in form, the applicant is entitled to registration unless his prima facie case is overcome by evidence on behalf of the opposer, in which event it is incumbent on the applicant to establish his right to registration by a fair preponderance of testimony. William Wrigley, Jr., & Co. v. Norris (D. C. 1909) 34 App. D. C. 138.

49. —— **Weight and sufficiency.**—Evidence held to warrant a finding that the word "Ideal," as applied to brushes, had been understood as indicating brushes sold by H. and his predecessors, and not those made exclusively in England, so that an application by H. for registration of the word as a trade-mark, with a declaration that he had used it for ten years, was properly granted. Hughes v. Alfred H. Smith Co. (1913) 209 Fed. 37, 126 C. C. A. 179, affirming decree (D. C. 1913) 205 Fed. 302.

Evidence held to show that a trade-mark registered by complainant was valid, and that the same was infringed by defendant, authorizing complainant to relief. Planten v. Gedney (1915) 224 Fed. 382, 140 C. C. A. 68, reversing decree (D. C. 1915) 221 Fed. 281, and decree amended (1915) 228 Fed. 338, 142 C. C. A. 630.

Evidence held insufficient to indicate that complainant adopted the red cross as a trade-mark for toothbrushes to indicate quality only. Loonen v. Deitsch (C. C. 1911) 189 Fed. 487.

Evidence held to establish the validity of the registered trade-mark "Coca-Cola," under this section. Coca-Cola Co. v. Deacon Brown Bottling Co. (D. C. 1912) 200 Fed. 105.

Exclusive use for 10 years of the words "Old Lexington Club," as applied to whisky, is not shown where it appears that the opposer, during that time, has been using the words "Lexington Club," as applied to whisky. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co. (1908) 31 App. D. C. 223.

The affidavits submitted by the applicant for registration of the words "Our Worth" as a trade-mark to show that a prior registrant of the word "Worth" as a trade-mark for similar goods had abandoned the use of the mark held insufficient to so show. In re Nash Hardware Co. (1909) 33 App. D. C. 221.

Proof of the use of "Planten's C. & C. or Black Capsules," where those words have been registered, does not establish a use of the words "Black Capsules" as a trade-mark, for the words eliminated from the registered mark are, under a prior application, an essential part of that mark. Planten v. Canton Pharmacy Co. (1909) 33 App. D. C. 268.

Evidence that the words "Old Crow" have been used for many years by plaintiff and his predecessors as the mark of their brand of whisky, and that plaintiff has succeeded directly to the rights of the original distiller of such whisky, is prima facie sufficient to show plaintiff's right of trade-mark in the words "Old Crow." W. A. Gaines & Co. v. Leslie (1898) 54 N. Y. Supp. 421, 25 Misc. Rep. 20.

Cited without definite application, Trade-Mark Cases (1879) 100 U. S. 82, 97, 25 L. Ed. 550; U. S. v. Seymour (1894) 14 Sup. Ct. 871, 872, 153 U. S. 353, 38 L. Ed. 742; Warner v. Searle & Hereth Co. (1903) 24 Sup. Ct. 79, 80, 191 U. S. 195, 48 L. Ed. 145; Halter v. Nebraska (1907) 27 Sup. Ct. 419, 421, 205 U. S. 34, 51 L. Ed. 696, 10 Ann. Cas. 525; Dadirrian v. Yacubian (1900) 98 Fed. 872, 874, 39 C. C. A. 321; Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 666.

§ 9491. (Act Feb. 20, 1905, c. 592, § 6, as amended, Act March 2, 1907, c. 2573, § 2.) Examination of application; publication of trade-mark; filing notice of opposition; issue of certificate of registration where no notice of opposition; refusal of application on examination.

On the filing of an application for registration of a trade-mark

which complies with the requirements of this Act, and the payment of the fees herein provided for, the Commissioner of Patents shall cause an examination thereof to be made; and if on such examination it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of this Act, the Commissioner shall cause the mark to be published at least once in the Official Gazette of the Patent Office. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor, in the Patent Office within thirty days after the publication of the mark sought to be registered, which said notice of opposition shall be verified by the person filing the same before one of the officers mentioned in section two of this Act. An opposition may be filed by a duly authorized attorney, but said opposition shall be null and void unless verified by the opposer within a reasonable time after such filing. If no notice of opposition is filed within said time, the Commissioner shall issue a certificate of registration therefor, as hereinafter provided for. If on examination an application is refused, the Commissioner shall notify the applicant, giving him his reasons therefor. (33 Stat. 726. 34 Stat. 1252.)

See notes to section 1 of this act, ante, § 9485.

This section, as originally enacted, did not contain the provision, "An opposition may be filed by a duly authorized attorney, but said opposition shall be null and void unless verified by the opposer within a reasonable time after such filing." That provision was inserted by amendment of the section, making it read as set forth here, by Act March 2, 1907, c. 2573, § 2, last cited above.

Fees on filing applications for registration, and on filing notice of opposition thereto, were prescribed by sections 1 and 14 of this act, ante, § 9485, and post, § 9496.

Notes of Decisions

1. Publication of mark.
2. Notice of opposition.
3. Priority of use.
4. Abandonment and extinguishment.
5. Right to registration.
6. Deception of public.
7. Opposition in general.
8. Amendment of opposition.
9. Conditions precedent.
10. Laches.
11. Evidence.
12. Determination of application.
13. Conclusiveness of decisions.

1. Publication of mark.—Where there is a material change made in the original application of a trade-mark, the commissioner is justified, under the provisions of this section, in ordering a second publication. Carter Medicine Co. v. Barclay (1910) 36 App. D. C. 123.

2. Notice of opposition.—Notice of opposition cannot be amended, after period allowed for filing such notice, so as to carry back the date of the opposer's alleged use of the mark to a period prior to that stated in the notice of opposition. Hannis Distilling Co. v. George W. Torrey Co. (1909) 32 App. D. C. 530.

3. Priority of use.—See notes under § 9490, ante.

4. Abandonment and extinguishment.—See notes under § 9490, ante, and § 9506, post.

5. Right to registration.—The Patent Office should not recognize a property right in a mark, and grant it registration, when the courts, upon the same facts, would decline to protect the mark if registered. Levy v. Uri (1908) 31 App. D. C. 441.

A party may not segregate his trade-mark, and, by registering each of its features separately, thereby prevent the registration by another party of any particular part of the mark as actually used. Planten v. Canton Pharmacy Co. (1909) 33 App. D. C. 268.

A trade-mark will not be registered where registration would revive a monopoly heretofore held under a patent now expired. In re Oneida Community (1913) 41 App. D. C. 260.

Where an article is known by a certain name, and the registration of that name is sought, an opposition based upon the manufacture and sale of such article during the 10-year period is sufficient. Tim & Co. v. Cluett, Peabody & Co. (1914) 42 App. D. C. 212.

The registration of the word "Troy" as a trade-mark for men's outer shirts and collars will not be denied upon opposition wherein the opposer alleges merely that 90 per cent. of the collars and a large percentage of the shirts made in the country are made in the city of Troy, N. Y., where it has not used the word as a mark on its shirts and collars. Id.

6. Deception of public.—See notes under § 9490, ante, and § 9506, post.

7. Opposition in general.—Under section 9485, ante, the Commissioner of Patents is vested with power merely to determine whether the trade-mark is subject to appropriation, and has actually been used in interstate or foreign commerce, and he cannot require the

applicant to add to his drawing matter appearing on the specimen, but not contained in the drawing. In re Standard Underground Cable Co. (1906) 27 App. D. C. 320.

One who has used a word as a trade-name, although he is not entitled to ownership of it as a trade-mark, is entitled to oppose the application of another for the registration of the name as a trade-mark. Johnson v. Brandau (1909) 32 App. D. C. 348.

If the opponent in an opposition has not used the contested mark as a trade-mark upon goods of a like description, he has no foundation for the opposition to its registration by another, for he can sustain no legal injury or damage thereby. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484.

Proof of actual damages is not essential to the maintenance by a corporation of an opposition to the registration of its corporate name by another as a trade-mark in violation of section 9490, ante; and it is immaterial that the opposer has not actively engaged in the business for which it was incorporated. Asbestone Co. v. Philip Carey Mfg. Co. (1914) 41 App. D. C. 507.

An opposer, who shows no personal interest in the subject-matter, cannot assert the use of the mark by third persons in support of his opposition. Tim & Co. v. Cluett Peabody & Co. (1914) 42 App. D. C. 212.

Proceedings for the registration of a trade-mark may be changed or abolished; and cases pending at the time of the enactment of an amendatory statute are governed by it, unless expressly excepted from its operation. Given v. New York Athletic Club (1914) 42 App. D. C. 558.

An opposer waives its right to object upon the ground that the mark is the distinguishing part of its corporate name, by failing to set out such objection in the notice of opposition. Rookwood Pottery Co. v. A. Wilhelm Co. (1915) 43 App. D. C. 1; Simplex Electric Heating Co. v. Gold Car Heating & Lighting Co. (1915) 43 App. D. C. 28.

One who has not shown that he will be damaged by the registration of a trade-mark cannot urge in opposition that the mark has not been in actual use by the applicant as a trade-mark for the goods claimed. B. V. D. Co. v. Potterf (1915) 43 App. D. C. 33.

8. Amendment of opposition.—Quære, whether an amendment to an opposition to registration of a trade-mark setting up a new ground of opposition will be equivalent to a new opposition, and therefore not permissible if the period within which opposition can be made has elapsed. Battle Creek Sanitarium Co. v. Fuller (1908) 30 App. D. C. 411.

9. Conditions precedent.—This section is not satisfied by the filing of the notice by a party, verified by his attorney, even though such party is out of the country. Martin v. Martin & Bowne Co. (1906) 27 App. D. C. 59.

10. Laches.—Where an opposition is not properly verified by the person filing it, and an instrument which is practically a new application, properly verified, is filed after the expiration of such period, it is filed too late. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. (1908) 31 App. D. C. 498.

Quære, whether an opposer to an application for registration of a trade-mark, who has failed to properly verify his opposition filed within the 30 days allowed him, may be given leave by the Commissioners of Patents, after the expiration of that time, to make a proper affidavit to his original opposition. Id.

11. Evidence.—The rule that a judge is not to shut his eyes to what everybody else of intelligence knows applies in proceedings in the Patent Office. In re Excelsior Shoe Co. (1913) 40 App. D. C. 480.

Though no evidence in introduced to show that there is such an organization as boy scouts, the Commissioner of Patents may take judicial notice of the fact in passing upon an application for a trade-mark involving that name. Id.

Opinion testimony as to confusion in trade, if similar words were applied as trade-marks to the same class of goods, is of no great assistance in determining the question; but the effect of the marks upon the mind of the tribunal is the controlling factor. Waterbury Chemical Co. v. Reed & Carnrick (1913) 41 App. D. C. 256.

Upon opposition upon the sole ground that the applicant is estopped to deprive opposer of the right to use it, and hence not entitled to registration, the applicant need not introduce evidence on any other question, but he waives his right to confine the issue to this point by introducing evidence on other points. B. Fischer & Co. v. Knickerbocker Mills Co. (1914) 42 App. D. C. 570.

12. Determination of application. — The commissioner of patents has the right to consider and determine whether the word or words can become the subject of lawful appropriation as a trade-mark, and, if they cannot, to reject the application; his duties in that respect being more than ministerial. U. S. v. Duell (1901) 17 App. D. C. 471.

A trade-mark must be considered in its entirety, as described in the application for its registration; and the fact that certain letters used in it may constitute a valid technical trade-mark in themselves has no bearing upon the question whether the application will be

granted or denied. In re Schweinfurter Pracisions-Kugel-Lager-Werke Fichtel & Sachs (1912) 38 App. D. C. 279.

British statutes, certified to, concerning standards for sterling silver, and establishing assay officers for the certification thereof by certain emblems, and standard publications giving the history of the English hall marks, may be considered by the Commissioner of Patents in passing on an application for registration of insignia for silver. In re Gorham Mfg. Co. (1913) 41 App. D. C. 263.

13. Conclusiveness of decisions.—An adjudication of similarity on an opposed application is conclusive in subsequent proceedings to register the same mark under the ten-years' clause of the trade-mark act. Barclay v. Carter Medicine Co. (1913) 41 App. D. C. 240.

A final adjudication of similarity, upon which a plea of res judicata may be predicated, occurs when the applicant's demurrer alleging such dissimilarity as to make confusion or deception impossible being overruled, and a default judgment awarded. Id.

§ 9492. (Act Feb. 20, 1905, c. 592, § 7.) Notice to applicant of opposition; declaration of interference; examination of interference or opposition; grounds for refusal of registration.

In all cases where notice of opposition has been filed the Commissioner of Patents shall notify the applicant thereof and the grounds therefor.

Whenever application is made for the registration of a trade-mark which is substantially identical with a trade-mark appropriated to goods of the same descriptive properties, for which a certificate of registration has been previously issued to another, or for registration of which another has previously made application, or which so nearly resembles such trade-mark, or a known trade-mark owned and used by another, as, in the opinion of the Commissioner, to be likely to be mistaken therefor by the public, he may declare that an interference exists as to such trade-mark, and in every case of interference or opposition to registration he shall direct the examiner in charge of interferences to determine the question of the right of registration to such trade-mark, and of the sufficiency of objections to registration, in such manner and upon such notice to those interested as the Commissioner may by rules prescribe.

The Commissioner may refuse to register the mark against the registration of which objection is filed, or may refuse to register both of two interfering marks, or may register the mark, as a trade-mark, for the person first to adopt and use the mark, if otherwise entitled to register the same, unless an appeal is taken, as hereinafter provided for, from his decision, by a party interested in the proceeding, within such time (not less than twenty days) as the Commissioner may prescribe. (33 Stat. 726.)

See notes to section 1 of this act, ante, § 9485.

Suits in equity involving interfering registered trade-marks were authorized by section 22 of this act, post, § 9507.

Notes of Decisions

1. Right to registration.
2. Truth and good faith of representations.
3. Similarity of marks and priority of use.
4. Nature of interference.
5. Right to institute an interference.
6. Estoppel to urge invalidity of act.
7. Determination of interference.
8. Injury to opposer.
9. Laches.
10. Decision as authorizing injunction against infringement.
11. Effect of prior decisions.
12. Pleading.
13. Evidence.
14. Newly discovered evidence.

1. Right to registration.—What constitutes trade-marks in general. See notes under § 9490, ante.

Where there is not the slightest similarity between two whisky trade-marks except that one contains the name "Henderson" and one the name "Anderson," the owner of the former is entitled to registration over the opposition of the latter. Buchanan-Anderson-Nelson Co. v. Breen & Kennedy (1906) 27 App. D. C. 573.

Ignorance of a competitor's application of his trade-mark to a particular kind of goods is no excuse for knowingly appropriating the mark for use upon the same general class of goods; and registration will not be granted, on opposition, to the appropriator. Simplex Electric Heating Co. v. Gold Car Heating & Lighting Co. (1915) 43 App. D. C. 28.

Where an opposition to the registration of a mark as a trade-mark is dismissed, the question whether the ap-

plicant's mark shall be registered is one for the determination of the Patent Office, and not for this court. Alaska Packers Ass'n v. Admiralty Trading Co. (1915) 43 App. D. C. 198.

2. **Truth and good faith of representations.**—Deception of public as barring action or suit. See notes under § 9506, post.

3. **Similarity of marks and priority of use.**—See notes under § 9490, ante.

4. **Nature of interference.**—A trade-mark interference proceeding is not merely one of priority, as in a patent interference proceeding, but involves any question that might arise in an ex parte case. In re Herbst (1909) 32 App. D. C. 565.

5. **Right to institute an interference.**—The commissioner of patents may institute an interference between opposing claimants for registration of the same trade-mark, to determine ownership. Hanford v. Westcott (C. C. 1879) Fed. Cas. No. 6,022.

Although the owner of a trade-mark has lost his right to oppose registration thereof by another, he may still protect his right of property by the usual remedies at law and in equity, and he may possibly obtain a remedy through a declaration of interference under section 9492, or by a proceeding for cancellation under section 9498. Martin v. Martin & Bowne Co. (1906) 27 App. D. C. 59.

6. **Estoppel to urge invalidity of act.**—A party who opposes an application for registration of a trade-mark on the ground that he is the owner of a trade-mark of the same general appearance as that of the applicant cannot be heard to question the constitutionality and validity of the statute. Gaines v. Knecht (1906) 27 App. D. C. 530; Gaines v. Carlton Importation Co. (1906) Id. 571; Buchanan-Anderson-Nelson Co. v. Breen & Kennedy (1906) Id. 573.

7. **Determination of interference.**—An interference proceeding under the trade-mark law is instituted to determine priority of adoption and use, and, when that question is decided, the inquiry is at an end. If a later applicant seeks to re-register the mark for any lawful reason, he must show that the entire right, title, and interest in the trade-mark have become vested in him. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

The title to a certificate of registration of a trade-mark, if claimed under some act or set of acts done or performed after its issue, cannot as a rule be determined in an interference proceeding. Id.

Refusal of registration to one of the parties on the ground that the mark had already been registered by a stranger to the interference proceedings is final, if not appealed from, and therefore one of such parties has no right thereafter to prosecute his original application before the examiner of trade-marks. In re Herbst (1908) 32 App. D. C. 269; In re Boston Wine & Spirits Co. (1912) 39 App. D. C. 421.

Where an application for registration as a trade-mark for shoes made of leather and asbestos of a picture of an ass, over which is the applicant's name, and across which, in large letters, is the word "asbestos," while underneath is the word "fireproof," is opposed by a manufacturer of fireproof shoes, who claims the use of the word "asbestos" as a trade-name for his shoes, registration should be denied, with leave to applicant to amend by disclaiming and omitting the word objected to. Johnson v. Brandau (1909) 32 App. D. C. 348.

The Commissioner of Patents has the right to refuse registration to both parties to a trade-mark interference. Planten v. Canton Pharmacy Co. (1909) 33 App. D. C. 268.

In a trade-mark interference case, when one of the parties has had no opportunity to offer testimony as to whether the function of the mark is to describe a specific article made under a patent issued to him, and not to indicate origin, it is erroneous to refuse to register the mark on that ground. Mathy v. Republic Metalware Co. (1910) 35 App. D. C. 151.

In a trade-mark interference case, the issue is not one merely of priority, as in a patent interference, but involves any issue that might be raised in an ex parte case. Star Brewery Co. v. Val. Blatz Brewing Co. (1911) 36 App. D. C. 534.

8. **Injury to opposer.**—If the opposer has not manufactured and put on the market a similar article to that on which the trade-mark has been used, it cannot properly be said that the registration of the mark will damage him, and his opposition will be dismissed, even though the patent upon the article on which the trade-mark was used has expired. Underwood Typewriter Co. v. A. B. Dick Co. (1911) 36 App. D. C. 175.

If the opponent has not shown that he will be injured or damaged by the registration, he cannot question the sufficiency of the applicant's evidence to show his actual use of the mark in commerce as a trade-mark for the goods claimed. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484.

9. **Laches.**—Mere delay on the part of the owner of a trade-mark to assert his right, as such, cannot be made the ground of successful opposition by an infringer to the registration of the trade-mark by the owner. Michigan Condensed Milk Co. v. Kenneweg Co. (1908) 30 App. D. C. 491.

In a trade-mark interference case the only question involved is whether the right of registration will be accorded

either or both of the parties. And whether either of the parties has been guilty of laches will not be considered. Phœnix Paint & Varnish Co. v. John T. Lewis & Bros. (1908) 32 App. D. C. 285.

In an opposition on the ground of deceptive similarity to the opposer's mark, the fact that the opposer has taken no steps against the applicant because of the use of the mark, and that actual deception has not been shown, should be given weight. Wm. A. Rogers, Limited, v. International Silver Co. (1910) 34 App. D. C. 410.

10. Decision as authorizing injunction against infringement.—The decision of the Commissioner of Patents in favor of a right in an interference is not such a judicial determination as will justify granting a preliminary injunction against infringement. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (C. C. 1903) 123 Fed. 149.

11. Effect of prior decisions.—The decision of the Patent Office that a given word is valid as a trade-mark must be accepted as conclusive in an interference proceeding between rival applicants for registration of the word as a trade-mark. United States Playing Card Co. v. C. M. Clark Pub. Co. (1907) 30 App. D. C. 208.

Where, on opposition being made, the application was denied on the ground that to register the mark would prolong the monopoly of an expired patent held by the applicant, and other federal courts had on the same ground denied the same party injunctions restraining other parties from using the mark as a trade-mark, this court affirmed the decision of the commissioner. J. A. Scriven Co. v. W. H. Towles Mfg. Co. (1909) 32 App. D. C. 321; Same v. Ferguson McKinney Dry Goods Co. (1909) 32 App. D. C. 323.

The plea of former adjudication to an opposition is properly sustained where, in the previous interference proceeding, one of the questions raised in the opposition was determined, and the other question could have been determined, though it was not actually presented. Bluthenthal & Bickart v. Bigbie Bros. & Co. (1909) 33 App. D. C. 209.

An opposition to a technical mark, sustained on the ground of priority of adoption and use, does not conclude another opposition, to a nontechnical mark, upon the ground of exclusive use during the statutory period. Carter Medicine Co. v. Barclay (1910) 36 App. D. C. 123.

12. Pleading.—A demurrer to an opposition to an application for registration of a trade-mark admits the allegations of the opposition in so far as facts, and not conclusions of law, are stated; and the demurrer cannot properly be supported by affidavit. Wm. A. Rogers v. International Silver Co. (1907) 30 App. D. C. 97.

The statement in an opposition to an application for registration of a trade-mark, that the mark of the applicant so closely resembles the marks of the opposer as to be calculated to confuse and deceive purchasers and the public generally, is a conclusion of law, which is not admitted by a demurrer to the opposition. Id.

The allegation in an opposition to the registration of certain words as a trade-mark that the opposer uses the words, or words of similar import, in its advertising matter, and has so used them for about 28 years, is insufficient. Battle Creek Sanitarium Co. v. Fuller (1908) 30 App. D. C. 411.

13. Evidence.—Where the application of the junior party alleged a continuous use since 1891, and of the senior party a continuous use since 1900, and the testimony showed the earliest date of the junior party's use to have been 1895, and of the senior party since 1894 at least, and the giving of a subsequent date in his application was satisfactorily explained, the senior party was entitled to an award of priority of adoption and use. Rose Shoe Mfg. Co. v. Rosenbush (1906) 28 App. D. C. 465.

In a trade-mark interference proceeding, the party last to make application has the burden of showing prior adoption and use of the trade-mark. Bluthenthal v. Bigbie (1907) 30 App. D. C. 118.

The statement by a witness that a certain word was adopted and used by his company as a trade-mark is a mere conclusion, when based upon trade lists in evidence and testimony of former witnesses. United States Playing Card Co. v. C. M. Clark Pub. Co. (1907) 30 App. D. C. 208.

The testimony in a trade-mark interference case reviewed, and held to sustain the decision of the Commissioner of Patents. American Stove Co. v. Detroit Stove Works (1908) 31 App. D. C. 304.

The burden of proof is on the opposer to show that deception of the public by reason of similarity of applicant's mark to that of opposer would probably follow. Andrew McLean Co. v. Adams (1908) 31 App. D. C. 509.

In a trade-mark case involving the registration of the word "Excelsior" as applied to stepladders, it will not be presumed, at the instance of the opposer of the application that the word has become a generic designation of ladders manufactured by the applicant, instead of a name indicating a source or origin of manufacture, especially where it also appears that several other concerns have manufactured ladders embodying the same patent, and designated them under different trade-names. Udell-Predock Mfg. Co. v. Udell Works (1908) 32 App. D. C. 282.

Evidence in a trade-mark interference case involving priority of use of a red Greek cross as a trade-mark for toilet

powders held sufficient to show prior use. Johnson & Johnson v. Whelan (1909) 33 App. D. C. 4.

Opposition sustained to the registration of the word "spearmint," as applied to chewing gum, under the 10-year clause of section 9490, ante, where the testimony of unimpeached and disinterested witnesses on behalf of the opposer shows that during the 10-year period his firm placed on the market and exclusively sold a brand of gum under that name, the kind used which bear the name of the brand and the names of the makers of the labels, while the only evidence for the applicant is that of a few witnesses to the effect that they never saw or heard of that brand of gum. William Wrigley, Jr., & Co. v. Norris (1909) 34 App. D. C. 138.

Evidence consisting of sales memoranda and bills showing frequent sales made in a year prior to the adoption and use of the word "Autoline" by the other party, and thereafter, of oil designated as "Autolene," but not showing that the name was affixed to or marked upon the packages, is insufficient to show prior use of the name as a trade-mark. Crescent Oil Co. v. W. C. Robinson & Son Co. (1910) 34 App. D. C. 440.

Where the reason of one of the parties for adopting the mark claimed to be deceptively similar to the mark of the other party is not above suspicion, that fact should be given weight, if a doubt exists. Wm. A. Rogers, Limited, v. International Silver Co. (1910) 34 App. D. C. 484.

In reaching a conclusion on an appeal in a trade-mark interference proceeding, the court eliminated from its consideration testimony elicited by leading questions, where objections to such questions were noted. H. C. Cole & Co. v. William Lea & Sons Co. (1910) 35 App. D. C. 355.

Prior adoption and use of a trade-mark consisting of the letters "F F F," as applied to flour, is sufficiently shown by entries of its predecessor, showing shipments of "3 F flour," and the testimony of a disinterested witness, that such predecessor used the trade-mark "F F F" upon flour, and that he had done much of the branding himself, where such shipments and use antedated the adoption and use of the mark by the other party. H. C. Cole & Co. v. William Lea & Sons Co. (1910) 35 App. D. C. 355.

The burden of proof is upon the junior party in a trade-mark interference, and all doubts must be resolved against him. Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. (1910) 35 App. D. C. 425.

Upon the question whether there is such a similarity between two marks as will cause confusion in trade, an ocular inspection of the marks constitutes the most satisfactory evidence. Nestle & Anglo-Swiss Condensed Milk Co. v. Walter Baker & Co. (1910) 37 App. D. C. 148, writ of certiorari denied Walter Baker & Co. v. Nestle & Anglo-Swiss Condensed Milk Co. (1911) 32 Sup. Ct. 525.

Where opposition is made on the ground that the applicant was not the exclusive user of the mark for 10 years prior to the passage of the trade-mark act of February 20, 1905, the applicant must show exclusive use during the 10-year period. C. A. Gambrill Mfg. Co. v. Waggoner-Gates Milling Co. (1912) 38 App. D. C. 532.

Where the uncontradicted testimony on behalf of the opposing party was to the effect that it had used the mark on flour manufactured and sold by it for more than 10 years prior to the passage of the trade-mark act of February 20, 1905, and where the witnesses were men of intelligence, and presumably of character, and were testifying concerning a matter of which they must have had knowledge, the opposition should be allowed. Id.

In a trade-mark opposition case involving the question whether the goods of the parties are of the same descriptive properties, the opinions and conclusions of witnesses familiar with the articles are not entitled to any particular weight, especially if there is direct conflict between them. Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484.

Where it appears that registrations of a given word as applied to certain products have extended back for 20 years, and there is no evidence of abandonment of the marks, they must be presumed to be still in use. Quaker City Flour Mills Co. v. Quaker Oats Co. (1915) 43 App. D. C. 260.

14. Newly discovered evidence.—A motion to reopen a trade-mark interference case for the purpose of taking newly discovered evidence, which was not made until after a finding adverse to movant, and the affidavits in support of the motion failed to show that the alleged newly discovered evidence could not have been discovered during the time fixed for taking testimony by the use of ordinary diligence, will be refused. American Stove Co. v. Detroit Stove Works (1908) 31 App. D. C. 304.

§ 9493. (Act Feb. 20, 1905, c. 592, § 8.) Appeal from decision of examiner to Commissioner of Patents.

Every applicant for the registration of a trade-mark, or for the renewal of the registration of a trade-mark, which application is refused, or a party to an interference against whom a decision has been rendered, or a party who has filed a notice of opposition as to

a trade-mark, may appeal from the decision of the examiner in charge of trade-marks, or the examiner in charge of interferences, as the case may be, to the Commissioner in person, having once paid the fee for such appeal. (33 Stat. 726.)

See notes to section 1 of this act, ante, § 9485.

Fees on appeals from the decision of the examiner to the Commissioner of Patents were prescribed by section 14 of this act, post, § 9499.

Notes of Decisions

Decisions reviewable.—Where a party whose application for a trade-mark was rejected, sought, more than two years afterwards, to amend his application, so as to bring it under the provisions of the new law, but the commissioner held that the application was not pending within the meaning of the act of 1905, his decision virtually refused registration, and was appealable. In re Mark Cross Co. (1905) 26 App. D. C. 101.

A decree pro confesso rendered by the Examiner of Interferences upon a demurrer to a notice of opposition is appealable to the Commissioner of Patents upon the single question of the sufficiency of the notice, under this section. G. & J. Tire Co. v. G. J. G. Motor Car Co. (1913) 39 App. D. C. 508.

§ 9494. (Act Feb. 20, 1905, c. 592, § 9.) Appeal from decision of Commissioner of Patents to Court of Appeals of District of Columbia.

If an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable. (33 Stat. 727.)

See notes to section 1 of this act, ante, § 9485.

Notes of Decisions

Applicability of statutes.—R. S. §§ 4914, 4915, ante, § 9459, and post, § 9560, are applicable in trade-mark cases under this section. E. C. Atkins & Co. v. Moore (1909) 29 Sup. Ct. 390, 392, 212 U. S. 285, 53 L. Ed. 515.

Construction of act.—A controversy between rival applicants for the registration of a trade-mark is not an "interference" case, within the meaning of Act Feb. 9, 1893, § 9; and an appeal does not lie from the commissioner of patents in such controversy to the District of Columbia court of appeals. Einstein v. Sawhill (1898) 2 App. D. C. 10.

The right of appeal granted by this section is statutory, and must be confined to the express terms of the statute. In re Standard Oil Co. (1913) 39 App. D. C. 491.

"Applicant for registration."—The term "applicant for registration," as used in this section, means an original applicant, and not one merely seeking a renewal. In re Standard Oil Co. (1913) 39 App. D. C. 491.

Decisions reviewable.—A trade-mark interference declared under the preceding act, but not decided until after the passage of this act. is appealable to this court under the provisions of this section, where the application involved has been amended to bring it under the provisions of that act. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

The action of the Commissioner of Patents in requiring an applicant for a trade-mark to strike out a description of the mark from his petition and refer only to the accompanying drawings is not reviewable on appeal, unless there has been a gross abuse of his discretion. In re E. C. Atkins & Co. (1907) 29 App. D. C. 385.

When the examiner of interferences sustains certain grounds of a demurrer to an opposition to the registration of a trade-mark, the opposer should then, if at all, ask leave to amend his opposition, and not after an appeal to the commissioner; and appeal does not lie from the decision of the commissioner, in the absence of abuse of his discretion. Battle Creek Sanitarium Co. v. Fuller (1908) 30 App. D. C. 411.

Questions reviewable.—The Court of Appeals will not consider whether either of the names "Anderson" and "Henderson," found in rival trade-marks, is the proper subject of registration under the trade-mark act, but will merely consider whether the resem-

blance between the two marks as used is calculated to deceive and mislead the public. Buchanan-Anderson-Nelson Co. v. Breen & Kennedy (1906) 27 App. D. C. 573.

Whether a mark can be registered as a valid trade-mark because of its character and use will not be considered by this court on an appeal from a decision of the Commissioner of Patents in an interference proceeding between rival applicants for registration of the mark. Case v. Murphey (1908) 31 App. D. C. 245.

The question of whether a mark is registerable is not before the court on an appeal from a decision of the Commissioner of Patents dismissing a notice of opposition on the ground of prior use by the opposer. Hannis Distilling Co. v. George W. Torrey Co. (1909) 32 App. D. C. 530.

Where application is denied on the ground of the similarity of the word with a registered trade-mark, the applicant, on an appeal, cannot raise the question that the word already registered was not the proper subject for a technical trade-mark, and therefore its registration conferred no right on the registrant. In re Wilcox & Co. (1910) 36 App. D. C. 107.

Finality of determination.—A decision on appeal from a decision of the Commissioner of Patents in proceedings for the registration of a trade-mark, which affirms the latter's decision, and directs the clerk to certify its opinion to the commissioner, according to law, is not final for the purpose of an appeal to, or writ of error from, the federal Supreme Court. E. C. Atkins & Co. v. Moore (1909) 29 Sup. Ct. 390, 392, 212 U. S. 285, 53 L. Ed. 515.

§ 9495. (Act Feb. 20, 1905, c. 592, § 10.) Assignments of trade-marks.

Every registered trade-mark, and every mark for the registration of which application has been made, together with the application for registration of the same, shall be assignable in connection with the good will of the business in which the mark is used. Such assignment must be by an instrument in writing and duly acknowledged according to the laws of the country or State in which the same is executed; any such assignment shall be void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from date thereof. The Commissioner shall keep a record of such assignments. (33 Stat. 727.)

See notes to section 1 of this act, ante, § 9485.

A provision for the issue of a certificate of registration to the assignee of the applicant was made by section 11 of this act, post, § 9496.

Fees for recording transfers, etc., were prescribed by section 14 of this act, post, § 9499.

Notes of Decisions

1. Assignability of trade-marks.
2. Requisites and validity of assignment.
3. Construction and operation of assignments.
4. Change or dissolution of partnership.
5. Insolvency or bankruptcy.
6. Licenses.
7. Contracts.
8. Succession or inheritance.
9. Estoppel.
10. Evidence.
11. Injunction.

1. Assignability of trade-marks.—As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, as such transfer would be productive of fraud upon the public, in which respect it differs from a patent or a copyright; but in connection with the article produced it may be bought and sold like other property. Dietz v. Horton Mfg. Co. (1909) 170 Fed. 865, 96 C. C. A. 41; Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152; Morgan v. Rogers (C. C. 1884) 19 Fed. 596, 597; Spiegel v. Zuckerman (C. C. 1910) 175 Fed. 978 (decree affirmed [1911] 188 Fed. 63, 110 C. C. A. 133); In re Jaysee Corset Co. (D. C. 1911) 201 Fed. 779; Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. (1910) 35 App. D. C. 425; Detroit Creamery Co. v. Velvet Brand Ice Cream Co. (Mich. 1915) 153 N. W. 664; Rodseth v. Northwestern Marble Works (1915) 152 N. W. 885, 129 Minn. 472.

The owner of a trade-mark affixed to articles manufactured at his establishment may, on selling the business, lawfully transfer therewith to the purchaser the right to use the trade-mark. Kidd v. Johnson (1879) 100 U. S. 617, 25 L. Ed. 769.

The fact that a trade-mark bears the owner's name and portrait does not render it unassignable. Dr. S. A. Richmond Nervine Co. v. Richmond (1895) 159 U. S. 293, 16 Sup. Ct. 30, 40 L. Ed. 155.

A registered trade-mark for a brand of smoking tobacco, the only essential feature of which is the name of the brand, is not personal to the individual registering it, but may be transferred. Sarrazin v. W. R. Irby Cigar & Tobacco Co. (1898) 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541.

A right of individuals to use certain trade names and devices in connection with the manufacture and sale of an article is not personal, in such sense that it cannot be sold and assigned to another, in a different locality, in connection with a transfer of the good will of their business. Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co. (1899) 95 Fed. 457, 37 C. C. A. 146.

A trade-mark is not by itself such property as can be transferred, and the right to use it cannot be assigned except as incidental to the transfer of the business or property with which it has been used. A transfer of the right to use it in connection with a different article, or one of a different manufacture, would result in deceiving the public as to the article or its origin, which it is the sole legitimate purpose of a trade-mark to prevent, and a transferee will not be protected in such use by a court of equity. Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. (1901) 113 Fed. 468, 51 C. C. A. 302.

The sale of all the property of a manufacturing or commercial corporation, including "its franchises, name, and good will," passes to the purchasers the right to the old company's tradename, and to protection in its exclusive use. The Peck Brothers & Company v. Peck Bros. Co. (1902) 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81, writ of certiorari denied Peck Bros. Co. of Illinois v. Peck Bros. & Co. of Connecticut (1902) 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

Where plaintiff used the name "Old Oscar Pepper Distillery, Woodford County, Ky.," as a brand or mark, after the distillery had passed into the hands of defendants, complainant was not entitled to use the brand "Old Oscar Pepper Whisky" to designate whisky made by him elsewhere, but the designation formerly used attached to the place of manufacture, and might properly be used by defendants for the product there made. Pepper v. Labrot (C. C. 1881) 8 Fed. 29.

The right to use the words "Twin Brothers," in connection with portraits of the twins, had been lawfully assigned to the plaintiff. Held, that he was entitled to an injunction against one of the twins who had set up a separate establishment, and was making use of this trade-mark in manufacturing yeast. Burton v. Stratton (C. C. 1882) 12 Fed. 696.

A trade-mark will pass under a general conveyance of all the assets and effects of a firm, though not specifically designated. Morgan v. Rogers (C. C. 1884) 19 Fed. 596.

An injunction against infringement will not be refused because complainant was not the original designer or owner of the trade-mark, but succeeded to the rights of a firm which owned it. Cuervo v. Landauer (C. C. 1894) 63 Fed. 1003.

In a suit between the originator of a manufacturing business and the purchaser thereof, it was decided that the right to the trade-mark and tradename used in connection therewith was not exclusive in either party, but that each had a right to the limited use thereof, and such right was assignable. Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co. (C. C. 1898) 87 Fed. 203.

Where a company manufactured a plow known as the "Bissell," and Bissell later withdrew and formed another company which made plows also marked "Bissell," which second company was subsequently discontinued, but later part of its stock and patterns and the right to use its corporate name were sold to defendants (who were not named Bissell), the second corporation had no right to use the name "Bissell" as it did, as against complainant, which had acquired the prior right, and defendants obtained no right by the attempted assignment. Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C. 1902) 121 Fed. 357.

W. held entitled to use his own name in the name of a firm with which he was connected which manufactured pens in competition with complainant, and that the right to use such name passed to defendant by assignment. L. E. Waterman Co. v. Modern Pen Co. (D. C. 1912) 193 Fed. 242, decree modified (1912) 197 Fed. 534, 117 C. C. A. 30, which is modified (1912) 197 Fed. 536, 117 C. C. A. 32.

A defendant, convicted of having been engaged in an unlawful combination, may transfer a valid title to its trade-mark, especially where the decree authorizes an assignment to the transferee, and the transferee may protect his rights as against an infringer. Weyman-Bruton Co. v. Old Indian Snuff Mills (D. C. 1912) 197 Fed. 1015.

The transfer by a man of the right to use his name as a trade-mark does not preclude him from subsequently using it himself in his own business otherwise than by affixing it to his goods as a trade-mark. Guth Chocolate Co. v. Guth (D. C. 1914) 215 Fed. 750.

A man, whose name has become so identified with his goods as to give it a secondary meaning, may sell the exclusive right to its use in connection with a sale of his business, although it will not readily be presumed, but must be clearly shown. Id.

One operating under the style of the "Perfection Mattress Company" after he has sold out such business may be restrained from carrying on a rival business under the name of "Kyle Perfection Mattress," though such mattress was not protected by patent; since his purchaser had a right to the exclusive use of the term "Perfection Mattress," both as a trade-mark and under the sale of the good will of the Perfection Mattress Company. Kyle v. Perfection Mattress Co. (1900) 28 So. 545, 127

Ala. 39, 50 L. R. A. 628, 85 Am. St. Rep. 78.

As the primary object of a trade-mark is to indicate the origin of the article to which it is affixed, there is no distinct property right in the mark separate from the article to which it has been associated; in other words, the trade-mark may not be assigned in gross. Jackson Corset Co. v. Cohen (1912) 38 App. D. C. 482.

An assignment of a trade-mark, unaccompanied by the business or good will in which the trade-mark had been used, is ineffectual for any purpose except as evidence of an abandonment of the mark by the assignor, and confers upon the assignee no exclusive right to its use. Sauers Milling Co. v. Kehlor Flour Mills Co. (1913) 39 App. D. C. 535.

When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, the right to use of the trade-mark may be lawfully transferred with the establishment. Dant v. Head (1888) 10 Ky. Law Rep. (abstract) 638.

The name of a newspaper is in the nature of a trade-mark, and passes by assignment with the business in which it is used, but, apart from the business, it confers no right of ownership; and so plaintiffs can have no right in the name of the paper as an element of value, unless the material property itself is held to pass to them under the will. Seabrook v. Grimes (Md. 1908) 68 A. 883.

The trade-marks "A. M. Hoxie's Mineral Soap," and "A. M. Hoxie's Pumice Soap," are assignable, as importing to the public, not that the soaps were made by Hoxie personally, but according to his formula. Hoxie v. Chaney (1887) 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

Where manufacturers have made goods for many years, and put their name, "Draper," in various forms on the different articles, to denote their superior quality, they will acquire a right to the use of the name, and can make an assignment of its use to another. H. A. Williams Mfg. Co. v. Noera (1893) 158 Mass. 110, 32 N. E. 1037.

A trade-name given to an orchestra by its founder is not assignable, since it is personal to him, and rests on reputation as a musician; and its use by an assignee to designate a body of musicians different from those who earned a reputation thereunder would be a fraud on the public. Messer v. The Fadettes (1897) 168 Mass. 140, 46 N. E. 407, 37 L. R. A. 721, 60 Am. St. Rep. 371.

A trade-mark adopted by one engaging in business on his own account under an assumed name is not a personal trade-mark, but one connected with the business carried on under the assumed name; and it might be assigned, or be made to pass with a transfer of such business and name. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

The name of a man, used as a trade-mark, separated from the business in connection with which the man has used it, cannot be the subject of sale. Skinner v. Oakes (1881) 10 Mo. App. 45.

Territorial rights in a trade-mark cannot be sold to different persons so as to enable each to make and sell their goods as those made by the original owner of the mark, in fraud of the public. Snodgrass v. Welle (1882) 11 Mo. App. 590, memorandum.

A trade-mark, as an accessory of property, or as a thing to be used in connection with one's business, and applicable to the product of his manufactory, or to his goods in trade, is a subject of the law's care, and is assignable. Tuttle v. Blow (1903) 176 Mo. 158, 75 S. W. 617, 98 Am. St. Rep. 488.

A firm engaged in putting up special preparations and prescriptions, known in the market by a trade-mark and the name of the firm, made an assignment, for the benefit of creditors, of "all property and effects of every nature and description." Under this assignment the assignee sold all preparations and proprietary rights and articles of the firm. Held, that the right to use the firm name and trade-marks passed to the purchaser, and a surviving partner of the old firm should be restrained from making and selling the special preparations under the old names and labels. Hegeman & Co. v. Hegeman (N. Y. 1880) 8 Daly, 1.

The name "Sarony," used as a trade-mark in photography, was personal to the photographer and not assignable, and a printer who is not a photographer, holding himself out as "Sarony," is perpetrating a fraud, and equity will not relieve him. Burrow v. Marcean (1910) 124 N. Y. S. 810, 67 Misc. Rep. 656.

A name, representing that an article is manufactured by a certain person, is not assignable apart from the business with which it originated. Wiltberger v. Walker (1883) 8 Ohio Dec. 588, 9 Wkly. Law Bul. 42.

A manufacturer of "Barlow's Indigo Blue" sold his business and recipe to plaintiff, who continued the business under the same name. Subsequently another party, who had been making a blue as "J. H. Barlow's Soluble Washing Blue," having discontinued his business, sold the name to defendant. Held, that as such name was not a valid trade-mark, nor assignable apart from the business with which it originated, plaintiff was entitled to an injunction restraining defendant from using such name. Id.

Although there is no property in a trade-mark as a mere abstract right, a property therein will pass by assignment or by operation of law, to any one who takes at the same time the right

to manufacture or sell the particular merchandise to which the trade-mark has attached. Dixon Crucible Co. v. Guggenheim (Pa. 1869) 2 Brewst. 321.

If certain words were adopted by a grocery company as a trade-mark for syrup sold by them, the sale of the stock of groceries carried with it the right to the trade-mark. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App. 1908) 108 S. W. 413.

The good will and trade-marks of a business may be sold separately from the property and book accounts of the concern. Tennant v. Dunlop (1899) 33 S. E. 620, 97 Va. 234.

All the property, assets, and business of the firm of Fish Bros., wagon manufacturers, passed by successive changes to Fish Bros. & Co.; thence into the hands of a receiver; and thence to the Fish Bros. Wagon Company, a corporation. The Fish brothers remained in the business through all the successive changes, and became directors and officers of the new company, but withdrew some years after the organization of the company and set up on their own account, under the firm name of Fish Bros. & Co. Held, that the corporation owned the good will of the old business, including the right to use the Fish trade-marks. Fish Bros. Wagon Co. v. La Belle Wagon Works (1892) 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

The trade-name under which a banking business has been profitably conducted for a number of years is a part of the good will, and as such is an assignable asset. Bank of Tomah v. Warren (1896) 68 N. W. 549, 94 Wis. 151.

2. Requisites and validity of assignment.—A trade-mark cannot be conveyed in gross, by independent transfer, without also conveying the business to which the trade-mark attaches. The Fair v. Jose Morales & Co. (1899) 82 Ill. App. 499; Crossman v. Griggs (1904) 71 N. E. 560, 186 Mass. 275.

The right of a later competitor to use his own name on his goods if he does not mislead the public may be transferred to a partnership with whatever good will the assignee has, though by the partnership agreement he is only to remain a partner a little over a year. L. E. Waterman Co. v. Modern Pen Co. (1914) 35 Sup. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree (1912) 197 Fed. 534, 117 C. C. A. 30.

An assignment of a flour trade-mark, disassociated from the business in which it was used and in which it had acquired its value by association with the manufacture of flour by the originator and his successors, was void. Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76.

Where one used the name of his factory superintendent as a trade-name, and later, after such superintendent had quit his employ, sold the business, together with the right to use the trade-mark, as the trade-mark was used to denote candies made by the firm, and was not a guaranty that they were made by the superintendent personally, the use thereof was not a fraud on the public, and the sale of the right thereto was valid. Oakes v. Tonsmierre (C. C. 1883) 49 Fed. 447.

The assignment of a trade-mark by the originator and owner to a corporation organized by him to succeed to the manufacture and sale of the article is valid. Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C. 1899) 97 Fed. 781.

The ownership of a trade-mark by an assignee or transferee is sufficiently indicated by its placing its name as manufacturer on the article sold under such trade-mark. Id.

Under this section a trade-mark registered under the act cannot be assigned unless the good will is also transferred, and an assignment of the trade-mark confers no rights on the assignee if the assignor continues to sell the same article, although under a different name. Eiseman v. Schiffer (C. C. 1907) 157 Fed. 473.

A manufacturer cannot make a valid assignment of a trade-mark separate from a transfer of the good will and business in connection with which it was used. Independent Baking Powder Co. v. Boorman (C. C. 1910) 175 Fed. 448.

Manufacturers of a baking powder, which they sold under four or five different trade-names, assigned one of such names to another, with the right to use it as a trade-mark for baking powder, but continued as before to manufacture and sell the same product under some one of the other names. Held, that the trade-mark could not be so separated from the product with which it had been associated, and that the assignee acquired no exclusive right thereto which he could transfer. Id.

A sale by the surviving member of the partnership stock in trade, good will, formula for making whisky, and stencils for marking barrels and kegs with the trade-mark name of the brand of whisky made by the firm carries with it the right to use the trade-mark. Bluthenthal v. Bigbie (1907) 30 App. D. C. 118.

The issuance of circulars by the user of a trade-mark to its customers, informing them of the transfer of its brands, and "that they could rely upon getting the same material under the same brand as they had been getting," does not constitute a transfer of the business and of the right to use the trade-mark. Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. (1910) 35 App. D. C. 425.

A general assignment is inoperative in respect to passing a right to a trade-mark, if the right was not inventoried

by the trustee or appraisers, and never claimed by the trustee or the creditors of the insolvent, nor in any manner disposed of under the assignment. Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

Where one who had been engaged as a manufacturer under a trade-name entered a partnership under an agreement that the name and style of the firm should be the same as under the individual's ownership, the property right to the trade-name passed to the firm without being distinctly enumerated. Moore v. Rawson (1904) 70 N. E. 64, 185 Mass. 264.

An instrument given by a debtor to his creditor, undertaking that the debtor would not sell or dispose of his interest in the name or trade-mark of his business, without the creditor's consent, until the sum owing the creditor should be paid, was not an assignment of the trade-name or trade-mark. Crossman v. Griggs (1904) 71 N. E. 560, 186 Mass. 275.

The title of a newspaper as a trade-mark passes on a sale and delivery of the newspaper, the name and good-will thereof, the plant, and all things appertaining thereto. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

Where a bill of sale included all contracts, obligations, and everything in any way pertaining to the business of the partnership, it was effective to convey the partnership's trade-marks. Corbett Bros. Co. v. Reinhardt-Meding Co. (N. J. 1910) 76 A. 243.

A transfer to a director, of the trade-mark of a corporation at a meeting when only he and one or two other directors are present, and without notice to a third, is invalid. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1890) 20 N. Y. Supp. 462.

An assignment of the trade-mark of a corporation, made by the president of a corporation, in connection with the good will, but without any showing of authority, is invalid. Id.

The purchase at foreclosure of mills and mines does not carry with it the right to use the trade-mark, or affect the right of the former manufacturers to use same, particularly where it had already been used by them to designate the product of other than the original mills, and so had ceased to indicate primary origin or locality. Id.

Where one's name, after his death, continued to be used by the successor in business, on such successor's ceasing to do business, an assignment by him of such brand and trade-mark was against public policy, and void. Mayer v. Flanagan (1896) 12 Tex. Civ. App. 405, 34 S. W. 785.

The assignment of a trade-mark to confer right on the assignee must be accompanied by a use of the trade-mark in the manner and for the purposes used by the assignor. Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

3. Construction and operation of assignments.—An assignment of a business, with the debts and plant, includes trade-marks used in the business, and gives the assignee the exclusive right thereto. Morgan v. Rogers (C. C. 1884) 19 Fed. 596; Witthaus v. Braun (1876) 44 Md. 303, 22 Am. Rep. 44; Merry v. Hoopes (1888) 111 N. Y. 415, 18 N. E. 714.

Where an inventor designed a new trade-mark, but the company making the article became insolvent before the mark was formally transferred to it by the designer, yet it was nevertheless the owner thereof, and the property in the same passed to the assignee for benefit of creditors, and to a subsequent purchaser from him. Dr. S. A. Richmond Nervine Co. v. Richmond (1895) 159 U. S. 293, 16 Sup. Ct. 30, 40 L. Ed. 155.

Where a patentee registered a trade-mark with the words "Doctor A. Reed's," printed above the cut, the name so printed was not an essential part of the trade-mark, and hence, if a conveyance of the trade-mark gave any right to the use of the name, it was only in connection with such particular representation. Dr. A. Reed Cushion Shoe Co. v. Frew (1908) 162 Fed. 887, 89 C. C. A. 577, reversing decree (C. C. 1908) 158 Fed. 552.

Where the chief effect of an assigned trade-mark is to point out the original manufacturer and the original place of its manufacture, the courts refuse relief to the assignee who uses the trade-mark on goods made at a different place without giving notice of the assignment. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

When an assigned trade-mark has been so long associated with the goods to which it was affixed before the assignment as to indicate their character as completely as their manufacturer or place of manufacture, and the assignee affixes it to goods of a like character, equity will protect him, though he gives no notice of the assignment. Id.

Manufacturer of candy transferring to corporation organized by him right to use his name held properly enjoined from using such name in connection with another candy manufacturing enterprise. Guth v. Guth Chocolate Co. (1915) 224 Fed. 932, 140 C. C. A. 410, affirming decree Guth Chocolate Co. v. Guth (D. C. 1914) 215 Fed. 750.

The assignee of a whole right in a trade-mark, and of the property in the goods to which it is attached, may enjoin its wrongful use by others to the like extent as his assignor. Walton v. Crowley (C. C. 1856) Fed. Cas. No. 17,133.

The exclusive right to use a trade-mark will pass on an assignment of the

exclusive right to make and sell the article to which it is applied. Filkins v. Blackman (C. C. 1876) Fed. Cas. No. 4,786.

Under an assignment of the exclusive right to use the name of the inventor in the manufacture and sale of certain medicine for a term of 10 years, with the condition that, on the performance of the covenant for such time, the assignee shall have "all of the rights and privileges" to use the inventor's name, without reward, for 50 years, the assignee acquires, after the 10 years, the same exclusive rights which he had during such years. Id.

A writing extending to purchasers "the use of all my brands formerly used by me in my Cincinnati house," where the seller also had a New York house, held to convey an exclusive right to use the trade-mark. Johnson v. Schenck (C. C. 1877) Fed. Cas. No. 7,412.

A trade-mark, indicative of origin, or ownership in the proprietor, of a certain business, may be sold or assigned by him as an appurtenance of such business, and the assignee may become entitled to the exclusive use of such mark, even as against such proprietor himself. Burton v. Stratton (C. C. 1882) 12 Fed. 696.

An assignee or purchaser of a trade-mark must in the use thereof indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned. Stachelberg v. Ponce (C. C. 1885) 23 Fed. 430, decree affirmed (1888) 128 U. S. 686, 9 Sup. Ct. 200, 32 L. Ed. 569.

Although a name cannot be appropriated as a technical trade-mark, yet where it has been used for many years in connection with a distinctive dressing for the article, by which it has become well known to the trade and to consumers, the right to the exclusive use of such dressing is one which passes with the sale of the assets and good will of the business, and in which the purchaser is entitled to protection. Kronthal Waters v. Becker (C. C. 1905) 137 Fed. 649.

A patentee, who has adopted and registered a trade-mark may assign the right to use such trade-mark as an incident to a license to make and sell the patented article, without losing his rights therein, and, on termination of the license, is reinvested with full title to the trade-mark, with the right to protection against its continued use by the licensee. Hoffman v. B. Kuppenheimer & Co. (C. C. 1910) 183 Fed. 597.

One who conveyed the right to use his name as a trade-mark for chocolates by which they became widely known, held not entitled to use such name alone or in connection with other words on packages of chocolates made by another and sold in competition with complainant's product. Guth Chocolate Co. v. Guth (D. C. 1914) 215 Fed. 750.

Where the proprietor of "Brewer's Lung Restorer" sold the exclusive right to manufacture the medicine together with the trade-mark, and agreed never to use or permit his name to be used on any other preparation for similar purposes, such contract did not limit his skill in compounding medicines for the cure of such diseases, but merely operated to prevent him from placing or permitting his name to be placed on such medicines. Brewer v. Lamar (1882) 69 Ga. 656, 47 Am. Rep. 766.

A person may, by assigning the right to use his name in the manufacture of a certain article, bar himself forever from such use; but he cannot bar himself from again engaging in the same business without limit of time or territory. Frazer v. Frazer Lubricator Co. (1886) 18 Ill. App. (18 Bradw.) 450.

An assignment of "all right, title, and interest" in and to a business, and "its assets, profits, and emoluments," without making any mention of any trade-marks or trade name, is not sufficient to show a relinquishment by the assignor of his right to use his own name in connection with similar manufactures afterwards made by him. Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. (1892) 142 Ill. 494, 30 N. E. 339, affirming (1891) 40 Ill. App. 430.

Where a business is actually, though not formally, transferred, the transferee has the right to use the trade-name. Allegretti v. Allegretti Chocolate Cream Co. (1898) 52 N. E. 487, 177 Ill. 129, affirming decree Rubel v. Allegretti Chocolate Cream Co. (1898) 76 Ill. App. 581.

When an inventor holding a patent for a valuable improvement engaged in the profitable manufacture and sale thereof, at all times affixing his trade-mark a transfer and assignment of all of his letters patent to the plaintiff and all his rights to the property in such trade-mark carried with it the exclusive right to manufacture and sell such articles specified in the letters patent, and to carry on the business of making and selling them. Julian v. Hoosier Drill Co. (1881) 78 Ind. 408.

Where defendant made a bill of sale of "The Kansas Book Bindery," under which name he had previously done business, together with all his right, title, and good will to the above, he devested himself of the right to use the old name on his re-engaging in the same business in the same state. Drake v. Dodsworth (1867) 4 Kan. 159.

Where T. was the distiller and a stockholder of the E. H. T. Co., which sold its property, trade-marks, etc., to the S. Co., the latter had no right to use the autograph signature of T., as it might appear in the corporate name of E. H. T., Jr., Co., nor advertise him as the distiller of their O. F. C. and Carlisle whiskies, and the assumption by T. and his sons of the partnership name E. H. T., Jr., & Sons, though similar to the corporate name E. H. T.,

Jr., Co., was not a violation of the rights of the S. Co. George T. Stagg Co. v. Taylor (1894) 95 Ky. 651, 27 S. W. 247.

One may so transfer the right to use his labels and trade-marks as to extinguish his right to use them, though they are such as to indicate that he is the manufacturer of the articles on which they are placed; but the purchaser must so modify them as to show that he, and not the seller, is now carrying on the business. Symonds v. Jones (1890) 82 Me. 302, 19 Atl. 820, 8 L. R. A. 570, 17 Am. St. Rep. 485.

The mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another. To permit this to be done would be a fraud upon the public. Witthaus v. Braun (1876) 44 Md. 308, 22 Am. Rep. 44.

Where a manufacturer conveyed to his former partner "all my right, title, and interest in and to all and singular the partnership property belonging to the firm, meaning hereby to sell and convey all my interest in the entire assets of the firm," the trade-marks passed by the bill of sale, and the purchaser might restrain the seller from using wrappers bearing the trade-marks, and from doing matters tending to injure and impair the good will of the business. Hoxie v. Chaney (1887) 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

One who sold his business and trade-mark will be enjoined from using the same or a closely similar trade-mark for the same article, or using it to describe his business concern. Russia Cement Co. v. Le Page (1888) 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

One who organized an orchestra, giving it a certain name, could not, by assignment, bind the other members of the orchestra who were not parties to the contract so as to prevent them from using such name. Messer v. The Fadettes (1897) 168 Mass. 140, 46 N. E. 407, 37 L. R. A. 721, 60 Am. St. Rep. 371.

An assignment by one to his copartner of all the property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. Williams v. Farrand (1891) 50 N. W. 446, 88 Mich. 473, 14 L. R. A. 161.

Where a man has given his own name to a particular manufacture, and sells the use of his name in the manufacture of those particular goods, equity will restrain him from advertising goods of the same quality under his own name, though actually made by him. Probasco v. Bouyon (1876) 1 Mo. App. 241.

Where a man has parted with the right to use his own name as a trade-mark, a woman whom he marries acquires no right to use his name for that purpose. Skinner v. Oakes (1881) 10 Mo. App. 45.

Territorial rights to a trade-mark cannot be sold to different persons so as to enable each to make and sell their goods as those made by the original owner of the mark in fraud of the public. Snodgrass v. Welle (1882) 11 Mo. App. 590.

A vendor who has sold out his business and who afterwards with the consent of the vendee does engage in the business, can restrain a subsequent assignee of the vendee from the use of the trade-name under which the vendor had formerly transacted his business. Howe v. Searing (1860) 19 N. Y. Super. Ct. (6 Bosw.) 354, 19 How. Prac. 14, 10 Abb. Prac. 264.

Where the owners of a spring of mineral water had for years disposed of the waters under the name "The Congress Spring," "Congress Water," and "Congress Spring Water," a sale of the spring passed to the purchaser the right to use such names as a trade-mark. Congress & Empire Spring Co. v. High Rock Congress Spring Co. (N. Y. 1871) 10 Abb. Prac. (N. S.) 348.

One who bought from the owner a natural mineral water spring and all his interests therein was entitled to relief against the owner attempting to appropriate the trade-mark as descriptive of the water of the spring. Congress & E. Spring Co. v. High Rock Congress Spring Co. (1871) 45 N. Y. 291, 6 Am. Rep. 82.

A purchaser from the assignee of the good will, trade-marks, etc., of an established business, sold the same to a corporation. Held, that the corporation had no right to assume the firm name, and could only hold itself out as the successors of the firm. Hegeman & Co. v. Hegeman (N. Y. 1880) 8 Daly, 1.

One who purchased a recipe for "Magnetic Balm," and for 25 years manufactured and sold "Barker & Smith's Magnetic Balm," was entitled to protection in the use of the name. Smith v. Sixbury (N. Y. 1881) 25 Hun, 232.

A new firm, which succeeds to the business of an old one, may acquire by purchase and assignment the trade-mark of the old firm, and thereby succeed to the exclusive right to use the same. Kinney Tobacco Co. v. Maller (1889) 53 Hun, 340, 6 N. Y. Supp. 389.

Where all of defendant's property was sold under mortgage, and defendant gave the purchaser an order for all "trade-marks, and woodcuts and electrotypes of the trade-marks," which were delivered accordingly, it was the intention of the parties that the exclusive right to such trade-marks should pass with the property as an incident thereto, and that plaintiff was entitled

to the exclusive use of the same. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1891) 60 Hun, 583, 15 N. Y. Supp. 249.

A manufacturer of spool silk organized a corporation to continue the manufacture and sale, and transferred to it various property, including a quantity of cabinets bearing his name, or combinations, which had been distributed to retail dealers throughout the country and were used for holding spools of such silks for sale by the dealers. A factory situated in another state was not included in the transfer, and no mention was made of conveying any exclusive rights. Held, the corporation did not acquire the exclusive right, as against such manufacturer, to use his name or the combinations thereof in the manufacture of spool silks. Cutter v. Gudebrod Bros. Co. (1899) 55 N. Y. Supp. 298, 36 App. Div. 362.

Where such corporation thereafter made a general assignment, the assignee acquired no title to the use of the trade-name which he could sell and convey. Id.

Dr. David Kennedy, who sold to a corporation the good will of his business, with the sole right to use the names "Dr. David Kennedy, Rondout, N. Y.," and "Dr. D. Kennedy, Rondout, N. Y.," and later his connection with the company ceased, would be enjoined from receiving and opening mail addressed to "Dr. David Kennedy of Rondout" or "Dr. D. Kennedy," though some of the letters so addressed in no way concerned the corporation. Dr. David Kennedy Corp. v. Kennedy (1899) 55 N. Y. Supp. 917, 36 App. Div. 599, judgment modified (1901) 59 N. E. 133, 165 N. Y. 353.

Where defendant assigned to plaintiff all the firm's "personal assets, including good will, of every nature and kind," and all their rights, except "all patents relating to automatic piano players, * * * as well as trademarks or any property of any nature or kind relating" to the firm's business in connection with the manufacture and sale of said automatic piano players, plaintiff could enjoin defendant from manufacturing or selling pianos under the name "Ludwig," or any name of which the word "Ludwig" formed a part, whether such pianos had interior mechanism or not, and from placing the word "Ludwig," or any name of which the word "Ludwig" formed a part, on any visible part of such instruments, or from using such names in advertising them, but could not enjoin defendant from advertising that a playing mechanism made by him is contained in a particular piano, nor the designation of such mechanism as the "Ludwig Player," provided the name "Ludwig" was not upon any visible part of such pianos. Ludwig & Co. v. Claviola Co. (1911) 129 N. Y. Supp. 310, 144 App. Div. 388.

The right to protection in the use of a name as a trade-mark will pass by assignment. Drake Medicine Co. v. Glessner (1903) 67 N. E. 722, 68 Ohio St. 337.

The right to a trade-mark owned and used by a firm will pass under an assignment of "all the personal property of the firm." Piper v. Laughman (1884) 6 Pa. Co. Ct. R. 232.

The mere assignment of the family name by a brother of a cigar manufacturer, whose cigars had become widely known thereunder, without an assignment of any secret process or particular formula for making the cigars, is evidence that the assignment was in fraud of the manufacturer's rights, and is, in itself, sufficient to deprive the assignee of claiming any benefit from the doctrine of laches and estoppel. Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co. (1908) 70 A. 968, 222 Pa. 116.

That plaintiff had been guilty of laches in allowing his brother to infringe his trade-mark and trade-name did not authorize an assignee of his brother so to do. Id.

The mere discontinuance of a banking business for eight months, while the same is in the hands of an assignee, will not preclude the assignee's vendee from asserting his right to use the former trade-name, which passed to him by the assignment and transfer. Bank of Tomah v. Warren (1896) 68 N. W. 549, 94 Wis. 151.

4. Change or dissolution of partnership.—The purchaser of the business and good will of a partnership acquires the right to a trade-mark used by the firm. Adams v. Adams (N. Y. 1879) 7 Abb. N. C. 292; Robinson v. Storn (1899) 52 S. W. 880, 103 Tenn. 40.

A retiring partner, who assents to the continuation of the business by the other partners at the same place and under the same name, retains no interest in the good will, such as gives him a right to use a trade-mark belonging to the firm. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

A retiring partner, who assents to the continuation of the business by the other partners at the same place and under the same name, retains no interest in the good will, such as will give him a right to use a trade-mark belonging to the firm. Id.

On the dissolution of the partnership, and the transfer by the owner of the trade-mark of his interest in the factory property, such owner could continue in the purchaser the right to use the trade-mark which he had previously permitted the firm to use in their factory. Batcheller v. Thomson (1899) 93 Fed. 660, 35 C. C. A. 532, reversing decree (C. C. 1898) 86 Fed. 630.

A trade-mark adopted by a partnership may be used by either member

after its dissolution, and where one obtains letters of registration in his own name he may be compelled to transfer an equal interest to the other. Taylor v. Bothin (C. C. 1879) Fed. Cas. No. 13,780.

The exclusive right to use the trade-mark of a firm does not pass to a member by implication on a sale of the business to him, but he may use the trade-mark, provided he do so in a manner not to deceive the public. Young v. Jones (C. C. 1879) Fed. Cas. No. 18,159. CONTRA, see Blackwell v. Dibrell (C. C. 1878) Fed. Cas. No. 1,475.

A partnership suffering by any one to use its name as a part of the firm style and title, though it may acquire by such license an exclusive right to the use of the name so long as the partnership continues intact, cannot, upon its dissolution, confer the same privilege upon its successor. Horton Mfg. Co. v. Horton Mfg. Co. (C. C. 1883) 18 Fed. 816.

In the absence of an express agreement, a trade-mark used theretofore by one who enters a partnership does not, on the withdrawal of the member bringing the mark into the partnership, remain the property of the partnership. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

Where a retiring partner acquiesces in the retention by the firm of the old stand, the good will, including in some cases the trade-mark, remain with the firm. This rule does not apply where the firm, and not alone an individual member, withdraws from business. Duluth Superior Milling Co. v. Koper (1911) 37 App. D. C. 115.

The label issued by L. & Co. indicated that the firm was the manufacturer and seller of the medicine, and stated that "none was genuine without the fac simile signature, L. & Co." L. transferred all his rights, and afterwards formed a partnership with his wife for the purpose of selling similar medicine. Held, that he might be enjoined from the use of any label indicating that such medicine was prepared and sold by L. & Co., or that L. was the original compounder of it. Spieker v. Lash (1894) 102 Cal. 38, 36 Pac. 362.

Where a partnership, manufacturer of a medicine, is not a patentee thereof, one partner who sells his interest to the other, cannot be restrained from manufacturing and selling similar medicine. Id.

In the absence of express provisions in the articles when a partnership is formed, a trade-mark connected with the business of the firm became a part of its assets, and passed, on dissolution of the firm, to the continuing partner, unless expressly reserved. Miller v. Cummins (1884) 6 Ky. Law Rep. 96.

Where firms engaged in the same business in different states contained a mutual partner whose name was used for each business, and who later died, the survivors of one firm could not enjoin the surviving partner of the other firm from therein using the firm name and attaching it to machinery sold by him, but made by others than themselves. Rogers v. Taintor (1867) 97 Mass. 291.

Where for 17 years after the death of the senior member of a soap-manufacturing firm, the firm had owned and enjoyed the exclusive use of their original trade-mark, on the dissolution of the firm, and sale by his executors of the manufactory to L., they could not maintain a bill in equity to compel a member to join in an agreement to transfer to L. the right to use the trade-mark. Sohier v. Johnson (1872) 111 Mass. 238.

Where firm manufacturing ice cream under trade-mark sold its assets and good will to a purchaser who used the trade-mark on its product, the partner originating it could not transfer it to another. Detroit Creamery Co. v. Velvet Brand Ice Cream Co. (Mich. 1915) 153 N. W. 664.

A retiring partner has no right to use signs containing the old firm name without sufficient alterations or additions to give distinct notice of the change in the firm, and if he does so such act constitutes unlawful competition entitling the remaining partner to an injunction. Peterson v. Humphrey (N. Y. 1857) 4 Abb. Prac. 394.

Defendant W. was in partnership with the plaintiffs in making and selling pills. Plaintiffs had no exclusive right to manufacture and sell such pills. The firm was dissolved, and W. continued to manufacture pills, using the same partnership name. Held not to affect the right of the firm to use such partnership name in the sale of such pills. Comstock v. White (N. Y. 1860) 10 Abb. Prac. 264.

A purchaser of all the partnership property of a firm on their dissolution does not thereby acquire the right to use the firm name as a label on his goods, or to advertise himself as the successor of the firm. Reeves v. Denicke (N. Y. 1871) 12 Abb. Prac. (N. S.) 92.

Where the surviving partner purchased all of the deceased member's interest in the business, including the right to all trade-marks, he was entitled to advertise himself as successor of such firm and describe his tables as "Phelan & Collender Standard American Tables," as against a son of the deceased partner, engaged in the same business, so long as defendant did nothing to induce the public to believe that his tables were in fact made by the son. Phelan v. Collender (N. Y. 1875) 6 Hun, 244.

Where a drug house acquired the right to the use of the words "Estab-

lished 1780," or "Established A. D. 1780," as a trade-mark, when the partnership ended, the right to use such trade-mark passed to its successors. Hazard v. Caswell (N. Y. 1878) 57 How. Pac. 1.

Where on the dissolution of a firm one partner purchased certain of its assets, and became the assignee of the lease, but there was nothing in the agreement preventing the other partner engaging in business, the purchasing partner was not authorized to continue the use of the firm name or to declare himself as "successor to" such firm. Morgan v. Schuyler (1880) 79 N. Y. 490, 35 Am. Rep. 543.

A. & B., partners in business, used the word "Silex" as a trade-mark. Upon dissolution, there being no reference to the good will or to the trademark, A. continued the business at the same place, using the trade-mark. Held that, assuming that the word "Silex" could be used as a trade-mark, and that the firm of A. & B. had the exclusive right to use it, A. did not acquire such right, and could not maintain injunction therefor, against B. Huwer v. Dannenhoffer (1880) 82 N. Y. 499.

Upon dissolution of a partnership, either partner may continue to use the trade-marks, unless he has in some manner transferred or devested himself of the right to do so. Hazard v. Caswell (1883) 93 N. Y. 259, 45 Am. Rep. 198.

Secret processes of manufacture, trade-names which have been applied to the manufactured products, and trade-marks owned by the firm, are not subject of sale on dissolution of the firm; and thereafter each party may, in the absence of an agreement to the contrary, manufacture by such processes, and use such names and marks. Baldwin v. Von Micheroux (1894) 83 Hun, 43, 31 N. Y. Supp. 696, affirming (1893) 5 Misc. Rep. 386, 25 N. Y. Supp. 857.

Where no partnership existed in conducting, by two persons, a business under a firm name or style, neither had the right, after a termination of the association, to the exclusive use of the name. Longenecker v. Longenecker Bros. (Sup. 1913) 140 N. Y. S. 403.

Where, on dissolution of a partnership, one of the partners purchased all of the firm property together with "the good will of the business heretofore done by the firm," he thereby acquired the right to use the old firm name as a trade-mark. Burckhardt v. Burckhardt (1885) 42 Ohio St. 474, 51 Am. Rep. 842.

A trade-mark belonging to a copartnership may be used, after the death of one of the partners, by the surviving partners and the administrator of the deceased partner. Lewis v. Smith (1889) 8 Pa. Co. Ct. R. 327.

A trade-mark does not pass under a sale of the lease and good will of a copartnership, the sale being made by the surviving partner. Id.

Where a retiring partner in a firm, who had the right to use the old firm name, organized a corporation under such name, and located near by, the fact that temporary confusion arose in the mails directed to the old firm was not sufficient to authorize an injunction against the corporation to restrain it from using the name. Fite v. Dorman (Tenn. 1900) 57 S. W. 129.

5. **Insolvency or bankruptcy.**—A right to the exclusive use of the name of a partnership, consisting of the individual name of one partner, with the addition "& Co.," does not pass by an assignment for creditors so that it may be conveyed to a purchaser at the assignee's sale. Iowa Seed Co. v. Dorr (1886) 70 Iowa, 481, 30 N. W. 866, 59 Am. Rep. 446.

The right of a person to use his name as a brand on manufactures, the words used in connection with his name being words of common use, is a personal right, and does not pass to his assignee in bankruptcy. Mattingly v. Stone (Ky. 1889) 12 S. W. 467.

The right to use trade-marks, in connection with a manufacturing business, which are not personal in their character, but merely designate the place or establishment at which goods are manufactured, passes to the assignee in insolvency of the owner. Warren v. Warren Thread Co. (1883) 134 Mass. 247.

An assignment by a publishing company for the benefit of creditors passes its trade-marks and trade-names. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co. (1906) 77 N. E. 841, 191 Mass. 353, 5 L. R. A. (N. S.) 1077.

On a general assignment for the benefit of creditors, the trade-mark of the assignor is among the assets, and may be disposed of, the same as other assets, without order of the court. In re Knox (N. Y. Com. Pl. 1879) 1 Month. Law Bul. 47.

An assignment of an insolvent debtor, by which property is described under a general designation, will not carry the right of the assignor to the use of his own name in his future business. Bellows v. Bellows (1898) 53 N. Y. Supp. 853, 24 Misc. Rep. 482, 6 N. Y. Ann. Cas. 170.

Where a manufacturer of spool silk, who had acquired an extensive reputation, transferred to a corporation, which he had organized to continue its manufacture and sale, a quantity of spool cabinets bearing his name burned therein, for distribution among retail dealers. They were so constructed that to remove the name would destroy their value as property. He had voluntarily devoted spool cabinets, having his name burned therein, for distribution to retail dealers, to the use of the corporation, with the right to sell the same, the corporation's assignee for the benefit

of creditors acquired the same right, and a purchaser from him was entitled to be protected in their use. Cutter v. Gudebrod Bros. Co. (1899) 61 N. Y. S. 225, 44 App. Div. 605, judgment affirmed (1901) 61 N. E. 887, 168 N. Y. 512.

An assignment for the benefit of creditors does not carry with it to the assignee the exclusive right to the use of a trade-mark and trade-name of one of its incorporators, so as to entitle the assignee to sell such right as against the original owner. Id.

Where one made a voluntary assignment of "all and singular" his "lands, tenements, hereditaments, appurtenances, goods, chattels, * * * property and effects of every kind and description," and the assignee thereafter conveyed to plaintiffs the "building, fixtures, good will, and the name of the 'Bank of Tomah,' " plaintiffs thereby acquired the exclusive right to the tradename. Bank of Tomah v. Warren (1896) 68 N. W. 549, 94 Wis. 151.

6. **Licenses.**—Where the owner of a trade-mark formed a new firm, not transferring to the firm his trade-mark, but allowing the firm to use it on packages manufactured by them, the permission to use the trade-mark conferred on the firm gave them no interest therein, and the right to use the same passed to the manufacturer's assignee. Kidd v. Johnson (1879) 100 U. S. 617, 25 L. Ed. 769.

Where the owner of a trade-mark was also a manufacturer of the goods on which it was affixed, the relinquishment of a license to use the trade-mark was not void on the ground that a trademark, distinct from the articles manufactured, was not the subject of sale, as such transaction was simply a relinquishment to the owner of the license to use his property. Batcheller v. Thomson (1899) 93 Fed. 660, 35 C. C. A. 532, reversing decree (C. C. 1898) 86 Fed. 630.

An agreement between the owner of a trade-mark and a member of a firm to whom he had granted a license to use it, that, when such member retired from the firm, all the rights and privileges granted to him should revert to the owner of the trade-mark, was an agreement that on such retirement the use of the trade-mark should cease. Id.

The licensed use in the business of a firm of the trade-mark owned by one partner did not place the trade-mark in the firm, as a part of its assets, nor make it partnership property. Id.

Where an inventor permitted plaintiff to use his name in connection with his invention, and later improved it and licensed a corporation to use his later patents, such corporation and its licensees were only entitled to use the inventor's name in manufacture and sale of their shoes in connection with an express statement that such shoes were not those made under the original patent. Dr. A. Reed Cushion Shoe Co. v. Frew (1908) 162 Fed. 887, 89 C. C. A. 577.

Where Baron Liebig granted to complainant's predecessor the exclusive right to use his name in connection with extract of meat by his process, and complainant sold its product in the United States under such name for 20 years before the name began to be used in this country by any one else, he may enjoin its use by another. Liebig's Extract of Meat Co. v. Liebig Extract Co. (1910) 180 Fed. 688, 103 C. C. A. 654, reversing decree (C. C. 1909) 172 Fed. 158.

The owner of a trade-mark for goods which he manufactures under a patent is not entitled to enjoin the use thereof by a dealer purchasing his goods from a manufacturer licensed under the patent. Walker v. Reid (C. C. 1877) Fed. Cas. No. 17,084.

Disregard of territorial limits allotted by license, and misuse of the trademark, forfeit the right to the same. Manhattan Medicine Co. v. Wood (C. C. 1878) Fed. Cas. No. 9,026.

In a suit to restrain infringement of trade-mark it is no defense that defendant had a license for its use, where defendant failed to perform the conditions of the license, and plaintiff notified him that the license was terminated. Martha Washington Creamery Buttered Flour Co. of United States v. Martien (C. C. 1890) 44 Fed. 473.

A mere implied license to use a patent does not accrue to such licensee's successor, who purchases the trademark, and it acquired no right to mark its goods as patented; and its use of patentee's designations and imitation of his packages and designs constituted unfair competition. Hygienic Fleeced Underwear Co. v. Way (C. C. 1904) 133 Fed. 245, decree reversed (1905) 137 Fed. 592, 70 C. C. A. 553.

The use of a trade-mark cannot be licensed except as incidental to the transfer of the business or property in connection with which it has been used. Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. (1910) 35 App. D. C. 425.

Where one who had used a trademark organized a corporation to which he transferred his business and good will, and the corporation continued the manufacture of the article to which the mark was applied, and used the mark, the transfer of the business and good will necessarily carried with it the right to use the mark, and that the corporation was not a mere licensee. Jackson Corset Co. v. Cohen (1912) 38 App. D. C. 482.

Statute which provides that whenever any person, corporation, association, or union of workmen has adopted any label announcing that goods to which such label shall be attached were manufactured by such person, or by a member or members of such association or union, it shall be unlawful to counterfeit or imitate the same, has no application to

a union label adopted by an unincorporated association of hat makers who made no hats themselves, copies of which label were furnished gratis to manufacturers of hats employing only union workmen. Lawlor v. Charles H. Merritt & Son (1906) 63 A. 639, 78 Conn. 630.

One, on selling a hotel with the good will, who consents to the employment of his own surname to designate it, if such consent be purely gratuitous, may withdraw it at pleasure, since his surname is personal to him, and not an element of good will of the business. Vonderbank v. Schmidt (1892) 44 La. Ann. 264, 10 South. 616, 15 L. R. A. 462, 32 Am. St. Rep. 336.

Plaintiff, engaging in business under an assumed name, adopted a trade-mark, and thereafter transferred the business to defendant under an agreement that defendant might carry on the business so long as plaintiff continued in his employment. Held, defendant could not use the trade-mark after plaintiff left his employment; the limitation of the right to use the trade-mark being to the right to use the business name. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

A naked license to use a trade-mark is void. Detroit Creamery Co. v. Velvet Brand Ice Cream Co. (Mich. 1915) 153 N. W. 664.

License to use a name for a certain time on a publication, does not give right to use such name with reference to editions subsequently published except to show that the original matter was compiled by the use of complainants' bureau. Munn & Co. v. Americana Co. (N. J. Ch. 1913) 88 A. 330.

An injunction restraining the further continuance of certain words as a part of a corporate name would not be denied on the ground of hardship, where the hardship, if any, arose from acts of the corporation after the contracts authorizing the use of such name had expired. Id.

The acquiescence of the owner of a trade-mark in its use by another may be withdrawn by him, and will not give any license for its subsequent use. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

The mere consent of a person to use his name as a sign or trade-mark will not be regarded as irrevocable, except in a case where the intention is made clear. McCardel v. Peck (N. Y. 1864) 28 How. Prac. 120.

Where the proprietor of a hotel, licensed defendant to place the name of the hotel on his coaches, the arrangement to continue so long as the parties were mutually satisfied, when defendant continued the use of the name of the hotel after receiving notice terminating his authority, he might be restrained by injunction. Deiz v. Lamb (1866) 29 N. Y. Super. Ct. (6 Rob.) 537.

Transfer of wood cuts of a trade-mark by the plaintiffs to the defendants, simply to enable the latter to label articles which they were manufacturing for the plaintiffs, and under their supervision, does not give the defendants any property in the trade-mark, so that they might use it in their own business after dissolving connection with the plaintiffs. Lockwood v. Bostwick (N. Y. 1869) 2 Daly, 521.

Consent to the use or imitation of one's trade-mark by another, when purely gratuitous may be withdrawn, and, when implied, it lasts no longer than the silence from which it springs. Amoskeag Mfg. Co. v. Garner (N. Y. 1876) 54 How. Prac. 297.

The invalidity of a registered trade-mark cannot be set up by a licensee using the trade-mark, in defense to an action to recover license fees. Hilsen v. Libby (1878) 44 N. Y. Super. Ct. (12 Jones & S.) 12.

Plaintiff claimed a trade-mark in certain words by reason of a concession made to him by the inventor of certain garments. The inventor had never made such garments, nor had he been a vendor of them with such words attached. Held, that the inventor had no trade-mark, and plaintiff acquired none by the concession. Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier (N. Y. 1888) 47 Hun, 521.

A firm which arranged with the inventor for the exclusive manufacture of the article and the use of his name in connection with other terms used by him, as a trade-mark, did not have, seven years thereafter, any exclusive proprietary right in the name of the inventor, as applied to underwear in the United States, where underwear having the same descriptive name had been sold by various dealers for years, even if it acquired such right in such foreign country. Dr. Jaeger's Sanitary Woolen System Co. v. La Boutillier (1893) 5 Misc. Rep. 78, 24 N. Y. Supp. 890.

A selling agent who used the manufacturer's name as a trade-name during a lease of business premises from such manufacturer had nothing more than a mere license to use the name during the term of the lease, and would be restrained from thereafter doing business under that name. Joseph Laurer Brewing Co. v. Ehresman (1908) 111 N. Y. Supp. 266, 127 App. Div. 486.

Where a corporation, acquiring the business name of an individual which was essential to the business, permitted the individual to maintain a separate business, using his name in styling it, the corporation was not entitled to restrain the transferee of the individual's business after his death. John H. Woodbury Dermatological Institute v. Woodbury (1909) 120 N. Y. Supp. 638.

One licensed to use cement of a certain kind, the patent process of which was owned by the licensor, held not to

have obtained any right to the use of a trade label used exclusively in connection with the licensor's products. Waterproofing Co. v. Hydrolithic Cement Co. (1912) 138 N. Y. Supp. 265, 153 App. Div. 47.

On the termination of the license the licensor could resume the use of the trade-names under which the patented product was sold. Id.

A licensee under a patent like the owner thereof, loses, with the expiration of the patent, his exclusive right to the use as a trade-mark of a name which he applied to a patented article and permitted it to become known by, during the life of the patent. Prest-O-Lite Co. v. Ray (1914) 147 N. Y. Supp. 138, 162 App. Div. 62 (reversing judgment [Mun. Ct. N. Y. 1913] 147 N. Y. Supp. 219); Same v. Brockner (1914) 147 N. Y. Supp. 147, 162 App. Div. 75.

One member of the firm of "McGowan Brothers" sold to the other his interest, including the old patterns with that name thereon, and the purchaser incorporated under the name, "The McGowan Brothers Pump and Machine Company." The seller set up a similar business himself. Held, that he was entitled to restrain the corporation from the use of "McGowan Brothers" in its name; the right to use the old patterns being in the nature of a revocable license. McGowan Brothers Pump & Machine Co. v. McGowan (Ohio, 1872) 2 Cin. R. 313.

Use of a trade-name while shippers were agents for a steamship company was a mere license, and gave them no right to use the name after the agency was terminated. Winsor v. Clyde (Pa. 1872) 9 Phila. 513.

The use of a name, while the shippers were agents for a steamship company, is a mere license, and gives no right to its use after the agency is terminated. Id.

Defendant, having bought at sheriff's sale the personal property of the insolvent firm of which plaintiff was a member, and used the old firm name, then of no commercial value, in continuing the business, at suggestion and consent of plaintiff that its use be continued indefinitely, and by expenditure of money and proper business methods given the name value, plaintiff cannot revoke the license, or require an account for moneys realized by use of the name. Harris v. Brown (1902) 51 A. 586, 202 Pa. 16, 90 Am. St. Rep. 610.

Where J. gave A. permission to use a certain formula under his trade-name or trade-mark but did not give an exclusive right, the registration of the trade-mark by A. could not deprive J. of his right to subsequently use the formula and trade-name. Friedman v. Hollander Bros. Drug Co. (1913) 86 A. 194, 238 Pa. 397.

7. **Contracts.**—A contract between persons having similar trade-marks, whereby one is to use one form of the trade-mark in connection with certain words, and the other is to use another form in connection with other words, is not recordable in the patent office, as a transfer of a right to use a trade-mark. Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co. (1894) 63 Fed. 438, 11 C. C. A. 277.

Where defendant contracted to stamp all manufacturers connected with lead pencils * * * not without first name, or at least with the initials of the first name, afterward using the name "E. Faber" on its goods as it had previously done, the use of such name was not in violation of the contract. Von Faber-Castell v. Faber (1905) 139 Fed. 257, 71 C. C. A. 383, reversing decree (C. C. 1903) 124 Fed. 603, and writ of certiorari denied (1905) 26 Sup. Ct. 750, 199 U. S. 609, 50 L. Ed. 331.

The bill of sale by Oakes to Probasco stipulated that the right to use the name "Oakes' Candies" should cease on a sale of the business by Probasco to a stranger, and should then revert to Oakes; but the purchaser from Probasco was not aware of this condition. Held that, being a bona fide purchaser, he was not bound thereby, and could convey it to another, who had notice of the stipulation. Oakes v. Tonsmierre (C. C. 1883) 49 Fed. 447.

As the bona fide purchaser had good title to the trade-mark, he could convey it to another, even though the latter had notice of the stipulation. Id.

Where plates, illustrations, and stamps were delivered to A. under an incomplete contract for the sale of the same, and $4,000 was paid as part consideration, but B. refused to enter into a more definite contract, or comply with terms of the incomplete agreement, and proceeded to publish the book, B. was entitled to a return of the plates, etc., upon paying back to A. the $4,000 received, with interest, but was not entitled to damages or an accounting. Hubbard v. Thompson (C. C. 1885) 25 Fed. 188, decree reversed (1889) 9 Sup. Ct. 710, 131 U. S. 123, 33 L. Ed. 76.

Where, in consideration of a certain royalty, defendant should have, for a long term of years, the exclusive sale of certain waters in the United States and foreign countries during the life of the contract, the defendant had no right to sell other mineral waters, under the same name in competition with the waters of plaintiff's spring. Hill v. Lockwood (C. C. 1887) 32 Fed. 389.

Where defendant had a license to use a trade-mark and a machine to make certain articles, and defaulted in royalties, claiming he had purchased of plaintiff's predecessor machines for making such article, defendant may use the machine until worn out, and sell the article made by it, and as the trade-mark appears to be intended to designate the article manufactured by the

invention, and not that made by complainant personally, defendant may use it on the article so made by him. Martha Washington Creamery Buttered Flour Co. v. Martien (C. C. 1889) 37 Fed. 797.

Agreement by owner of a trade-mark that his former partner may use the trade-mark, conditioned that he will furnish the article to the retiring partner at a fixed price, and will not sell to others at less than a stated advance over such price, does not give the remaining partner the right to use the trade-mark after he has ceased to comply with the agreement on his part. Greacen v. Bell (C. C. 1902) 115 Fed. 553.

An instrument by F., granting to G. the absolute and exclusive use of certain trade-marks, in certain states, and providing that the agreement shall not prevent F. or its successors from using such trade-marks in said states, provided it shall not adopt any new label which shall imitate or conflict in color or design with the label of G., does not give G. a mere license, but assigns the exclusive ownership and good will in the trade-marks, within the specified states, merely reserving to F. certain permissive rights of personal use. Griggs, Cooper & Co. v. Erie Preserving Co. (C. C. 1904) 131 Fed. 359.

A contract purporting to license the use of a trade-mark is invalid, and will not support an action to recover royalties reserved thereby, where the only thing granted is the right to sell machines made by defendant, with which plaintiff has, and has had, no connection, under a name previously used by him in connection with different machines. Lea v. New Home Sewing Mach. Co. (C. C. 1905) 139 Fed. 732.

Complainant sold its product under a trade-mark and only to wholesale dealers under contracts which bound them to sell, only at a certain price, and only to retail dealers who also had contracts with complainant fixing the retail price. Held, such contracts were legal, and complainant was entitled to restrain defendants, not having any contract with complainant, from buying or selling such product. Wells & Richardson Co. v. Abraham (C. C. 1906) 146 Fed. 190, order affirmed (1906) 149 Fed. 408, 79 C. C. A. 228.

Right under contract with complainant to use words infringing its trade-mark held to cease when defendant ceased ordering complainant's product. Elliott Varnish Co. v. Sears, Roebuck & Co. (D. C. 1915) 221 Fed. 797.

The proprietor of a medicine known as "Brewer's Lung Restorer," sold the same with the exclusive right to manufacture and sell it, surrendered his trade-mark to the purchaser, and agreed "never to use or permit his name to be used on any preparation which could be recommended or sold for the same purposes." Held, that such contract, though in partial restraint of trade, was not unreasonable, and, being for a sufficient consideration, was valid. Brewer v. Lamar (1882) 69 Ga. 656, 47 Am. Rep. 766.

Where one sold his present and future interest in a patented article to plaintiffs, authorized the use of his name in the manufacture and sale by them of such article, and agreed to refrain from the manufacture and sale thereof, or the use of his name in connection therewith, and later sold a very similar article under his name, this was a breach of the contract with plaintiffs which would be enjoined. Frazer v. Frazer Lubricator Co. (1887) 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73.

A contract giving a person for a certain time the right to use a brand on the whisky manufactured by him gives him the right to use the brand, at any time after the expiration of the period, on whisky which was manufactured within the period specified in the contract. Mattingly v. Stone (Ky. 1889) 12 S. W. 467.

Where A. contracted with B. to carry passengers from the station to B.'s hotel, being given the right to use the name "Revere House" on his carriages and badges, and C., who formerly had such a contract with B., refused to cease the use of the words "Revere House," A., by his agreement with B., had an exclusive right to use the words "Revere House" for the purpose of indicating that he had the patronage of that house for the conveyance of passengers. Marsh v. Billings (1851) 61 Mass. (7 Cush.) 322, 54 Am. Dec. 723.

Injunction held the proper remedy to prevent the further use of a trade-name by defendants after the contract right to use same had expired, where it appeared that defendants' further use was calculated to injure plaintiffs' property rights. Munn & Co. v. Americana Co. (N. J. Ch. 1913) 88 A. 330.

One who contracted with a hotel proprietor to use the hotel name on coaches used in conveying passengers to and from it, and on uniforms worn by the drivers of such coaches, in consideration of a certain sum, acquired the exclusive right to use such name in that manner. Stone v. Carlan (N. Y. 1850) 3 Code Rep. 67.

A contract by which the plaintiff, having a reputation as a seedsman, sold to the defendant a large quantity of empty bags for seeds, with the plaintiff's label, the same to be filled by the purchaser with seeds, and sold in a certain county named in the contract, and not elsewhere, is void as against public policy, and will not be enforced. Bloss v. Bloomer (N. Y. 1857) 23 Barb. 604.

An oil known as "Pepper's Signal Oil" was manufactured by a firm composed of Pepper and the defendant. Plaintiff made an agreement with Mrs. Pepper, after the dissolution of the firm, that

he should have the exclusive right to the use of the name for five years. Held, that such agreement did not entitle plaintiff to the exclusive use of such name as a trade-mark as against the defendant where it appeared that Mrs. Pepper did not succeed to any business of her husband or acquire any right to the use of the name. Weston v. Ketcham (N. Y. 1876) 51 How. Prac. 455.

Where plaintiff reserved the right to use the name of a monthly journal, and to prohibit its use if defendant failed in his performance, on a breach by the latter plaintiff is entitled to injunctive relief. New York Polyclinic Medical School & Hospital v. King (1899) 57 N. Y. Supp. 796, 27 Misc. Rep. 250.

Where a hat maker sold his manufacturing establishment and trade-mark to a corporation, agreeing not to use his former trade-mark, injunction would be granted to restrain use of trade-mark. Metzger v. Knox (Sup. 1912) 136 N. Y. Supp. 681, 77 Misc. Rep. 271, order affirmed (1912) 137 N. Y. Supp. 1129, 153 App. Div. 911.

One may by contract deprive himself of the use of his own name in a given business. Zagier v. Zagier (1914) 83 S. E. 913, 167 N. C. 616.

The manufacturer of a certain plow disposed of his factory and rights. Subsequently he acquired additional patents, and began the manufacture of an improved plow, using a new trade-mark. Held, in an action to restrain those manufacturing under the first patents from using the new trade-mark, that the fact that the patentee may have violated an agreement by embarking in the manufacture of an improved plow gave the owners of his old trade-mark no right to use his new trade-mark. Burch v. Toledo Plow Co. (1898) 8 O. C. D. 201, 15 Ohio Cir. Ct. R. 483.

Where H. sold his interest in "Hall's Vegetable Sicilian Hair Restorer," and bound himself not to make or sell the same, impart the secret thereof or recipe to any one, or manufacture any article similar thereto, he deprived himself of the right to make and sell such medicine, and that complainant was entitled to restrain him from doing so; but defendant might make and sell other preparations for the hair. Gillis v. Hall (Pa. 1865) 2 Brewst. 342, 7 Phila. 422.

An agreement to use the partnership trade-name on its incorporation held to pass the right therein to the corporation. Wright Restaurant Co. v. Seattle Restaurant Co. (1912) 122 P. 348, 67 Wash. 690.

A manufacturer having built a reputation, under contract with W., the patentee, for W.'s saw swage, so advertised, and also as "New W." or "Improved W." swage, W. could not use his name in a similar manner in selling another saw swage, though he could advertise that he was the inventor, and that he sold a new or improved swage. Phœnix Mfg. Co. v. White (Wis. 1912) 135 N. W. 891.

8. Succession or Inheritance.—The successor to the business and good will of a safe and lock company, with the right to use the surname of the founder, while entitled to protection against the use of any name, mark, or advertisement indicating that the seller is the successor of the original company, or that its goods are the product of that company or its successors, cannot have an injunction totally restraining the use of such surname, and thus interfering with the right of the founder's sons to continue in the safe business and use their own name in so doing. Donnell v. Herring-Hall-Marvin Safe Co. (1908) 28 Sup. Ct. 288, 208 U. S. 267, 52 L. Ed. 481 (reversing decree Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co. [1906] 143 Fed. 231, 74 C. C. A. 361); Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. (1908) 28 Sup. Ct. 350, 208 U. S. 554, 52 L. Ed. 616 (modifying judgment Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [1906] 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. [N. S.] 1182).

One Le Page, having originated and sold an article styled "Le Page's Glue," organized a corporation to which he transferred the assets and good will of the business. He subsequently made individually a similar article, patented as an improvement, which he sold as "glue made by Le Page," and thereafter formed a new corporation, which sold the article as glue made by Le Page. Held, that the Le Page Company, by accepting the assignment of the patent, and allowing Le Page to manage and control its business, was proceeding under his authority and as his successor, and could have no greater rights to the use of the name "Le Page," as against the original corporation, than Le Page himself. The Le Page Co. v. Russia Cement Co. (1892) 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

A trade-mark used for many years solely in connection with paint made at a fixed place, and from ore dug from a certain mine, becomes localized and identified with the mine and place of manufacture so as to pass to the purchaser of the factory, mine, and business, as incidental thereto. Prince's Metallic Paint Co. v. Prince Manuf'g Co. (1893) 57 Fed. 938, 6 C. C. A. 647, affirming decree (C. C. 1892) 53 Fed. 493.

The fact that defendant was successor to a wholesale firm doing a shoe business under the name of "Nolan Bros." will not entitle him to the use of such name in the retail shoe business as successor to such firm, as the latter is a distinct and different business. Nolan Bros. Shoe Co. v. Nolan (1900) 63 P. 480, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346.

Complaint alleged that the plaintiff

succeeded to her husband's business and to the use of his name with his consent and agreement. Held, this was sufficient as against defendant, who had no legal right thereto from the husband, to enable the plaintiff to maintain the suit. McCardel v. Peck (N. Y. 1864) 28 How. Prac. 120.

Where plaintiff built a public building and christened it "Booth's Theater," and mortgaged and leased the premises under the name he had given them, his grantees and their successors had the right to call the building "Booth's Theater." Booth v. Jarrett (N. Y. 1876) 52 How. Prac. 169.

Under Laws N. Y. 1880, c. 561, the successors of one dead, who for five years carried on business in his sole name, may use his name as theirs in continuing his business, with the addition of "& Co.," and with the permission of his legal representatives. Arnstaedt v. Blumenfeld (N. Y. 1885) 13 Daly, 354.

Plaintiffs succeeded to a trade-mark long owned in the family, and arranged that each should use it by placing their individual names thereon, in place of their grandfather's. Held, an injunction to restrain the use of it by a stranger would be sustained. Appeal of Pratt (1888) 117 Pa. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

Plaintiffs, A., C. & Co., being the successors of Stillman & Co., continued to use "Stillman & Co." as a trade-mark; Latimer, Stillman & Co., the lessees of a mill formerly used by Stillman & Co., used "Stillman Mills" as a trade-mark; and it appearing that no deception could be charged on either complainants or respondents, and that no person of the old firm of Stillman & Co. was a member of the firm of A., C. & Co., injunction could not be granted. Carmichel v. Latimer (1876) 11 R. I. 395, 23 Am. Rep. 481.

9. **Estoppel.**—Partnership letters to purchasers of part of its business, showing assent to the use of trade-marks previously conveyed by one partner, estops surviving partner to deny his power to convey the same. Johnson v. Schenck (C. C. 1877) Fed. Cas. No. 7,412.

10. **Evidence.**—The assignment of a trade-mark to complainant is not established by testimony that witness had been connected with the business of complainant and its "predecessor" for over 20 years. P. Lorillard Co. v. Peper (C. C. 1895) 65 Fed. 597.

Parol evidence of an officer of a corporation that the transfer to it of a business included the right to use the name "Scientific American," held sufficient, where the evidence was not objected to, and defendants did not insist on the production of the written transfers. Munn & Co. v. Americana Co. (N. J. Ch. 1913) 88 A. 330.

In an action to restrain use of a trade-mark, the uncontradicted testimony of a stockholder that plaintiff company now owns the trade-mark is sufficient to enable the jury to pass upon the question of ownership. Blackwell's Durham Tobacco Co. v. McElwee (1888) 100 N. C. 150, 5 S. E. 907.

An intention to entirely divest oneself of the right to use his own name in his business and transfer it to another will not be presumed, but must be fairly shown. F. T. Blanchard Co. v. Simon (1905) 51 S. E. 222, 104 Va. 209.

11. **Injunction.**—Procedure in injunction cases, see notes under § 9504, post.

§ 9496. (Act Feb. 20, 1905, c. 592, § 11.) Certificates of registration and record thereof; copies of records, books, etc., and of certificates of registration, as evidence.

Certificates of registration of trade-marks shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be signed by the Commissioner of Patents, and a record thereof, together with printed copies of the drawing and statement of the applicant, shall be kept in books for that purpose. The certificate shall state the date on which the application for registration was received in the Patent Office. Certificates of registration of trade-marks may be issued to the assignee of the applicant, but the assignment must first be entered of record in the Patent Office.

Written or printed copies of any records, books, papers, or drawings relating to trade-marks belonging to the Patent Office, and of certificates of registration, authenticated by the seal of the Patent Office and certified by the Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof. (33 Stat. 727.)

See notes to section 1 of this act, ante, § 9485.

Fees for copies of certificates of registration and other papers, and for recording transfers and other papers, were prescribed by section 14 of this act, post, § 9499.

The printing and distribution of copies of certificates of trade-marks and la-

bels registered were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 78, par. 71, ante, § 7093(2).

Notes of Decisions

Certificate of registration.—The certificate of the registration of a trade-mark need not include a certified copy of the declaration filed with the trade-mark. Walker v. Reid (C. C. 1877) Fed. Cas. No. 17,084.

Effect of certificate.—The certificate of registry issued under Act July 8, 1870, is not conclusive of the claimant's right to appropriate the device. Moorman v. Hoge (C. C. 1871) Fed. Cas. No. 9,783.

Certificate as evidence.—The provisions of the Phillippine Commission making Spanish certificate of registration of a trade-mark conclusive evidence of title, are subject to the section, prohibiting actions founded on infringement of trade-mark when the complaining party has been guilty of imposing on the public. Ubeda v. Zialcita (1913) 33 Sup. Ct. 165, 226 U. S. 452, 57 L. Ed. 296.

Certificate of registration of a trade-mark is sufficient prima facie evidence to indicate a compliance with all the regulations enacted therefor, and the burden of showing noncompliance is on the person who asserts it. Hughes v. Alfred H. Smith Co. (1913) 209 Fed. 37, 126 C. C. A. 179, affirming decree (D. C. 1913) 205 Fed. 302.

The certificate of the commissioner of patents as to the registration of a trade-mark held admissible in evidence, and prima facie evidence of proper registration. U. S. v. Steffens (D. C. 1877) Fed. Cas. No. 16384.

§ 9497. (Act Feb. 20, 1905, c. 592, § 12.) Duration of certificate of registration, and renewal thereof.

A certificate of registration shall remain in force for twenty years, except that in the case of trade-marks previously registered in a foreign country such certificates shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall in no case remain in force more than twenty years, unless renewed. Certificates of registration may be, from time to time renewed for like periods on payment of the renewal fees required by this Act, upon request by the registrant, his legal representatives, or transferees of record in the Patent Office, and such request may be made at any time not more than six months prior to the expiration of the period for which the certificates of registration were issued or renewed. Certificates of registration in force at the date at which this Act takes effect shall remain in force for the period for which they were issued, but shall be renewable on the same conditions and for the same periods as certificates issued under the provisions of this Act, and when so renewed shall have the same force and effect as certificates issued under this Act. (33 Stat. 727.)

See notes to section 1 of this act, ante, § 9485.

Certificates of registration issued under previous acts were excepted from the operation of the repeal of all acts and portions thereof inconsistent with this act, by section 30 of this act, post, § 9516.

Notes of Decisions

Renewal.—A request for renewal of a certificate of registration of a trade-mark is not to be treated as an original application, or governed by the same procedure, as the procedure is prescribed by this section. Ewing v. Standard Oil Co. (1914) 42 App. D. C. 321.

Renewal of a certificate of registration under the provisions of this section in no sense confers new rights, but is a correction of the records to the date of renewal by the registrant or owner of the mark, asserting his continual use of it, and therefore title in it. Id.

§ 9498. (Act Feb. 20, 1905, c. 592, § 13.) Cancellation of registration; proceedings therefor.

Whenever any person shall deem himself injured by the registration of a trade-mark in the Patent Office he may at any time apply to the Commissioner of Patents to cancel the registration thereof. The Commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question and who shall give notice thereof to the registrant. If it appear after a hearing before the examiner that the registrant was not en-

titled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner shall so decide, the Comsioner shall cancel the registration. Appeal may be taken to the Commissioner in person from the decision of examiner of interferences. (33 Stat. 728.)

See notes to section 1 of this act, ante, § 9485.

Cancellation of the certificate of registration, in a suit in equity involving interfering registered trade-marks, was authorized by section 22 of this act, post, § 9507.

Notes of Decisions

Construction of act.—Although the owner of a trade-mark has lost his right to oppose registration thereof by another, he may still protect his rights by proceeding for cancellation under this section. Martin v. Martin & Bowne Co. (1906) 27 App. D. C. 59, 7 Ann. Cas. 47.

The provisions of this section permitting the registration of a trade-mark to be challenged by a proceeding for cancellation, apply to registrations allowed under previous acts. Stamatopoulos v. Stephano Bros. (1914) 41 App. D. C. 590.

Grounds for cancellation.—The Commissioner of Patents under this section has the authority, on petition of one claiming to be injured by registration of a trade-mark, to cancel its registration, although it was registered on the ground that the registrant had been the exclusive user of the mark for 10 years prior to the passage of the act, if it appears that such was not the fact. McIlhenny v. New Iberia Extract of Tabasco Pepper Co. (1910) 34 App. D. C. 430.

A trade-mark for flour, under the 10-year clause of the trade-mark act, is properly canceled upon the application of a party who shows that during that period he asserted title to the mark and caused stencils to be made of it, with which flour was branded that was supplied to and sold by him. Duluth Superior Milling Co. v. Koper (1911) 37 App. D. C. 115.

An applicant will not be permitted to urge as fraudulent and improper the same trade-mark use on which he founds his claim to cancellation. Deitsch Bros. v. Loonen (1912) 39 App. D. C. 114.

Where a flour dealer, selling flour under contract with the manufacturer, used a mark, registered as a trade-mark by the manufacturer and used by him on flour sold to other dealers within 10 years of the time that the dealer registered the mark under the 10-year clause of the Trade-Mark Act, the Commissioner properly canceled the registration to the dealer, on the ground that the dealer had not exclusively used the mark for the 10 years prior to his registration. Van Alstyne & Co. v. Boutwell Milling & Grain Co. (1915) 43 App. D. C. 530.

Persons entitled to cancellation.—A company which advertises and sells steel which is the product of an electrical furnace, as "electro" steel, and receives orders from customers for steel of that kind under that name, has a sufficient interest in the word to entitle it to apply for the cancellation of the registration of the word as a trade-mark by a rival company. Electro Steel Co. v. Lindenberg Steel Co. (1915) 43 App. D. C. 270.

Estoppel.—One who, after his application for a technical trade-mark had been twice refused, canceled his application, and filed an amended application based upon the ten-year clause, is estopped, in a subsequent proceeding to cancel the registration of a rival's mark, from treating his own registration as that of a technical mark. Joseph Lay Co. v. Indianapolis Brush & Broom Mfg. Co. (1913) 40 App. D. C. 36.

Pleading.—An averment in a petition for cancellation of the word "Tobasco" that the petitioner had used the word as a trade-mark, is not sufficient, because, unless the word had been used in the same business as that in which it had been used by the petitioner, no injury would have resulted to him and no right to file a petition for cancellation would have followed; and an additional averment in such a petition that the registration of the word by the respondent has been "much to the prejudice, damage, and loss of your petitioner" is also insufficient, when not supported by a statement of the facts. E. McIlhenny's Son v. New Iberia Extract of Tobasco Pepper Co. (1908) 30 App. D. C. 337.

Affidavits not referred to in a petition for the cancellation of a registered trade-mark, and filed after the filing of the petition, form no part thereof. Id.

The right to file a petition for the cancellation of a registered trade-mark is dependent upon a showing of interest; and his petition must contain a statement of fact on this jurisdictional question sufficiently full to show affirmatively that he has been injured by the registry of the mark he seeks to have canceled. Id.

Review.—If, on an appeal from a decision canceling a registered trade-mark, it appears that the application was sufficient in form to warrant registration either as a technical trade-mark or under the 10 years' clause of

this section, and there was no express finding by the Commissioner on the subject, the appellant will be entitled to prevail if he can show that he is entitled to registration on either ground. McIlhenny v. New Iberia Extract of Tabasco Pepper Co. (1910) 34 App. D. C. 430.

§ 9499. (Act Feb. 20, 1905, c. 592, § 14.) Fees.

The following shall be the rates for trade-mark fees:

On filing each original application for registration of a trade-mark, ten dollars: Provided, That an application for registration of a trade-mark pending at the date of the passage of this Act, and on which certificate of registration shall not have issued at such date, may, at the option of the applicant, be proceeded with and registered under the provisions of this Act without the payment of further fee.

On filing each application for renewal of the registration of a trade-mark, ten dollars.

On filing notice of opposition to the registration of a trade-mark, ten dollars.

On an appeal from the examiner in charge of trade-marks to the Commissioner of Patents, fifteen dollars.

On an appeal from the decision of the examiner in charge of interferences, awarding ownership of a trade-mark or canceling the registration of a trade-mark, to the Commissioner of Patents, fifteen dollars.

For certified and uncertified copies of certificates of registration and other papers, and for recording transfers and other papers, the same fees as required by law for such copies of patents and for recording assignments and other papers relating to patents. (33 Stat. 728.)

See notes to section 1 of this act, ante, § 9485.

Fees for copies of patents, and for recording assignments and other papers relating to patents, mentioned in this section, were prescribed by R. S. § 4934, ante, § 9482.

§ 9500. (Act Feb. 20, 1905, c. 592, § 15.) Application of R. S. §§ 4935, 4936, to trade-mark fees.

Sections forty-nine hundred and thirty-five and forty-nine hundred and thirty-six of the Revised Statutes, relating to the payment of patent fees and to the repayment of fees paid by mistake, are hereby made applicable to trade-mark fees. (33 Stat. 728.)

See notes to section 1 of this act, ante, § 9485.

R. S. §§ 4935, 4936, mentioned in this section, are set forth ante, §§ 9483, 9484.

§ 9501. (Act Feb. 20, 1905, c. 592, § 16.) Registration prima facie evidence of ownership; infringement, and recovery of damages therefor; treble damages.

The registration of a trade-mark under the provisions of this Act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not

exceeding three times the amount of such verdict, together with the costs. (33 Stat. 728.)

See notes to section 1 of this act, ante, § 9485.

Damages, in addition to the profits to be accounted for, are recoverable upon a decree for wrongful use of a trade-mark in a suit for an injunction, and the court has the same power to increase such damages as is given by this section in actions at law, by section 19 of this act, post, § 9504.

Damages are not recoverable in a suit for infringement by a party failing to give the notice of registration prescribed by section 28 of this act, post, § 9514, except on proof that defendant was notified of infringement and continued the same after such notice, by a further provision of said section 28.

Notes of Decisions

I. Registration as evidence
1. Effect of registration.

II. Infringement

(A) In general
2. Dependent on validity of trade-mark.
3. Unfair competition.
4. Nature of infringement.
5. Nature of property.
6. Right to protection in general.
7. Injuries from infringement.

(B) What constitutes infringement
8. In general.
9. Nature of the injury.
10. Printing and selling infringing labels.
11. Knowledge or intent.
12. Imitation—In general.
13. —— Marks, devices, or symbols.
14. —— Names in general.
15. —— Arbitrary, fictitious, or fanciful names.
16. —— Names of persons, firms, or corporations.
17. —— Packages, bottles, wrappers, or labels.
18. Use of trade-mark or trade-name for different goods.
19. Deception of public.
20. Right to use same name.
21. —— Names of persons, firms, or corporations.

(C) Procedure
22. Jurisdiction.
23. Parties.
24. Injunction.
25. Evidence—Registration as evidence.
26. —— Presumptions and burden of proof.
27. —— Admissibility.
28. —— Weight and sufficiency.
29. Trial.
30. Damages and profits.

I. REGISTRATION AS EVIDENCE

1. Effect of registration.—The registry of a trade-mark under this section may be evidence in a suit to restrain infringement of a common-law trade-mark used for the same article in domestic commerce, to show what complainant really claimed. Richter v. Reynolds (1893) 59 Fed. 577, 8 C. C. A. 220, affirming decree Richter v. Anchor Remedy Co. (C. C. 1892) 52 Fed. 455; Kohler Mfg. Co. v. Beshore (C. C. 1892) 53 Fed. 262.

The prima facie evidence of title which the registry of the trade-mark gave to the complainant was overthrown by the proof of the appropriation of the name by defendant in 1884. Brower v. Boulton (1893) 58 Fed. 888, 7 C. C. A. 567, affirming decree (C. C. 1892) 53 Fed. 389.

Registration under this section as formerly enacted is prima facie evidence of ownership of the alleged trade-mark, and therefore of its validity. Dadirrian v. Yacubian (1900) 98 Fed. 872, 873, 39 C. C. A. 321.

Under this section as formerly enacted registration of a trade-mark is only prima facie evidence of ownership, and is not conclusive or binding on the courts as to the right of a party to its exclusive use. Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664; Glen Cove Mfg. Co. v. Ludeling (C. C. 1885) 22 Fed. 823.

Registration of a trade-mark consisting of a colored thread twisted in one of the strands of the rope, had no legal effect except to indicate that such manufacturer claimed the trade-mark set forth in its application at the time of the registration. Dodge Mfg. Co. v. Sewall & Day Cordage Co. (C. C. 1898) 142 Fed. 288.

The registration of a trade-mark in the patent office does not affect those not engaged in commerce with foreign nations or Indian tribes with notice thereof. Brennan v. Emery-Bird Thayer Dry-Goods Co. (C. C. 1900) 99 Fed. 971.

This act is practically a recording or registration statute, and is by its term a prima facie evidence of its rights, and the fact of registration pursuant to its provisions is at best prima facie evidence of such right. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (C. C. 1903) 123 Fed. 149, 150.

The registration of a trade-mark confers no right or title thereto on the registrant, and is at best only prima facie evidence of his right, which is not sufficient to warrant a court in granting a preliminary injunction against its infringement. Id.

Registration is only prima facie proof under the statute in any case, and it is consistent with the general import of the statute for Congress to establish what should be prima facie proof of secondary meaning. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

Admission to registration under the act of March 3, 1881, is merely an admission by the government that the ap-

plicant is the owner of a valid trade-mark, and the certificate granted is only prima facie evidence of that fact, and does not conclude a third party. U. S. v. Braun (D. C. 1889) 39 Fed. 775.

Registration of trade-mark held to show prima facie that the device is the subject of exclusive appropriation, though this section does not so provide. Planten v. Gedney (D. C. 1915) 221 Fed. 281, decree reversed (1915) 224 Fed. 382, 140 C. C. A. 68.

That a word was registered as a trade-mark is evidence that it had not such a descriptive meaning as to prevent its use as a trade-mark. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

II. INFRINGEMENT

(A) In general

2. Dependent on validity of trade-mark.—See notes under § 9490, ante.

3. Unfair competition.—See notes under § 9508, post.

4. Nature of infringement.—The remedies afforded by the provisions of this section as formerly enacted are only available when the infringement of such trade-mark consists in the use of a counterfeit or imitation on goods intended for such commerce. Warner v. Searle & Hereth Co. (1903) 24 Sup. Ct. 79, 81, 191 U. S. 195, 48 L. Ed. 145, affirming decree Searle & Hereth Co. v. Warner (1902) 112 Fed. 674, 50 C. C. A. 321.

The entire substantive law of trade-marks, excepting statutory provisions and their construction, is a branch of the broader law of unfair competition; the ultimate offense in infringement suits being that defendant has passed off his goods as and for those of complainant. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

In cases of infringed trade-marks, equity gives relief on the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Job Printers' Union of Chicago v. Kinsley (1903) 107 Ill. App. 654.

Actions to restrain the infringement of trade-marks are based on the doctrine that the law will not allow one person to sell his goods as and for the goods of another, and thereby prevent not alone fraud on private rights, but as well on the public. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

5. Nature of property.—Where a word or symbol has been duly appropriated as a trade-mark, it becomes property, which a competitor has no right to use, either alone or in connection with matter to which its owner lays no claim, without such owner's consent. Enoch Morgan's Sons Co. v. Ward (1907) 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

The right to the exclusive use of a trade-mark is a property right, for an infringement of which damages may be recovered in an action at law, and to prevent the continued violation of which an injunction may be resorted to. Handy v. Commander (1897) 22 So. 230, 49 La. Ann. 1119.

In an action for infringement, plaintiff could not establish title through a purchase at an executor's sale eo nomine of the trade-mark involved, as a trade-mark cannot be levied on and sold under execution, as a species of tangible property, apart from the article it has served to identify, unless under authority of statute. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1890) 20 N. Y. Supp. 462.

In an action for infringement, plaintiff might show title by proving the purchase by him under a levy and sale of the property, franchises, and rights of a corporation formerly owning the trade-mark, at a time when the trade-mark was all that was left of the property of the corporation, as it was a species of property which the statute made vendible. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1891) 60 Hun, 583, 15 N. Y. Supp. 249.

6. Right to protection in general.—One who, by 10 years' actual and exclusive use, is entitled to register as a trade-mark a mark not subject to appropriation by the common-law trade-mark, becomes on registration the owner of the trade-mark entitled to the protection given by the provisions of this section, and of section 9504, post. Thaddeus Davids Co. v. Davids (1914) 34 Sup. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, reversing decree (1912) 192 Fed. 915, 114 C. C. A. 355.

The right of the owner of a trade-mark to be protected in the exclusive use thereof is not dependent on the federal statute authorizing registration. Ohio Baking Co. v. National Biscuit Co. (1904) 127 Fed. 116, 62 C. C. A. 116, affirming judgment National Biscuit Co. v. Ohio Baking Co. (C. C. 1900) 127 Fed. 160, and writ of certiorari denied (1904) 25 Sup. Ct. 788, 195 U. S. 630, 49 L. Ed. 352.

Trade-marks are protected on the ground of property as well as on the ground of fraud. Oakes v. Tonsmierre (C. C. 1883) 49 Fed. 447, 453.

If one secures the registration of a mark, symbol, word, or device which is not a valid trade-mark, another person who affixes the same to his goods and sells them cannot be punished. U. S. v. Braun (D. C. 1889) 39 Fed. 775.

Complainant having registered a trade-mark consisting of the letter "M" within a circle, but not having used the same on all its goods, held not entitled to restrain the alleged infringement of the mark by defendant's use

of a circle inclosing a dot. G. W. J. Murphy Co. v. Metal Stamping Co. (D. C. 1914) 214 Fed. 382.

Registered trade-mark "Listerine" held entitled to protection, though before its adoption a surgeon named Lister had inaugurated a method of surgical dressing, and though the owner of the trade-mark did not acquire from him the right to use such name. Lambert Pharmacal Co. v. Kalish Pharmacy (D. C. 1911) 219 Fed. 323.

7. Injuries from infringement.—One publishing a magazine under the name "Comfort," has a trade-name in such title, entitling him to an injunction, without proof of damages, for infringing it by the use of the name "Home Comfort" for a magazine. Gannert v. Rupert (1904) 127 Fed. 962, 62 C. C. A. 594, reversing decree (C. C. 1902) 119 Fed. 221.

The right to protection against infringement is incidental only to an existing business, and there can be no damage in connection with a violation of such right, except as there is injury to the business and good will through loss of sales or damage to the reputation of the goods. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

The basis of a suit to enjoin infringement of a trade-mark is the injury to complainant's trade, business reputation, and good will by the fraudulent use of the trade-mark, and where no injury to them has resulted from, or is threatened by, defendant's acts, there is no ground for injunction. Hanover Star Milling Co. v. Allen & Wheeler Co. (1913) 208 Fed. 513, 125 C. C. A. 515.

It is within the discretion of the court to enjoin an imitation in form, color, or lettering of packages when it is proven that the imitation was willfully made, or when such imitation, though innocently made, results in damage to the one whose rights are infringed. Enoch Morgan's Sons Co. v. Whittier-Coburn Co. (C. C. 1902) 118 Fed. 657.

The infringement of a trade-mark implies injury, and, where it is of such character as is calculated to deceive purchasers, the owner is not bound to wait until injury has actually resulted, before he can maintain a suit for relief by injunction. Lanahan v. John Kissel & Son (C. C. 1905) 135 Fed. 899.

Defendant manufactured and sold envelopes in imitation of those used by complainant telegraph company for telegrams, intending that they should be used for advertising matter sent through the mail. Held that, since the use of such envelopes, if deceptive at all, was merely momentary and not deceitful, complainant's claim of injury was derived entirely from inferences based on another inference, and that the facts were insufficient to establish actionable injury. Postal Telegraph-Cable Co. v. Livermore & Knight Co. (C. C. 1911) 188 Fed. 696.

Where it is shown that a trade-mark has been infringed, and that actual, probable, or possible injurious consequences are or may be the result of such infringement, equity will grant relief. Avery v. Meikle (1883) 81 Ky. 73.

Though a label is made up with a view of imitating part of another's trade-mark, damages are not allowable unless it is shown that a person had so acted as to damage his competitor. New Orleans Coffee Co. v. American Coffee Co. of New Orleans (1909) 49 So. 730, 124 La. 19.

Damages need not be alleged and shown to entitle one to enjoin the use of his name in the business of another who has no right thereto. Bagby & Rivers Furniture Co. v. Rivers (1898) 40 A. 171, 87 Md. 400, 40 L. R. A. 632, 67 Am. St. Rep. 357.

Where certain medicines are designated by the name of the inventor as a generic term, descriptive of a kind or class, the inventor is not entitled to the exclusive right of combining or vending them where he had secured no patent therefor, and hence, if any person prepares medicines of an inferior quality, and by this means all medicines of that class were brought into disrepute, the inventor could maintain no action for loss sustained by him in consequence thereof, unless the medicines were sold as and for the medicines prepared by such inventor. Thomson v. Winchester (1837) 36 Mass. (19 Pick.) 214, 31 Am. Dec. 135.

Where plaintiff had invented a certain medicine, and defendant had prepared an inferior article, which he sold as and for the medicine of the plaintiff, it was held to be a fraud, for which the plaintiff might maintain an action without proof of special damage. Id.

Complainant manufactured and sold a dyspepsia cure under the trade-name of "Rex." Defendants thereafter compounded a dyspepsia cure in the same form, which it sold under the name "Rexall." Held that, since persons not familiar with the exact appearance of each might be deceived, plaintiff was entitled to an injunction, though there was no proof of actual damages sustained. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

A change made in trade-names after complaint did not change the liability for infringement. McGrew Coal Co. v. Menefee (1912) 144 S. W. 869, 162 Mo. App. 209.

The gist of an action to enjoin one from using a trade-name is not an impairment of complainant's profits by defendant's competition, but the fraudulent representation that defendant's goods are complainant's; and the fact that a complainant is or may be injured by the use of the name is not material. International Silver Co. v. Rogers (1906) 63 A. 977, 71 N. J. Eq. 560.

It is only when false representation

as to the manufacturer of the goods is directly or indirectly made, and only to the extent to which it is made, that the party appealing to a court of justice can be entitled to relief. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

A manufacturer has the right to put or stamp his own name on the goods made by him, and on the bands, wrappers, or covers in which they are put up; and any injury which another manufacturer of the same surname has suffered or may suffer therefrom is to be considered an injury without a remedy. Faber v. Faber (N. Y. 1867) 49 Barb. 357, 3 Abb. Prac. (N. S.) 115.

Where it appeared that many fire insurance companies have the same name as life insurance companies, and that no uncertainty or confusion arises from that fact, and defendant disclaimed intention to copy plaintiff's name, it was not shown that injury would result to plaintiff during pendency of the action to restrain the use of the name assumed by defendant, and plaintiff was not entitled to an injunction. Commercial Union Assur. Co. v. Smith (1888) 2 N. Y. Supp. 296.

The owner of a trade-mark is entitled to an injunction to prevent a threatened infringement, though as yet he has suffered no actual loss therefrom. Taendsticksfabriks Akticbolagat Vulcan v. Myers (1893) 139 N. Y. 364, 34 N. E. 904.

Where defendant has intentionally so put up his goods that the size and form of package, and color of wrapper, and distinctive style and color of the labels, are likely to, and do, mislead, plaintiff is entitled to an injunction, especially if the goods are of a class purchased by people who are easily deceived. Reckitt & Sons v. Kellogg (1898) 50 N. Y. Supp. 888, 28 App. Div. 111.

Actual pecuniary injury, resulting from the wrongful appropriation of the trade-name of a company, need not be shown to sustain an action to enjoin the infringement. Roy Watch-Case Co. v. Camm-Roy Watch-Case Co. (1899) 58 N. Y. Supp. 979, 28 Misc. Rep. 45.

Where the use by defendants of plaintiffs' trade-name and other devices would result in loss to plaintiffs, and defendants' acts were with the design to mislead the public, proof of injury was not necessary to entitle plaintiffs to an injunction. Brown v. Braunstein (1903) 83 N. Y. Supp. 1096.

Similarity in cigar labels, sold in different territories, with no evidence of damage, or deception of purchasers, will not sustain a complaint to enjoin infringement. B. Payn's Sons Tobacco Co. v. Payette (Sup. 1914) 149 N. Y. Supp. 183, 86 Misc. Rep. 276.

An injunction granted against the use of the words "Colton Dental Rooms" in such a way as to deceive the public and injure one who had purchased the exclusive right to use the name of the "Colton Dental Association," in connection with the use of nitrous oxide in extracting teeth, and whose office was in the same street as that of defendant. Colton v. Thomas (Pa. 1868) 2 Brewst. 308.

A person who stamps the name of "Roger Williams" on his cloth of similar description to that of another, who has appropriated such words, with the design and effect of fraudulently passing it upon the market as and for cloth manufactured by such action, to the lessening of his gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby. Barrows v. Knight (1860) 6 R. I. 434, 78 Am. Dec. 452.

(B) What constitutes infringement

8. **In general.**—Registration of marks as dependent on infringing character and priority of use, see notes under § 9490, ante.

9. **Nature of the injury.**—To constitute infringement the resemblance need not be such as would deceive persons seeing the two trade-marks placed side by side, or as would deceive experts. Liggett & Myer Tobacco Co. v. Hynes (D. C. 1884) 20 Fed. 883; Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

The use of one only of the words which constitute a trade-mark may be sufficient to constitute an infringement, without appropriating all the words included in it. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

To warrant restraining the imitation of the label on complainant's goods, it is sufficient if the imitation be close enough to deceive the unwary, incautious, or ignorant purchaser. Sterling Remedy Co. v. Eureka Chemical & Mfg. Co. (1897) 80 Fed. 105, 25 C. C. A. 314; Id. (C. C. 1895) 70 Fed. 704; Cauffman v. Schuler (C. C. 1903) 123 Fed. 205.

Plaintiffs' predecessor placed on the market a scouring soap wrapped in silver paper, and the coined word "Sapolio" on each end and on one side, and the pictorial representation "of a young man's face observing itself reflected in a pan" on one side. Defendant subsequently put out a powder in a round can, dressed in yellow, called "Sopono" with a young woman's face observing itself reflected in a pan. Held, that defendant's label constituted an infringement. Enoch Morgan's Sons Co. v. Ward (1907) 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

A case of technical infringement of a registered trade-mark held not made out where the trade-mark of defendant was not identical with complainant's nor so like it as to be readily taken for it. Hutchinson, Pierce & Co. v. Loewy (1908) 163 Fed. 42, 90 C. C. A. 1.

Where the owner of a trade-mark has

permitted other manufacturers to use it for a number of years without objection, it becomes so far common property that the only restriction which can be imposed on its use is that each user shall so identify his goods as to indicate their origin, and prevent confusion and deception and unfair competition. Dietz v. Horton Mfg. Co. (1909) 170 Fed. 865, 96 C. C. A. 41.

Infringement of a trade-mark is a continuing trespass, and the owner is entitled to an injunction whether the infringement was intentional or not and whether it was injurious or not. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

To sustain a charge of infringement, the owner of a trade-mark must have used it on the same class of goods as the infringer. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274.

Infringement of a trade-mark does not necessarily involve actual fraud, or even wrongful intent, on the part of the infringer. Gulden v. Chance (1910) 182 Fed. 303, 105 C. C. A. 16, reversing decree (C. C. 1910) 180 Fed. 178.

What is not and cannot be a trade-mark cannot be infringed as a trade-mark. Diederich v. W. Schneider Wholesale Wine & Liquor Co. (1912) 195 Fed. 35, 115 C. C. A. 37.

"Infringement" of a trade-mark is the unlawful copying of a mark and sending forth thereunder an article calculated to be taken for one already established in the trade. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

To sustain a charge of infringement of a trade-mark, the owner must have used it on the same class of goods put out by the alleged infringer, but not necessarily on the same species of goods. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 S. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

The basis of the action of a court of equity to restrain infringement is fraud on the part of the defendant. Delaware & H. Canal Co. v. Clark (C. C. 1870) Fed. Cas. No. 3,764.

The essence of the wrong in infringement consists in the sale of the goods of one person as those of another. Osgood v. Allen (C. C. 1872) Fed. Cas. No. 10,603.

The use of another name, such as "Reeves' improved," in place of "Humphreys'," before the words "homeopathic specifics," does not avoid infringement, as the remedies are purchased by the public by the numbers alone, and the defendant has made use of such numbers. Humphreys' Specific Homeopathic Medicine Co. v. Wenz (C. C. 1882) 14 Fed. 250.

By contract complainant had exclusive right to export and sell water under its name of "Hunyadi Janos," which he had adopted as a trade-mark, in Great Britain and America. Defendant sold it in the United States in bottles with the same label as used by complainant, except that defendant's bottles were stamped with words different from those of plaintiff. Held, that complainant was not entitled to an injunction. Appollinaris Co. v. Scherer (C. C. 1886) 27 Fed. 18.

Where defendants gave to customers asking for plaintiff's article a different one without explanation, although it did not resemble plaintiff's in size, shape, label, or wrapper, the transaction amounted to an infringement of plaintiff's trade-mark, and would be enjoined. Enoch Morgan's Sons Co. v. Wendover (C. C. 1890) 43 Fed. 420, 10 L. R. A. 283.

The trade-mark "One Night Cough Cure," or "Corn Salve and Cough Syrup. One Night Cure,"—is not infringed by a label with the words, "Beshore One Night Cough Cure." Kohler Mfg. Co. v. Beshore (C. C. 1892) 53 Fed. 262, decree affirmed Same v. Beeshore (1893) 59 Fed. 572, 8 C. C. A. 215.

The putting up of drawing paper in packages for sale in the form of rolls, that being the most convenient form for handling such goods and not peculiar or unusual, cannot be considered in itself an infringement upon the rights of an older dealer. Keuffel & Esser Co. v. H. S. Crocker Co. (C. C. 1902) 118 Fed. 187.

A concern engaged in buying burned out electric incandescent lamps and reconstructing the same is not entitled to resell them with the trade-mark of the original manufacturer therein, where it was affixed by the maker for legitimate trade-mark purposes, and, in the process of reconstructing the lamps, can be obliterated at a small cost. General Electric Co. v. Re-New Lamp Co. (C. C. 1903) 121 Fed. 164; General Electric Co. v. Re-New Lamp Co. (C. C. 1904) 128 Fed. 154.

Similarity, and not identity, is the test of infringement of a trade-mark; and it is sufficient if the imitation is such that unwary purchasers are likely to be misled thereby. Gulden v. Chance (C. C. 1908) 163 Fed. 447, decree reversed Chance v. Gulden (1908) 165 Fed. 624, 92 C. C. A. 58.

To constitute infringement, it is sufficient that the competing label contains the trade-mark of another, and that confusion or deception is likely to result, independent of the fact that the accessories are dissimilar. Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, decree reversed Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

Whether trade-mark infringement exists does not depend solely on similarity

to the eye or ear, but on whether there is such similarity as readily leads the mind of customers to confusion. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

The copying by defendants on their business cards and stationery of a picture used by complainant as a trade-mark on its goods does not constitute an infringement. New York Mackintosh Co. v. Flam (D. C. 1912) 198 Fed. 571.

The word "Bestyette" is not infringed by the use of the word "Veribest" on similar goods. Id.

The use of an infringer's name in connection with a trade-mark in connection with the owner's does not render the unauthorized use of it less of an infringement. Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 153.

A trade-mark is not infringed by its use on the very article for which it was designed, although by another than the registered owner. Coca-Cola Co. v. Bennett (D. C. 1915) 225 Fed. 429.

An imitation of a label is a colorable representation thereof, calculated to produce in the mind of the purchaser of goods the impression that they were manufactured or sold by the person whose label has been imitated. Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204.

A finding that the word "Hygeia" has been used by defendant, alone and in combinations, conspicuously, and that such use is liable to make purchasers mistake defendant's goods for plaintiff's goods (which were distilled waters), is not a finding that defendant's use of its corporate name, Hygeia Ice Company, was an infringement of plaintiff's trade-mark, "Hygeia." Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

Where the manufacturer of "Brewer's Lung Restorer" sold the same together with the trade-mark, and agreed never to use or permit his name to be used on any similar preparation, his subsequent compounding and selling another medicine under the name of "Brewer's Sarsaparilla Syrup," as a permanent cure for all diseases of the lungs and throat, constitute an infringement of the trade-mark so sold. Brewer v. Lamar (1882) 69 Ga. 656, 47 Am. Rep. 766.

The use of the word "Cotosuet" as a trade-mark is not an infringement upon the right to use the word "Cottolene." N. K. Fairbank Co. v. Swift & Co. (1896) 64 Ill. App. 477.

The essence of the wrong of invading the right to the exclusive use of a trade-mark consists in the sale of the goods of one manufacturer or vendor for those of another by means of such trade-mark. William J. Moxley Co. v. Braun & Fitts Co. (1901) 93 Ill. App. 183.

No trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled. Job Printers' Union of Chicago v. Kinsley (1903) 107 Ill. App. 654.

Where the similitude is in the substantial parts of a trade-mark, there is an infringement, and an evasive attempt to hide the similarity or a colorable explanation apparently for the purpose of escaping the effect of a wrongful use of the trade-mark will not defeat the owner's right to an injunction. Keller v. B. F. Goodrich Co. (1889) 19 N. E. 196, 117 Ind. 556, 10 Am. St. Rep. 88.

The exclusive appropriation as a trade-name of an uncopyrighted stock label sold by a printer to dealers in different localities, but not to more than one dealer in the same locality, and who did not contract against the acquisition of a trade-name in the label when he sold the same, is not a fraud upon the printer. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

An infringement of a trade-mark by the use of the genuine or of an exact copy or reproduction or colorable imitation thereof, in such a way that the goods are likely to be mistaken for the genuine product, constitutes an invasion of the proprietor's right of property. Id.

Where defendants, after notice that their trade-mark was an infringement, continued to permit their names to appear in the same form of advertisement, and to sell their preparation without any change of name, shape, or label, such conduct constituted a direct and intentional infringement. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

To constitute infringement a trade-mark must on its face be calculated to mislead purchasers as to who is the real manufacturer and proprietor of the goods sold under it and so interfere with the profits of the rightful owner, and the question of intent is of no consequence where there is no act of fraud. Schuneman v. Burk (Mich. 1879) Howell, N. P. 5.

A candy manufacturer by the name of Oakes sold a certain kind of candy under the name of "Oakes' What is it?" Defendant sold like candy as "Hawthorne's What is it?" Held not to show unfair competition. Oakes v. St. Louis Candy Co. (1898) 48 S. W. 467, 146 Mo. 391.

Similarity of names used, constituting piracy of trade-name. See Gamble v. Stephenson (1881) 10 Mo. App. 581, memorandum.

The infringement of a trade-mark consists of the unauthorized use or colorable imitation of it upon substituted goods of the same class as those

for which the mark has been appropriated. Westminister Laundry Co. v. Hesse Envelope Co. (Mo. App. 1913) 156 S. W. 767.

To constitute infringement on a trade-name, it is necessary that the two places of business be in actual competition, and where one is engaged exclusively in retailing boots and shoes, and the other in the manufacture and wholesale jobbing thereof, there is no such competition as will warrant restraining the latter at the suit of the former, though the retail firm had legally acquired its trade-name before the organization of the wholesale company. Regent Shoe Mfg. Co. v. Haaker (1906) 106 N. W. 595, 75 Neb. 426, 4 L. R. A. (N. S.) 447.

The wrongful use of one of several words of a trade-mark is a justiciable infringement. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1905) 60 A. 561, 69 N. J. Eq. 159, affirmed (Err. & App. 1906) 71 A. 1134, 71 N. J. Eq. 300.

Complainant's use of a color device had been confined to its fabrics of linen and cotton hose or jackets; the lines of dyed threads extending longitudinally through the fabric. Defendant's only use of the red, white, and blue, used by complainant, was on its rubber hose, by printing them with a plate three or four inches long and an inch wide on or near the ends of the section of rubber hose. Defendant also used the colors in question on its letter heads, catalogues, and envelopes. The colors were used on only a portion of complainant's goods. Held insufficient to show an infringement of complainant's trade-mark rights in the colors. Id.

One may not palm off his goods as the goods of a rival and thereby cheat the purchasing public and injure the business of the rival. National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J. Ch. 1914) 91 A. 126.

Where a manufacturer adopts a certain trade-mark, and stamps it upon the article manufactured, he is entitled to the exclusive use of it, and equity will enjoin any other person, who pirates such trade-mark, from using the same. Taylor v. Carpenter (N. Y. 1844) 11 Paige, 292, 42 Am. Dec. 114.

On a bill to restrain one from the use of trade-marks, the ground is that the complainant has an interest in the good will of his trade or business, and having taken a particular label or sign in connection therewith, he is entitled to protection against one who attempts to pirate upon the good will of his friends or customers by using such label or sign without his consent or authority. Partridge v. Menck (N. Y. 1846) 2 Sandf. Ch. 622.

Although plaintiff had an exclusive right to the title "Old Sleuth, the Detective," as applicable to a work of fiction, as he had no property right in the name as indicating authorship, and could not have any property right in the accompanying picture, that being no trade-mark, use of the same picture and a somewhat similar title, by another, was no such invasion of his rights as to entitle him to an injunction. Munro v. Smith (1891) 59 Hun, 624, 13 N. Y. Supp. 708.

Though plaintiff's label, inscribed "Maryland Club Rye Whisky," is a trade-mark, it is not infringed by defendant's label, inscribed "Maryland Rye," and underneath, in smaller but equally conspicuous print, "Club Whisky," as the word "Club" indicates the quality of liquor, and the word "Maryland" denotes merely the geographical origin of the product. Cahn v. Hoffman House (Com. Pl. 1893) 7 Misc. Rep. 461, 28 N. Y. Supp. 388.

One D. sold oil manufactured by plaintiff, using a label designed by him while dealing in the oil of another manufacturer, and used on that oil, and subsequently on the oil manufactured by plaintiff's vendor. The label did not bear the name of either manufacturer, nor had there ever been a transfer from one to another. Held, that the evidence did not show that plaintiff ever obtained title to the label. Société des Huiles d'Olive de Nice v. Rorke (1894) 82 Hun, 611, 31 N. Y. Supp. 51; Société des Huiles d'Olive de Nice v. Rorke (1896) 5 App. Div. 175, 39 N. Y. Supp. 28.

Similarity of picture and device on a label, but with different wording sufficient to deceive a purchaser of ordinary caution, and to injure plaintiff's trade. is an infringement. Ft. Stanwix Canning Co. v. William McKinley Canning Co. (1900) 63 N. Y. Supp. 704, 49 App. Div. 566.

The unauthorized use by another of one's individual name, upon ice wagons, cards and billheads in his name as a dealer in ice, conducting correspondence under the same title, and indorsing checks made to such person's order, is such an injury to the person's right to the exclusive use of his own name as will be restrained, notwithstanding a contract by such person not to engage in the ice business for a term of years. Scheer v. American Ice Co. (1900) 66 N. Y. Supp. 3, 32 Misc. Rep. 351.

On application to restrain defendant from infringement of label, the fact that dissimilarities between the labels appeared more prominently when the wrappers were placed side by side did not constitute a valid test as to whether there was such infringement as should be enjoined. Monopol Tobacco Works v. Gensior (1900) 66 N. Y. Supp. 155, 32 Misc. Rep. 87.

Where plaintiffs manufactured in Germany a preparation called by them "Lanoline," which they sold for 60 cents per can, their rights, after the patent expired, were not infringed by the defendant by the manufacture and sale, at

20 cents per can, of a practically identical product, which it called "British Lanoline"; the label being otherwise clearly dissimilar to that used by plaintiffs, and clearly stating where and by whom the product was manufactured. Jaffe v. Evans & Sons (1902) 75 N. Y. Supp. 257, 70 App. Div. 186.

Such unfair conduct as is calculated to deceive the public as to the ownership and conduct of the business is the gist of infringement of a trade-name or trade-mark, and equity will protect the owner thereof. Ball v. Broadway Bazaar (1909) 87 N. E. 674, 194 N. Y. 429, reversing judgment (1907) 106 N. Y. Supp. 249, 121 App. Div. 546.

Where a company purchased the business and good will of a bankrupt tea company, together with the right to use its name, which was that of an individual, a third person, who organized a tea company under the same name and hired the old servants and managers of the bankrupt company, unlawfully infringed the right of the purchaser. James Van Dyk Co. v. F. V. Reilly Co. (1911) 130 N. Y. Supp. 755, 73 Misc. Rep. 87.

Oneida Game Trap Company, by words stamped on the pan of its traps, held to be infringing trade-mark of Oneida Community, but not in stamping it at any other place or in stamping its address and the name of the trap on the pan. Oneida Community v. Oneida Game Trap Co. (Sup. 1914) 150 N. Y. Supp. 918, judgment affirmed (Sup. 1915) 154 N. Y. Supp. 391.

Since defendant's label was not even a colorable imitation of plaintiff's trade-mark, though some of the words were the same, plaintiff was not entitled to restrain the use of the same. Barnett v. Kent (Pa. 1880) 8 Wkly. Notes Cas. 355.

Where a manufacturer had a trade-mark described in the patent office as the letters "P. C. W.," generally arranged "as shown in the accompanying fac simile, in which they appear as script, printed in a horizontal line, upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trade-mark," use of the letters "W. H. W.," printed in script, in white, in a horizontal line upon a dark background, the way in which plaintiff's trade-mark was used, was not an infringement. P. C. Weist Co. v. Weeks (1896) 35 A. 693, 177 Pa. St. 412, 34 L. R. A. 172.

Where complainant made and sold "Morse's Compound Syrup of Yellow Dock Root," in bottles in paper wrappers, and defendant subsequently set up the sale in bottles, without wrappers, of "Dr. Morse's Celebrated Syrup," those words being blown in the glass, with labels inscribed "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound," the bottles being exactly similar in size and shape, but the labels different, defendant's use of such bottles was an infringement of plaintiff's form of bottle. Alexander v. Morse (1884) 14 R. I. 153, 51 Am. Rep. 369.

Any use of the key or catchword in a trade-mark in a way calculated to deceive is an infringement. Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

Actual fraud or deception is not necessary that plaintiffs may enjoin defendant from conducting a hotel under the same name as their previously established hotel. Martell v. St. Francis Hotel Co. (1909) 98 P. 1116, 51 Wash. 375.

If one trade-name so far resembles the other as to deceive persons of ordinary caution into the belief that they are dealing with the one concern when they use the name of the other, it is an infringement, even though the name, or some part of it, is a geographical name. Rosenburg v. Fremont Undertaking Co. (Wash. 1911) 114 P. 886.

10. Printing and selling infringing labels.—Printing and selling labels in imitation of a trade-mark to enable the parties to whom the labels are sold to palm off their goods upon the public as the goods of the owner of the trade-mark, is a violation of the rights of such owner. De Kuyper v. Witteman (C. C. 1885) 23 Fed. 871.

Selling an imitation, as such, without encouraging its resale for the genuine article, does not infringe the right of the manufacturer of the genuine. Hostetter Co. v. Van Vorst (C. C. 1894) 62 Fed. 600.

The keeping for sale and selling of labels made in imitation of complainant's, with intent that they shall be used, and which are used, by the purchaser in palming off on the public, as complainant's, goods not made by him, gives a right of action for infringement. Hennessy v. Herrmann (C. C. 1898) 89 Fed. 669.

11. Knowledge or intent.—In a suit to restrain the infringement of a trade-mark, the intent with which the infringing trade-mark was adopted, or what suggested it, was immaterial. Saxlehner v. Siegel-Cooper Co. (1900) 21 Sup. Ct. 16, 179 U. S. 42, 45 L. Ed. 77; Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506 (affirming decree Hygeia Distilled Water Co. v. Consolidated Ice Co. [C. C. 1906] 114 Fed. 139); Hutchinson, Pierce & Co. v. Loewy (1908) 163 Fed. 42, 90 C. C. A. 1.

That an infringer of a technical trade-mark did not know of its prior use by another is immaterial as respects the right of the owner to an injunction. De Voe Snuff Co. v. Wolff (1913) 206 Fed. 420, 124 C. C. A. 302; Eagle White Lead Co. v. Pflugh (1910) 180 Fed.

579 (decree reversed Pflugh v. Eagle White Lead Co. [1911] 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh [1911] 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610); Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 Pac. 913; Holmes, Booth & Haydens v. Holmes Booth & Atwood Mfg. Co. (1870) 37 Conn. 278, 9 Am. Rep. 324; Viano v. Baccigalupo (1903) 67 N. E. 641, 183 Mass. 160; Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437; Dale v. Smithson (N. Y. 1861) 12 Abb. Prac. 237; Taendsticksfabriks Aktiebolaget Vulcan v. Myers (1893) 139 N. Y. 364, 34 N. E. 904; Clinton Metallic Paint Co. v. New York Metallic Paint Co. (1898) 50 N. Y. Supp. 437, 23 Misc. Rep. 66; Oneida Community v. Oneida Game Trap Co. (Sup. 1914) 150 N. Y. Supp. 918 (judgment affirmed [Sup. 1915] 154 N. Y. Supp. 391); International Silver Co. v. Wm. H. Rogers Corp. (1904) 57 A. 1037, 66 N. J. Eq. 119 (reversed [Err. & App. 1905] 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506); Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1905) 60 A. 561, 69 N. J. Eq. 159 (affirmed [Err. & App. 1906] 71 A. 1134, 71 N. J. Eq. 300); Gowans v. Ahlborn Bros. (Pa. 1886) 4 Kulp, 31; Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

The mere fact that one knows that cheap goods stamped with his name can and will be sold by dishonest dealers as being manufactured by a company of similar name which manufactures a high class of goods, does not justify an injunction against the use of such stamp. Rogers v. Wm. Rogers Manuf'g Co. (1895) 70 Fed. 1019, 17 C. C. A. 575.

Where it appears that a competitor has unnecessarily and knowingly imitated his rival's goods in nonfunctional features, a court of equity is justified in interfering by injunction. Rushmore v. Badger Brass Mfg. Co. (1912) 198 Fed. 379, 117 C. C. A. 255.

An injunction to restrain infringement will not be refused because defendants bought boxes with infringing labels on them without knowing of the infringement. Cuervo v. Landauer (C. C. 1894) 63 Fed. 1003.

An unwitting infringement of a trademark, which ceased upon defendants' knowledge thereof, will not sustain a suit for an injunction, it being clear that there had been no intentional violation of complainant's rights, and that none was threatened. Brennan v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1900) 99 Fed. 971.

The publisher of a periodical has a property right in its name which a court of equity will protect, but it is essential that the adoption of the name by defendant should have been with intent to deceive, or that its use by him is calculated to deceive persons of ordinary intelligence and care, and thereby cause injury to complainant. Gannett v. Ruppert (C. C. 1902) 119 Fed. 221, decree reversed Gannert v. Same (1904) 127 Fed. 962, 62 C. C. A. 594.

A corporation doing business under the name "Landlords' Protective Bureau" may restrain defendants from conducting a similar business, under the name "Landlords' Protective Department," though defendants had no knowledge of complainant's existence until after the organization of their rival business. Koebel v. Chicago Landlords' Protective Bureau (1904) 71 N. E. 362, 210 Ill. 176, 102 Am. St. Rep. 154, affirming judgment Chicago Landlords' Protective Bureau v. Koebel (1904) 112 Ill. App. 21.

The resemblances of a trade-mark need not be such as would mislead an expert or could not be easily detected, as it is enough if such resemblances exist as would lead an ordinary purchaser to suppose he was buying the genuine article and not an imitation, and if the differences are only colorable, and there is no reason for the resemblances except the purpose of deceiving the purchaser of one article into the belief of its being the manufacturer of another, the court will presume the fraud was intended. Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

Even when the imitation is unintentional, yet colorable, and such that a majority of persons would not notice the difference, equity will enjoin its use. Metcalfe v. Brand (1887) 86 Ky. 331, 5 S. W. 773, 9 Am. St. Rep. 282.

Trade-marks are property, and a person using such marks without the sanction and authority of the owner will be restrained, even when it does not appear there was any fraudulent intent in the use thereof. Stonebraker v. Stonebraker (1870) 33 Md. 252.

Where plaintiff had previously and continuously used a trade-mark, and defendant thereafter adopted a mark so similar that buyers were likely to purchase defendant's goods for those of plaintiff, it was no defense that defendant's use of its mark was not originally intended as an imitation. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

Defendant's clerk made a practice of substituting cheap cigars in boxes with plaintiff's trade-mark thereon, as well as in place of the cigars of other makers, causing the various cigar makers to complain thereof to the United States internal revenue officers, which resulted in the clerk being fined. The president of defendant company advanced the money to pay his fine, and thereafter retained him as clerk. Held, that the infringement of plaintiff's trade-mark was willful, justifying an award of punitive damages. Lampert v. Judge & Dolph Drug Co. (1911) 141 S. W. 1095, 238 Mo. 409, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351, reversing judg-

ment (1906) 100 S. W. 659, 119 Mo. App. 693.

Where plaintiffs had for many years used the name "Akron Water Lime" for their product, when defendants renamed their product "Onondaga Akron Cement and Water Lime," not having used the word "Akron" before, knowing of plaintiff's quarry, and that such name had been given to their water lime and cement, defendant's use of the word "Akron" was unlawful and constituted an infringement of plaintiff's trade-mark. Newman v. Alvord (N. Y. 1866) 35 How. Prac. 108.

One who uses a trade-name belonging to another, in ignorance of the other's right, is not liable to him in damages. Weed v. Peterson (N. Y. 1872) 12 Abb. Prac. (N. S.) 178.

One will not be restrained from the use of his own name as a trade-mark where it did not appear that defendant's use of the name was with intent to deceive the public or injure plaintiff. Decker v. Decker (N. Y. 1876) 52 How. Prac. 218.

The manufacturer of goods familiarly known by and sold under his name is entitled to an injunction against any person selling goods of an inferior quality under that name, with intent to deceive the public. Priestley v. Adams (1891) 59 Hun, 380, 13 N. Y. Supp. 41.

The name "Camm-Roy Watch-Case Co." is an infringement on the name "Roy Watch-Case Co.," which may be enjoined, regardless of the motive of the offending company. Roy Watch-Case Co. v. Camm-Roy Watch-Case Co. (1899) 58 N. Y. Supp. 979, 28 Misc. Rep. 45.

A fraudulent, or even accidental, copy of plaintiff's trade-mark, with merely colorable and evasive differences, calculated to impose upon the public, will be enjoined. Dreydoppel v. Young (Pa. 1880) 14 Phila. 226.

Where an inventor and manufacturer of an article puts his own or his partner's name to it, the presumption is that he does so to indicate its origin and maker, and intends the name as a trade-mark; and that dealers misunderstand the facts will not excuse their infringement. Shaw v. Pilling (1896) 175 Pa. 78, 34 Atl. 446.

The mere fact that defendant had no knowledge of plaintiff's prior appropriation of the trade-mark, and that he discontinued the use thereof as soon as notified, is not ground for refusing an injunction or dismissing the bill, where in his answer he denies the right of the plaintiff to the exclusive use of the mark, and in no way intimates that he himself will not resume its use in the future. E. T. Fraim Lock Co. v. Shimer (1910) 43 Pa. Super. Ct. 221.

The use of a trade-name will be enjoined where the intent is to get an unfair share of another's business, or where the effect of defendant's action is to produce confusion in the public and loss to plaintiff. Suburban Press v. Philadelphia Suburban Pub. Co. (1910) 75 A. 1037, 227 Pa. 148.

One has the right to label his goods with his own name or that of his mill if no fraudulent purpose is intended, and in doing so cannot be held liable for a violation of a trade-mark. Carmichel v. Latimer (1876) 11 R. I. 395, 23 Am. Rep. 481.

Where there was a material difference between the products of plaintiff and defendant, and defendant appropriated plaintiff's trade-name with a view of deceiving and reaping an advantage, plaintiff was entitled to judgment protecting his trade-name. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

12. Imitation—In general.—Deception of public as test of infringement. See notes post, this section.

The use of one only of the words which constitute a trade-mark may be sufficient to constitute an infringement, without appropriating all the words included in it. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

The imitation which under this section is an infringement of a registered trade-mark must be calculated to mislead the public as to the origin of the goods, where the mark could only have been registered as having been in actual and exclusive use for ten years. Thaddeus Davids Co. v. Davids (1914) 34 Sup. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, reversing decree (1912) 192 Fed. 915, 114 C. C. A. 355.

A technical trade-mark, although not a fac simile of another, may be so used by a rival manufacturer as to imitate another's trade-mark, and, when such use actually deceives the public, it constitutes an infringement, against which a court of equity will grant relief. National Biscuit Co. v. Swick (C. C. 1903) 121 Fed. 1007.

A manifest imitation in details of construction of an article, with a consequent likelihood of confusion, should be enjoined, unless the points of resemblance are the necessary result of an effort to comply with the physical requirements essential to commercial success. Lovell-McConnell Mfg. Co. v. American Ever-Ready Co. (1912) 195 Fed. 931, 115 C. C. A. 619.

Complainant not entitled to restrain the use by defendant of its trade-mark in a territory where complainant had never sold such brand, but where defendant had, in good faith and without knowledge of its prior use by complainant, built up an extensive trade under the same name. Hanover Star Milling Co. v. Allen & Wheeler Co. (1913) 208 Fed. 513, 125 C. C. A. 515.

A person cannot imitate the trade-mark of another by using any of its prominent and distinguishing words, where calculated to deceive the cautious

and careful purchaser. U. S. v. Roche (C. C. 1879) Fed. Cas. No. 16,180.

A company which was the exclusive consignee in this country of the Hungarian Hunyadi Janos water placed on its bottles a trade-mark of its own, not used by its consignors. Afterwards it began selling another Hungarian water, using the same trade-mark, but with labels so distinctive as to challenge the attention of purchasers. Held, that this was no infringement of the rights of the owners of the Hunyadi Janos water. Saxlehner v. Graef (C. C. 1897) 81 Fed. 704.

Registered trade-mark held not infringed, there being no similarity, except in the use of descriptive words open to both parties and to the rest of the world. Sprigg v. Fisher (D. C. 1915) 222 Fed. 964.

One person will not be permitted by imitating a distinctive name or mark to impose upon the public an article of his own manufacture as the genuine article of another. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

A manufacturer who, for the purpose of presenting his goods to the public, has adopted a particular combination of features, in part old and in part new, is entitled to an injunction against a palpable imitation thereof. Hildreth v. D. S. McDonald Co. (1895) 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440.

It is not enough that the public are misled by a trade-mark imitated; the imitation must be of some mark or sign which a person has a right to appropriate. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

The use of an imitation of a trade-mark will be enjoined, though the imitation differ from the original in some details which would not attract attention. Williams v. Johnson (1857) 15 N. Y. Super. Ct. (2 Bosw.) 1; Heinz v. Brueckmann (1890) 134 Pa. 495, 19 Atl. 674.

In determining whether plaintiff's trade-mark was infringed, the standard of comparison should be the trade-mark registered by it and in use when the injunction suit was filed, and not a somewhat similar trade-mark used by plaintiff theretofore. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App. 1908) 108 S. W. 413.

13. —— Marks, devices, or symbols.— Where a manufacturer has been in the habit of stamping his goods with a particular mark or brand, so that purchasers know they are of his manufacture, no other manufacturer has a right to adopt the same stamp. McLean v. Fleming (1877) 96 U. S. 245, 251, 24 L. Ed. 828.

After the patent expired and the design became common property, plaintiffs were not entitled to relief against defendants who used a similar design on their spools, on the ground of their prior monopoly. Coats v. Merrick Thread Co. (1893) 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847.

Where one making sewing machines placed thereon a device calculated and intended to lead the public to think that they were made by another company, it is immaterial that he used on his machines the words "New York S. M. Mfg. Co. Warranted," while the name of the company placed by it on its machines in the same place, was "The Singer Manufacturing Co." Singer Mfg. Co. v. Bent (1896) 16 Sup. Ct. 1016, 163 U. S. 205, 41 L. Ed. 131, reversing decree (C. C. 1889) 41 F. 214.

Where defendant closely simulated the name and symbols of plaintiff's product with the purpose to deceive the public into the belief that the article was manufactured by the old and well-known manufacturer, and that "N-E-W" indicated a new kind of the old Clark's spool cotton, defendant should be enjoined from using the word "Clark's," or "Clark's Spool Cotton," or "Clark's Thread," and also the letters "N-E-W." Clark Thread Co. v. Armitage (1896) 74 Fed. 936, 21 C. C. A. 178, modifying and affirming (C. C. 1895) 67 Fed. 896.

Where medicinal and surgical plasters had become known and were asked for as "Red Cross Plasters," the use by another of a Greek cross of somewhat different form, with a large red circle in the center, was an infringement, though bearing on its face letters and marks not on the other, and though there was little resemblance in the packages or other indicia. Johnson & Johnson v. Bauer & Black (1897) 82 Fed. 662, 27 C. C. A. 374, reversing Johnson v. Bauer (C. C. 1896) 79 Fed. 954.

A trade-mark consisting of the words "Three in One" printed in black letters, and the picture of the figure "1" in red on a white background, upon which are superimposed in white the figure "3" and the word "in," is not infringed by a trade-mark consisting of the words "Big Four" in red, and the picture of a large figure "4" in blue, superimposed upon a rectangular background in red, containing other descriptive words in blue and white letters. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

After the expiration of a patent, the public, who are entitled to manufacture the structure, have a right to employ in advertising the drawings of the expired patent, even though they have been used by the owner of the patent as a trade-mark. Van Kannel Revolving Door Co. v. American Revolving Door Co. (1914) 215 Fed. 582, 131 C. C. A. 650.

One having a right to make and sell a revolving door, may advertise the

same by a conventional picture of such a door, without infringing on the rights of any other maker. Id.

The trade-mark, "Gedney's C. & C. (Black) Capsules," is a colorable imitation of a trade-mark, "Planten's C. & C. or Black Capsules." Planten v. Gedney (1915) 224 Fed. 382, 140 C. C. A. 68, reversing decree (D. C. 1915) 221 Fed. 281, and decree amended (1915) 228 Fed. 338, 142 C. C. A. 630.

A trade-mark consisting of the word "Stark" over a semicircular arch with the letter "A" below is infringed by a like device, except that the word "Star" is substituted for "Stark." Gardner v. Bailey (C. C. 1871) Fed. Cas. No. 5,221.

A trade-mark consisting of the words "Genuine Durham Smoking Tobacco," with the side figure of a bull as a symbol, is infringed by the use of the words "The Durham Smoking Tobacco," in connection with the head of a bull. Blackwell v. Armistead (C. C. 1872) Fed. Cas. No. 1,474.

A trade-mark for soap, "Mottled German Soap," with a circle and moon and stars in the middle, held infringed by "S. W. McBride's German Mottled Soap," with a crescent and single star, though "Mottled German Soap" or "Mottled Soap" had been in common use for years. Proctor v. McBride (C. C. 1875) Fed. Cas. No. 11,441.

Use of "Apollinis" with representation of bow and arrow or anchor restrained as infringing trade-mark of "Apollinaris" with representation of anchor. Apollinaris Brunnen v. Somborn (C. C. 1878) Fed. Cas. No. 496.

A registered trade-mark for plug tobacco, consisting of longitudinal and transverse lines for dividing the plug, will not prevent the use of Greek crosses and half crosses for the same purpose. Dausman & Drummond Tobacco Co. v. Ruffner (C. C. 1878) Fed. Cas. No. 3,585.

The use of a monogram in the same manner and with accessories in imitation of plaintiff's trade-mark held to be an infringement. Consolidated Fruit-Jar Co. v. Thomas (C. C. 1879) Fed. Cas. No. 3,131.

The use by defendant on labels of a word printed in imitation of a different word on complainant's labels will be enjoined where it is calculated to deceive ordinary buyers. Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707.

Complainant for many years used in commerce with foreign nations, as applied to a preparation of corn flour for food, the word "Maizena," and a picture representing the cultivation of the corn, and the preparation and cooking of the flour, by Indians. Defendant used, in the sale of his cornstarch in foreign countries, the word "Maizharina," accompanied with a pictorial representation of a man carrying a quantity of maize in his arms. Held, that defendant was guilty of infringement of complainant's trade-marks. Glen Cove Mfg. Co. v. Ludeling (C. C. 1885) 22 Fed. 823.

Complainant is entitled to relief if the marks or brands used by defendants sufficiently resemble the complainant's marks or brands to be mistaken for them. Southern White Lead Co. v. Cary (C. C. 1885) 25 Fed. 125.

Defendant's hair crimpers are placed in a bright red box, but of different shape from complainant's box, on which is a white label, bearing words different from those on complainant's label. The use of the representation of the woman's head by defendant's predecessor antedated its use by complainant's predecessor. Held, there was no infringement of complainant's trade-mark. Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co. (C. C. 1889) 37 Fed. 365; Id., 40 Fed. 588.

A trade-mark consisting of the words "Warren Hose Supporter," and a cut of a hose supporter engaged with a stocking, is infringed by another in all respects similar, except that the word "Warranted" is substituted for "Warren." Frost v. Rindskopf (C. C. 1890) 42 Fed. 408.

An underwear trade-mark, consisting of a sun surrounded by rays, having a distinctly marked human face, and frequently, though not necessarily, bearing the words "Warmth is Life," is not infringed by a symbol having an imperfect outline, somewhat resembling sun rays, but whose characteristic feature is a circle inclosing a monogram; the label never bearing the words "Warmth is Life," but always having the name of the manufacturing company using it. Jaros Hygienic Underwear Co. v. Simons (C. C. 1892) 49 Fed. 276.

Where plaintiff's trade-mark for 30 years was a picture within a circle surrounded by the words, "Old Bourbon Whiskey, Bourbon Co., Ky.," and below the picture the words, "From J. A. Miller, Paris," and defendants, doing business in another state, adopted a like picture, including the circle, with the words: "The King of all Whiskies. John Miller & Co., Sole Proprietors, Boston, Mass.,"—it is an infringement; and it is immaterial that defendants use the device both upon barrels and bottles, while plaintiff has heretofore used it only on barrels, and that defendants' whisky is a "blended" whisky, having but one stamp, while plaintiff's is a "straight" whisky, having two stamps. G. G. White Co. v. Miller (C. C. 1892) 50 Fed. 277.

A trade-mark consisting of the word "Star," and the symbol of a star, adopted and used in combination with the words "Star Shirts," and other words describing the articles, is infringed by using a star and crescent, making the star so prominent that such goods may also be designated as "Star Goods," and purchasers may be readily deceived, even though the star so used is not of

the color usually employed for the trade-mark, and is a five-pointed star, while that in the trade-mark is uniformly six-pointed. Hutchinson v. Blumberg (C. C. 1892) 51 Fed. 829.

A trade-mark consisting of a conventional diamond-shaped figure is not infringed by a representation of a rough, irregular, radiant diamond. Pittsburgh Crushed-Steel Co. v. Diamond Steel Co. (C. C. 1898) 85 Fed. 637.

Complainant's trade-mark of an equilateral triangular figure, which as applied to bottled pale ale is colored red, is infringed by defendant's mark of a combination of a red triangle nearly equilateral, a narrow gold border surrounding and binding it, a monogram composed of the letters C and F in the middle, and some fine scroll ornamentation in each corner. Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C. 1899) 96 Fed. 206.

Placing upon wrappers a fac simile signature in imitation of complainant's registered trade-mark, in compliance with a special order given by agents or detectives acting for the complainant, does not constitute an actionable infringement of the trade-mark. Liebig's Extract of Meat Co. v. Libby, McNeill & Libby (C. C. 1900) 103 Fed. 87.

A firm in Wales adopted as a trade-mark the letters of "M. F." in monogram inclosed within a circle. They subsequently granted a license to use the process and trade-mark to a manufacturer in the United States, which was afterward acquired by complainant. Held, that the letters were the essential feature, and any use of them by another to designate a different plate, either alone or in connection with other letters or words, was an infringement. American Tin Plate Co. v. Licking Roller Mill Co. (C. C. 1902) 158 Fed. 690.

Where the goods of a manufacturer have come to be known by a particular name, the adoption by a rival of any mark or device which causes his goods to become known in the market by the same name may be an infringement of the trade-mark. Id.

A trade-mark of the representation of a five-pointed star, with the word "Galena" above and the word "Oil" below it, and the letter "G" in its center, is not infringed by a device consisting of a six-pointed star made by imposing one triangle upon another and having the words "Extra Star" in connection. Galena-Signal Oil Co. v. W. P. Fuller & Co. (C. C. 1906) 142 Fed. 1002.

Infringement of a trade-mark is the use of a mark identical with complainant's or colorably resembling it, although the wrongful imitation need not be exact or perfect, but may be limited or partial. Thaddeus Davids Co. v. Davids (C. C. 1911) 190 Fed. 285, decree reversed (1912) 192 Fed. 915, 114 C. C. A. 355.

Trade-marks of the word "Auto" and a picture of a motor car, on packages of chocolate held infringed by the use of both the word and picture on packages of similar kind, although of somewhat different style and coloring, and although the design was registered as a trade-mark in Switzerland before its use by complainant, where it was not until afterward used on goods sold in this country. Walter Baker & Co. v. Delapenha (C. C. 1908) 160 Fed. 746.

The name "Union Leader," as a trade-mark for tobacco packages, is not infringed by the name "Union World." American Tobacco Co. v. Globe Tobacco Co. (C. C. 1911) 193 Fed. 1015.

A manufacturer adopting an English emblem as a trade-mark on silver is entitled to an injunction against infringement, where he had used such mark for over 50 years. Gorham Mfg. Co. v. Weintraub (D. C. 1912) 196 Fed. 957.

Where complainant colored one edge of its canvas belting green and used the same as a trade-mark, such mark was not infringed by defendant putting out similar belting, both edges of which were painted black. Gandy Belting Co. of Baltimore City v. Victor-Balata & Textile Belting Co. (D. C. 1914) 215 Fed. 795.

The trade-mark "oMo" for a dress shield held infringed by the mark "DMD," used in the same place on the same class of goods. Omo Mfg. Co. v. Mystic Rubber Co. (D. C. 1914) 225 Fed. 92.

Plaintiffs' trade-mark for tea packages consisted of an X-mark with the firm's initials in the angles. Defendants' tea was put up in the same size packages, and the labels were identical, except that the name of the importing firm and the initials in the X-mark were different. This kind of a label had been used by tea importers for 20 years, and it did not appear that plaintiffs invented it. Persons purchasing tea were influenced merely by the initials in the X-mark. Held, that there was no infringement of plaintiffs' trade-mark. Castle v. Siegfried (1894) 103 Cal. 71, 37 Pac. 210.

Though plaintiffs acquired great skill in the manufacture of silver-plated spoons and forks, and stamped their manufactured products with their name and other characteristics, one who acquired the right from other persons named "Rogers" to stamp that name on plated spoons and forks manufactured by him for himself and them will not be enjoined from the use of the name "Rogers" merely; but may not so use the name as to closely imitate plaintiffs' trade-mark. Meriden Britannia Co. v. Parker (1872) 39 Conn. 450, 12 Am. Rep. 401.

The law will protect against the fraudulent simulation of a trade-mark. State v. Hagen (1893) 33 N. E. 223, 6 Ind. App. 167.

In case of a wrongful imitation of a trade-mark, a variation should be re-

garded as immaterial which requires close inspection to detect. Laird v. Wilder (1872) 72 Ky. (9 Bush) 131, 15 Am. Rep. 707.

Plaintiff marked the words "Golden Crown" on the boxes and fastened four tin tags of a particular size, shape, lettering, and position on each bar of his plug twist tobacco, with the words "Golden Crown" on each. Defendant used the words "Golden Chain," in connection with tin tags, lettered and arranged in a manner similar to plaintiff's. Held, that the words "Golden Chain" in connection with the tags should be restrained. Parlett v. Guggenheimer (1887) 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Where plaintiff had used as a trade-mark five-pointed stars made of tin, with a hole in the center, and defendant began using a tin symbol of the same size as plaintiff's with eight points slightly inclined to the right, a hole in the center, and the word "Buzz" dimly impressed on the surface, the "Buzz Saw" symbol was an infringement of the plaintiff's trade-mark, and its use should be enjoined. Liggett & Meyers Tobacco Co. v. Sam Reid Tobacco Co. (1890) 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313.

Where defendant used a certain symbol on the packages containing its goods, for the purpose of identifying them, complainant was entitled, after having made use of the symbol for the purpose of distinguishing its goods from others, to restrain defendant from employing it in the same manner on similar goods. Johnson & Johnson v. Seabury & Johnson (1905) 61 A. 5, 69 N. J. Eq. 696.

Where complainant used as its trade-mark "Standard T. O. C. Company" inclosed in an ellipse, another corporation which used the words "superior quality" inclosed in an ellipse, together with the initials of its corporate name, "T. O. C. & L. Co.," will be enjoined from using the initials "T. O. C." in connection with the ellipse. Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co. (1906) 63 A. 846, 71 N. J. Eq. 555.

Where complainant had first adopted as a trade-mark or symbol the figure of a black bear, defendant's subsequent use of a polar bear as a trade-mark is not an infringement. Bear Lithia Springs Co. v. Great Bear Spring Co. (1906) 71 A. 383, 71 N. J. Eq. 595.

A rosette used by defendant upon its bread is so markedly different from a seal used by complainant as not to present a case of trade-mark infringement. Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch. 1913) 89 A. 863.

Defendants began the manufacture and sale of a steel pen, closely resembling plaintiff's in every particular, on which was stamped "303," and "Esterbrook & Co., extra fine." The pens were put up in boxes of the same size and similar to those of plaintiff, with a label and similar to those of plaintiff, with a label containing the same words and figures, except "Esterbrook & Co." instead of "Joseph Gillott." Held, defendants' acts constituted an infringement of plaintiff's trade-mark "303," and plaintiff was entitled to an injunction. Gillott v. Kettle (1854) 10 N. Y. Super. Ct. (3 Duer) 624, 2 Liv. Law Mag. 371; Same v. Esterbrook (1872) 48 N. Y. 374, 8 Am. Rep. 553, affirming (1867) 47 Barb. 455.

Where the manufacturers of spool cotton adopted a trade-mark of four concentric circles of certain colors with certain wording, another manufacturer was guilty of imitation in adopting a trade-mark exactly similar in design, though somewhat different in wording. Clark v. Clark (N. Y. 1857) 25 Barb. 76.

A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market; and he is entitled to protection in the exclusive use of the peculiar marks or symbols appropriated by him, designating or indicating the true origin or ownership of the article to which they are affixed. Gillott v. Esterbrook (1872) 48 N. Y. 374, 8 Am. Rep. 553.

Plaintiff put up whisky in a barrel with a red rim and a glazed surface on the head with the letters "AAA" and a Maltese cross, and defendant put up whisky in barrels of a similar character with the letters "XXX" and a crown. Held, that defendant's barrel was an infringement of plaintiff's trade-mark. Cook v. Starkweather (N. Y. 1872) 13 Abb. Prac. (N. S.) 392.

Where plaintiff adopted as a trade-mark the figure of a pig or hog, by which his article had acquired the name in the trade of "The Pig Brand," it was infringed by a label of a somewhat similar style having the device of a small boar. Popham v. Wilcox (N. Y. 1873) 14 Abb. Prac. (N. S.) 206.

A trade-mark consisting chiefly of an eagle with outstretched wings, perched on a mortar in which rested a pestle, held infringed by use of the same symbol though another name than the plaintiff's appeared conspicuously on the labels; this, too, notwithstanding the general use of similar symbols among apothecaries. Hegeman v. O'Byrne (N. Y. 1880) 9 Daly, 264.

Defendants will not be enjoined from using the symbol "R 12" on their goods, which was used by plaintiff merely to show the size of the sheets in each package of stationery, and by defendants for the same purpose. Marcus Ward & Co. v. Ward (1891) 61 Hun, 625, 15 N. Y. Supp. 913.

Posters used in advertising defendant's play, entitled "Charley's Uncle,"

though in the same style as the posters advertising plaintiff's play, entitled "Charley's Aunt," are not so similar thereto as will entitle plaintiff to an injunction against their use, where plaintiff's posters bore device of a laughing cat, and defendant's posters bore the device of an owl. Frohman v. Miller (1894) 8 Misc. Rep. 379, 29 N. Y. Supp. 1109.

The appellation "The Little Antique Shop" is an infringement of the name "The Little Shop," when applied to a similar business in the same locality. Crawford v. Lans (1899) 60 N. Y. Supp. 387, 29 Misc. Rep. 248.

Where the label used by defendant was an infringement of plaintiff's label, that the similarity in the labels was restricted to the general arrangement, terms, and details on the top of the box, while the wrappers on the bottom were essentially dissimilar, did not make the use of the defendant's label less of an infringement. Monopol Tobacco Works v. Gensior (1900) 66 N. Y. Supp. 155, 32 Misc. Rep. 87.

Plaintiff's trade-mark, consisting of two fields united by a bar wider in the middle than at its ends, and of a maltese cross, with a stag's head on its face, placed over the bar, was infringed by a trade-mark of two fields joined by a bar, precisely similar in outlines to plaintiff's only it was inverted, and had above the bar an enlarged stag's head, without the maltese cross; and that the respective names of plaintiff and defendant were on the respective trade-marks, is immaterial. Dunlap & Co. v. Young (1902) 74 N. Y. Supp. 184, 68 App. Div. 137, reversed (1903) 66 N. E. 964, 174 N. Y. 327.

A trade-mark consisting of the words "The Rising Sun Stove Polish," with a vignette of the sun, was not infringed by a stove polish on the label of which the words "Rising Moon," with a vignette of the moon, was printed. Morse v. Worell (Pa. 1874) 1 Wkly. Notes Cas. 80, 31 Leg. Int. 380.

Where plaintiff had adopted a devise known as "Rising Sun," used by defendant of a similar device labeled "Rising Moon," was a plain imitation of plaintiff's trade-mark, and plaintiff was entitled to an injunction. Morse v. Conwell (Pa. 1875) 2 Wkly. Notes Cas. 12.

14. —— **Names in general.**—The city of Carlsbad, Bohemia, having long made and sold salts, under the name of "Carlsbad Sprudel Salts," it was an infringement to sell articles of salts in no way derived from the Carlsbad waters under the name of "Improved Effervescent Carlsbad Powder," it appearing that the city of Carlsbad had not used the name upon any but genuine salts derived from the spring waters, and there being no evidence that it had authorized or acquiesced in such use by any other person. City of Carlsbad v. Kutnow (1895) 71 Fed. 167, 18 C. C. A. 24, affirming (C. C. 1895) 68 Fed. 794.

The imitation by defendant of complainant's name for a brand of whisky, registered as a trade-mark, held such as to constitute infringement. W. A. Gaines & Co. v. Turner-Looker Co. (1913) 204 Fed. 553, 123 C. C. A. 79.

A defendant held chargeable with a violation of complainant's rights by the use made of a patentee's name upon articles made by it after the expiration of the patent, where through long prior and exclusive use by complainant it had come to in part indicate origin to the public. Yale & Towne Mfg. Co. v. Worcester Mfg. Co. (D. C. 1913) 205 Fed. 952.

Trade-mark held infringed, if adoption of similar name substantially lessens the value of the property right therein. N. K. Fairbanks Co. v. Ogden Packing & Provision Co. (D. C. 1914) 220 Fed. 1002.

Any doubt as to misleading similarity will be resolved against the party selecting such similar name. Id.

It is the use and colorable or imitative character of a trade-name that controls upon the question of infringement. Creswill v. Grand Lodge K. P. of Georgia (1910) 67 S. E. 188, 133 Ga. 837.

Where defendant, in putting up molasses candy, used the same paper and style of wrapper as did plaintiff, with the word "McDonald" in red Roman letters on the middle of the wrappers, and the use of the paper and style of wrapper was not original with plaintiff, it was proper to enjoin defendant from printing any name or word in red ink on the wrappers covering its candy whereby it should be caused to resemble that of plaintiff. Hildreth v. D. S. McDonald Co. (1895) 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440.

A defendant will be restrained from publishing a newspaper under the name of the plaintiff's paper, if such name is so used as to lead the public to suppose that the paper published by the defendant is the same as that published by the plaintiff. Bell v. Locke (N. Y. 1840) 8 Paige, 75, 34 Am. Dec. 371.

An injunction will not issue to restrain another from issuing or publishing a newspaper similarly named, where it does not appear that the public has been deceived, and the names of the two papers are so dissimilar that no one acquainted with the language in which they are printed would be decoyed into taking one for the other. Stephens v. De Couto (1868) 30 N. Y. Super. Ct. (7 Rob.) 343; Same v. De Conto (1868) 4 Abb. Prac. (N. S.) 47.

Where the names of two papers are so far different that, considering the dissimilarity of type and general appearance, one is not liable to be mistaken for the other, no injunction can be granted. Stephens v. De Conto (N. Y. 1868) 4 Abb. Prac. (N. S.) 47.

Although a newspaper proprietor may by appropriation and use acquire

such a property in the name of his paper as will be protected from piracy, yet the mere assimilation of the name by another person, unless it was clearly calculated to deceive the public, would not be unlawful. Stephens v. De Couto (1868) 30 N. Y. Super. Ct. (7 Rob.) 343.

The words "Independent National System of Penmanship," in letters of the same size and form and occupying the same position upon copy books as the trade-mark "Payson, Dunton & Scribner's National System of Penmanship," held to be an infringement, and their use properly restrained by injunction. Potter v. McPherson (N. Y. 1880) 21 Hun, 559.

Manufacture for many years of "Vienna" bread, sold with a label containing the words "Vienna Model Bakery," entitled plaintiff to restrain the use by others of a label in imitation of his own, and particularly from applying the word "Vienna" to baked articles. Fleischmann v. Schuckmann (N. Y. 1881) 62 How. Prac. 92.

In 1872 plaintiffs registered in the patent office, as a trade-mark, the words "Maryland Club Rye Whiskey, C. B. & Co., Special Trade-Mark," surrounding the seal of Maryland, a monogram, and a representation of a clover leaf, a copy of which, printed on white paper about six inches square, their initials forming part of this design, they placed on each barrel of their Maryland Club whisky. In 1882, defendant began the sale of a whisky, painting his barrel heads yellow, and stenciling thereon in black the words "Maryland Jockey Club Rye Whiskey," so that the words "Maryland" and "Whiskey" formed a circle around the barrel head in letters one and one-half inches high; "Club" appearing in letters 2½ inches high, and "Jockey" in letters seven-eighths of an inch high. Held an infringement. Cahn v. Gottschalk (1888) 14 Daly, 542, 2 N. Y. Supp. 13.

Where plaintiffs and defendants both used titles including the word "Life," but with different coloring, size of letters, etc., and plaintiffs used the word in a different sense from that in which it was employed by defendants, the use of the word by the latter in no respect infringed upon its employment by plaintiffs. Stokes v. Allen (1890) 56 Hun, 526, 9 N. Y. Supp. 846, affirming judgment (Sup. 1888) 2 N. Y. Supp. 643.

Where plaintiff issued a monthly periodical of limited circulation, and defendant a weekly periodical with a somewhat similar name, and there was no evidence showing actual confusion in any instance from the claimed similarity in names, injunction was properly denied. Forney v. Engineering News & Pub. Co. (1890) 57 Hun, 588, 10 N. Y. Supp. 814.

Where the price, time of publication, class of news of the "New York Commercial" differs from that of "The Commercial Advertiser," and the only evidence of injury consists in opinion, controverted by other witnesses, the facts do not justify the conclusion that the use of the name by the defendant is calculated to deceive any purchaser or advertiser of common intelligence. Commercial Advertiser Ass'n v. Haynes (1898) 49 N. Y. Supp. 938, 26 App. Div. 279.

An injunction will lie to restrain the branding by defendant of his products with a name made valuable by plaintiff in connection with the manufacture of a similar product. Smith v. Kernan (1880) 8 Ohio Dec. 32, 5 Wkly. Law Bul. 145.

The use of the words "Dr. Drake's Famous German Croup Remedy" is an infringement of the trade-name "Dr. Drake's German Croup Remedy." Drake Medicine Co. v. Glessner (1903) 67 N. E. 722, 68 Ohio St. 337.

No intentional deception appearing, the publication of a newspaper, under the name of "The Northwest News," does not infringe the rights of publishers of a paper long published at the same place under the name of "The New Northwest." Duniway Pub. Co. v. Northwest Printing & Publishing Co. (1884) 11 Or. 322, 8 Pac. 283.

Where a medicine was made and sold under the name "Hall's Vegetable Sicilian Hair Restorer," the making and sale of an imitation under the name "Vegetable Sicilian Hair Renewer" constitutes an imitation of plaintiff's trademark. Gillis v. Hall (Pa. 1865) 2 Brewst. 342, 7 Phila. 422.

15. —— Arbitrary, fictitious, or fanciful names.—"No-To-Bac," appropriated as a trade-mark for a medicine designed to cure the tobacco habit, is not infringed by "Baco-Curo," used with a similar medicine. Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co. (1897) 80 Fed. 105, 25 C. C. A. 314.

The name "Gold Drop," used by defendant, is sufficiently similar in sound to the name "Gold Dust," previously adopted by complainant for a similar article, and its use constitutes an infringement, although defendant uses a different style of label and package, especially where defendant sells its product, which retails at the same price, at a lower price to dealers, and thus makes it an object for them to palm it off on purchasers asking for complainant's whenever possible which it is shown they in fact have done. N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (1900) 102 Fed. 327, 42 C. C. A. 376.

A person publishing a magazine under the name "Comfort" has a trade-name in such title, which is infringed by the use of the name "Home Comfort" for a magazine. Gannert v. Rupert (1904) 127 Fed. 962, 62 C. C. A. 594, reversing decree Gannett v. Ruppert (C. C. 1902) 119 Fed. 221.

Use of the name "Don Cæsar," in connection with the sale of defendants' olives, not an infringement of complainant's trade-mark "Don Carlos," used

in the same trade. Chance v. Gulden (1908) 165 Fed. 624, 92 C. C. A. 58, reversing decree Gulden v. Chance (C. C. 1908) 163 Fed. 447.

The word "Knotair" is not an infringement of the word "Holeproof" as applied to the manufacture and sale of hosiery. Holeproof Hosiery Co. v. Wallach Bros. (1909) 172 Fed. 859, 97 C. C. A. 263, modifying order (C. C. 1908) 167 Fed. 373.

The name Coca-Cola, duly registered as a trade-mark, and which had become the distinctive name under which complainant's product was known, held infringed by the name, "Fletcher's Coca-Cola" used on a similar product. Nashville Syrup Co. v. Coca-Cola Co. (1914) 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358, affirming judgment Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

The trade-mark "Necco" held not infringed by the word "Nawaco," printed in different type and different in appearance from the trade-mark as registered. New England Confectionery Co. v. National Water Co. (1915) 224 Fed. 344, 140 C. C. A. 30.

The owner of the trade-mark "Best Spanish Flavored Durham" cannot enjoin the use of "Genuine Durham Smoking Tobacco" where he used the word "Durham" as a mere unmeaning incident. Blackwell v. Armistead (C. C. 1872) Fed. Cas. No. 1,474.

The use of the word "Chatterbox," in connection with the same method of selection and illustration of stories, form of binding, and vignette, by defendants, held an infringement of complainant's right in the name. Estes v. Leslie (C. C. 1886) 27 Fed. 22.

Where complainant had long manufactured and sold an article designated as "Dr. Price's Cream Baking-Powder"; the word "Cream" not having been used on packages of baking powder before that time; and it not being descriptive of an ingredient of the article, or of its quality or kind, injunction would be granted. Price Baking Powder Co. v. Fyfe (C. C. 1891) 45 Fed. 799.

A trade-mark consisting of the word "Momaja," as applied to a blend of coffee, is infringed by the use of the word "Mojava," applied to another blend of coffee. American Grocery Co. v. Sloan (C. C. 1895) 68 Fed. 539.

"Cuticura," as a trade-mark for a toilet soap, is infringed by the word "Curative," applied to a different soap, with such lettering and arrangement as to produce a deceptive resemblance to said trade-mark. Potter Drug & Chemical Corp. v. Miller (C. C. 1896) 75 Fed. 656.

Trade-mark "Vitæ-Ore," and its abbreviation, "V-O," as applied to a medicinal preparation, held infringed by the words "Vitalizing Ore," also applied to a medicinal preparation. Noel v. Ellis (C. C. 1896) 89 Fed. 978.

The use of the word "Cottoleo" is an infringement of the trade-mark "Cottolene" previously registered for the sale of the same substance. N. K. Fairbank Co. v. Central Lard Co. (C. C. 1894) 64 Fed. 133.

The trade-name "German Sweet Chocolate" is infringed by the words "Germania Sweet Chocolate." Walter Baker & Co. v. Baker (C. C. 1896) 77 Fed. 181.

"Sunlight" is a good trade-mark for a soap, and is infringed by the use of the name "American Sunlight." Lever Bros. v. Pasfield (C. C. 1898) 88 Fed. 484.

Sale of a liquid in bottles under the name of "Rough on Skeeters," is not an infringement on "Rough on Rats," the article being wholly unlike any preparation sold by plaintiff and one which could not be mistaken therefor, so as to create unfair competition. Wells v. Ceylon Perfume Co. (C. C. 1900) 105 Fed. 621.

Where complainant manufactured, sold, and advertised a preparation of rennet under the name "Junket Tablets," he was entitled to an injunction against the use by defendant, a later manufacturer of the name "Junket Capsules," for a similar preparation put up in capsules, but defendant had the right to designate his preparation as for use in making Junket, provided the word was given no greater prominence than the rest of the designation. Hansen v. Siegel-Cooper Co. (C. C. 1900) 106 Fed. 691.

The word "Sapho" sufficiently resembles "Sapolio" to constitute an infringement where the packages are identical in form, size and color of wrapper, with a label in similitude of that used on packages of Sapolio. Enoch Morgan's Sons Co. v. Whittier-Coburn Co. (C. C. 1902) 118 Fed. 657.

The word "Elastic" held to have been used for such length of time by plaintiff as to have acquired a secondary meaning as identifying sectional bookcases, and similar articles of its manufacture, and to entitle it to protection against the use of such word in connection with the goods of other manufacturers, even if not valid as a technical trade-mark. Globe-Wernicke Co. v. Brown (C. C. 1903) 121 Fed. 185.

The words "Home Comfort" are an infringement of complainant's trade-mark "Home Brand," used on canned goods, the word "Home" being the essential feature of it. Griggs, Cooper & Co. v. Erie Preserving Co. (C. C. 1904) 131 Fed. 359.

The word "Porosknit," as a trade-mark for underwear, if valid, must be regarded as not descriptive but as an arbitrary word, having no meaning as applied to such goods, and as such is not infringed by the words "Porous Underwear," stamped on underwear in letters of different style and color. Chalmers Knitting Co. v. Columbia

Mesh Knitting Co. (C. C. 1908) 160 Fed. 1013.

The word "Ceresota," as the name of a brand of flour is clearly infringed by the use of the name "Cressota" by a different manufacturer. Northwestern Consol. Milling Co. v. Mauser & Cressman (C. C. 1908) 162 Fed. 1004.

Where complainant produced a peculiar style of type, sold under the name of "Caslon Bold," to indicate its own goods, another manufacturer may be restrained from making use of that name. Keystone Type Foundry v. Portland Pub. Co. (C. C. 1910) 180 Fed. 301, decree affirmed (1911) 186 Fed. 690, 108 C. C. A. 508.

The trade-mark "Knoxall," as applied to lead pencils, constituted an infringement on the phrase "Beats-All" previously used on pencils by complainant. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

The arbitrary name "Knotair," as applied to a make of hosiery, is not in itself an infringement of the trademark "Holeproof," previously adopted by another manufacturer. Holeproof Hosiery Co. v. Wallach Bros. (C. C. 1911) 190 Fed. 606, decree modified (1911) 192 Fed. 534, 112 C. C. A. 655.

The word "Nubias," under which defendant's Turkish tobacco cigarettes were sold, held an infringement of the word "Nubia," under which complainant had previously sold such cigarettes. Perkins v. Apollo Bros. (D. C. 1912) 197 Fed. 476.

The word "Radames," used by defendants as a trade-mark for cigarettes, held an infringement of complainants' cigarette trade-mark, "Rameses." Stephano v. Satmatopoulos (D. C. 1912) 199 Fed. 451.

Complainant's trade-mark in the word "Coca-Cola" held infringed by defendant's use of the word printed in different type in an unhyphenated form, accompanied by the word "Fletcher's." Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Manufacturer of Coca-Cola held not entitled to enjoin preparation and sale of similar beverage under the name "Koke" merely because some purchasers of Coca-Cola referred to it as "Koke," on the theory that this had beocme a secondary trade-name of plaintiff's beverage. Cola-Cola Co. v. Branham (D. C. 1914) 216 Fed. 264.

"Listogen" held not descriptive by suggestion so as to be properly applied to a compound similar to that sold under the name "Listerine." Lambert Pharmacal Co. v. Bolton Chemical Corporation (D. C. 1915) 219 Fed. 325.

Registered trade-mark "Cottolene," held infringed by adoption and use of the trade-name, "Chefolene," for a similar product. N. K. Fairbanks Co. v. Ogden Packing & Provision Co. (D. C. 1914) 220 Fed. 1002.

Trade-mark "beaded," applied to shoe lace tips, held infringed by use of the words "Nubeaded," "Nu-B-Ded," and "Nubded." United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

Trade-mark "Roof Leak," in connection with roof paint, held infringed by sales under the name "Never Leak." Elliott Varnish Co. v. Sears, Roebuck & Co. (D. C. 1915) 221 Fed. 797.

Word "Everlasting," trade-mark on aluminum cooking utensils, with the word "Ware," held injurious to maker of "Wearever," or "Everwear," utensils, as tending to deceive buyers, and so an unlawful infringement; but not an infringement when used alone. Aluminum Cooking Utensil Co. v. National Aluminum Works (D. C. 1915) 226 Fed. 815.

The principle on which the simulation of trade or business names is restrained, where the name assumed is of a fanciful or arbitrary character, is not that there is property acquired in the word or name employed, but it is to prevent fraud and deception in dealing with the party charged with the simulation or infringement. Original La Tosca Social Club v. La Tosca Social Club (1904) 23 App. D. C. 96.

The word "Kalodont," as applied to tooth paste, held not to so nearly resemble "Sozodont," used as a trade-mark on similar preparations, as to be calculated to mislead and deceive purchasers. Landespriv., etc., v. Hall & Ruckel (1911) 36 App. D. C. 532.

The use of the word "Dover" merely as the name of a certain kind of egg beater will not constitute such word a trade-mark, so as to entitle the proprietor, after his patent has expired. to enjoin its use by a manufacturer of other egg beaters. Dover Stamping Co. v. Fellows (1895) 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448.

Plaintiff, a manufacturer of "Flex-Arch" shoes held not entitled to enjoin defendant from using the trade-name "Coes & Young's 7.00 Flexible Arch-Support Shoes," or from using an illustration in advertising showing a shoe bent at the arch. E. W. Burt & Co. v. Coes & Young Co. (1912) 98 N. E. 596, 212 Mass. 134.

Plaintiff applied the name "What Cheer" to a restaurant established by him, and built up a lucrative business. Defendant thereafter opened a restaurant near by under the name "New and Original What Cheer Restaurant." Held, that defendant's use of the words "What Cheer" constituted a piracy of plaintiff's trade-name, entitling plaintiff to restrain the use thereof. Gamble v. Stephenson (1881) 10 Mo. App. 581.

Where plaintiff has, for a number of years, used the name "Portland" to distinguish his stoves from others on the market, a rival dealer will be restrained from advertising and selling a differ-

ent stove as the "Famous Portland." Amos H. Van Horn v. Coogan (1894) 52 N. J. Eq. (7 Dick.) 380, 28 Atl. 788.

Injunction sustained to protect the use of the compounded term "Cocaine," to designate a hairwash, and the subsequent adoption, by a rival dealer, of the word "Cocoine," to designate a similar compound put up by him held an infringement. Burnett v. Phalon (1862) 22 N. Y. Super. Ct. (9 Bosw.) 192; Id. (1867) 1 Abb. Dec. 267, 5 Abb. Prac. (N. S.) 212, *42 N. Y. (3 Keyes) 594.

One who had coined the compound word "Electro-Silicon," and applied it to a polishing powder prepared by them is entitled to restrain an imitator from designating a similar powder and put up in like packages, "Electric-Silicon." Electro-Silicon Co. v. Trask (N. Y. 1880) 59 How. Prac. 189.

The rights of a publisher in the nom de plume "Old Sleuth" are infringed by publications under the pseudonym "Sleuth," or "Young Sleuth," or others in which the name "Sleuth" conspicuously figures. Munroe v. Tousey (1891) 59 Hun, 622, 13 N. Y. Supp. 79, judgment reversed Munro v. Same (1891) 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

The words "Nickel-Saved," as a brand of cigars is a sufficiently close resemblance to the words "Nickel-In," used in connection with similar articles, to entitle the originator of the latter term to restrain the use of the former. Schendel v. Silver (1892) 63 Hun, 330, 18 N. Y. Supp. 1, judgment affirmed (1893) 139 N. Y. 644, 35 N. E. 206.

The use of the word "Crow" on a label of a whisky called "White Crow" is an infringement on the existing trademark of "Old Crow," as used on plaintiff's brand of whisky first distilled by a man named Crow. W. A. Gaines & Co. v. Leslie (1898) 54 N. Y. Supp. 421, 25 Misc. Rep. 20.

After plaintiffs had established a label having on it "Excelsior Felt Pads," defendants began the manufacture of similar goods, changing the word "Excelsior" to "Excellent," and using labels almost an exact reproduction of such manufacturers' label. Held, that defendants were guilty of an infringement of such trade-mark, which plaintiffs were entitled to enjoin. Volger v. Force (1901) 71 N. Y. Supp. 209, 63 App. Div. 122.

Where plaintiff's trade-mark was "Omega Oil," defendants would be restrained from using the words "Omega Oil" as a part of their designation of the manufacture as liniment and soap, and which was of the same color as Omega Oil. Omega Oil Co. v. Weschler (1901) 71 N. Y. S. 983, 35 Misc. Rep. 441.

There is no such similarity in name between "Yama-Mai" and "Mamie," as used in trade-marks, as to justify the issuance of an injunction against the use of the latter, where there was no showing that the latter was adopted with the intent of interfering with plaintiffs' business, or of deceiving the public. Boessneck v. Iselin (1903) 82 N. Y. Supp. 164, 83 App. Div. 290.

Plaintiff, who had registered the word "Oneida" as a part of its trade-mark "Oneida Community," held entitled to enjoin defendant from using the name "Oneida Game Trap Company" and from stamping word "Oneida" upon its traps. Oneida Community v. Oneida Game Trap Co. (Sup. 1915) 154 N. Y. Supp. 391, affirming judgment (Sup. 1914) 150 N. Y. Supp. 918.

The name "Excelsior" as applied to stoves and ranges was infringed by the words "New Excelsior and Approved Excelsior," applied on stoves and ranges of a similar character manufactured by another. Sheppard v. Stuart (Pa. 1879) 7 Wkly. Notes Cas. 498.

Plaintiff had adopted the name "Lone Jack" for his smoking tobacco. Defendant put on the market cigarettes under the name of "Lone Jack Cigarettes." Defendant surrounded the name with a device different from that adopted by plaintiff. Held, that plaintiff was entitled to an injunction. Carroll v. Ertheiler (Pa. 1880) 14 Phila. 424.

A stove manufacturer having appropriated the trade-mark "Excelsior" may enjoin the subsequent use of the names "New Excelsior" and "Improved Excelsior" by his competitors. Appeal of Peterson (Pa. 1881) 4 Walk. 80.

In a suit to enjoin the infringement of the name "Georgia Coon" as a trademark for syrup by using the name "New Coon," whether defendant's use of the latter words was an infringement held a jury question. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

16. —— Names of persons, firms, or corporations.—Use of defendant's name "Wiener's" in heavy black letters held not an infringement of plaintiff's trademark, consisting of the "Warner's" in heavy black script; and hence the court properly refused to enjoin defendant from using his name in any style of type, unless accompanied by his given name. Warner Bros. Co. v. Wiener (1914) 214 Fed. 30, 130 C. C. A. 424, order modified on rehearing (1914) 218 Fed. 635, 134 C. C. A. 393.

Where complainants owned the tradename of "West End Distillery Co.," and also the brands "Ky's Criterion" and "Honeymoon," and defendants placed on their goods "East End Distillery Co.," in connection with the brands "Ky's Credential" and "Honeycomb," and also their own names as distillers, the use of their names was lawful, and the adoption of the name "East End

Distillery Co." in itself did not afford a ground of action. Kentucky Distilleries & Warehouse Co. v. Wathen (C. C. 1901) 110 Fed. 641.

Confusion resulting and the public being misled, by the use of the word "Keystone" in defendant's corporate name, "Keystone Oil & Manufacturing Company," defendant should be enjoined from use of such word in that part of its business. Buzby v. Keystone Oil & Mfg. Co. (D. C. 1913) 206 Fed. 136.

The adoption of the name of a manufacturer or seller of an article which is a trade-mark, by a person bearing a different name, is a clear infringement, a slight change in the name, such as cutting off the final letter or prefixing "Von," or "Van," not preventing its use from being piracy. Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204.

The use of the name "Allegretti & Co." is an infringement of the trade-name of "Allegretti Chocolate Cream Co." Rubel v. Allegretti Chocolate Cream Co. (1898) 76 Ill. App. 581, affirmed Allegretti v. Same (1898) 52 N. E. 487, 177 Ill. 129.

The application stated that plaintiff's trade-mark "consists of the arbitrary word symbol 'E. H. Taylor, Jr., & Sons,' being a script fac simile of the signature of our name by the senior member thereof. This has generally been arranged * * * in black script, on a horizontal line within a circular border embracing the word 'Old Taylor,' but these are nonessential," etc. Held, that a trade-mark used by the defendant, having in it the words "Old Kentucky Taylor," is not an infringement of the plaintiff's trade-mark. E. H. Taylor, Jr., & Sons Co. v. Taylor (1905) 85 S. W. 1085, 124 Ky. 173, 27 Ky. Law Rep. 625.

An original device bearing the words, "Auburn Lynn Shoes, Auburn, Maine," is an arbitrary, composite name, constituting an impersonal trade-mark, and is infringed by the adoption of the phrase, "Auburn Lynn Shoe Co.," as a trade-mark and corporate name. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

Complainants, doing business as the "Manufacturers' Outlet Company," which name they have registered as a trade-mark, are entitled to restrain the use of the name "Taunton Outlet Company" by another in the same business, such words having a tendency and being intended to lead persons to believe that it was the complainants' place of business. Samuels v. Spitzer (1900) 58 N. E. 693, 177 Mass. 226.

Where a partnership is carrying on the business of roasting peanuts under the name of the "Boston Peanut Roasting Company," the use of the name "Boston Trade Peanut Roasting Company" by a competitor on the same street is an infringement. Viano v. Baccigalupo (1903) 67 N. E. 641, 183 Mass. 160.

Soon after plaintiff commenced to do business under the trade-name "Oriental Process Rug Renovating Company," but before plaintiff had acquired any rights therein defendant in good faith commenced business under the name "Oriental Rug & Carpet Renovating Works," advertising, generally under the name "Chutjian Bros. Oriental Rug & Carpet Renovating Works." Neither used any process peculiar to himself. Held, that plaintiff had acquired no better right than had defendant, and injunction not allowed. Giragosian v. Chutjian (1907) 80 N. E. 647, 194 Mass. 504.

Where the "Northwestern Knitting Company" has been engaged in knitting articles of underwear, conducting all its business under its corporate name, use by defendant of the name "Northwestern Knitting Mill" was likely to cause confusion in the trade, deceive the public, and prejudice the rights of plaintiff. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

The Plant Seed Company, was organized in 1872 by Plant Bros., dealers in flowers, bulbs, plants, etc. The Michel Plant & Seed Company was incorporated in 1882, the name being changed from "H. Michel & Co.," dealers in flowers, plants, etc. Held, that equity would not restrain the use of defendant's name, such name being a proper indication of its business, and not likely to mislead customers. Plant Seed Co. v. Michel Plant & Seed Co. (1889) 37 Mo. App. 313.

The rule of law as to the use of a trade-name of another applies where a corporation takes or imitates the name of a rival trader. International Silver Co. v. Wm. H. Rogers Corp. (1904) 57 A. 1037, 66 N. J. Eq. 119, reversed (Err. & App. 1905) 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506.

The proprietor of a hotel managed as "The Hotel Dominion" is entitled to restrain another from operating a new hotel under the name of "The New Dominion," as against the objection that the owner of the new hotel as tenant of the old improved its reputation by reason of his labors. O'Grady v. McDonald (N. J. 1907) 66 A. 175.

Plaintiff, known to the trade as the Tuerk Water-Motor Company, may enjoin defendants, the "Tuerk Water-Meter Company," from using such firm name, or any other substantial imitation of plaintiff's name, being calculated to have, and having, a misleading result with ordinary purchasers. Tuerk Hydraulic Power Co. v. Tuerk (1895) 92 Hun. 65, 36 N. Y. Supp. 384.

The trade-name and sign "Best & Co. —Lilliputian Bazaar," with the street and store numbers and the name "New York" added, is not infringed by one of "Broadway Bazaar—Brooklyn's Best Lilliputian Store, 1185 Broadway, Brooklyn." Ball v. Broadway Bazaar

(1907) 106 N. Y. Supp. 249, 121 App. Div. 546.

Defendant is entitled to manufacture and sell game traps under its own corporate name of "Oneida Game Trap Company" without infringing any rights of the Oneida Community, Limited, also manufacturing game traps. Oneida Community v. Oneida Game Trap Co. (Sup. 1914) 150 N. Y. Supp. 918, judgment affirmed (Sup. 1915) 154 N. Y. Supp. 391.

Plaintiff's sign, "I. X. L. General Merchandise Auction Store," is not infringed by the sign over defendant's store, "Great I. X. L. Auction Company." Lichtenstein v. Mellis (1880) 8 Or. 464, 34 Am. Rep. 592.

Under the evidence in an action by the "Howe Grain and Mercantile Company" to enjoin defendants from doing business under the name of "Howe Grain Company," held, that plaintiff was entitled to the relief sought. Hughes v. Howe Grain and Mercantile Co. (Tex. Civ. App. 1914) 162 S. W. 1187.

17. —— Packages, bottles, wrappers, or labels.—An injunction will not be granted to restrain use of a label whose only resemblance to the complainant's label is that certain letters, which alone convey no meaning, are inserted in the center of each; the dissimilarity of the labels being such that no one will be mislead as to the true origin or ownership of the merchandise. Amoskeag Mfg. Co. v. Trainer (1879) 101 U. S. 51, 25 L. Ed. 993.

Where the only resemblance was in size and shape of packages, which were common to the trade, and in arrangement of lettering on the labels, but the words and coloring were different, the resemblance was not sufficient to warrant an injunction. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, 30 C. C. A. 496.

Complainants were not entitled to a decree enjoining the sale merely of a rose-colored capsule, unembossed, though of the same size and shape, or even with the words "Extra Dry" impressed thereon, as on complainants,' in the absence of evidence of its use in a manner to deceive customers to complainants' damage. Von Mumm v. Witteman (1898) 91 Fed. 126, 33 C. C. A. 404, affirming decree (C. C. 1898) 85 Fed. 966.

An injunction will be granted restraining the use, however innocent of intended wrong, of a device which constitutes an infringement on the trademark of another, on goods of a like character. Manitowoc Pea-Packing Co. v. William Numsen & Sons (1899) 93 Fed. 196, 35 C. C. A. 267.

Use of a trade-mark so similar to plaintiff's in color, etc., though with different wording, that it was liable to deceive's careless purchasers, was an infringement on complainant's trademark, and should be enjoined. Ohio Baking Co. v. National Biscuit Co. (1904) 127 Fed. 116, 62 C. C. A. 116, writ of certiorari denied (1904) 25 Sup. Ct. 788, 195 U. S. 630, 49 L. Ed. 352, affirming judgment National Biscuit Co. v. Ohio Baking Co. (C. C. 1900) 127 Fed. 160.

Where the French government expelled the Carthusian monks, and defendant bought from the court receiver the good will, products, and trademarks of the order, he was not vested with the right to use the name and labels of the monks in the United States, and would be enjoined from imitating the original labels in such manner as to mislead purchasers. Baglin v. Cusenier Co. (1908) 164 Fed. 25, 90 C. C. A. 499, decree reversed (1911) 31 Sup. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, modifying decree (C. C. 1907) 156 Fed. 1016.

A trade-mark used on a label for a face cream held not infringed by another of different colors and lettering, and which resembled complainant's only in that both contained picture of a woman's head within a circle. Aubry Sisters v. Creme de Mohr Co. (1913) 203 Fed. 861, 122 C. C. A. 102.

A trade-mark, consisting of the word "Abricotine" in connection with the initials P. G. on a tabret or shield and the facsimile of a signature was infringed by using the word Abricotine in connection with similar goods. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

Complainant's trade-mark, "Old Smoke House Blend," used in connection with a mixture of smoking tobacco, held infringed by defendants' label, referring to person whose picture appeared thereon as "Old Smoke House Root." Jacoway v. Young (1915) 228 Fed. 630, 143 C. C. A. 152.

Where a label had been in use in substantially the same form for a dozen or more years prior to suit brought, the use of a label of the same size, color, and type, and of the same general appearance, with corresponding compartments and similar, although not identical, designations, should be enjoined. Sawyer v. Kellogg (C. C. 1881) 7 Fed. 720.

Where defendants use tin tags which are so close an imitation that they are calculated to mislead the retail purchaser, whether so intended or not,—it is an infringement of complainants' trademark, and such use may be enjoined. Lorillard v. Wight (C. C. 1883) 15 Fed. 383.

The sale of a chewing gum under the name of "Heisel's Elastic Tolu" is not an infringement of the trade-mark "Adams' Sappota Tolu Chewing Gum." Adams v. Heisel (C. C. 1887) 31 Fed. 279.

Defendant's labels had the same figures, colors, and words, and were so much like complainant's that one might

easily be mistaken for the other. One was called "Peach Blossom," and the other "Sweet Lotus." Held, defendant's wrappers were a palpable imitation of complainant's, and their use should be enjoined. Wellman & Dwire Tobacco Co. v. Ware Tobacco Works (C. C. 1891) 46 Fed. 289.

A label with a white background, and in red and black letters, an advertisement of "Elastic Starch," with a large and prominent cut of a flatiron, as a trade-mark for starch, is not infringed by another label, as a trade-mark for starch, bearing, on a red background, in white, yellow, and black letters, an advertisement of "E.'s New Process Starch," with a picture of a colored woman holding up prominently a freshly-ironed shirt, underneath which, on a table, appears a small flatiron. J. C. Hubinger Bros. Co. v. Eddy (C. C. 1896) 74 Fed. 551.

A solid blue label for packages of laundry soap, bearing the words "Old Country," is not infringed, or unfairly imitated, by the use of a label having on it the national colors of the United States with the words "Our Country." Allen B. Wrisley Co. v. Geo. E. Rouse Soap Co. (C. C. 1898) 87 Fed. 589.

Where defendant's package and label is so near like plaintiff's in general appearance that one is apt to be mistaken for the other, the use of the label by the defendant or of one substantially similar thereto will be enjoined. Centaur Co. v. Killenberger (C. C. 1898) 87 Fed. 725.

Where plaintiffs had long used the word "Hunter" for their whisky, and also a picture of a uniformed man on horseback, and later defendants began the sale of a white label, with the picture of a huntsman on foot, with dogs, thereon, and the words "White Label Hunter Whiskey, Bottled by," followed by their own name and address, such labels were an infringement of complainants' exclusive right of trade-mark in the word "Hunter." Lanahan v. John Kissel & Son (C. C. 1905) 135 Fed. 899.

A patented cigar band, wider at one end than the other, of brown color, on which were printed the words: "Trademark Pat'd Dec. 9, 1902. E. Regensburg & Sons"—was not infringed by a band of a similar color and shape on which the only lettering was the inscription of the name "Juan F. Portuondo" in script evidently imitating an autograph. E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co. (C. C. 1905) 136 Fed. 866, decree affirmed (1905) 142 Fed. 160, 73 C. C. A. 378.

Use of a certain trade-mark for 30 years entitles the user to enjoin the later adoption and use by defendants of labels on the same kind of products, the principal feature of which has a general similarity in appearance, although differing in dress and position, from that of complainant, and in connection with its own name as manufacturer. Walter Baker & Co. v. Puritan Pure Food Co. (C. C. 1905) 139 Fed. 680.

Where labels used on bottles by defendants in no respect resemble labels used by plaintiffs on bottles containing similar medicine, except that both labels have thereon the words "Sarsaparilla and Iron," plaintiffs are not entitled to an injunction or to damages. Schmidt v. Welch (Cal. 1893) 35 Pac. 626.

The plaintiffs had long manufactured and sold hairpins known and readily sold as "Tayler's hairpins." The defendants had procured from L. B. Taylor the right to mark their packages "L. B. Taylor & Co.," to which they added "Cheshire, Conn.," using a device, labels, and wrappers so nearly resembling the plaintiffs' in size and color as to be likely to deceive careless and unwary purchasers. Defendants acted in good faith, and with no design to infringe the plaintiffs' rights. Held, defendants should be enjoined. Williams v. Brooks (1883) 50 Conn. 278, 47 Am. Rep. 642.

The trade-marks "The Universal Cough Remedy," "Hunnewell's Electric Pills," and "Alterative Laxative Pills, Dr. Gilman Daveis' Formula," are not infringed by the labels "Hunnewell's Celebrated Cough Remedy," "Hunnewell's Family Pills," and "Daveis' Alterative Laxative Pills." Gilman v. Hunnewell (1877) 122 Mass. 139.

One who had no name for his product and did not advertise it as his make, but put it up under the trade-names and trade-marks of different customers in cartons upon which was printed a representation that it was manufactured exclusively by the customers, could not enjoin the use of similar cartons by a rival manufacturer. Shelley v. Sperry (1907) 99 S. W. 488, 121 Mo. App. 429.

Where the color of the paper, the words used, and the general appearance of labels show an evident design to imitate those used by plaintiff, the use of defendant's label will be enjoined notwithstanding he puts his own name on the wrappers. Lea v. Wolf (N. Y. 1872) 13 Abb. Prac. (N. S.) 389.

Plaintiff was entitled to restrain a subsequent dealer from using upon like packages a device like plaintiff's trademark, except that the monogram had "F." instead of "A." Godillot v. Hazard (1875) 49 How. Prac. 5; Same v. Harris (1880) 81 N. Y. 263.

The trade-mark "Sapolio" is entitled to be protected, independent of the trade-marks act of congress, against sale of a like article, in similar wrappers and labels, under the name "Saphia." Enoch Morgan's Sons Co. v. Schwachhofer (N. Y. 1878) 55 How. Prac. 37.

An imitation of the packages, labels, and manner of dressing goods of another will be restrained where the defendant has combined these things in a way well calculated to deceive buyers of the article. Electro-Silicon Co. v. Levy (N. Y. 1880) 59 How. Prac. 469.

Defendant's boxes of medicine bore a close and intentional resemblance to

plaintiff's boxes externally, and in the arrangement and number of the bottles, calculated to mislead the public. Held, that plaintiff was entitled to restrain defendant from infringing on his original and peculiar method of preparing, wrapping, boxing, and packing his medicines. Humphreys Homeopathic Medicine Co. v. Bell (1888) 15 Daly, 6, 2 N. Y. Supp. 50.

Where defendant placed on his cigarettes a label similar to plaintiff's, with some difference in wording, the form and style of the letters and characters closely resembling those used by plaintiff, as did also the manner in which they were grouped, the use of this combination by defendant was an infringement of plaintiff's trade-mark. Kinney Tobacco Co. v. Maller (1889) 53 Hun, 340, 6 N. Y. Supp. 389.

Where defendant's wrappers resembled plaintiff's in color, size, and style of type, but they were not so used as to display these words, or to present them to the immediate observation of purchasers, a preliminary injunction could not be sustained. Babbitt v. Brown (1891) 58 Hun, 609, 12 N. Y. Supp. 409.

Where defendant uses a label which has the same general appearance as plaintiff's. is of paper of the same color, resembles it in its prominent features, and is placed on packages in size, shape, and appearance like those of plaintiff, it constitutes an infringement, and plaintiff is entitled to an injunction restraining its use. Jerome v. Johnson (1899) 59 N. Y. Supp. 859.

Plaintiff's trade-mark consisted of the design of a ribbon extending diagonally across the package, tied in a bowknot at its center, in combination with a small gilt seal and the word "Sen-Sen" plainly printed at the top and bottom of the package, while defendant's design consisted of a similar colored ribbon in the center of the package, with a bowknot at the upper end, in combination with the large gilt seal, on which was plainly printed the word "Trix." The words "Sen-Sen" and "Trix" had no prior meaning before their use by the parties. Held no infringement. T. B. Dunn Co. v. Trix Mfg. Co. (1900) 63 N. Y. Supp. 333, 50 App. Div. 75.

Where the label complained of was the same in general device, coloring, and arrangement, as plaintiff's, differing only in an occasional word or figure, and both were so designed and printed as to throw into prominence the words "Monopol Tobacco Works" in the one, and the circle with the words "North Pole Tobacco Works" in the other, there was such infringement as should be enjoined. Monopol Tobacco Works v. Gensior (1900) 66 N. Y. Supp. 155, 32 Misc. Rep. 87.

One who uses a label which at a casual glance resembles that of a labor organization, though associated with distinguishing words or names, will be enjoined from further use where the union has fully complied with the law in adopting its label. Myrup v. Friedman (1908) 112 N. Y. Supp. 1138, 128 App. Div. 888, affirming order (Sup. 1908) 110 N. Y. Supp. 1106, 58 Misc. Rep. 323.

The words "Meyers Crystal Blue," printed on a blue label on the top of purple boxes inclosing a shield, were not infringed by the use of the words "Meyers German Blue" printed on similar labels. Sawyer v. Meyer (Pa. 1875) 2 Wkly. Notes Cas. 197.

Plaintiff's bottle had a depression or panel on one side in which were blown in the glass, in block letters, the words "Hoyt's German Cologne, E. W. Hoyt & Co., Lowell, Mass." Defendant imitated this bottle in all respects, except the lettering on their bottle was "Hoyt's Egyptian Cologne, F. Hoyt & Co., Philadelphia," and had in addition a picture of the sphynx and a pyramid, which were not on the plaintiff's bottles. Held, the imitation was apparent, and plaintiffs were entitled to an injunction. Hoyt v. Hoyt (1886) 2 Pa. Co. Ct. R. 152.

A yellow label, with a black border, containing the words "Microbe Destroyer," without any devise or symbol, is not a fraudulent imitation of a white label of different size, with a red border, containing the words "Microbe Killer," together with the picture of a man striking a skeleton with a bludgeon. Alff v. Radam (1890) 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

Plaintiff's and defendant's medicines were both put up in gallon jugs of similar shape and color. One was called "Microbe Destroyer," and the other "Microbe Killer." One label had a conspicuous red symbol or figure in the center, with printed matter in columns at each side, and a bright red border. The other was printed on blue or yellow paper, with no symbol, and no columns of print. Held, no infringement. Radam v. Capital Microbe Destroyer Co. (1891) 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

The trade-mark of "Magic Headache," used on packages in connection with other reading, is not infringed by the use of similar packages, with similar labels, directions, and reading, but not using the words "Magic Headache." Gessler v. Grieb (1891) 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

18. Use of trade-mark or trade-name for different goods.—Defendant had the right to use the words "Waukesha Hygeia Mineral Springs" as a trade-mark, and complainant had the exclusive right to the use of the word "Hygeia" as a trade-mark, except in the form used by defendant. Held, that the fact that defendant made the word "Hygeia" more conspicuous than the rest of his trade-mark did not constitute an infringement of complainant's rights. Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water

Co. (1894) 63 Fed. 443, 11 C. C. A. 282.

Where one Ludlow built up a reputation for valves sold under his name, and though after his patent expired, defendant might be entitled to use the word "Ludlow" to describe the character of his valves, he should be restrained from using such word, except in connection with a clear and unequivocal statement that the valves were manufactured by defendant, and not by complainant. Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co. (1908) 166 Fed. 26, 92 C. C. A. 60.

Where the words "High Standard" have been used for a number of years by one exclusively for a trade-mark, and have thereby acquired a secondary meaning as designating and identifying the products of such maker, their use by another in connection with similar goods in a way which may probably deceive purchasers will be enjoined as unfair competition. Lowe Bros. Co. v. Toledo Varnish Co. (1909) 168 Fed. 627, 94 C. C. A. 83.

Where the term "Nic Carter" was registered as a trade-mark of a weekly periodical devoted to fiction, its protected use was limited to periodicals, and could not prevent the use of the words to designate a personage in a moving picture exhibition. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 S. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

Complainant, having a registered trade-mark, "Rex," applied to a medicine useful for dyspepsia and other disorders, held not entitled to enjoin defendant from using on his blood purifier the word "Rex" as his trade-mark. Theodore Rectanus Co. v. United Drug Co. (1915) 226 Fed. 545, 141 C. C. A. 301.

A manufacturer had no right to use the illustration of a crown as a trade-mark for paints generally, where another has previously used it for white lead. Smith v. Reynolds (C. C. 1872) Fed. Cas. No. 13,098; Id. (C. C. 1876) Fed. Cas. No. 13,099.

Plaintiff recorded the word "Heliotype" as used in connection with a print made by a patented process called "Heliotype." Held, that its use on a print not made by such process was not an infringement. Osgood v. Rockwood (C. C. 1873) Fed. Cas. No. 10,605.

A trade-mark used only in connection with the dry white oxide of zinc is not infringed by use in connection with paint composed of white oxide of zinc, ground in oil, falsely represented as containing white oxide of zinc made by the owner of the trade-mark. La Societe Anonyme Des Mines v. Baxter (C. C. 1877) Fed. Cas. No. 8,099.

There is no such substantial difference between cigarettes and smoking tobacco as will justify a manufacturer of cigarettes in applying to them a name which has become the well-recognized designation of another manufacturer's smoking tobacco. Carroll v. Ertheiler (C. C. 1880) 1 Fed. 688, 690; American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Courts should not be astute to recognize in favor of an infringer fine distinctions between different articles of merchandise of the same general nature, and should resolve against the wrongdoer any fair doubt whether the public may be deceived through the application of the spurious symbol; and hence pale ale and half and half must, as against an infringer, be treated as malt liquors substantially similar to each other, and belonging to the same class. Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C. 1899) 96 Fed. 206.

Canning companies in California have the right to use the name "California" as a trade designation, and, when their products have become well and favorably known by such name, are entitled to protection against the fraudulent use on the same kind of fruit, grown and put up elsewhere, of labels designating it as California fruit. California Fruit Canners' Ass'n v. Myer (C. C. 1899) 104 Fed. 82.

A trade-mark used by the owner on packages of baking soda and saleratus is infringed by the use thereof by another on packages of baking powder, the articles being of the same class. Church & Dwight Co. v. Russ (C. C. 1900) 99 Fed. 276.

Complainant acquired by assignment the exclusive right to use the name "Pancoast" as a trade-name upon the patented article. Held the use, by defendant of the name "Pancoast," or its equivalent, "Pan-Coast," on a different article from that of the patents with which it had always been associated was an infringement of complainant's rights as owner, of both the patents and the trade-name, which entitled him to an injunction. Janney v. Pan-Coast Ventilator & Mfg. Co. (C. C. 1904) 128 Fed. 121.

Complainant manufactured two preparations for making root beer. One was in syrup form, which complainant had extensively advertised, and was called by consumers "Hires" or "Hires Root Beer." Defendant purchased the extract preparation, and made a beverage therefrom without following the directions to prepare it by fermentation with yeast, and sold the beverage as "Hires" or "Hires Root Beer." Held, that defendant's action constituted a violation of complainant's trade-name rights in the name "Hires." Charles E. Hires Co. v. Xepapas (C. C. 1910) 180 Fed. 952.

Vassar College held not to have such a property right in its name and insignia as to entitle it to restrain defendant's use thereof in the advertisement of chocolate candy. Vassar College v.

Loose-Wiles Biscuit Co. (D. C. 1912) 197 Fed. 982.

Registration of the word "Jewel," as applied to gasolene stoves, will not be permitted where prior use by another company of the same word as applied to coal and wood stoves is shown. American Stove Co. v. Detroit Stove Works (1908) 31 App. D. C. 304.

One who has adopted a trade-mark to identify his product, and has created a valuable market therefor, and has induced public confidence in the superior quality of his goods, is entitled to be protected against those who, without right, attempt to appropriate his trade-mark and apply it to other goods of the same class. J. W. Epperson & Co. v. Bluthenthal (Ala. 1906) 42 So. 863.

Though the O. F. C. and Carlisle whiskies were frequently called "O. F. C. (Taylor)" and "Carlisle (Taylor)" by dealers, it appearing that the parties having the right to name the whiskies had never so called them, the S. Co. cannot complain of the use of the trade-mark "Old Taylor Whisky" by the E. H. T., Jr., & Sons Co. George T. Stagg Co. v. Taylor (1894) 95 Ky. 651, 27 S. W. 247.

The fact that a trade-name was used without any intention of showing the origin of goods, and without the purpose of acquiring any right to the name as applied to the goods, did not prevent one from adopting it as a trade-name for the manufacture by him of similar goods. Cohen v. Nagle (1906) 76 N. E. 276, 190 Mass. 4, 2 L. R. A. (N. S.) 964.

A manufacturer put the word "Sunshine" as a trade-mark on its stoves and the letters "SS" or "S" on the detachable parts to indicate that they were intended to fit a "Sunshine" stove. Another manufacturer made parts of stoves in exact imitation of those of the "Sunshine" stove, and advertised that they were made by the manufacturer of the "Sunshine" stove. Held such a course was an infringement of the trade-mark "Sunshine." Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437.

Where a contract giving the right to use an individual's name entitled parties to use the name only when applied to the several commodities specified therein, an injunction forbidding its use on other articles, where such use is not deceptive or misleading, goes too far, and should be modified accordingly. Andrew Jergens Co. v. Woodbury (1909) 90 N. E. 344, 197 N. Y. 66, affirming and modifying judgment (1908) 112 N. Y. S. 1121, 128 App. Div. 924, and rehearing denied (1910) 91 N. E. 1109, 197 N. Y. 581.

Defendant's use of the word "Italian" as identifying an inferior grade of underwear held unfair competition and a violation of the rights of plaintiff who had established that word as identifying a superior grade manufactured and sold by him. Julius Kayser & Co. v. Italian Silk Underwear Co. (1914) 146 N. Y. Supp. 22, 160 App. Div. 607.

Fraud cannot be imputed from the fact that coal operators sell under the same name coal which is mined from a neighboring colliery not upon the tract of land from which the trade-name is derived, but which is essentially the same kind of coal. Piper v. Laughman (1884) 6 Pa. Co. Ct. R. 232.

19. Deception of public.—A trade-mark is infringed if there is such a resemblance as is calculated to mislead ordinary purchasers. McLean v. Fleming (1877) 96 U. S. 245, 251, 24 L. Ed. 828; Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co. (1897) 80 Fed. 105, 25 C. C. A. 314 (affirming [C. C. 1895] 70 Fed. 704); Kann v. Diamond Steel Co. (1898) 89 Fed. 706, 32 C. C. A. 324; Van Camp Packing Co. v. Cruikshanks Bros. Co. (1898) 90 Fed. 814, 33 C. C. A. 280; G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133; De Voe Snuff Co. v. Wolff (1913) 206 Fed. 420, 124 C. C. A. 302; Walton v. Crowley (C. C. 1856) Fed. Cas. No. 17,133; Hostetter v. Vowinkle (C. C. 1871) Fed. Cas. No. 6,714; Blackwell v. Armistead (C. C. 1872) Fed. Cas. No. 1,474; Manhattan Medicine Co. v. Wood (C. C. 1878) Fed. Cas. No. 9,026; Consolidated Fruit-Jar Co. v. Thomas (C. C. 1879) Fed. Cas. No. 3,131; Hostetter v. Adams (C. C. 1882) 10 Fed. 838; Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707; Glen Cove Mfg. Co. v. Ludeling (C. C. 1885) 22 Fed. 823; Southern White Lead Co. v. Cary (C. C. 1885) 25 Fed. 125; Anheuser-Busch Brewing Ass'n v. Clarke (C. C. 1886) 26 Fed. 410; Sterling Remedy Co. v. Eureka Chemical & Mfg. Co. (C. C. 1895) 70 Fed. 704; Cauffman v. Schuler (C. C. 1903) 123 Fed. 205; Walter Baker & Co. v. Puritan Pure Food Co. (C. C. 1905) 139 Fed. 680; Liggett & Myer Tobacco Co. v. Hynes (D. C. 1884) 20 Fed. 883; Coca-Cola Co. v. J. G. Butler & Sons (D. C. 1916) 229 Fed. 224; Hall & Ruckel v. Ingram (1906) 28 App. D. C. 454; Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200; Boardman v. Meriden Britannia Co. (1868) 35 Conn. 402, 95 Am. Dec. 270; Ball v. Siegel (1886) 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766; Frazer v. Frazer Lubricator Co. (1886) 18 Ill. App. (18 Bradw.) 450; Sohl v. Geisendorf (Ind. 1871) 1 Wils. 60; Metcalfe v. Brand (1887) 86 Ky. 331, 5 S. W. 773. 9 Ky. Law Rep. 801, 9 Am. St. Rep. 282; A. Cusimano & Co. v. Olive Oil Importing Co. (1905) 38 So. 200, 114 La. 312; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960; Gilman v. Hunnewell (1877) 122 Mass. 139; Filley v. Fassett (1869) 44 Mo. 168, 100 Am. Dec. 275;

Drummond Tobacco Co. v. Addison Tinsley Tobacco Co. (1892) 52 Mo. App. 10; Regent Shoe Mfg. Co. v. Haaker (1906) 106 N. W. 595, 75 Neb. 426, 4 L. R. A. (N. S.) 447; Wirtz v. Eagle Bottling Co. (1892) 50 N. J. Eq. 164, 24 Atl. 658; Merrimack Manufacturing Co. v. Garner (N. Y. 1855) 4 E. D. Smith, 387; Brooklyn White Lead Co. v. Masury (N. Y. 1857) 25 Barb. 416; Williams v. Spence (N. Y. 1863) 25 How. Prac. 366; Lockwood v. Bostwick (N. Y. 1869) 2 Daly, 521; Brown v. Mercer (1874) 37 N. Y. Super. Ct. (5 Jones & S.) 265; Popham v. Cole (1876) 66 N. Y. 69, 23 Am. Rep. 22; Colman v. Crump (1877) 70 N. Y. 573; Hurricane Patent Lantern Co. v. Miller (N. Y. 1878) 56 How. Prac. 234; Cahn v. Gottschalk (1888) 14 Daly, 542, 2 N. Y. Supp. 13; Oneida Community v. Oneida Game Trap Co. (1914) 150 N. Y. S. 918 (judgment affirmed [1915] 154 N. Y. S. 391); Colladay v. Baird (Pa. 1860) 4 Phila. 139; Wiest Co. v. Weeks Co. (1895) (Pa. Com. Pl.) 7 Kulp. 505; Shaw v. Pilling (1896) 175 Pa. 78, 34 Atl. 446; White v. Trowbridge (1906) 64 A. 862, 216 Pa. 11; Listman Mill Co. v. Williams Listman Milling Co. (1894) 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907. CONTRA, see Popham v. Wilcox (N. Y. 1873) 14 Abb. Prac. (N. S.) 206.

One using "Fairbank's Gold Dust" as a name for washing powder is not entitled to enjoin the use by another of the words "Gold Drop," where the packages are so dissimilar that there is no likelihood of deceiving purchasers using any care whatever. N. K. Fairbank Co. v. R. W. Bell Manuf'g Co. (1896) 77 Fed. 869, 23 C. C. A. 554; N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (C. C. 1898) 88 Fed. 694.

Equity will not restrain a defendant from the use of a label on the ground that it infringes the plaintiff's trademark, unless the form, the words, the figures, lines, and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using, and may be expected to exercise, would mistake the one for the other. Gilman v. Hunnewell (1877) 122 Mass. 139; Miskell v. Prokop (1899) 79 N. W. 552, 58 Neb. 628.

Where the intention to deceive has been shown it is not necessary that the similarity be so close as to deceive purchasers exercising ordinary care and prudence, but only that it should be sufficient to deceive the incautious and unwary. Drummond Tobacco Co. v. Addison Tinsley Tobacco Co. (1892) 52 Mo. App. 10; Smith v. Woodruff (N. Y. 1867) 48 Barb. 438.

Where plaintiff's work is a star of tin, a half inch in diameter, having a hole in the center, and defendant uses a round piece of gilded paper, three-fourths of an inch in diameter, having on it a red star, with certain wording, and there is no evidence of actual deception, defendant's mark is not calculated to mislead. Liggett & Myers Tobacco Co. v. Finzer (1888) 128 U. S. 182, 9 Sup. Ct. 60, 32 L. Ed. 395.

Complainant marks its plug tobacco with a star of tin, a half inch in diameter, having a hole in the center. Defendant uses a round piece of gilded paper, three-fourths of an inch in diameter, having on it a red star, under which is the word "Light." There is no evidence of actual deception. Held, that defendant's mark is not calculated to mislead. Id.

Where one making sewing machines placed thereon a device calculated and intended to mislead the public as to the manufacturer, it is immaterial that he used on his machines the words "New York S. M. Mfg. Co. Warranted," while the name of the company, which was placed by it on its machines in the same place, was "The Singer Manufacturing Co." Singer Mfg. Co. v. Bent (1896) 163 U. S. 205, 16 Sup. Ct. 1016, 41 L. Ed. 131.

The use of a brand differing from that used by another only in adding the initials to a name, slightly altering the design of the letters in a prominent word, and the arrangement of certain letters and words, is a colorable imitation, manifestly intended to mislead the public, and will be enjoined. Pillsbury v. Pillsbury-Washburn Flour Mills Co. (1894) 64 Fed. 841, 12 C. C. A. 432.

Dissimilarities appearing on comparison are not a test of infringement of a trade-mark wrapper, as purchasers have not the advantage of making comparisons, and an article may be advertised and become known by its name, or by certain catchwords easily retained in the memory, an imitation of which may be sufficient to deceive purchasers exercising ordinary care, though the wrappers in other respects may be dissimilar. Stuart v. F. G. Stewart Co. (1899) 91 Fed. 243, 33 C. C. A. 480, reversing decree (C. C. 1898) 85 Fed. 778.

It is sufficient to warrant an injunction against infringement of a tradename that defendant has used it in a manner which is likely to produce confusion as to the origin of the article to which it is applied. Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506, affirming decree Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C. 1906) 144 Fed. 139.

The test of infringement of a trademark is whether the device used by defendants is calculated to induce purchasers using ordinary care to purchase articles to which it is affixed in the belief that they are made by the owner of the trade-mark. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

A maker of horseshoe nails adopted

as a trade-mark a check figure formed by intersecting lines, which was impressed on the bevel face of the heads of the nails. Defendant commenced the use of a similar check figure, the only material difference being that a triangular space in the center was left plain. Held, defendant's mark sufficiently resembled complainant's to deceive purchasers and to indicate an intention to do so, and constituted an infringement. Capewell Horse Nail Co. v. Green (1911) 188 Fed. 20, 110 C. C. A. 170, affirming decree (C. C. 1910) 182 Fed. 404.

Actual intent to deceive purchasers need not necessarily be shown to entitle to relief against one who so nearly imitates a trade-mark as to enable dealers to deceive purchasers. W. A. Gaines & Co. v. Turner-Looker Co. (1913) 204 Fed. 553. 123 C. C. A. 79.

The use of one's label for the purpose of deceiving purchasers will be enjoined. Coffeen v. Brunton (C. C. 1849) Fed. Cas. No. 2,946.

Where the representations employed bear such resemblance to plaintiff's trade-mark as to be calculated to mislead generally the purchasers of the article, and to make it pass with them for the one sold by him, such representations will be enjoined. Walton v. Crowley (C. C. 1856) Fed. Cas. No. 17,133.

Where numerals were prominent features in plaintiff's design, and the same numerals were used in a similar design by defendants, such use, adopted to designate the same kind of articles, is calculated to aid in deceiving the public, and is an infringement of plaintiff's trade-mark. The Shaw Stocking Co. v. Mack (C. C. 1882) 12 Fed. 707.

The only resemblance between defendant's and complainants' packages was in the color of the labels, the use of the words "Montserrat Lime-Fruit Juice," and the form of the bottles, but the evidence disclosed that most lime-juice bottles were quite similar in size and design. Held no deception. Evans v. Von Laer (C. C. 1887) 32 Fed. 153.

Defendants' use of a bottle for bitters which closely resembles plaintiff's in form, color, label, etc., with a difference only in a part of the label design, is an imitation well and designedly calculated to deceive. Myers v. Theller (C. C. 1889) 38 Fed. 607.

The use of the term "Celluloid" by defendant as applied to an article of his manufacture, "Celluloid Starch," is not such as to induce the public to believe that the starch was connected with plaintiff, a company manufacturing articles from celluloid, or a product of its manufacture, and it is not an infringement of its trade-mark. Celluloid Mfg. Co. v. Read (C. C. 1891) 47 Fed. 712.

Use of the arbitrary term "Bromidia," previously adopted by another, is an imitation likely to deceive the public, notwithstanding the fact that the infringing manufacturer's name is printed on each label. Battle v. Finlay (C. C. 1892) 50 Fed. 106.

To establish infringement of a trade-mark, it is not essential to show that any one has actually been deceived, or an intent to deceive, although proof that persons have been deceived is pertinent and persuasive evidence that the mark complained of is calculated and was intended to deceive. American Tin Plate Co. v. Licking Roller Mill Co. (C. C. 1902) 158 Fed. 690.

Plaintiff's trade-mark was "Old Mill Soap." Defendant in using the name, "Old Stone Mill Soap," on similar packages, with the letters and the type of the names similar in each case, and the appearance of the package well calculated to deceive the public, was guilty of unfair competition. Swift & Co. v. Brenner (C. C. 1903) 125 Fed. 826.

Where there was no imitation of complainants' packages, nor any evidence that the name was adopted for any fraudulent or dishonest purpose, but it was shown that it had a tendency to confuse purchasers, liability to confusion and deception was ground for restraining defendants from using the name unless accompanied by a clear statement that its cocoa was not that of complainants. Van Houten v. Hooton Cocoa & Chocolate Co. (C. C. 1904) 130 Fed. 600.

Where plaintiff adopted as a trade-mark the letters "HM," which it marked on its goods in a shield-shaped space with the figure of a diamond between the letters, and defendant used the letters "MM," placed within a diamond-shaped space, the similarity between the two marks was not such as to deceive purchasers using reasonable care or to charge defendant with infringement. H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co. (C. C. 1908) 164 Fed. 1001, decree modified A. Y. McDonald & Morrison Mfg. Co. v. H. Mueller Mfg. Co. (1910) 183 Fed. 972, 106 C. C. A. 312.

Where, after the expiration of a patent on "Jenkins valves" defendant began to manufacture and sell similar valves under the same name, it was bound to disclose, in connection with the name, the source of manufacture in such way as to prevent the public from believing that defendant's valves were those of the successor of the patentee. Jenkins Bros. v. Kelly & Jones Co. (D. C. 1914) 212 Fed. 328.

One who adopts the name "Mechanics' Store" for his place of business may acquire a property right therein as a trade-name, so that equity will enjoin the use by another of the name "Mechanical Store" in such a way as to mislead purchasers. Weinstock, Lubin & Co. v. Marks (1895) 109 Cal. 529, 42 Pac. 142. 30 L. R. A. 182, 50 Am. St. Rep. 57.

When a partnership and its predeces-

sors in business for many years have been designated as the "Cyclops Machine Works," equity will not allow a corporation in the same locality to appropriate the word "Cyclops" in the conduct of its business for the purpose of misleading the customers and appropriating the good will of the partnership. Hainque v. Cyclops Iron Works (1902) 68 P. 1014, 136 Cal. 351.

A trade-mark, consisting of the picture of a tobacco plant and the words "Fabrica Tobaccos," which together had been in common use in the tobacco business with certain other words, is not infringed by a label having a similar picture, the words "Fabrico Tobaccos" on either side of the picture, and words differing from plaintiff's since as a whole they are not so similar that a purchaser using ordinary care and caution would likely mistake the one for the other. Solis Cigar Co. v. Pozo (1891) 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

The publication by William Rogers, Jr., of an advertisement that he is a manufacturer of "the celebrated Wm. Rogers, Sr., spoons, forks, and knives," is not in violation of the rights of the successors in business of William Rogers, Sr., who designate their goods in that manner, when the advertisement is not intended or calculated to induce the public to believe that the goods are manufactured by such successors, although the effect of the advertisement is to cause the goods of William Rogers, Jr., to be known in the market as "Wm. Rogers' goods." William Rogers Mfg. Co. v. Simpson (1887) 54 Conn. 527, 9 Atl. 395.

The doctrine that trade-marks shall not be simulated depends largely on the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such a manner as may deceive them by inducing or leading to the purchase of one thing for another. Hopkins Amusement Co. v. Frohman (1902) 103 Ill. App. 613, judgment affirmed (1903) 67 N. E. 391, 202 Ill. 541.

Where, in order to secure to itself the fame and benefits of plaintiff's drama and trade-mark, defendant had advertised his play under the name of such drama in order to deceive the public, and make such play so advertised, appear to be that owned by plaintiff, such facts were sufficient to justify an injunction restraining defendant on the ground of deception of the public. Hopkins Amusement Co. v. Frohman (1903) 67 N. E. 391, 202 Ill. 541, affirming judgment (1902) 103 Ill. App. 613.

A manufacturer printed on the boxes the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber"; the words "Akron Dental Rubber" being the trade-mark of a competitor, and printed in red ink and large type. The preceding words were printed in large black type, and the formula for the preparation of the article followed in red ink in very small type. Held, that the label was likely to mislead, and was an infringement. Keller v. B. F. Goodrich Co. (1888) 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Where the use of a trade-name is calculated to deceive the public, injunction may be granted against improperly using the name, whether in good faith or otherwise. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (1908) 114 N. W. 609.

There is not ground for an injunction to protect a trade-mark or label, where the ordinary purchaser is not deceived into buying defendant's goods when it is intended to buy plaintiff's. New Orleans Coffee Co. v. American Coffee Co. of New Orleans (1909) 49 So. 730, 124 La. 19.

In a suit to enjoin the infringement of a trade-name, a finding "that the similarity of names is likely to create confusion and lead to mistakes, and that such mistakes have been and are damaging to complainants," is sufficiently definite. Viano v. Baccigalupo (1903) 67 N. E. 641, 183 Mass. 160.

Complainant held entitled to protection against infringement by rival dealers of a carton calculated to deceive the ultimate consumer. Forster Mfg. Co. v. Cutter-Tower Co. (1912) 97 N. E. 749, 211 Mass. 219.

To justify an injunction against the use of a certain trade-mark, it should at least appear that the resemblance between the original and the one alleged to be similar is sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive, on the part of the defendant. McCartney v. Garnhart (1870) 45 Mo. 593, 100 Am. Dec. 397.

Use by defendant of some of the same words, and cuts of the same building, but not so similar as to induce purchasers to believe that plaintiff's product was being offered for sale, does not constitute infringement. Nicholson v. Wm. A. Stickney Cigar Co. (1900) 59 S. W. 121, 158 Mo. 158.

Complainant marked on the selvedge of silk "The Stirling Silk Company," and defendant subsequently put out a silk marked "The Sterling Silk Company," and the word "Wear" was added to "Guarantied," and there was a difference in the spacing between the words. Held, that complainant had a prima facie case for protection against the use of the name in the manner shown, since there was no difference substantial enough to prevent probable misleading to the retail purchaser. Stirling Silk Mfg. Co. v. Sterling Silk Co. (1900) 46 A. 199, 59 N. J. Eq. 394.

Where manufacturers of ribbons adopted a trade-mark, the form of which was necessarily liable to a cer-

tain degree of imitation in general effect, if the general form or idea was adopted, its protection as a trade-mark must, to some extent, depend on the liability of a purchaser to be deceived on close inspection. Corbett Bros. Co. v. Reinhardt-Meding Co. (N. J. 1910) 76 A. 243.

If the marks used by the defendants, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers paying the attention which such persons usually do in buying the article in question, an injunction will not be granted, but otherwise if careful inspection is necessary to distinguish the genuine. Partridge v. Menck (N. Y. 1846) 2 Sandf. Ch. 622.

Where an imitation is only partial, if it is calculated to mislead the public, and is manifestly intended for that purpose, an injunction will be granted. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

An infringement of a trade-mark may be enjoined if the imitation is calculated to mislead the public, even though the distinction between the imitation and the original would at once be seen upon a slight or casual examination. Popham v. Wilcox (N. Y. 1873) 14 Abb. Prac. (N. S.) 206.

Defendants imported matches in boxes of like size and general appearance to those of plaintiff and bearing a label, stamped in red, with the same words, except that "The Vulture" was substituted for "The Vulcan," with a facsimile of the same medals, and also a picture of a vulture. The words and characters on the bottom and one of the sides of the two boxes were widely dissimilar. Held, the resemblance was such as to tend to create confusion, and deceive intending purchasers of plaintiff's goods, and plaintiff was entitled to an injunction. Taendsticksfabriks Akticbolagat Vulcan v. Myers (1893) 139 N. Y. 364, 34 N. E. 904.

The fact that a newspaper has become popularly known as the "Commercial" or the "New York Commercial" may give it a proprietary right to such name, but, in order to restrain another paper from using that name, it must be shown that deception is probable and actual, or probable injury to the plaintiff will result. Commercial Advertiser Ass'n v. Haynes (1898) 49 N. Y. S. 938, 26 App. Div. 279.

Plaintiff's label was a picture and other devices and the words "Pride of Rome." Defendants adopted a label of the same size, having substantially the same picture as was on plaintiff's label, with the words, in similar lettering, "Pride of the Home" above, and other similarities. Held, defendants' label was an infringement on plaintiff's, the similarity being sufficient to deceive the ordinary customer. Ft. Stanwix Canning Co. v. William McKinley Canning Co. (1900) 63 N. Y. S. 704, 49 App. Div. 566.

Plaintiff was the owner of the trade-marks "Oriole Vermilion" and "Peerless Green," applied to dry colors. Defendant used the designation "O. Vermillion" and "P. Green," on similar dry colors, but no similarity in package or labels was attempted. Defendant showed that no representation was made to any customer tending to create a belief that the goods were plaintiff's, and that there was no attempt to deceive. Held, it cannot be said that defendant's marks were an infringement of plaintiff's trade-mark. Lavanburg v. Pfeiffer (1900) 66 N. Y. S. 39, 31 Misc. Rep. 690.

Plaintiff's trade-mark "Roachsault," used for its insecticide, not being descriptive of the article, is infringed by defendant's label, bearing the words "Warranted Chemical Roach Salt," though there is a considerable difference in the appearance of the labels; a condition being created, by identity of sound, whereby the purchaser may be easily deceived, and plaintiff be defrauded. Barrett Chemical Co. v. Stern (1900) 67 N. Y. S. 595, 56 App. Div. 143, 9 N. Y. Ann. Cas. 27.

Plaintiff did business in New York City under the trade-name of "Best & Co., Lilliputian Bazaar." Defendant was engaged in the same business in Brooklyn under the trade-name of "Broadway Bazaar, Brooklyn's Best Lilliputian Store." Held, the similarity of names and the nearness of defendant's place of business to plaintiff's supported the conclusion that the use of defendant's trade-name was calculated to deceive the public. Ball v. Broadway Bazaar (1909) 87 N. E. 674, 194 N. Y. 429.

The presentation of a burlesque under the name of "Chanticlair" may be enjoined by the owner of the play "Chantecler," on ground that it tends to deceive the public. Frohman v. William Morris (1910) 123 N. Y. S. 1090, 68 Misc. Rep. 461.

It is not necessary that a trade-mark should be copied to justify enjoining its use, if there is a resemblance calculated to deceive. Luytics Bros. v. E. Zimmermann & Co. (1912) 133 N. Y. S. 997, 149 App. Div. 542.

Where a manufacturer at Rochester, N. Y., adopted the name "Star Egg Carrier & Tray Manufacturing Company," a competitor there, who used the words "Rochester Egg Carrier Company," and whose advertisements made it easy for the public to confuse the two concerns, was guilty of unfair competition. Elbs v. Rochester Egg Carrier Co. (1912) 134 N. Y. S. 979.

Plaintiff, the "Lockport Canning Company," being first in the field in the city of Lockport, commonly known as Lock City, in the business of canning tomatoes, the use by defendant, in competition there with it, of the name "Lock City Canning Company," is calculated to deceive customers, and will be enjoined. Lockport Canning Co. v.

Pusateri (1913) 139 N. Y. S. 640, 79 Misc. Rep. 293.

Complainant since 1855 used as a trade-mark "Key Stone State Saponifier or Concentrated Lye." Defendant in 1859 began the manufacture of a similar article in New York, which he called "Babbitts' Saponifier or Concentrated Lye." Held, that the use by defendant of the words "Soponifier" and "Concentrated Lye" was a fraud on the public, since persons by paying ordinary attention would be deceived in purchasing defendant's article for the plaintiff's. Pennsylvania Salt Mfg. Co. v. Babbitt (Pa. 1867) 24 Leg. Int. 165.

A fraudulent or even accidental copy of plaintiff's trade-mark with merely colorable and evasive differences will be enjoined where it was calculated to impose on and deceive the public. Drydroppel v. Young (Pa. 1880) 37 Leg. Int. 397.

If a manufacturer uses a colorable imitation of the marks and symbols used by another of the same name, so as to confuse his goods with those of the other manufacturer in a manner calculated to deceive the public, he will be enjoined. Hoyt v. Hoyt (1886) 2 Pa. Co. Ct. R. 152.

Where the trade-marks and labels employed by a cigar manufacturer bear such resemblance to those of another that it is impossible to reach any other conclusion than that they were designed from them, so as to mislead the unobservant, the use of such trade-marks and labels may be enjoined. Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co. (1908) 70 A. 968, 222 Pa. 116.

In a suit to enjoin the use of a name as infringing a trade-mark, not only the identical word in the two names and its relation to the other words, but all the devices and marks upon the respective labels, should be considered, and if defendant's label is calculated to deceive one of ordinary prudence, there would be an infringement which would be enjoined. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App. 1908) 108 S. W. 413.

Injunction against use of a trade symbol similar to plaintiff's in the same business, not denied because purchasers are not likely to be misled. Manitowoc Malting Co. v. Milwaukee Malting Co. (1903) 97 N. W. 389, 119 Wis. 543.

Deception as ground for denial of registration, see notes under § 9490, ante.

Deception as barring suit or action for infringement, see notes under § 9506, post.

Element of unfair competition, see notes under § 9508, post.

20. Right to use same name.—When a trade-name of a descriptive character has been used by a manufacturer for so long a time, and has come to be so associated with his goods, it makes it the duty of another, who then commences its use in connection with a product of his own, to couple with it such caution as is suitable to guard the public from confusing the source of production. Dadirrian v. Yacubian (1900) 98 Fed. 872, 39 C. C. A. 321, affirming decree (C. C. 1898) 90 Fed. 812.

Where the manufacturer of a patented article gave the name of the patentee, and also an arbitrary name to the article, but without giving its own name as manufacturer, so that such arbitrary name merely identified the article with the patent, on the expiration of the patent another manufacturer has the right, not only to make and sell the article in the same form, but also to mark it with the same or a similar name, where it places thereon its own name as manufacturer, marked with sufficient prominence to clearly distinguish the article from those made by the original manufacturer. B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co. (1902) 118 Fed. 1014, 56 C. C. A. 596, affirming decree (C. C. 1901) 112 Fed. 144.

Where certain springs on an entire tract of land were known as the "Healing Springs," a purchaser of a portion of such tract was not entitled to the exclusive use of such name as against a purchaser of the balance, with the springs known as "Little Healing Springs," or "New Healing Springs," thereon. Virginia Hot Springs Co. v. Hegeman & Co. (1906) 144 Fed. 1023, 73 C. C. A. 612, affirming decree (C. C. 1905) 138 Fed. 855.

The right to use a copyrighted name upon the expiration of the copyright becomes public property, but must be so exercised as not to deceive members of the public and lead them to believe that they are buying the particular thing which was produced under the copyright. G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

The use by defendant of the name "Webster" in connection with dictionaries published by him, without an explanatory statement, held a violation of the rights of complainant, although its right to the exclusive use of the name had expired with the copyright. G. & C. Merriam Co. v. Saalfield (1911) 190 Fed. 927, 111 C. C. A. 517, opinion extended on rehearing (1912) 198 Fed. 369, 117 C. C. A. 245.

Where a name has been exclusively used to designate the product of a particular manufacturer so as to have become identified with it in the minds of purchasers and to be a valid trade-mark, it cannot be used by another on a similar product merely because ingredients are used in such other product which make the name in a sense de-

scriptive of it. Nashville Syrup Co. v. Coca-Cola Co. (1914) 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358, affirming judgment Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Where a trade-mark consists of a hyphenated word, one part of which is descriptive, and not subject to exclusive appropriation, while the other is purely arbitrary, the appropriation by another of the descriptive part only is not an infringement. S. R. Feil Co. v. John E. Robbins Co. (C. C. A. 1915) 220 Fed. 650.

Where the dominating characteristic of a trade-mark is a name by which the goods have become familiarly known to the public, another has no right to designate his goods by that name, even though he accompanies it with a different device. Carroll v. Ertheiler (C. C. 1880) 1 Fed. 688, 691.

One may be restrained from using his own name in such a way as to appropriate the good will of a business already established by others of that name; nor can he, by such use, appropriate the reputation of another by fraud, either actual or constructive. William Rogers Mfg. Co. v. Rogers & S. Mfg. Co. (C. C. 1882) 11 Fed. 495.

When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and all who deal in the article have the right to designate it by the name by which alone it is recognizable. Leclanche Battery Co. v. Western Electric Co. (C. C. 1885) 23 Fed. 276.

There is no characteristic of a trade-mark in the words "Webster's Dictionary," or in the form or size of that work as usually printed by G. & C. Merriam, such as to prevent its use by others in publishing old editions on which the copyright has expired. Merriam v. Texas Siftings Pub. Co. (C. C. 1892) 49 Fed. 944, following Merriam v. Famous Shoe & Clothing Co. (C. C. 1891) 47 Fed. 411.

Twelve years before the real Carlsbad water was first imported to this country, defendant began to make and sell his artificial Carlsbad, and continued the same without protest for 34 years. His labels and bottles are radically different from those of complainants, in which the real Carlsbad is now sold here. Held, that defendant had a right to continue the sale of his product, but should be enjoined from using "Carlsbad" unless accompanied by some word (as "Artificial") plainly indicating that the water is not the natural spring water. City of Carlsbad v. Schultz (C. C. 1897) 78 Fed. 469.

A strict technical trade-mark in a name is not infringed by merely calling a similar article by that name, without affixing it to such article. Air Brush Mfg. Co. v. Thayer (C. C. 1897) 84 Fed. 640.

Where the court has decided that each of the parties to a suit is entitled to use the same name and trade-mark to designate their product, neither may give out or claim that he manufactures the only genuine article of that name. Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co. (C. C. 1898) 87 Fed. 203.

The Continental Insurance Company, which is usually further designated in its policies, advertisements, and literature as "of the city of New York," and is now engaged in the fire insurance business throughout the United States, has acquired thereby no exclusive right to the use of the word "Continental" in connection with such business, and may not enjoin the use of such word in the name of the "Continental Fire Association," with the additional designation, "of Ft. Worth, Texas," in the absence of proof of any fraudulent intent or conduct on the part of defendant, or that the public have been deceived by the similarity of the names. Continental Ins. Co. v. Continental Fire Ass'n (C. C. 1899) 96 Fed. 846.

Another maker of an article after the patent thereon has expired may use a trade-mark by which it has become identified. Frank W. Whitcher Co. v. Snelerson (D. C. 1913) 205 Fed. 767.

In suit to enjoin use of name similar to complainant's trade-name, fact that defendant had incorporated under its name held not a defense. Mobile Transfer Co. v. Schwarz (Ala. 1915) 70 So. 640.

While a trade-mark applies and is protected throughout the entire limits of the jurisdiction of the sovereignty granting the right, a trade-name not founded on any authority or right from the state, but based upon usage in the particular locality in which the party using it is doing business, is peculiarly local; and, as trade-marks may be owned by one person in one country or jurisdiction, and by another person in another state or country, so one person may have a property right in a trade-name in one locality, and another person in the same word or device in another locality. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

Where, in a suit to restrain the wrongful use of a trade-name, the only issue was as to the propriety of employing the particular name, the court was not required to suggest a method of enabling the public to discriminate between the business of plaintiff and defendant. Dyment v. Lewis (Iowa, 1909) 123 N. W. 244.

Use of the same letters, words, and numerals, in the same colors, and in the same places, as plaintiff has heretofore used them may be an infringement, even though the letters, words, and numerals do not in themselves be-

long to plaintiff's trade-mark proper. Avery v. Meikle (1883) 81 Ky. 73.

Where plaintiff had acquired a right of property in a name for cigars manufactured by him, and was injured by defendant's use of the word, and defendant had no right to the word other than the general right to names that have not been previously appropriated, an injunction restraining defendant from using the word was proper. Cohen v. Nagle (1906) 76 N. E. 276, 190 Mass. 4, 2 L. R. A. (N. S.) 964.

On dissolution of the firm each partner has a right to use the partnership trade-mark if he continues in the business, unless it has been otherwise agreed. Smith v. Walker (1885) 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

One person cannot enjoin another from using a particular name as a trade-name, unless he has made actual prior use of same as his own trade-name. Rodseth v. Northwestern Marble Works (1915) 152 N. W. 885, 129 Minn. 472.

A corporation may be enjoined from using as a trade-name, without something to distinguish it, a name adopted by it and previously established as the trade-name of another. Id.

Where "Charter Oak" stoves were not conspicuously known by the particular device which surrounded the name on them, but by the name itself, the use of the name "Charter Oak," separated from the other parts of the trade-mark, amounted to an infringement of the maker's rights. Filley v. Fassett (1869) 44 Mo. 168, 100 Am. Dec. 275.

A manufacturer of baseballs, who has a contract to make baseballs for the American League of Baseball Clubs, and who uses on his product the words "Official American League" may not restrain a rival manufacturer from subsequently using such words for the period covered by the contract, except on a showing that such words have become associated in the public mind with his product. A. J. Reach Co. v. Simmons Hardware Co. (1911) 135 S. W. 503, 155 Mo. App. 412.

No person has a right to use the names, marks, letters, or other symbols which another has previously got up, or been accustomed to use, in his trade, business, or manufactures. Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586; Taylor v. Carpenter (N. Y. 1845) 2 Sandf. Ch. 603.

Where a manufacturer of glass used a brand consisting of his name followed with the representation of the size and number of feet of glass, another manufacturer could not be enjoined from using the words designating different qualities, following his name on a brand used by him. Stokes v. Landgraff (N. Y. 1853) 17 Barb. 608.

The use by defendant of the name of plaintiff's hotel as a trade-mark for his cigars will be enjoined, though, at the time of the registration of such trade-mark, plaintiffs had not opened the hotel for business, where the hotel was well known by the name in question. Kinsley v. Jacoby (1892) 28 Abb. N. C. 451, 20 N. Y. Supp. 46.

Injunction will not be granted, at the suit of one who claims to own the trade-names "Oriole Vermilion" and "Peerless Green," to restrain another dealer from using the trade-names "O. Vermilion" and "P. Green." Lavanburg v. Pfeiffer (1898) 52 N. Y. S. 801, 23 Misc. Rep. 577.

Where defendant closely imitated plaintiff's catalogues, receipts, store arrangements, etc., and adopted a trade-name which her father had abandoned some years before, but which was identical with that under which plaintiff had built up his business, plaintiff may enjoin the use of such trade-name. Arnheim v. Arnheim (1899) 59 N. Y. S. 948, 28 Misc. Rep. 399.

Where one adopted a trade-mark of certain words which do not in themselves designate the origin or ownership of the merchandise, and which has not been used long enough to be known to the trade, and another party in entire ignorance of the fact, and without any apparent design of imitation, uses the same words as part of his trade-mark, a court of equity will not interfere by injunction. Seltzer v. Powell (Pa. 1871) 8 Phila. 296.

Where defendants sold various patents to plaintiff, and assured him that the ownership would confer on him a monopoly of the trade in such articles, which was not a fact, plaintiff was nevertheless entitled to the name as a trade-mark, and might enjoin its use by defendant. Pittsburgh Brass Co. v. Adler (Pa. 1889) 2 Monag. 235.

Acquisition of trade-mark and priority of use in general, see notes under § 9490, ante.

21. —— **Names of persons, firms, or corporations.**—A surname is not susceptible of exclusive appropriation as a trade-mark by any one. Any man may use his own name in all legitimate ways, as the whole or a part of a corporate name. The most a court will do where two individuals are entitled to use the same name is to correct any abuse by either of that right. Wm. Rogers Mfg. Co. v. Rogers & S. Mfg. Co. (C. C. 1882) 11 Fed. 495; Wm. A. Rogers, Limited, v. International Silver Co. (1910) 34 App. D. C. 410; International Silver Co. v. Rogers (1906) 63 A. 977, 71 N. J. Eq. 560; Walton v. Whann (Pa. 1876) 8 Leg. Gaz. 82; Hoyt v. Hoyt (1886) 2 Pa. Co. Ct. R. 152.

Where complainants sold "Brown's Iron Bitters," compounded by one Brown, and defendants later began to sell "Brown's Iron Tonic," prepared under a different formula by another Brown, in good faith, and the bottles,

labels, and wrappers of the two bore no resemblance, as there was no evidence of fraud or intent to deceive the public, there is no ground for equitable relief. Brown Chemical Co. v. Meyer (1890) 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, affirming (C. C. 1887) 31 Fed. 453.

One using the generic name of the article after the expiration of the patent must accompany the name with such indications that the article is of his manufacture as will unmistakably inform the public of that fact. Singer Mfg. Co. v. June Mfg. Co. (1896) 16 Sup. Ct. 1002, 163 U. S. 169, 41 L. Ed. 118, reversing decree (C. C. 1889) 41 Fed. 208.

A corporation long engaged in the sale of fountain pens as "Waterman's" and "Waterman's Ideal" under the name of "L. E. Waterman Co.," will be protected against use of the name "Waterman" in the same business by the agent of A. A. Waterman & Co., except in the form "Arthur A. Waterman & Co." with the suffix "Not connected with the L. E. Waterman Co.," prominently displayed. L. E. Waterman Co. v. Modern Pen Co. (1914) 35 Sup. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree (1912) 197 Fed. 534, 117 C. C. A. 30.

One LePage, having originated and sold extensively throughout the United States an article styled "LePage's Glue," organized a corporation, to which he transferred the assets and good will of the business. Subsequently he manufactured individually a similar article which he sold as "Glue made by LePage," and thereafter formed a new corporation, "The LePage Company," which sold the article as "Glue made by the LePage Company." Held, this was a violation of the right acquired by the original corporation to the use of the name "LePage" in connection with glues. The LePage Co. v. Russia Cement Co. (1892) 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

Complainant acquired the right to manufacture and sell in the United States "Johann Hoff's Malt Extract," and which entered commerce under the name "Johann Hoff's" or simply "Hoff's" extract. Defendant became the selling agent for a malt extract, using the words "Hoff's Malt Extract" and also a perpendicular side label, "Manufactured by Leopold Hoff." Held, defendant should be enjoined from using the words "Hoff's Malt Extract," unless preceded by the word "Leopold," and that the perpendicular label was insufficient. Tarrant & Co. v. Johann Hoff (1896) 76 Fed. 959, 22 C. C. A. 644, affirming (C. C. 1896) 71 Fed. 163.

One Duryea and his brothers were the controlling members of the Glen Cove Manufacturing Company, which for a long time made and sold "Duryea's Starch." Duryea, having subsequently withdrawn from the company, his sons procured other starch to be made for them, and sold it as "Starch Prepared by Duryea & Co.," etc., without any imitation of labels or packages. Held that this was a proper use by Duryea and his sons of their own name and could not be enjoined. Duryea v. National Starch-Manuf'g Co. (1897) 79 Fed. 651, 25 C. C. A. 139.

Where the words "Baker's Chocolate" had come to mean, in the minds of the public, complainant's goods, held, that a subsequent maker of chocolate with the same name was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sells are "Baker's Chocolate." Walter Baker & Co. v. Sanders (1897) 80 Fed. 889, 26 C. C. A. 220.

Where defendant, during his connection with a corporation, permitted it to use his name in connection with a patent of his, both the successor of the corporation and defendant were entitled to use the name in the manufacture and sale of such article, provided such words were used in connection with others clearly indicating the manufacturer of the particular article. Hygienic Fleeced Underwear Co. v. Way (1905) 137 Fed. 592, 70 C. C. A. 553, reversing decree (C. C. 1904) 133 Fed. 245.

Where both complainant and defendant were entitled to use the name "Way" or "Way's" in connection with a patent owned by defendant, use of the words "manufactured and owned by" complainant, was objectionable as including the words "and owned," as they indicated that complainant alone had the right to make and sell goods of the kind to which they related. Id.

Although one has built up a business under, and known by, his own name, another of the same name, engaging in the same business, will not be restrained from any use of the name in the manufacture but only as to the use of the name without some explanation which would prevent deception. Rowley v. J. F. Rowley Co. (1908) 161 Fed. 94, 88 C. C. A. 258.

Where a patentee executed various licenses to use such patents and acquiesced in the use of his name by complainant and other licensees for a considerable period, during which they expended large sums to advertise shoes made under such name, complainant was entitled to restrain the use of such name with the patentee's consent by others manufacturing under later patents for alleged improvements, the effect of which was to mislead purchasers to believe that such shoes were those manufactured by complainant. Dr. A. Reed Cushion Shoe Co. v. Frew (1908) 162 Fed. 887, 89 C. C. A. 577.

Complainant held entitled to restrain defendant's use of the word "Williams," either in a corporate name or in the name of any business concern or individual name used in the advertising

and sale of soap without some other word to distinguish the goods from those of complainant's manufacture. Williams Soap Co. v. J. B. Williams Soap Co. (1911) 193 Fed. 384, 113 C. C. A. 310, writ of certiorari denied Same v. J. B. Williams Co. (1912) 32 Sup. Ct. 841, 225 U. S. 712, 56 L. Ed. 1268.

A lineal descendant of the original "Davids" who established complainant's business held entitled to use his own name in his own business, notwithstanding complainant had registered the name as a trade-mark. Thaddeus Davids Co. v. Davids (1912) 192 Fed. 915, 114 C. C. A. 355, reversing decree (C. C. 1911) 190 Fed. 285.

Defendants' use of the family name of one of them on labels used in selling their product held not an infringement of complainant's registered trade-mark "Davids." Id.

Where L. E. Waterman Company had established a business in fountain pens under such name and the trade-mark "Waterman's Ideal," defendant, as assignee of A. A. Waterman & Co., will be enjoined from using such name on pens sold in competition with complainant, without changing it to "Arthur A. Waterman & Co.," and adding the words "not connected with the L. E. Waterman Co." L. E. Waterman Co. v. Modern Pen Co. (1912) 197 Fed. 534, 117 C. C. A. 30, modifying decree (D. C. 1912) 193 Fed. 242, and decree modified (1912) 197 Fed. 536, 117 C. C. A. 32.

The word "Chickering," having been applied to pianos manufactured by Jonas Chickering and his successors in business since 1823, acquired a secondary signification which was available, as against others having the same name, to prevent them from advertising that there were two kinds of "Chickering" pianos, and that theirs was one. Chickering v. Chickering & Son (1914) 215 Fed. 490, 131 C. C. A. 538.

Plaintiff's use of name, without showing that it was merely the successor of the original party of that name, held not to deprive it of the right to protection against infringement. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

Where one has used his name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by another bearing the same name, in such form as to constitute a false representation of the origin of the goods. Landreth v. Landreth (C. C. 1884) 22 Fed. 41.

Hohner is a well-known maker of harmonicas in Wurtemberg, most of which are sold under his name in this country. Leiterd made harmonicas in Saxony, and put upon them his own name, with the word "nach" and the words "Improved Hohner" in larger and plainer letters, and sold them in this country. Hohner's right to the use of his own name was infringed, and he was entitled to an injunction and accounting. Hohner v. Gratz (C. C. 1892) 52 Fed. 871.

A manufacturer cannot, by extensively advertising his name in connection with goods made by him, acquire the right to enjoin another person with the same surname from selling similar goods under that surname, when such other person has for many years been engaged in the manufacture of such goods, and puts his full name on his labels. American Cereal Co. v. Eli Pettijohn Cereal Co. (C. C. 1896) 72 Fed. 903.

One selling goods in packages prominently marked with his own name and initials, not tending to induce greater confusion than would naturally result therefrom, cannot be restrained by another of the same name, even though the former expected that unscrupulous dealers would offer his goods as the goods of the latter. Wm. Rogers Mfg. Co. v. Rogers (C. C. 1898) 84 Fed. 639, order denying preliminary injunction affirmed (1899) 95 Fed. 1007, 37 C. C. A. 358.

The manufacture and sale in good faith by a man named Stewart of "Dr. Stewart's Dyspepsia Tablets" is not an infringement or unfair competition in respect to "Stuart's Dyspepsia Tablets," where the former are put up in packages dissimilar to those of the latter. Stuart v. F. G. Stewart Co. (C. C. 1898) 85 Fed. 778, decree reversed (1899) 91 Fed. 243, 33 C. C. A. 480.

No special right to use a family name which has become a trade-name applied to a manufactured article accrues by virtue of the relation which descendants bear to the original manufacturer of the same name, such descendants being entitled to no other than their natural rights to use their own names in the transaction of their own business. Wyckoff v. Howe Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, decree reversed Wyckoff, Seamans & Benedict v. Same (1903) 122 Fed. 348, 58 C. C. A. 510, which is reversed Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 49 L. Ed. 972.

Giving the name "Remington" to a corporation engaged in making typewriters by two stockholders of that name, such persons not being manufacturers of typewriters, nor having their own names put on the machines, was not a legitimate use of their natural right to use their name in their own business to the injury of the plaintiff, who had purchased from the original Remington the right to use that name. Id.

Where a pencil business became widely known under the name "A. W. Faber," use of the word "Faber" by another of that name was unfair trade, and plaintiff was entitled to restrain him from using the word without the

prefix "Eberhard" or "John E." or "J. Eberhard." Von Faber v. Faber (C. C. 1903) 124 Fed. 603, decree reversed Von Faber-Castell v. Same (1905) 139 Fed. 257, 71 C. C. A. 383, writ of certiorari denied (1905) 26 Sup. Ct. 750, 199 U. S. 609, 50 L. Ed. 331.

Where complainant purchased the right to use the name "Rowley" in the artificial limb manufacture, defendant Rowley was not entitled to use his name in such connection. J. F. Rowley Co. v. Rowley (C. C. 1907) 154 Fed. 744, decree reversed Rowley v. J. F. Rowley Co. (1908) 161 Fed. 94, 88 C. C. A. 258.

A prior right to a trade-name under which a business is conducted and good will established, though that of an individual, will be protected against another of the same name who uses it to pass off a fraudulent imitation as the goods of the one first acquiring a right to its use. Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. 1908) 158 Fed. 552, decree reversed (1908) 162 Fed. 887, 89 C. C. A. 577.

Complainant, the Thaddeus Davids Company, and its predecessors, owned and controlled by persons whose family name was Davids, had used the word "Davids" as a trade-mark for 25 years. Defendant, also composed of persons whose surname was Davids, adopted it as a trade-name, and the corporate name, "Davids Manufacturing Company," using the name "Davids" in a similar manner, except that the words "Davids Manufacturing Company" were placed in prominent type at the bottom of their label. Held, that defendant's use of the name was not objectionable. Thaddeus Davids Co. v. Davids (C. C. 1908) 165 Fed. 792, decree reversed (1910) 178 Fed. 801, 102 C. C. A. 249.

Where a corporation by using the term "Dodge's" became well known and built up a large business, another corporation in the same business would be enjoined from using the term "Dodge's" on its signs, although a man named Dodge was the manager of the latter corporation, and although the term was not used on its signs with any actual fraudulent intent. Dodge Stationery Co. v. Dodge (1904) 78 P. 879, 145 Cal. 380.

As between father and son bearing the same name, the adoption and use by the son after the father's death of his own name as a trade-mark and stamp, viz.: "[Eagle.] Wm. Rogers. [Star.]"—is not, in the absence of fraud on his part, an infringement of the trade-marks, "Wm. Rogers Mfg. Co.," "1865. Wm. Rogers Mfg. Co.," and "[Anchor.] Wm. Rogers & Son," used as stamps by the father during his life, and by his successors in business after his death. William Rogers Mfg. Co. v. Simpson (1887) 54 Conn. 527, 9 Atl. 395.

An original unincorporated beneficial association had no exclusive right to the words "Freundschaft Lodge," or "Humboldt Lodge," or to the word "Hertha," or to such words combined. Freundschaft Lodge, No. 72 D. O. H. v. Alchenburger (1908) 85 N. E. 653, 235 Ill. 438, affirming judgment Alchenburger v. Freundschaft Lodge No. 72 D. O. H. (1902) 138 Ill. App. 204.

Where a manufacturer had for some years painted upon the sides of his wagons the words "Shaver Wagon, Eldora," painting the same words upon wagons made and offered for sale by defendants was an infringement which would be enjoined. Shaver v. Shaver (1880) 54 Iowa, 208, 6 N. W. 188, 87 Am. Rep. 194.

One will not be prohibited from using his own name on articles of his own manufacture because it had first been rightfully used by another, but will not be permitted to induce the belief of customers or others desiring to purchase that the articles so marked are the products of the other. Ætna Mill & Elevator Co. v. Kramer Milling Co. (1910) 109 P. 692, 82 Kan. 679.

Where partners, as J. G. M. & Sons, sell their business, good will, and trademark, a firm composed of J. G. M. and one son, who was not in the first firm, cannot use the firm name and brand of J. G. M. & Sons. J. G. Mattingly Co. v. Mattingly (Ky. 1895) 31 S. W. 279.

Lamb, an inventor, sold rights under his patents to two corporations located in different states, both of which adopted the name "Lamb Knitting Machine Company," and sold the machines they manufactured as Lamb machines, and goods manufactured thereon became known as "Lamb," or "Lamb Knit," goods. Thereafter Lamb organized a corporation, known as the "Lamb Knitting Company," and sold the property and business of this company to another corporation. Held, the latter company did not possess any exclusive right to use either the term "Lamb" or the peculiar stitch in the manufacture and sale of knit goods. Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co. (1899) 78 N. W. 1072, 120 Mich. 159, 6 Detroit Leg. N. 97, 44 L. R. A. 841.

After an inventor severed his connection with the corporation which had been organized to manufacture and sell the grates invented, he patented a different grate, which was thereafter manufactured by a partnership formed by him. Held, that such partnership was entitled to advertise that they manufactured a grate under patent granted to such inventor, provided it was also stated, in language equally prominent, that the partnership was distinct from the corporation. Gordon Hollow Blast Grate Co. v. Gordon (1905) 105 N. W. 1118, 12 Detroit Leg. N. 789, 142 Mich. 488.

The name "Finney's Famous Orchestra," adopted as a name for a musical organization, is the property of those

whose services in connection with the orchestra made the name valuable, and its use by others is a fraud upon the public which will be enjoined. Finney Orchestra v. Finney's Famous Orchestra (Mich. 1910) 126 N. W. 198, 17 Detroit Leg. N. 282.

That a person has acquired some skill in a business which he has conducted with the intent of profiting unlawfully by the trade reputation of another does not, as against an injured party, entitle a corporation in which he is interested to adopt that name in the same business, though it may be accompanied with additions sufficient to prevent a purchaser from mistaking the goods of one for the goods of another. International Silver Co. v. William H. Rogers Corp. (1905) 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, reversing orders (1904) 57 A. 725, 66 N. J. Eq. 140, and 57 A. 1037, 66 N. J. Eq. 119.

A corporation will not be restrained from stamping the initials of its corporate name on its goods, though another corporation previously used the same initials as a part of its trademark. Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co. (1906) 63 A. 846, 71 N. J. Eq. 555.

One is not entitled to use his name as a trade-mark in such a way as to deceive the public and deprive a manufacturer of the same name of the benefit of the notoriety which his machines had gained. Howe v. Howe Mach. Co. (N. Y. 1867) 50 Barb. 236.

Defendant Decker was entitled to use the name "Decker" as a trade-mark in the sale of his pianos, notwithstanding plaintiff, another person by the same name, was engaged in the same business, where it did not plainly appear that defendant's use of the name was with a view to mislead the public. Decker v. Decker (N. Y. 1876) 52 How. Prac. 218.

A defendant will not be restrained from the use of his own name, by a competitor having the same name and engaged in the same business, unless it plainly appears that it is used for the purpose of deception, or with a view to mislead the public or injure the plaintiff. Id.

The goods of plaintiff were sold for many years under the name of the "Amoskeag Manufacturing Company," sometimes the full name appearing, sometimes the word "Amoskeag," and again only "A. M. Co." Plaintiffs had never produced nor dealt in prints or calicoes, and consequently never applied thereto its corporate name. Defendants used a label on certain prints of their manufacture with the word "Amoskeag" thereon without the license or consent of plaintiff. Held, that the use was unauthorized, and could be enjoined. Amoskeag Mfg. Co. v. Garner (N. Y. 1876) 54 How. Prac. 297.

The plaintiff assumed the name of "Frank Leslie," and published various newspapers under titles of which the words "Frank Leslie's" formed a part. His son, by plaintiff's directions, took the same name, afterwards changed it to Henry Leslie, and later resumed the name of "Frank," and with others published a serial, entitled "Frank Leslie, Junior's, Sporting and Dramatic Times." Held, this was not such a use of the words "Frank Leslie" as would entitle the plaintiff to an injunction. England v. New York Pub. Co. (N. Y. 1878) 8 Daly, 375.

While one may honestly use his own name as a trade-mark to designate an article which he produces, where the use of the name is for the purpose of leading the public to believe that the articles so designated are those of the prior user of the title, such use will be restrained. Id.

Where one sold his business, and right to use his name, and agreed not to engage in a like business for two years, on his reentering business, after three years, under his own name, an injunction would not lie, in the absence of fraud, to prevent him from using such trade name, although some confusion and mistake arose therefrom. Scott Stamp & Coin Co. v. J. W. Scott Co. (1890) 58 N. Y. Super. Ct. 379, 15 N. Y. Supp. 325.

Philip Caswell, Jr., of the firm of Caswell, Hazard & Co., sold his interest in the firm, including the good will, to the defendant Hazard. Ten years later plaintiff, of the name of Caswell, sold his interest in the property of the firm, except its trade-marks, to the other members. The right to use the firm name as a trade-mark was not disposed of. Held, that plaintiff did not have the exclusive right to use the name of "Caswell" as a trade-mark in the business, and the other members of the firm could not be enjoined from using it as such. Caswell v. Hazard (1890) 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833, affirming (1888) 50 Hun, 230, 2 N. Y. Supp. 783.

Where the machinery for many years manufactured and sold by S. Howes became known to the trade as "Howes machinery," and plaintiff corporation was organized for the purpose of carrying on the business, naming it "The S. Howes Company," and later one Charles N. Howes conveyed to defendant the right to use his name, and it adopted "Howes" as part of its corporate name, and engaged in manufacturing similar machinery, plaintiff had the exclusive right to the use of the name "Howes." S. Howes Co. v. Howes Grain-Cleaner Co. (1898) 52 N. Y. S. 468, 24 Misc. Rep. 83.

Where an established business is conducted under the name of G., A. & Co., others will be enjoined from doing a similar business as a corporation under the same name, although the names of two of the incorporators are G. and

A. Schmid v. De Grauw (1899) 59 N. Y. S. 569, 27 Misc. Rep. 693.

Where, upon dissolution of a firm, each party continued a similar business in the same locality, defendant taking a new partner, and making use of the old firm name, which consisted of his own name and the words "& Co." while plaintiff used his name as successor to the old firm, defendant was entitled to continue the use of his own name and that plaintiff while holding himself out as the successor of the old firm was not entitled to restrain defendant from the use of the firm name. Lepow v. Kottler (1906) 100 N. Y. S. 779, 115 App. Div. 231.

The purchaser of the rights to "Woodbury's Facial Soap" was entitled to restrain the original manufacturers from subsequently manufacturing and selling soap known as "Woodbury's New Skin Soap." Andrew Jurgens Co. v. Woodbury (1907) 106 N. Y. S. 571, 56 Misc. Rep. 404.

An exclusive right may be acquired in the name in which a business has been carried on, which will be protected by injunction against infringement. Id.

Where plaintiff in New York City used the trade-name of "Best & Co., Lilliputian Bazaar," and defendant did the same kind of business in Brooklyn under the trade-name of "Broadway Bazaar, Brooklyn's Best Lilliputian Store," defendant will be enjoined from using the words "Best," "Lilliputian," and "Bazaar," in connection with each other, but not from the use of the word "Lilliputian," either alone or in connection with other words. Ball v. Broadway Bazaar (1909) 87 N. E. 674, 194 N. Y. 429, reversing judgment (1907) 106 N. Y. S. 249, 121 App. Div. 546.

Where one for several years used his surname as a designation of his hats, with a uniform price usually appearing in connection therewith, another having the same surname would be enjoined from using it in his hat business, together with the figures indicating a similar price, unless in connection with his surname, without the figures, he used his first name with it, though the parties had different trademarks inside the hats they dealt in. Kaufman v. Kaufman (1910) 123 N. Y. S. 699.

The organizer of a corporation, who conferred upon it the right to use his name as a trade-name, is properly enjoined from engaging in a competing business in his own name, or granting to any person a license or authority to use his name or portrait in a competing business. Stephen Merritt Burial & Cremation Co. v. Stephen Merritt Co. (1913) 140 N. Y. S. 895, 155 App. Div. 565.

As a grandson was diverting trade from the corporation organized by the grandfather, by misleading the public, he was properly enjoined from using his own name, without showing that it was he, and not the grandfather, who was engaged in business. Id.

One practicing dentistry under a firm name and style may not enjoin a corporation engaged only in the business of manufacturing and selling dental supplies from using the same name followed by the word "incorporated." Longenecker v. Longenecker Bros. (1913) 140 N. Y. S. 403.

One who assumed the name of his brother, who had legally adopted the name of B., may not enjoin his brother's wife and another, as partners, from conducting the same kind of business in the same block in the name of B. & Co., or B. and the name of the partner, in the absence of unfair competition otherwise. Bernhard v. Bernhard (1913) 142 N. Y. S. 94, 156 App. Div. 739.

The name "Backus Oil Co.," was given to it by one of its incorporators, F. M. Backus. Thereafter the interest of F. M. Backus was purchased, and he moved to another city, and began carrying on the identical business under the name "The Backus Oil & Car Grease Co." Held, defendant's use of the same name constituted an illegal infringement, without regard to the fact that the name of one of defendant's partners was "Backus." Backus Oil Co. v. Backus Oil & Car Grease Co. (Com. Pl. Ohio, 1880) 5 Wkly. Law Bul. 546.

Where plaintiff's husband used his Christian name, Rudolph, to designate his business, which was continued by his widow and a brother, on dissolution of this firm defendants were not entitled to use the name "Rudolph" in the same business next door, though it was the Christian name of one of the partners engaged in their business; such name having been legally acquired as a trade-mark by plaintiff's husband, which she acquired by purchase from the executors. Standinger v. Standinger (Pa. 1862) 19 Leg. Int. 85.

Where a retiring partner entered into no contract restricting him from prosecuting a similar competing business, he is not deprived of his right to use his own name in connection with such business, from the fact that his surname is a portion of the trade-mark used by the firm of which he was formerly a member. White v. Trowbridge (1906) 64 A. 862, 216 Pa. 11.

One whose name, for many years, has been associated with the sale of Steinway and Behr pianos by a certain firm will not be enjoined from using the same name for a corporation selling other kinds of pianos in the same locality; since the Steinway and Behr pianos have reputations of their own, aside from the dealers who handle them. Fite v. Dorman (Tenn. 1900) 57 S. W. 129.

As against a manufacturer of wheels, having the right to designate them "Whitney" wheels, a rival, merely because employing a Whitney, never a manufacturer, cannot advertise them

as "Whitney," but merely the facts about its employé. Sanford-Day Iron Works v. Enterprise Foundry & Machine Works (1915) 172 S. W. 537, 130 Tenn. 669.

Where the principal point of resemblance between the signs, labels, etc., is the prominence given to the name "Harson," which is the surname of complainant and one respondent, and there is nothing in respondents' advertisement, except the use of such name, which would deceive the public, respondents will not be enjoined from using such advertising matter, as said respondent has the right to so use his surname. Harson v. Halkyard (1900) 46 A. 271, 22 R. I. 102.

A partner in whose name business was conducted sold his interest to his copartner, and conducted, under the name which the partnership had formerly used, an entirely different business, in a different part of the city. Held, such use of the name of the old firm gave the purchasing partner no right to recover damages for such use. F. T. Blanchard Co. v. Simon (1905) 51 S. E. 222, 104 Va. 209.

A firm under the name of "Eastern Outfitting Company" did business in Spokane. A corporation engaging in similar business in Seattle under the same name attempted to open business in Spokane. Held, that the corporation, though using its own name as a trade-name, was not entitled to restrain the firm from using its name in Spokane. Eastern Outfitting Co. v. Manheim (Wash. 1910) 110 P. 23.

While every person has the right to use his own name in his own business, he must do so under proper safeguards for the rights of any other person who has acquired a right to the use of it as a trade-name. Wright Restaurant Co. v. Seattle Restaurant Co. (1912) 122 P. 348, 67 Wash. 690.

All the property, assets, and business of the firm of Fish Bros., wagon manufacturers, passed by successive changes to Fish Bros. & Co.; thence into the hands of a receiver; and thence to the Fish Bros. Wagon Company, a corporation. The Fish brothers remained in the business through all the successive changes. Several years after the organization of the company the Fish brothers withdrew therefrom, and set up on their own account, under the firm name of Fish Bros. & Co. Held, in an action by the corporation, that plaintiff's right to the use of trade-marks with the word "Fish" is not exclusive, and defendants may in good faith apply the same trade-marks to the wagons manufactured by them, provided they do it in a way not calculated to induce persons to buy the same for those manufactured by plaintiff. Fish Bros. Wagon Co. v. La Belle Wagon Works (1892) 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

(C) Procedure

22. **Jurisdiction.**—See notes under § 9502, post.

23. **Parties.**—Questions of trade-mark will be adjudicated only upon the rights of the parties before the court, and as between their conflicting claims, and not with a view to the guardianship of the public, except in cases where injury to the public health or morals enters into the ingredients of the allegations. Ellis v. Zeilin (1871) 42 Ga. 91.

24. **Injunction.**—Procedure in injunction cases in general, see notes under § 9504, post.

25. **Evidence — Registration as evidence.**—See notes ante, this section.

26. **—— Presumptions and burden of proof.**—Conceding the burden of proof to rest upon the manufacturer of a medicine under a secret formula, when suing to restrain the use of his trade-name by an alleged infringer, to show that the latter's medicine is not made by his formula, there is at least a prima facie presumption of a difference between the two formulas. Jacobs v. Beecham (1911) 31 Sup. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree Beecham v. Jacobs (1908) 159 Fed. 129, 86 C. C. A. 623.

Where infringement is clear, proof of actual fraudulent intent is unnecessary. The Le Page Co. v. Russia Cement Co. (1892) 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

The fact that defendants adopted a new label much resembling complainant's, shortly after a former infringer of complainant's trade-mark came into their employ, is most suggestive of an intentional imitation. Scheuer v. Muller (1896) 74 Fed. 225, 20 C. C. A. 161.

Where an alleged infringer in America, who used marks unquestionably belonging to another in foreign countries, claims to have anticipated him in the use of the mark in the American market, such alleged infringer should show with accuracy and detail the times of its earlier sales. Kathreiner's Malzkaffee Fabriken Mit 'Beschrænkter Haftung v. Pastor Kneipp Medicine Co. (1897) 82 Fed. 321, 27 C. C. A. 351.

When one sued for infringement sets up a prior right by use to the trade-mark in question, it is incumbent on him to establish his prior use, at least satisfactorily; and the defense is not made out by evidence which is conflicting and evasive, and rests largely on the unreliable memories of interested witnesses, who frequently contradict themselves. Raymond v. Royal Baking Powder Co. (1898) 85 Fed. 231, 29 C. C. A. 245, affirming decree Royal Baking Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376.

It is not essential to the right to an injunction against infringement that absolute fraud or willful intent to infringe be shown, but it will be presumed that

the defendant intended the natural consequences of its acts. N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (1900) 102 Fed. 327, 42 C. C. A. 376.

Where defendants had fraudulently appropriated plaintiff's trade-marks and labels and used the same in the sale of mineral water, plaintiff was not bound, on an accounting of profits, to show what part of defendant's goods it could have sold had it used honest marks and labels. Saplehner v. Eisner & Mendelson Co. (1905) 138 Fed. 22, 70 C. C. A. 452.

To invoke jurisdiction of equity to prevent infringement of a trade-mark and unlawful competition, it is incumbent on complainant to show that he has a property right in the mark, which is acquired chiefly by prior adoption and exclusive use of the mark or symbol distinguishing complainant's proprietorship. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

In a suit for infringing a trade-mark, judicial notice would not be taken that the word "Abricotine" is a word in general use in the French language in connection with French commerce and descriptive of apricot cordial. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

In suit for infringing trade-mark, there is no presumption of validity to be overcome, and testimony of unaided recollections of a witness of dates 40 years old cannot be accepted. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. A. 1915) 226 Fed. 531.

Injunction against use of a label will not be granted unless complainant's right is clear. Coffeen v. Brunton (C. C. 1851) Fed. Cas. No. 2,947.

Where two or three makers are using the same word as a mark or brand on the same class of goods at the same time, and one asserts the right to it as a trade-mark, and seeks to enjoin the others from using it, he has the burden of proof to show that he was in fact the first to use it. Spiegel v. Zuckerman (C. C. 1910) 175 Fed. 978, decree affirmed (1911) 188 Fed. 63, 110 C. C. A. 133.

Necessity of proof of bad faith in a suit for infringement of a trade-mark does not obtain where defendant continued to use the mark after warning. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

On proof of sales by dealers of articles bearing infringing trade-marks of another manufacturer, they must be presumed to have intended the infringement. Gorham Mfg. Co. v. Schmidt (D. C. 1912) 196 Fed. 955.

In a suit for infringement of a trade-mark, not involving unfair competition, complainants need not establish fraudulent intent. Stephano v. Satmatopoulos (D. C. 1912) 199 Fed. 451.

Proof of duplicity or exact imitation is not necessary to establish infringement of a trade-mark. Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Plaintiff suing for infringement of trade-name "Listerine" held to have the burden of proof, but to have met the burden of showing a possibility of confusion by showing defendant's adoption of the arbitrary name "Listogen." Lambert Pharmacal Co. v. Bolton Chemical Corporation (D. C. 1915) 219 Fed. 325.

Where it appears that a trade-mark was used to secure a benefit to the user at the expense of the owner, and not simply used in good faith for the purpose of explanation or information, the just presumption is that the person using it intends to deceive. Keller v. B. F. Goodrich Co. (1889) 19 N. E. 196, 117 Ind. 556, 10 Am. St. Rep. 88.

In an action for the infringement of a trade-mark, the plaintiff need not prove fraud, or the inferior quality of the goods of the defendant to which he has applied the appropriated trade-mark. Avery v. Meikle (1883) 81 Ky. 73.

Where plaintiff corporation purchased a distillery from the assignee of an insolvent partnership, and continued to use the brand and trade-mark of such firm without objections by the assignee or creditors of the firm, it must be presumed, in an action for infringement, that the debts of the partners were settled, and that the trade-mark reverted to the partners as their property, and that they had the right to use it in the name of the corporation which they subsequently formed. E. H. Taylor, Jr., & Sons Co. v. Taylor (1905) 85 S. W. 1085, 27 Ky. Law Rep. 625, 124 Ky. 173.

The word "Patented," put upon the label of an unpatented article, the trade-mark being patented, and it not appearing that the word "Patented" was used with intent to deceive the public, it would be presumed to have been used in reference to the trade-mark, and not to the article. Insurance Oil Tank Co. v. Scott (1881) 33 La. Ann. 946, 39 Am. Rep. 286.

In suits for infringement, fraudulent intent is presumed, but in actions based on unfair competition the plaintiff must prove this intent, or show facts and circumstances from which it may be reasonably inferred. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

Sales by defendant under a trade-name resembling that of plaintiff, to a purchaser who knew the goods were manufactured by defendant, and sales made to persons at a distance, who had no knowledge of plaintiff's existence, cannot be assumed to be injurious to plaintiff, if the goods themselves are not impressed with deceptive marks. W. R. Lynn Shoe Co. v. Auburn-Lynn

Shoe Co. (1907) 69 A. 569, 103 Me. 334.

To entitle a complainant to relief against imitation of a certain trade-mark, he must clearly show a property right in himself, and also that the resemblance between the original and the imitation is such as would mislead persons purchasing with ordinary caution. Robertson v. Berry (1879) 50 Md 591, 33 Am. Rep. 328; Blackwell v. Wright, (1875) 73 N. C. 310.

A bill to restrain the fraudulent use of trade-marks cannot be maintained, without alleging and proving that such use was for the purpose of falsely representing the articles so marked, to be manufactured by the plaintiff. Ames v. King (1854) 68 Mass. (2 Gray) 379.

The fact that a plaintiff manufacturer has used a distinctive package and label more or less for 10 years, and largely for the last two years of that period, raises a presumption that the public has learned to recognize his goods by the appearance of the package. New England Awl & Needle Co. v. Marlboro Awl & Needle Co. (1897) 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377.

If there is no evidence as to where the defendants intended to sell the goods or where the firms having the trade-mark sold theirs, beyond the fact that all parties concerned had their places of business in Boston, it is a sufficient answer that, if it would be a defense to show that goods to which counterfeit trade-marks had been attached in this state were intended solely for sale in other states, the defendants were called upon to give some evidence of the intent. Commonwealth v. Rozen (1900) 176 Mass. 129, 57 N. E. 223.

On the use by defendant of a trade-name similar to that used by plaintiff for 15 years, fraud is presumed and need not be affirmatively shown. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

Where complainants sought to restrain an imitation of their business sign as a trade-mark, and the evidence was directed to show only that defendants' sign so closely resembled complainants' as to deceive the public, but it did not appear that the device on the sign was customarily attached to complainants' products as a trade-mark, complainants were not entitled to relief on the theory of trade-mark infringement. Covert v. Bernat (1911) 138 S. W. 103, 156 Mo. App. 687.

Fraud in adopting a trade-name is not presumable from a change on suit being brought. McGrew Coal Co. v. Menefee (1912) 144 S. W. 869, 162 Mo. App. 209.

To restrain the use of a trade-name, one must show that it was not, at the time of his attempted appropriation of it, in common use in connection with like businesses, buildings, or localities. Chadron Opera House Co. v. Loomer (1904) 99 N. W. 649, 71 Neb. 785.

The voluntary selection and use of the word "Eureka" as part of defendant's corporate name, with the intention or purpose in part of competing with complainant, whose hydraulic hose and other goods the word had come to designate and distinguish in the trade, to the knowledge of defendant, raises a presumption that it was done with the intent to profit by complainant's reputation in competitive goods; and no further proof was necesary to entitle complainant to an injunction. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1906) 71 A. 1134, 71 N. J. Eq. 300, affirming decree (1905) 60 Atl. 561, 69 N. J. Eq. 159.

The burden of showing that the claim of priority is unfounded, or the absence of any injury resulting from its imitation, rests upon the defendant. Messerole v. Tynberg (N. Y. 1868) 4 Abb. Prac. (N. S.) 410; Merserole v. Same (N. Y. 1868) 36 How. Prac. 14.

Where defendants had been employed by plaintiff, and, shortly after leaving its service, engaged in a similar business, adopting a trade-mark which was a simulation of plaintiff's label likely to deceive consumers, without explanation, a fraudulent intent would be presumed. Bolen & Byrne Mfg. Co. v. Jonasch (1899) 60 N. Y. S. 555, 29 Misc. Rep. 99.

Where it is charged that defendant has imitated the packages of plaintiff, not only must the fact of imitation be shown, but it must also appear that the imitation is made with the intent to impose on the public. Hoeb v. Bishop (1889) 10 Ohio Dec. 595, 22 Wkly. Law Bul. 151.

No intent to injure the owner of a trade-mark need be shown by him in a suit for infringement. Appeal of Peterson (Pa. 1881) 4 Walk. 80.

A close imitation of a trade-mark is evidence of fraudulent intent, and actual fraudulent intention need not be proved. Hoyt v. Hoyt (1886) 2 Pa. Co. Ct. R. 152.

27. —— **Admissibility.**—A decision of the high court of chancery in England, granting defendant the right to register as a trade-mark the words alleged to be an infringement, and the affidavits upon which such decision was made, are irrelevant and inadmissible in an infringement suit in this country. City of Carlsbad v. Kutnow (1895) 71 Fed. 167, 18 C. C. A. 24, affirming (C. C. 1895) 68 Fed. 794.

The fact that one of the defendants was in 1870 engaged in manufacturing imitations of the goods, labels, and trade-marks now manufactured and owned by complainants, and was then successfully sued therefor, is immaterial, and the record of that suit which was offered only for the purpose of showing that fact, is excluded. Myers v. Theller (C. C. 1889) 38 Fed. 607.

Evidence that plaintiff's agent purchased an article in defendant's store, being distinctly told that it was not of complainant's manufacture; but after the purchase, by a false statement to the clerk, he induced her to mark the duplicate sale bill delivered to him with the purchase to indicate that the article was of complainant's make, is not available in support of a claim that defendant sold other goods as those of complainant. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1899) 92 Fed. 774.

Where defendant engaged as selling agent for typewriters sold under the trade-name of "Remington-Sholes," evidence relating to such machines emanating from the Remington-Sholes Company, under whom defendant justified, and with the name in controversy on them, and transactions relating thereto, although occurring in foreign countries, was admissible as res gestæ. Wyckoff v. Howe Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, reversed Wyckoff, Seamans & Benedict v. Same (1903) 122 Fed. 348, 58 C. C. A. 510, and Howe Scale Co. v. Wyckoff Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 116 O. G. 299, 49 L. Ed. 972.

In a suit for infringement the introduction of two packages of tobacco having the same name and apparently manufactured by different individuals is irrelevant, when unaccompanied by proof of the circumstances surrounding the origin and use of the packages. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Where a defense to a suit for infringement is that the trade-mark was in common use before plaintiff used it, and was publicly registered as a trade-mark by W., and defendant introduced evidence to show such use was known to, and acquiesced in by plaintiff, plaintiff could show by way of rebuttal that it prosecuted to judgment an action against W. for infringement. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

The court having ruled, without objection, that evidence of the fact that the products of both parties were on sale at the same or different places in a city was admissible, it is too late to contend for the first time on appeal that the fact was immaterial. Id.

At the trial for infringement of a label on matches plaintiff's agent was asked, "After that match was placed upon the market by defendants, what effect, if any did it have upon your trade of the Vulcan match?" and "Did the placing upon the market of the Vulture match have any effect upon the sales of the Vulcan match through you?" Held, the questions, although incorrect in form, were improperly excluded under a general objection and defendants thus precluded themselves from the objection that there was no proof that persons had been deceived into the belief that defendants' label was that of plaintiff. Taendsticksfabriks Aktiebolaget Vulcan v. Myers (1890) 58 Hun, 161, 11 N. Y. Supp. 663.

In an action for infringement of a trade-mark, evidence of acquiescence by others than defendant in plaintiff's claim to the trade-mark is properly excluded. Matchett v. Lindberg (1896) 2 App. Div. 340, 37 N. Y. Supp. 854.

In an action to restrain the use of an imitation of plaintiff's trade-mark for cigars, a denial of the allegation of good quality, etc., of plaintiff's goods, did not entitle defendant to give affirmative evidence of the poor quality of plaintiff's goods, or as to false representations concerning them which would mislead the public. Falk v. American West Indies Trading Co. (1902) 75 N. Y. S. 964, 71 App. Div. 320, affirming judgment (1901) 73 N. Y. S. 547, 36 Misc. Rep. 376.

A certified copy of defendant's application for a registration of his claimed trade-mark is admissible against his objection that the law authorizing the registration of trade-marks is unconstitutional, as a statement of defendant for the purpose of contradicting his testimony. Blackwell's Durham Tobacco Co. v. McElwee (1888) 100 N. C. 150, 5 S. E. 907.

In an action to restrain the use of a trade-mark, it was proper to admit a question to defendant whether there was not an interfering declaration filed by plaintiffs, after he had made his application, as it tended to show whether there had been a quiet acquiescence by them in his claim to title. Id.

A question put to defendant whether he had ever sued any one for an alleged infringement was properly admitted, as the answer tended to explain and qualify his previous testimony as to its use. Id.

In an action to restrain an alleged imitation of the labels on plaintiff's medicines the identity of the medicines used by plaintiff and defendant cannot be shown, being not at issue. Radam v. Capital Microbe Destroyer Co. (1891) 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Where plaintiff's trade-mark and defendant's alleged imitation of it are both before the court, the opinion of witnesses as to the closeness of similarity is inadmissible in evidence. Id.

That persons had been deceived in regard to the medicines cannot be proved by plaintiff's testimony as to what such persons said to him, since such testimony would be mere hearsay. Id.

To show damages from infringement, plaintiff may show a falling off of his custom concurrently with defendants' beginning to use the trade-mark, it being for the jury to say whether such use was the cause of the diminution.

Shaw v. Pilling (1896) 175 Pa. 78, 34 Atl. 446.

28. —— **Weight and sufficiency.**— Positive proof of fraudulent intent is not required, where proof of infringement is clear. McLean v. Fleming (1877) 96 U. S. 245, 253, 24 L. Ed. 828.

Evidence that a firm had occasionally, during a period of three years, used the same term as employed by complainant for a similar manufacture will not defeat complainant's right, where none are able to testify that any flour so designated by that firm has been on sale for over 20 years. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, affirming decree Holt v. Menendez (C. C. 1885) 23 Fed. 869.

That defendant had formerly used an entirely different style of package, and after being advised that complainant's goods were more popular, changed to his present style, while it raises a strong suspicion of fraudulent intent, is not conclusive, if the rest of the evidence seems to negative such intent. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, —— C. C. A. ——, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 690, 43 L. Ed. 1179.

In determining the question of fraudulent imitations of packages and labels, merely noting points of difference or similarity is not sufficient. The packages and labels must be considered as a whole. Id.

Complainant was proprietor of the word "Cuticura" as a trade-mark for a toilet soap. Defendant called its soap "Cuticle." There was nothing in the box, wrapper, or general get-up of the package which tended in any way to induce the purchaser of the latter soap to believe that he was purchasing the former. Held insufficient to authorize injunction at suit of complainant. Potter Drug & Chemical Corp. v. Pasfield Soap Co. (1901) 106 Fed. 914, 46 C. C. A. 40, affirming decree (C. C. 1900) 102 Fed. 490.

In an action for infringement and for unlawful competition, evidence held insufficient to show that defendants' whisky, sold under the name of "Old Crow," or "Crow," in competition with plaintiff's whisky, sold under the same name, was deleterious or fraudulent. Kahn v. W. A. Gaines & Co. (1908) 161 Fed. 495, 88 C. C. A. 437, writ of certiorari denied W. A. Gains & Co. v. Kahn (1908) 29 Sup. Ct. 682, 212 U. S. 572, 53 L. Ed. 656.

Evidence that defendant, upon the filing of complainant's interference, disclaimed title to the symbol and ceased to use it, is insufficient to justify an injunction restraining defendant from infringing complainants' right to such symbol. Van Raalt v. Schneck (1908) 170 Fed. 1021, 95 C. C. A. 672, affirming decree (C. C. 1908) 159 Fed. 248.

In determining the question of the infringement of a trade-mark, the evidence of the eyes is more persuasive than any other. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

In a suit to restrain infringement of a trade-mark and unlawful competition, conflicting evidence held to require a finding that complainant was not the first appropriator of the name and mark. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

The court may base its conclusions as to infringement upon a comparison of the devices used by plaintiff and defendant, and does not necessarily require the testimony of witnesses as to the likeness. Von Mumm v. Frash (C. C. 1893) 56 Fed. 830, following Coats v. Merrick Thread Co. (1893) 13 Sup. Ct. 966, 149 U. S. 562, 37 L. Ed. 847.

Testimony of witnesses hired to secure evidence that they purchased of defendant imitation bitters, put up in genuine bottles procured for the purpose, held insufficient, where they relied solely on opinions formed from tasting the liquid, and where they were opposed by the testimony of defendant and his employés and others, that the bitters so sold were genuine, and that had never procured or sold any imitation article. Hostetter Co. v. Bower (C. C. 1896) 74 Fed. 235.

Similarities in the methods of dressing up goods for the market, and of advertising them, which, when considered alone, are immaterial and insignificant, may be important as tending to establish a general design on the part of one dealer to palm off his goods as those of another, and as helping to establish the intent in more flagrant infringements of right. Hilson Co. v. Foster (C. C. 1897) 80 Fed. 896.

Complainant charged defendant with selling goods of other makers as those of complainant. The sole evidence of any such sales was the testimony of agents of complainant, sent for the purpose of procuring evidence, which was not very satisfactory, and failed to show a single sale to a bona fide purchaser, or any motive therefor, or that defendant knew of the sales so made, but showed that it did not know of them, and that the representations made by its clerks were contrary to its orders and rules, that no notice of any claim of such conduct was given to defendant until suit was brought, and that the real purpose of the suit was to prevent the defendant from selling complainant's goods, because it sold them at a lower price than competing dealers, and than complainant regarded as for its best interests. Held, that such evidence was wholly insufficient to establish a right to relief. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1899) 92 Fed. 774.

Where it is charged that defendants fraudulently refilled plaintiff's bottles with a cheap spurious imitation, which they sold as the genuine article, the burden of proof is on the complainant; and, where complainant's case rested entirely on opinions of witnesses who had no expert knowledge, the evidence is insufficient to warrant a decree which would brand the defendants as frauds and cheats. Hostetter Co. v. Comerford (C. C. 1899) 97 Fed. 585.

Evidence held not to entitle complainant to a permanent injunction against infringement and unfair competition, broader in its terms than a preliminary order which was entered with defendant's consent. G. W. Cole v. Cole's Many-Use Oil Co. (C. C. 1906) 147 Fed. 930.

Evidence held to justify a finding that complainant's tobacco to which the trade-mark in controversy was attached was suitable for smoking and might be so used in cigarettes. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Where complainant sued for infringement of a publication of information concerning transfers of New York City real estate, three instances of copying with reference to three different descriptions were insufficient to justify an injunction against defendants' work, but complainant would be left to its remedy at law. Record & Guide Co. v. Bromley (C. C. 1910) 175 Fed. 156.

Evidence held sufficient to entitle a complainant to an injunction restraining defendants from selling articles bearing infringing trade-marks. Gorham Mfg. Co. v. Schmidt (D. C. 1912) 196 Fed. 955.

Evidence held sufficient to entitle a complainant to an injunction against threatened infringement of a trade-mark. Gorham Mfg. Co. v. Di Salvo (D. C. 1912) 196 Fed. 956.

To entitle a manufacturer to enjoin another from selling under its true name a product which he has a right to make and sell, on the ground that it is an imitation, it is not sufficient to show that defendant's product is not known. Hiram Walker & Sons v. Grubman (D. C. 1915) 224 Fed. 725.

Plaintiff, in action for damages for unfair competition, held to have made out a prima facie case sufficient to entitle him to nominal damages and hence to a hearing on the merits. Kimball v. Hall (1913) 89 A. 166, 87 Conn. 563.

It is not necessary to show that defendant acted with a fraudulent intention, nor that any one has been actually deceived. It is enough if defendant has so simulated complainant's trade-mark that its use is calculated to deceive, and there is a probability that patrons will be so deceived. Job Printers' Union of Chicago v. Kinsley (1903) 107 Ill. App. 654.

Where defendant prepared and sold a certain kind of medicine as and for medicine prepared by plaintiff, plaintiff is entitled to recover therefor without proof of special damage. Thomson v. Winchester (1837) 36 Mass. (19 Pick.) 214, 31 Am. Dec. 135.

A mere comparison of the words showing similarity of trade-names is insufficient, without proof that from the form of the goods, the names, labels, shape of the packages, etc., there exists a reasonable probability that purchasers using ordinary care will be deceived by the similarity of names. Regis v. H. A. Jaynes & Co. (1904) 185 Mass. 458, 70 N. E. 480.

That one using the trade-mark of another after his license so to do had expired had agreed to pay during the life of the license a specified sum annually for the use of the trade-mark is some evidence of the damages sustained because of such wrongful use. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

In a suit to enjoin defendant from using the word "Marshall" in manufacturing engines known as the "Marshall perfecting engine," evidence held to show that the quoted words designated the engine manufactured by defendant under a patent, and were not a trade-name. Marshall Engine Co. v. New Marshall Engine Co. (1909) 89 N. E. 548, 203 Mass. 410.

Evidence, in an action for damages for the infringement of a trade-mark, held to show the infringement as alleged, justifying the overruling of a demurrer to plaintiff's evidence. Lampert v. Judge & Dolph Drug Co. (Mo. 1911) 141 S. W. 1095, reversing judgment (1906) 100 S. W. 659, 119 Mo. App. 693.

Opinions of witnesses familiar with the trade, and habits of customers, is of weight in determining whether an ordinary customer would be likely to be deceived by the similarity, and, when aided by evidence of actual deception, is controlling, unless the dissimilarity between the two marks is such as to exclude any probability of deception. Drummond Tobacco Co. v. Addison Tinsley Tobacco Co. (1892) 52 Mo. App. 10.

Evidence to prove a prior use of a trade-mark by others than the claimant thereof must be positive and satisfactory. St. Louis Carbonating & Mfg. Co. v. Eclipse Carbonating Co. (1894) 58 Mo. App. 411.

In an action to restrain the use of a trade-mark, evidence held not to sustain decree for plaintiff. Regent Shoe Mfg. Co. v. Haaker (1906) 106 N. W. 595, 75 Neb. 426, 4 L. R. A. (N. S.) 447.

In a suit to enjoin the use of the word "Eureka," evidence held to show that defendant's adoption and use of the word was for the purpose of availing itself to some extent of the trade reputation complainant had given to goods

marketed under that name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1905) 60 A. 561, 69 N. J. Eq. 159, affirmed (Err. & App. 1906) 71 A. 1134, 71 N. J. Eq. 300.

A bill alleged that the term "Rogers goods" had acquired a secondary meaning as meaning the goods of complainant. The evidence did not show that defendant called his goods "Rogers goods," and he announced that his ware was made by "W. H. Rogers, of Plainfield, N. J." Held not to authorize equity to restrain defendant from using his name as a trade-name. International Silver Co. v. Rogers (1906) 63 A. 977, 71 N. J. Eq. 560.

Where complainant's use of a color device had been confined to its fabrics of linen and cotton hose or jackets, and defendant's only use of the colors used by complainant was on its rubber hose, and also on its letter heads, catalogues, and envelopes, the evidence was insufficient to show an infringement of complainant's trade-mark rights in the colors. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1906) 71 A. 1134, 71 N. J. Eq. 300, affirming decree (1905) 60 Atl. 561, 69 N. J. Eq. 159.

To entitle one to restrain the use of false signs and trade-marks by defendant, it is only necessary to show that the signs and trade-marks used are false, and that the effect is to deceive the public. Peterson v. Humphrey (N. Y. 1857) 4 Abb. Prac. 394.

On an application to restrain the unauthorized use of a firm name, it is not necessary to show that actual damage has accrued to the plaintiffs. Reeves v. Denicke (N. Y. 1871) 12 Abb. Prac. (N. S.) 92.

Evidence that defendants had used the same material for representing and securing their trade-mark as plaintiffs, and had made their label of the same shape and size, with the same distribution of the words indicating the commodity, was sufficient to establish infringement. Popham v. Wilcox (N. Y. 1873) 14 Abb. Prac. (N. S.) 206.

To sustain an action for violation of a trade-mark right it is sufficient to prove plaintiff's ownership and its actual infringement, without establishing a fraudulent intent on defendant's part. Colman v. Crump (1877) 70 N. Y. 573.

In a suit to restrain the use of the trade-mark "Sweet Caporal," on a brand of cigarettes the tobacco of which was treated by the "Hornbostel process," the evidence tended to show that the public was ignorant of the existence of such process; that the process was of no value, there being other and more efficient means of obtaining the same end; that defendant had abandoned the use of said process, and notified plaintiff to that effect; that the word "Sweet" was prefixed to the word "Caporal," which had always belonged to defendant, as a means of determining the amount of sales of tobacco subject to plaintiff's process, no agreement being made that the same should constitute a trade-mark. Held, that an injunction was properly refused. Hornbostel v. Kinney (1888) 110 N. Y. 94, 17 N. E. 666, affirming (1885) 52 N. Y. Super. Ct. (20 Jones & S.) 41.

Proof of a single instance of infringement of a trade-mark, known at the time to the person injuriously affected thereby, does not constitute by itself alone, a sufficient basis for injunctive relief in a suit instituted more than seven years later. Stetson v. Brennen (1897) 48 N. Y. S. 601, 21 App. Div. 552.

In an action for infringement, plaintiff's failure to prove registration of his trade-mark, as alleged, is not fatal to his recovery, where the allegations are broad enough to admit of proof of the trade-mark as existing through exclusive use, and defendants do not assail the method of proof adopted, and where, assuming the variance, defendants fail to offer any proof to controvert the existence of the trade-mark, as a matter of fact. W. A. Gaines & Co. v. Leslie (1898) 54 N. Y. S. 421, 25 Misc. Rep. 20.

Where there is an actual infringement of the trade-mark itself, or where the resemblance is such as to leave the question of imitation in doubt, that the party charged with imitation has also adopted a like style of putting up his packages may be some evidence on the question of intent. Brown v. Seidel (1893) 153 Pa. 60, 25 Atl. 1064, 31 Wkly. Notes Cas. 519.

To justify a ruling, on demurrer, that one of two trade-marks is so entirely dissimilar from the other that it is not and cannot be an infringement of it, the dissimilarity should be so marked as to leave no doubt in the mind of the court. Leidersdorf v. Flint (1880) 50 Wis. 400, 7 N. W. 252.

29. **Trial.**—Where the indictment alleged a Christian name was "Matt," while some of the witnesses testified that the name was "Max," an instruction that, while it was necessary to prove the names of the partners as alleged, the doctrine of idem sonans obtained, and the law did not favor extreme technicality in regard to proof of names, was objectionable, because of the tendency of the phrase "extreme technicality" to induce the jury to disregard the difference between the names. Vincendeau v. People (1906) 76 N. E. 675, 219 Ill. 474, reversing judgment (1905) 119 Ill. App. 603.

Whether a name has become public property by having acquired a generic meaning descriptive of a general kind, quality, or class of goods, is a question of fact. H. A. Williams Mfg. Co. v. Noera (1893) 158 Mass. 110, 32 N. E. 1037.

Where the evidence showed without contradiction that defendant's predecessors had adopted the arbitrary word "Roachsault," had it duly registered,

and had transferred the same to defendant, he was entitled to a charge that he had a valid trade-mark, and it was error to submit the question to the jury. Stern v. Barrett Chemical Co. (1899) 61 N. Y. S. 221, 29 Misc. Rep. 609, reversing judgment (1899) 58 N. Y. S. 1129, 28 Misc. Rep. 429.

Where, in an action for infringement, the court decides there has been no infringement, its rulings concerning plaintiff's claim for damages become immaterial. Radam v. Capital Microbe Destroyer Co. (1891) 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Where the petition failed to state that plaintiff's trade-mark had on it the words "Kohlberg Bros.," which, by the evidence, it appeared to have, it was for the jury to determine whether there was a variance between the trade-mark declared on and that proved, since there was abundant evidence, outside of the words referred to, identifying the trade-mark used by plaintiff as that described in the petition. Goodman v. Bohls (1893) 3 Tex. Civ. App. 183, 22 S. W. 11.

30. **Damages and profits.**—Exemplary damages are recoverable for an injury from counterfeiting plaintiff's trade-mark. Warner v. Roehr (C. C. 1884) Fed. Cas. No. 17,189a.

In an action for damages for the infringement of a trade-mark the measure of damages is plaintiff's loss, and not defendant's gain, caused by the infringement. Addington v. Cullinane (1887) 28 Mo. App. 238.

Where a retiring partner wrongfully described himself as successor to the old firm, and injury resulting seriously affected plaintiff's business, he was entitled to recover adequate damages, and was not limited in his proof to loss of commissions or profits on the business done by customers of the old firm, who had been induced to deal with the infringing partner. Burckhardt v. Burckhardt (1885) 42 Ohio St. 474, 51 Am. Rep. 842.

Although an inventor of an unpatented medicine has no exclusive right to make and sell it, yet, if others make it, they must not sell it as the manufacture of the inventor, nor adopt his label or trade-mark, nor one so nearly like it as to deceive the public, and they are equally liable for the damage, whether such trade-mark be adopted by fraud or mistake. Davis v. Kendall (1850) 2 R. I. 566.

Injunction suits, see notes under § 9504, post.

CITED WITHOUT DEFINITE APPLICATION

Trade-Mark Cases (1879) 100 U. S. 82, 87, 25 L. Ed. 550; Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365; A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (1906) 26 Sup. Ct. 425, 201 U. S. 166, 50 L. Ed. 710; Spiegel v. Zuckerman (1911) 188 Fed. 63, 110 C. C. A. 133; Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 666.

§ 9502. (Act Feb. 20, 1905, c. 592, § 17.) Jurisdiction of suits respecting trade-marks.

The circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act, without regard to the amount in controversy. (33 Stat. 728.)

See notes to section 1 of this act, ante, § 9485.

Jurisdiction of proceedings to enforce an injunction against infringement of a registered trade-mark, by punishment for contempt or otherwise, was conferred on the court by which such injunction was granted, or any other circuit court, etc., or a judge thereof, by section 20 of this act, post, § 9505.

The circuit courts were abolished and their jurisdiction transferred to the district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268, and jurisdiction of all suits at law and in equity arising under the trade-mark laws was conferred on the district courts by Jud. Code, § 24, par. 7, ante, § 991(7).

Notes of Decisions

Jurisdiction in general.—Under Act March 3, 1881, § 11, the circuit court has no jurisdiction of an action between citizens of the same state for infringement of a trade-mark, where it is not alleged that it "was used on goods intended to be transported to a foreign country." Ryder v. Holt (1888) 9 Sup. Ct. 145, 128 U. S. 525, 32 L. Ed. 529; Schumacher v. Schwencke (C. C. 1886) 26 Fed. 818; Graveley v. Graveley (C. C. 1890) 42 Fed. 265; Prince's Metallic Paint Co. v. Prince Mfg. Co. (C. C. 1892) 53 Fed. 493; Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664, 666.

A United States circuit court has no jurisdiction of a suit to enjoin infringement of a trade-mark where the parties are citizens of the same state, if

the trade-mark is not one that can be lawfully registered under this act, and the right to relief must therefore be based on the fact that defendant is using it as an instrument of fraud. Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365.

A bill may be maintained in the federal circuit court to restrain the infringement of a common-law trade-mark where other jurisdictional facts are present. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 172 Fed. 826, affirming decree (C. C. 1909) 167 Fed. 575.

Unless complainant's trade-mark is used on goods intended to be transported to a foreign country, the court can take no cognizance of the wrong in a suit between citizens of the same state. Glen Cove Mfg. Co. v. Ludeling (C. C. 1885) 22 Fed. 823, 825.

The provision of this section as formerly enacted, giving the right to commence suit, in a trade-mark case without alleging the amount in controversy, is not repealed by section 991 as formerly enacted requiring the amount to be $2,000 to give the federal court jurisdiction. Glotin v. Oswald (C. C. 1895) 65 Fed. 151.

The right to an injunction against unfair competition in trade rests upon the ground of fraud; and the federal courts have no jurisdiction of a suit for such an injunction, even with respect to foreign commerce, in a suit between citizens of the same state. Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237, reversing Elgin Nat. Watch Co. v. Illinois Watch-Case Co. (C. C. 1898) 89 Fed. 487.

The United States courts cannot entertain a suit to restrain unfair competition, based on acts done wholly in a foreign country, although it obtains jurisdiction of the parties. Vacuum Oil Co. v. Eagle Oil Co. (C. C. 1903) 122 Fed. 105.

Where, owing to noncompliance with the provisions of this section, the registration of a valid trade-mark is void, the trade-mark is not thereby nullified, but still retains the properties of a common-law trade-mark, and for its infringement suit may be brought in the federal court, if the requisite diversity of citizenship exists and the requisite judicial amount is involved. Edison v. Thomas A. Edison, Jr., Chemical Co. (C. C. 1904) 128 Fed. 1013.

Where a trade-name had not been registered, as required by this section as formerly enacted, federal jurisdiction of a suit for unfair competition was not conferred by such act, but existed only under the rules governing ordinary suits at law or in equity. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

Where a bill for unfair competition in the use of a trade-name did not allege that the name was used or to be used on goods intended to be transported to a foreign country or in commerce with Indian Tribes, the Circuit Court did not acquire jurisdiction under this section as formerly enacted. Id.

Jurisdiction of suit for injunction and accounting, as to registered trade-marks, is subject to section 1033, forbidding suits in districts other than that of defendant's residence. Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co. (D. C. 1913) 210 Fed. 393.

State courts.—The provisions of this section conferring upon the United States courts jurisdiction over suits arising from the wrongful use of a trade-mark used in foreign commerce does not impair the jurisdiction of the state courts over suits for the infringement of trade-marks. In re Keasbey & Mattison Co. (1895) 16 Sup. Ct. 273, 274, 160 U. S. 221, 40 L. Ed. 402.

A suit cannot be maintained in a federal court to enforce rights under a state statute relating to trade-marks, where the transactions complained of occurred outside of such state. Rehbein v. Weaver (C. C. 1904) 133 Fed. 607.

Where a bill for unfair competition in the use of a trade-name did not allege that the name was used or to be used on goods intended to be transported to a foreign country, or in commerce with Indian Tribes, the Circuit Court did not acquire jurisdiction under this section. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

Act 1881, relating to trade-marks used in commerce with foreign nations, which provides that any person who shall counterfeit "any trade-mark registered under this act" shall be liable to an action on the case, does not apply to any trade-mark that has not been registered, so as to oust the jurisdiction of a state court in a prosecution for counterfeiting a foreign trade-mark which is not registered under the act of 1881. People v. Molins (1888) 7 N. Y. Cr. R. 51, 10 N. Y. Supp. 130.

The state courts have jurisdiction of a suit to restrain the infringement of a trade-mark. Smail v. Sanders (1889) 118 Ind. 105, 20 N. E. 296.

The act of Congress assuming to confer exclusive jurisdiction upon the federal courts in trade-mark cases has been pronounced unconstitutional. Id.

This section and section 9508 did not impair the jurisdiction of the state courts over suits for the infringement of trade-marks, notwithstanding the infringing mark had been registered under such act. Traiser v. J. W. Doty Cigar Co. (1908) 84 N. E. 462, 198 Mass. 327.

A state court has jurisdiction of a suit to restrain the use of a trade-

mark, and for the profits realized through the wrongful use thereof. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

Section 9508, post, does impair the jurisdiction of state courts over suits for the protection of trade-marks, whether registered or not. Julius Kayser & Co. v. Italian Silk Underwear Co. (1914) 146 N. Y. Supp. 22, 160 App. Div. 607.

This section does not exclude the jurisdiction of the state courts, so that the owner of a registered trade-mark was entitled to protection from infringement and unfair competition by a suit therein. Oneida Community v. Oneida Game Trap Co. (1915) 154 N. Y. S. 391, affirming judgment (1914) 150 N. Y. S. 918.

Pleading.—Rights and remedies pertaining to trade-marks generally exist independently of the federal statute, and, where citizenship gives jurisdiction, it is not necessary that the bill should allege that the parties, or either of them, are engaged in foreign commerce, or commerce with Indian tribes, as is required by section 9485, to give jurisdiction where the parties are citizens of the same state. Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664.

A bill for unfair competition in the use of a trade-name should allege that the name was used or to be used on goods intended to be transported to a foreign country or in commerce with Indian Tribes, in order to give the Circuit Court jurisdiction. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

Temporary injunction.—Motion for a preliminary injunction in a suit between citizens of the same state for infringement should not be granted, although the affidavits disclosed a case of unfair competition, the jurisdiction to retain the case as to that matter being doubtful. Goldstein v. Whelan (C. C. 1894) 62 Fed. 124.

Review.—When suit was not based on diverse citizenship, but on allegations of unfair competition, containing no cause of action under federal constitution or laws, decree dismissing suit to restrain infringement not appealable to federal supreme court. G. & C. Merriam Co. v. Syndicate Pub. Co. (1915) 35 Sup. Ct. 708, 237 U. S. 618, 59 L. Ed. 1148, dismissing appeal (1913) 207 Fed. 515, 125 C. C. A. 177.

Cited without definite application, Hutchinson, Pierce & Co. v. Loewy (1910) 30 Sup. Ct. 613, 217 U. S. 457, 54 L. Ed. 838.

§ 9503. (Act Feb. 20, 1905, c. 592, § 18.) Certiorari for review by Supreme Court of cases arising under act.

Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this Act in the same manner as provided for patent cases by the Act creating the circuit court of appeals. (33 Stat. 729.)

See notes to section 1 of this act, ante, § 9485.

The provisions for review of patent cases by the Supreme Court by writs of certiorari, mentioned in this section, were contained in Act March 3, 1891, c. 517, § 6, 26 Stat. 828, which was superseded by Jud. Code, § 240, ante, § 1217.

Notes of Decisions

Certiorari.—A final decree of a Circuit Court of Appeals in a suit to enjoin the infringement of a trade-mark registered under section 9485, ante, can be reviewed by the federal Supreme Court only upon certiorari in view of this section. Hutchinson, Pierce & Co. v. Loewy (1910) 30 Sup. Ct. 613, 217 U. S. 457, 54 L. Ed. 838.

An appeal to the federal supreme court to review a decision of a circuit court of appeals in a case arising under the trade-mark act of 1905 is placed upon the same footing, as respects the remedy by certiorari, as cases arising under the patent laws. Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

§ 9504. (Act Feb. 20, 1905, c. 592, § 19.) Power of courts to grant injunctions; recovery of damages in addition to profits to be accounted for; treble damages; assessment of profits and damages.

The several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause

the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed. (33 Stat. 729.)

See notes to section 1 of this act, ante, § 9485.

Section 16 of this act, mentioned in this section, is set forth ante, § 9501.

Damages are not recoverable in a suit for infringement by a party failing to give the notice of registration prescribed by section 28 of this act, post, § 9514, except on proof that defendant was notified of infringement, and continued the same after such notice, by a further provision of said section 28.

Notes of Decisions

1. Grounds of action.
2. Conditions precedent.
3. Defenses—In general.
4. —— Laches.
5. —— Estoppel.
6. Adequate remedy at law.
7. Persons entitled to sue.
8. Persons liable.
9. Jurisdiction.
10. Retention of jurisdiction acquired.
11. Parties.
12. Pleading.
13. Evidence.
14. —— Presumptions and burden of proof.
15. —— Admissibility.
16. —— Weight and sufficiency.
17. Discovery.
18. Temporary injunction—In general.
19. —— Imitation or simulation.
20. —— Rights in doubt.
21. —— Discretion of court.
22. —— Injury or inconvenience to defendant.
23. —— Damage or injury to complainant.
24. —— Effect of laches or estoppel.
25. —— Security.
26. —— Scope of inquiry and questions considered.
27. —— Evidence.
28. Effect of prior decisions.
29. Damages and profits—Infringement.
30. —— Unfair competition.
31. Decree or order.
32. Costs.
33. Violation of injunction.

1. Grounds of action.—A court of equity will assume jurisdiction of the infringement of a trade-mark only for the purpose of protecting the property; and the protection of the public is not of itself sufficient to give jurisdiction. Avery v. Meikle (1883) 81 Ky. 73.

That complainant employed as a trade-name for its pavement the word "Bitulithic," and caused it to be copyrighted and filed for record as a copyrighted word in the office of the secretary of state, was no ground for restraining defendant from contracting with municipalities for the putting down of a pavement described as a "Bitulithic" pavement, where the proposals required the pavement to be made according to certain specifications showing the materials and manner of construction. Warren Bros. Co. v. Barber Asphalt Pav. Co. (1906) 108 N. W. 652. 13 Detroit Leg. N. 445, 145 Mich. 79.

An injunction will lie to restrain one in the use of the trade-mark of another. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

The mere possession by a defendant of a die for the printing of plaintiff's trade-mark, which the defendant decided, as soon as it was made, not to use, and from which no damage has resulted, is too trivial to authorize an injunction. Stetson v. Brennen (1897) 48 N. Y. S. 601, 21 App. Div. 552.

Infringement, see notes under § 9501, ante.

Unfair competition, see notes under § 9508, post.

2. Conditions precedent.—Where a retiring partner on resuming business by himself erected signs containing the old firm name in a misleading manner, and refused to remove such signs, the remaining partner was exonerated from any obligation to offer to contribute to the expenses of the removal or to allow a reasonable time therefor as a condition precedent to his right to sue to restrain the maintenance of the signs. Peterson v. Humphrey (N. Y. 1857) 4 Abb. Prac. 394.

3. Defenses—In general.—It is not an equitable defense to an action to restrain infringement of a trade-mark that defendant's wares are equal in quality to those of plaintiff. Taylor v. Carpenter (C. C. 1846) Fed. Cas. No. 13,785; Cleveland Stone Co. v. Wallace (C. C. 1892) 52 Fed. 431; Shaver v. Shaver (1880) 54 Iowa, 208, 6 N. W. 188, 37 Am. Rep. 194; Taylor v. Carpenter (N. Y. 1844) 11 Paige, 292; Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586; Partridge v. Menck (N. Y. 1846) 2 Sandf. Ch. 622; Partridge v. Menck (N. Y. 1877) 2 Barb. Ch. 101; Prince Mfg. Co. v. Prince's Metallic Paint Co. (1892) 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

In action for injunction it is no defense that other parties in other localities have done as defendant did, unless it appears that the plaintiff assented to or acquiesced in such infringements on his rights. Funke v. Dreyfus (1882) 34 La. Ann. 80, 44 Am. Rep. 413; Filley v. Fassett (1869) 44 Mo. 168, 100 Am. Dec. 275.

It is no defense that the name of one of the infringing firm accompanied the

brand on the goods sold by them, instead of the name of complainants. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, affirming decree Holt v. Menendez (C. C. 1885) 23 Fed. 869.

It is no defense that the name of one of the infringing firm accompanied the brand on the goods sold by them, instead of the name of complainants. Id.

It is not a defense to a suit to enjoin infringement of a trade-name that defendant uses distinctive labels or forms of package. N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (1900) 102 Fed. 327, 42 C. C. A. 376.

Where the defendant more than two years before suit on notice from complainant of its claim ceased the acts complained of, and thereafter committed no act of unfair competition, complainant is not entitled to either an injunction or an accounting. Ferguson-McKinney Dry Goods Co. v. J. A. Scriven Co. (1908) 165 Fed. 655, 91 C. C. A. 491.

Where defendant sold three bottles of spurious whisky bearing complainant's trade-mark, to complainant's detectives, and also had in his possession a supply of labels carrying complainant's trade-mark, which might be easily affixed to spurious goods, so as to palm it off on the public for complainant's straight whisky, the fact that the sale was by complainant's solicitation did not preclude complainant from an injunction, under the rule that a plaintiff cannot recover damages for an act done by defendant at plaintiff's solicitation. Julius Kessler & Co. v. Goldstrom (1910) 177 Fed. 392, 101 C. C. A. 476; Same v. Klein (1910) 177 Fed. 394, 101 C. C. A. 478.

A defendant, who indulged in unfair competition with respect to certain labels and packages, is not entitled to immunity by reason of the fact that complainant has used in his business other labels and packages, as to which no charge of unfair competition can be made. Gulden v. Chance (1910) 182 Fed. 305, 105 C. C. A. 16, reversing decree (C. C. 1910) 180 Fed. 178.

Where defendant manufactured and sold a competing article in bottles of similar shape and character to those of plaintiff, it was no defense to suit for unlawful competition that defendant had done all in his power to destroy the similarity, but had not been successful in doing so. Moxie Co. v. Danost (1913) 206 Fed. 434, 124 C. C. A. 316, reversing decree (D. C. 1912) 197 Fed. 678.

If a manufacturer or wholesale dealer willfully puts up goods in such a way that the ultimate purchaser will be deceived into buying them as the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409, reversing decree (C. C. 1912) 192 Fed. 930.

It is no defense to infringement suit that defendant had purchased machines constructed on plaintiff's order for the manufacture of the article under the license, where such machines were not made by plaintiff, and he derived no advantage from their construction or purchase. Martha Washington Creamery Buttered Flour Co. of United States v. Martien (C. C. 1890) 44 Fed. 473.

It is no defense to infringement suit that compensation may be made, for plaintiff is not seeking to enforce a forfeiture, but insists that the license is terminated by the terms of the contract. Id.

The facts that the infringer of a trade-mark, on being notified of his infringement, told his customers to erase the trade-marks from their goods, and had since gone out of business, are not ground for denying an injunction, where every step of the suit has been contested by the infringer, and he has put the complainants to the expense of proving every fact necessary to establish their right and his infringement. Hutchinson v. Blumberg (C. C. 1892) 51 Fed. 829.

It is no defense to a suit for infringement of the trade-mark "Cottolene" by the use of the word "Cottoleo" that defendant sold under his own name, and made no attempt, other than by use of the word "Cottoleo," to sell his goods as if manufactured by plaintiff. N. K. Fairbank Co. v. Central Lard Co. (C. C. 1894) 64 Fed. 133.

One who, after using an infringing label for some time, discontinues it merely for financial reasons, still claiming a right to use it, should be enjoined. Saxlehner v. Eisner & Mendelson Co. (C. C. 1898) 88 Fed. 61, decree modified (1899) 91 Fed. 536, 33 C. C. A. 291, which is reversed (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

Where there are strong resemblances between the name and dress of the goods of defendant and complainant, and no sufficient reason for such resemblances appears, the fact that there are differences which appear on a comparison is not a defense to a suit for unfair competition. Sterling Remedy Co. v. Gorey (C. C. 1901) 110 Fed. 372.

The fact that two corporations are located in different communities does not affect the right of one to an injunction restraining the other from unfair competition by adopting a similar corporate name, where they are engaged in the same business, and their products are both sold in the same open markets. Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C. 1902) 121 Fed. 357.

The fact that the infringement of a trade-mark had ceased before the com-

mencement of a suit in equity therefor does not deprive the court of jurisdiction, where the bill alleges a threatened and intended continuance of such infringement, which allegation was justified by the facts. Saxlehner v. Eisner (C. C. 1905) 140 Fed. 938, decree affirmed 147 Fed. 189, 77 C. C. A. 417, writ of certiorari denied Eisner v. Saxlehner (1906) 27 Sup. Ct. 778, 203 U. S. 591, 51 L. Ed. 331.

The claim that a conveyance by one manufacturing corporation to another contains a provision in violation of the anti-trust law of the United States, is not available as a defense by another manufacturer when sued for infringement or unfair competition, where it is shown that the same has been continuously used by the grantee as its own, since a time prior to the commencement of the alleged infringement or unfair imitation. R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co. (C. C. 1907) 151 Fed. 819.

Where defendant continued to make use of complainant's trade-mark after notice to desist and contested a suit brought to compel it to do so, complainant's right to injunction is not defeated because defendant had, in fact, ceased such use before the suit was brought, which fact was not known to complainant. Thomas G. Plant Co. v. May Mercantile Co. (C. C. 1907) 153 Fed. 229; Same v. Hamburger (C. C. 1907) 153 Fed. 232.

An agreement between two manufacturers by which each agreed not to refill and use a trade receptacle of the other without removing or obliterating the plate thereon, was not a license to either to use the tanks of the other, and no defense to a suit to enjoin infringing of trade-mark and unfair competition. Prest-O-Lite Co. v. Post & Lester Co. (C. C. 1908) 163 Fed. 63.

Complainant held not entitled to an injunction to restrain an alleged infringement of trade-mark; the purpose of the suit being to protect plaintiff in monopolizing sales. Coca-Cola Co. v. Bennett (D. C. 1915) 225 Fed. 429.

It is no defense that defendant commenced using a trade union's labels fraudulently before the statute authorizing an action to enjoin such use was passed. Tracy v. Banker (1898) 49 N. E. 308, 39 L. R. A. 508, 170 Mass. 266.

An injunction will be granted where at the time the suit was begun defendant was infringing the right of complainant to the exclusive use of trade-marks, although at the time of final hearing such practices had ceased, and defendant had promised a perpetual cessation of the infringement. Clark Thread Co. v. William Clark Co. (1897) 37 A. 599, 55 N. J. Eq. 658, reversed (1898) 40 A. 686, 56 N. J. Eq. 789.

The fact that one has been a wrongdoer in the use of his name as a trade-name does not warrant equity to prevent him from subsequently using in good faith his name as a trade-name in the same business. International Silver Co. v. Rogers (1906) 63 A. 977, 71 N. J. Eq. 560.

In an action for infringement, the fact that shortly before service of summons defendant had stopped using the labels did not preclude plaintiff from a right to continued injunction. India Rubber Co. v. Rubber Comb & Jewelry Co. (1879) 45 N. Y. Super. Ct. (13 Jones & S.) 258.

That the play entitled "Chanticlair" was produced in Europe by the persons from whom defendant obtained their rights before the play "Chantecler" is not a defense to a claim for injunction against a burlesque of the play "Chanticler"; reports of the character of the play "Chantecler" having preceded its actual production. Frohman v. William Morris (1910) 123 N. Y. S. 1090, 68 Misc. Rep. 461.

It is no defense to an action for infringement of the right to use the name acquired by a purchaser of a bankrupt tea company that plaintiff agreed to sell defendant part of the business but failed to keep his bargain. James Van Dyk Co. v. F. V. Reilly Co. (1911) 130 N. Y. S. 755, 73 Misc. Rep. 87.

Where a person has by the expenditure of money and labor built up a business under a trade-name, another person will be enjoined from using the same name or one so similar to it as to mislead, and having been incorporated by such name is not a defense. Backus Oil Co. v. Backus Oil & Car Grease Co. (1880) 8 Ohio Dec. 93, 5 Wkly. Law Bul. 546.

Prior use, see notes under § 9501, ante.

Deception of public, see notes under § 9506, post.

Intent as determining infringement, see notes under § 9501. ante.

As determining unfair competition, see notes under § 9508, post.

4. —— **Laches.**—Equity will not, as a general rule, refuse an injunction against unfair competition in trade on the ground of laches, even though the delay may be such as to preclude an accounting of profits. Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co. (1908) 117 N. W. 447, 105 Minn. 315; Gowans v. Ahlborn Bros. (Pa. 1886) 4 Kulp, 31; Hoyt v. Hoyt (1886) 43 Leg. Int. 151, 2 Pa. Co. Ct. R. 152.

The right to an injunction against the intentional use of complainant's trade-mark is not lost by delay of 13 years, where it does not appear that the trade-mark has acquired an increased value from defendant's use; but an accounting will not be granted. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526 (affirming decree Holt v. Menendez [C. C. 1885] 23 Fed. 869); Manhattan Medicine Co.

v. Wood (C. C. 1878) Fed. Cas. No. 9,026.

A right of action is not defeated on the ground of laches by failure for many years to assert it, when, during that time, the owner was making repeated, persistent, and, for a long time, unsuccessful, efforts in his own country to establish his rights. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291; Same v. Neilsen (1900) 21 Sup. Ct. 16, 179 U. S. 43, 45 L. Ed. 77, reversing decree (1899) 91 Fed. 1004, 34 C. C. A. 690.

No exemption from the defenses of laches to a suit by the French Republic and its lessee was effected by the declaration in article 8 of the treaty with France of June 11, 1887 (25 Stat. 1376), that "the commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not of a trade or commercial mark." La Republique Francaise v. Saratoga Vichy Spring Co. (1903) 24 Sup. Ct. 145, 191 U. S. 427, 48 L. Ed. 247, affirming decree La Republique Francaise v. Saratoga Vichy Springs Co. (1901) 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830.

A delay of eight years before commencing suit to enjoin infringement will not bar relief, where the defendant's competition during that time was inconsiderable. Rahtjen's American Composition Co. v. Holzappel's Composition Co. (1900) 101 Fed. 257, 41 C. C. A. 329, reversed Holzapfel's Compositions Company v. Rahtjen's American Composition Company (1901) 22 Sup. Ct. 6, 183 U. S. 1, 46 L. Ed. 49.

A suit for unfair competition in the sale of water from mineral springs, brought in the name of a sovereign nation, which is the owner of such springs, will not preclude the defense of laches, where the party beneficially interested as plaintiff is a private corporation. La Republique Francaise v. Schultz (1900) 102 Fed. 153, 42 C. C. A. 233.

A complainant is not entitled to a preliminary injunction, where the real defendant, who is defending although not nominally a party, has been openly and notoriously carrying on the competition complained of for more than 10 years in the same city with complainant and with its knowledge, and no such relief has been previously asked for. Edward & John Burke v. Bishop (1906) 144 Fed. 838, 75 C. C. A. 666.

Under the circumstances of this case, complainant, although it may be entitled to an injunction, is barred by its laches from the right to an accounting for profits. Worcester Brewing Corp. v. Rueter & Co. (1907) 157 Fed. 217, 84 C. C. A. 665.

The proprietor of the Hunyadi Janos Springs in Buda-Pesth, Hungary, having through laches lost the right to protection in a trade-mark, except in connection with the word "Janos," cannot maintain a suit to enjoin the sale of a water made in this country under the label "Carbonated Artificial Hunyadi, Conforming to Fresenius' Analysis of the Hunyadi Janos Springs," there being nothing in such name to mislead purchasers or make a case of unfair competition. Saxlehner v. Wagner (1907) 157 Fed. 745, 85 C. C. A. 321, decree affirmed (1910) 30 Sup. Ct. 298, 216 U. S. 375, 54 L. Ed. 525.

A suit to enjoin future infringement of a trade-mark is not subject to the general rule of laches and the statute of limitations because repeated infringements establish no right to continue them, and mere delay in suing to enjoin them does not prove an abandonment of his rights by an owner of a trade-mark, or an estoppel from preventing subsequent infringement. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 35, 104 C. C. A. 475. 32 L. R. A. (N. S.) 274.

Delay in bringing suit for infringement, which would bar the right to recover damages for prior infringement, will not necessarily preclude relief in equity against further infringement; the matter being within the discretion of the court. Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin (1910) 183 Fed. 22, 105 C. C. A. 314, affirming decree (C. C. 1909) 171 Fed. 125.

Where plaintiff, after notifying defendant of his infringing use of a trade-mark, permitted such use for 20 years with no further objection, the laches was such as disentitled it to an injunction restraining defendant from using it in the territory where it had established its business and the reputation of its goods during the intervening years. Id.

The first appropriator of a trade-mark may, by laches or estoppel, lose its right to restrain a later user. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. A. 1915) 226 Fed. 531.

Injunction against future trade-mark infringement will not be denied because of the mere laches of complainant, not constituting an estoppel. Theodore Rectanus Co. v. United Drug Co. (C. C. A. 1915) 226 Fed. 545.

One who in good faith uses a label in ignorance that it is another's trade-mark will be restrained from further using the same; but if the owner of the trade-mark has had knowledge of such use, and through indifference or negligence has taken no steps to protect his rights, he is not entitled to an account of sales or damages. Low v. Fels (C. C. 1888) 35 Fed. 361.

In a suit to restrain the infringement of plaintiffs' trade-mark and for an account of profits, where the only evidence of notice to plaintiffs of the illegal use, and consequent laches in demanding an account, was the fact that

they had an agency 800 miles distant from defendants' place of business, the plea presented no sufficient defense. Gilka v. Mihalovitch (C. C. 1892) 50 Fed. 427.

The use of the name "Vichy" in connection with an artificial product, having been begun in good faith, and continued for 30 years without objection on the part of complainants, they could not be heard to assert the right to an injunction. La Republique v. Schultz (C. C. 1899) 94 Fed. 500.

A delay of six years, with knowledge of defendant's acts, will not defeat the right to an injunction, where the right is clear, although it may preclude the recovery of damages for the past wrong. Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C. 1902) 121 Fed. 357.

Where complainant had no knowledge of defendant's use of the infringing words until 1902, and plaintiff brought suit promptly thereafter to enjoin such use, and to restrain defendant from selling his commodity in packages similar to complainant's packages, complainant was not barred from relief by laches. Devlin v. McLeod (C. C. 1904) 135 Fed. 164.

Where complainant delayed suit for several years, in the meantime having imitated and copied another's methods, labels, and mode of advertising, it was guilty of such laches as estopped it from maintaining the suit. Virginia Hot Springs Co. v. Hegeman & Co. (C. C. 1905) 138 Fed. 855, decree affirmed (1906) 144 Fed. 1023, 73 C. C. A. 612.

The right to an injunction against the infringement is not defeated by the length of time of such use unknown to the proprietor, or by the fact that he has not, up to the time of the suit, extended his trade to the locality occupied by defendant. Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C. 1906) 144 Fed. 139, decree affirmed Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506.

Where various events delayed final prosecution of an infringement suit for thirteen years, although there were no motions or request for more expeditious prosecution, complainant was not guilty of such laches as to preclude an injunction, though not entitled to an accounting. Edward & John Burke, Limited, v. Bishop (C. C. 1910) 175 Fed. 167.

A complainant is not entitled to protection against infringement of its labels, capsule, and collocation, used in the sale of an article of merchandise, if, for a long period, it has knowingly allowed others to use substantially the same capsule, labels, and collocation without objection. Id.

Mere delay unattended with such circumstances as show acquiescence in the use by another of an infringing trademark will not produce a forfeiture so as to prevent an injunction against further infringement. Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, decree reversed Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

A delay of several years before commencing suit, with knowledge that defendant was openly using the alleged infringing name and expending large sums in advertising its product thereunder, constitutes such laches as to bar injunctive relief as well as an accounting. Valvoline Oil Co. v. Havoline Oil Co. (D. C. 1913) 211 Fed. 189.

While plaintiff was entitled to an injunction restraining defendant's use of the word "Jenkins" as the name of a valve, except in conjunction on the same side with the words "Made by Kelly-Jones Co.," plaintiff's laches for 10 years barred its right to recover damages and costs. Jenkins Bros. v. Kelly & Jones Co. (D. C. 1914) 212 Fed. 328.

Mere failure to assert one's right to a trade-mark by infringement suit for a number of years, unattended by circumstances sufficient to raise an estoppel, will not necessarily bar his right to maintain such a suit. Star Brewery Co. v. Val Blatz Brewing Co. (1911) 36 App. D. C. 534.

Where plaintiff did not know of the infringing use of his label by others until 1899, and such use did not come into competition with him until 1902, plaintiff was not estopped to enjoin use of the label in his locality by delaying suit until February, 1903. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

Where the infringement was not complete until five or six months before action brought, though it began the year previous, there was no such laches as would bar plaintiff's right to relief. Avery v. Meikle (1887) 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604.

The fact that the officers of an association entitled to protection from the use of counterfeit labels and stamps, knew of the defendant's acts for more than two years before bringing suit for injunction, but supposed that they could have no remedy in equity against him, does not show such laches as will defeat the suit. Tracy v. Banker (1898) 170 Mass. 266, 49 N. E. 303, 39 L. R. A. 508.

A delay of nearly two years in suing for infringement is not such laches as defeats the right to require an accounting, where the delay was in part caused by negotiations between the parties, and in part by the desire of the owner of the trade-mark to collect other money due to him from the wrongdoer, especially where the owner notified the wrongdoer of his claim, and warned him that he would be held responsible for any further use of the trade-mark.

Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

Failure of complainant to bring suit to restrain an infringement of plaintiff's name, applied to his restaurant, for a year, did not constitute such laches as to preclude plaintiff from relief. Gamble v. Stephenson (1881) 10 Mo. App. 581.

Laches of the plaintiff will not avail as a defense in a proceeding to restrain the use of a trade-name, where the defendant adopted the name with a fraudulent intent. Sanders v. Jacob (1885) 20 Mo. App. 96.

During the use by defendant for many years of an imitation of plaintiff's trade-mark, part of which was without active objection, different changes in shape and general appearance were introduced in the course of attempts at an amicable adjustment. Held, the accounting prayed for should be denied without prejudice to the right to proceed at law for damages. Drummond Tobacco Co. v. Addison Tinsley Tobacco Co. (1892) 52 Mo. App. 10.

In a suit to restrain infringement of a trade-mark, evidence that defendant and its predecessors for many years had been using the labels, but that plaintiff did not discover such use until shortly before the institution of the suit, does not show such laches or neglect as to estop plaintiff from asserting its right to injunctive relief. W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co. (1904) 107 Mo. App. 507, 81 S. W. 648.

Where plaintiff knew of defendant corporation, and delayed suit for infringement for a year, during which time defendant expended a large sum of money in establishing a plant and building up a business, complainant was barred by laches from demanding an accounting of the profits made by defendants. International Silver Co. v. William H. Rogers Corp. (1904) 57 A. 725, 66 N. J. Eq. 140, reversed (Err. & App. 1905) 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506.

Although complainant was entitled to an injunction restraining the use of certain descriptive words by another, it was not entitled to an accounting of profits, where it had been guilty of laches and delay in asserting its rights. Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co. (1913) 88 A. 210, 81 N. J. Eq. 419, 519.

A delay of six months in filing a bill to restrain use of a trade-name owned by complainants held not such laches as would preclude relief. Munn & Co. v. Americana Co. (N. J. 1913) 88 A. 330.

Where a corporation seeks to enjoin the unlawful use of its corporate name or the distinctive part thereof, laches can never have the effect of a concession that a person will not extend the order or the application of his name, nor can it confer upon the wrongdoer the right to build up and establish the business in another's name. Amoskeag Mfg. Co. v. Garner (N. Y. 1876) 54 How. Prac. 297.

Where a manufacturer of cotton goods seeks yearly to enjoin the application of his trade-mark, the question of his right to restrain the application of that mark to a variety of cotton goods in which hitherto he has not dealt is a sufficiently close one that extreme laches would solve the question adversely to him. Id.

Where in an action for infringement it was shown that plaintiffs knew of the infringement for a long time, but took no steps to arrest it, they could recover damages only for such sales as were shown to have taken place after the commencement of the action. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1879) 57 How. Prac. 121.

Where plaintiff's agent, resident in the state, knew of the alleged infringement for five years before action brought, plaintiffs are not entitled to an accounting of profits, by reason of laches. Cahn v. Gottschalk (1888) 14 Daly, 542, 2 N. Y. Supp. 13.

Where, for 25 years, various religious bodies other than plaintiff or its predecessor used the words "Salvation Army" as part of their title, were engaged in the same work to which plaintiff was devoted, and used the words "War Cry" as a part of their newspaper titles, plaintiff could not because of laches sue to restrain the use of the name "Salvation Army" and the name "War Cry."—Salvation Army in United States v. American Salvation Army (1908) 114 N. Y. S. 1039, 62 Misc. Rep. 360.

Delay of nearly two years in seeking relief from infringement precluded plaintiff from obtaining an account of gains and profits. Lloyd v. William S. Merrill Chemical Co. (Super. Ct. Cin. Ohio, 1891) 25 Wkly. Law Bul. 319.

Delay of three years, and until defendant had built up an extensive business, to restrain the use of a name, where no transfer was ever asked, and no use of the name by complainant made, showed such laches and intent to avoid the use of the name as to defeat an application for injunction. Tygert-Allen Fertilizing Co. v. J. F. Tygert Co. (1899) 43 A. 224, 191 Pa. St. 336.

The fact that defendant put his packages on the market a year before complainant filed his bill to restrain such competition, does not deprive complainant of his right to an accounting. C. F. Simmons Medicine Co. v. Mansfield Drug Co. (1893) 93 Tenn. (9 Pickle) 84, 23 S. W. 165.

Ground for denial of preliminary injunction, see notes post, this section.

5. —— **Estoppel.**—Where the purchaser on foreclosure uses the trade-mark under claim and color of title, with the full knowledge of the former owner, for eight years without objection, the latter is estopped to afterwards maintain a suit to restrain such user.

Prince's Metallic Paint Co. v. Prince Manuf'g Co. (1893) 57 Fed. 938, 6 C. C. A. 647, affirming decree (C. C. 1892) 53 Fed. 493.

Where the treasurer and managing director of a corporation assented to or did not object to the name chosen by defendant as a corporate name, his action had enough of an official and binding character to estop his company from objecting to the use by the new company of its corporate name in connection with the thread made by it. Clark Thread Co. v. Armitage (1896) 74 Fed. 936, 21 C. C. A. 178, affirming (C. C. 1895) 67 Fed. 896.

The fact that another corporation, also had the right to use "Clark" in connection with thread which had always been distinguished from complainant's thread by difference in color of labels and the form of words, did not prevent complainant firm from enjoining defendant's fraudulent use of the words. Id.

Plaintiffs were estopped by the sale of business and good will, which, although made in the corporate name, was negotiated by them and of which they were individually the chief beneficiaries, from using the name Hall in connection with a competing business to the injury of the purchaser. Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co. (1906) 143 Fed. 231, 74 C. C. A. 361, reversed Donnell v. Same (1908) 28 Sup. Ct. 288, 208 U. S. 267, 52 L. Ed. 481.

In a suit to enjoin further use of the name of defendants' patent medicine as unlawful competition, complainant's inexcusable laches is no defense to its right to an injunction restraining defendants' future misconduct. Dr. Peter H. Fahrney & Sons Co. v. Ruminer (1907) 153 Fed. 735, 82 C. C. A. 621.

Estoppel held to defeat injunctive relief against one using a trade-mark. Theodore Rectanus Co. v. United Drug Co. (C. C. A. 1915) 226 Fed. 545.

Acquiescence by any person in the wrongful use of his name will not estop him from asserting his rights in equity, unless he has notice during such acquiescence of the facts rendering the use of his name wrongful. Horton Mfg. Co. v. Horton Mfg. Co. (C. C. 1883) 18 Fed. 816.

The owner of a trade-mark is not estopped to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on the business as to which the infringement is charged. Moxie Nerve-Food Co. v. Baumbach (C. C. 1887) 32 Fed. 205.

Where the long and successful use of a trade-mark or name is clearly established, the fact that plaintiff has recognized and permitted the limited use thereof by another, which does not appear to have misled anybody, will not estop him to prevent others from using it. Tetlow v. Tappan (C. C. 1898) 85 Fed. 774.

Where, by stipulation in a former suit, complainant waived all claim against the principal infringer, he is estopped to sue for contributory infringement one who had made and furnished to such infringer the cartons used by it containing the infringing trade-mark. Hillside Chemical Co. v. Munson & Co. (C. C. 1906) 146 Fed. 198.

The fact that complainant might have a remedy for infringement of his patent does not preclude him from maintaining a suit for unfair competition. Fonotipia Limited v. Bradley (C. C. 1909) 171 Fed. 951.

Nonaction of Ford Motor Company held not to prevent it from subsequently restraining a dealer in auto parts from advertising them as Ford articles. Ford Motor Co. v. Wilson (D. C. 1915) 223 Fed. 808.

Acquiescence in the use of a certain trade-name for a number of years in a wholesale shoe business does not preclude one from objecting to its use in a retail shoe business, since the mere use of a trade-name in one business does not give the right to use it in another business. Nolan Bros. Shoe Co. v. Nolan (1900) 63 P. 480, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346.

Failure of plaintiffs to interfere with the wrongful use of their trade-mark by defendant's vendor does not estop them from enjoining defendant from its use, though he has expended money in the purchase and improvement of the property on the faith of their supposed acquiescence in its use. Northcutt v. Turney (1897) 41 S. W. 21, 101 Ky. 314, 19 Ky. Law Rep. 483.

Where defendant is not shown to have practiced any simulation of complainant's title or trade-mark, and complainant by its own acts created in great part the very confusion of which it complains, injunction will be refused. Bear Lithia Springs Co. v. Great Bear Spring Co. (N. J. 1907) 68 A. 86.

Where plaintiff sought to restrain defendant from selling pills under plaintiff's label, defendant was estopped to claim that plaintiff was not entitled to an injunction because the pills were an innocent humbug by which both parties were attempting to deceive the public. Comstock v. White (N. Y. 1860) 18 How. Prac. 421, 10 Abb. Prac. 264.

In a suit to enjoin the use of a trade label after its alleged abandonment by defendant's predecessor, judgment should be rendered for defendant upon his counterclaim, by enjoining plaintiff from using the trade-name, upon a showing that plaintiff never acquired any right thereto as against defendant. Waterproofing Co. v. Hydrolithic Cement Co. (1912) 138 N. Y. S. 265, 153 App. Div. 47.

Defendant will be enjoined from conducting its hotel under the same name

as that of plaintiffs, in the same neighborhood, and previously established, such use resulting in confusion and injury to the hotels and the public, although defendant's hotel is larger and more expensive, and caters more to transient trade, while that of plaintiffs is more of a family hotel, and although plaintiffs bought their hotel pending such injunction suit by their vendor, and knew of the litigation. Martell v. St. Francis Hotel Co. (1909) 98 Pac. 1116, 51 Wash. 375.

6. Adequate remedy at law.—Where defendant's label has been slightly changed shortly before suit commenced, but still remains practically the same, the complainant is not restricted to an action at law for an injury resulting from the use of the old label, but equity may consider both together. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, 30 C. C. A. 496, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 690, 43 L. Ed. 1179.

An injunction will not be issued on account of a single act of fraud and unfair competition, there being an adequate remedy at law. Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

Where defendant used plaintiffs' trade-name and a copy of their badge in a competing business to deceive the public, plaintiffs had no adequate remedy at law, regardless of the question of defendant's insolvency, and were therefore entitled to an injunction. Morton v. Morton (1905) 82 P. 664, 148 Cal. 142.

Where it appears that the party infringing a trade-mark intends to continue the wrong, an injunction against such continuance is the sole adequate remedy. Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

The use of a similar trade-mark, with the intention of deceiving the public, will be enjoined, where the injuries likely to result are irreparable in damages. Whitley Grocery Co. v. McCaw Mfg. Co. (1898) 32 S. E. 113, 105 Ga. 839.

Infringement of plaintiff's trade-mark is a fraud on the owner of the trade-mark, coupled with a damage against which the legal remedy may not be adequate and complete relief, so as to authorize the interposition of equity. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

Where the Seattle Press-Times Company executed a mortgage on its newspaper plant, circulation, franchises, and good will in 1895, and in 1897 the Times Printing Company was incorporated, and purchased the paper, and published it under the name of the Seattle Daily Times for two years before a sale was made under the mortgage, the plaintiff, as assignee of the purchaser under the foreclosure, cannot enjoin the defendant from using the name Press-Times, or any kindred name, since he has a remedy at law. Lawrence v. Times Printing Co. (1900) 61 P. 166, 22 Wash. 482.

See, also, notes under § 1244, ante.

7. Persons entitled to sue.—A number of independent mill owners in Minneapolis, Minn., may join in a suit to prevent a dealer procuring his flour elsewhere from branding it "Minneapolis, Minn.," etc. Pillsbury-Washburn Flour-Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162 (reversing order [C. C. 1897] 82 Fed. 816).

Several cigar manufacturers, interested in obtaining the same relief against defendant for unfair competition in the sale of cigars not made in Key West, in packages marked and labeled to indicate that they were made there, were entitled to join as complainants. Key West Cigar Mfrs.' Ass'n v. Rosenbloom (C. C. 1909) 171 Fed. 296.

Where an association of cigar manufacturers, as an association, did not manufacture or deal in cigars, and was not in any competition with defendant, it could not sue in equity for unfair competition, alleged to consist in the sale by defendant of cigars not made in Key West in packages marked and labeled to indicate that they were made there. Id.

Where one person or corporation is entitled to relief in a case of fraudulent competition in trade, two or more persons or corporations having a common interest in preventing the fraud may unite to maintain a suit in equity. Pillsbury-Washburn Flour-Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Northcutt v. Turney (1897) 41 S. W. 21, 101 Ky 314, 19 Ky. Law Rep. 483.

The fact that one flour mill is located 10 miles from Minneapolis, Minn., will not prevent the owner from joining other millers of that city in a suit to prevent unfair competition, when it appears that his mill is an integral part of a Minneapolis milling plant using the same machinery and processes. Pillsbury-Washburn Flour-Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162, remanding case (C. C. 1897) 82 Fed. 816.

An interest in the good will of the business or in the other property threatened is sufficient to maintain suit against fraudulent use of labels or symbols. Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878, affirming decree Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882.

Complainant, registering trade-mark for mixture of tobacco, held entitled to enjoin infringement by persons employing R., formerly employed by complainant and a former proprietor of complainant's business, who claimed to

have originated the mixture. Jacoway v. Young (C. C. A. 1915) 228 Fed. 630.

An alien manufacturer may maintain a bill for injunction against a citizen of the United States using his trade-mark. Coffeen v. Brunton (C. C. 1849) Fed. Cas. No. 2,946; Taylor v. Carpenter (N. Y. 1844) 11 Paige, 292.

Assignee of originator of article and title may enjoin infringing use of name, and style and appearance of article. Estes v. Worthington (C. C. 1887) 31 Fed. 154.

Plaintiff, having become sole proprietor of the business having a trade-mark from the original proprietor through several mesne purchases, is entitled to maintain the suit for an injunction. Jennings v. Johnson (C. C. 1889) 37 Fed. 364.

When a trade-mark is a mark of special qualities, due to the originator thereof, an assignee, who continues to use labels which contain the false statement that the goods are prepared by the originator, is not entitled to relief against an infringer. Alaska Packers' Ass'n v. Alaska Imp. Co. (C. C. 1894) 60 Fed. 103.

Where a licensing contract has been, in effect, declared in force, the licensee was entitled to a preliminary injunction in another jurisdiction to restrain unfair competition by another by using the name "Gramophone," to the exclusive use of which the complainant was entitled under his license so long as it remained in force. Seaman v. Johnson (C. C. 1901) 106 Fed. 915, decree reversed Johnson v. Seaman (1901) 108 Fed. 951, 48 C. C. A. 158.

Defendants were formerly agents for the sale of phonographs which are the invention of the complainant, Edison, and placed over their place of business a sign reading "The Edison Phonograph Agency," which sign they allowed to remain after the termination of their agency, although they continued to sell phonographs. Complainant neither manufactured nor sold phonographs, but was a stockholder in the corporations which manufactured and sold the same. Held, that the sign did not imply that defendants were agents for complainant, but only that they were agents for the sale of the machine known as the "Edison Phonograph," and that complainant had no pecuniary interest in the matter, either as an individual or as a stockholder, which entitled him to maintain a bill to enjoin such use of his name. Edison v. Hawthorne (1901) 108 Fed. 839, 48 C. C. A. 67, affirming decree (C. C. 1901) 106 Fed. 172.

The owner of patents, and also of a trade-name in connection therewith, may enjoin the use of such trade-name by another, although he is not at the time manufacturing the patented article, nor is it being made or sold by others. Janney v. Pan-Coast Ventilator & Mfg. Co. (C. C. 1904) 128 Fed. 121.

Complainant, not entitled to an injunction against using a company name adopted for business purposes in Philadelphia, on evidence showing prior use by them in New York, and also that complainant on their demand used such name for a considerable time only in connection with his own as agent. Corbin v. E. Taussig & Co. (C. C. 1904) 132 Fed. 662, decree modified Taussig v. Corbin (1906) 142 Fed. 660, 73 C. C. A. 656.

In a suit for unfair competition, the fact that the bottles used by defendant are of a patented design does not give the manufacturer and patentee any legal or equitable interest in the suit which entitles him to intervene. Moxie Nerve Food Co. of New England v. Modox Co. (C. C. 1908) 179 Fed. 415.

R. Solis, manager and largest stockholder of the Solis Manufacturing Company, turned over to it his whole business, good will and trade, and, although there was no formal transfer of the trade-mark, the corporation continued its use. Held, the corporation would not be denied relief against a third person on account of the condition of the title. Solis Cigar Co. v. Pozo (1891) 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

A foreign insurance company doing business in Iowa by comity under a license from that state was not deprived of the right to protection against the unlawful use of a portion of its name and trade symbol by an Iowa insurance company. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (Iowa, 1908) 114 N. W. 609.

A person who uses a trade-mark that another, by reason of its prior adoption, has the exclusive right to use, cannot restrain a third person from also using it. Parlett v. Guggenhiemer (1887) 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

Where the administrator of A. conveys to B. the right to use A.'s name in his business, the administrator may join with B. in a bill in equity, under Gen. St. Mass. c. 56, § 3, to restrain C. (A.'s former partner) from continuing to do business under the name of "A. & Co." Morse v. Hall (1872) 109 Mass. 409.

An injunction against the wrongful use of a union cigar label cannot be granted on the ground of special injury to plaintiffs, who are officers and members of the union, but are not manufacturers of or dealers in the cigars on which such label is used. Weener v. Brayton (1890) 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

Under St. Mass. 1895, c. 462, § 3, a voluntary trade union may bring a suit to prevent fraudulent use and counterfeiting of its labels. Tracy v. Banker

(1898) 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

A complaint in an action brought by "officers and members of the Cigar Makers' Protective Union No. 98, a branch and member of the Cigar Makers' International Union of America, composed of local union societies," to restrain defendant from putting up, selling, stamping, or offering for sale any boxes containing any cigars whatever, having posted, placed or put thereon a label or trade-mark in imitation of plaintiffs' label, and having thereon the words "Union Made Cigars," shows a proprietary interest in plaintiffs in the trade-mark or label entitling them to maintain the action. Allen v. McCarthy (1887) 37 Minn. 349, 34 N. W. 416.

Organization of a new company for sale of some of its products does not affect complainants' right to maintain a suit to restrain unfair competition by another manufacturer relating to the brush business, which was retained by complainant. Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co. (1913) 88 A. 210, 81 N. J. Eq. 419, 519.

The court of chancery has the power to prevent the pirating of trade-marks; and this, whether the complainant was the original inventor and proprietor of the article on which the mark is put or not. Partridge v. Menck (N. Y. 1847) 2 Barb. Ch. 101, 47 Am. Dec. 281.

The conductor of an enterprise for the innocent amusement of the public may have an injunction to restrain the unauthorized use of the name or designation adopted by him. Christy v. Murphy (N. Y. 1856) 12 How. Prac. 77.

Where plaintiff owned or controlled certain medicinal preparations, he was entitled to enjoin infringement, though he was not himself the manufacturer of the goods. Schmid v. Maeurer (1887) 9 N. Y. St. Rep. 843.

One or more members of an unincorporated association of operatives which has adopted a device to designate articles manufactured by its members may bring an action in behalf of all the members to restrain an infringement of the device. Strasser v. Moonelis (1888) 55 N. Y. Super. Ct. (23 Jones & S.) 197.

In a suit to enjoin the use of a trade-name and from conspiring to deprive plaintiff of its use, if the right to and ownership of the name is in defendants, or one of them, plaintiff would not be entitled to the relief demanded. Solar Baking Powder Co. v. Royal Baking Powder Co. (1908) 112 N. Y. S. 1013, 128 App. Div. 550.

Unlawfulness, arising from a corporation practicing medicine, does not preclude it from enjoining unfair competition in a separate enterprise for the manufacture and sale of proprietary medicines. World's Dispensary Medical Ass'n v. Pierce (1911) 96 N. E. 738, 203 N. Y. 419, modifying judgment (1910) 122 N. Y. S. 818, 138 App. Div. 401.

The subordinate lodges of a trades union association which has a common label for the use of all of its members cannot maintain a bill to restrain the unauthorized use of such label. McVey v. Brendel (1891) 144 Pa. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 13 L. R. A. 377, 27 Am. St. Rep. 625.

8. **Persons liable.**—The fact that defendant is selling alleged infringing packages as agent for a nonresident is no ground for refusing an injunction, though he may not be liable for profits. Walter Baker & Co. v. Sanders (1897) 80 Fed. 889, 26 C. C. A. 220.

A person who establishes a business for the purpose of engaging in unfair competition, and afterwards transfers such business to a corporation in which he becomes a stockholder, is liable to be enjoined with the corporation with respect to a continued unfair competition. Wm. G. Rogers Co. v. International Silver Co. (1902) 118 Fed. 133, 55 C. C. A. 83.

Stockholders in a corporation are not individually liable or subject to injunction because of unfair competition practiced alone by the corporation. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. (1906) 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182, decree modified Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. (1908) 28 Sup. Ct. 350, 208 U. S. 554, 52 L. Ed. 616.

Where the executive officers of a corporation held a full power of attorney authorizing them to act in all matters pertaining to the company, they could be personally charged with infringement of trade-marks and unfair competition in the transaction of the corporation's business. Saxlehner v. Eisner (1906) 147 Fed. 189, 77 C. C. A. 417, affirming decree (C. C. 1905) 140 Fed. 938, and writ of certiorari denied Eisner v. Saxlehner (1906) 27 Sup. Ct. 778, 203 U. S. 591, 51 L. Ed. 331.

One who took over the business of publishing certain books from another, pending a suit against the latter for infringing a trade-name in the title of such books, was bound by the decree subsequently entered in such suit. G. & C. Merriam Co. v. Saalfield (1911) 190 Fed. 927, 111 C. C. A. 517, opinion extended on rehearing (1912) 198 Fed. 369, 117 C. C. A. 245.

Individuals operating a corporation held proper defendants in a suit to restrain the use of a trade-name in such a manner as to infringe complainant's prior right to use the same name. Williams Soap Co. v. J. B. Williams Soap Co. (1911) 193 Fed. 384, 113 C. C. A. 310, writ of certiorari denied Same v. J. B. Williams Co. (1912) 32 Sup. Ct. 841, 225 U. S. 712, 56 L. Ed. 1268.

Personal liability of officers of a corporation for damages for infringement of trade-mark is not enforceable in equity as a sole ground of equitable relief.

Wm. A. Rogers v. Nichols (1915) 224 Fed. 415, 139 C. C. A. 643.

One who puts into the hands of retail dealers an article made by him, and so dressed up as to enable such dealers to deceive the ultimate purchaser, may be enjoined. Von Mumm v. Frash (C. C. 1893) 56 Fed. 830.

One who, after using an infringing label for some time, discontinues it merely for financial reasons, still claiming a right to use it, should be enjoined. Saxlehner v. Eisner & Mendelson Co. (C. C. 1898) 88 Fed. 61, decree affirmed (1899) 91 Fed. 536, 33 C. C. A. 291.

It is no sound objection to the granting of a preliminary injunction against unfair competition that defendants are sellers only, and not the manufacturers, where the manufacturer has been advised of the suit, and given an opportunity to be heard, of which he has availed himself. Hansen v. Siegel-Cooper Co. (C. C. 1900) 106 Fed. 690.

A merchant filling orders from customers for an article advertised by the manufacturer, and well known by its trade-name, with a different and inferior article, is chargeable with unfair trade, and may be enjoined at suit of the manufacturer. N. K. Fairbanks Co. v. Dunn (C. C. 1903) 126 Fed. 227.

In suit for unfair competition, only those conducting the business, and not their clerks or officers, held required to account. Hiram Walker & Sons v. Grubman (D. C. 1915) 222 Fed. 478.

Where a manufacturer puts it within the power of a dealer to deceive the public, and the public is deceived into believing that the manufacturer's goods were made by another, the manufacturer is guilty of unfair competition. Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

R., the manufacturer of goods wrongfully stamped with the trade-mark of the petitioner, conducted the business through an agent, who, with his own knowledge and consent, was held up by R. to the public as the proprietor, and, so far as the public could reasonably judge, was the proprietor. Held, an injunction against the further use of the trade-mark by this apparent proprietor should be granted, upon a petition brought for that purpose to which R. was not made a party. Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

In a suit to enjoin the infringement of a trade-mark and for damages, a joint decree was properly entered against defendants shown to be joint tort-feasors in the infringement. Arguelles v. Sabio (Fla. 1913) 63 So. 428.

Where wholesale dealers place goods bearing a fraudulent trade-mark in the hands of retailers, with which the retailers are enabled to deceive the public, the wholesale dealers are liable to an injunction, though they do not mislead or intend to mislead the retail dealers to whom they sell. George G. Fox Co. v. Glynn (1906) 78 N. E. 89, 191 Mass. 344, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619.

A commission merchant, who sells a spurious article, knowing its character, is liable to a suit to restrain its further sale by the proprietor of the trade-mark, and will be subjected to the costs of such suit. Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586.

One who organizes a corporation and owns practically all of the stock therein is a proper party defendant to an action against such corporation to enjoin the use of an infringing trade-name. Burrow v. Marceau (1908) 109 N. Y. S. 105, 124 App. Div. 665.

Equity will be reluctant, except in a clear case, to restrain a religious organization, though its name and methods bear some slight resemblance to another religious body. Salvation Army in United States v. American Salvation Army (1908) 114 N. Y. S. 1039, 62 Misc. Rep. 360.

9. Jurisdiction.—See notes under § 9502, ante.

10. Retention of jurisdiction acquired.—Where complainant was not entitled to an injunction, equity would not retain jurisdiction for a naked accounting of profits and damages; complainant's remedy at law being adequate and complete. Van Raalt v. Schneck (1908) 170 Fed. 1021, 95 C. C. A. 672, affirming decree (C. C. 1908) 159 Fed. 248.

Where, pending a suit for infringement of a trade-mark, complainant sold its business, good will, and trade-marks to another, but not its right to recover for past infringement, it parted with only a part of its interest in the suit, and the court, having acquired jurisdiction, will retain it to dispose of all the questions involved. Curtis Davis & Co. v. Smith (C. C. 1901) 105 Fed. 949.

11. Parties.—A manufacturer, whose business was injured by the unfair competition of defendant, held not required to join a jobber, through which it sold a portion of its product, in a suit for an injunction. Coca Cola Co. v. Gay-Ola Co. (1912) 200 Fed. 720, 119 C. C. A. 164.

In suit against officers of a corporation to restrain them from infringing trade-mark and for damages, the corporation alleged to have been formed in pursuance of a conspiracy by the officers is an indispensable party. Wm. A. Rogers v. Nichols (1915) 224 Fed. 415, 139 C. C. A. 643.

Where a distiller granted the sole and exclusive control of his bottle product for five years, and agreed not to permit others to use his trade labels, a bill by the grantee to enjoin infringement was defective which failed to make the distiller a complainant or state a reason for not doing so. Krauss v. Jos. R. Peebles' Sons Co. (C. C. 1893) 58 Fed. 585.

Assignees of defendants restrained from using a trade-mark, who use the

mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the original suit by supplemental bill. Dadirrian v. Gullian (C. C. 1897) 80 Fed. 986.

No injunction can issue against infringement, on a bill to which an exclusive licensee (when there is one) is not a party. Wallach v. Wigmore (C. C. 1898) 87 Fed. 469.

Where a corporation and a limited partnership had an actual, though not an equal, interest in the use of certain marks and labels, they were properly joined as plaintiffs in a suit for infringement thereof. Jewish Colonization Ass'n v. Solomon & Germanski (C. C. 1903) 125 Fed. 994.

A corporation is not an indispensable party to a suit for unfair competition against individuals, although defendants are charged with having fraudulently assumed the corporate name; since the authority of the corporation, if it was given, constitutes no defense. Elgin Nat. Watch Co. v. Loveland (C. C. 1904) 132 Fed. 41.

In a petition for an injunction brought by the owner of a trade-mark, who is apparently the sole proprietor of the business, a silent partner, whose existence is unknown to the public, is not a necessary party. Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

In an action to enjoin the violation of a trade-mark, persons who are not the publishers or makers of the infringing article, but who are engaged as the venders thereof, may be joined as defendants with the former. Matsell v. Flanagan (N. Y. 1867) 2 Abb. Prac. (N. S.) 459.

12. Pleading.—An injunction restraining the use of a trade-mark will not be granted upon the pleadings in a doubtful case, but the court will wait until the proofs are heard. Portuondo v. Monne (C. C. 1886) 28 Fed. 16; Partridge v. Menck (N. Y. 1846) 2 Sandf. Ch. 622; Spottiswoode v. Clark (N. Y. 1846) 2 Sandf. Ch. 628; Partridge v. Menck (N. Y. 1847) 2 Barb. Ch. 101, 47 Am. Dec. 281; Merrimack Mfg. Co. v. Garner (N. Y. 1855) 2 Abb. Prac. 318, 4 E. D. Smith, 387; Samuel v. Berger (N. Y. 1856) 4 Abb. Prac. 88; Same v. Buger (N. Y. 1856) 13 How. Prac. 342; Fetridge v. Merchant (N. Y. 1857) 4 Abb. Prac. 156; Wolfe v. Goulard (N. Y. 1859) 18 How. Prac. 64; Marshall v. Pinkham (1881) 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

A bill to restrain using a name claimed by complainant as a trade-mark, which contains no allegation of actual fraud or fraudulent intent on the part of defendant, is insufficient, unless plaintiff's right to the exclusive use of the name as a trade-mark is established. Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237, reversing decree Elgin Nat. Watch Co. v. Illinois Watch Case Co. (C. C. 1898) 89 Fed. 487, and affirmed (1901) 21 Sup. Ct. 270, 179 U. S. 665, 45 L. Ed. 365.

A bill to restrain defendant from using a name claimed by complainant as a trade-mark, which contains no allegation of actual fraud or fraudulent intent, is insufficient to entitle the complainant to relief, unless his right to the exclusive use of the name as a trade-mark is established. Id.

A bill did not state facts which entitled complainant to equitable relief, since it was not shown that purchasers bought defendant's products in the belief that they were made by complainant. American Washboard Co. v. Saginaw Mfg. Co. (1900) 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

The name "Bénédictine," as applied to an article of unchanging quality, has come to designate the quality and place of manufacture rather than the name of the manufacturer, and it is unnecessary for complainant, in order to be entitled to the protection of the trade-mark, to indicate that it claims as assignee, there having been no change in the place of manufacture or in the formula, and substantially none in the manufacturer. A. Bauer & Co. v. La Société Anonyme De La Distillerie De La Liqueur Bénédictine De L'Abbaye De Fécamp (1903) 120 Fed. 74, 56 C. C. A. 480.

A bill for unfair competition by the use by defendant of a name similar to one used by complainant must clearly allege that it was so used with intent to deceive the public or patrons, and an allegation that it was "calculated to deceive" is insufficient. Industrial Press v. W. R. C. Smith Pub. Co. (1908) 164 Fed. 842, 90 C. C. A. 604.

A bill, alleging the imitation of complainant's label, registered as a trade-mark and that defendant uses labels in so nearly the exact form and configuration of complainants as to deceive purchasers and induce them to purchase its goods as those of complainant states a cause of action for unfair competition as well as for infringement of trade-mark. G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133.

A cause of action for unfair competition and one for infringement of trade-mark may properly be joined. Id.

A bill for infringement of a trade-mark, which set out the original and alleged infringing labels, held to show on its face such intentional similarity between the two labels as to constitute infringement. Id.

A bill which alleged manufacture of article by plaintiff for defendant, under contract whereby plaintiff ceased the business of selling and that defendant had ceased buying under the contract, but was selling its own product, of identical appearance with plaintiff's does not state a cause of action for unfair competition. Favorite Mfg. Co. v.

Portland Mfg. Co. (1913) 208 Fed. 542, 125 C. C. A. 544.

The fraudulent intent, as charged in a bill for infringement of a trade-mark, must be taken as confessed, on demurrer to the bill and complainant will be entitled to an injunction. Enoch Morgan's Sons' Co. v. Hunkele (C. C. 1879) Fed. Cas. No. 4,493.

Where a bill alleged that by the use of certain labels complainant was enabled to receive a higher price for his cigars, and that the sale of counterfeit labels injured his trade, though there is no trade-mark in such labels as complainant shows special damage, and the action of defendants is confessedly fraudulent, in that they sold the spurious labels though they may not have used them on cigars of their own manufacture, the bill alleges good grounds for equitable relief. Carson v. Ury (C. C. 1889) 39 Fed. 777, 5 L. R. A. 614.

Where exhibits of the devices used by both complainant and defendant accompany the bill the court will sustain a demurrer, where the exhibits show that there is no infringement. Collins Chemical & Mfg. Co. v. Capitol City Mfg. Co. (C. C. 1890) 42 Fed. 64.

A bill disclosed adequate cause for complaint, which alleged that the public had been deceived and the complainants had sustained damage. As there might be some evidence of a fraudulent intent on defendants' part to get the benefit of complainant's reputation, and as the public might possibly be deceived to complainants' damage in consequence of the facts averred, a demurrer to the complaint was overruled. Merriam v. Holloway Pub. Co. (C. C. 1890) 43 Fed. 450; Merriam v. Famous Shoe & Clothing Co. (C. C. 1891) 47 Fed. 411.

A bill alleging that defendants have imitated complainant's method of bronzing horseshoe nails, with the intention of deceiving the public, states a charge of fraud which should not be decided on demurrer whether the method of bronzing is or is not a technical trade-mark. Putnam Nail Co. v. Bennett (C. C. 1890) 43 Fed. 800.

Where complainant alleges the various transfers by which it acquired title to certain springs in France, from which it has long obtained mineral waters for sale under the name "Vichy," it is not necessary to make profert of the instruments of title. La Republique Francaise v. Schultz (C. C. 1893) 57 Fed. 37.

Complainant alleged that it had for many years published a trade journal, called "The United States Investor," which had acquired a high reputation and large circulation in the United States and other countries; that defendant had begun the publication of a similar paper called "The Investor," at the head of the editorial column of which it placed the words "Published by the Investor Publishing Company"; and that such acts of the defendant had caused confusion in complainant's business, diverted its trade, and caused damage to it. Held that the bill stated a case of equitable relief. Investor Pub. Co. of Massachusetts v. Dobinson (C. C. 1896) 72 Fed. 603.

A bill for infringement of a trade-mark cannot be sustained as a bill to restrain unfair competition when it does not allege that defendants have attempted or intend to practice any deceit for the purpose of selling defendants' goods as the goods of complainant. Lamont v. Leedy (C. C. 1898) 88 Fed. 72.

Where the purpose and effect of defendant's acts complained of are not clear on the pleadings, and can better be determined after a hearing on the merits, the disposition of issues raised by exceptions to the answer will be deferred until a hearing is had. E. T. Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C. 1899) 96 Fed. 972.

In a suit for infringement the plea which set up that the bill was insufficient, because not showing that complainant had the exclusive right to the trade-name claimed to be infringed, and was not entitled to protection in using such name in connection with "bitters," made and manufactured after formulæ long known and understood and not belonging exclusively to complainant, is multifarious. Hostetter Co. v. E. G. Lyons Co. (C. C. 1900) 99 Fed. 734.

The objection to a bill for infringement that it is insufficient to entitle complainant to relief, because it does not show that complainant has the exclusive right to the trade-name claimed to be infringed, must be raised by demurrer, since it is a defect on the face of the bill. Id.

But see Equity Rule 29, vol. 3, p. 2508, ante.

In a suit to restrain infringement of a trade-mark, the facts which are essential, such as the existence of the trade-mark, an imitation by defendant, either actual or colorable, without complainant's license or acquiescence, and registration, where that is essential, must be alleged positively, and not merely on information and belief. Gaines & Co. v. Sroufe (C. C. 1901) 117 Fed. 965.

Where complainant alleged the use of a trade-mark for a certain number of years, that he had acquired the exclusive right thereto, and that defendants were fraudulently using such name in violation of his said right, averments in the answer showing that such name was used by them long prior to the time when complainant claimed to have commenced its use, and the extent of their use, were directly responsive to the bill. Uri v. Hirsch (C. C. 1903) 123 Fed. 568.

Where a complainant alleges that his business has become large and profitable and his trade-mark valuable, and offers evidence in support of such al-

legations, it is competent for defendant to show by cross-examination or otherwise, without pleading the same, that his goods are not as represented by his trade-mark or advertising, and that his business has been built up on false representations which deprive him of the right to relief in equity. Id.

In a suit for infringement, an objection that the trade-marks are invalid, because consisting of geographical names, etc., cannot be considered on demurrer. Jewish Colonization Ass'n v. Solomon & Germanski (C. C. 1903) 125 Fed. 994.

Action for infringement of labels and trade-marks and one for unlawful competition may be found, where both the trade-mark and labels claimed to be owned by plaintiffs were made use of in the same acts that would constitute a violation of the rights of the plaintiffs as to both. Id.

In a suit to enjoin infringement of a trade-mark, allegations in the answer that complainant acquired and uses the trade-mark pursuant to a conspiracy with a manufacturer, not a party to the suit, for the purpose of destroying competition, in violation of the anti-trust law, are impertinent and irrelevant, and will be stricken out on exception. Independent Baking Powder Co. v. Boorman (C. C. 1904) 130 Fed. 726.

A plea to a bill for unfair competition is insufficient, it not denying explicitly the averments that the term had acquired a secondary meaning in the trade and with the public; as, if such averments are true, complainants are entitled to protection against the misleading use of the term. G. & C. Merriam Co. v. Straus (C. C. 1904) 136 Fed. 477.

A plea to a bill for unfair competition which amounts substantially to a denial, with an allegation of evidential facts to disprove the charges of the bill, is improper, an answer being sufficient. Id.

Although a descriptive term cannot become a technical trade-mark, a bill states a case of unfair competition, where it alleges that by reason of the long and extensive use of such term by complainant to designate its product it has acquired a secondary meaning, and that defendant is using such term in connection with an inferior article of its own manufacture for the purpose of palming the same off on customers as the goods of complainant. Standard Varnish Works v. Fisher, Thorsen & Co. (C. C. 1907) 153 Fed. 928.

Where a bill states a cause of action which entitles the complainant to relief against the use of certain trade-marks and names in combination, it will not be held demurrable because he may not be entitled to enjoin their use separately, or to relief to the full extent prayed for. Holeproof Hosiery Co. v. Richmond Hosiery Mills (C. C. 1908) 167 Fed. 381.

A bill to enjoin defendant from using a secret formula alleged to have been fraudulently obtained from complainant, and also from so dressing and naming the product as to constitute unfair competition, is not necessarily multifarious. James B. Sipe & Co. v. Columbia Refining Co. (C. C. 1909) 171 Fed. 295.

A bill charging defendant with unfair competition in imitating in form and appearance an article made by complainant for the purpose and with the effect of deceiving purchasers, and inducing them to purchase such article as that of complainant, is not subject to demurrer. Allen v. Walton Wood & Metal Co. (C. C. 1910) 178 Fed. 287.

A bill for unlawful competition was not demurrable for failure to allege the amount and value of the goods fraudulently used by defendant, the names of defendant's agents, or of the parties buying the same, nor because it only alleged that defendant's use of the fraudulent syrup occurred on "divers days and at divers places" within the jurisdiction of the court. Charles E. Hires Co. v. Simpkins (C. C. 1910) 179 Fed. 1012.

Where, in a suit for infringement of a trade-mark in interstate commerce, the bill alleged that defendant was engaged in interstate commerce, and complainant made some proof thereof, in the absence of reply or counter proof, defendant could not complain of the insufficiency of the proof that he was engaged in interstate commerce in the sale of such articles. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

A bill held not to state a cause of action for unfair competition. Burrowes v. Carrom-Archarena Co. (C. C. 1911) 190 Fed. 204.

A bill for injunction by the Winchester Repeating Arms Company, alleging that defendant advertises for sale "Winchester Model Single Shot Take Down Rifles," thereby securing correspondence and getting hold of customers to whom it sells guns other than those made by complainant, states no cause of action; it not being alleged that persons have bought guns of defendant believing them to have been made by complainant. Winchester Repeating Arms Co. v. Butler Bros. (D. C. 1904) 128 Fed. 976.

A bill to enjoin alleged unlawful competition, failing to allege the amount in controversy, or that defendant was not financially responsible to answer in damages, held insufficient to warrant the granting of a preliminary writ. Ginn v. Apollo Pub. Co. (D. C. 1913) 209 Fed. 713.

Where a complaint states a cause of action for an injunction for unfair competition, it is not objectionable because complainant also demands damages.

Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379.

A bill for infringement of a registered trade-mark may be dismissed on demurrer or motion when noninfringement is evident. Sprigg v. Fisher (D. C. 1915) 222 Fed. 964.

A bill alleging plaintiff's long use of a trade-name, and injury to his business by defendant's use of a very similar name, in the same business, stated facts entitling plaintiffs to an injunction. Morton v. Morton (1905) 82 P. 664, 148 Cal. 142.

Complaint against the use of the word "Santa Ana" in the sale of butter, which showed that Santa Ana was a city in which butter was manufactured, and failed to show that plaintiff's butter was there manufactured, was insufficient as failing to show that his labels were not false and misleading. Los Angeles Creamery Co. v. J. R. Newberry Co. (Cal. App. 1913) 132 P. 289.

Where a bill shows that complainants had rights in a trade-mark, and the defendant is using a trade-mark resembling that of complainants in package, shape, color, and appearance, and is selling his article as that of complainants, it is error on demurrer to dismiss the bill. Bluthenthal v. Mohlmann (1905) 38 So. 709, 49 Fla. 275.

Allegations of fraudulent acts and intent, on the part of defendant, in a bill to restrain the use of the name of a business house, are sufficient to sustain the bill. O'Kane v. West End Dry-Goods Store (1897) 72 Ill. App. 297.

A complaint, alleging that defendant, by the adoption and use of its business name infringes the business name of plaintiff, that both companies are engaged in the same business in the same city, and that by the use of such name defendant wrongfully obtains a large amount of business intended for plaintiff, states a cause of action for injunction against the use of such name. Computing Cheese Cutter Co. v. Dunn (1909) 88 N. E. 93, 45 Ind. App. 20.

Complaint, in an action to enjoin unfair competition and for damages, held to sufficiently allege a fraudulent conspiracy by defendants to sell their goods as plaintiff's. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

A bill which alleged that defendant had been selling bags containing an imitation of plaintiff's advertisement, and had deprived plaintiff of large profits which he would have otherwise earned, but did not allege or show by necessary implication that defendant had used any of the bags since the certificate of registration was issued, did not authorize the issuance of a preliminary injunction. Smith-Dixon Co. v. Stevens (1904) 59 A. 401, 100 Md. 110.

Plaintiff could not maintain a bill in equity, either to restrain the use of "H. & C." as an infringement of a trade-mark, or to restrain the use of his name, in the absence of a distinct allegation that the defendant used the name of H. with intent to represent it to be the name of the plaintiff, meaning thereby to defraud and injure him. Hallett v. Cumston (1872) 110 Mass. 29.

A bill to enjoin infringement which alleged that plaintiff and his predecessor for many years used the letters "N. S." to designate cigars of a certain style and form, made from a certain standard grade of tobacco, and of superior and uniform workmanship, showed a trade-mark indicating a distinctive kind of cigar. Frank v. Sleeper (1890) 150 Mass. 583, 23 N. E. 213, distinguishing Hoxie v. Chaney (1887) 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

Allegations that there existed a trade-mark in the use of a word, and that the defendant corporation claims a right to the trade-mark, are insufficient where there is no allegation as to whom it belongs. Pennell v. Lothrop (1906) 77 N. E. 842, 191 Mass. 357.

A complaint, alleging plaintiff's established trade and use of a certain name, and defendant's subsequent use of a trade-name so similar as to cause confusion and trouble, is good on demurrer. People's Outfitting Co. v. People's Outlet Co. (Mich. 1912) 136 N. W. 599.

A complaint which states that plaintiff's predecessor had used the devices in question for more than 20 years, and that plaintiff had succeeded to all his rights thereto, is sufficient. J. R. Watkins Medical Co. v. Sands (1900) 82 N. W. 1109, 80 Minn. 89.

A bill alleging that complainant was a manufacturer of bottled drinks, that the bottles which he used had the name "C. E. Wright Ice & Coal Company," of which he was sole proprietor, blown in the bottles, and that defendant had obtained some of the bottles, was putting up a drink similar to that made by complainant, and thus injuring complainant's business, shows that the proceeding is against defendant individually, and by complainant as an individual. Correro v. Wright (Miss. 1908) 47 So. 379.

A petition which states that the adoption and use by defendant of plaintiff's corporate name were with fraudulent intent, that the public were deceived, and plaintiff's trade diverted to defendant thereby, states a case for equitable relief. Plant Seed Co. v. Michel Plant & Seed Co. (1886) 23 Mo. App. 579.

Where it appeared that plaintiff was the owner and had the exclusive title, his recovery, on the theory of an abandonment of the trade-mark and its subsequent adoption, cannot be denied, because no such allegations were made, as plaintiff was not required to prove that it acquired the title in all, or in the several, ways alleged. W. A. Gaines & Co. v. E. Whyte Grocery,

Fruit & Wine Co. (1904) 107 Mo. App. 507, 81 S. W. 648.

Where complainant sued to restrain use of a business sign as an infringement of complainant's trade-mark, he could not, under such complaint, obtain a decree on the theory that defendant's use of the sign constituted unlawful competition. Covert v. Bernat (1911) 138 S. W. 103, 156 Mo. App. 687.

A bill on behalf of an association of journeymen hatters, to enjoin use of a counterfeit of the union label adopted by it, cannot be sustained, where it does not allege that said association is the owner thereof, or that it is trading in, the hats or caps to which the label is applied, or has ever put them on the market. Schmalz v. Wooley (1898) 39 A. 539, 56 N. J. Eq. 649, reversed (1898) 41 A. 939, 57 N. J. Eq. 303, 43 L. R. A. 86, 73 Am. St. Rep. 637.

Where a spring of mineral water, under the name "Congress Spring Water," was sold, the right to use the name passed with the sale, so that, in an action by the purchaser to enjoin third persons from infringing the name as a trade-mark, it was not necessary to allege an express assignment of the trade-mark. Congress & Empire Spring Co. v. High Rock Congress Spring Co. (N. Y. 1871) 10 Abb. Prac. (N. S.) 348.

Where, in an action to restrain the alleged infringement of plaintiff's trade-mark, the facts did not show an infringement, an order granting an injunction could not be sustained on the ground of fraudulent representations or devices on defendant's part to palm off his goods as those of plaintiff. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1879) 57 How. Prac. 121.

A complaint which alleged that the defendant wrongfully printed and used sample tickets in imitation of plaintiffs', with the intent to defraud and deceive the public and buyers and dealers in tobacco, greatly to the damage and prejudice of the plaintiffs, and that the ownership of the sample ticket was in the plaintiffs, stated a cause of action. Linde v. Bensel (N. Y. 1880) 22 Hun, 601.

A complaint alleging the purpose of plaintiff's organization and adoption of a label, its profit to plaintiff, its acceptance by the public, and defendant's imitation thereof for the purpose of deceiving the public, to plaintiff's irreparable injury, held to state a good cause of action. Bloete v. Simon (N. Y. 1887) 19 Abb. N. C. 88.

An allegation that plaintiff had by purchase obtained all the right and title to the exclusive use of the trade-mark is broad enough to admit evidence that the trade-mark had been sold under execution against defendant and had by intermediate sales been acquired by plaintiff. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1891) 60 Hun, 583, 15 N. Y. Supp. 249, judgment reversed (1892) 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

In an action to restrain unfair competition, a supplemental answer setting up a patent secured by defendants will not be held frivolous because it cannot constitute a complete defense, where it is possible that some of the acts of unfair competition alleged may be justified by the invention. Silver & Co. v. Waterman (1907) 106 N. Y. S. 899, 122 App. Div. 373.

Injunction will not lie to restrain a dealer from selling and displaying hats bearing imitations and counterfeits of a certain design or device, where there are no allegations that the design is one of which plaintiff claims the exclusive use, that defendant is now using the design, nor threatened injury in the future of plaintiff's rights. United Hatters of North America v. Loeb (1901) 22 Ohio Cir. Ct. R. 339, 12 O. C. D. 272.

Where the complaint simply asked that plaintiff be protected in the exclusive use of the nonregistered word "Gargline," and failed to charge that defendant had simulated plaintiff's stamps or labels so as to deceive the public, or that his use of the word "Gargeline" was fraudulent in any manner, it was insufficient. Woodcock v. Guy (1903) 74 P. 358, 33 Wash. 234.

See Equity Rule 29, set forth in vol. 3, p. 2508, ante.

13. Evidence.—Validity of trade-mark or trade-name, see notes under § 9490, ante.

Assignments, see notes under § 9495, ante.

Infringement, see notes under § 9501, ante.

As to abandonment or extinguishment of mark and as to unfair competition, see notes under § 9508, post.

14. —— Presumptions and burden of proof.—In a suit to restrain infringement of a trade-mark, evidence held insufficient to sustain defendant's burden of proving an acquiescence by complainant, creating an estoppel, or to show laches which would defeat the suit. Capewell Horse Nail Co. v. Green (1911) 188 Fed. 20, 110 C. C. A. 170, affirming decree (C. C. 1910) 182 Fed. 404.

15. —— Admissibility. — The statement filed to obtain registration, and attached to the affidavits on motion for a preliminary injunction, may be considered on the final hearing. Kohler Manuf'g Co. v. Beeshore (1893) 59 Fed. 572, 8 C. C. A. 215.

16. —— Weight and sufficiency.—Proof of a single sale, though made to complainant's detective, may, in connection with other proofs, be sufficient to justify an injunction. Lever

Bros. v. Pasfield (C. C. 1898) 88 Fed. 484.

17. Discovery.—See, also, notes of decisions under section 1536, "Equity Practice and Procedure," note 225.

When a manufacturer parts with his goods, and they go upon the market, any third person has the right to purchase and sell them as he pleases, and the courts will not aid the manufacturer in litigation brought under the guise of protecting his trade-mark or to suppress unfair competition, to examine the defendant or his witnesses to discover where the goods were purchased. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1899) 92 Fed. 774.

When a bill to restrain infringement of a trade-mark waives the oath of defendant, discovery will not lie. Gorham Mfg. Co. v. Weintraub (C. C. 1910) 180 Fed. 639.

Complainant in unfair competition will not be compelled to disclose in advance of the hearing the names of persons alleged to have been deceived into buying defendant's goods. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1914) 213 Fed. 535.

18. Temporary injunction—In general.—Where the evidence in an action for the illegal use of a trade-name showed that complainant had nothing to complain of, except the use of a corporate name made up of the name of the owner of the defendant concern, with the name of his place of business attached, and which had not been selected unnecessarily or for the purpose of illegitimate competition, the complainant was not entitled to relief. Baker v. Baker (1902) 115 Fed. 297, 53 C. C. A. 157.

A preliminary injunction restraining defendant from using in this country the bottles, labels, name, and trade-mark formerly used by others in France, based on affidavits largely made on information and belief, and which do not determine the question whether the product is the same originally sold under such trade-mark, was too broad in its terms. Baglin v. Cusenier Co. (1905) 141 Fed. 497, 72 C. C. A. 555, reversing order (1905) 156 Fed. 1015.

Where, in a suit for infringement of plaintiff's trade-mark and unlawful competition, there was some evidence that defendants had sold hose of other manufacture for "Holeproof" hose of complainant's manufacture, a preliminary injunction restraining sales of such goods unless the customer is informed that the goods offered are not complainant's was properly granted. Holeproof Hosiery Co. v. Wallach Bros. (1909) 172 Fed. 859, 97 C. C. A. 263, modifying order (C. C. 1908) 167 Fed. 373.

An order affirmed, granting a preliminary injunction restraining defendant, the "Bates Numbering Machine Company," from using such corporate name, or the words "Bates Numbering Machine," in connection with machines of any other make than plaintiff's. Bates Numbering Mach. Co. v. Bates Mfg. Co. (1910) 178 Fed. 681, 102 C. C. A. 181, modifying order Bates Mfg. Co. v. Bates Numbering Mach. Co. (C. C. 1909) 172 Fed. 892.

An order granting a preliminary injunction restraining defendant from infringing complainant's trade-mark of "Ideal" as a name for fountain pens, and from unfair competition by using the name "Waterman" without initials as a name for such pens, affirmed; but restraining use of the name "A. A. Waterman & Co." by defendant in connection with its business held erroneous. L. E. Waterman Co. v. Modern Pen Co. (1910) 183 Fed. 118, 105 C. C. A. 408.

An order denying a preliminary injunction against alleged unfair competition affirmed. National Washboard Co. v. Goldstein (1912) 198 Fed. 68, 117 C. C. A. 176.

Facts held insufficient to entitle a manufacturer to an injunction restraining defendants from selling any of complainant's products, except in original packages, from which the identifying marks had not been erased or obliterated. B. V. D. Co. v. Kommel (1912) 200 Fed. 559, 119 C. C. A. 39.

Temporary injunction not allowed against using the word "Wonderfoot," applied to silk hosiery, in suit for alleged infringement of trade-mark "Wunderhose," attached to low-priced cotton stockings. Richmond Hosiery Mills v. Julius Kayser & Co. (1913) 204 Fed. 778, 123 C. C. A. 590.

Where B. was restrained from making and selling stuffed animals after complainant's models, defendant also will be restrained from selling such toys purchased from B., until it was established by proof that they had not been copied from complainant's. Steiff v. Gimbel Bros. (1914) 214 Fed. 569, 131 C. C. A. 21.

A preliminary injunction will be granted to restrain the use of a trade-mark where plaintiff has been in exclusive possession of the same for a number of years, and defendant has just commenced to manufacture under such name. Filkins v. Blackman (C. C. 1876) Fed. Cas. No. 4,786.

Where the extensive use of a trade-mark by others, with the implied acquiescence of the owner, has contributed to give a reputation and create a demand for the article to which it has been applied, which it would not otherwise have acquired, equity should not by any stringent intervention assist the owner to secure these fruits. Estes v. Worthington (C. C. 1885) 22 Fed. 822.

A preliminary injunction should be granted to protect the use of the word "Eureka," upon a showing that the plaintiff had used the name since 1875,

although another firm used it to a limited extent for another kind of goods from 1872 to 1874. Symonds v. Greene (C. C. 1886) 28 Fed. 834.

Where complainant and its predecessors had for many years manufactured and sold scythe stones under certain trade-marks, and defendants began manufacturing and selling scythe stones under the above names, held the terms indicate a selection and care in manufacture, and a preliminary injunction would be granted against defendants' use of all the names. A. F. Pike Mfg. Co. v. Cleveland Stone Co. (C. C. 1888) 35 Fed. 896.

Where a store advertised sales at reduced prices of men's shirts made from Wamsutta cotton, when they were made of a much inferior cotton, a temporary injunction should be granted restraining advertising and selling such shirts as made from Wamsutta cotton, notwithstanding defendant denied knowledge of the untrue representation, and the sales were discontinued on service of the motion papers and notice of the misrepresentation. Wamsutta Mills v. Fox (C. C. 1892) 49 Fed. 141.

A preliminary injunction will be granted when from the affidavits the court is satisfied of the infringement, unless there are special circumstances which take the case out of the general rule. G. G. White Co. v. Miller (C. C. 1892) 50 Fed. 277.

Where, after the issuance of a preliminary injunction, defendant resorted to another label so like complainant's as to deceive consumers, a second preliminary injunction will be granted against the use of the latter label. Cuervo v. Owl Cigar Co. (C. C. 1895) 68 Fed. 541.

A preliminary injunction upon a trade-mark which has not been established by adjudication will not be granted, where defendant's affidavits indicate a prior use, though it be doubtful whether the same was not abandoned. French v. Alter & Julian Co. (C. C. 1896) 74 Fed. 788.

Upon a bill and affidavits showing that "Fig Syrup" or "Syrup of Figs" was not known in connection with a liquid laxative medicine until it was prepared by the complainant; that the good will in its manufacture is of great value; and that defendants, desiring to perpetrate a fraud and deceive the public, are making and selling a laxative under that name,—a preliminary injunction will be granted. California Fig-Syrup Co. v. Clinton E. Worden & Co. (C. C. 1898) 86 Fed. 212.

Where a manufacturer has built up an extensive trade in his product, known by a certain name, and a second manufacturer of a similar article places it in the market under the same name, and in packages so similar as to deceive the unwary and careless, this entitles the first manufacturer to a preliminary injunction, although he is not entitled to the exclusive use of the name as a trade-name. Centaur Co. v. Robinson (C. C. 1899) 91 Fed. 889.

Defendants were selling a toilet soap put up in bars similar in size and shape to those of complainants' soap, but different in color. The bars of both had upon one face the words "a base de Glycerine," but on the reverse face of complainants' was the name "La Parisienne," while on defendants' was the name "Rose de France." Held, in view of the distinctive names of the two articles, and in the absence of proof that any one had actually been deceived, a court was not justified in granting a preliminary injunction against defendants. Kroppf v. Furst (C. C. 1899) 94 Fed. 150.

The registered trade-mark "Yusea" having been commonly pronounced by the trade in general as though spelt "You see a," the owner is entitled to a preliminary injunction against the use of the earlier conceived but subsequently registered trade-mark "U-C-A," as applied to the manufacture and sale of a similar article. Welsbach Light Co. v. Adam (C. C. 1901) 107 Fed. 463.

Where plaintiff had acquired the business of the original Rogers Bros., with the right to use such name, or "Rogers," as its trade-mark, preliminary injunction will lie against others named Rogers from using that name, or "Rogers Bros.," in any manner which might simulate plaintiff's trade-mark, on like goods. International Silver Co. v. Simeon L. & George H. Rogers Co. (C. C. 1901) 110 Fed. 955.

Where defendant used all practical means not to deceive the public nor infringe on plaintiff's trade-mark, in the absence of clear proof that complainant placed its trade-mark where it did for legitimate trade-mark purposes, to identify its goods, and not with the ulterior purpose of preventing legitimate competition, a court would not grant a preliminary injunction, but would leave the rights of the parties to be determined on a full hearing. General Electric Co. v. Re-New Lamp Co. (C. C. 1903) 121 Fed. 164.

The decision of the commissioner of patents in favor of a right in an interference is not such a judicial determination as will justify granting a preliminary injunction against infringement. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co. (C. C. 1903) 123 Fed. 149.

Where plaintiff claims that defendant has violated its trade-mark and trade-name, a preliminary injunction will issue, though defendant has partly modified its carton so as to remove the more objectionable features. Dwinell-Wright Co. v. Co-Operative Supply Co. (C. C. 1906) 148 Fed. 242.

In a suit for unfair competition in obtaining and selling complainant's products at less than its established prices,

and in so representing them in its circulars as to injure complainant's business, the showing made on an application for a preliminary injunction held not such as to entitle complainant to an injunction in advance of a full hearing on the merits. Oliver Typewriter Co. v. American Writing Mach. Co. (C. C. 1907) 156 Fed. 177.

A preliminary injunction granted restraining defendant from infringing certain trade-marks and trade-names on a prior adjudication establishing the validity of other trade-marks similarly used. Carmel Wine Co. v. Palestine Hebrew Wine Co. (C. C. 1908) 161 Fed. 654.

Where defendant used the name "Rogers" on the silver-plated ware of its manufacture, and had acquired no right to use the name, but used it solely to mislead and defraud the public, complainants, having a qualified property right therein, were entitled to a preliminary injunction to restrain such use. Wm. A. Rogers v. Cohannet Silver Co. (C. C. 1910) 186 Fed. 241.

Where complainant compounded and sold a perfumed face powder under the phrase "Poudre de Riz de Java," and defendant also used the words "Poudre de Riz de Java" on similar packages and in advertisements, complainant was entitled to a preliminary injunction against the use of the name "Poudre de Riz de Java," but not to prevent defendant from calling its product "Rice Powder" or "Poudre de Riz." Wertheimer v. Batcheller Importing Co. (C. C. 1911) 185 Fed. 850.

A manufacturer of milk products held entitled to temporary injunction against the use of his well-known surname in the manufacture and sale of ice cream and like products. Borden's Condensed Milk Co. v. Borden Ice Cream Co. (D. C. 1912) 194 Fed. 554, order reversed (C. C. A. 1912) 201 Fed. 510.

A preliminary injunction to restrain defendants from using a name in connection with chewing gum in alleged violation of a contract denied. American Chicle Co. v. W. J. White Chicle Co. (D. C. 1912) 196 Fed. 977.

Where complainant appealed from an adverse decree in a suit to restrain the infringement of an alleged trade-mark on cordage, the court, pending such appeal, would not grant a temporary injunction in a subsequent suit for similar relief on the theory of unlawful competition. Samson Cordage Works v. Puritan Cordage Mills (D. C. 1912) 197 Fed. 205.

A preliminary injunction granted to restrain infringement of the trade-mark "Coca-Cola." Coca-Cola Co. v. Deacon Brown Bottling Co. (D. C. 1912) 200 Fed. 105.

Preliminary injunction against infringement of trade-names denied on the showing made. Rudge-Whitworth v. Houk Mfg. Co. (D. C. 1914) 221 Fed. 678.

Where an injunction merely restrained defendant, his agents, and employés from representing himself as the representative of plaintiffs, and from wearing on his hat, while soliciting the transfer of baggage, a badge with the word "Morton's" thereon, or any badge similar thereto, it was prohibitory only, and not mandatory, and was properly issued pending trial. Morton v. Morton (1905) 82 P. 664, 148 Cal. 142.

Where plaintiff had printed the form of label which he had registered for another company for a long time before he had filed the label, and that company had been using the label as an advertisement for the sale of their products for some time, a preliminary injunction without hearing defensive matter should not be granted. Smith-Dixon Co. v. Stevens (1904) 59 A. 401, 100 Md. 110.

Plaintiff put out a new brand, and labeled it "Trenton Pork Roll." Defendant put forth a brand labeled "Trenton Style Pork Roll." Held, that plaintiff was entitled to preliminary injunction as to this product. Taylor Provision Co. v. Edwards (N. J. 1911) 81 A. 1120.

Where plaintiffs had long published a newspaper entitled "The National Police Gazette," a preliminary injunction should be granted to restrain defendants from continuing the publication of a paper entitled the "United States Police Gazette," and printed in a way actually to deceive purchasers and readers. Matsell v. Flanagan (N. Y. 1867) 2 Abb. Prac. (N. S.) 459.

An injunction pendente lite should be granted where plaintiff's ownership of a trade-mark is established as against one defendant by a former adjudication, and as against the other, by plaintiff's purchase of the trade-mark at an auction sale of the assets of the firm. Rorke v. Société des Huiles D'Olive de Nice (1897) 43 N. Y. S. 548, 14 App. Div. 173.

Where affidavits allege that defendant has sold goods in a few instances under a verbal description which included the names claimed by plaintiff, and defendant denies those allegations, a preliminary injunction will not be granted. Lavanburg v. Pfeiffer (1898) 52 N. Y. S. 801, 23 Misc. Rep. 577.

Where defendant proposed to produce a play with the same name as that of plaintiff at his theater, which was not in fact the same play, it appearing that plaintiff would probably establish his claim, an injunction pendente lite will be granted. Frohman v. Payton (1901) 68 N. Y. S. 849, 34 Misc. Rep. 275.

M. and H. formed a copartnership in 1883. Afterwards both the original members retired, and later commenced a business of the same nature at the old situation, under the name H. M. Co., with "M., Proprietor," appearing in small letters underneath; claiming to have formed a copartnership with one of the H. family who had at one time belonged to the other firm, but who

died pending action. Some confusion in business resulted, and the affidavits showed bad faith on M.'s part. Held to authorize a temporary injunction restraining the use of the name H. without the further order of the court. Hildreth v. McCaul (1902) 74 N. Y. S. 1072, 70 App. Div. 162.

Where it appeared by affidavit that defendant had taken bottles with plaintiff's label, refilled them with distilled water, and sold them as genuine "Poland Water," and had pleaded guilty in a criminal prosecution therefor, plaintiff should have been awarded a temporary injunction in his action for permanent injunctive relief, notwithstanding defendant's disclaimer of intention to infringe his rights. Hiram Ricker & Sons v. Leigh (1902) 77 N. Y. S. 540, 74 App. Div. 138.

Where defendant advertised that a certain salesman formerly in the employ of plaintiff, generally known as "George's" and "Fisher's," could be found at "Balsam's Misfit Parlors," the name being defendant's surname, and there was nothing in the contents of the advertisement calculated to mislead the public to plaintiff's detriment, an injunction pendente lite restraining defendant from using the names "George's" or "Fisher's," at present used by plaintiff in conducting its business at different places, would not be granted. Sultzbach Clothing Co. v. Balsam (1907) 107 N. Y. S. 622, 56 Misc. Rep. 324.

Under the facts shown, held, that a preliminary injunction, sought to restrain defendant from using the words "Mutt and Jeff" in connection with cartoons, would be denied. Star Co. v. Wheeler Syndicate (1915) 155 N. Y. S. 782.

A publisher of a publication called "Motor Boat" is not entitled to a temporary injunction to restrain a foreign corporation from publishing a magazine called "Motor Boating Magazine," on the ground that it had not obtained a certificate authorizing it to do business in the state. Motor Boat Pub. Co. v. Motor Boating Co. (1907) 107 N. Y. S. 468, 57 Misc. Rep. 108.

Equity will restrain defendant from using the word "GLAD," printed and arranged so as to imitate closely in general appearance a label of the defendant, in which the word "BOLD" is used as a name of a brand; but the court will not by preliminary injunction restrain the mere use of the word "GLAD" as the name of a brand of cigars. Bobrow v. Manekin (1915) 59 Pa. Super. Ct. 334.

A preliminary injunction to restrain alleged infringement of a trade-mark will not be granted where the ex parte affidavits contain mere suggestions of fraud on the part of defendant. Platt v. Stackhouse (Com. Pl. 1893) 2 Pa. Dist. R. 601.

Where plaintiff had used for many years a trade-name and labels of a distinctive design, and defendants simulated same, a preliminary injunction was properly continued until final hearing. Heusner v. Baugher (1915) 94 A. 225, 248 Pa. 536.

Where plaintiff bought the trade-mark "Georgia Coon," as applied to syrups, under which a large trade in "Coon" molasses had been built up, he was entitled to an injunction restraining a third person from using the word "Coon." Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

Infringement in general, see notes under § 9501, ante.

Unfair competition in general, see notes under § 9508, post.

19. —— Imitation or simulation.—The showing held sufficient to entitle a complainant to a preliminary injunction against unfair competition by defendant by marking its make of sash cord to resemble that of complainant to such an extent as to tend to mislead purchasers. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

A preliminary injunction will be granted when the court is satisfied from the affidavits and exhibits that defendant's labels are devised to delude the purchaser into the belief that he is buying complainant's goods, and where such label is in fact well calculated to effect that purpose. Scheuer v. Muller (1896) 74 Fed. 225, 20 C. C. A. 161.

Where the lettering arrangement on defendant's packages resembled that on plaintiff's, but differed in size, form, and color, and both packages were of the same size and shape, which characteristics were common to the trade, and both made of blue and white striped cloth, but the stripes on defendant's package were four times the width of those on complainant's, the resemblance was not sufficient to warrant an injunction. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, 30 C. C. A. 496, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 690, 43 L. Ed. 1179.

Where the size, shape, and general color scheme of defendant's packages resembled plaintiff's, but the print and figures on the wrappers did not, an order refusing complainant a preliminary injunction would not be disturbed. Proctor & Gamble Co. v. Globe Refining Co. (1899) 92 Fed. 357, 34 C. C. A. 405.

The manufacturer of an article not protected by patent or trade-mark is not entitled to a preliminary injunction to restrain as unfair trade the making and selling of a similar article at a much smaller price, merely because, for practical and economical reasons, the materials and form of the two articles were substantially alike. St. Paul Electric Co. v. McCrum-Howell Co. (1911) 189 Fed. 849, 112 C. C. A. 150.

The bill charging that defendant shows toys made by complainant as

samples of what defendant's principals manufacture, and it being shown that complainant's toys are copied by defendant's principals in unnecessary features, the natural explanation of which is an attempt to impress the public that they are buying complainant's toys, injunction pendente lite will be granted. Margarete Steiff v. Bing (1913) 206 Fed. 900, 124 C. C. A. 560.

The name "Chatter-Book," printed upon the cover of defendants' juvenile books, and of the general appearance of complainants' books, being an imitation of the name "Chatterbox," as used by plaintiff, an injunction pendente lite is granted against its use. Estes v. Leslie (C. C. 1886) 29 Fed. 91.

Where for many years plaintiff had used the name "Bromidia," a word coined for and arbitrarily applied to its preparation, and defendants subsequently manufactured and sold a similar compound, labeled "Compound Elixir Chloral & Bromide of Potassium," underneath which, in large letters, the most prominent and conspicuous word on the label is the word "Bromidia," while below, in smaller type, though distinct and of good size, is a statement that it is prepared by defendants, this was an infringement of the trademark, and an injunction pendente lite must be granted. Battle & Co. v. Finlay (C. C. 1891) 45 Fed. 796.

The publication of a book will be enjoined pendente lite when its title imitates the essential portion of the title of complainant's book in a manner calculated to mislead, and adopted for that purpose. Harper v. Holman (C. C. 1897) 84 Fed. 224.

When it clearly appears that the packages in which defendants inclose and sell their goods are a misleading simulation of those of plaintiff, and intentionally so, a preliminary injunction against their use will be granted. Draper v. Skerrett (C. C. 1899) 94 Fed. 912.

Injunction pendente lite will issue to restrain a defendant from selling article not manufactured by or for the complainant in packages which by their appearance are so nearly like complainant's packages as to be calculated to deceive. Johnson v. Brunor (C. C. 1901) 107 Fed. 466.

Where the evidence showed that plaintiff's trade-mark consisted mainly in the words, "See that Hump?" in connection with the name "De Long," that these words were not used by defendant, and that the manner in which defendant dressed its goods on cards was not such as to mislead an ordinary purchaser, an injunction would not be granted pendente lite. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C. 1902) 118 Fed. 938.

Complainants had adopted the name "Limetta," using a label on which the name, in red and gilt letters, was the prominent feature. Defendant commenced sale of a similar article, having the same color, put up in similar bottles, sealed with similar capsules, and with a label in which the name "Limette" was printed, also in red and gilt, in the same position as the name on complainants' labels. The descriptive matter was also similar, and the label did not bear the name of the manufacturer. Held, the general similarity in appearance of packages and labels was such that complainants were entitled to a preliminary injunction. Drewry & Son v. Wood (C. C. 1903) 127 Fed. 887.

Although unfair competition, by simulating the dress of complainants' goods, is apparently shown, a preliminary injunction will not be granted, where it appears that defendant has publicly used the same dress for many years. Von Mumm v. Steinmetz (C. C. 1905) 137 Fed. 168.

The showing made of unfair competition, based on the alleged similarity in shape and style of packages and color and style of wrappers in which chocolate is put up for the market by complainants and defendant, respectively, held insufficient to warrant the granting of a preliminary injunction. Lamont, Corliss & Co. v. Hershey (C. C. 1905) 140 Fed. 763.

Preliminary injunction granted, restraining the use by defendant of the words "elastic seam" or "stretchiseam," used by complainant as trade-marks to designate certain styles of garments manufactured by it. J. A. Scriven Co. v. Girard Co. (C. C. 1905) 140 Fed. 794, order modified (1906) 148 Fed. 1019, 79 C. C. A. 533.

A preliminary injunction to restrain imitation of complainant's packages will not be granted although such imitation is shown, where there is evidence which, though disputed, tends to show that complainant has used its packages for an article different from that for which they were designed, of inferior quality, and not made at the place thereon stated. National Starch Co. v. Koster (C. C. 1906) 146 Fed. 259.

A preliminary injunction restrained defendant from using upon individual cigars of panatella shape bands simulating those of complainant in shape and colors. Clay v. Kline (C. C. 1906) 149 Fed. 912.

Where complainant and its predecessors had long used the trade-name "Virgin Leaf" to designate a brand of fine-cut tobacco, and defendant used such a name for his cigarettes, claiming his use of the word to be a substitute for "Virginia" and descriptive of the tobacco used, complainant was entitled to a preliminary injunction, defendant being relegated to his right to use the word "Virginia" instead of "Virgin." American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Where complainant's evidence did not show that the words "Pork Roll" as used by him, or "Taylor's Pork Roll," in connection with the sale of pork in cylindrical cotton packages, had acquired a distinct meaning in the eyes of the public for the particular article of food described before defendant put his product on the market in similar packages, complainant was not entitled to a preliminary injunction to restrain defendant's use of such packages and dressing. Taylor Provision Co. v. Gobel (C. C. 1910) 180 Fed. 938.

Complainant was entitled to a preliminary injunction restraining defendant's sale of similar articles, though under another name, on cards so closely resembling complainant's that purchasers would be liable to be deceived, without proof of specific instances in which an individual purchaser had been deceived. American Pin Co. v. Berg Bros. (C. C. 1911) 188 Fed. 683.

A temporary injunction against the publication of pictures of statuary which defendant produces and sells which are exact copies of pictures in the catalogue of complainant, engaged in the same business, will not be granted on the ground of unfair competition. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

Imitation by defendants of complainant's packages containing chewing gum held to be such as to indicate an intention to deceive purchasers and to entitle complainant to a preliminary injunction. Wm. Wrigley, Jr., Co. v. L. P. Larson, Jr., Co. (C. C. 1911) 195 Fed. 568.

Plaintiff having a valid trade-mark in the name "Paris" as applied to garters, held entitled to a preliminary injunction against defendant's use of the word "French" in the same connection. A. Stein & Co. v. Liberty Garter Mfg. Co. (D. C. 1912) 198 Fed. 959.

Complainant's trade-mark "Coca-Cola" held prima facie infringed by the sale of a similar substance under the term "Extract of Coca and Kola," so as to entitle complainant to a preliminary injunction. Coca-Cola Co. v. American Druggists' Syndicate (D. C. 1912) 200 Fed. 107.

Defendant's use of the word "Messmate," as applied to a ship galley stove, held an infringement of complainant's trade-mark, "Shipmate," and complainant was entitled to an injunction pendente lite. Stamford Foundry Co. v. Thatcher Furnace Co. (D. C. 1912) 200 Fed. 324.

Where the plaintiff's trade-mark contained the words: "Merrimack Prints. Fast Colors. Lowell, Mass.," but the defendant's was in this form: "English Free Trade. Merrimack Style. Warranted Fast Colors," and the embellishments surrounding both were similar to each other the resemblance was not sufficient to warrant an injunction to restrain the defendant from the use of his label, pending a suit at law against him for that purpose. Merrimack Mfg. Co. v. Garner (N. Y. 1855) 4 E. D. Smith, 387.

Where plaintiff's first quality flint paper bears the mark, "Baeder's Flint Paper Company, Flint Paper," and for the purpose of deceiving the public, and disposing of second-class paper, appearing to be made by plaintiffs as their first-class paper, defendants mark their second-rate paper as "Baeder's Flint Paper [Star], manufactured at Riverside Flint Paper Mills, Philadelphia, No. 1, Warranted," a preliminary injunction was proper. Baeder v. Baeder (1889) 52 Hun, 170, 5 N. Y. Supp. 123.

Where two publications were of the same dimensions, but the coloring and general design of the covers were so different that no one could mistake the one publication for the other, although the titles were very similar, plaintiff was not entitled to restrain defendant during the pendency of the action from publishing or selling its magazine. Motor Boat Pub. Co. v. Motor Boating Co. (1907) 107 N. Y. S. 468, 57 Misc. Rep. 108.

Plaintiff manufactured and sold cigarettes under the name "Romanoff" and "Salambo," while defendants put up similar cigarettes under the names "Ivanoff" and "Salome." Defendant also imitated the typography of plaintiff's price lists, and one of plaintiff's packages, on which nearly all of the printing was covered by a label placed over it transversely, was so closely imitated by defendant that the difference could be detected only by close scrutiny. In other respects there was hardly any danger of diversion of trade by similarity of package, and both of the packages were duplicates of packages previously designed by defendant marked "Russian Cigarettes," containing Russian characters with an embossed eagle in different colors. Where defendant exceeded his rights only with reference to a transverse label and price lists, injunction pendente lite would be denied on defendant's giving an undertaking to answer a judgment in such sum as might be fixed; otherwise, the injunction would be granted as against such unlawful infringement. Romanoff Cigarette Co. v. Vuccino (1909) 118 N. Y. S. 535.

Where certain labels used by the defendant were obvious imitations of plaintiff's labels, and adopted to deceive purchasers and secure plaintiff's trade, defendant will be restrained by preliminary injunction from using them. Seeman v. Zechnowitz (1910) 121 N. Y. S. 125, 136 App. Div. 937.

20. —— **Rights in doubt.**—A preliminary injunction against the use of a trade-name properly denied, where com-

plainant's exclusive right to the name was doubtful. American Cereal Co. v. Eli Pettijohn Cereal Co. (1896) 76 Fed. 372, 22 C. C. A. 236, affirming (C. C. 1896) 72 Fed. 903.

The right of complainant to a preliminary injunction to restrain alleged infringement of a trade-mark held so doubtful on the proofs as to require the denial of such relief. Anargyros & Co. v. Anargyros (1909) 167 Fed. 753, 93 C. C. A. 241.

Where plaintiff had exclusive right to patents east of the Mississippi river, and royalty rights west of it, he could enjoin the use of his trade-name by the purchaser, from plaintiff's grantor, of territorial rights in the patent in certain states west of said river. Gray v. Taper-Sleeve Pulley Works (C. C. 1883) 16 Fed. 436.

Where it is doubtful whether the name claimed as a trade-mark is not descriptive of articles themselves, rather than that the patentee made them, a preliminary injunction should not be granted. Leclancha Battery Co. v. Western Electric Co. (C. C. 1884) 21 Fed. 538.

Where affidavits make it doubtful that plaintiff had such exclusive use by symbols as to make their use by defendants pass their wares as his, a preliminary injunction will be denied. Portuondo v. Monne (C. C. 1886) 28 Fed. 16.

To justify a preliminary injunction against infringement of a registered trade-mark, both the right and the injury asserted must be clearly shown. Postal Tel. Cable Co. v. Netter (C. C. 1900) 102 Fed. 691.

Preliminary injunction refused, where there is a conflict of evidence as to the date of the origination of the combination of color and form. Cantrell & Cochrane v. Wittemann (C. C. 1901) 109 Fed. 82.

A preliminary injunction against the infringement of an alleged trade-mark will not be granted unless complainant's right to its exclusive use is clearly established. Diamond Match Co. v. Safe Harbor Match Co. (C. C. 1901) 109 Fed. 154.

Preliminary injunction denied, to restrain the use by one financially responsible, of alleged imitation of trade-mark, where the priority of right is doubtful, and there is little or no evidence of a fraudulent intent or purpose to mislead purchasers on the part of the defendant, and where, during three years, not more than four purchasers are shown to have been deceived thereby as to the origin of the goods. H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co. (C. C. 1904) 132 Fed. 585.

Where defendant submitted affidavits claiming a prior use of defendant's word for a similar product and a general use of combinations of the stem of the Latin word "murus" with various terminations, no adjudication having been had in favor of complainant, a preliminary injunction would be denied under the rule that such a writ will not be granted except when the papers present a clear case. Benjamin Moore & Co. v. Auwell (C. C. 1908) 158 Fed. 462.

Where it was doubtful whether complainant was the proper party to sue, and defendant claims that it stopped selling in competition with complainant's product, a preliminary injunction will be denied. Billiken Co. v. Baker & Bennet Co. (C. C. 1909) 174 Fed. 829.

On application for a preliminary injunction, the showing held insufficient to entitle complainant to an injunction restraining defendant from using the word "syphon" in connection with refrigerators not made under plaintiff's patent; the word not being truly descriptive of the patented article, and there being a conflict in the testimony as to whether it has acquired a secondary popular meaning in that connection as identifying such article. Seeger Refrigerator Co. v. Parks (C. C. 1910) 178 Fed. 283.

A preliminary injunction should not be granted before the issues are made up, complainant's rights not being free from doubt, and there being a sharp contention on all the points presented, especially in view of the new equity rules, enabling parties to obtain a speedy hearing. Goldsmith Silver Co. v. Savage (D. C. 1913) 206 Fed. 1001.

To authorize an injunction to restrain the use of a particular trade-mark, the complainant's title to the exclusive use and enjoyment of such trade-mark should be clear and unquestionable. Ellis v. Zeilin (1871) 42 Ga. 91.

An injunction to restrain infringement of trade-mark will not be granted where the legal title is doubtful, or where it would tend to create a monopoly. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

Where affidavits filed by plaintiffs and defendants left the question in doubt whether plaintiffs were the originators of the compound in question, whether the name in question was not a mere designation of the principal ingredients of such compound, and whether the dissimilarity of the bottles and labels used by defendants in putting up the compound was sufficient to prevent the public from buying their compound for that of plaintiffs, a preliminary injunction was properly denied. Keasbey v. Brooklyn Chemical Works (1891) 61 Hun, 627, 16 N. Y. Supp. 318.

Injunction pendente lite denied, where it was disputed whether the forms in question were devised by plaintiff's president or by the employé. Robert S. Denham Co. v. Salt (1913) 143 N. Y. S. 892, 159 App. Div. 881.

21. —— Discretion of court.—The granting of a preliminary injunction to restrain the infringement of a trade-mark is purely within the discretion of

the trial court; and such injunctions will, in general, be dissolved when the answer denies the fact and the equity of the bill on which it was granted. Standard Chocolate Co. v. Robert A. Johnston Co. (1912) 200 Fed. 53, 119 C. C. A. 281; Tucker Mfg. Co. v. Boyington (C. C. 1875) Fed. Cas. No. 14,-229; McVey v. Brendle (Pa. 1888) 5 Lanc. Law Rev. 350.

It is not an abuse of discretion for a court to refuse a preliminary injunction against the use of wrappers the use of which defendants have abandoned, or of advertising matter which they agree at the hearing that they will not use pending the suit. Centaur Co. v. Marshall (1899) 97 Fed. 785, 38 C. C. A. 413.

Where, though there was a striking resemblance in size, shape, coloring, and appearance between plaintiffs' and defendant's packages, the trade-names were quite dissimilar, and were printed in large type, and defendant showed that there was more or less similarity between boxes of different manufacturers on the market in respect to size, shape, covers, and labels, and the charges against defendant of bad faith and intending to mislead purchasers were denied—the denial of a temporary injunction pendente lite was not an abuse of discretion. Schenker v. Awerbach (1903) 85 N. Y. S. 129, 89 App. Div. 612.

22. —— **Injury or inconvenience to defendant.**—A preliminary injunction against alleged unfair competition will not be granted on ex parte affidavits unless a clear case is made out, where it would result in serious damage to defendant. New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co. (1900) 102 Fed. 890, 43 C. C. A. 46; New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co. (C. C. 1900) 99 Fed. 85.

The use of the words "air cell" and "fireboard," in designating certain fireproof material manufactured and sold by defendant, does not amount to such a fraud upon a previous manufacture of similar products as will warrant the issue of a preliminary injunction upon the pleadings. New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co. (1900) 102 Fed. 890, 43 C. C. A. 46.

The question of the damages that might be sustained by the defendant upon granting the order, as compared with that to the plaintiff by denying it, the financial ability of the defendant to respond to any damages assessed against him, and that there was no intent on the part of the defendant to appropriate the property of the plaintiff, are all considerations proper for the court to weigh in determining the question of granting or denying a temporary injunction. Hanson v. Jaccard Jewelry Co. (C. C. 1887) 32 Fed. 202.

23. —— **Damage or injury to complainant.**—A preliminary injunction should not be granted, where it does not clearly appear that the defendants' label or wrapper is such an imitation as will and does deceive the public, or that the complainants will suffer irreparable damages by a denial of the injunction. Foster v. Blood Balm Co. (1887) 77 Ga. 216, 3 S. E. 284.

Where there is no charge that defendant is insolvent, and irreparable damage not being probable, and the question of imitation being for the jury, an interlocutory injunction against infringement is properly denied. Lies v. Daniel (1887) 82 Ga. 272, 8 S. E. 432.

When delay to prosecute infringers has tended to mislead the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. Estes v. Worthington (C. C. 1885) 22 Fed. 822.

A motion for preliminary injunction against the infringement will not be granted, where the use of the trademark complained of was only for a week and has been discontinued, but leave will be granted to renew the motion if the defendant continues to use the name in advertising. Waterproofing Co. v. Neal Farnham, Inc. (C. C. 1911) 188 Fed. 679.

The court will not order a preliminary injunction, where defendant has discontinued the use of the infringing label and does not intend to use it again; but plaintiff may renew his motion for an injunction on defendant using the label. Coane v. Netter (C. C. 1911) 188 Fed. 681.

24. —— **Effect of laches or estoppel.**—Laches as defense in general, see notes ante, this section.

Delay in making the application is no bar to a preliminary injunction, although it may preclude complainant's obtaining past profits. Consolidated Fruit-Jar Co. v. Thomas (C. C. 1879) Fed. Cas. No. 3,131.

Where it appears that complainant had knowledge of the alleged infringement of its rights for many years before suit was brought, the bill is fully met by the answer, and no showing of defendant's insolvency is made, a preliminary injunction will not be granted. E. T. Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C. 1899) 96 Fed. 972.

A preliminary injunction to restrain unfair competition will not be granted on conflicting evidence, where complainant had known of the purposes and practices of defendant for a year and a half before commencing suit, during all of which time they were active competitors in business. C. O. Burns Co. v. W. F. Burns Co. (C. C. 1902) 118 Fed. 944.

While mere delay or acquiescence will not defeat the right to an injunction to restrain infringement of a trade-mark,

it may afford good ground for denying a preliminary injunction to put a stop to an established business prior to a final hearing. Havana Commercial Co. v. Nichols (C. C. 1907) 155 Fed. 302.

Where the alleged infringement commenced in June, 1899, and complainant filed a bill for injunction in March, 1900, the delay was fatal to a preliminary injunction, where it appeared defendant was able to respond to any decree for an accounting that might be rendered, unless the balance of inconvenience resulting from restraining defendant, pending trial, was much less than that of refusing to restrain him if complainant were ultimately successful. Stirling Silk Mfg. Co. v. Sterling Silk Co. (1900) 46 A. 199, 59 N. J. Eq. 394.

25. —— **Security.**—The court, in a suit for unlawful use of a trade-mark, will grant a preliminary injunction, unless defendant will enter into security to respond in damages if it should be determined that the trade-mark is valid and that it has been infringed. Coane v. Netter (C. C. 1911) 188 Fed. 681.

On the granting of a preliminary injunction against infringement of a trade-mark, the effect of which, if wrongfully granted, will be to cause a loss to defendant not capable of fair approximation, it is competent for the court to fix a sum as liquidated damages, and require complainant to give security for its payment, if final relief should be denied. Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 153.

26. —— **Scope of inquiry and questions considered.**—On an application for a preliminary injunction to restrain the use of a trade-mark, the court cannot pass upon the merits of the defense. Blackwell v. Armistead (C. C. 1872) Fed. Cas. No. 1,474.

There is no arbitrary period during and over which a brand must be sold and advertised to entitle the complainant to an injunction against imitators, but the question of time is always one to be considered in connection with all the facts of a given case. Taylor Provision Co. v. Edwards (N. J. 1911) 81 A. 1120.

27. —— **Evidence.**—The writing of a single letter to a customer of another manufacturer, stating that the latter is infringing a patent, and that any one purchasing from him would be held as an infringer, is not sufficient proof of unfair competition to warrant a preliminary injunction. George Frost Co. v. Kora Co. (1906) 140 Fed. 987, 71 C. C. A. 19, affirming decree (C. C. 1904) 136 Fed. 487.

Where complainants owned the trade-name of "West End Distillery Co.," and also the brands "Ky's Criterion" and "Honeymoon," the use of the name "East End Distillery Co.," in connection with such brands as "Ky's Credential" and "Honeycomb" was prima facie evidence of an intentional simulation, which entitled complainant to a preliminary injunction on the ground of unfair competition. Kentucky Distilleries & Warehouse Co. v. Wathen (C. C. 1901) 110 Fed. 641.

Evidence held sufficient to show that the word "Siphon" had become identified by the public with certain refrigerators to such extent as to entitle the owner of the patent to a preliminary injunction to restrain another from using the words "Siphon" or "Siphon System" or "Syphon" or "Syphon System" in connection with its refrigerators. Seeger Refrigerator Co. v. White Enamel Refrigerator Co. (C. C. 1910) 178 Fed. 567.

Evidence held to establish unfair competition by defendant which entitled complainant to a preliminary injunction. Baldwin v. Grier Bros. Co. (D. C. 1914) 210 Fed. 560.

In a suit to enjoin defendant from using the words "Travelers' Insurance" as a part of its name, evidence held to show that "travelers' insurance" is a distinct class of insurance. Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (1911) 134 S. W. 877, 142 Ky. 523, judgment modified (1911) 136 S. W. 154, 143 Ky. 216.

A temporary injunction restrained M. from showing, displaying, or otherwise using the name of H. in or upon any papers, devices, or signs used in the business. Thereafter defendant issued a circular announcing H.'s death, and stating that he, as survivor, was the sole owner of the business. It appeared that in at least one instance the circular was inclosed in an envelope printed, "After 5 days return to H. M. Co., M., Prop.," and on which the name H. was plainly visible, though some blue ink was spread over it. Held sufficient to justify a finding that the order had been violated. Hildreth v. McCaul (1902) 74 N. Y. S. 1075, 70 App. Div. 615.

In an action to enjoin imitating plaintiffs' trade-marks, styles of packing, and of labeling boxes, evidence held sufficient to establish a prima facie case of infringements, entitling plaintiffs to a temporary injunction. Boker v. Korkemas (1907) 106 N. Y. S. 904, 122 App. Div. 36.

28. **Effect of prior decisions.**—An interlocutory decree in another circuit, enjoining infringement and unfair competition, is not conclusive in a suit by the same parties against an agent of that principal. Walter Baker & Co. v. Sanders (1897) 80 Fed. 889, 26 C. C. A. 220.

The word "Pocahontas" having been used as a trade-name for coal for fully 20 years, and such trade-name having been sustained and its infringement enjoined in another circuit, a preliminary injunction was properly granted in the present case. Atwater v. Castner (1898) 88 Fed. 642, 32 C. C. A. 77, rehearing denied (1898) 90 Fed. 828, 32 C. C. A. 602.

When an order granting a preliminary injunction was clearly proper when made, it will not be reversed merely because the circuit court of appeals for another circuit has since held that the trade-mark cannot be sustained. Id.

A decree sustaining a demurrer to a bill for infringement, and dismissing the same for want of general equity, is not a bar to a second suit for unfair competition, on the ground that defendant was using the identical numbers used by complainant to designate its corresponding labels, and also that it made its labels with a red border, in imitation of complainant's. Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. (1903) 121 Fed. 313, 57 C. C. A. 9.

The record and evidence in a prior case for infringement, to which defendant was not a party, while inadmissible as proof of the issues on trial, was competent for the information of the chancellor as to the scope of the decision in the prior case as a precedent. Kahn v. W. A. Gaines & Co. (1908) 161 Fed. 495, 88 C. C. A. 437, reversing decree W. A. Gaines & Co. v. Kahn (C. C. 1907) 155 Fed. 639, and writ of certiorari denied W. A. Gains & Co. v. Kahn (1908) 29 Sup. Ct. 682, 212 U. S. 572, 53 L. Ed. 656.

Where by an interlocutory decree on the merits it was adjudged that a defendant was chargeable with unfair competition in simulating the dress of complainant's goods, and a reference was directed to take an accounting, all questions as to defendant's liability are concluded, and cannot be reopened before the master. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (1909) 168 Fed. 898, 94 C. C. A. 310, affirming decree (C. C. 1908) 159 Fed. 292.

A decree prescribing the language of the statement to accompany the use of the word "Webster" in connection with dictionaries is not conclusive as to the precise form of statement required, in another suit in a different district against one in privity with the first defendant for a different trespass. G. & C. Merriam Co. v. Saalfield (1911) 190 Fed. 927, 111 C. C. A. 517, opinion extended on rehearing (1912) 198 Fed. 369, 117 C. C. A. 245.

Defendants, bottling whisky under contract with the claimant of a brand and indemnified by him, held entitled to set up a judgment in a prior suit between complainant and claimant over the right to use the brand as against an objection of want of privity. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. A. 1915) 226 Fed. 531.

The decision of the examiner cannot be questioned collaterally, and the successful party is entitled to a provisional injunction against the licensees of the unsuccessful party when no doubt exists as to the infringement. Hanford v. Westcott (C. C. 1879) Fed. Cas. No. 6,022.

A judgment for defendant in a suit to restrain infringement of plaintiff's trade-mark will not bar a similar suit against defendant's vendor, unless it appear that the latter openly defended his interest in the former suit. Lacroix v. Lyons (C. C. 1888) 33 Fed. 437.

A decision of the high court of chancery in England, granting defendant the right to register as a trade-mark the words alleged to be an infringement is no bar to a suit here for an infringement by using such words. City of Carlsbad v. Kutnow (C. C. 1895) 68 Fed. 794.

That a claim was improvidently or mistakenly made in a former suit for infringement against different defendants, and which could not be sustained, will preclude the complainant from alleging the true state of facts in a subsequent suit. Centaur Co. v. Robinson (C. C. 1899) 91 Fed. 889.

Where a decree has been entered in one circuit enjoining unfair competition, a preliminary injunction to the same effect will be granted in another circuit in a suit by the same complainant against a different defendant, who is handling the same goods, but who is not shown to be bound by the former decree. Baker v. Sanders (C. C. 1899) 97 Fed. 948.

Although a prior adjudication determined that another manufacturer has the right to use a name similar to that used by complainant, a dealer in the goods of such manufacturer may be enjoined from making further oral representations tending to confuse the goods of the two makers in the minds of purchasers. Weber Medical Tea Co. v. Kirschstein (C. C. 1900) 101 Fed. 580.

Where the rights of parties to the use of certain trade-names and labels have been adjudicated, and the defendants thereafter submitted a proposed new form of label, which was approved as unobjectionable, another court will not grant a preliminary injunction against the use of such label by defendants on the application of the complainant. Weber Medical Tea Co. v. Weber (C. C. 1900) 102 Fed. 156.

A defendant will not be required to account for the gains and profits from unfair competition where, under a prior decision between the parties, it was justified in believing that with certain changes, which it made, it would not be chargeable with an unlawful invasion of complainant's rights. Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. 1908) 158 Fed. 552, decree reversed (1908) 162 Fed. 887, 89 C. C. A. 577.

A preliminary injunction to restrain alleged unfair competition denied, where defendant's label conformed to an order of court made in a suit by complainant against the manufacturer. Société Anonyme, etc., Benedictine v. Hygrade Wine Co. (C. C. 1909) 173 Fed. 796.

Where complainants were previously found not to be the rightful owners of

a trade-mark, and it was determined that H. & Co. were entitled thereto, the conclusiveness of such adjudication as between the parties and their privies was not affected by complainants' subsequent registration of the trade-mark in ex parte proceedings, notwithstanding this section declares that registration of a trade-mark is itself prima facie evidence of ownership. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. 1910) 179 Fed. 544.

Prior adjudication in favor of complainant in a suit for infringement against others and prior successful prosecution of an interference in the Patent Office with reference to the same mark, while not controlling in a subsequent suit by complainant against defendants for infringement, were forceful factors on the issue of prior adoption and use of such trade-mark by complainant. Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, decree reversed Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

A judgment in a prior suit that H. & Co. had previously used a trade-mark claimed by complainants, and that complainants were thereafter not entitled to exclusive use of same, was conclusive as between parties and their privies and was not affected by complainants' subsequent ex parte registration of the mark, under § 9491. W. A. Gaines & Co. v. Rock Spring Distilling Co. (D. C. 1913) 202 Fed. 989.

The decision of the Commissioner of Patents, affirmed by the Court of Appeals, D. C., canceling the registration of defendants' trade-mark "Tabasco," concludes them from asserting a legal right to its exclusive use as descriptive of pepper sauces made by them. New Iberia Extract of Tabasco Pepper Co. v. E. McIlhenny's Son (1912) 61 So. 131, 132 La. 149.

The interlocutory decree, which adjudicates that plaintiff is entitled to an injunction, and which sends the case to a master to determine the damages and profits, determines plaintiff's right to relief, and it is not open to investigation before the master. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

A judgment restraining a corporation from using the name of its president because of infringement does not affect the right of the president to retire from the corporation and engage in the same business on his own account in his own name, so long as he does not infringe plaintiff's trade-mark, though the use of his name in such business may result in confusion in the public mind. De Long v. De Long Hook & Eye Co. (1896) 7 App. Div. 33, 39 N. Y. Supp. 903.

A judgment in an action for an injunction, holding defendant entitled to use a trade-name, is conclusive on such question in a subsequent action by him to enjoin the plaintiff in the former suit from using such name. Schmid v. De Grauw (1899) 59 N. Y. S. 569, 27 Misc. Rep. 693.

29. Damages and profits—Infringement.—In determining the amount of profits it is proper to refuse to allow the infringer any portion of the general expenses of the business not shown to have been increased by his dealings in the shoes on which the trade-mark was used. Regis v. Jaynes (1906) 77 N. E. 774, 191 Mass. 245; Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75, 23 L. R. A. (N. S.) 1150.

A trade-mark was held to be infringed, so as to entitle a complainant to an injunction, but on account of laches it was held that he was not entitled to a decree for an accounting and for gains and profits. McLean v. Fleming (1877) 96 U. S. 245, 248, 24 L. Ed. 828.

In a suit for infringement, where one defendant acted in good faith, and the sales of the others were small, they should not be required to account for profits. Saxlehner v. Siegel-Cooper Co. (1900) 21 Sup. Ct. 16, 179 U. S. 42, 45 L. Ed. 77.

Owner of trade-mark can recover profits acquired by infringer from infringing sales, and impossibility of apportionment between profits from infringement and those due to intrinsic merit excuses owner of trade-mark from showing what part of infringer's profits were attributable to the use of the infringing mark. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 36 Sup. Ct. 269, 240 U. S. 251, 60 L. Ed. 629.

Delay of 30 years in bringing suit for infringement deprives plaintiff of an accounting for gains and profits made during such time. La Republique Francaise v. Schultz (1900) 102 Fed. 153, 42 C. C. A. 233.

In an action for the illegal use of a trade-name, where the evidence did not show that any one had been deceived, or that a single customer had been lost by defendant's conduct, complainant was entitled to only nominal damages. Baker v. Baker (1902) 115 Fed. 297. 53 C. C. A. 157.

Where complainant, because of laches, is not entitled to an accounting for past profits, and the evidence does not disclose that the trade-mark was infringed to any extent after the filing of the bill of complaint, a decree granting an injunction to restrain future infringement and denying an accounting gives to complainant substantially all the relief he is entitled to. N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (1902) 116 Fed. 332. 54 C. C. A. 204.

An accounting will not be ordered in a suit for infringement, where it ap-

pears that there is no rational rule by which the profits realized from the use of the name could be estimated. Ludington Novelty Co. v. Leonard (1903) 127 Fed. 155, 62 C. C. A. 269, affirming decree (C. C. 1902) 119 Fed. 937, and writ of certiorari denied (1905) 25 Sup. Ct. 797, 197 U. S. 620, 49 L. Ed. 909.

Where defendant was engaged in selling other goods, as well as Hunyadi water, on which it infringed complainant's trade-marks and labels, and it appeared that the defendant's salesmen sold more goods of other character than they did of Hunyadi water, the traveling expenses and salaries of such salesmen should be charged to general expenses, and not against the defendant's Hunyadi department exclusively. Decree Saxlehner v. Eisner & Mendelson Co. (1905) 138 Fed. 22, 70 C. C. A. 452, affirming decree (C. C. 1904) 127 Fed. 1023.

Accounting of profits resulting from infringement will be denied, where the damages or profits are trivial or disproportionate to the expense of taking an account. Julius Kessler & Co. v. Goldstrom (1910) 177 Fed. 392, 101 C. C. A. 476; Same v. Klein (1910) 177 Fed. 394, 101 C. C. A. 478.

Where the owner of a trade-mark on baking soda and baking powder, who had used it on the former but never on the latter, learned that defendant corporation had used it on baking powder but not on baking soda about nine years before it sued for an accounting, an accounting must be limited to the time subsequent to commencement of the suit. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274.

In a suit for an accounting of profits secured by an infringement of a trade-mark, the general rule of laches applies, unless unusual circumstances make it inequitable to allow the prosecution of the suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute. Id.

Where the manufacturer and sellers of an article were joined as defendants in a suit for infringement, and defendants all answered and went to trial, on a finding of infringement, the court properly awarded to complainant all the profits which defendants jointly and severally made from their infringement. Capewell Horse Nail Co. v. Green (1911) 188 Fed. 20, 110 C. C. A. 170, affirming decree (C. C. 1910) 182 Fed. 404.

Complainant can only recover profits on the ground of loss of sales; but where it was impossible to determine whether simulation or some other cause induced a sale, defendant may be required to account for the profit made. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

In a suit for infringement the owner is entitled, not only to an injunction, but to the recovery of profits, as incident to and a part of his property right; while in suits for unfair competition complainant is entitled to only such damages as will compensate him for the injury actually suffered. P. E. Sharpless Co. v. Lawrence (1914) 213 Fed. 423, 130 C. C. A. 59.

Nominal damages only will be given for infringing a label, where no specific injury has been proved. Coffeen v. Brunton (C. C. 1849) Fed. Cas. No. 2,946.

Equity will protect the owner of a trade-mark by an injunction against an infringer and a decree for damages, which is ordinarily the loss of profits from the infringement. Hostetter v. Vowinkle (C. C. 1871) Fed. Cas. No. 6,714.

Where complainants' sales fell off in an amount at least equal to sales made by defendant of the imitated article, damages were awarded to the extent of the profits they would have made on the number sold by the defendant. Id.

Where K. was adjudged an infringer, and an injunction issued against him, complainant was entitled to an accounting to enable him to ascertain what profits were made by K. by his work and labor, and what damages resulted therefrom. Sawyer v. Kellogg (C. C. 1881) 9 Fed. 601.

Where one has profited by the sale of goods in violation of the rights of another in a trade-mark, the owner of the trade-mark is entitled to them, whether the same profits would have been made by him or not, and not to any more if they would, for the same profit could not be made by both. Atlantic Milling Co. v. Rowland (C. C. 1886) 27 Fed. 24, appeal dismissed Rowland v. Atlantic Milling Co. (1889) 10 Sup. Ct. 1073, 136 U. S. 648, 34 L. Ed. 549.

The owner may recover the profits arising from the sale of the spurious goods, with the trade-mark impressed on them. He is not limited to the difference between the price for which the spurious goods would sell without, and the price of the same goods with, the trade-mark. Benkert v. Feder (C. C. 1888) 34 Fed. 534, judgment affirmed Feder v. Benkert (1895) 70 Fed. 613, 18 C. C. A. 549.

One who in good faith uses a label in ignorance of the fact that it is another's trade-mark will be restrained from further using the same; but if the owner of the trade-mark has had knowledge of such use of it, and through indifference or negligence has taken no steps to protect his rights, he is not entitled to an account of sales or damages. Low v. Fels (C. C. 1888) 35 Fed. 361.

Complainant, having proved infringement, is entitled to an interlocutory decree enjoining further infringements, and to an accounting for damages.

Sanborn Map & Publishing Co. v. Dakin Pub. Co. (C. C. 1889) 39 Fed. 266.

One who purposely imitates the label of another, with intent to sell his goods on the other's reputation, will be enjoined, and required to respond in damages. Saxlehner v. Nielson (C. C. 1898) 88 Fed. 71, decree modified (1899) 91 Fed. 1004. 34 C. C. A. 690, which is reversed (1900) 21 Sup. Ct. 16, 179 U. S. 43, 45 L. Ed. 77.

Exemplary damages cannot be awarded by a master on an accounting directed in a suit in equity for infringement of a trade-mark. Hennessy v. Wilmerding-Loewe Co. (C. C. 1900) 103 Fed. 90.

The amount recoverable by the owner of a trade-mark from a willful infringer is not limited to the profits made by the defendant, but includes also the damages resulting to the complainant from the injury to his business or the reputation of his goods. Id.

Where, in a suit for unlawful competition in the sale of certain dolls, defendant's claim that it was not the manufacturer of the dolls, but purchased and sold them without the knowledge that complainant claimed an exclusive right to place the dolls, packed in a particular carton, on the market, and that the suit was begun without previous notice, after which it immediately began to sell its dolls in plain boxes, defendant was not liable on such facts for damages or profits. Billiken Co. v. Baker & Bennet Co. (C. C. 1909) 174 Fed. 829.

Where, on a bill for unlawful use of a trade-mark, there was no suggestion of any damages which would justify the expense of an accounting, a master will not be ordered. Ludington Co. v. Leonard (1911) 127 Fed. 155, 157, 62 C. C. A. 269, and other like cases, applied. Keystone Type Foundry v. Portland Pub. Co. (C. C. 1910) 180 Fed. 301, decree affirmed (1911) 186 Fed. 690, 108 C. C. A. 508.

A delay of 13 years in declaring an interference constitutes such laches as to be tantamount to a license to defendants to continue the infringement, which precluded complainant from recovering damages accrued before suit brought, entitling complainant only to an injunction against further infringement. Eagle White Lead Co. v. Pflugh (C. C. 1910) 180 Fed. 579, decree reversed Pflugh v. Eagle White Lead Co. (1911) 185 Fed. 769, 107 C. C. A. 659, writ of certiorari denied Eagle White Lead Co. v. Pflugh (1911) 31 Sup. Ct. 719, 220 U. S. 615, 55 L. Ed. 610.

The owner of a registered trade-mark is not required to await the effect of infringement and prove actual injury either to himself or the purchasing public, but may sue to prevent, as well as to stop, confusion. Id.

Where defendants disclaimed any guilty knowledge, and offered to desist from the use and sale of the spurious article, and had only sold therefrom packing amounting to $44.07, complainant was entitled to an injunction restraining further sales, and to an order for the destruction of the spurious packing but was not entitled to damages. Peerless Rubber Mfg. Co. v. Nichol (C. C. 1911) 187 Fed. 238.

Where a trade-mark is bodily appropriated, the courts will grant injunctive relief, though in some instances denying an accounting. Valvoline Oil Co. v. Havoline Oil Co. (D. C. 1913) 211 Fed. 189, 194.

Where no one desiring complainant's tires was misled into purchasing defendant's no accounting will be ordered. Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

In an action to recover damages for violation of trade-mark, profits actually realized from sales of the spurious article under the simulated trade-mark are recoverable as damages, and the recovery of plaintiff is not limited to the amount of such profits. Graham v. Plate (1871) 40 Cal. 593, 6 Am. Rep. 639.

One whose trade-mark has been violated is entitled to recover all profits realized by the wrongdoer from sales of the spurious articles, and also all damages resulting from such violation. El Modelo Cigar Mfg. Co. v. Gato (1889) 25 Fla. 886, 7 South. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537.

Where a decree pro confesso was entered as to the infringement, damages were properly allowed for proven profits as an incident of the injunction. Arguelles v. Sabio (Fla. 1913) 63 So. 428.

To authorize recovery for profits derived from use of a counterfeit label, it must be shown that defendant acted in bad faith, and there must be proof of damages or profits. Beebe v. Tolerton & Stetson Co., 91 N. W. 905, 117 Iowa, 593.

Where it was shown that, although defendant had not actually appropriated plaintiffs' trade-mark, he had simulated it, he might be compelled to produce his books to show the number of articles thus simulated and sold by him, and the measure of plaintiffs' damages was the entire net profits made by defendant upon such sales and not on such as could be shown to have been actually represented and sold as the articles of plaintiffs. Avery v. Meikle (1887) 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604.

Where one's trade-mark has been appropriated by another, or his goods have been so closely imitated as to destroy the efficacy of his trade-mark, he may elect whether he will claim damages against the wrongdoer or require him to account for profits; and if he elects to take the profits, he will not

be required to show affirmatively that he has been damaged, but it will be assumed that those purchasing the simulated goods would have been the customers of the plaintiff but for the simulation. And even though the plaintiff may, in such an action, have claimed "damages," this will not preclude him from electing to take the profits, which is in fact the true criterion of damages in equity, no other special injury being alleged or claimed. Id.

The fact that plaintiffs claimed damages does not preclude them from electing to have account of profits. Id.

Where a trade-mark has been infringed. the wrongdoer must account for profits made, and also for all damages sustained by the plaintiff on account of the wrongful acts, and since it cannot be ascertained how much of the profit is due to the trade-mark, and how much to the extrinsic value of the commodity, the whole will be awarded to plaintiff. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499. 100 Me. 461, 4 L. R. A. (N. S.) 960.

Persons using trade-marks without the sanction or authority of the owner will be required to account for the profits derived from the unauthorized use of such marks. Stonebraker v. Stonebraker (1870) 33 Md. 252.

On the taking of an account of profits from infringement of trade-mark, defendants were liable for all profits, irrespective of whether there had been any actual deception of the public. Regis v. Jaynes (1906) 77 N. E. 774, 191 Mass. 245.

Defendants, who persisted in the infringement during the litigation, could not invoke the rule that an account of profits will not be taken where the wrongful use is accidental or without wrongful intent. Id.

Where the evidence shows that the infringer intended to defraud plaintiff, the latter is entitled to an accounting of the entire profits realized from the sale of the infringing articles, and the account is to be stated as of the time when the bill was filed. Reading Stove Works, Orr, Painter & Co., v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437.

The fact that there is no evidence that the owner of a trade-mark sustained damages because of another's wrongful use thereof does not necessarily make it inequitable to hold the wrongdoer liable for the profits realized through his use of the trade-name. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

Where one receiving a temporary license to use a trade-mark used it after the expiration of the license, and after notice not to do so, and warning that he would be held responsible for further use, he was guilty of wrongfully using the trade-mark, and liable for the profits realized thereby, though he acted on advice of counsel not informed of the temporary license. Id.

Plaintiff adopted an assumed name as a trade-mark, and thereafter transferred the business to defendant, under an agreement that he should carry it on so long as plaintiff remained in his employ. Plaintiff left defendant's employ and forbade him to further use the trade-mark; but defendant continued its use. Held, plaintiff could compel defendant to account for profits. Id.

In determining profits realized through wrongful use of a trade-mark, the failure of the infringers, after they had received notice from the owner of the trade-mark, to keep accounts which would show accurately the amount of their expenses and of their profits on the shoes, may be considered as a circumstance bearing against them. Id.

In determining profits realized through wrongful use of a trade-mark, it is proper to treat as evidence of the cost of the shoes a cost sheet prepared and acted on by the infringers in the conduct of the business, in the absence of explicit evidence to the contrary. Id.

The actual profits made by one wrongfully using the trade-mark of another after his right under a license so to do had expired cannot be decisively measured by the amount of the agreed license fee. Id.

Where plaintiff adopted a trade-mark on shoes manufactured for him according to his directions by defendant, who infringed the trade-mark, defendant was not liable for the total profits on the shoes sold by him, but was liable for the amount of the trade-mark profits, and could retain for himself the manufacturing profits. Id.

In determining the profits, it is proper, in considering losses from bad debts, to treat such sales as if they had not been made. Id.

Plaintiff could recover the damages sustained from wrongful use of his trade-name, and also, so far as necessary to full compensation, the profits realized therefrom by defendant, but could not recover profits which plaintiff lost the opportunity of making by reason of defendant's sales. Foster Mfg. Co. v. Cutter-Tower Co. (1913) 101 N. E. 1083, 215 Mass. 136.

A decree for an accounting in a suit for infringement can only be made where an injunction is, or could have been, granted in the course of the suit. Clark Thread Co. v. William Clark Co. (1897) 37 A. 599, 55 N. J. Eq. 658, reversed (1898) 40 A. 686, 56 N. J. Eq. 789.

One who has infringed a trade-mark belonging to several independent manufacturers cannot be required to account to one of those manufacturers for all the profits realized through the

infringement. Clark Thread Co. v. William Clark Co. (1898) 40 A. 686, 56 N. J. Eq. 789, reversing decree (1897) 37 A. 599, 55 N. J. Eq. 658.

In a suit to restrain the fraudulent use of trade-marks, where plaintiff is entitled to relief, equity will decree an accounting of damages. Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586; Taylor v. Carpenter (N. Y. 1845) 2 Sandf. Ch. 603.

In a suit to enjoin infringement, the judgment cannot direct the damages to be assessed by a sheriff's jury. The proofs must be taken by the court or a referee. Guilhon v. Lindo (1862) 22 N. Y. Super. Ct. (9 Bosw.) 605.

In determining profits on sales unlawfully made, it was error to refuse to deduct the expense of selling, where it was shown that defendant manufactured and sold both silk and cotton thread, but that the greater part of its business was in other than plaintiff's brands, which were sold in connection with the others, and that defendant claimed it was unable to separate the expense of sale of the one class from the other. Cutter v. Gudebrod Bros. Co. (1907) 83 N. E. 16, 190 N. Y. 252, reversing judgment (1906) 97 N. Y. S. 1131, 112 App. Div. 894.

In an action for unlawful use of plaintiff's name, where no damages were allowed, and recovery only awarded for profits, which were ascertainable at the time of the sale, it was proper to allow interest from the time of the commencement of the action. Id.

Where the infringement is born of a deliberate and premeditated plan to divert from plaintiff business and profits fairly resulting from his own enterprise, defendant must account for the profits which accrued from his wrongdoing. Standard Cigar Co. v. Goldsmith (1914) 58 Pa. Super. Ct. 33.

In suit for an injunction and accounting for counterfeiting a trade-mark, the cost of advertisements by complainant after the granting of a preliminary injunction, warning the public against such counterfeits, is not recoverable as damages. Buchanan v. Carpenter (1896) 36 A. 90, 19 R. I. 337.

In proceedings for contempt for violating an injunction against infringing plaintiff's cigar label, the mere fact that the profit derived by defendant was a certain sum per thousand did not warrant a finding that plaintiff was damaged in such sum by each thousand cigars sold by defendant. Davidson v. Munsey (1905) 80 P. 743, 29 Utah, 181.

In an action to restrain the use of a trade-mark on the ground that it is an infringement and is deceptive to purchasers, the complaint may also ask for an accounting and for damages. Leidersdorf v. Flint (1880) 50 Wis. 400, 7 N. W. 252.

30. —— Unfair competition.—In determining the profits made by defendant corporation in unfair competition with plaintiff, it is proper to include in the cost of manufacture and sale reasonable sums paid in good faith, as salaries to managing officers; but where such officers are practically the corporation, and are the parties really guilty of the unfair competition, their salary should not be included in the cost of manufacture and sale. Nashville Syrup Co. v. Coca Cola Co. (C. C. A. 1914) 215 Fed. 527 (affirming judgment Coca-Cola Co. v. Nashville Syrup Co. [D. C. 1912] 200 Fed. 157); W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1907) 69 Atl. 569, 103 Me. 334.

Profits recoverable in equity for unfair competition are governed by the same rule as in cases for infringement of trade-marks, and are not limited to such as accrued from sales in which it is shown that the customer was actually deceived, but include all made on the goods sold by defendant in the simulated dress or packages, and in violation of complainant's rights. N. K. Fairbank Co. v. Windsor (C. C. 1902) 118 Fed. 96 (decree reversed [1903] 124 Fed. 200, 61 C. C. A. 233); W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960.

Where a decree finds defendants guilty of unfair competition, complainant, on proper proof, is entitled to recover compensation to the extent of the invasion of his rights. Williams v. Mitchell (1901) 106 Fed. 168, 45 C. C. A. 265.

A finding of intentional fraud by inference is not warranted, where defendants purchased a quantity of cartons, the use of which had been determined by a Circuit Court, not to constitute unfair competition as against complainant, and used the same until the decision of such court was reversed, when they at once ceased such use. N. K. Fairbank Co. v. Windsor (1903) 124 Fed. 200, 61 C. C. A. 233, reversing decree (C. C. 1902) 118 Fed. 96.

In a suit for unfair competition, if it appears to the court that an inquiry as to damages or profits would rest on no basis except conjecture or speculation, or would yield no profits or damages proportionate to the cost of the investigation, an accounting may not be ordered. G. & C. Merriam Co. v. Ogilvie (1909) 170 Fed. 167, 95 C. C. A. 423.

Where a decree finding unfair competition and granting an injunction is entered, complainant is entitled to a reference on the question of profits or damages, unless it clearly appears that proof of such profits or damages is impossible. Florence Mfg. Co. v. Dowd (1911) 189 Fed. 44, 110 C. C. A. 608.

In a suit for the fraudulent use of a trade-mark, complainant is entitled to recover the whole profit realized by defendant from the sale of articles under color of the infringing mark. J.

F. Rowley Co. v. Rowley (1912) 193 Fed. 390, 113 C. C. A. 386.

In a suit for unfair competition, an accounting of profits will not be ordered where an injunction will satisfy the substantial equities of the case. Id.

The right of a complainant for an accounting for unfair competition considered. Rushmore v. Badger Brass Mfg. Co. (1912) 198 Fed. 379, 117 C. C. A. 255.

Where unfair competition is established, an accounting should be ordered, unless it clearly and certainly appears that neither upon the existing record nor upon any record which complainant can make before the master could there be any substantial recovery. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

In strict trade-mark cases the infringer is held to account for profits accruing because of the unauthorized use of the property right; and unfair competition in trade may, under proper conditions, entitle the injured party to the same measure of relief. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409, reversing decree (C. C. 1912) 192 Fed. 930.

The rule as to the measure of damages recoverable in a suit for unfair competition limits recovery to compensatory damages for past injury, and is distinguished from that applicable in patent and trade-mark cases. Id.

Where a decree awarding an injunction and damages was affirmed in a suit for unlawful competition, in which a recovery for infringement of a trade-mark was denied, an order for an accounting of profits was improper; the word "damages" being limited to the indemnity recoverable for the injury sustained by complainants. P. E. Sharpless Co. v. Lawrence (1914) 213 Fed. 423, 130 C. C. A. 59.

A decree holding defendants liable for profits realized from unfair competition, by using a label so like complainant's as to be deceptive, affirmed on the ground that during the time for which profits were allowed defendants were chargeable with international fraud. Notaseme Hosiery Co. v. Straus (1914) 215 Fed. 361, 131 C. C. A. 503, affirming decree (D. C. 1913) 209 Fed. 495.

In the computation of profits, deduction for expenses will not be made where the business was conducted in connection with defendant's regular business, increasing the gross profits without increasing the gross expenses. Societe Anonyme v. Western Distilling Co. (C. C. 1891) 46 Fed. 921.

Where an article put up and sold in packages simulating those of complainant was manufactured by defendant in the course of its ordinary business, without increasing the expenses of such business, defendant is not entitled, in an accounting for profits, to an allowance for the estimated cost of manufacture as a separate business. N. K. Fairbank Co. v. Windsor (C. C. 1902) 118 Fed. 96, decree reversed (1903) 124 Fed. 200, 61 C. C. A. 233.

Where the gist of the action was defendant's use of a label similar to that used by complainant, the fact that defendant's use thereof at the time suit was brought had been inconsiderable did not warrant the refusal of an injunction, though insufficient to entitle complainant to an accounting. Devlin v. McLeod (C. C. 1904) 135 Fed. 164.

Complainant's predecessor in title having made previous use of the word "Rex" in connection with proprietary medicine, and defendant's use of the same word in connection with medicinal preparations for similar use having been innocent, complainant was not entitled to an accounting of profits or assessment of damages for unfair trade. United Drug Co. v. Theodore Rectanus Co. (D. C. 1913) 206 Fed. 570.

In a suit for unlawful competition, defendants' continued use of their label after notice of the infringement held to show fraudulent intent entitling complainants to recover profits after the expiration of a reasonable time after notice of the infringement. Notaseme Hosiery Co. v. Straus (D. C. 1913) 209 Fed. 495.

Where plaintiff's damages from sales by defendant of liquor in bulk, to be used in refilling bottles bearing plaintiff's labels, was insignificant, an accounting will be denied. Hennessy v. Wine Growers' Ass'n (D. C. 1914) 212 Fed. 308.

In action for substituting another whisky for plaintiff's accounting will be confined to profits; amount of damages not being susceptible of a safe estimate. Hiram Walker & Sons v. Grubman (D. C. 1915) 222 Fed. 478.

Where a defendant has deliberately engaged in unfair trade, complainant is entitled to recover damages and profits from the time the violation of his rights commenced, but expense of sales must be deducted. Walter Baker & Co. v. Slack (1904) 130 Fed. 514, 65 C. C. A. 138.

In addition to the profits made by defendant in unfair competition, plaintiff may recover for losses in his own business, caused by such competition, and, if the loss results partly from such competition and partly from other causes, plaintiff can recover for so much of the loss as he shows resulted from defendant's acts, and it is sufficient for him to produce enough evidence to enable the court to make a reasonably probable estimate. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1907) 69 A. 569, 103 Me. 334.

Where the dealings of one guilty of unfair competition were the substantial and integral part of its entire business,

the court must make a deduction for expenses from the profits realized. C. A. Briggs Co. v. National Wafer Co. (1913) 102 N. E. 87, 215 Mass. 100.

Where defendant imitated the plaintiff's label in size, shape, color, device, and general appearance on inferior goods manufactured and sold by defendant, the fact that the label bears a name which could not be protected in equity as a trade-mark would not prevent a recovery of damages sustained in an action for deceit. Conrad v. Joseph Uhrig Brewing Co. (1880) 8 Mo. App. 277.

A court of chancery which has taken cognizance of a suit for unfair competition, in which an injunction is sought as the main remedy, may grant the injunction and authorize an accounting for profits as an incidental relief. L. Martin Co. v. L. Martin & Wilckes Co. (N. J. 1908) 71 A. 409, decree reversed (N. J. 1909) 72 A. 294.

On a bill to enjoin unfair competition, the court cannot decree that defendant shall account for damages suffered in addition to accounting for profits made by defendant. L. Martin Co. v. L. Martin & Wilckes Co. (N. J. 1909) 72 Atl. 294, reversing decree (N. J. 1908) 71 Atl. 409.

Where a person not only pirates the trade-marks of another, but uses them to fraudulently induce the public to believe the article is the genuine article, and with the intention of supplanting plaintiffs in their good will and trade and business, they are not only entitled to an injunction, but will be entitled to recover damages sustained in consequence of the fraud. Taylor v. Carpenter (N. Y. 1844) 11 Paige, 292, 42 Am. Dec. 114.

Damages sustained through unlawful use of a trade-name will not be allowed, where they are slight, and plaintiff did not object promptly to the unlawful use. S. Howes Co. v. Howes Grain-Cleaner Co. (1898) 52 N. Y. S. 468, 24 Misc. Rep. 83.

Equity will treat one who has been guilty of unfair competition as a trustee for the injured competitor so far as the former has derived profits from his acts. Westcott Chuck Co. v. Oneida Nat. Chuck Co. (1910) 92 N. E. 639, 199 N. Y. 247, reversing judgment (1909) 118 N. Y. S. 1149, 133 App. Div. 937.

Damages not to be awarded for unfair competition and trade-mark infringement, in the absence of fraud. Oneida Community v. Oneida Game Trap Co. (1914) 150 N. Y. S. 918, judgment affirmed (1915) 154 N. Y. S. 391.

31. Decree or order.—Where defendant's packages resembled complainant's in numerous particulars besides those of size, color, and form, an injunction should be granted restraining the sale of any form of package which should present a general appearance as closely resembling complainant's packages as the one complained of; but the injunction should not be construed as preventing the sale of packages of the size, weight, shape, or color of complainant's package, provided that they were so differentiated in general appearance as not to be calculated to deceive the ordinary purchaser. N. K. Fairbank Co. v. R. W. Bell Manuf'g Co. (1896) 77 Fed. 869, 23 C. C. A. 554.

Where defendant has been guilty of unfair competition equity should not give its approval in advance to a changed form proposed to be adopted by defendant to avoid future liability; but it should leave to the defendant the responsibility of deciding for himself, and at his own risk, what changes are necessary to avoid infringement. Charles E. Hires Co. v. Consumers' Co. (1900) 100 Fed. 809, 41 C. C. A. 71.

The circuit court, in determining, after having entered a decree enjoining infringement for unfair competition, that defendant may rightfully use certain proposed new labels or advertising matter, acted irregularly; such question being outside of the issues in the case, and one which can only be authoritatively determined in a new action upon issues properly framed, and evidence taken thereunder. Williams v. Mitchell (1901) 106 Fed. 168, 45 C. C. A. 265.

To authorize a preliminary injunction against unfair competition, the right should be clear; and where it was not shown that any purchaser had ever in fact been deceived, and the question of deceptive similarity could not be determined with certainty on the evidence adduced, the discretion of the trial court in denying the motion will not be interfered with by the appellate court. Pfeiffer v. Wilde (1901) 107 Fed. 456, 46 C. C. A. 415.

Where complainant is entitled to an injunction restraining all of many imitations, the court should not be nice in limiting the scope of the relief granted because some of the imitations if practiced singly and without fraudulent intent might not constitute unfair competition. Sterling Remedy Co. v. Spermine Medical Co. (1901) 112 Fed. 1000, 50 C. C. A. 657.

An interlocutory order against the unlawful imitation of a trade-name and unfair competition affirmed, but, especially as the parties do not agree as to the completeness of the record, full reservation is made for final hearing. Modox Co. v. Moxie Nerve Food Co. (1907) 162 Fed. 649, 89 C. C. A. 441, affirming order Moxie Nerve Food Co. of England v. Modox Co. (C. C. 1907) 153 Fed. 487, and applying Wm. G. Rogers Co. v. International Silver Co. (1902) 118 Fed. 133, 55 C. C. A. 83.

Courts of equity may require any form of words to be used in connection

with an appropriated name, as a generic description of an article, to completely protect the rightful owner of the name from injury and the public from imposition. Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co. (1908) 166 Fed. 26, 92 C. C. A. 60.

Where, in a suit for unfair competition in which a cross-bill was filed, each party was found to have trespassed on the legal rights of the other, the court may in its discretion refuse to award an accounting in favor of either. G. & C. Merriam Co. v. Ogilvie (1909) 170 Fed. 167, 95 C. C. A. 423.

A writ against infringement of a trade-mark, in addition to enjoining the precise design found to infringe, may properly include any mark "so similar to complainant's * * * as to be likely to deceive purchasers." Capewell Horse Nail Co. v. Green (1911) 188 Fed. 20, 110 C. C. A. 170, affirming decree (C. C. 1910) 182 Fed. 404.

It is sometimes proper for the court, in settling a decree forbidding unfair competition, to prescribe that certain forms may be used, and, if used, will not constitute prohibited fraud. Coca-Cola Co. v. Gay-Ola Co. (1914) 211 Fed. 942, 128 C. C. A. 440.

An order denying a motion to restrain defendant from notifying complainant's customers of its claim that an article made and sold by complainant infringed a patent owned by defendant held within the discretion of the court, and affirmed. Clip Bar Mfg. Co. v. Steel Protected Concrete Co. (1914) 213 Fed. 223, 129 C. C. A. 567, affirming decree (D. C. 1913) 209 Fed. 874.

Ordinarily, when a name has acquired a secondary signification entitled to protection, the rights of the parties may be adjusted by compelling those using the name in its primary sense to accompany it by a statement negativing connection with those entitled to use it in its secondary signification. Chickering v. Chickering & Sons (1914) 215 Fed. 490, 131 C. C. A. 538.

Where complainants were entitled to the exclusive use of the word "Chickering" in its secondary signification as applied to pianos and defendants were entitled to use the same word as a proper name belonging to them in the same business, the court properly required defendants to adopt a new name for all their pianos and use it with a statement that they were "made by" defendants. Id.

An injunction against infringement of the trade-mark "Prest-O-Lite" held properly granted, and not too broad. Searchlight Gas Co. v. Prest-O-Lite Co. (1914) 215 Fed. 692, 131 C. C. A. 626.

In view of instances of deceptive representations or conduct, Keystone Oil & Manufacturing Company will be enjoined from selling lubricants without noting on each package that they were not the products of the Keystone Lubricating Company. Keystone Oil & Mfg. Co. v. Buzby (1914) 219 Fed. 473, 135 C. C. A. 185, reversing decree Buzby v. Keystone Oil & Mfg. Co. (D. C. 1913) 206 Fed. 136.

Where business of complainant and defendant was nation-wide, decree protecting complainant's trade-name only in a specified part of the United States held improper. Diamond Crystal Salt Co. v. Worcester Salt Co. (1915) 221 Fed. 66, 137 C. C. A. 16.

Where notice as to difference between pianos could not be placed on fallboard with name of manufacturer without mutilating the piano, proper notice attached to cheek-block held sufficient. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

Form of warning notice to be attached to pianos, to distinguish them from pianos of another, prescribed. Id.

Piano company, having name similar to plaintiff's trade-marks and tradenames, held to be required to insert notice clearly distinguishing the pianos in advertisements and to display it in salesrooms. Id.

Corporation organized by persons formerly connected with original Knabe piano business may not be enjoined from claiming that its pianos had quality of Knabe pianos. Id.

Court held to have erred in requiring defendant to distinguish its pianos from plaintiff's by placing corporate name and warning notice in finely inscribed lines on metal plate, thus tending to discredit its pianos. Id.

Court held to have erred in requiring notice on pianos of corporation organized by persons formerly connected with original Knabe business to state that the piano was not a "Knabe," or an "original Knabe." Id.

Use of defendant's name "Knabe Bros. Co." on pianos, held insufficient to distinguish them from pianos of party succeeding to original Knabe business, and therefore warning notice was properly required. Id.

The court, having jurisdiction because of registration of the trade-mark, will enjoin defendants from using the trade-mark for article not made by complainant. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. A. 1915) 226 Fed. 531.

In suit for infringing right to use words as applied to a product, defendants held to abandon any claim to relief on the theory that they had a trade-mark. Id.

Where defendants closely imitated plaintiffs' packages and labels in color and design for the purpose of fraud, they should be enjoined (1) from further dressing up their product in the manner before employed, or from using in combination the marks, labels, and capsules described; (2) from using any colorable imitation of plaintiffs' trademark; (3) from placing the words "Extra Dry" on any bottles of their product, of the character described, either

in combination or otherwise; (4) from surrounding the neck and cork of any bottles of the form generally used for champagne, and containing their product, with the rose-colored metal capsule, whether stamped as before, or otherwise. Von Mumm v. Frash (C. C. 1893) 56 Fed. 830.

Where plaintiff had registered the word "Foutz's," and defendant organized the S. A. Foutz Company as a competitor, and advertised its product as "Foutz's," defendant's act constituted unlawful competition and its corporate name should be amended, and the word "Foutz" on defendant's packages, circulars, advertisements, and literature should only be used in connection with a statement that the material was prepared from the formulas of "Stanley A. Foutz," and that the goods were not prepared by complainant successor to the original Foutz Company. David E. Foutz Co. v. S. A. Foutz Stock Food Co. (C. C. 1908) 163 Fed. 408.

Where it was shown that the names "Spanish tile arch" and "cohesive tile arch" by long use have come to indicate the work of complainant, without the use of his name in connection therewith, to adequately protect use of such names as a trade-mark the injunction should prohibit their use by defendant, even with his own name prefixed or added, except in connection with other words clearly indicating that he is not the original maker of such arches. R. Guastavino Co. v. Comerma (C. C. 1911) 184 Fed. 549.

On motion for preliminary injunction to restrain use of trade-mark, held, that relief would be conditioned upon complainant contributing to defendant's expense in making changes as to his wrappers. Bernstein v. Danwitz (C. C. 1911) 192 Fed. 943.

An injunction order restraining unfair competition in the use of the name "Chickering" on pianos construed. Chickering & Sons v. Chickering (C. C. 1911) 198 Fed. 958.

Equity cannot compel a merchant to designate by signs within and without the building who was the proprietor thereof, but should require him to distinguish his store from his competitor's by some sufficient indication to the public that his store is a different place of business from that of the other. Weinstock, Lubin & Co. v. Marks (1895) 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57.

On a writ of error brought to reverse a decree on account of its uncertainty, held, that respondents could clearly understand from it that they were enjoined against using the particular labels and numbers described in it, and that so far the decree was free from uncertainty. Boardman v. Meriden Britannia Co. (1869) 36 Conn. 207.

Where a petition described the trade-marks particularly, and the injunction forbade defendants from "issuing the representation of said trade-mark," the injunction was made sufficiently explicit by reference to the petition. William Rogers Mfg. Co. v. Rogers (1871) 38 Conn. 121.

Where defendants fraudulently used the name of one of them for the purpose of attracting custom intended for another, old, established firm of the same name, a decree that enjoined defendants' use of the name, unless coupled with words that clearly indicate that the firm is not the complainant, is not too broad. Allegretti v. Allegretti Chocolate-Cream Co. (1898) 52 N. E. 487, 177 Ill. 129, affirming decree Rubel v. Allegretti Chocolate Cream Co. (1898) 76 Ill. App. 581.

The fact that a manufacturer uses a brand, composed in part of his own name, which is so similar to that of another manufacturer as to indicate an intent to deceive, does not justify an injunction forbidding absolutely the further transaction of such business in his own name. Rock Springs Distillery Co. v. Monarch (Ky. 1893) 22 S. W. 1028.

A decree enjoining infringing the trade-mark of another must be limited to restraining the use of the mark, leaving such other free to make and vend as its own product all the parts of stoves which it formerly made, but with the mark omitted. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437.

Where an injunction is granted in a suit for infringement, it ought to be only to the extent to which the false representation is directly or indirectly made. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

An injunction restraining defendant from using an oblong form of package adopted by plaintiff for packing tea is too broad, since that would prevent defendant from using such form, though of a different color from plaintiff's, and entirely plain, and destitute of any of plaintiff's distinguishing marks and devices. Fischer v. Blank (1893) 138 N. Y. 244, 33 N. E. 1040.

In a suit to prevent unfair competition, held proper for the decree to provide that the name of a married woman be prefixed to her name when used in relation to the firm business, and to restrain any further representations concerning the two places of business. Bernhard v. Bernhard (1913) 142 N. Y. S. 94, 156 App. Div. 739.

Where plaintiff complains merely of defendant's unfair competition in imitating its book covers, a decree enjoining defendant from publishing or selling any books in imitation of plaintiff's books is too broad, and should be modified so as to apply only to book covers. J. S. Ogilvie Pub. Co. v. Royal Pub. Co. (1913) 88 A. 316, 241 Pa. 5.

32. Costs.—In trade-mark cases the ordinary rule is that a decree for an

infringement and an injunction carries costs; and this rule applies, though no demand was made before suit that the defendant should cease to use the infringing trade-mark. Sawyer v. Kellogg (C. C. 1881) 9 Fed. 601.

Where a party unwittingly violating a trade-mark by printing labels, on being notified of the infringement, promised to desist and offered to surrender the lithographic stone, but an injunction suit was nevertheless brought, complainant should pay his own costs. Bass, Ratcliff & Gretton v. Guggenheimer (C. C. 1895) 69 Fed. 271.

A decree for complainant in a contested suit for infringement carries all costs, in accordance with the usual rule in equity, unless under exceptional circumstances. Hennessy v. Wilmerding-Loewe Co. (C. C. 1900) 103 Fed. 90.

Defendant having discontinued the use of the objectionable labels, and the infringement thereby of complainant's trade-mark being of very limited amount, no costs will be allowed against him. Lever Bros., Limited, Boston Works v. Smith (C. C. 1902) 112 Fed. 998.

In a suit for unfair competition, where the charge against defendant is established, but, owing to fraudulent representations by complainant in respect to its goods, it is not entitled to relief in equity, neither party will be allowed costs. Moxie Nerve Food Co. of New England v. Modox Co. (C. C. 1907) 155 Fed. 304.

Where, in a suit for unlawful competition, complainant was successful only in an inconsequential part of the litigation, costs would not be awarded to either party. Moxie Co. v. Bagoian (D. C. 1912) 197 Fed. 680.

Plaintiff, suing for unfair competition, is entitled to costs, though he maintains only a part of his claim; defendant contesting such part. C. A. Briggs Co. v. National Wafer Co. (1913) 102 N. E. 87, 215 Mass. 100.

Where defendant is shown to have used unlawfully a union label on one occasion only, which was induced by complainant's agent, the decree restraining defendant from violating complainant's rights will be without costs. United Garment Workers of America v. Davis (N. J. 1909) 74 A. 306.

Though in a suit for infringement complainant was denied relief because its trade-mark was a fraud on the public, yet where respondent was guilty of a similar fraud costs were denied to it. New York & N. J. Lubricant Co. v. Young (N. J. 1910) 77 A. 344.

One found guilty of pirating trade-marks must pay the costs of the suit to restrain him. Taylor v. Carpenter (N. Y. 1846) 2 Sandf. Ch. 603.

In an action for infringement of a trade-mark, plaintiff is not entitled to recover, as a part of the damages caused by the infringement, the costs of obtaining an injunction in the cause. Burnett v. Phalon (N. Y. 1861) 12 Abb. Prac. 186, 21 How. Prac. 100.

33. Violation of injunction.—Violation of injunction, see Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 676, 221 U. S. 580, 55 L. Ed. 863 (reversing judgment [1908] 164 Fed. 25, 90 C. C. A. 499); L. E. Waterman Co. v. Standard Drug Co. (1913) 202 Fed. 167, 120 C. C. A. 455; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409 (reversing decree [C. C. 1912] 192 Fed. 930); Société Anonyme de la Distillerie v. Western Distilling Co. (C. C. 1890) 42 Fed. 96; Janney v. Pan-Coast Ventilator & Mfg. Co. (C. C. 1904) 131 Fed. 143; Swift v. Dey (1865) 27 N. Y. Super. Ct. (4 Rob.) 611; Devlin v. Devlin (N. Y. 1875) 67 Barb. 290; Id. (1877) 69 N. Y. 212, 25 Am. Rep. 173; Porous Plaster Co. v. Seabury (1888) 48 Hun, 620, 1 N. Y. Supp. 134; Prince Mfg. Co. v. Prince's Metallic Paint Co. (1889) 51 Hun, 641, 4 N. Y. Supp. 349; Prince Mfg. Co. v. Prince's Metallic Paint Co. (1889) 51 Hun, 443, 4 N. Y. Supp. 348 (affirming judgment [1888] 2 N. Y. Supp. 682); Danziger v. Gottlieb (1913) 141 N. Y. Supp. 739, 156 App. Div. 779; Ayer v. Hall (Pa. 1871) 3 Brewst. 509; Gillis v. Hall (Pa. 1871) 8 Phila. 231; Witthaus v. Wallace (Pa. 1876) 2 Wkly. Notes Cas. 610, 618.

See, also, notes under § 1245, ante.

§ 9505. (Act Feb. 20, 1905, c. 592, § 20.) Order for destruction of infringing labels, etc.; service of injunction, and proceedings for enforcement thereof.

In any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any circuit court of the United States, or by a judge thereof, may

be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other circuit court, or judge thereof, in the United States, or by the supreme court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the circuit court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office. (33 Stat. 729.)

See notes to section 1 of this act, ante, § 9485.

Notes of Decisions

Destruction and effacement of marks.—Defendant, on being enjoined from continuing to violate a trade-mark of the plaintiff, was required to produce before a referee appointed by the court such spurious articles as at the commencement of the action were in his possession, for the purpose of having the spurious trade-mark erased therefrom, by or under the direction of the referee. Jurgensen v. Alexander (N. Y. 1862) 24 How. Prac. 269.

Search warrant.—Relief by search warrant under Act Aug. 14, 1876, § 7, denied for lack of definiteness in the affidavit and proof of the applicant's right or title. In re O'Donnell (C. C. 1878) Fed. Cas. No. 10,434.

§ 9506. (Act Feb. 20, 1905, c. 592, § 21.) Restrictions on actions for infringement.

No action or suit shall be maintained under the provisions of this Act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained. (33 Stat. 729.)

See notes to section 1 of this act, ante, § 9485.

Restrictions on registration of marks as trade-marks were imposed by section 5 of this act, ante, § 9488.

Notes of Decisions

1. Deception of public—In general.
2. —— Place of origin or manufacture of article.
3. —— Quality and properties of articles.
4. —— Patented and copyrighted articles.
5. —— Wrongful use of name.
6. Unlawful business.
7. Injurious article.
8. Abandonment and extinguishment.
9. Pleading.
10. Evidence.
11. Effect of prior decisions.
12. Costs.

1. Deception of public—In general.—Deceptions as ground for denial of registration, see notes under § 9490, ante.

Deception as an element of infringement, see notes under § 9501, ante.

Deception as an element of unlawful competition, see notes under § 9508, post.

Where complainants' trade mark or name has been assumed for the purpose of deceiving the public as to the character and nature of their business or the article sought to be protected, equity will not protect them in the exclusive right to use such trade mark or name. Fowle v. Spear (C. C. 1847) Fed. Cas. No. 4,996; Ginter v. Kinney Tobacco Co. (C. C. 1882) 12 Fed. 782; Clotworthy v. Schepp (C. C. 1890) 42 Fed. 62; Joseph v. Macowsky (1892) 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53; Clark v. Ætna Iron Works (1892) 44 Ill. App. 510; Fetridge v. Wells (N. Y. 1857) 4 Abb. Prac. 144, 13 How. Prac. 385; Hobbs v. Francais (N. Y. 1860) 19 How. Prac. 567; Hazard v. Caswell (1883) 93 N. Y. 259, 45 Am. Rep. 198; Hennessy v. Wheeler (N. Y. 1876) 51 How. Prac. 457; Id. (1876) 69 N. Y. 271, 25 Am. Rep. 188; Helmbold v. Hembold Mfg. Co. (1877) 53 How. Prac. 453; New York Consol. Card Co. v. Union Playing Card Co. (1886) 39 Hun, 611; Koehler v. Sanders (1890) 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576 (affirming [1888] 48 Hun, 48); Wilson v. Needermann (1888) 10 Ohio Dec. 226, 19 Wkly. Law Bul. 268; Palmer v. Harris (1869) 60 Pa. 156, 100 Am. Dec. 557; McNair v. Cleave (1874) 31 Leg. Int. 212, 10 Phila. 155. CONTRA. Kohler Mfg. Co. v. Beeshore (1893) 59 Fed. 572, 8 C. C. A. 215 (affirming decree [C. C. 1892] 53 Fed. 262); Sea-

bury v. Grosvenor (C. C. 1877) Fed. Cas. No. 12,576; Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696; Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75; Colton v. Deane (1887) 7 N. Y. St. Rep. 78; Dixon Crucible Co. v. Guggenheim (Pa. 1869) 2 Brewst. 321; C. F. Simmons Medicine Co. v. Mansfield Drug Co. (1893) 93 Tenn. (9 Pickle) 84, 23 S. W. 165.

An injunction will not be granted where plaintiff itself uses the trade-mark in part in violation of its established meaning, as a means of selling another product than that to which it can rightfully be applied, and to which the public have been and are led to believe it is alone applied. Prince's Metallic Paint Co. v. Prince Mfg. Co. (1893) 57 Fed. 938, 6 C. C. A. 647 (affirming [C. C. 1892] 53 Fed. 493); Prince Mfg. Co. v. Prince's Metallic Paint Co. (1892) 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

Not every exaggerated puff of a dealer's goods is such a false representation as will prevent relief in a suit to restrain infringement of trade-mark, but it must be such materially fraudulent statements as to the character and quality of the goods which would, if untrue, deceive the public to its injury. Edward & John Burke, Limited, v. Bishop (C. C. 1910) 175 Fed. 167; Regent Shoe Mfg. Co. v. Haaker (1906) 106 N. W. 595, 75 Neb. 426, 4 L. R. A. (N. S.) 447.

Where a trade-mark is assigned to the person who manufactures the article to which the trade-mark is affixed, there is no false representation to the public, because the article is still manufactured at the same place and by the same person. Witthaus v. Braun (1876) 44 Md. 303, 22 Am. Rep. 44; Hard v. Seeley (N. Y. 1865) 47 Barb. 428.

A cigar label, which states that "the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship," is not illegal, as being immoral, or against public policy. Cohn v. People (1894) 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821; Cigar Makers' Protective Union No. 4 v. Lindner (1895) 2 Ohio N. P. 114, 3 Ohio Dec. 244.

Prohibition against any action founded on infringement of a trade-mark under Philippine Commission Act No. 666, § 9, where complaining party is guilty of imposition on the public, defeats an infringement suit by a person infringing an earlier trade-mark of a third person. Ubeda v. Zialcita (1913) 33 Sup. Ct. 165, 226 U. S. 452, 57 L. Ed. 296.

Application, to defeat a suit for infringement of a trade-mark under a grant from the Spanish governor general, of the rule laid down by Philippine Commission Act, No. 666, § 9, denying recovery if complaining party is guilty of imposing on the public, does not give retroactive effect as against such grant, contrary to general principles of interpretation and to the treaty of Paris of April 11, 1899, art. 13. Id.

A corporation using expressions indicating its commercial origin, and properly using a trade-mark assigned to it, although such expressions were not wholly true in fact, is not guilty of such fraud or misrepresentation as will prevent it obtaining relief against infringement. Clark Thread Co. v. Armitage (1896) 74 Fed. 936, 21 C. C. A. 178, affirming (C. C. 1895) 67 Fed. 896.

The sale, in four years, of 31 dozen boxes, of a dozen spools each, bearing on the box covers the words, "J. & J. Clark & Co., Paisley," which may have been somewhat misleading, was so insignificant as to be of no importance in determining the corporation's right to maintain the suit. Id.

The fact that the American agent of a foreign manufacturer itself puts up a similar American preparation, with labels somewhat similar, though not enough so to deceive, is not sufficient to deprive the foreign maker of his right to enjoin the sale by third parties of an American preparation dressed up to imitate his own. Scheuer v. Muller (1896) 74 Fed. 225, 20 C. C. A. 161.

Inaccurate statements in labels, if entirely immaterial, are not such false representations as will bar a suit to enjoin infringements. Tarrant & Co. v. Johann Hoff (1896) 76 Fed. 959, 22 C. C. A. 644.

A complainant cannot maintain a suit in equity to protect his monopoly in the use of a trade-name, where he has represented by his labels and otherwise that the article was other than that now claimed, and has built up the business which he seeks to protect upon such representations. Dadirrian v. Yacubian (1900) 98 Fed. 872, 39 C. C. A. 321, affirming decree (C. C. 1898) 90 Fed. 812.

That a complainant is chargeable with fraudulent misrepresentations to the public is not, strictly speaking, a defense, but it will be given effect by the court in the interest of the public by refusing to grant relief to the complainant. Memphis Keeley Institute v. Leslie E. Keeley Co. (1907) 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921.

That a label registered as a trade-mark has thereon a notice of copyright, even if such notice misrepresents the fact, does not affect the right of the owner to maintain a suit for infringement of its trade-mark or unfair competition by imitation of such label by another. G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133.

A trade-mark held not invalid because of an alleged false statement for reg-

istration. W. A. Gaines & Co. v. Turner-Looker Co. (1913) 204 Fed. 553, 123 C. C. A. 79.

Bill for unfair competition and infringement of trade-name held properly dismissed without prejudice to new bill, after untruthful advertising by complainant had been abandoned. Diamond Crystal Salt Co. v. Worcester Salt Co. (1915) 221 Fed. 66, 137 C. C. A. 16.

Injunctive relief against infringement held not to be denied, where misrepresentations by plaintiff where promptly discontinued when complained of and no deception was intended. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

That plaintiff sold pianos not Knabe pianos as bearing "Knabe guarantee" held not ground for denial of injunction against defendant's misuse of the word "Knabe." Id.

Equity will not protect by an injunction the trade-marks of owners of quack medicines. Fowle v. Spear (C. C. 1847) Fed. Cas. No. 4,996; Heath v. Wright (C. C. 1855) Fed. Cas. No. 6,310.

The right to a trade-mark is forfeited by its deceptive use to designate a spurious article. Manhattan Medicine Co. v. Wood (C. C. 1878) Fed. Cas. No. 9,-026.

That the manufacturers of scythe stones have sometimes put on labels bearing their brand the names of jobbers to whom they have sold stones, does not show any deception of the public. A. F. Pike Mfg. Co. v. Cleveland Stone Co. (C. C. 1888) 35 Fed. 896.

Correcting false statements after the suit is filed does not help the case of one who, because of such false statements, had no right to relief at the time the suit was filed. Alaska Packers' Ass'n v. Alaska Imp. Co. (C. C. 1894) 60 Fed. 103.

The owner of several mills situated in different states, who has ceased to manufacture at one of his mills, and supplies the customers of that mill with the product of his other mills, cannot enjoin the violation of a trade-mark which assumes that said mill is still running. American Cereal Co. v. Eli Pettijohn Cereal Co. (C. C. 1896) 72 Fed. 903.

A statement that the applicant's use of such mark has been exclusive is not false, so as to deprive him of the right of registration or estop him from maintaining an action to protect his right because it may appear that some one else had previously used such mark in violation of his exclusive right. Capewell Horse Nail Co. v. Mooney (C. C. 1909) 167 Fed. 575, decree affirmed (1909) 172 Fed. 826, 97 C. C. A. 248.

A complainant who has commenced suit for infringement of a trade-mark and for unfair competition, may issue circulars to the trade stating such facts and its claimed rights, and their issuance will not be enjoined on petition of the defendant, on mere denials of the allegations of the bill, and in advance of a hearing or the taking of any evidence upon the issues of fact joined. Warren Featherbone Co. v. Landauer (C. C. 1903) 151 Fed. 130.

Use of a special name for an article when desired to sell at a reduced price to meet competition, at other times selling the same article at a higher price under one of the other names, was not for true trade-mark purposes, and no trade-mark rights were thereby acquired therein which would be protected by a court of equity. Independent Baking Powder Co. v. Boorman (C. C. 1910) 175 Fed. 448.

An objection to the maintenance of complainant's bill for infringement of trade-mark that such mark was applied to a cheap inferior pencil and was a fraud on the public, was unsustainable when made by defendant who was pirating complainant's business by the use of an infringing trade-mark on a similar pencil. American Lead Pencil Co. v. L. Gottlieb & Sons (C. C. 1910) 181 Fed. 178.

Nonresident aliens, who registered a trade-mark for cigars made in the United States, held, under the facts shown, not entitled to protection in equity against infringement or unfair competition. De Nobili v. Scanda (D. C. 1912) 198 Fed. 341.

Injunction against infringement of trade-name in common use for 34 years held not to be denied, even though it was, when originally used, of a deceptive character. Lambert Pharmacal Co. v. Bolton Chemical Corporation (D. C. 1915) 219 Fed. 325.

The maker of an article, who makes false representations to the public in respect to it in his advertisements, has no standing in equity to maintain a suit to protect a trade-mark under which it is sold. Channell Chemical Co. v. E. W. Hayden Co. (D. C. 1915) 222 Fed. 162.

The United States, having first appropriated the device of an eagle, with the letters U. S. under it, for the purpose of marking firearms manufactured by the government, may prevent any private manufacturer using the same device on firearms manufactured by him, and thus falsely representing to the world that his firearms were made by the United States. (1889) 19 Op. Atty. Gen. 361.

The jurisdiction of equity to restrain infringement of a trade-mark is based on the right of property in the complainant and its fraudulent invasion by another, and is exerted to prevent fraud on him and the public; and a material misrepresentation as to the person by whom the article is manufactured, or as to the materials composing it, deprives plaintiff of the right to relief. J. W. Epperson & Co. v. Bluthenthal (Ala. 1906) 42 So. 863.

Where a manufacturer of butter al-

lowed another to wrap a different butter in his wrapper, and sell it as his butter, he cannot, after the registration of its wrapper as a trade-mark, recover for the infringement thereof, since a person seeking protection against the fraud of another must himself be free from fraud. Castroville Co-operative Creamery Co. v. Col (Cal. App. 1907) 92 P. 648.

If the representation of the trade-mark does not in fact mislead the public, and may be understood in any reasonable sense as substantially true, the trade-mark will be entitled to protection, though some wrong impressions may be received by the public. Meriden Britannia Co. v. Parker (1872) 39 Conn. 450, 12 Am. Rep. 401.

Where any symbol or label claimed as a trade-mark is so worded as to contain a distinct assertion which is false, no property right can be claimed; nor can the right to the exclusive use of it be maintained in a court of equity. Schuster Co. v. Muller (1906) 28 App. D. C. 409.

The mere fact that a person has sought to deceive the public by false representations does not defeat his right to protect his trade-name in a court of equity, where such false representations were with respect to immaterial matters, and the trade-name itself does not contain any misrepresentations. Wormser v. Shayne (1904) 111 Ill. App. 556.

Where, in connection with the use of a trade-name, the word "copyright" is used, when no copyright actually exists, it cannot be said that such trade-name includes a misrepresentation which will defeat the right of the owner to protect such trade-name by injunction in a court of equity. Wormser v. Shayne (1904) 111 Ill. App. 556.

A continued use, after his death, of the fac simile of the autograph of the discoverer of a cure for drunkenness, is not such a fraud upon the public as to preclude equitable relief against unfair competition; but false representations as to the ingredients or manufacturer of a remedy will preclude such relief. Leslie E. Keeley Co. v. Hargreaves (1908) 86 N. E. 132, 236 Ill. 316.

One who made use of a label as a trade-name without knowing of its use by others was not guilty of fraud in registering it as a trade-mark when he heard that others were about to make use of it, and stating on his labels that it was registered, although he did not go about the state before making the registration to discover whether any persons in other localities had made use of the same word or device in their business or not. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

Where names or terms have become identical in the minds of the public with one's business, use thereof by another in a manner calculated to deceive the public, cannot be justified, and this rule prohibits one from using his own name or a geographical name so as to pirate on the good will of a business rival. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

The owner of a trade-mark not used in accordance with its true meaning has no equity to sustain a suit to protect it. New Orleans Coffee Co. v. American Coffee Co. of New Orleans (1909) 49 So. 730, 124 La. 19.

Statements concerning plaintiff's rights to a trade-name, which, though erroneous, were not such as to deceive the public, were therefore insufficient to deprive plaintiff of the right to an injunction. Gruber Almanack Co. v. Swingley (1906) 63 A. 684, 103 Md. 362.

Plaintiff was not precluded from his right to relief from imitation on account of false advertising, where the findings showed merit in the bread as made by plaintiff and that he had stopped all false advertising for a year and a half before the bill was filed. George G. Fox Co. v. Best Baking Co. (1911) 95 N. E. 747, 209 Mass. 251.

Where words in a label adopted as a trade-mark are substantially true and contain nothing calculated to deceive the public, the fact that they are not literally true will not deprive the owner of the right to the exclusive use thereof. Conrad v. Joseph Uhrig Brew. Co. (1880) 8 Mo. App. 277.

One is not entitled to injunctive relief from unfair competition, where he seeks the relief to enable him to continue to deceive the public by listing the name of a defunct newspaper, and soliciting patronage for it as a going paper. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

Material false representations as to the secret formula of a preparation, or in trade-mark or labels, deprives one of standing in a court of equity, and a suit to enjoin misuse of his trade-mark cannot be maintained. Newbro v. Undeland (1903) 96 N. W. 635, 69 Neb. 821.

The fact that complainant in a suit to enjoin unfair competition had falsely represented that it had, by act of Congress, exclusive right to use the devices which its labels bore, did not disentitle it to relief; the false claim having been withdrawn. Johnson & Johnson v. Seabury & Johnson (1905) 61 A. 5, 69 N. J. Eq. 696.

If the commodity selling under a trade-name or symbol is offered under a misrepresentation, the seller cannot call upon the court to aid him in preserving the right to deceive the public without interruption. Bear Lithia Springs Co. v. Great Bear Spring Co. (1906) 71 A. 383, 71 N. J. Eq. 595.

An action to enjoin the use of a

trade-mark cannot be resisted by showing that the names used on the trade-mark are false and fictitious. Stewart v. Smithson (N. Y. 1856) 1 Hilt. 119.

Where defendant has deliberately, and without any color of right adopted the emblems and appellations employed by the plaintiff, simply to break in upon the trade and profit of the latter, an injunction should be granted, notwithstanding that the trade-mark claimed by plaintiff was intended and calculated to deceive the public. The public, in such case, should be left to its own guardianship. Fetridge v. Merchant (N. Y. 1857) 4 Abb. Prac. 156.

To deprive one of protection of a trade-mark, the deception alleged must be in the trade-mark itself, not in advertisements used to advance the sales of the article. Curtis v. Bryan (N. Y. 1867) 36 How. Prac. 33.

In an action to enjoin imitation of a trade-mark, the defense that the article did not contain the ingredients indicated by the trade-mark was not available, where the evidence was contradictory. Smith v. Woodruff (N. Y. 1867) 48 Barb. 438.

One who has never obtained any gold medal on his product is not entitled to the exclusive use of the words "Gold Medal" as a trade-mark in connection with the name of such article, as the use of the words in such connection are a fraud on the public. Taylor v. Gillies (N. Y. 1874) 5 Daly, 285.

Where plaintiff used bottles which did not hold a full pint or quart, but nothing appeared thereon to indicate the quantity contained, nor did it appear that the bottles were used in trade as measures of quantity, or that plaintiff ever represented that they contained a full quart or pint, and plaintiff's brandy was imported in bottles, and entered at the custom house with the true quantity stated, it was error for the court to refuse the injunction on the ground that plaintiffs used the bottles for the purpose of deceiving its customers as to their quantity. Hennessy v. Wheeler (1877) 69 N. Y. 271, 25 Am. Rep. 188, reversing (1876) 51 How. Prac. 457.

Where plaintiff described his medicine as "prepared by Dr." M., who had originally prepared it, but who no longer did so, and never had the title of "Doctor," the statements as to its preparation were not a fraud on the public, and constituted no defense in a suit by plaintiff to enjoin infringing use by defendant. D. Ransom, Son & Co. v. Ball (1889) 54 Hun, 635, 7 N. Y. Supp. 238.

Plaintiff is not entitled to protect a trade-mark, the use of which by plaintiff constitutes a misrepresentation, though the misrepresentation does not appear on the face of the trade-mark, or in advertisements or circulars, where the trade-mark has a particular meaning with the trade, as being applicable only to a certain product. Prince Mfg. Co. v. Prince's Metallic Paint Co. (1892) 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

An injunction pendente lite to restrain the imitation of plaintiffs' label will be denied, where defendant abandoned the use of that label before the hearing of the motion, and that plaintiffs were misleading the public by falsely claiming that the form of their cakes of soap, and the title in the label were secured by a trade-mark. Brown v. Doscher (1893) 66 Hun, 626, 20 N. Y. Supp. 900.

Where manufacturers have established a trade in certain felt pads under the name "Excelsior," that they manufactured them for others, and printed the retailers' names on the labels, cannot prevent them from restraining an infringement. Volger v. Force (1901) 71 N. Y. Supp. 209, 63 App. Div. 122.

A party may not always appropriate to his own use in his business a label in prior use particularly appropriated by another where such act deceives the ordinary buyer. Westcott Chuck Co. v. Oneida Nat. Chuck Co. (1907) 106 N. Y. Supp. 1016, 122 App. Div. 260.

Persons engaged in deceiving the public by pretending to tell fortunes have no property right in a name or appellation assumed in their business which a court of equity will protect, since a party invoking such protection must himself be free from fraud in his representations to the public. Fay v. Lambourne (1909) 90 N. E. 1158, 196 N. Y. 575, affirming order (1908) 108 N. Y. S. 874, 124 App. Div. 245.

False statement as to date of registration of trade-mark will not deprive one of his right to protection from infringement where the public could not have been deceived by such statement. C. F. Simmons Medicine Co. v. Mansfield Drug Co. (1893) 93 Tenn. (9 Pickle) 84, 23 S. W. 165.

To restrain defendant from selling goods, falsely representing them to be manufactured by plaintiff, plaintiff must come into court with clean hands. Horlick's Malted Milk Co. v. A. Spiegel Co. (1913) 144 N. W. 272, 155 Wis. 201.

2. —— Place of origin or manufacture of article.—A court of equity will not protect the trade-mark of a medicine which is put forth with a misrepresentation as to the manufacturer of the article, and the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser. Manhattan Medicine Co. v. Wood (1883) 2 Sup. Ct. 436, 108 U. S. 218, 27 L. Ed. 706.

The continued use of circulars and labels which suggest the foreign origin of a product, after its manufacture had been begun in this country, and the use of the name of the original proprietor for some time after the business had

been transferred to his son, are not such fraud as defeats the right of a manufacturer to relief in equity against unfair competition. Jacobs v. Beecham (1911) 31 Sup. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree Beecham v. Jacobs (1908) 159 Fed. 129, 86 C. C. A. 623.

Where, in a suit for infringement of the trade-mark "Prince's Metallic Paint," relief was refused because plaintiff had forfeited its equity by using the trade-mark in connection with paints made from ores dug from other than the original Prince mine, defendant in that litigation, who had always used the trade-mark in connection with paints not coming from the Prince mine, had no equity to sustain a suit for infringement against the former plaintiff. Prince's Metallic Paint Co. v. Prince Mfg. Co. (1893) 57 Fed. 938, 6 C. C. A. 647, affirming decree (C. C. 1892) 53 Fed. 493.

No right is acquired by use in a label and trade-mark which states that the article is prepared in London by a firm named, who are purveyors to her majesty, whereas in truth it is prepared by an entirely different firm in New York. Raymond v. Royal Baking-Powder Co. (1898) 85 Fed. 231, 29 C. C. A. 245, affirming Royal Baking-Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376.

The fact that the manufacturer of a cordial made according to a recipe obtained from the Benedictine monks labels it as "Genuine Benedictine Liquor of the Benedictine Monks of the Abbey of Fecamp" does not preclude relief against one who manufactures and puts upon the market a cordial in such form and guise as to clearly indicate that it is the identical article sold by complainant. Societe Anonyme de la Distillerie v. Western Distilling Co. (C. C. 1890) 43 Fed. 416.

Where plaintiff's circulars stated its products to be made at different quarries, that all were made from the same quarries or rock formation was not evidence of a material false statement, as the plaintiff had the right to associate one trade-mark with a name arbitrarily given to a part of his quarries, or to represent that the stones were made from "selected" or from "best blue Heron grit," so long as he furnished the same article and the same quality demanded by the preference of his customers. Cleveland Stone Co. v. Wallace (C. C. 1892) 52 Fed. 431.

Complainant's right to relief against unfair competition cannot be defeated on the ground that it has been guilty of fraud in misrepresenting to the public the origin of an article manufactured by it, which is not involved in the suit. Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882, decree affirmed Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878.

A complainant using the name of "Old Country Soap" for the purpose of falsely inducing persons who came to this country from Europe to believe such soap was made in the "old country" is not entitled to protection in the use of such name as a trade-name by a court of equity. Allen B. Wrisley Co. v. Iowa Soap Co. (C. C. 1900) 104 Fed. 548, decree affirmed Allen B. Wrisley v. Same (1903) 122 Fed. 796, 59 C. C. A. 54.

Stamping shoes "Old Colony Shoe Company, Rockland, Mass.," when no such company exists, and the shoes were not manufactured in Rockland, which was a city having a reputation for the manufacture of fine shoes has a tendency to deceive the public, and deprives the user of such trade-mark of the right of protection. Coleman, Burden & Warthen Co. v. Dannenberg Co. (1898) 30 S. E. 639, 103 Ga. 784, 41 L. R. A. 470, 68 Am. St. Rep. 143.

In consequence of misrepresentations as to genuineness of the signature on labels, as to place of manufacture, etc., plaintiff could not maintain his suit. Siegert v. Abbott (1884) 61 Md. 276, 48 Am. Rep. 101.

If a person has falsely adopted the words "East Indian" to denote that certain medicines were used in the East Indies, and that the formula for them was obtained there, he cannot maintain a bill in equity to restrain an infringement of such trade-mark. Connell v. Reed (1880) 128 Mass. 477, 35 Am. Rep. 397.

Where the sole proprietors of an article manufactured exclusively for them in Paris represented that they were "sole manufacturers" of the article in Paris, when in fact they had no factory there, was not such a material misrepresentation as precluded them from equitable relief against a fraudulent infringement thereof. Gluckman v. Strauch (1904) 91 N. Y. Supp. 223, 99 App. Div. 361, affirmed (1906) 79 N. E. 1106, 186 N. Y. 560.

False advertisements as to place of bottling and of the curative properties of complainant's water were such misrepresentations as will deprive complainant of relief in a suit to enjoin the infringement of his trade-name. Bear Lithia Springs Co. v. Great Bear Spring Co. (1906) 71 A. 383, 71 N. J. Eq. 595.

A party attempting to deceive the public by a trade-mark containing on its face a falsehood as to the place where his goods are manufactured is guilty of the same fraud of which he complains, and equity will not extend its protection to him. Palmer v. Harris (1869) 60 Pa. (10 P. F. Smith) 156, 100 Am. Dec. 557.

3. — **Quality and properties of articles.**—The use of the term "Syrup of

Figs" upon the bottles containing the compound and on the cartons and wrappers, calculated to induce the public falsely to believe that fig juice is an important element in the composition of such preparation, will deprive the manufacturer of equitable relief against the sale of a medicinal preparation named, marked, and packed in imitation of the older medicine. Clinton E. Worden & Co. v. California Fig Syrup Co. (1903) 23 Sup. Ct. 161, 168, 187 U. S. 516, 47 L. Ed. 282 (reversing decree [1900] 102 Fed. 334, 42 C. C. A. 383 which affirmed [D. C. 1899] 95 Fed. 132); California Fig Syrup Co. v. Putnam (1895) 69 Fed. 740, 16 C. C. A. 376 (affirming [C. C. 1895] 66 Fed. 750); Same v. Frederick Stearns & Co. (1896) 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56; Same v. Stearns (C. C. 1895) 67 Fed. 1008.

The use of "Fig Syrup" or "Syrup of Figs" to designate a laxative compound the basis of which is senna, and which is correctly described in the labels or circulars is not a misrepresentation such as will deprive complainant of the right to equitable relief. Clinton E. Worden & Co. v. California Fig Syrup Co. (1900) 102 Fed. 334, 42 C. C. A. 383 (affirming decree California Fig Syrup Co. v. Worden [C. C. 1899] 95 Fed. 132, and decree reversed [1903] 23 Sup. Ct. 161, 187 U. S. 516, 47 L. Ed. 282); California Fig-Syrup Co. v. Clinton E. Worden & Co. (C. C. 1898) 86 Fed. 212.

Statements on labels and wrappers of a preparation as to its medical value are so largely of matters of opinion rather than statements of fact that, although apparently extravagant, they will not justify refusing a preliminary injunction against one who is clearly infringing the proprietary rights of the maker. Moxie Nerve Food Co. of New England v. Holland (1905) 141 Fed. 202; Newbro v. Undeland (1903) 96 N. W. 635, 69 Neb. 821.

Where a party sold what was in fact a grease under the trade-mark of "non-fluid oil," it was a material misrepresentation to the public, such as would prevent equitable relief in case of an infringement of such trade-mark. New York & N. J. Lubricant Co. v. Young (1910) 77 A. 344, 77 N. J. Eq. 321, 140 Am. St. Rep. 560.

Where a trade-mark contains false representations with respect to the article on which it is used, it will not be protected by a court of equity, although the article may be as good as that which it is falsely represented to be. Uri v. Hirsch (C. C. 1903) 123 Fed. 568.

In a suit for infringement of a trade-mark for whisky, the testimony and exhibits of complainant showed that his trade-mark as registered and used of his barrels and bottles contained a representation that his whisky was made in Nelson county, Ky.; that he also conspicuously advertised such to be the fact by the markings on his packages, and by advertising matter, using cuts of a distillery, with the words "Old Style Nelson County Pure Rye," etc. It was shown without contradiction that he owned no distillery, that whisky sold by him was purchased from rectifiers, was not made in Kentucky, and was not a pure rye or bourbon as represented, but a blended whisky flavored, and containing coloring matter, his trade-mark being stenciled on the barrels at his request. Where both his trade-mark and business were founded on false representations as to place of manufacture, ingredients, etc., intended to deceive the public, a court of equity would not entertain a suit for their protection by enjoining another from infringing his trade-mark. Id.

Where a proprietary preparation used largely as a mere beverage was also falsely and fraudulently represented to contain valuable medicinal ingredients, a court of equity cannot afford protection to any part of its business against infringement of trade-mark or unfair competition. Moxie Nerve Food Co. of New England v. Modox Co. (C. C. 1907) 152 Fed. 493.

Complainant was not entitled to protection where guilty of fraudulent misrepresentations, in that its proprietary remedy did not contain any gold or chloride of gold, as represented to the public. Memphis Keeley Institute v. Leslie E. Keeley Co. (1907) 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921.

Any material misrepresentation in a label or trade-mark as to the person by whom the place where, or the material of which an article is manufactured deprives a person of equitable relief when such trade-mark is infringed, although the act of the infringer was without justification, and although the false article was as good as the true one. New York & N. J. Lubricant Co. v. Young (N. J. 1910) 77 A. 344.

The name of "Syrup of Figs" could not constitute a valid trade-mark for a laxative compound composed chiefly of senna, with the addition of a small quantity of fig juice, to give the preparation a more pleasant taste. Clinton E. Worden & Co. v. California Fig Syrup Co. (1903) 23 Sup. Ct. 161, 168, 187 U. S. 516, 47 L. Ed. 282.

That the city of Carlsbad sells "Carlsbad Sprudel Lozenges," which contain but 10 per cent. of the ingredients found in Carlsbad water, and 90 per cent. of cane sugar, constitutes no fraud or misrepresentation such as would be a defense; for lozenges, by dictionary definition, are small cakes of sugar or confection, often medicated. City of Carlsbad v. Kutnow (1895) 71 Fed. 167, 18 C. C. A. 24, affirming decree (C. C. 1895) 68 Fed. 794.

Complainants manufactured and sold

a mixture of certain bitter, aromatic, and carminative substances, together with alcohol added as a preservative solvent, and represented the bitters did not contain any "intoxicating ingredients." Such representations were not so false and fraudulent as to deprive complainants of relief in a suit to enjoin unlawful competition. Siegert v. Gandolfi (1906) 149 Fed. 100, 79 C. C. A. 142, reversing decree (C. C. 1905) 139 Fed. 917, and writ of certiorari denied Gandolfi v. Siegert (1907) 27 Sup. Ct. 790, 205 U. S. 542, 51 L. Ed. 922.

Where plaintiff advertised and sold a patent medicine as a blood purifier, claimed to cure a great number of diseases, which in fact it did not do, and, while it claimed that the medicine was composed in part of imported herbs, refused to disclose the ingredients of the medicine or to state from what herb houses or firms the herbs were purchased, held not to show that complainant did not come into equity with clean hands, and was therefore not entitled to relief against defendants' unfair competition by the sale of another medicine under a similar name. Dr. Peter H. Fahrney & Sons Co. v. Ruminer (1907) 153 Fed. 735, 82 C. C. A. 621.

Manufacturers of hosiery under the name "Holeproof" are not precluded from an injunction by the fact that it is false and misleading; it being merely a boastful and fanciful word not intended as a representation that the hose manufactured and sold by complainant thereunder would never wear out. Holeproof Hosiery Co. v. Wallach Bros. (1909) 172 Fed. 859, 97 C. C. A. 263, modifying order (C. C. 1908) 167 Fed. 373.

A statement on the label of whisky bottled in bond that its "purity" was guaranteed by the United States government held not such a fraudulent representation as would debar the distiller from relief in equity against infringement of its trade-mark. W. A. Gaines & Co. v. Turner-Looker Co. (1913) 204 Fed. 553, 123 C. C. A. 79.

The name "Coca Cola" as applied to a flavoring syrup for carbonated drinks, containing about 2 per cent. of a compound made from coca leaves and cola nuts, held not so substantially and really deceptive as to invalidate it as a trade-mark, under the 10-year clause. Nashville Syrup Co. v. Coca-Cola Co. (1914) 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358, affirming judgment Coca-Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Where it is sought to be shown in defense that the beverage contains alcohol, and is not an extract of a tropical plant as alleged, and the evidence shows that some chemists found a teaspoonful of alcohol in a quart, and others much less, and that it was used to cut the flavoring oils and mostly evaporated, the defense is not sustained. Moxie Nerve-Food Co. v. Baumbach (C. C. 1887) 32 Fed. 205.

A manufacturer who falsely represents the composition of his goods by the labels on his packages is in no position to enjoin a rival manufacturer from using similar labels and packages, on the ground that the latter thereby deceives the public. Clotworthy v. Schepp (C. C. 1890) 42 Fed. 62.

Where a distiller mixes 35 per cent. of other whiskies with his own brand of whisky, and sells the mixture under his trade label, to the effect that the mixture is warranted perfectly pure and unadulterated, a court of equity will not protect the distiller or his privies in contract from infringement of the trade-mark thus fraudulently used. Krauss v. Jos. R. Peebles' Sons Co. (C. C. 1893) 58 Fed. 585.

A printed statement that only the best grades of Havana tobacco were used in the cigars, when, in fact, the cigars contained a considerable proportion of inferior tobacco, not Havana, and in some instances no Havana tobacco at all, was such a misrepresentation as to disentitle the manufacturer to relief against an imitator of his labels, advertisements, etc., though found clearly guilty of unfair competition. Hilson Co. v. Foster (C. C. 1897) 80 Fed. 896.

The fact that the wrappers of a medicine contain an erroneous statement that the compound is purely vegetable, where the same wrapper truthfully gives the formula in accordance with which it is made, is not such a fraud as will defeat the right of the manufacturer to relief from unfair competition. Centaur Co. v. Robinson (C. C. 1899) 91 Fed. 889.

The fact that the preparation known as "Syrup of Figs" may not, as a medicine, accomplish all that is claimed for it, is not sufficient evidence of fraud to deprive the company making it of the right to relief in a court of equity. California Fig-Syrup Co. v. Warden (C. C. 1899) 95 Fed. 132.

The Liebig process of making extract of meat not being a trade secret, but free to be employed by all, equity cannot enjoin one from designating his product as "Liebig's," at suit of a rival dealer, on the ground that it is not in fact made by such process, and the designation is therefore fraudulent; that being a question which can only arise between seller and purchaser. Liebig's Extract of Meat Co. v. Walker (C. C. 1902) 115 Fed. 822.

Misrepresentations made upon labels and wrappers and in advertisements respecting the medicinal properties of the article will not debar one from relief in equity, where he has permanently discontinued such misrepresentations and makes only such representations as are considered warranted. Moxie Nerve Food Co. of New England v. Modox Co. (C. C. 1907) 153 Fed. 487, order

affirmed Modox Co. v. Moxie Nerve Food Co. (1907) 162 Fed. 649, 89 C. C. A. 441.

Complainant cannot enjoin use of names which are original and fanciful as applied to his compound, where he is either perpetrating a fraud on the public by falsely claiming the presence of oil of pine as an ingredient, or claiming a trade-name in a mere proper pharmaceutical designation of the drug he seeks to protect. Leach v. Scarff (C. C. 1911) 188 Fed. 446.

Where a red cross was only suggestive of asepsis and general cleanliness, and not descriptive of the general character of the brush, and not intended to imply consent or approval of its use by the Red Cross Society, it was not objectionable as being either illegal or deceitful in itself. Loonen v. Deitsch (C. C. 1911) 189 Fed. 487.

Where complainant used a red cross as a trade-mark on toothbrushes, the fact that he added the words "Red Cross Brush" or "Red Cross" did not convict him of bad faith as indicating that the brushes had been adopted by or had anything to do with the Red Cross Society. Id.

Where, in a suit to restrain the infringement of a trade-mark bottles were so labeled and lettered as to induce the public to believe that they were obtaining a quality of whisky far superior to what they actually bought, equity will not interfere. J. W. Epperson & Co. v. Bluthenthal (Ala. 1906) 42 So. 863.

The use of the word "Habana" on a label, when in fact the cigars on which the label appeared were merely Havana filler, is such a deceit on the public that equity will furnish no relief against an infringement. Solis Cigar Co. v. Pozo (1891) 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Use of the words "the only high grade butterine" is not such fraud or deception as to deprive the manufacturer of the protection of a court of equity in its use as a trade-mark. William J. Moxley Co. v. Braun & Fitts Co. (1901) 93 Ill. App. 183.

One who advertised his nostrum as a certain cure for a large number of diseases, for many of which the medicine would be palpably ineffectual, cannot enjoin an infringement of the trade-name of such medicine by a competitor. A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. (Ind. App. 1909) 86 N. E. 1025.

Where a bill to enjoin the wrongful imitation of a trade-mark alleged that complainant's preparation was "free from all mineral and poisonous substances," which allegation was shown to be false, equity would not protect complainant in deceiving the public by such false representations. Laird v. Wilder (1872) 72 Ky. (9 Bush.) 131, 15 Am. Rep. 707.

Where statements as to grade, quality, brand, and importation of tea are deceptive, though not deliberately so, plaintiffs have no right to equitable interference for infringement of trade-mark. Kenny v. Gillet (1889) 70 Md. 574, 17 Atl. 499.

Equity will not protect as a trade-mark, the statement on the label: "The great smallpox and diphtheria cure and preventive. Cures the worst cases without marking, unless already scabbed"—asserting a falsehood, and being designed to deceive the public. Houchens v. Houchens (1902) 51 A. 822, 95 Md. 37.

Where plaintiff made and extensively advertised a bread as "Creamalt," a "new bread made with milk and malt" which was true, he was not precluded from enjoining defendant from imitating the bread; the word "Creamalt" not necessarily implying the use of pure cream, and it being fair to term the bread a new bread, though these ingredients had been used before. George G. Fox Co. v. Best Baking Co. (1911) 95 N. E. 747, 209 Mass. 251.

The designation of complainant's products as "nonfluid oils" held not a material misrepresentation, so as to defeat his right to protection against imitation. New York & New Jersey Lubricant Co. v. O. W. Young (N. J. 1915) 94 A. 570.

The use of the word "Magnetic" where there was no pretense that the liquid possessed any magnetic qualities does not show any fraudulent intent to deceive the public which would deprive plaintiff of its right to an injunction. D. Ransom, Son & Co. v. Ball (1889) 54 Hun, 635, 7 N. Y. Supp. 238.

Where plaintiff sought to enjoin imitation of a trade-mark, consisting of a certain device with Italian words, designating the macaroni as large and indicating the province of Genoa, Italy, while that sold by plaintiff was a domestic product, as the impression conveyed by plaintiff's trade-mark was the false idea that his product was the genuine Italian macaroni, he was not entitled to protection. Wilson v. Needermann (Ohio, 1888, Super. Ct. Cin.) 19 Wkly. Law Bul. 268.

Where the first manufacturers of a drug for the trade claimed in their circulars and labels to be its discoverers, the statement, whether true or false, was not one of a material fact, and did not affect plaintiffs' right to an injunction to prevent the wrongful use of their trade-mark. Lloyd v. William S. Merrill Chemical Co. (Ohio, 1891, Super. Ct. Cin.) 25 Wkly. Law Bul. 319.

Where a wholesale grocer adopted as a trade-mark on his syrups the words "Georgia Coon," using the words "Genuine molasses" in connection therewith on molasses that was not pure cane molasses, but was formed largely of glucose, which was generally known and no one could be deceived by the labels, the use of the words "Genuine molasses" was not such a deception as to prevent the wholesale grocer from obtaining relief in a court of equity

against one infringing the trade-mark. Western Grocer Co. v. Caffarelli Bros. (Tex. Civ. App. 1908) 108 S. W. 413.

Under R. S. Wis. 1898, § 1409g, a proprietary medicine label which falsely states that the medicine is put up by a physician will not be protected by injunction. Lemke v. Dietz (1904) 98 N. W. 936, 121 Wis. 102.

4. —— Patented and copyrighted articles.—No right to a trade-mark which includes the word "patent" and describes the article as "patented" can arise when there is and has been no patent; nor is the claim valid for other words used, where it is based upon their use in connection with that word. Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. (1901) 22 Sup. Ct. 6, 183 U. S. 1, 46 L. Ed. 49, 97 O. G. 958, reversing decree Rahtzen's Composition Co. (1900) 101 Fed. 257, 41 C. C. A. 329.

The use of the word "patent" to indicate a medicine made by a secret formula, when the medicine is in fact not patented, is not such fraud as defeats the right of the manufacturer to relief in equity against unfair competition. Jacobs v. Beecham (1911) 31 Sup. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree Beecham v. Jacobs (1908) 159 Fed. 129, 86 C. C. A. 623.

The names on fruit jars, "Mason's Patent, Nov. 30th, 1858," "Mason's Improved," and "The Mason Jar of 1858," held not entitled to protection because having a tendency to mislead the public, a patent therefor having been adjudged invalid, but the designation "The Mason Jar of 1872" is not open to the same objection. Consolidated Fruit-Jar Co. v. Dorflinger (C. C. 1874) Fed. Cas. No. 3,129.

A person has no right to mark his goods with any words or terms indicating that they are manufactured under a patent which he does not own and has no right to use, and the courts will restrain him from such action. Washburn & Moen Mfg. Co. v. Haish (C. C. 1879) Fed. Cas. No. 17,217.

The use for several years after a patent had expired of the word "patented," or statements clearly implying that the article was protected by a patent, is such a fraud as will preclude relief in equity against unfair competition, although no such statements were made in connection with complainant's trade-mark, or on the packages themselves. Burton v. Stratton (C. C. 1882) 12 Fed. 696, 699; Preservaline Mfg. Co. v. Heller Chemical Co. (C. C. 1902) 118 Fed. 103.

Where, after expiration of the patent, in order to claim a trade-mark in the name by which the patented medicine was known, the owner asserted for the first time that in the preparation of the medicine it varied from the formula of the patent, this conduct was not such as to commend itself to a court of equity, on a motion to restrain alleged unfair competition. Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605.

An index line pointing significantly to the feature of the article is not such reference to a patent, which had been held invalid except as to the triple band of spring wire to strengthen the hook, as will constitute such a deception of the public as precluded complainant from relief in a court of equity against unfair competition. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C. 1905) 139 Fed. 146, decree modified (1906) 144 Fed. 682, 75 C. C. A. 484.

The presence of the word "Copyrighted" on a label, when in fact it had not been copyrighted, was not such a misrepresentation as would prevent the owner's receiving protection. Solis Cigar Co. v. Pozo (1891) 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279.

Where complainant advertised that its method of marking its name on the selvedge of silk was patented, and no patent right existed, such action was ground for refusing complainant a preliminary injunction against infringement. Stirling Silk Mfg. Co. v. Sterling Silk Co. (1900) 46 A. 199, 59 N. J. Eq. 394.

Where one was notified that his application had been allowed and letters patent would be forwarded in September, that the words "patent Sept." were used by the manufacturer before actual receipt of the letters patent would not bar his right to protect his trade-mark. Lauferty v. Wheeler (N. Y. 1882) 11 Abb. N. C. 220.

The use by plaintiffs on their registered label of the words "Pat. Aug. 13th, 1872," that being the date of the registry of their trade-mark, cannot be regarded as a false affirmation that the goods were patented, so as to deprive them of relief from infringement. Cahn v. Gottschalk (1888) 14 Daly, 542, 2 N. Y. Supp. 13.

5. —— Wrongful use of name.—Where a father and son were in partnership, using as a trade-mark "C. B. & Son," and the father sold his interest to others of his sons, who continued the business with the former son, the use of the same trade-mark by the new firm was not misrepresentation, such as to bar the right to restrain infringement of the trade-mark. Feder v. Benkert (1895) 70 Fed. 613, 18 C. C. A. 549, affirming judgment Benkert v. Feder (C. C. 1888) 34 Fed. 534.

The administrator of a manufacturer was not entitled to restrain unfair competition and infringement, having misled the public to believe that the decedent still lived, and his personality having been a factor in the retention of the good will. Hazlett v. Pollack Stogie Co. (1912) 195 Fed. 28, 115 C. C. A. 30, 39 L. R. A. (N. S.) 632, af-

firming decree (C. C. 1911) 188 Fed. 494.

Right to relief in equity against infringement of trade names, etc., held subject to forfeiture through deception of the public. Hazlett v. Pollack Stogie Co. (1912) 195 Fed. 28, 115 C. C. A. 30, 36 L. R. A. (N. S.) 632, affirming decree (C. C. 1911) 188 Fed. 494.

A company which, after acquiring the business and the right to the exclusive use of the name "Chickering" as a trade-name, continued so to use it on the fall board and name plate of pianos manufactured by it, is not guilty of such a fraud on the public as would deprive it of the right to protect the name against infringement. Chickering v. Chickering & Sons (1914) 215 Fed. 490, 131 C. C. A. 538.

A person who appropriates a trade-mark belonging to another, without his consent, cannot afterwards acquire a good title by the abandonment thereof by the first proprietor; and a third person, using the same trade-mark, may plead such defect of title, in a suit by the person who first wrongfully appropriated it. O'Rourke v. Central City Soap Co. (C. C. 1885) 26 Fed. 576.

A corporation which succeeds to a business and the use of a trade-mark is not debarred from suing to restrain infringers, either by the absence of an assignment of the business by its predecessors, or a supposed trespass on rights of the defendant by such predecessors, which does not appear to have caused injury. Royal Baking Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376, appeal dismissed Raymond v. Royal Baking Powder Co. (1896) 76 Fed. 465, 22 C. C. A. 276.

The mere fact that partners conduct their business under the name of the "Standard Distilling Company" is not sufficient to show that they represent themselves as a corporation for the purpose of deceiving and defrauding the public, so as to debar them of the right to invoke the protection of a court of equity in the use of such name. Block v. Standard Distilling & Distributing Co. (C. C. 1899) 95 Fed. 978.

One who has wrongfully appropriated the business of a licensee under a patent has no standing to complain of unfair competition because of his sale of a similar article under a like name. Corbin v. E. Taussig & Co. (C. C. 1904) 132 Fed. 662, decree modified Taussig v. Corbin (1906) 142 Fed. 660, 73 C. C. A. 656.

After plaintiffs had severed their connection with "Millbrae Dairy," but continued to use the name, they could not restrain defendant from using the name "Millbrae" in a competing business, since their own use of the name was a fraud on the public. Millbrae Co. v. Taylor (Cal. 1894) 37 Pac. 235, 25 L. R. A. 193.

Use of the name of a former president of a corporation as its corporate name, and his surname, used possessively, as its popular name, does not import a declaration that a person of the name used is now connected with it, so as to render such use fraudulent. Dodge Stationery Co. v. Dodge (1904) 78 P. 879, 145 Cal. 380.

A dealer doing business under an assumed name, who stamped on the shoes the assumed name, adopted the name as a trade-mark, and whose letter heads contained the assumed name, followed by the words "Manufacturers of * * * Shoes," was not guilty of such fraudulent representations as would defeat his right to recover the profits realized by another through the wrongful use of the trade-mark. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75, 23 L. R. A. (N. S.) 1150.

A rival dealer will not be restrained from the use of a trade-name where plaintiff is himself wrongfully using the name. Amos H. Van Horn v. Coogan (1894) 52 N. J. Eq. (7 Dick.) 380, 28 Atl. 788.

Circulating catalogues and price lists containing false statements as to the exclusive right to a name, where it is not proved that the trade-name owes its value to such false representations, and the publication had ceased prior to the filing of the bill will not prevent plaintiff's relief from unfair competition. Johnson & Johnson v. Seabury & Johnson (N. J. 1907) 67 A. 36.

Chancery will not enjoin the use of a trade-name similar to complainants' name, "London Shop," to the extent that complainants seek to benefit from a suggestion by their name that their stores are connected with a London store, which is untrue. Rosenthal v. Blatt (N. J. Ch. 1912) 83 A. 387.

Where one sold the right to use his name, the purchaser's assignee thereof may not restrain the sale by third persons of goods made by the owner of such name and stamped therewith, since to grant such an injunction would enable the plaintiffs to perpetrate a fraud on the public. Samuel v. Berger (N. Y. 1856) 24 Barb. 163.

The right to a name used by persons in their calling equity will not protect where the name or phrase claimed as such is intended and calculated to deceive the public. Fay v. Lambourne (1908) 108 N. Y. Supp. 874, 124 App. Div. 245.

The right to a name used by persons in their calling is similar to the right to the use of a trade-mark, which right equity will not protect where the name or phrase claimed as such is intended and calculated to deceive the public. Fay v. Lambourne (1909) 90 N. E. 1158, 196 N. Y. 575.

A judgment enjoining one not entitled to the use of the prefix "Dr." from manufacturing or selling any proprietary remedies under his name with the prefix "Dr.," and from using his name

in his business in such a manner as to mislead does not interfere with his right to honestly use his name in an honest business. World's Dispensary Medical Ass'n v. Pierce (1910) 122 N. Y. Supp. 818, 138 App. Div. 401.

Where plaintiff purchased the business of a bankrupt tea company, together with the right to use its name, its use of the name to advertise its goods was not a fraud on the public, even though the grades of the goods had been changed since the purchase, and plaintiff was entitled to an injunction to prevent another person from infringing its right to use the name of the bankrupt tea company. James Van Dyk Co. v. F. V. Reilly Co. (1911) 130 N. Y. Supp. 755, 73 Misc. Rep. 87.

The use of the trade-mark "Trommer Extract of Malt Co.," used by one who made his extract in an entirely different manner from Trommer, whose extract was justly famous, was fraudulent, and therefore not to be protected. Buckland v. Rice (1884) 40 Ohio St. 526.

6. Unlawful business.—A corporation engaged in the liquor trade contrary to law cannot sue to enjoin another corporation from using a name similar to its own. Portsmouth Brewing Co. v. Portsmouth Brewing & Bottling Co. (1893) 67 N. H. 433, 30 Atl. 346.

Where an unincorporated association of operatives allows a device adopted to designate articles manufactured by its members to be used by those manufactories only which employ exclusively its members, this is not conclusive that the objects of the association are illegal, so as to deprive it of the right of protection of its device against fraudulent imitations. Strasser v. Moonelis (1888) 55 N. Y. Super. Ct. (23 Jones & S.) 197.

7. Injurious article.—A trade-mark, attached to a medicinal preparation which may do some good as advertised, is not invalid because the preparation is harmful when an excessive amount is taken. Theodore Rectanus Co. v. United Drug Co. (1915) 226 Fed. 545, 141 C. C. A. 301.

In a suit to restrain defendant's use of the word "Rex" in competition with complainant's "Rex" dyspepsia tablets, that the tablets were made of drugs which were harmful, when taken otherwise than as prescribed, was no defense. United Drug Co. v. Theodore Rectanus Co. (D. C. (1913) 206 Fed. 570.

8. Abandonment and extinguishment.—Abandonment or extinguishment as affecting registration of mark or as to right to use of name of patented article on expiration of patent, see notes under § 9490, ante.

A person may adopt as a valid trademark words which have been originated by another and afterwards abandoned by him. Rome Machine & Foundry Co. v. Davis Foundry & Machine Works (Ga. 1910) 68 S. E. 800; W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co. (1904) 107 Mo. App. 507, 81 S. W. 648; Rosenburg v. Fremont Undertaking Co. (Wash. 1911) 114 P. 886.

Abandonment of the right to the exclusive use of a distinctive package or other dress for goods is not shown by the fact that it has been also used by others, unless there has been such acquiescence by complainant as to indicate also an intention to abandon. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60 (reversing decree [1899] 91 Fed. 536, 33 C. C. A. 291); Actiengesellschaft Vereinigte Ultramarin-Fabriken v. Amberg (1901) 109 Fed. 151, 48 C. C. A. 264.

Right to sue for violation of trademark is lost by long delay or gross laches. McLean v. Fleming (1877) 96 U. S. 245, 24 L. Ed. 828.

The right to an injunction against the intentional use of complainant's trademark is not lost by laches, though the action was not brought for 13 years after infringement began, especially where it does not appear that the trademark has acquired an increased value from defendant's use; but an accounting will not be granted. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, affirming decree Holt v. Menendez (C. C. 1885) 23 Fed. 869.

The right to a trade-mark once lost by permitting infringements until the word has become generic is not regained here by a change of the law of the country of its origin, by which the owner's right to it is established there after it has been held to be public property for many years. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

The adoption by the Carthusian monks of a new designation for the liqueur manufactured by them is not such an abandonment of their old marks as will preclude relief against infringement in the United States by the French liquidator of their properties, or those claiming under him, where such change was made in order to save the French market for their product, and they have continuously asserted their rights against infringers. Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 674, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1908) 164 Fed. 25, 90 C. C. A. 499.

One who, after using an alleged trademark for a short time, abandons it for nearly a quarter of a century, has no right to resume its use after it has been long employed by another, who has built up under it a large and successful business. Raymond v. Royal Baking-Powder Co. (1898) 85 Fed. 231, 29 C. C. A. 245, affirming Royal Baking Powder Co. v. Raymond (C. C. 1895) 70 Fed. 376.

By the failure to take action for the

protection of his rights, the foreign owner abandoned all exclusive claim to the use in the United States of the trade-name. Saxlehner v. Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, 93 O. G. 940, reversing (1899) 91 Fed. 536, 33 C. C. A. 291, and modifying decree (C. C. 1898) 88 Fed. 61.

Where the manufacturer of an article placed upon the packages a notice in the usual form that the article was made under a patent, the right to the exclusive use of the name of the article as a trade-name expires with the expiration of the patent, whether the article was in fact made in accordance with the patent or not. Horlick's Food Co. v. Elgin Milkine Co. (1903) 120 Fed. 264, 56 C. C. A. 544; G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, modifying decree Ogilvie v. G. & C. Merriam Co. (C. C. 1907) 149 Fed. 858, and writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Abandonment of a trade-mark will not be found, unless supported by proof of a clear intention of the owner to entirely discontinue its use. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

The right to use a trade-mark held forfeited by nonuser for eight years. Blackwell v. Dibrell (C. C. 1878) Fed. Cas. No. 1,475.

Voluntary relinquishment of the original mark for a new device forfeits the right to the old mark. Manhattan Medicine Co. v. Wood (C. C. 1878) Fed. Cas. No. 9,026.

Abandonment of a trade-mark is not made out by showing numerous infringements in which the owners of such trade-mark have not acquiesced. Williams v. Adams (C. C. 1879) Fed. Cas. No. 17,711.

A corporation which has acquired a property right to the use of a trade-mark cannot be deprived thereof by the assumption of such name subsequently by another corporation, whether the latter select its name by the act of corporators or the name is selected for it in a special act by the legislative body. Goodyear Rubber Co. v. Goodyear's Rubber-Mfg. Co. (C. C. 1884) 21 Fed. 276, decree reversed Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co. (1888) 9 Sup. Ct. 166, 128 U. S. 598, 32 L. Ed. 535.

That the owner of a trade-mark allows the packages to be labeled with the names of the dealers to whom the article is sold does not invalidate the trade-mark. Lichtenstein v. Goldsmith (C. C. 1889) 37 Fed. 359.

The words "Webster's Dictionary," which appeared on the title-page of the edition of 1847, are now public property, by reason of the expiration of the copyright; and any one may reprint that edition, and entitle the reprint "Webster's Dictionary." Merriam v. Famous Shoe & Clothing Co. (C. C. 1891) 47 Fed. 411.

Where plaintiff's predecessors for some years pooled with other manufacturers, and all sold like patterns under like labels, there had been no such indiscriminate use of the patterns as would deprive plaintiff of its exclusive right. Cleveland Stone Co. v. Wallace (C. C. 1892) 52 Fed. 431.

Plaintiff's predecessors used the words "La Venzolana" on five shipments of flour in 1873, three in 1885, one in 1886, several in 1887, 1888, 1889, and 1890. Plaintiff used them on similar shipments thereafter, and caused same to be registered as a trade-mark November, 1891. Defendant has used the same words much more continuously and extensively on similar shipments since October, 1884. Held, that whatever rights accrued to plaintiff's predecessors by the use of the words in 1873 were lost by abandonment long before defendant began using them in 1884. Brower v. Boulton (C. C. 1892) 53 Fed. 389.

The omission from a registered trade-mark of a feature theretofore sometimes used in connection with it is an abandonment of that feature to the public. Pittsburgh Crushed-Steel Co. v. Diamond Steel Co. (C. C. 1898) 85 Fed. 637.

Advertisements by the exclusive selling agent that the trade-name had become a general name for all similar waters, held an abandonment of the trade-mark, which was binding on the owner of the wells. Saxlehner v. Eisner & Mendelson Co. (C. C. 1898) 88 Fed. 61, decree modified (1899) 91 Fed. 536, 33 C. C. A. 291, which is reversed (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

Right to an accounting by an infringer of a trade-mark is barred by laches, where he openly infringed for over three years, to the knowledge of, and without objection by, the owner of the trade-mark. N. K. Fairbank Co. v. Luckel, King & Cake Soap Co, (C. C. 1901) 106 Fed. 498.

The original user of the word "Singer," to denote the source of manufacture of sewing machines, by applying it also to designate the machine itself, lost the right to prevent others from using it, provided they clearly specified the actual manufacturer, but is not precluded from enjoining its use to mislead and deceive purchasers. Singer Mfg. Co. v. Hipple (C. C. 1901) 109 Fed. 152.

The fact that a manufacturer has modified the dress by which its goods had become known to the public, does not justify a rival manufacturer in adopting or simulating the earlier dress. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C. 1908) 159 Fed. 292, decree affirmed (1909) 168 Fed. 898, 94 C. C. A. 310.

Complainant had instituted eight dif-

ferent suits in the United States to restrain imitation of its dress of bottles in which it sold Guinness' Stout, including the capsule; and in 1893, when R. commenced selling the same stout under similar labels, collocation, and capsules, complaint was made, and negotiations followed. Suit was commenced in 1896, which was considerably delayed owing to the residence of the parties and witnesses; and, complainant's solicitor dying, the suit was discontinued by consent in 1901. A new suit was instituted in March, 1904, and evidence was taken therein in 1906, 1908, and 1909; there being no orders limiting the time, or motions or requests for more expeditious prosecution, and since the suit was begun there had been a partial compliance by R. with complainant's demand. Held, that complainant had not abandoned its right to the protection of its labels, capsule, and collocation. Edward & John Burke, Limited, v. Bishop (1910) 175 Fed. 167.

In order to establish abandonment of a merchant's right to protection of his labels and collocation under which his goods are sold, an actual intent to abandon must be shown, though it may be inferred from his acts or laches necessarily pointing to actual abandonment. Id.

A manufacturer of a baking powder in which the acid constituent was alum, and which was sold under the name "Solar" as a trade-mark, lost all rights it possessed in such trade-mark by transferring it to a baking powder in which phosphate was substituted for alum. Independent Baking Powder Co. v. Boorman (C. C. 1910) 175 Fed. 448.

Name "Listerine" held not to have become descriptive or generic so that the owner's right to the name had been lost. Lambert Pharmacal Co. v. Bolton Chemical Corporation (D. C. 1915) 219 Fed. 325; Nolan Bros. Shoe Co. v. Nolan (1900) 63 P. 480, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346.

Abandonment, being in the nature of a forfeiture, must be clearly and convincingly proved by the one alleging it; and a mark used as a trade-mark will never be held abandoned, unless a clear intention to do so appears. Mathy v. Republic Metalware Co. (1910) 35 App. D. C. 151.

When the owner of a trade-mark abandons it, it becomes the subject of reappropriation by one who had theretofore used it, and he may register it. Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. (1910) 35 App. D. C. 425.

If a mark has come to be so public and in such universal use that nobody can be induced from the use of it to believe that he is buying the goods of the original trader, the right of the original trader to the mark is lost. Star Brewery Co. v. Val. Blatz Brewing Co. (1911) 36 App. D. C. 534.

If a trade-mark or trade-name has been abandoned it may be resumed and re-adopted by the original proprietor, if in the meantime it has not been taken possession of by another. Rome Machine & Foundry Co. v. Davis Foundry & Machine Works (1910) 68 S. E. 800, 135 Ga. 17.

The omission of a manufacturing company at Moline to put their advertising name "Moline Plow" on their plows devests them of the right to prevent other manufacturers at Moline from using the same name. Candee v. Deere (1870) 54 Ill. 439, 5 Am. Rep. 125.

The use of some word, letter, or character of a trade-mark by different parties, without hinderance, will not work an abandonment. Sohl v. Geisendorf (Ind. 1871) 1 Wils. 60.

Mere nonuser of a trade-mark for a year does not constitute an abandonment, although it may entitle others to use the trade-mark during that time. Julian v. Hoosier Drill Co. (1881) 78 Ind. 408.

Plaintiff, doing business under the name Atlas Assurance Company, and using a symbol of Atlas supporting the world as a trade-mark, did not abandon its exclusive right to use the name and device by permitting the "Atlas Mutual Insurance Company" and other insurance companies doing business elsewhere in the United States to use the same name and device; there being no privity between such companies and defendant. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (1908) 114 N. W. 609.

Where one sells his distillery, and agrees that during a short period, in which he does not propose to engage in the business the purchasers may use his name in branding whisky, there is no such suspension of the use on his part as will cause him to lose his right to use it thereafter. Mattingly v. Stone (Ky. 1890) 14 S. W. 47.

Where one Draper marked his product with that name in various forms, but, on notice from another not to use "Draper Oiler Co.," he substituted "F. Draper & Co.," and permitted a large customer to use labels of "Draper Steel Oilers" on his packages, the name "Draper" did not become public property by reason of such acts. H. A. Williams Mfg. Co. v. Noera (1893) 158 Mass. 110, 32 N. E. 1037.

Defendant had used the word "Knickerbocker" for two years to mark the shoes manufactured by him, but discontinued to use it for four years on going out of business, but did not abandon his intent to use it. On the re-establishment of his business in another state, he named his concern the "Knickerbocker Shoe Company." Held, that defendant had not abandoned the trademark. Burt v. Tucker (1901) 59 N. E. 1111, 178 Mass. 493, 52 L. R. A. 112, 86 Am. St. Rep. 499.

Where a third person used labels con-

taining plaintiff's trade-name, procuring such labels from another, who testified that he made similar labels for another manufacturer, the labels were not used to show that the cigars came from any particular maker, so as to deprive plaintiff of his right to the name. Cohen v. Nagle (1906) 76 N. E. 276, 190 Mass. 4, 2 L. R. A. (N. S.) 964.

A temporary disuse of a trade-mark by the owner thereof during the period of a license to another to use it is not necessarily an abandonment of his rights. Nelson v. J. H. Winchell & Co. (1909) 89 N. E. 180, 203 Mass. 75.

In a suit to restrain infringement of a special trade-mark for "Old Crow" whisky, held that, if the words were ever used by others as a trade-mark, there was such a complete disuse as to amount to an abandonment, rendering them capable of appropriation. W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co. (1904) 107 Mo. App. 507, 81 S. W. 648.

That a manufacturer of pens had placed on his boxes of pens a caution to the public to beware of pens similarly marked and manufactured by others is not an acquiescence in the use of his trade-mark by others. Gillott v. Esterbrook (N. Y. 1867) 47 Barb. 455.

Where plaintiffs made no objection, during more than seven years, to the use by defendant of the name adopted by him, which was very similar to plaintiffs' trade-name, plaintiffs had acquiesced in defendant's use of the name "Westchester" by their laches, and could not prevent such use. Wormser v. Levy (1884) 59 N. Y. Super. Ct. 1, 12 N. Y. Supp. 558, judgment affirmed (1891) 126 N. Y. 670, 27 N. E. 854.

A label adopted and filed by a labor union to designate the goods made by its members is not abandoned by adopting and filing another label of the same size, shape, color, and general appearance, where the later label differs from the first only in a few words descriptive of the object of the union, though one of the officers of the union testified that the first label was "abandoned," and afterwards the other label had been used. Perkins v. Heert (1896) 5 App. Div. 335, 39 N. Y. Supp. 223.

A person who lends to a corporation the use of his name does not thereby lose the right to use it afterwards in his own business. De Long v. De Long Hook & Eye Co. (1896) 7 App. Div. 33, 39 N. Y. Supp. 903.

Where one had abandoned the use of his name as a trade-name for 25 years, and then made a general assignment, equity will not enforce the right to such trade-name of one who purchased the same from the assignees 20 years after the assignment. Bellows v. Bellows (1898) 53 N. Y. Supp. 853, 24 Misc. Rep. 482, 6 N. Y. Ann. Cas. 170.

The fact that the word "Zoolak" was used in connection with the word "Matzoon" indicates no intention to abandon the use of the word "Matzoon." Dr. Dadirrian & Sons Co. v. Hauenstein (1902) 74 N. Y. Supp. 709, 37 Misc. Rep. 23.

A stove manufacturer does not forfeit a right to a trade-mark by failing to put it on all his stoves. Appeal of Peterson (Pa. 1881) 4 Walk. 80.

Where the children, at the death of the father appropriated to their use a symbol or device used by the father as a trade-mark, its use by the several members of the family did not destroy its distinctive features, and leave it open to public use. Appeal of Pratt (1888) 117 Pa. 401, 11 Atl. 878, 2 Am. St. Rep. 676.

Where defendant, after some use of his trade-mark, formed a partnership which used the mark several years, and then by a company formed by defendant, after which the business and good will were sold to plaintiff company, and defendant then sold his interest in the latter company, he had no right to use the trade-mark on the output of a mill owned by him individually. Listman Mill Co. v. William Listman Milling Co. (1894) 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

Where one constantly used a word as his trade-name, applied for registration of it, and was diligent in his efforts to protect it as his trade-name, the fact that he subsequently used in connection with the word his own name, and registered the same in the United States Patent Office, was not an abandonment. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

9. Pleading.—The rule that equity will not protect a person against infringement of trade-marks or labels, where he has been guilty of false or misleading representations in relation thereto, cannot be invoked, where defendant neither pleaded that plaintiff had made any false representations nor offered proof thereof on the trial. Fleischmann v. Fleischmann (Sup. 1896) 39 N. Y. Supp. 1002.

10. Evidence.—The existence of companies doing business under the names of the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like, which names refer to special branches of trade, cannot be set up to show acquiescence in the public use of the general word "celluloid." Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1887) 32 Fed. 94.

A complainant, seeking the protection of his rights in a proprietary medicine, should be required as a part of his affirmative case to allege and prove that his preparation is what it purports to be, and is represented to the public to be, there being no presumption that such representations are true upon

which a court can act. Moxie Nerve Food Co. of New England v. Modox Co. (C. C. 1907) 152 Fed. 493.

While the proprietor of a secret preparation is entitled to protection of his trade secret, yet to the extent that he has revealed or represented the character or composition of his preparation to the public he has waived secrecy, and there is no hardship in requiring him to prove the truth of such representations to a court of equity whose aid he invokes for its protection. Id.

A representation that the article is "pure old rye whisky," is not falsified by proof that the whisky is diluted with water, and that the packages containing it bear only one stamp, while high proof whisky bears two stamps, so as to deprive plaintiffs of relief for infringement. Cahn v. Gottschalk (1888) 14 Daly, 542, 2 N. Y. S. 13.

In a suit to enjoin the use of a trade label after its alleged abandonment by defendant's predecessor, evidence held not to show that it was intended by defendant's predecessor to abandon the right to the trade-name. Waterproofing Co. v. Hydrolithic Cement Co. (1912) 138 N. Y. Supp. 265, 153 App. Div. 47.

Evidence held to raise the question whether plaintiff did not abandon the single word "Coon" as a trade-mark by changing its label in material respects after succeeding to the rights to the trade-mark. Caffarelli Bros. v. Western Grocer Co. (1908) 127 S. W. 1018, 102 Tex. 104, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App. 1908) 108 S. W. 413.

11. Effect of prior decisions.—Where relief for infringement is denied because of plaintiff's misrepresentations, he has no exclusive right to the trade-mark which will sustain a defense in another infringement suit between different parties. Parlett v. Guggenheimer (1887) 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416.

12. Costs.—Where complainant's bill to restrain infringement was dismissed because complainant's use of the trade-marks was calculated to deceive the public, but the proof showed a flagrant and shameless case of pirating on defendants' part, no costs would be allowed. Hazlett v. Pollack Stogie Co. (C. C. 1911) 188 Fed. 494, decree affirmed (1912) 195 Fed. 28, 115 C. C. A. 30, 36 L. R. A. (N. S.) 632.

§ 9507. (Act Feb. 20, 1905, c. 592, § 22.) Suits involving interfering registered trade-marks.

Whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other due proceedings had according to the course of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation. (33 Stat. 729.)

See notes to section 1 of this act, ante, § 9485.

Cited without definite application,
Hughes v. Alfred H. Smith Co. (D. C. 1913) 205 Fed. 302.

§ 9508. (Act Feb. 20, 1905, c. 592, § 23.) Existing rights and remedies for wrongful use of trade-mark preserved.

Nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this Act had not been passed. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

Certificates of registration issued under previous acts were excepted from the operation of the repeal of inconsistent acts and parts of acts by section 30 of this act, post, § 9516.

Notes of Decisions

I. Construction of act

1. In general.
2. Jurisdiction of state courts.

II. Infringement

3. In general.

III. Unfair competition

(A) In general

4. Right to protection in general.

(B) What constitutes unfair competition

5. Nature of unfair competition.
6. Wrongful intent.
7. Necessity of actual deception of public.
8. Imitation or simulation—In general.
9. —— Marks, devices, or symbols.
10. —— Names in general.
11. —— Arbitrary, fictitious, or fanciful names.
12. —— Names of persons, firms, or corporations.

III. Unfair competition—Cont'd

(B) What constitutes unfair competition —Cont'd

13. —— Packages and wrappers.
14. —— Labels.
15. —— Bottles.
16. Use of trade-mark or trade-name for purpose of competition.
17. Right to use name—In general.
18. —— Corporate names.
19. Fraudulent use of packages, bottles, wrappers, or labels.
20. Reference to previous connection with another.
21. Interference with business of another.
22. Disparagement of goods of another.

(C) Defenses

23. In general.
24. Deception of public as barring action or suit.
25. Laches.
26. Estoppel.

(D) Procedure

27. Right to relief.
28. Persons entitled to sue.
29. Persons liable.
30. Grounds of action.
31. Joinder of causes of action.
32. Parties.
33. Pleading, indictment, or information.
34. Evidence—Presumptions and burden of proof.
35. —— Weight and sufficiency.
36. Injunction.
37. Damages and profits.

I. CONSTRUCTION OF ACT

1. In general.—Where the ground for relief in a suit for infringement was unfair competition in domestic commerce, and the cause of action alleged was an imitation of plaintiff's trade-mark on cartons used in local trade, and there was no allegation that complainant's foreign trade was injured by the acts complained of, the fact that the trade-mark was registered, and that complainant was entitled to protection under the federal statute with regard to foreign commerce, was immaterial. Ohio Baking Co. v. National Biscuit Co. (1904) 127 Fed. 116, 62 C. C. A. 116, affirming judgment National Biscuit Co. v. Ohio Baking Co. (C. C. 1900) 127 Fed. 160, and writ of certiorari denied (1904) 25 Sup. Ct. 788, 195 U. S. 630, 49 L. Ed. 352.

The right of the proprietor of a trade-mark to its exclusive use, and to protect and enforce such right by proceedings in chancery, exists by virtue of the common law, and independently of the trade-mark acts. U. S. v. Roche (C. C. 1879) Fed. Cas. No. 16,180.

The rights and remedies concerning trade-marks generally depend upon the laws of the states, common or statutory, and not upon the laws of the United States. Luyties v. Hollender (C. C. 1884) 21 Fed. 281.

The right to trade-marks, and the remedies for their protection, exist independently of statutory regulations; and failure to enumerate descriptive words in the list of limitations on the right to the registry of trade-marks, does not by implication validate a trade-mark consisting of such words. L. H. Harris Drug Co. v. Stucky (C. C. 1891) 46 Fed. 624.

The California statute of 1863, granting protection to registered trade-marks, does not abrogate the remedies afforded by the common law to owners of trade-marks not registered. Derringer v. Plate (1865) 29 Cal. 292, 87 Am. Dec. 170.

Section 9485, ante, is permissive only, and does not affect the rights of owners of unregistered trade-marks which are expressly preserved by this section. Traiser v. J. W. Doty Cigar Co. (1908) 84 N. E. 462, 198 Mass. 327.

2. Jurisdiction of state courts.—See, also, notes under § 9502, ante.

This section does not impair the jurisdiction of state courts over suits for the protection of trade-marks, whether registered or not. Julius Kayser & Co. v. Italian Silk Underwear Co. (1914) 146 N. Y. Supp. 22, 160 App. Div. 607.

II. INFRINGEMENT

3. In general.—See notes under § 9501, ante.

III. UNFAIR COMPETITION

(A) In general

4. Right to protection in general.—Where the question is simply one of unfair competition, it is not essential that there should be any exclusive or proprietary right in the words or labels used. Pillsbury-Washburn Flour-Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162.

That one has obtained a monopoly in the material of which his goods are made does not give him any broader rights to protection in his trade-name or against unfair competition. American Washboard Co. v. Saginaw Mfg. Co. (1900) 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

The right to protection against unfair competition is incidental only to an existing business, and there can be no damage in connection with a violation of such right, except as there is injury to the business and good will through loss of sales or damage to the reputation of the goods. G. & C. Merriam Co. v. Saalfield (1912) 198 Fed. 369, 117 C. C. A. 245, extending opinion on rehearing (1911) 190 Fed. 927, 111 C. C. A. 517.

Relief against unfair competition is granted only on the ground that complainant's business is injured thereby. Borden Ice Cream Co. v. Borden's Condensed Milk Co. (1912) 201 Fed. 510, 121 C. C. A. 200, reversing order Borden's Condensed Milk Co. v. Borden Ice Cream Co. (D. C. 1912) 194 Fed. 554.

Protection of a trade-mark depends primarily on prior adoption and original exclusive use, entitling the appropriator to common-law protection

against similar and deceptive dressing, coupled with fraudulent misrepresentation. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

That complainants for many years had published detective stories exploiting a character described as "Nic Carter" did not entitle them to restrain defendant's use of the same term to designate a character in moving picture films, on the ground of unlawful competition in trade. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

While dramatization and moving pictures are cognate forms of production, in the absence of copyright, no relation exists between either of such forms of production and a written book. Id.

The law of unfair trade is to protect the honest trader in the business which fairly belongs to him, to punish the dishonest trader, who is taking his competitor's business by unfair means, and to protect the public from deception. Id.

The law governing technical trademarks is but a branch of the law regulating trade competition; the prevention of unfair competition being the desideratum in both. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment (D. C. 1912) 197 Fed. 476.

Complainant manufacturing and selling acetylene gas in tanks for automobile held entitled to protection of its exchange system, as well as its right to refill its own tanks. Prest-O-Lite Co. v. Davis (1914) 215 Fed. 349, 131 C. C. A. 491, affirming decree (D. C. 1913) 209 Fed. 917.

When the goods of a manufacturer have become popular, not only because of their intrinsic worth, but also by reason of the manner in which they have been advertised, the good will thus created is entitled to protection against unfair competition. Hilson Co. v. Foster (C. C. 1897) 80 Fed. 896.

The adoption of a manufacturer's distinctive means of advertising his goods, by the use, for similar goods, of means which involve nothing original, and, though not identical at any point, are similar at every point, including the use of a picture which, in general design and in the idea conveyed, is so like a picture used to advertise such manufacturer's goods as to be readily mistaken for it by the ordinary purchaser, though differing from it in details of arrangement, constitutes unfair competition. Id.

Evidence showed, that, prior to complainant's use of the symbol, defendants had used the word "Columbia," without the symbol, and their paper had become known, and was asked for, as "Columbia paper," and that subsequently complainant began the use of the word and symbol. Held that, irrespective of the question of a technical trade-mark, complainant should be enjoined. Morgan Envelope Co. v. Walton (C. C. 1897) 82 Fed. 469.

It was not material that the transactions occurred in foreign countries, since the boundaries of the dealing, and not of countries, constitute the limits of investigation; nor could the laws of such countries vary the rights of parties in the United States with respect to transactions emanating therefrom, though carried out in foreign countries. Wyckoff v. Howe Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, decree reversed Wyckoff, Seamans & Benedict v. Same (1903) 122 Fed. 348, 58 C. C. A. 510, which is reversed Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 49 L. Ed. 972.

An artist has no such common-law right in pictures drawn by him and sold to, and published and copyrighted by, another, as to render it unfair competition for the latter to afterward publish other pictures depicting different scenes merely because they contain characters in imitation of those in the earlier ones. Outcalt v. New York Herald (C. C. 1906) 146 Fed. 205.

Whatever may be the secondary meaning gained by a purely geographical name, there is no exclusive right of property in its application to vendible articles, and its use by others can be prevented, not on the ground of trademark infringement, but only on that of unfair competition in trade. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C. 1911) 185 Fed. 557.

Where one had, at great expense, built up a valuable trade in his product, made in a distinctive manner, his rights were entitled to protection against defendant, his prior sales manager, who, after leaving complainant's employ, started to make and sell similar dusters. Howard Dustless Duster Co. v. Carleton (C. C. 1911) 185 Fed. 999, order revoked on motion (C. C. 1911) 187 Fed. 472.

In a suit for unlawful competition, complainant, before any showing of actual damages, was not entitled to an injunction restraining defendant from putting out a package and circular similar to complainant's. Id.

Complainants' right to enjoin infringement of their trade-names is unaffected by the amount of business run by defendant. Garcia v. Garcia (D. C. 1912) 197 Fed. 637.

A controversy between manufacturers as to whose product was the "original and only genuine" article of the name held not to involve any property rights which could be protected by injunction. Borden's Condensed Milk Co. v. Horlick's Malted Milk Co. (D. C. 1913) 206 Fed. 949.

The original manufacturer of a fly

catcher, known to the trade as the "Pyramid," held entitled to compel a subsequent manufacturer to adopt a hanger of a color different from plaintiff's, and to cease the use of words as used by plaintiff, and either put on its label its name or some legend indicating that the article does not come from plaintiff. Moebius v. Louis Dejonge & Co. (D. C. 1914) 215 Fed. 443.

A word or phrase may acquire a secondary meaning or construction which, while it may not be registered or selected as a trade-mark, may be appropriated by the person who has developed it, and the use of which will be protected against unfair competition. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

One who, by advertising and by the method of conducting his business of manufacturing and selling a particular kind of bread, acquires a good will, is entitled to protection against any one seeking to avail himself of a demand in the market for his bread. George G. Fox Co. v. Hathaway (1908) 85 N. E. 417, 199 Mass. 99.

A trade-mark is protected on the theory of an absolute property right in the holder, and without reference to questions of fraud or damage, while fraud or damage, express or implied, is essential to entitle the holder to protection in the use of a trade-name. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

One who has established a reputation for his goods under a given mark is entitled to be protected in the enjoyment thereof, and the public purchasing a commodity are entitled to be protected against the fraud in the sale of a different article on the market under a mark in the similitude of the genuine. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

A private right of action for unfair competition is solely for the protection of the property rights of complainant and such property rights in the case of a manufacturer must consist in the good will or reputation acquired by the product by reason of words associated with it. A. J. Reach Co. v. Simmons Hardware Co. (Mo. App. 1911) 135 S. W. 503.

To constitute unfair competition by the use of words or a phrase, the word or phrase must have been long employed, so as to be understood by the public as designating the particular goods or business. Westminister Laundry Co. v. Hesse Envelope Co. (Mo. App. 1913) 156 S. W. 767.

Where plaintiff ran a blind advertisement by printing the word "stopurkicken" without plaintiff's name until the public's curiosity was aroused, when plaintiff's name was to follow in connection therewith, defendant envelope company's use of the word before plaintiff's name had been printed in connection therewith was not unfair competition. Id.

Complainant had established a reputation for its "prepared ham" for years before the defendant entered the trade; and therefore, when the complainant was obliged to change the name of its brand from "prepared ham" to something else, under the federal pure food law, such change was equivalent to putting out a new brand, concerning which he was entitled to be protected from simulation. Taylor Provision Co. v. Edwards (N. J. 1911) 81 A. 1120.

Since the law treats whisky as property, a trade-mark under which whisky bottled by the manufacturer is sold is entitled to protection. People v. Luhrs (1909) 89 N. E. 171, 195 N. Y. 377, affirming judgment (1908) 111 N. Y. S. 749, 127 App. Div. 634.

Though the patentee of a device loses the exclusive right to manufacture on expiration of the patent, he is entitled to protection against unfair competition. Westcott Chuck Co. v. Onedia Nat. Chuck Co. (1910) 92 N. E. 639, 199 N. Y. 247, 139 Am. St. Rep. 907, 20 Ann. Cas. 858, reversing judgment (1909) 118 N. Y. S. 1149, 133 App. Div. 937.

A manufacturer who produces and stamps with his trade-mark an article of recognized excellence in the market acquires a property right in it which equity will protect from infringement. B. Payn's Sons Tobacco Co. v. Payette (1914) 149 N. Y. Supp. 183, 86 Misc. Rep. 276.

Owner of apartment house held not entitled to restrain use of its name by a hotel, where he had suffered and would suffer no money loss. Astor v. West Eighty-Second St. Realty Co. (1915) 152 N. Y. Supp. 631, 167 App. Div. 273.

A trade-mark which in its original signification or by association distinctly points to the origin or ownership of the article to which it is applied will be protected, but a generic or geographical name designating a city or district, or merely descriptive of the article, and which may be employed with truth by other manufacturers, is not entitled to protection as a trade-mark. Avenarius v. Kornely (1909) 121 N. W. 336, 139 Wis. 247.

(B) What constitutes unfair competition

5. **Nature of unfair competition.**—Unfair competition consists in attempting to pass upon the public the goods or business of one person as that of another. Proctor & Gamble Co. v. Globe Refining Co. (1899) 92 Fed. 357, 34 C. C. A. 405; Borden Ice Cream Co. v. Borden's Condensed Milk Co. (1912) 201 Fed. 510, 121 C. C. A. 200 (reversing order Borden's Condensed Milk Co. v. Borden Ice Cream Co. [D. C. 1912] 194 Fed. 554); Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483; Merriam v. Texas Siftings Pub. Co. (C. C. 1892)

49 Fed. 944, 948; Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651; Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882 (decree affirmed Shaver v. Heller & Merz Co. [1901] 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878); Sayre v. McGill Ticket Punch Co. (D. C. 1912) 200 Fed. 771; Margarete Steiff v. Bing (D. C. 1914) 215 Fed. 204; McFell Electric & Telephone Co. v. McFell Electric Co. (1903) 110 Ill. App. 182; Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34; Motor Accessories Mfg. Co. v. Marshalltown Motor Material Mfg. Co. (Iowa, 1914) 149 N. W. 184; Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960; Westminister Laundry Co. v. Hesse Envelope Co. (1913) 156 S. W. 767, 174 Mo. App. 238; International Silver Co. v. Wm. H. Rogers Corp. (1904) 57 A. 1037, 66 N. J. Eq. 119 (reversed [Err. & App. 1905] 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506); World's Dispensary Medical Ass'n v. Pierce (1911) 96 N. E. 738, 203 N. Y. 419 (modifying judgment [1910] 122 N. Y. Supp. 818, 138 App. Div. 401); B. Payn's Sons Tobacco Co. v. Payette (1914) 149 N. Y. Supp. 183, 86 Misc. Rep. 276; Columbia Engineering Works v. Mallory (1915) 147 P. 542, 75 Or. 542; Pacific Coast Condensed Milk Co. v. Frye & Co. (1915) 147 P. 865, 85 Wash. 133.

Fraud is the basis of unfair competition. A. Leschen & Sons Rope Co. v. Fuller (1914) 218 Fed. 786, 134 C. C. A. 570; Day v. Webster (1897) 49 N. Y. Supp. 314, 23 App. Div. 601.

To give a right to an injunction, it is sufficient that the court is satisfied that respondent intended to palm off his goods as the goods of complainant, and that he persists after a request to desist. McLean v. Fleming (1877) 96 U. S. 245, 254, 24 L. Ed. 828.

The difference between cases for infringement of trade-mark and those for relief against unfair competition is mainly in the matter of proof, the imitation of a trade-mark raising a conclusion presumptive of fraud, while in cases of unfair competition actual fraud or misleading of the public, or conduct calculated and intended to mislead it, must be shown by the proofs. Scriven v. North (1904) 134 Fed. 366, 67 C. C. A. 348, modifying decree (C. C. 1903) 124 Fed. 894.

A dealer may not lawfully seek to obtain his rival's custom by deceiving the public through the appropriation of some characteristic of the rival's package which was new in the art, and is the rival's peculiar property. United States Tobacco Co. v. McGreenery (1906) 144 Fed. 1022, 74 C. C. A. 682, affirming decree (C. C. 1906) 144 Fed. 531.

Evidence examined, and held insufficient to show that buyers were deceived by the defendant's use of any feature of the complainant's label on tobacco packages which was peculiar to the complainant and which the defendant has no right to use. Id.

The mere making and sale of repair parts for a well-known machine the patents on which have expired, by other than the patentee and maker of the machine, is not an act of unfair trade, unless they are put out as the goods of the original patentee. Bender v. Enterprise Mfg. Co. (1907) 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. (N. S.) 448, 113 Ann. Cas. 649, reversing decree Enterprise Mfg. Co. v. Bender (C. C. 1906) 148 Fed. 313.

The copyright on "Webster's Unabridged Dictionary" having expired, a competing publisher may be enjoined from issuing misleading and deceptive circulars and advertisements which show an intention to deceive purchasers into buying the competing publisher's dictionary, on the supposition that it is one of the series published by the original publisher. G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Where one avails himself of the principle of public dedication of a name, he must in good faith fully identify his production, and clearly disassociate it from that of one who has given significance to the name, and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, it is something produced and put upon the market by himself. Id.

The power of courts of equity to restrain unfair competition is founded on sound business morality. Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co. (1908) 166 Fed. 26, 92 C. C. A. 60.

Where defendant charged plaintiff with infringement, and thereby injured plaintiff's trade, but did not sue to restrain such alleged infringement, its failure to attempt to establish the legal right it claimed was conclusive evidence of its bad faith and of unfair competition, and complainant was entitled to an injunction and an accounting for damages. Racine Paper Goods Co. v. Dittgen (1909) 171 Fed. 631, 96 C. C. A. 433, affirming decree Dittgen v. Racine Paper Goods Co. (C. C. 1908) 164 Fed. 85.

Not every appropriation, of the ideas of another, amounts to unfair trade competition. There must be an established right in that which is taken, as well as a practiced deception, before this ensues. Gulden v. Chance (1910) 182 Fed. 303, 105 C. C. A. 16, revers-

ing decree (C. C. 1910) 180 Fed. 178.

The fact that an article of defendant's manufacture is represented by unprincipled retailers as that of complainant does not render defendant liable for unfair competition, providing it did its legal duty in distinguishing its product from that of complainant. Rathbone, Sard & Co. v. Champion Steel Range Co. (1911) 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258.

Where the deception of purchasers is not the natural result of the imitation by defendant of goods made by complainant, and there is no intention to so deceive purchasers, a case of unfair competition is not made out. Id.

The adoption by one manufacturer of the characteristic features of another's product, common to articles of that class, does not of itself amount to unfair competition. Edward Hilker Mop Co. v. United States Mop Co. (1911) 191 Fed. 613, 112 C. C. A. 176.

Dealer held not required to advise inquirer for his goods, designating them by his name, that there is a competitor of the same name in the business. Walter Baker & Co. v. Gray (1911) 192 Fed. 921, 113 C. C. A. 417, 52 L. R. A. (N. S.) 899, writ of certiorari denied (1912) 32 Sup. Ct. 528, 223 U. S. 732, 56 L. Ed. 634.

A grocer held not guilty of unfair competition in delivering to customers "William H. Baker's Chocolate," in response to an order for "Baker's Chocolate." Id.

Infringement of a trade-mark is inseparably involved in a suit for unlawful competition, the right to protection against the latter depending on prior and exclusive use. Metcalf v. Hanover Star Milling Co. (1913) 204 Fed. 211, 122 C. C. A. 483.

An action to protect trade-mark rights, whether at law to recover damages, or in equity to restrain further infringement, is founded upon false representation. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment (D. C. 1912) 197 Fed. 476.

In trade-mark and unfair competition cases, the ground of action and the reason for the remedy are identical; both being cases of unfair competition in trade, and the difference being only in the methods and degrees of proof required. Hanover Star Milling Co. v. Allen & Wheeler Co. (1913) 208 Fed. 513, 125 C. C. A. 515.

Unfair competition cannot be predicated on the use of a name which defendant has a perfect right to use. Warner Bros. Co. v. Wiener (1914) 214 Fed. 30, 130 C. C. A. 424, order modified on rehearing (C. C. A. 1914) 218 Fed. 635.

To constitute unfair competition, there must be such deceptive use of a name or word as amounts to a fraud on the public; but this deception may consist in the fraudulent use of a corporate name. Keystone Oil & Mfg. Co. v. Buzby (1914) 219 Fed. 473, 135 C. C. A. 185, reversing decree Buzby v. Keystone Oil & Mfg. Co. (D. C. 1913) 206 Fed. 136.

A manufacturer of white lead in Chicago will be enjoined from the use of the words "White Lead, St. Louis," except as to preparations of white lead manufactured there; such use tending to deceive and defraud the public and complainant, a manufacturer of lead in St. Louis. Southern White-Lead Co. v. Coit (C. C. 1888) 39 Fed. 492.

Where Edison sold machines ordered, but not taken by plaintiff, the purchasers, in offering these machines for sale as "Edison Vitascopes," were not guilty of unfair competition with complainants, since there was no misleading or deception of the public, who in fact obtained the identical machines to which the name was intended to apply. Vitascope Co. v. United States Phonograph Co. (C. C. 1897) 83 Fed. 30.

The grounds on which unfair competition in trade will be enjoined are either that the means used are dishonest, or that, by false representation or imitation of a name or device, there is a tendency to create confusion in the trade, and work a fraud upon the public, by inducing it to accept a spurious article. Where these grounds are absent, and no trade-mark rights exist, injunction does not lie. Id.

The criterion of unfair competition is whether ordinary purchasers, as distinguished from members of the particular trade, are deceived. R. Heinisch's Sons Co. v. Boker (C. C. 1898) 86 Fed. 765.

While a defendant may have the right to use every one of the elements entering into complainant's trade-mark and packages if used separately, yet his use of the same in combination, for the evident purpose of imitating in appearance complainant's packages, constitutes unfair competition. National Biscuit Co. v. Ohio Baking Co. (C. C. 1900) 127 Fed. 160, judgment affirmed Ohio Baking Co. v. National Biscuit Co. (1904) 127 Fed. 116, 62 C. C. A. 116, and writ of certiorari denied (1904) 25 Sup. Ct. 788, 195 U. S. 630, 49 L. Ed. 352.

The duplication of disk records of vocal and instrumental music for use in talking machines and placing the copies so made in the market, colored in imitation of the originals, and bearing the same numbers by which they are marked by the original manufacturer and designated in its catalogue, constitutes unfair competition. Victor Talking Mach. Co. v. Armstrong (C. C. 1904) 132 Fed. 711.

A later manufacturer, which not only appropriated a name solely because it had become known and popular through

complainant, but also incorporated complainant's name in its own corporate name without any apparent reason therefor except to deceive the public as to the origin of its goods, is chargeable with unfair competition. Selchow v. Chaffee & Selchow Mfg. Co. (C. C. 1904) 132 Fed. 996.

The principles of unfair competition in trade will protect a publisher who has imparted to his books peculiar characteristics, which enable the public to distinguish them from books published by others and containing the same literary matter. G. & C. Merriam Co. v. Straus (C. C. 1904) 136 Fed. 477.

Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol; the test being whether what has been done tends to pass off the goods of one for those of another, or to deprive such other of his rights. Bates Mfg. Co. v. Bates Numbering Mach. Co. (C. C. 1909) 172 Fed. 892, order modified Bates Numbering Mach. Co. v. Bates Mfg. Co. (1910) 178 Fed. 681, 102 C. C. A. 181.

In a suit to restrain unlawful competition, equity does not concern itself with the means. If the result is fraudulent, and the public are induced thereby to purchase the goods of one under the belief that they are those of another, the means will be enjoined. Id.

"Unfair competition" does not necessarily involve the question of the exclusive right of another to use a name, symbol, or device, and a word may not be capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of the word amounting to unfair trade. Dyment v. Lewis (1909) 123 N. W. 244, 144 Iowa, 509, 26 L. R. A. (N. S.) 73.

The existence of a valid trade-mark is not essential to a right of action for unfair competition in which the essence of the wrong consists in the palming off of the merchandise of one person for that of another. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

Unfair competition is distinguishable from infringement of a trade-mark, in that it does not necessarily involve the question of the exclusive right of another to the use of the name, symbol, or device copied or imitated. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

The right to an injunction against unfair competition in trade does not rest in the right of complainant to be protected in the exclusive use of a trade-mark, but upon the ground of fraud. Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237, reversing decree Elgin Nat. Watch Co. v. Illinois Watch-Case Co. (C. C. 1898) 89 Fed. 487, and affirmed (1901) 21 Sup. Ct. 270, 179 U. S. 665, 45 L. Ed. 365, 94 O. G. 755.

Where there was no other indication of unfair means used by defendant, the fact that by means of an arrangement of numbers designating the various styles of defendant's type any one could be easily taught to find in complainant's catalogue the "Caslon Bold" type in controversy was insufficient to establish unlawful competition. Keystone Type Foundry v. National Compositype Co. (C. C. 1911) 183 Fed. 891, decree affirmed (1912) 193 Fed. 1021, 113 C. C. A. 667.

Where complainant manufactured and sold an alleged dustless dustcloth of black color, but was not a pioneer in the business, he might not restrain defendant from putting out in competition, a similar cloth made from black material purchased from another. Howard Dustless Duster Co. v. Carleton (C. C. 1911) 187 Fed. 472, revoking order on motion 185 Fed. 999.

The borrowing, by a newcomer in trade, from the first maker, of something not necessary to the excellence of the product nor required for functional perfection, but which is calculated to attract and fix the attention of the careless, is what constitutes unlawful competition. Margarete Steiff v. Bing (D. C. 1914) 215 Fed. 204.

One charged with unfair competition is not chargeable with an occasional remark of an unidentified occasional salesman of his product, based on misrepresentations by the salesman, so as to confuse the product of the manufacturer with the product of the complaining manufacturer. Moebius v. Louis Dejonge & Co. (D. C. 1914) 215 Fed. 443.

Relief against unfair competition is granted upon the ground that one who has built up a good will and reputation for his goods is entitled to the benefits therefrom; good will being property which will be protected. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

One man has no right to so advertise his business as to induce the public to believe it is the business of another. Armstrong v. Kleinhans (Ch. 1880) 1 Ky. Law Rep. 112.

That plaintiffs for some years had run a stage line from a station on two other railroads, to their hotels, affords no legal right to exclude another stage line over the same route, and much less from another station upon another railroad to the same destination, so long as the new line is not represented as that of the plaintiffs, or a fraud is perpetrated upon the traveler or the plaintiffs. Ricker v. Portland & R. F. Ry. (1897) 38 A. 338, 90 Me. 395.

Where defendant, a druggist, prepared a certain kind of medicine and designates and sells it as and for the medicine prepared by plaintiff, such sale

constitutes unlawful competition for which plaintiff is entitled to recover. Thomson v. Winchester (1837) 36 Mass. (19 Pick.) 214, 31 Am. Dec. 135.

Where loaves of bread made by defendant were, except for slight differences in the labels, substantially the same in appearance as those long made and advertised by plaintiff, such imitation was likely to deceive the ordinary purchaser, and to constitute an instrument of fraud in the hands of a retail dealer. George G. Fox Co. v. Best Baking Co. (1911) 95 N. E. 747, 209 Mass. 251.

The ruling that, where plaintiff had long made and extensively advertised loaves of bread of certain shape under a certain name, another was not entitled to make loaves of the same shape without differentiating by mark or brand, so as not to deceive the public, did not depend on whether or not the shape of plaintiff's loaf was uneconomical and generally less convenient, or was a desirable and economic one. Id.

An action will lie for falsely and fraudulently selling goods of one's own manufacture as the manufacture of another, to his injury. Mrs. G. B. Miller & Co. Tobacco Manufactory v. Commerce (1883) 45 N. J. Law (16 Vroom) 18, 46 Am. Rep. 750.

Where one previously in complainant's employ for many years left such employ and began a competitive manufacture of plates for electric batteries, without anything to indicate to purchasers that they were not made by complainant, and intended by defendant to be used in complainant's batteries for renewals, complainant was entitled to restrain defendant from manufacturing his plates without such distinguishing marks that the public could not be misled. Edison Mfg. Co. v. Gladstone (N. J. Ch. 1903) 58 A. 391.

That the symbol used by complainant had been commonly used by the public for ornamental and advertising purposes before its adoption by complainant did not entitle defendant to use the same label on the same class of goods, where such use was intended to mislead purchasers as to the origin of the goods. Johnson & Johnson v. Seabury & Johnson (1905) 61 A. 5, 69 N. J. Eq. 696.

Where plaintiff's hotel became well known as "The Metuchen Inn," although no such sign was used, and he later used such a sign for another house, defendant's subsequent use of that sign on the old place was a deception of the public, and complainant was entitled to an injunction restraining such use. Busch v. Gross (N. J. Ch. 1906) 64 A. 754.

The law of unfair competition does not protect purchasers against falsehoods which tradesmen may tell, but the falsehood must be told by the article itself. Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch. 1913) 89 A. 863.

Seeking to induce the public to believe that one's product is that of another is unfair competition, but mere duplication as to the details of a device is not, regardless of any confusion as to the source of manufacture caused thereby. Westcott Chuck Co. v. Onedia Nat. Chuck Co. (1910) 92 N. E. 639, 199 N. Y. 247, reversing judgment (1909) 118 N. Y. Supp. 1149, 133 App. Div. 937.

Defendant will be enjoined from using the words "Dr. Pierce," or the word "Pierce," without prefixing his Christian name or the initials, in advertising, labeling, etc., proprietary medicines, where otherwise his remedies would be confused in the public mind with those of a long-established and well-known competitor, and where defendant is not a licensed physician; but he may use his own name, if deception be obviated. World's Dispensary Medical Ass'n v. Pierce (1911) 96 N. E. 738, 203 N. Y. 419, modifying judgment (1910) 122 N. Y. Supp. 818, 138 App. Div. 401.

One having a right to prepare and vend proprietary articles may enjoin another from styling himself "sole proprietor" while exercising a similar right. McAllister v. Stumpp & Walter Co. (Sup. 1898) 55 N. Y. Supp. 693, 25 Misc. Rep. 438.

The use by one not entitled to the prefix "Dr." of the prefix to his name, in connection with his remedies, is a fraud on the public, because the prefix indicates that he is a medical man, and that his remedies are compounded, or the formulas therefor originated, by a licensed physician. World's Dispensary Medical Ass'n v. Pierce (1910) 122 N. Y. Supp. 818, 138 App. Div. 401.

A corporation manufactured and sold proprietary medicines under the tradename "Dr. Pierce," or "Dr. Pierce's," and represented that they were useful for specified diseases. It had as transferee of Dr. Pierce, a physician duly licensed, the right to use such name and designation of the remedies made and sold by it. Defendant, whose name was "Pierce," but who was not a licensed physician, manufactured and sold preparations under different names, each of which contained as a prominent part thereof "Dr. Pierce," "Dr. Pierce's," or "Pierce's." These preparations were represented as useful remedies for the specified diseases. Held, that the acts of defendant were calculated to deceive an ordinarily careful purchaser by inducing a belief that the preparations were the products of the corporation, entitling it to an injunction to restrain defendant from putting up any proprietary remedies under any of the various names "Dr. Pierce," "Dr. Pierce's," or "Pierce's." Id.

One creating an instrument or combination of instruments more convenient than theretofore known, which he does not patent, is not entitled to com-

plain of unfair competition by one using the same contrivance without copying features not affecting its working capacity. Elbs v. Rochester Egg Carrier Co. (Sup. 1912) 134 N. Y. S. 979.

It is not unfair competition for a subsequent manufacturer of pulleys to advertise "our sheaves and pins fit your old blocks." Columbia Engineering Works v. Mallory (1915) 147 P. 542, 75 Or. 542.

The general rule is that anything done by a rival in the same business designed or calculated to mislead the public in the belief that they were buying the product of another's manufacture would be in fraud of that other's rights, and would afford just grounds for equitable interference. Hohenstein v. Perelstine (1908) 37 Pa. Super. Ct. 540.

The doctrine of unfair competition is based on the principle of common business integrity, and equity only affords relief when this principle has been violated, and the mischief which equity will guard against is a confusion in trade-names, or in the identity of parties, or in the goods sold, so as to deceive the public and work a fraud on the party having a right to a trade-name. Eastern Outfitting Co. v. Manheim (Wash. 1910) 110 P. 23.

6. Wrongful intent.—Where a plaintiff has the absolute right to the use of a word or words as a trade-mark, if an infringement is shown, the wrongful or fraudulent intent is presumed, though it may be rebutted in exemption of damages; but, where the alleged trade-mark is not a good trade-mark, and relief can only be awarded against unfair competition or perfidious dealing, such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1901) 21 Sup. Ct. 270, 274, 179 U. S. 665, 45 L. Ed. 365.

An injunction to restrain unfair competition will not be granted where defendant has not been guilty of intentional or actual unfairness, and has not employed imitative devices to draw trade from the complainant, or acted with bad faith or wrongful purpose. Morgan Envelope Co. v. Walton (1908) 86 Fed. 605, 30 C. C. A. 383, 84 O. G. 811, certiorari denied Walton v. Morgan Envelope Co. (1898) 18 Sup. Ct. 949, 171 U. S. 686.

The intention with which a defendant adopted a particular dress for merchandise does not alone afford any ground for an injunction, and is immaterial where the dress itself is not calculated to deceive purchasers to the complainant's damage. Centaur Co. v. Marshall (1899) 97 Fed. 785, 38 C. C. A. 413.

To entitle a manufacturer to prevent a competitor from imitating a name used by him which is descriptive, and therefore not a valid trade-mark, the imitation must be with fraudulent intent or such as is calculated to deceive the public. Florence Mfg. Co. v. J. C. Dowd & Co. (1910) 178 Fed. 73, 101 C. C. A. 565 (reversing decree Same v. Dowd [C. C. 1909] 171 Fed. 122); Draper v. Skerrett (C. C. 1902) 116 Fed. 206.

A fraudulent intent is of the essence of unfair competition in trade, and to warrant relief in a suit for unfair competition there must be proof of fraudulent intent to palm off the goods manufactured by others as those manufactured by the plaintiff, or proof of facts and circumstances from which such an intent and fraud may be fairly inferred. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (1900) 104 Fed. 243, 43 C. C. A. 511, affirming decree (C. C. 1899) 92 Fed. 774.

Walter Baker & Co. have long manufactured chocolate. W. H. Baker later began its manufacture, but distinguishes his product from the other. Defendant, a retail grocer, advertised to sell "Baker's" cocoa and chocolate, and when customers called for either by that name they were given the W. H. Baker product. After suit brought such customers were told: "We have two Bakers. Which do you want, W. H. or Walter Baker?" and when they asked for the best, they were given the W. H. Baker product. Held, there was a clear design to deceive customers, and complainant was entitled to restrain defendant from advertising any product but complainant's under the name of "Baker," or furnishing it in response to requests for "Baker's" goods, or in any manner using such name in connection with other goods without clearly designating by whom such goods were made. Walter Baker & Co. v. Slack (1904) 130 Fed. 514, 65 C. C. A. 138.

Unless a defendant adopts means calculated to injure complainant through unfair competition, the intention is immaterial; there being no ground for relief where there has been no injury. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

The presence of an inequitable purpose is an element of great weight in determining a question of fairness in trade. G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Where defendant imitated closely and in needless details plaintiff's product, using the same name, he was chargeable with unfair competition, and complainant was entitled to an injunction to restrain the same; the imitation being clearly by design. Rushmore v. Saxon (1909) 170 Fed. 1021, 95 C. C. A. 671, affirming decree (C. C. 1908) 158 Fed. 499.

Defendants, in imitating complain-

ant's cartons and packages containing "Spearmint" gum, held chargeable with willful and intentional unfair competition, which entitled complainant to an injunction. William Wrigley, Jr., & Co. v. Grove Co. (1910) 183 Fed. 99, 105 C. C. A. 391.

Defendant made and sold mattresses of inferior material, but marked with the same names as complainant's, to a large store which had previously sold complainant's. Defendant also furnished for display in the store windows sample mattresses of the same quality as complainant's, which were cut open to show the material. Held, that the purpose was clearly to deceive purchasers, and that plaintiff was entitled to an injunction. Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co. (1911) 185 Fed. 431, 107 C. C. A. 501.

To authorize an injunction to restrain unfair competition in trade, there must be evidence which satisfies the court that there was a wrongful intent in fact, or justifies the inference from the inevitable consequences of the act complained of. Charles E. Hires Co. v. Villepigue (1912) 196 Fed. 890, 116 C. C. A. 452.

Imitations of the goods and packages of another manufacturer, which singly, if accompanied by good faith, might not constitute unfair competition, may do so where they are used with an actual intent to deceive purchasers. Coca-Cola Co. v. Gay-Ola Co. (1912) 200 Fed. 720, 119 C. C. A. 164.

A suit for infringement of trade-mark differs from one for unfair competition in that in the former the wrongful intent is presumed from the fact of infringement, while in the latter it must be proved, although an inference of such intent may be justified from the inevitable consequences of the act complained of. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

Where defendant manufactures an article closely resembling Hostetter's Bitters in appearance and flavor, which it sold in bulk to its customers, advising them at the same time to refill bottles that originally contained Hostetter's Bitters with the spurious article, and put them on the market as genuine, though defendant did not itself use plaintiff's labels and bottles, it was guilty of a wrong which a court of equity will enjoin. Hostetter Co. v. Brueggeman-Reinert Distilling Co. (C. C. 1891) 46 Fed. 188.

An injunction to restrain the infringement of a trade-mark will not be refused because defendants have made no sales, where it appears that they bought for the purpose of selling, and would have done so but for complainant's suit. Cuervo v. Landauer (C. C. 1894) 63 Fed. 1003.

Where complainants have long used characteristic labels, defendants will be restrained from using labels of the same size and color, sufficiently corresponding in general appearance to deceive the ordinary customer, and manifestly designed to enable unscrupulous persons to palm off a spurious article on the public. Von Mumm v. Wittemann (C. C. 1898) 85 Fed. 966.

Every possible color for capsules having been appropriated by proprietors of various brands, and the term "Extra Dry" having been so long and generally used to denote character and quality, the use by defendants of a capsule of the same color as that used by complainants, with the words "Extra Dry" thereon, as used by complainants, though used with fraudulent intent, cannot be enjoined. Id.

When the article sold is inferior and spurious, and the packages sufficiently resemble complainant's to make it apparent that the design is to deceive the consuming public, injunction will be granted, although defendant is a dealer, who purchased from the originator of the fraud, and, since action brought, has voluntarily ceased to deal in the goods. Burnett v. Hahn (C. C. 1898) 88 Fed. 694.

The corporate name and trade-mark "Wm. G. Rogers," in competition with the Wm. Rogers Mfg. Co. by persons formerly employed by such latter company held to conclusively show want of good faith on defendants' part, and plaintiff was entitled to a preliminary injunction restraining them from making or selling ware stamped with the mark "Wm. G. Rogers." International Silver Co. v. Wm. G. Rogers Co. (C. C. 1902) 113 Fed. 526.

There being no wrongful intent by defendant, his label not being otherwise similar to complainant's, except in name, and bearing his own name, and no damage to complainant being shown, there is no unfair competition. Daviess County Distilling Co. v. Martinoni (C. C. 1902) 117 Fed. 186.

The right to relief against unfair competition is not dependent upon an actual fraudulent intent, where the conduct of defendant was such as would naturally deceive the public. Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C. 1902) 121 Fed. 357.

To make out a case of unfair or fraudulent competition there must be an actual wrongful intent to deceive the public into the belief that the goods of the one party are the goods of the other, accompanied by such acts and devices as are likely to do so, or such duplication in form and dress of the one by the other as will produce a confusion calculated to bring this about, of which the party complained against is convicted of being willing to have the benefit. Lamont, Corliss & Co. v. Hershey (C. C. 1905) 140 Fed. 763.

The fact that defendants, who were selling large quantities of the medicine to consumers at less than the price fixed by complainant, before doing so, removed from the bottles all cartons and labels containing numbers which would

enable complainant to trace the original purchaser, was sufficient to authorize a finding that defendants knowingly participated in the breaches of the contracts between the sellers and complainant. Wells & Richardson Co. v. Abraham (C. C. 1906) 146 Fed. 190, affirmed (1906) 149 Fed. 408, 79 C. C. A. 228.

Unfair competition is not made out where there is no evidence of an intention to defraud or deceive and the resemblance between the two products is not such as to deceive the class of persons who buy such products. T. B. Wood's Sons Co. v. Valley Iron Works (C. C. 1911) 191 Fed. 196, decree affirmed Valley Iron Works v. T. B. Wood's Sons Co. (1912) 196 Fed. 780, 116 C. C. A. 46.

Motive is not an essential element of unfair competition, though often valuable in determining its existence. Moebius v. Louis Dejonge & Co. (D. C. 1914) 215 Fed. 443.

The fair and honest use of a name cannot be enjoined when it is used in the ordinary course of business in the way and manner in which other manufacturers of similar goods are accustomed to use their own name in the preparation for sale or sale of goods. Rogers v. Rogers (1885) 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

Defendant's intent is not material in determining whether he has been guilty of unfair competition in the use of a trade-name, if the probable effect of his conduct is to deceive the public so as to pass his goods off as those of another. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

To enjoin another from engaging in the same business in the same locality under a similar name, on the ground of unfair competition, it is not necessary that there be an intention to defraud. Kansas Milling Co. v. Kansas Flour Mills Co. (1913) 133 P. 542, 89 Kan. 855.

It is immaterial that defendant did not intend to deceive the public, where he knowingly put it in the power of the retailers to do so, although the package and label were not a technical trademark. New England Awl & Needle Co. v. Marlboro Awl & Needle Co. (1897) 46 N. E. 386, 168 Mass. 154, 60 Am. St. Rep. 377.

In a suit for unfair competition, complainant held entitled to injunctive relief, though defendant had acted innocently. Forster Mfg. Co. v. Cutter-Tower Co. (1912) 97 N. E. 749, 211 Mass. 219.

Where defendant adopted a trade-name similar to that which had been used by plaintiff for some 15 years, and conducted a similar business, the use is presumptively fraudulent after notice of plaintiff's prior rights, though the name was adopted in ignorance of plaintiff and with no intent to divert its trade. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

Use of a certain brand by one will not be restrained because another had previously used it, where the name had formerly been used by various manufacturers, and where the person sought to be enjoined did not attempt in any way to deceive the public into the belief that they were buying the shoes offered for sale by the other person. Perlberg v. Smith (1905) 62 A. 442, 70 N. J. Eq. 638.

Complainant not entitled to restrain defendant from using white wax paper, with red labels and strings, for its bread, where it appeared from a comparison of the articles that they were not likely to deceive, and there was no evidence of any intent to defraud. Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch. 1913) 89 A. 863.

Upon an application to restrain, upon the ground of unfair competition, the use by defendant of a certain kind of wrapper and marks for its bread, evidence held not to show intent to defraud. Id.

Though the fact that defendant was amply solvent would not prevent an injunction for unfair competition, yet where there was no evidence of any intent to defraud, or that there had been any deception or damages, the court should be cautious in issuing a preliminary injunction where the defendant is amply solvent. Id.

Where defendant made an article as nearly as possible like plaintiffs', with a different name, and put up in wrappers closely resembling the plaintiffs' in color and size, and partially in the inscription and directions for use, as the imitation was intended to deceive purchasers, the defendant should be restrained from using such wrappers. Enoch Morgan's Sons Co. v. Schwachofer (N. Y. 1878) 5 Abb. N. C. 265.

Plaintiffs and defendants used bottles of like size and shape, but distinguishable to the eye, and with their respective firm names blown in. Each was clearly labeled with the name and place of manufacture, which were entirely different. The small print following in each case set forth methods and purposes of use not at all identical. Held, that it was not shown that defendants had simulated plaintiffs' goods with intent to deceive buyers. Siegert v. Abbott (1893) 72 Hun, 243, 25 N. Y. Supp. 590.

The use of the trade-name "New York Frame & Picture Co.," or "N. Y. Frame & Picture Co.," does not show an intent to deceive so as to authorize an injunction at the suit of the United States Frame & Picture Company. United States Frame & Picture Co. v. Horowitz (Sup. 1906) 100 N. Y. Supp. 705, 51 Misc. Rep. 101.

Publisher for 60 years of fashion journal entitled "Le Bon Ton" could restrain, despite lack of fraudulent intent, publication of similar journal entitled "Gazette du Bon Ton." S. T.

Taylor Co. v. Nast (Sup. 1915) 154 N. Y. Supp. 982.

Where the public is in fact misled, whether intentionally or otherwise, by the imitation of signs or symbols, injunction will be granted. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

Where there is no such similarity in the trade-marks used by plaintiffs and defendants as to justify the conclusion that one was intended as an imitation of the other, the fact that there is a resemblance in the size of the packages, and the manner of putting them up, so that perhaps a careless person might mistake one for the other if no examination was made, is not sufficient to justify the interference of a court of equity. Brown v. Seidel (1893) 153 Pa. 60, 25 Atl. 1064, 31 Wkly. Notes Cas. 519.

Question of fraudulent intent is a question for the jury, where defendants applied to their atomizer the name "Burgess," which plaintiff had adopted, and used his label, which bore an exact pictorial representation of the article, though defendants supposed the name was a merely descriptive one, which any one might use, and gave evidence of a custom of the trade for dealers to "borrow" each other's cuts for advertising purposes. Shaw v. Pilling (1896) 175 Pa. 78, 34 Atl. 446.

Where defendant put on the market "Dr. M. A. Simmons' Liver Medicine," in packages so substantially similar to those of complainant's "Simmons' Liver Medicine" as to deceive the public, and this was done with the purpose of selling it in place of complainant's medicine, the latter is entitled to restrain the use of such labels and packages by defendant. C. F. Simmons Medicine Co. v. Mansfield Drug Co. (1893) 93 Tenn. (9 Pickle) 84, 23 S. W. 165.

7. Necessity of actual deception of public.—Where the simulation of a complainant's trade-name by defendant is manifestly liable to deceive, it is not necessary for complainant to show that purchasers have actually been deceived, to entitle him to relief. Fuller v. Huff (1900) 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 62 A. 499, 100 Me. 461, 4 L. R. A. (N. S.) 960; McLoughlin v. Singer (1898) 53 N. Y. Supp. 342, 33 App. Div. 185.

Complainants made and sold an article under the name of "Crushed Steel" or "Steel Emery." A conventional figure of a diamond shape, or lozenge, was used as a trade-mark on the packages. Later defendants began selling a similar article under the name of "Diamond Steel," using a picture of a radiant diamond as a trade-mark upon the packages. Held, that the similarity between the symbols and names was not such as to warrant an injunction against defendant, in the absence of evidence that any purchaser had been deceived thereby. Kann v. Diamond Steel Co. (1898) 89 Fed. 706, 32 C. C. A. 324.

Where defendant sold to plaintiff's agents a spurious article, and furnished them empty containers bearing plaintiff's label and trade-mark, to be used in retailing to customers, defendant was engaged in unfair competition, although there was no proof that any customer had actually been deceived. Samuel Bros. & Co. v. Hostetter Co. (1902) 118 Fed. 257, 55 C. C. A. 111.

The deceit or probable deceit of an ordinary purchaser, so that he buys or probably will buy the articles of one manufacturer as those of another, is an indispensable element of a cause of action for unfair competition. Allen B. Wrisley Co. v. Iowa Soap Co. (1903) 122 Fed. 796, 59 C. C. A. 54, affirming decree Allan B. Wrisley v. Same (C. 1900) 104 Fed. 548.

Where, in a suit to restrain the use of letters of the alphabet, attached to various qualities of plaintiff's manufactured goods, there was no evidence that any purchaser had ever been deluded, by the use of the letters by defendant, or that buyers generally for consumption relied on the letters as the earmarks of complainant's manufacture, plaintiff could not restrain defendant's use thereof on the ground of unfair competition. Stevens Linen Works v. William & John Don & Co. (1904) 127 Fed. 950, 62 C. C. A. 582, affirming judgment (C. C. 1903) 121 Fed. 171.

Where two persons are engaged in selling like goods, while neither can acquire the exclusive right to aptly designate and describe them, neither has the right to do any of those things in such manner as to mislead purchasers; and, where the resemblances in such particulars are calculated to mislead, the older dealer is entitled to an injunction, even though actual deception is not shown. Bickmore Gall Cure Co. v. Karns (1905) 134 Fed. 833, 67 C. C. A. 439, reversing decree Bickmore Gall Cure Co. v. Karns Mfg. Co. (C. C. 1903) 126 Fed. 573.

In order to entitle complainant to relief in a suit for unlawful competition, it is not necessary that the public should be actually deceived; it being sufficient that the infringement had a tendency to deceive. O'Connell v. National Water Co. (1908) 161 Fed. 545, 88 C. C. A. 487, affirming decree National Water Co. v. O'Connell (C. C. 1908) 159 Fed. 1001.

Where the style and dress of defendant's article was such as to deceive purchasers, it was not necessary for complainant to show, in a suit for unlawful competition, that innocent purchasers had been in fact deceived. Florence Mfg. Co. v. J. C. Dowd & Co. (1910) 178 Fed. 73, 101 C. C. A. 565, reversing decree Same v. Dowd (C. C. 1909) 171 Fed. 122.

Where one uses a certain material

and form of construction for an unpatented article, he cannot restrain another from using the same construction, for utilitarian reasons, except for a distinctive name plate, where no deception of purchasers is shown. Pope Automatic Merchandising Co. v. McCrum-Howell Co. (1911) 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463, writ of certiorari denied McCrum-Howell Co. v. Pope Automatic Merchandising Co. (1912) 32 S. Ct. 527, 223 U. S. 730, 56 L. Ed. 633.

In a suit for unfair competition, it is not necessary to prove that the immediate purchasers of defendant's product were deceived, if it is defendant's expectation and purpose that such purchasers will use it to deceive the ultimate consumer. Coca-Cola Co. v. Gay-Ola Co. (1912) 200 Fed. 720, 119 C. C. A. 164.

A defendant held chargeable with unfair competition in so coloring and dressing its product as to resemble complainant's with the purpose of deceiving consumers. Id.

In a suit for unfair competition, it is sufficient if the actual and probable result of the use of defendants' labels will be the deception of the ordinary purchaser making purchases under ordinary conditions. Notaseme Hosiery Co. v. Straus (1912) 201 Fed. 99, 119 C. C. A. 134.

Where a defendant willfully put up its goods in such a way as to deceive ultimate purchasers, plaintiff will not be held to specific proof that such purchasers were deceived, and limited to loss of profits thus established, but loss will be presumed. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409, reversing decree (C. C. 1912) 192 Fed. 930.

The deceiving or probable deceiving of the ordinary purchaser is an indispensable basis of a cause of action for simulating the product of one party by that of another. A. Leschen & Sons Rope Co. v. Fuller (1914) 218 Fed. 786 134 C. C. A. 570.

An injunction should be granted if the defendants adopt their brand for the purpose of selling their goods as and for the goods of the complainant, or for the purpose of enabling others to do so, and it will not be sufficient for the defendants to show that no deception is in fact practiced on those with whom they deal personally, but injunction will be granted if consumers are or may be deceived. Southern White-Lead Co. v. Cary (C. C. 1885) 25 Fed. 125.

Where it appears that the only reason why defendants dress up their article in the manner employed by them is because it can be successfully used to defraud the ultimate consumer, it is unnecessary to prove that any particular person has been in fact so defrauded. Von Mumm v. Frash (C. C. 1893) 56 Fed. 830.

Where defendant had furnished the means of deceiving the public as to the source of his article, he should be enjoined from selling Host-Style Bitters, and, at the same time and in connection with the sale, giving to the purchaser empty Hostetter bottles. Hostetter Co. v. Becker (C. C. 1896) 73 Fed. 297.

The federal courts do not require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which is well calculated to deceive. Collinsplatt v. Finlayson (C. C. 1898) 88 Fed. 693.

When the differences between the labels are so marked that it is hardly conceivable that even the casual observer would mistake the one for the other, an injunction will be denied, especially when there is no proof that any purchaser was actually so misled. Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605.

The labels used by the respective parties compared and held not to show such similarity as a whole as to warrant a preliminary injunction on the ground of unfair competition, in the absence of any evidence of actual deception of the public. American Brewing Co. v. Bienville Brewery (C. C. 1906) 153 Fed. 615.

To warrant the granting of an injunction against unfair competition by the imitation of a label, it must either be manifest to the court on an inspection of the two labels that the similarity as a whole is such as would be likely to deceive ordinarily attentive and observing retail purchasers, or there must be proof of actual mistake by purchasers. Id.

In a suit for unfair competition, proof of actual deception is not necessary, but the court may determine without it from the exhibits themselves whether deception will be the natural and probable result of their use. Yale & Towne Mfg. Co. v. Worcester Mfg. Co. (D. C. 1913) 205 Fed. 952.

In determining whether unfair competition exists, actual deception need not be shown. W. F. & John Barnes Co. v. Vandyck-Churchill Co. (D. C. 1913) 207 Fed. 855.

The court, in a suit for unfair competition, must determine, from the appearance of the articles, whether the purchasing public will be deceived, though in doubtful cases actual instances of confusion may assist in arriving at a correct decision. Moebius v. Louis Dejonge & Co. (D. C. 1914) 215 Fed. 443.

If the court can see that a complainant's trade-marks are used or imitated in such a manner as probably to deceive customers or patrons, the motives of the defendant in adopting them are immaterial; and it need not appear that the public are in fact misled, or that such a state of facts exists that the court must necessarily infer that

the public will be deceived into purchasing the defendant's goods. Eckhart v. Consolidated Milling Co. (1897) 72 Ill. App. 70.

To constitute unfair competition defendant's conduct need not have actually deceived any one, but it is sufficient that such deception will be the natural and probable result of defendant's acts. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

Where defendant's use of a trade-name is calculated to deceive the public, and the ordinary person might easily be misled thereby, such use might be restrained, without proof that any person had been actually deceived. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (1908) 114 N. W. 609.

One seeking to enjoin another from using a trade-name need not show that any one has actually been misled, but it is sufficient that the name is so similar as to be likely to produce deception, and is a circumstance raising a presumption that it was adopted to deceive the public. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

To restrain a manufacturer from making and selling goods under the trade-mark of another, it is not necessary to prove that customers have actually been deceived; but it is sufficient if the resemblance is likely, on comparison, to cause one to be mistaken for the other. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co. (1909) 87 N. E. 751, 201 Mass. 437.

In a suit for unfair competition, complainant is not bound to show that specific buyers have been actually deceived, or that the infringer intended to deceive the public. Forster Mfg. Co. v. Cutter-Tower Co. (1912) 97 N. E. 749, 211 Mass. 219.

To entitle plaintiff to relief it was not necessary to prove that any customer of plaintiff had been deceived by anything done by defendant, if defendant knowingly put it in the power of retail dealers to deceive their customers. Corset & Brace Co. v. Corset Co. (1897) 70 Mo. App. 424.

Equity will restrain the use of descriptive words, where it would amount to unfair competition, without showing that any single person has been deceived, if, in the opinion of the court, the use of the words would be likely to deceive the public. Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co. (1913) 88 A. 210, 81 N. J. Eq. 419, 519.

In a suit to restrain the use of certain kind of wrappers and marks upon the ground of unfair competition, complainant need not show that any purchaser has in fact been deceived. Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch. 1913) 89 A. 863.

One suing to restrain unfair competition need not show intentional fraud or that any one has been actually deceived, but only that the marks, words, or other special arrangement of the rival manufacturer are such as will likely mislead persons in the ordinary course of purchasing goods. National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J. Ch. 1914) 91 A. 126.

Plaintiff's trade-mark was "Weber, New York," and use of the words "Webster, New York," there being nothing to show any intention by defendant to sell its pianos as the pianos made by plaintiff, or that the use of the word "Webster" had deceived any one, will not be denied. Foster v. Webster Piano Co. (1891) 59 Hun, 624, 13 N. Y. Supp. 338.

Where the evidence failed to show that any purchaser had ever been or was likely to be deceived by the alleged similarity of the goods, the injunction was properly denied. Marcus Ward & Co. v. Ward (1891) 61 Hun, 625, 15 N. Y. Supp. 913.

Where defendant reproduced a series of books by photographic process from plaintiff's books, a temporary injunction would lie, though plaintiff did not show dehors the books that they were inspired by fraudulent intent, nor that any person had been deceived. E. P. Dutton & Co. v. Cupples (1907) 102 N. Y. Supp. 309, 117 App. Div. 172.

Where defendant's labels on similar goods were a clear imitation of plaintiff's labels, plaintiff was entitled to an injunction without proving that any one has been or is likely to be deceived by the simulated label. India Rubber Co. v. Rubber Comb & Jewelry Co. (1879) 45 N. Y. Super. Ct. (13 Jones & S.) 258.

In an action for the infringement of a trade-mark, the inquiry is not whether the defendant intends to deceive, but whether the mark used by him and claimed to be an infringement actually does deceive the public. Blackwell v. Wright (1875) 73 N. C. 310.

Unfair competition is not established by proof of similarity in form, dimensions, or general appearance, or where there is a failure to show that the public was deceived by the said imitation. M. Werk Co. v. Ryan Soap Co. (1911) 33 Ohio Cir. Ct. R. 629.

A manufacturer will be enjoined from selling goods, where through a fraudulent imitation it appears that the public might probably be, or actually have been, deceived. Shepp v. Jones (Com. Pl. 1894) 3 Pa. Dist. R. 539.

Where simulation is so plain as to show an indisputable intention to deceive, and is obviously calculated to deceive, persons of ordinary intelligence, injunction should issue without evidence of specific instances of actual deception. Pacific Coast Condensed Milk Co. v. Frye & Co. (1915) 147 P. 865, 85 Wash. 133.

The wrongful use of a trade-name may be enjoined without proof that any

one has actually been deceived. Bank of Tomah v. Warren (1896) 68 N. W. 549. 94 Wis. 151.

Where the imitation of a trade symbol or device is established, it is not necessary to show by specific proof that purchasers have been actually deceived. Manitowoc Malting Co. v. Milwaukee Malting Co. (1903) 97 N. W. 389, 119 Wis. 543.

8. Imitation or simulation—In general.—Any manufacturer may copy an unpatented article of another, but he may not so imitate it as to shape, color, design, etc., as to cause the public to mistake his product for that of the prior manufacturer. Enterprise Mfg. Co. v. Landers, Frory & Clark (C. C. 1903) 124 Fed. 923 (decree affirmed [1904] 131 Fed. 240. 65 C. C. A. 587); Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

Where defendant's book contained some illustrations and illustrative matter substantially the same as plaintiff's, but different from the complainant's in other respects to such an extent that an ordinary customer possessing common intelligence would not mistake the one for the other, complainant was not entitled to a preliminary injunction on the ground of unfair competition in trade. Lare v. Harper & Bros. (1898) 86 Fed. 481, 30 C. C. A. 373; Harper & Bros. v. Lare (1900) 103 Fed. 203, 43 C. C. A. 182.

Where one person has so dressed out his goods as to deceive the public, and so put them upon the market to the manifest injury of another person and of the public, an action at law will lie for the deceit; and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition. Pillsbury-Washburn Flour-Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162.

Strong resemblances between the name or dress of the goods of defendant and complainant, for which no sufficient reason appears, presumed to exist for the purpose of misleading; and where they are such as to deceive ordinary purchasers, in the exercise of ordinary care, they are sufficient to establish unfair competition. Paris Medicine Co. v. W. H. Hill Co. (1900) 102 Fed. 148, 42 C. C. A. 227.

A dealer who purchases second-hand school books, cleans, trims, and rebinds the same, using covers in exact imitation of the originals, and places them in the market to be sold in competition with those of the publisher, although at a reduced price, is guilty of unfair competition. Doan v. American Book Co. (1901) 105 Fed. 772, 45 C. C. A. 42.

One who offers the goods of one manufacturer under the well-known names and established reputation of articles of another for the purpose of deceiving the public and defrauding the latter aggravates, rather than justifies, his wrong by placing his own name upon the packages. Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878, affirming decree Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882.

A claim of unfair competition cannot be sustained on allegations that defendant is making and selling sectional bookcases in imitation not only of the system, but of the general features of plaintiff's goods, with intent to deceive the public. It being open to the public to make and use bookcases having such characteristics, it is equally open to any one to make them for sale and to put them on the market. Globe-Wernicke Co. v. Fred Macey Co. (1902) 119 Fed. 696, 56 C. C. A. 304, writ of certiorari denied Same v. Macey (1904) 24 Sup. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

The labels and packages used by complainant for its cereal food preparation, "Grape-Nuts," and those used by defendant for its similar product, "Grain-Hearts," compared and taken as a whole, held so dissimilar in appearance that defendant could not be charged with unfair competition in the absence of evidence that purchasers had actually been deceived. Postum Cereal Co. v. American Health Food Co. (1902) 119 Fed. 848, 56 C. C. A. 360, affirming decree (C. C. 1901) 109 Fed. 898.

Similarity of circulars sent by defendant to its agents and prospective agents to those sent by complainant to its agents is not sufficient to constitute unfair competition, where the contents of the circulars were such that they were not likely to be shown to ultimate purchasers of the article. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105; Edward Hilker Mop Co. v. United States Mop Co. (1911) 191 Fed. 613, 112 C. C. A. 176.

Where the method of putting up complainant's plug tobacco was shown to be in common use and not distinctive, defendant's use of a somewhat similar label or tag, but containing printed matter essentially different from that on complainant's label, was insufficient to establish unfair competition. Continental Tobacco Co. v. Larus & Bro. Co. (1904) 133 Fed. 727, 66 C. C. A. 557.

Close simulation in form, name, and design, changed to correspond to those of plaintiff, showed a deliberate intention to deceive purchasers by palming off defendant's goods as those of complainants, which constituted unfair competition, and entitled complainants to an injunction. Scriven v. North (1904) 134 Fed. 366, 67 C. C. A. 348, modifying decree (C. C. 1903) 124 Fed. 894.

A manufacturer may put forth his goods in a dress, in no element of which

has he an exclusive right of use; and yet, if the ensemble has come to be a public guaranty of origin and quality, he may secure protection against unfair trade of a preying competitor. Enoch Morgan's Sons Co. v. Ward (1907) 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

A manufacturer of locks who deliberately and intentionally copied a higher-priced lock made by another manufacturer, so that the two were substantially identical in appearance to a casual observer, and retail purchasers were likely to mistake one for the other, is chargeable with unfair competition, although the parts of the lock separately may have been open to his appropriation. Yale & Towne Mfg. Co. v. Alder (1907) 154 Fed. 37, 83 C. C. A. 149, decree reversed (C. C. 1906) 149 Fed. 783.

In an issue of unfair competition in imitating the label or dress of a competitor, the question is not whether jobbers or dealers would be deceived, but whether the resemblance is such as is calculated and intended to deceive the ultimate purchaser. Gulden v. Chance (1910) 182 Fed. 303, 105 C. C. A. 16, reversing decree (C. C. 1910) 180 Fed. 178.

A manufacturer held chargeable with unfair competition in purposely imitating in appearance the goods of a competitor, and properly enjoined; but defendant should be permitted to use the common forms of the devices, although like complainant's devices, provided the same were marked so as to unmistakably indicate their origin. A. Y. McDonald & Morrison Mfg. Co. v. H. Mueller Mfg. Co. (1910) 183 Fed. 972, 106 C. C. A. 312, modifying decree H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co. (C. C. 1908) 164 Fed. 1001.

The test of unfair competition by the imitation of labels or marks is whether, when the goods are not side by side, an ordinarily prudent purchaser would be liable to purchase the one, believing that he was purchasing the other. Id.

Where the likeness is in the goods themselves, because of the copying of the unpatented design of complainant's article, and there is no attempt to deceive purchasers with respect to the manufacturer, there is no ground on which a court of equity can grant an injunction. Keystone Type Foundry v. Portland Pub. Co. (1911) 186 Fed. 690, 108 C. C. A. 508, affirming decree (C. C. 1910) 180 Fed. 301.

The manufacturer of an unpatented mechanical implement, with nothing for embellishment or distinction, except a name plate, cannot charge a competitor with unfair competition, because, for the same utilitarian reasons, he uses the same construction in all respects, excepting as to the name plate, which he makes distinctive, and no deception of purchasers is shown. Pope Automatic Merchandising Co. v. McCrum-Howell Co. (1912) 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463, writ of certiorari denied McCrum-Howell Co. v. Pope Automatic Merchandising Co. (1912) 32 Sup. Ct. 527, 223 U. S. 730, 56 L. Ed. 633.

A manufacturer may obtain a monopoly in the right to use a distinctive dress for the goods which will be protected against unlawful competition. H. E. Winterton Gum Co. v. Autosales Gum & Chocolate Co. (1914) 211 Fed. 612, 128 C. C. A. 212.

The manufacturer is guilty of unlawful competition if he so dresses his goods as to represent the goods of another and assists the retailer in palming off his goods as those of the competitor. Id.

One is not required to so distinguish his goods that careless buyers will know by whom they are made and sold. S. R. Feil Co. v. John E. Robbins Co. (C. C. A. 1915) 220 Fed. 650.

If the resemblance is such as is calculated to mislead the purchasers of the article, and thus to injure plaintiff's sales, he is entitled to redress. Humphreys' Specific Homeopathic Medicine Co. v. Wenz (C. C. 1882) 14 Fed. 250.

The use of a capsule of the same color as that used by complainants will not be enjoined, where there is no attempt at deception thereby, and where other labels used by defendant are so unlike those of complainants that no mistake could arise between them. Mumm v. Kirk (C. C. 1889) 40 Fed. 589.

Complainant alleged that it had the exclusive right to manufacture "hot-forged and hammer-pointed" horse-nails, and that defendant, with intent to cheat and defraud it, has advertised its nails as "hot-forged and hammer pointed," when in truth they are neither, and that in this way defendant has palmed off its goods for those of complainant. Held that, strictly speaking, neither nail is "hammer pointed," and that in the absence of any proof that defendant actually tried to deceive the public, or that any purchasers were actually deceived, no recovery could be had. Putnam Nail Co. v. Ausable Horsenail Co. (C. C. 1893) 53 Fed. 390.

Whether the manner in which a defendant dresses his goods for the market renders them such as to deceive intending purchasers, and warrants a court in interfering by injunction to prevent unfair competition, is a question to be decided on the circumstances in each case. Kroppf v. Furst (C. C. 1899) 94 Fed. 150.

Where a complainant has been in business for many years, one entering the market as a competitor, must use such method of wrapping, labeling, and cataloguing of his packages as not to

lead an intending purchaser of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing the goods of complainant. Keuffel & Esser Co. v. H. S. Crocker Co. (C. C. 1902) 118 Fed. 187.

One who so dresses his goods as to enable retail dealers to sell them to customers as those of a competitor is chargeable with unfair competition, although he is careful himself to sell them as his own. Enoch Morgan's Sons Co. v. Whittier-Coburn Co. (C. C. 1902) 118 Fed. 657.

Where a patented article was manufactured by both plaintiff and defendants, and the similarity was only such as was necessary in the making and operation of such article, and, though the form of the boxes in which the instruments of both parties were packed was similar, the circulars and labels on defendant's boxes distinguished the origin of their instruments, and were not similar to plaintiff's labels, except as to the picture of the instrument, defendants were not guilty of any misrepresentation tending to mislead the public, and were therefore not guilty of unfair competition. Marvel Co. v. Tullar Co. (C. C. 1903) 125 Fed. 829.

Where cards used by complainant and defendant, containing competing hooks and eyes, were substantially the same in size, color, and form, and, though the words were different, the style, printing, spacing, etc., were made to simulate complainant's card as closely as possible, and defendant later simulated complainant's mode of fastening the invisible eyes to the card, though stitched in a different manner, defendant was guilty of unfair competition. De Long Hook & Eye Co. v. Francis Hook & Eye Fastener Co. (C. C. 1905) 139 Fed. 146, decree modified (1906) 144 Fed. 682, 75 C. C. A. 484.

After complainant's pad, known as "Air Cushion Pads," and "A. C. Pads," had been patented, defendant began the manufacture of pads, on which it stamped the name "Air Cushion," and below used the words "Consolidated Hoof Pad Co., 18 Vesey St., N. Y.," and filed and registered the letters "A. C." as a trade-mark. Held, defendant's acts in thus imitating complainant's goods constituted unlawful competition, which complainant was entitled to restrain. Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C. 1905) 139 Fed. 151.

A manufacturer will be enjoined from so dressing his goods for the market that they are likely to be mistaken by purchasers for the goods of a competitor earlier in the business. Bates Mfg. Co. v. The Bates Mach., Co. (C. C. 1905) 141 Fed. 213.

Where articles of the same kind are made by different manufacturers in the same city, one having a long established reputation, a later manufacturer is required to exercise care to differentiate his packages, so that purchasers will not confuse the two products. National Starch Co. v. Koster (C. C. 1906) 146 Fed. 259.

The exact imitation of an unpatented article made by another, except for the name of the maker, and which goes beyond any necessary functional resemblance, will be enjoined. Strause v. Weil (C. C. 1911) 191 Fed. 527.

A manufacturer of a patented article, who began after the expiration of the patent, and who uses the name of the patentee as descriptive thereof, held required to so differentiate his product in its marking or dress that ordinary purchasers will not mistake it for that made and sold by the owners of the patent. De Long Hook & Eye Co. v. American Pin Co. (D. C. 1912) 200 Fed. 66.

Making and selling a miner's acetylene lamp in imitation of complainant's which was the first of its kind in the market, is unfair competition. Baldwin v. Grier Bros. Co. (D. C. 1914) 215 Fed. 735.

Parties preparing and selling to dealers a beverage called "Koke," somewhat similar in appearance and in the ingredients to Coco-Cola, prepared by plaintiff, held not guilty of unfair competition, where they neither sold Koke for Coca-Cola nor advised their customers to do so. Coca-Cola Co. v. Branham (D. C. 1914) 216 Fed. 264.

The fact that defendant in its catalogue copied cuts and descriptive matter relating to articles which it might sell as well as complainant, from complainant's catalogue, as well as from those of other manufacturers, was an invasion of complainant's rights, which entitled it to an injunction. Hamilton Mfg. Co. v. Tubbs Mfg. Co. (C. C. 1908) 216 Fed. 401.

Imitation by defendant of an article made by complainant, in which he had built up a trade pending application for a patent, in addition to the copying of complainant's advertising matter, held to constitute unfair competition. Stewart v. Hudson (D. C. 1915) 222 Fed. 584.

When one is frankly putting out an imitation he should be held very strictly to the requirement of distinguishing his goods from the original, and any doubt must be resolved against him. Hiram Walker & Sons v. Grubman (D. C. 1915) 224 Fed. 725.

The use on whisky made in the United States in imitation of Canadian whisky of certain labels held to constitute unfair competition as against Canadian manufacturers. Id.

Copying the form of articles made and sold by defendant for many years, so closely as to deceive purchasers, held to constitute unfair competition. United States Expansion Bolt Co. v. U. G. Kroncke Hardware Co. (D. C. 1915) 225 Fed. 383.

Where one puts up his product with intent to palm it off as that of another, and his act in fact tends to mislead

the purchasing public, a case is made out, though plaintiff has shown no exclusive right in any trade-mark or trade-name. Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 P. 913.

Plaintiff had long used dairy wagons painted in certain colors and with a certain picture on the sides, and with the sign "Walnut Grove Dairy" over his name. Held, that defendant will be enjoined from using wagons, painted in the same way, and with the sign "Walnut Park Dairy" over his name. Nokes v. Mueller (1897) 72 Ill. App. 431.

The public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them by indicating or leading to the purchase of one thing for another. Imperial Mfg. Co. v. Schwartz (1903) 105 Ill. App. 525.

Defendants not permitted to put out a competing product under a name and label so like complainant's that ordinary purchasers would probably mistake defendant's goods for complainant's. Grocers' Supply Co. v. Dupuis (1914) 107 N. E. 389, 219 Mass. 576.

Where defendant has simulated plaintiff's label, and placed the same on other goods, plaintiff, in an action for deceit, need not show specific damages; but the jury is entitled to assess such damages as they may, on the whole evidence, be satisfied plaintiff has sustained. Conrad v. Joseph Uhrig Brewing Co. (1880) 8 Mo. App. 277.

Evidence held to show no attempt by defendant to mislead the public in making and marketing a similarly appearing glass. Mississippi Wire Glass Co. v. Continuous Glass Press Co. (N. J. Ch. 1911) 81 A. 374.

Where defendant, in using a word which had previously been applied by plaintiff to very different kinds of goods, did not intend to represent thereby that his goods were of the plaintiff's manufacture, and the trade and the public were in no danger of being deceived by such name, the plaintiff was not entitled to an injunction. Amoskeag Mfg. Co. v. Garner (1869) 55 Barb. 151, 6 Abb. Prac. (N. S.) 265.

Where plaintiff issued an advertising pamphlet called "Little Red Book," and defendant, in the same business called his "The Red and White Book," but from a mere casual inspection and examination defendant's book would be distinguished from plaintiff's book, the use of the same was not unlawful as a fraudulent simulation of plaintiff's advertising medium. Tallcot v. Moore (1875) 6 Hun, 106.

One who imposes upon or deceives the customers of another by means of simulated labels, marks, indicia, or advertisements, will be restrained in equity from so doing, but it must be shown that the devices adopted are such as would ordinarily lead persons dealing in the articles to suppose them to be the same. Id.

A dealer in merchandise may acquire an exclusive right to shape, style, and dimensions of packages in which he exposes his goods for sale, with the emblems, devices, and other distinctive features on them, and the name adopted to represent their contents. Fischer v. Blank (1893) 138 N. Y. 244, 33 N. E. 1040, affirming (1892) 64 Hun, 635, 19 N. Y. Supp. 65.

Where, after expiration of plaintiff's patent defendant began making the article, placing thereon the year of manufacture, its own name, and the numerals used by plaintiff, and adopted the advertising matter of plaintiff, plaintiff was not entitled to damages on the ground that defendant deceived the public, without proof that such deception occurred, and evidence that defendant understood plaintiff was not sufficient. Westcott Chuck Co. v. Oneida Nat. Chuck Co. (1907) 106 N. Y. Supp. 1016, 122 App. Div. 260.

Where it is charged that the defendant has imitated the packages of the plaintiff for the purpose of imposing the goods of the former upon the public as those of the latter, not only must the fact of imitation be shown, but it must also appear that the imitation was made with intent to impose upon the public as aforesaid. Hoeb v. Bishop (Ohio Super. Ct. Cin. 1889) 22 Wkly. Law Bul. 151.

A manufacturer of "cabinet safes," so similar in size, shape, design, and color to the "safe cabinets" of another manufacturer, who had created a market for such cabinets, as to easily confuse persons of ordinary intelligence as to whose product they are purchasing, held guilty of unfair competition. Safe-Cabinet Co. v. Globe Wernicke Co. (1914) 3 Ohio App. 24, 34 Ohio Cir. Ct. R. 528.

Notwithstanding like coloring of manganese sheaves, Mallory pulleys held not put on the market in form or manner likely or probable to deceive the public into thinking they are those of a prior manufacturer. Columbia Engineering Works v. Mallory (1915) 147 P. 542, 75 Or. 542.

Where a person has been in the habit of putting up his goods in a peculiar and distinctive manner, he will be entitled to restrain another from imitating his packages in such a manner as to deceive purchasers. Hoyt v. Hoyt (1886) 2 Pa. Co. Ct. R. 152.

Where a cigar manufacturer not only appropriated the name of another manufacturer, simulated his labels, marks, and designs, but addressed advertisements and circulars to the trade, calculated to create the belief, which was not the truth, that the cigars manufactured by him were the original cigars of a particular brand, he was guilty of unfair trade competition. Juan F. Portuondo Cigar Mfg. Co. v. Vicente Por-

tuondo Cigar Mfg. Co. (1908) 70 A. 968, 222 Pa. 116.

When the simulation of another's trade-mark, labels, or dress of package is such as to deceive cautious or even ordinary purchasers, it constitutes unfair competition, which equity will enjoin. Robinson v. Storm (1899) 52 S. W. 880, 103 Tenn. 40.

Irrespective of technical trade-marks, the first user of a distinctive dress of goods is entitled to protection against another's use of a similar dress or name in unfair competition. Pacific Coast Condensed Milk Co. v. Frye & Co. (1915) 147 P. 865, 85 Wash. 133.

9. —— **Marks, devices, or symbols.**— After patent expired, and the design became common property, plaintiffs were not entitled to relief against defendants, who used a similar design on their spools, on the ground that its use by defendant was incidentally a misrepresentation as to the origin of the thread. Coats v. Merrick Thread Co. (1893) 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, affirming (C. C. 1888) 36 Fed. 324, 1 L. R. A. 616.

Where complainants had no exclusive right to the use of a picture or name as applied to a flour trade-mark, and there was no proof of a single instance in which the public had been deceived by the points of similarity of defendant's trade-mark, containing such name and symbols, defendant was not guilty of unlawful competition. Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76.

Where defendant closely copied plaintiff's designs and labels, the simulation evidenced an intention to deceive and constituted unfair competition, authorizing an injunction. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1908) 165 Fed. 413, 91 C. C. A. 363, writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 514, 53 L. Ed. 1063.

Copying by one manufacturer of an unpatented design of an article made by another, only a few of which had been sold, so that no purchaser was deceived, did not constitute unfair competition which would sustain a suit for an injunction. Rathbone, Sard & Co. v. Champion Steel Range Co. (1911) 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258.

Simulation on part of defendant of designations for plaintiff's goods previously used, calculated to palm off defendant's goods as plaintiff's products, held to entitle plaintiff to equitable relief. Keystone Oil & Mfg. Co. v. Buzby (1914) 219 Fed. 473, 135 C. C. A. 185, reversing decree Buzby v. Keystone Oil & Mfg. Co. (D. C. 1913) 206 Fed. 136.

One using a device stamped on a label cannot enjoin, on the ground of unfair competition, one who uses, in connection with his lager beer, a similar red triangle, having a large white "Z" thereon, the labels and posters being so utterly unlike that the ordinary purchaser would not be deceived. Bass, Ratcliff & Gretton v. Henry Zeltner Brewing Co. (C. C. 1898) 87 Fed. 468, decree affirmed Bass v. Same (1899) 95 Fed. 1006, 37 C. C. A. 355.

Use of the same letters of the alphabet as a mark to indicate the grade and width of the goods as were used by a competitor older in the business does not constitute unfair competition, where other distinctive labels and marks were used, and it does not appear that there was any intent to deceive purchasers. Stevens Linen Works v. William & John Don & Co. (C. C. 1903) 121 Fed. 171, judgment affirmed (1904) 127 Fed. 950, 62 C. C. A. 582.

The stamping on one side of the head of horseshoe nails of a diagonal check pattern in prior use by complainant did not constitute unfair competition, where the cartons and boxes in which the nails were sold were entirely unlike those used by complainant, and there was no attempt to deceive purchasers. Capewell Horse Nail Co. v. Putnam Nail Co. (C. C. 1905) 140 Fed. 670.

Complainant made and sold slabs of sweet chocolate separated into strips and each strip into two divisions by an indentation. On each division there was an oval disc in one of which were the figures "16" and on the other the words and figure "to 1" reading on each strip "16 to 1." Defendant sold similar slabs except that the strips were not precisely of the same dimensions and were divided into three divisions each having a raised shield thereon containing in succession "3" "for" and "1" making the device on each strip read "3 for 1," each strip being sold at retail for one cent. Held, defendant's device was not unfair competition. Knickerbocker Chocolate Co. v. Griffing (C. C. 1906) 144 Fed. 316.

An arbitrary symbol or device stamped only on articles made under certain patents, or the name of the patentee, on the expiration of such patents becomes public property, and their use by others does not constitute unfair competition. Greene, Tweed & Co. v. Manufacturers' Belt Hook Co. (C. C. 1906) 158 Fed. 640.

The name of a patentee of an article of a new and original type after the expiration of the patent may lawfully be used by any maker or dealer to designate articles of that type, and such use is not within the rule of unfair competition. Id.

If a manufacturer copies the form and ornamentation of another's patented article so as to pass off his article as that of such other, the latter may maintain a suit both for infringement of the patent and for unfair competition, and, although defendant may not be liable for infringement, he may still be chargeable with unfair com-

petition. Allen v. Walton Wood & Metal Co. (C. C. 1910) 178 Fed. 287.

Defendants are chargeable with unfair competition in stamping silver-plated ware with emblems in imitation of those used by complainant on its solid silverware. Gorham Mfg. Co. v. Weintraub (D. C. 1912) 196 Fed. 957.

Imitation of the form and appearance of a patented device made by defendant held to constitute unfair competition. Automatic Recording Safe Co. v. Bankers' Registering Safe Co. (D. C. 1915) 224 Fed. 506.

Where a manufacturer adopted a seal placed on each end of paper cartons containing its product, a rival manufacturer could not thereafter adopt a seal of similar general appearance, and similarly placed on its cartons. National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J. Ch. 1914) 91 A. 126.

Plaintiff painted its cabs yellow, and placed on them a certain distinguishing device, which was very nearly copied on defendant's cabs, which were also painted yellow. Held, that an injunction should be granted. New York Cab Co. v. Mooney (N. Y. 1884) 15 Abb. N. C. 152.

Defendant learned the composition of a medicine when at work for the apothecary who then made it. Held, defendant was entitled to manufacture the preparation and offer it for sale so long as he did not endeavor to deceive the purchaser by simulating the distinguishing marks adopted by plaintiff for the medicine made by the German corporation. Schmid v. Maeurer (1887) 9 N. Y. St. Rep. 843.

10. —— Names in general.—To entitle a name to equitable protection, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. Purchasers, though mistaken, are not in such a case deceived by false representations, and equity will not enjoin against telling the truth. Delaware & H. Canal Co. v. Clark (1871) 80 U. S. (13 Wall.) 311, 20 L. Ed. 581.

Where defendant adopted a name differing only in one word from plaintiff's for a similar business, although there was no simulation of packages, and the place of manufacture shown thereon was different, it was calculated to deceive purchasers, and constituted unfair competition; there being no necessity for its adoption. Fuller v. Huff (1900) 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332.

A manufacturer of shoes, which stamped upon the soles a trade-name so nearly resembling that used by a competitor as to be calculated to confuse purchasers, did not avoid a charge of unfair trade by placing its name as maker conspicuously on the carton on which each pair of shoes was sold to the retail dealer. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409, reversing decree (C. C. 1912) 192 Fed. 930.

Unfair competition in the sale of cigarettes under a similar name held not established, where defendant's package was so different in coloring, printing, and form that it could not be mistaken for complainant's. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment on rehearing (D. C. 1912) 197 Fed. 476.

Use by a defendant of a name for his article may be enjoined, when resembling complainant's trade-mark, although defendant's name or mark may be descriptive of such article. Noel v. Ellis (C. C. 1896) 89 Fed. 978.

In cases involving the alleged simulation of trade or business names, it is only in plain cases of wrong and mischief that an injunction will be granted, and there is no right to an injunction merely because of a similarity of names. There must be injury shown to result therefrom. Original La Tosca Social Club v. La Tosca Social Club (1904) 23 App. D. C. 96.

Where the combination of a numeral and geographical name has by long use come to be known to the trade as designating a particular grade of sand, equity will prevent its fraudulent use by another as unfair competition, though defendant's product may be better. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

Where one establishes a trade-name containing a geographical name and words descriptive of his business, a competitor, desiring to use the same name and descriptive words, must put them in such form that his trade-name will be distinguishable from that first in use. Rodseth v. Northwestern Marble Works (1915) 152 N. W. 885, 129 Minn. 472.

Where the old name of a newspaper was discontinued, although such name was listed as a going newspaper and patronage was thus obtained, equity would not restrain the publication of another newspaper on the ground that the similitude of its name to the old name of plaintiff's paper was unfair competition. Grocers' Journal Co. v. Midland Pub. Co. (1907) 105 S. W. 310, 127 Mo. App. 356.

A person who had formerly been editor of the "National Advocate," published in New York, started another paper, to be published at the same office, entitled the "New York National Advocate," and openly appealed to the friends of the "National Advocate" and to the public to support his paper. An injunction to restrain the publication of the new paper was refused. Snowden v. Noah (N. Y. 1825) Hopk. Ch. 347, 14 Am. Dec. 547.

Equity will protect the use of the

name of a newspaper as a trade-mark, from imitation or simulation which is designed as such to mislead the public. Matsell v. Flanagan (N. Y. 1856) 2 Abb. Prac. (N. S.) 459; American Grocer Pub. Ass'n v. Grocer Pub. Co. (N. Y. 1876) 51 How. Prac. 402; Id. (N. Y. 1881) 25 Hun, 398.

Where one uses a name which alone cannot be protected, in combination with a peculiar-styled package, and the combination constitutes the label, it will be protected. Cook v. Starkweather (N. Y. 1872) 13 Abb. Prac. (N. S.) 392.

Where defendant's place of business was not near plaintiff's, and for a long time its advertisements and notices stated that it had no connection with plaintiff, and its signs are essentially different, it will not be held to have made a fraudulent use of its name. Scott Stamp & Coin Co. v. J. W. Scott Co. (1890) 58 N. Y. Super. Ct. (26 Jones & S.) 379, 15 N. Y. Supp. 325.

Where the title page and name of two papers are similar, but having points of striking diversity, and printed in and upon other and different colors, the facts were not sufficient to justify an injunction upon the ground that purchasers would be induced to purchase defendant's paper instead of plaintiff's by reason of their similarity of appearance. W. J. Johnston Co. v. Electric Age Pub. Co. (1891) 60 Hun, 578, 14 N. Y. Supp. 803.

Defendant established himself in a similar business in the same street near plaintiff, used similar business signs and advertising devices, and used a name only slightly different. Held, that such use of the name and devices would be enjoined. De Youngs v. Jung (Com. Pl. 1894) 7 Misc. Rep. 56, 27 N. Y. Supp. 370, affirmed (Com. Pl. 1893) 25 N. Y. Supp. 479.

An evident attempt to deceive the public and obtain a benefit by the use of a name for which another has established a reputation will be enjoined. Falk v. American West Indies Trading Co. (1901) 73 N. Y. Supp. 547, 36 Misc. Rep. 376, judgment affirmed (1902) 75 N. Y. Supp. 964, 71 App. Div. 320.

One will be restrained from combining his name with marks and symbols similar to those used by another of the same name, so as to deceive the public. Hoyt v. Hoyt (1886) 43 Leg. Int. 151, 2 Pa. Co. Ct. R. 152.

11. —— Arbitrary, fictitious, or fanciful names.—The proprietor of a similar and competing remedy is not entitled to use the phrase "Candy Cathartic" in a similar combination, in connection with a word idem sonans with the name "Cascarets," with the intention or effect of confusing or deceiving purchasers as to the origin of his remedy. Sterling Remedy Co. v. Spermine Medical Co. (1901) 112 Fed. 1000, 50 C. C. A. 657.

The trade-mark "Grape-Nuts," adopted as the name of a cereal food preparation, is not infringed by the name "Grain-Hearts," used to designate a similar product. Postum Cereal Co. v. American Health Food Co. (1902) 119 Fed. 848, 56 C. C. A. 360, affirming decree (C. C. 1901) 109 Fed. 898.

Where complainant uses the words "XX Century Fire Pot" in its advertisements only, the stoves having a different name, defendant is not guilty of unfair competition in naming a stove "Twentieth Century Laurel," the maker's name also appearing plainly thereon. Germer Stove Co. v. Art Stove Co. (1907) 150 Fed. 143, 80 C. C. A. 9.

Complainant manufactured and sold a patent medicine made from herbs, known and widely advertised as "Alpenkrauter." After its sale became successful, defendants advertised a similar remedy under the name "St. Bernard Alpen Krauter." Held, that defendants' use of such term constituted unfair competition. Dr. Peter H. Fahrney & Sons Co. v. Ruminer (1907) 153 Fed. 735, 82 C. C. A. 621.

Although the word "sterling" is ordinarily descriptive of quality, and is not popularly used in connection with ale, one who adopted it to identify a particular manufacture of ale may be entitled to protection against its use by another in such manner as to create confusion as to the origin or identity of the two products. Worcester Brewing Corp. v. Rueter & Co. (1907) 157 Fed. 217, 84 C. C. A. 665.

Where plaintiff adopted the word "Ruberoid" as a trade-mark for a roofing material, which was invalid as an attempt to appropriate the descriptive term "rubberoid," it is not unfair competition for defendant to use of name "RubberO" to designate a similar roofing, plainly marked with defendant's name as manufacturer, and where there was no imitation of the form, dress, or appearance of complainant's packages, beyond the fact that both complainant and defendant, in common with all manufacturers of similar roofing material, put up their product in rolls. Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (1908) 163 Fed. 977, 90 C. C. A. 195, decree affirmed Standard Paint Co. v. Trinidad Asphalt Mfg. Co. (1911) 31 Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536.

Complainant made hose supporters having a rubber button, which was protected by a patent covering the use of rubber as the material, and advertised and sold the same under the tradename of "Velvet Grip." Defendant made wooden buttons for similar use, colored like rubber and used by other manufacturers on hose supporters sold to the public as rubber button supporters, and sometimes as "Velvet Grip" supporters. Held, that such sales constituted unfair competition. E. B. Es-

tes & Sons v. George Frost Co. (1910) 176 Fed. 338, 100 C. C. A. 258.

Where complainant manufactured and sold toilet brushes under the name "Keep-clean," defendant's manufacture and sale of tooth brushes under the word "Sta-Kleen," in similar packages constituted unlawful competition, although defendant applied the name "Sta-Kleen" to tooth brushes before complainant commenced the manufacture and sale of tooth brushes under its mark. Florence Mfg. Co. v. J. C. Dowd & Co. (1910) 178 Fed. 73, 101 C. C. A. 565, reversing decree Same v. Dowd (C. C. 1909) 171 Fed. 122.

The trade-mark "Sal-Vet" held not infringed by the word "SalTone." S. R. Fell Co. v. John E. Robbins Co. (C. C. A. 1915) 220 Fed. 650.

Where defendant began to use the word "Cellonite" for articles of the same substance as those which plaintiff had long sold as "Celluloid," the similarity was sufficient, under the circumstances, to mislead an ordinarily unsuspecting purchaser, and that the plaintiff was entitled to the relief sought. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1887) 32 Fed. 94.

The city of Carlsbad, Bohemia, having for 50 years been engaged in selling salts under the names "Carlsbad Salts" and "Carlsbad Sprudel Salts," is entitled to an injunction to restrain other parties from using these words, even with the word "Artificial" added thereto, as names for artificial salts containing the same chemical elements, although the artificial salts may be superior to the natural product. City of Carlsbad v. W. T. Thackeray & Co. (C. C. 1891) 57 Fed. 18.

The manufacturer of Cashmere Bouquet soap, who has built up a large business in making and selling it, may restrain the use by a rival manufacturer of the words "Violets of Cashmere" to describe another soap. Colgate v. Adams (C. C. 1898) 88 Fed. 899.

Though complainants use the word "Elgin" as a designating mark on watch movements only, the use of the name "Elgin Tiger" or "Elgin Giant" on watch cases in which other movements are sold is unfair competition, though the cases are made in the town of Elgin, there being no other movements than complainants' made there. Elgin Nat. Watch Co. v. Illinois Watch-Case Co. (C. C. 1898) 89 Fed. 487, decree reversed Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237.

"Uneeda," as applied to a biscuit, is a proper trade-mark; and the proprietor is entitled to an injunction against the use of "Iwanta" as the name of a similar biscuit put up and sold to the trade in packages so similar as to be calculated to deceive consumers. National Biscuit Co. v. Baker (C. C. 1899) 95 Fed. 135.

Where defendant bottled and sold natural mineral water from a spring at Saratoga under the name of "Saratoga Vichy," not attempting to palm it off as an imported water, and the labels being such as could not deceive a person of ordinary intelligence, the use of the name "Vichy" in connection with such water did not constitute unfair competition. La Republique Francaise v. Saratoga Vichy Spring Co. (C. C. 1900) 99 Fed. 733.

The manufacturer of a special line of ladies' shoes used as a trade-mark a peculiar form of the words "Queen Quality." Defendant was a dealer in shoes, and purchased shoes as nearly like complainant's as possible in style and quality, and caused to be stamped therein, where complainant placed its trade-mark, the word "Queen," together with its name and address. Held, that the action of defendant clearly showed an intention to deceive purchasers, which was likely to be successful, which constituted unfair competition, and entitled complainant to a preliminary injunction. Thomas G. Plant Co. v. May Co. (C. C. 1900) 100 Fed. 72.

Complainants adopted the name "Sorosis" as a trade-mark for a shoe for women manufactured by them of superior workmanship and a characteristic appearance. After plaintiff's "Sorosis" shoe for women had become known and popular, defendants began the use of the name "Sartoris," afterwards changed to "Sartoria" and "Satoria," to designate a woman's shoe of their make, very similar in appearance, but inferior in quality, to complainants' "Sorosis" shoes. Held, that such action constituted unfair competition. Little v. Kellam (C. C. 1900) 100 Fed. 353.

Use of the name "Our Country Soap" in competition with plaintiff's "Old Country Soap," where the packages were of the same size and shape, but the dress of the defendant's product bore the defendant's name and its place of manufacture, and was so unlike that of the plaintiff that it was not likely to deceive a common purchaser exercising ordinary care, did not constitute unfair competition. Allen B. Wrisley Co. v. Iowa Soap Co. (1903) 122 Fed. 796, 59 C. C. A. 54, affirming decree Allan B. Wrisley Co. v. Same (C. C. 1900) 104 Fed. 548.

The name "Oxford" on Bibles has so long been used to designate the Bibles prepared and published by the University of Oxford, England, as to have become identified with such particular publications as denoting their origin, and the use of such name by another publisher, having no connection with the place or name, can have no purpose except to deceive purchasers, and constitutes unfair competition. Chancellor, etc., of Oxford University v. Wilmore-Andrews Pub. Co. (C. C. 1900) 101 Fed. 443.

Defendants changed the name of their product from "Boston Cocktails" to "Boston Club Cocktails," with no wrongful motive. There is no other similarity to plaintiff's "Club Cocktails." Held, that the defendants' adoption of the word "Club" constituted unfair competition entitling complainants to an injunction. Heublein v. Adams (C. C. 1903) 125 Fed. 782.

A manufacturer which has adopted and uses the name "Queen Quality" as a trade-mark or name exclusively for its shoes of superior grade is entitled to be protected in such manner and use and to restrain a purchaser of shoes of its manufacture, but which it had rejected for such grade and stamped with a different name, from advertising, offering for sale, and selling the same under the name of "Queen Quality" shoes. Thomas G. Plant Co. v. May Mercantile Co. (C. C. 1907) 153 Fed. 229; Same v. Hamburger, Id. 232.

The use by a defendant of the name "Murafresco" for a wall finish was not an infringement of complainant's trade-name "Muresco" for a similar product. Benjamin Moore & Co. v. Auwell (C. C. 1909) 172 Fed. 508, judgment affirmed (1910) 178 Fed. 543, 102 C. C. A. 53.

Where plaintiffs used the word "Imperial" as a trade-mark for its product, and defendant used the same word in its corporate name, selling a like product, of other manufacturers, the use of the name in defendant's corporate name constituted unfair competition. McGraw Tire & Rubber Co. v. Griffith (C. C. 1911) 198 Fed. 566.

Sale of "American Lady" shoes held not unfair competition against sale of "American Girl" shoes. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (C. C. 1912) 192 Fed. 930.

Defendant manufacturing and selling a beverage called "Bo-La" in competition with complainant's "Moxie" held not guilty of unlawful competition, though the same form of bottles was used. Moxie Co. v. Daoust (D. C. 1912) 197 Fed. 678.

The word "Havoline," as a name for gas engine and automobile lubricants, held not an infringement of the trade-mark "Valvoline," as applied to lubricating, illuminating, and tempering oils. Valvoline Oil Co. v. Havoline Oil Co. (D. C. 1913) 211 Fed. 189.

The name "New Idea" for a type case held not so similar to the name "New Departure," used by complainant for a similar article, as to constitute unfair competition; the cases themselves being different in several respects, and each bearing the maker's name. Hamilton Mfg. Co. v. Tubbs Mfg. Co. (C. C. 1908) 216 Fed. 401.

Sale of substance similar to that manufactured by complainant under the trade-name "Listerseptine" held an infringement of complainant's registered trade-mark "Listerine." Lambert Pharmacal Co. v. Kalish Pharmacy (C. C. 1911) 219 Fed. 323.

Defendant, who made tires, branding them "Vacuum Tread," is not guilty of unfair competition against complainant, whose tires were called "Vacuum Cup Oil Proof." Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

Where plaintiff was selling laundry aid known as "Norub" under trade-mark consisting in part of shield, association of similar shield with name of defendant's sweeping germicide and cleanser, "Nodust," held unfair competition, but not an infringement. Van Zile v. Norub Mfg. Co. (D. C. 1916) 228 Fed. 829.

Where complainants had long been engaged in business under the style of "Six Little Tailors," and defendant opened a tailoring establishment under the name of "Six Big Tailors," the name was so similar that it was calculated to deceive the unwary, and its use would be enjoined. Mossler v. Jacobs (1896) 66 Ill. App. 571.

The test of whether the name adopted embodying a descriptive geographical term is so similar to the name of another as to warrant an injunction for unfair competition depends upon the character of the business and its relation to the geographical term; but when these are determined the question becomes one of law, turning upon the likelihood of deception resulting. Kansas Milling Co. v. Kansas Flour Mills Co. (1913) 133 P. 542, 89 Kan. 855.

In connection with his trade-mark in the sale of straight whisky plaintiff used the words "Old Taylor," though the essential feature was the script fac simile signature "E. H. Taylor, Jr., & Sons." Defendant, in advertising his blended whisky, used the words "Kentucky Taylor" and "Old Kentucky Taylor." Held that, though there is not such an infringement of a trade-mark as entitles plaintiff to an injunction and an accounting, defendant is guilty of a fraudulent simulation of plaintiff's whisky, and plaintiff is entitled to an action for damages for the fraud. E. H. Taylor, Jr., & Sons Co. v. Taylor (1905) 85 S. W. 1085, 124 Ky. 173, 27 Ky. Law Rep. 625.

Where plaintiff had for years distilled and sold whisky under the trade-mark "Bonnie Rye," defendant's manufacture and sale of a brand called "Bonnie & Co. Rye," the label of which, though differing in some respects from that of plaintiff's, was similar in its most striking features, constituted unfair competition. Bonnie & Co. v. Bonnie Bros. (1914) 169 S. W. 871, 160 Ky. 487.

In a suit by a manufacturer of brushes to restrain the use by another manufacturer of similar brushes of certain descriptive words, the word "rubber-vulc" or "rubber-bound" held to bear so close a resemblance to the word "rubberset" used by complainant as to be likely to deceive the public, and hence its use would be restrained. Rubber & Celluloid Harness Trimming Co. v.

Rubber-Bound Brush Co. (1913) 88 A. 210, 81 N. J. Eq. 419, 519.

In a suit by the manufacturer of "rubberset" brushes to restrain unfair competition by another manufacturer of brushes, the use of the word "rubber-bound" in latter's corporate name restrained, because amounting to unfair competition. Id.

Plaintiff used the designation "St. James," and the numerical symbol "½," to distinguish his cigarettes. Defendants used the words "St. James Parish Perique Cigarettes," and the symbol "½," applying the latter in the exact form employed by plaintiff. Held that, though it was shown that the term "St. James Parish Perique" was one in common use, and that the symbol "½" was used by both plaintiff and defendants only on mixed cigarettes, an injunction restraining the use of both designations would be granted. Kinney v. Basch (N. Y. 1877) 25 Am. Law Reg. (O. S.) 596.

Where a renovating tailor uses the words "The Brooklyn Valet" to describe his business, it constitutes a new and distinctive use of the term, giving him a right to restrain another from the use of the word "valet" in competition with his business. Cohn v. Reynolds (1899) 58 N. Y. Supp. 1138, 40 App. Div. 619, affirming judgment (1898) 57 N. Y. S. 469, 26 Misc. Rep. 473.

Where plaintiffs had adopted, and for 20 years used, the words "El Falcon" as a trade-mark to designate a well-known and favorite brand of cigars of their manufacture, the use of the words "El Falco" by a rival manufacturer to designate a brand of cigars should be enjoined. Falk v. American West Indies Trading Co. (1902) 75 N. Y. Supp. 964, 71 App. Div. 320, affirming judgment (1901) 73 N. Y. S. 547, 36 Misc. Rep. 376.

12. —— Names of persons, firms, or corporations.—A manufacturer of typewriters under the names "Remington" and "Remington Standard" not entitled to protection against the adoption by persons bearing respectively the surnames "Remington" and "Sholes" of the name "Remington-Sholes" for their typewriters, where the only confusion in the minds of the public results from the similarity in names, and not from the manner of their use. Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 116 O. G. 299, 49 L. Ed. 972, reversing decrees Wyckoff, Seamans & Benedict v. Howe Scale Co. of 1886 (1903) 122 Fed. 348, 58 C. C. A. 510, and (C. C. 1901) 110 Fed. 520.

The trade-mark "Davids" being a surname registered under section 9490, ante, proviso 4, placed at the top of a registrant's labels on ink manufactured by it, is imitated contrary to this section by persons bearing the same surname who put "C. I. Davids" in the same position on their ink labels and at the bottom thereof put "Davids Mfg. Co." Thaddeus Davids Co. v. Davids (1914) 34 Sup. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, reversing decree (1912) 192 Fed. 915, 114 C. C. A. 355.

The Continental Insurance Company of New York is not entitled to restrain another insurance company from the use of the word "Continental," where there is no attempt to deceive the public as to the identity of the two companies, and no such deception in fact is shown. Continental Ins. Co. v. Continental Fire Ass'n (1900) 101 Fed. 255, 41 C. C. A. 326.

While every man has the right to use his own name honestly and fairly in his own business, and is not responsible for resulting confusion with the goods of another of the same name, he must so use it as not to unnecessarily injure another, nor produce greater confusion than would naturally result from the mere similarity or identity of name. He may not dress his goods in a manner calculated to enable them to be palmed off on purchasers as those of another. Chickering v. Chickering & Sons (1903) 120 Fed. 69, 56 C. C. A. 475.

The word "Wiener," used to designate a corset, although the surname of the person using it, held an infringement of the trade-mark "Warner." Warner Bros. Co. v. Wiener (1914) 218 Fed. 635, 134 C. C. A. 393, modifying order on rehearing (1914) 214 Fed. 30, 130 C. C. A. 424.

Where defendant was arranging to put out piano bearing its corporate name similar to plaintiff's trade-marks and trade-names, plaintiff held entitled to sue for an injunction. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

The imitation of a manufacturer's label, where the only change was "Holsteter" and "Holsteter & Smyte," for "Hostetter" and "Hostetter & Smith," held to be illegal. Hostetter v. Vowinkle (C. C. 1871) Fed. Cas. No. 6,714.

"William Clark & Sons' Parabola Needles" is an infringement of "Roberts' Parabola Needles." Roberts v. Sheldon (C. C. 1879) Fed. Cas. No. 11,-916.

Where complainants had the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels, bottles, and other devices, and defendants were selling to the trade an extract out of which it was claimed Hostetter's Bitters could be made, with directions how to make such bitters, and that the retail dealers were making these bitters and refilling complainant's bottles, with their labels and devices thereon, and thus selling them, defendants had the right to sell their extract as charged, and could not be held responsible for the acts of third parties, and that an injunction would not be granted. Hostetter v. Fries (C. C. 1883) 17 Fed. 620.

Where complainant sold a medicine called "Brown's Iron Bitters," and defendants one called "Brown's Iron Ton-

ic," prepared under a different formula by another Brown, who, bona fide, gave it his name, the bottles, wrappers, and labels bearing no resemblance to those of complainant, and the medicine itself being distinguished in the circulars issued by defendants, held, no infringement of any symbol, device, or word constituting a trade-mark, nor any evidence of fraud or intent to deceive the public, and the mere similarity in the sound of the two names furnished no ground for equitable interference. Brown Chemical Co. v. Myer (C. C. 1887) 31 Fed. 453.

In dealing with corporations, an unlawful imitation of a name is subject to the same rules of law which apply where the parties are unincorporated firms or companies. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1887) 32 Fed. 94.

Where plaintiffs acquired the sole right to use the name "Remington" as a name for typewriters, and later others named Remington began making a typewriter under the name of "Sholes," which was changed to the "Remington-Sholes," since ultimate purchasers might be led to think that the addition of the names "Sholes" was a new style of the old machine coming from the same source, such use of the name "Remington" was an attempt to deceive the public, and unwarranted. Wyckoff v. Howe Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, reversed Wyckoff, Seamans & Benedict v. Same (1903) 122 Fed. 348, 58 C. C. A. 510, and Howe Scale Co. v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 116 O. G. 299, 49 L. Ed. 972.

Where a corporation wrongfully used the name "Remington" in connection with the word "Sholes" as applied to typewriters, the fact that it subsequently shortened the name to "Rem-Sho" was not such a change of the term as would guard purchasers against belief that they were not Remington machines. Id.

Swift & Co. is entitled to an injunction, on the ground of unfair competition, to restrain a manufacturer of like products from designating them by the name "Swift," where there is no apparent reason or appropriateness in such use. Swift & Co. v. Groff (C. C. 1902) 114 Fed. 605.

While a person has the right to use his own name to designate articles which he manufactures and deals in, a corporation has not the right to use the name of one of its incorporators, where it is the name by which an article made and sold by an older dealer is usually called for and described, so as to cause deception of purchasers and injury to the older manufacturer. J. & P. Coats v. John Coates Thread Co. (C. C. 1905) 135 Fed. 177.

The names "Rogers" and "RoDgers" being idem sonans, the mere capitalization of the "d" for the purpose of calling attention to the distinction between the names was insufficient to prevent confusion and deception of the public as to the manufacture of the goods. International Silver Co. v. Rodgers Bros. Cutlery Co. (C. C. 1905) 136 Fed. 1019.

Where defendant put out an article with the trade-mark "The Webster Star brand," on its boxes, above which was the single word "Underwood," to indicate that the box contained a ribbon of the proper size and on the appropriate spool for use in the Underwood typewriter, and not for the purpose of palming off its ribbons as of "Underwood" manufacture, such use of the word was not unlawful. Wagner Typewriter Co. v. F. S. Webster Co. (C. C. 1906) 144 Fed. 405.

Where plaintiff acquired the right to use the mark "D. A. Reed's," defendant in selling a competing article under the name "Dr. A. Reed, Patentee," was chargeable with unfair competition and a fraudulent invasion of complainant's prior acquired rights. Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. 1908) 158 Fed. 552, decree reversed (1908) 162 Fed. 887, 89 C. C. A. 577.

Where plaintiff for many years made and sold a "Bates Automatic Hand Numbering Machine," and defendant later put out "Bates Numbering Machines," such use of the word "Bates" in connection with numbering machines constituted unlawful competition, and complainant was entitled to restrain defendant's use of the words "Bates Numbering Machine Company" as its corporate name, and from using any other words the effect of which would be to mislead the public to believe that defendant's machines were those manufactured by complainant. Bates Mfg. Co. v. Bates Numbering Mach. Co. (C. C. 1909) 172 Fed. 892, order modified Bates Numbering Mach. Co. v. Bates Mfg. Co. (1910) 178 Fed. 681, 102 C. C. A. 181.

Complainants held entitled to enjoin use of the name "F. Garcia & Bros.," "Garcia Bros.," and any like combination of "Garcia" and "Bros.," by defendant, a sole trading competitor. Garcia v. Garcia (D. C. 1912) 197 Fed. 637.

Where the use of a corporate name results in palming off goods on the public as the goods of another, its use is properly enjoined. Bender v. Bender Store & Office Fixture Co. (1913) 178 Ill. App. 203.

Plaintiff, an insurance company, was organized under the name of Atlas Assurance Company, and did business in Iowa continuously since 1892 under permit issued by the state. In 1905 defendant was organized in Iowa under the name of Atlas Insurance Company. Held, the resemblance between plaintiff's and defendant's name was such as to mislead the ordinary purchaser of insurance, and hence defendant's use of the name should be restrained. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modi-

fied (Iowa, 1908) 114 N. W. 609.

Confusion of trade-names in business is sufficient ground for the issuance of an injunction. Id.

"The Kansas Milling Company" held not entitled to enjoin a new corporation from using the name "Kansas Flour Mills Company," on the ground of unfair competition where no steps were taken by the new company to increase such confusion as might naturally result from the similarity of the names. Kansas Milling Co. v. Kansas Flour Mills Co. (1913) 133 P. 542, 89 Kan. 855, Ann. Cas. 1915A, 540.

An individual conducting business in competition with a corporation having his name held not guilty of unfair competition, where he did not represent his goods as having been made by the corporation, and informed customers that he was not connected therewith. C. H. Batchelder & Co. v. Batchelder (1914) 107 N. E. 455, 220 Mass. 42.

Where a private educational institution has been established under a certain name, an imitation of its established title, calculated to mislead patrons, will be enjoined as unfair business competition, though the name imitated is not the subject of strict property rights as a trade-mark. Rickard v. Caton College Co. (1903) 92 N. W. 958, 88 Minn. 242.

A corporation which long did business under the name of the "United States Mercantile Reporting Company" is entitled to restrain the use of the name "United States Mercantile Reporting and Collecting Association" by another corporation subsequently formed, which makes unduly prominent that portion of its name which is similar to that of the first corporation. United States Mercantile Reporting Co. v. United States Mercantile Reporting & Collecting Ass'n (N. Y. 1888) 21 Abb. N. C. 115.

Where underwear originated by J., and manufactured and sold by plaintiff, were all-wool garments, and defendant used such name to designate the kind and quality of his goods, but sold an inferior article containing a substantial admixture of cotton, such use is a deceptive representation, against which plaintiff is entitled to an injunction. Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier (Super. N. Y. 1893) 5 Misc. Rep. 78, 24 N. Y. Supp. 890. In such case defendant will be enjoined from advertising, or in any way representing that the underwear sold by him, containing an admixture of cotton, is the kind and quality of underwear designated by the use of such name, and from so using J.'s name in connection with the word "Genuine," or other word or words, and from advertising or representing his underwear by any designation containing such name. Id.

Where a new corporation, calling itself the "Manufacturing Electrical Novelty Company," sent out circulars which had deceived customers of plaintiff, by reason of similarity of names, etc., the use of the name "The Manufacturing Electrical Novelty Company" would be restrained, as calculated to deceive the public. American Novelty & Mfg. Co. v. Manufacturing Electrical Novelty Co. (1901) 73 N. Y. Supp. 755, 36 Misc. Rep. 450.

Where defendant adopts the same name as used by plaintiff, and opens a store on the same street, and imitates the signs, cards, and notices of plaintiff, and by misrepresentation seeks to mislead customers to suppose they were dealing with plaintiff when in fact they were not, an injunction against such acts will be granted. Cohn v. Kahn (1882) 8 Ohio Dec. 472, 8 Wkly. Law Bul. 154.

Where a family named French have built up an extensive business in ice cream, injunction will lie against the use of the word "French" in connection with an ice cream business carried on by a competitor, who is not a Frenchman, and whose manifest purpose is to attract trade by creating a false impression as to his own identity. French Bros. Dairy Co. v. Giacin (1909) 31 Ohio Cir. Ct. R. 395.

Complainant, who has for several years done business and advertised as the "United States Dental Association," can restrain the use by another, in the same business, of the words "U. S. Dental Association" and the letters "U. S.," they having a tendency, and being evidently intended, to lead persons to suppose that it was the place of business of complainant. Cady v. Schults (1895) 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

Where S. & B. had a competitor by the name of "C. C. Williams," and used the name of "S. Williams" in connection with their business, maintaining a telephone in that name, so that it appeared in the telephone book near the competitor's, the use of the name was calculated to mislead the public generally. Scanlan & Bartell v. Williams (Tex. Civ. App. 1908) 114 S. W. 862.

One person may not use the name of another already in the same line of business, so that confusion or injury will result therefrom. Eastern Outfitting Co. v. Manheim (1910) 110 P. 23, 59 Wash. 428, 35 L. R. A. (N. S.) 251.

A corporation may be enjoined from using a name or conducting a business under a name so similar to that of a previously established concern engaged in the same line of business, that confusion or injury results therefrom. Rosenburg v. Fremont Undertaking Co. (Wash. 1911) 114 P. 886.

The right to have injunctive relief from an unfair use of a similar trade-name is not limited to trade-marks and trade-names as applied to some specific article or class of manufacture or merchandise alone, but is applicable to a

trade-name when used in connection with a business of any kind so as to become affixed to the establishment. Wright Restaurant Co. v. Seattle Restaurant Co. (1912) 122 P. 348, 67 Wash. 690.

13. —— **Packages and wrappers.**—In determining whether packages are calculated to deceive purchasers, equity regards the consumer as well as the middleman, for the courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package; but unless the similarity is such as to mislead such purchaser, injunction will not issue. N. K. Fairbank Co. v. R. W. Bell Mfg. Co. (1896) 77 Fed. 869, 23 C. C. A. 554, reversing (C. C. 1896) 71 Fed. 295.

Where, after plaintiff had successfully sold his "Gold Dust Washing Powder," defendant put out his "Buffalo Powder" in packages much like plaintiff's, though avoiding exact similarity, notwithstanding the fact that the word "Buffalo," together with defendant's name, on the packages, was distinctive, the changes were manifestly made with an intent to simulate complainant's packages, and to enable retail dealers to pass them off for complainant's. Id.

The court must use its own judgment as to similarity of packages and labels, considering the labels and packages as a whole, and the fact that a few isolated purchasers have been misled, does not necessarily bind it. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, 30 C. C. A. 496, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 690, 43 L. Ed. 1179.

In determining the question of fraudulent imitations of packages and labels merely noting points of difference or similarity is not sufficient. The packages and labels must be considered as a whole. Id.

Where defendant subsequently placed on the market files which copied those of complainant in names, emblems, colors, size, and style of type and general make-up so exactly that it would mislead the ordinary consumer, and having nothing thereon to indicate the maker, such action constituted unfair competition, and entitled complainant to an injunction. Globe-Wernicke Co. v. Brown & Besly (1902) 121 Fed. 90, 57 C. C. A. 344.

While no manufacturer of an article has a monopoly of form of package, or of color or of shape of letters, or of geographical names, he is yet entitled to protection against one who imitates his packages in any or all of such matters with the intent to deceive purchasers into buying his goods as those so imitated in dress, and in such manner as to render such deceit probable. A. Bauer & Co. v. La Société Anonyme De La Distillerie De La Liqueur Bénédictine De L'Abbaye De Fécamp (1903) 120 Fed. 74, 56 C. C. A. 480.

Defendants purchased copyrighted sheets of plaintiff's works from licensed publishers, and bound them into sets, which they sold. There was no attempt to imitate any other edition in style or appearance, nor to deceive purchasers, the only similarity being in the use of a single device on the cover, similar to one used on another edition; nor was it shown that any purchaser was actually deceived. Held, that such facts did not entitle plaintiff to damages for unfair competition. Kipling v. G. P. Putnam's Sons (1903) 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873.

Labels and cartons used by complainant and by defendant compared, and held not to show such similarity as to charge defendant with unfair competition. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

The boxes, cartons, labels, and advertising matter used by complainant and defendants disclose such similarity as to evidence a design to deceive purchasers on the part of defendants, and to constitute unfair competition. Bickmore Gall Cure Co. v. Karns (1905) 134 Fed. 833, 67 C. C. A. 439, reversing decree Bickmore Gall Cure Co. v. Karns Mfg. Co. (C. C. 1903) 126 Fed. 573.

Another manufacturer of a similar article made in the same shape, but with a different letter embossed thereon, and sold under the same name, is not chargeable with unfair competition, where the boxes in which the confection is retailed, while of the same size and shape, are dissimilar in coloring and lettering, so that ordinary purchasers would not be deceived as to the origin of the goods. Heide v. Wallace & Co. (1905) 135 Fed. 346, 68 C. C. A. 16.

Where the only distinction between containers was a slightly different color, and the use of the word "Mufflet," instead of "Muffler," the differences were insufficient to avoid confusion, and the use of such package constituted unlawful competition. Hygienic Fleeced Underwear Co. v. Way (1905) 137 Fed. 592, 70 C. C. A. 553, reversing decree (C. C. 1904) 133 Fed. 245.

A manufacturer, without a patent, of tipped matches, in which it is essential that the head and tip should be of different colors to enable users to distinguish the tip on which the match should be struck, is not entitled to maintain a monopoly in the use of any two particular colors, merely because he used them first. Diamond Match Co. v. Saginaw Match Co. (1906) 142 Fed. 727, 74 C. C. A. 59, writ of certiorari denied Saginaw Match Co. v. Diamond Match Co. (1906) 27 Sup. Ct. 776, 203 U. S. 589, 51 L. Ed. 330.

Certain forms and styles of cards, used by defendant and containing hooks

and eyes of its manufacture as dressed for market, held not to have such similitude to those of complainant as to constitute infringements or to make a case of unfair competition. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (1906) 144 Fed. 682, 75 C. C. A. 484, modifying decree (C. C. 1905) 139 Fed. 146.

Defendant not chargeable with unfair competition in making, advertising and selling an atomizer similar in appearance to complainants', not protected by any trade-mark or design patent, where the names given the two devices were different, and each was indelibly stamped with the name and address of the manufacturer, and there was no evidence of an intent to deceive purchasers. Dunlap v. Willbrandt Surgical Mfg. Co. (1906) 151 Fed. 223, 80 C. C. A. 575.

Evidence held to entitle complainant to restrain defendant from making and selling a cigar mold designated by the same name as one made by complainant, and in using similar cuts in its catalogues representing cigar maker's tools, without stamping its name upon such molds and plainly indicating on the cuts that it, and not complainant, was the manufacturer of the articles represented thereby. Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (1908) 161 Fed. 318, 88 C. C. A. 398.

One who manufactures and sells an automobile search light, inclosed in a shell of graceful but unpatented design, may maintain a bill for an injunction, profits, and damages against defendant who sells an automobile search light inclosed in a similar shell, if it is shown that the similarity of the shells does, or is likely to, deceive purchasers. Rushmore v. Manhattan Screw & Stamping Works (1908) 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269.

Where defendant closely simulated plaintiff's packages, with much the same labels, he was guilty of unlawful competition in the dress of its gum considering the prior trade, and complainant was entitled to an injunction restraining defendant from using boxes or containers which might be of sufficient similarity to mislead the ordinary purchaser and also from using the words "Satsuma Wafers." H. E. Winterton Gum Co. v. Autosales Gum & Chocolate Co. (1914) 211 Fed. 612, 128 C. C. A. 212.

Color may be one of the elements making up a dress of goods entitled to protection against unlawful competition. Id.

A decree enjoining unfair competition by defendant in imitating complainant's miners' lamp, in form, appearance, and packages, considered and affirmed. Grier Bros. Co. v. Baldwin (1915) 219 Fed. 735, 135 C. C. A. 433, modifying decree Baldwin v. Grier Bros. Co. (D. C. 1914) 215 Fed. 735.

Complainant not entitled to restrain defendant from adopting the practice originated by complainant of marking its oysters with a metal tag, different in color and wording from complainant's. Armstrong Seatag Corporation v. Smith's Island Oyster Co. (1915) 224 Fed. 100, 139 C. C. A. 656.

Imitation of package of medicine, as to form, color, and style, enjoined, though defendants substituted their own names in the various places where plaintiffs used theirs. Frese v. Bachof (C. C. 1876) Fed. Cas. No. 5,109; Id. (C. C. 1878) Fed. Cas. No. 5,110.

A court will restrain the fraudulent imitation of a package and label, although they do not technically constitute a trade-mark, where the public are thereby misled as to the source of the goods. Sawyer v. Horn (C. C. 1880) 1 Fed. 24, 38.

Where the defendant's wrapper bore so close a resemblance to that of complainant as to show a conscious attempt to imitate it, and complainant is not chargeable with laches, an injunction against the use or imitation, colorable or otherwise, will be granted, and an accounting ordered. Joseph Dixon Crucible Co. v. Benham (C. C. 1880) 4 Fed. 527.

Parties will be enjoined from putting up goods in packages in imitation, calculated to deceive the buying public and to defraud the original users of such packages; but such imitation must be sufficiently close to have that effect, or the injunction will be refused. Gail v. Wackerbarth (C. C. 1886) 28 Fed. 286.

Defendant manufactured and sold a medicine to which he gave a name similar to that of complainant's medicine, including the name of the inventor; he placed on the wrappers of his medicine a picture of a bust, and an autograph signature, complainant's medicine having long been known among an ignorant class of purchasers by similar signs; he issued directions which were almost a literal copy of the complainant's; and he published a card in which he described himself as the son and successor of the inventor of complainant's medicine. Held, that defendant was guilty of unfair competition. C. F. Simmons Medicine Co. v. Simmons (C. C. 1897) 81 Fed. 163.

Where a firm had a trade-mark in the name of the members composing it, and defendant purchased from a retiring member a right to use his name after he had conveyed to the firm all his interest in its property assets, and business, and thereupon began to make and sell goods stamped with the name and packed in a similar manner to the firm goods, the circumstances clearly indicated a fraudulent intent. R. Heinisch's Sons Co. v. Boker (C. C. 1898) 86 Fed. 765.

The California Fig-Syrup Company is entitled to protection from unfair competition in its business, irrespective of any question of trade-mark, and to enjoin the production and sale of a sim-

ilar article put up in such form that it can be sold to an ordinary purchaser as the preparation of such company. California Fig-Syrup Co. v. Worden (C. C. 1899) 95 Fed. 132, affirmed Clinton E. Worden & Co. v. California Fig-Syrup Co. (1900) 102 Fed. 334, 42 C. C. A. 383, which is reversed (1903) 23 Sup. Ct. 161, 187 U. S. 516, 47 L. Ed. 282.

Where defendant's packages were the same in form, color, and general appearance as complainant's, and which deceived purchasers familiar with complainant's goods the use of such packages constituted unfair competition, and entitled complainant to an injunction. Franck v. Frank Chicory Co. (C. C. 1899) 95 Fed. 818.

Complainant had sold its product in the United States for many years, and it had attained a wide reputation, when defendant entered the market with a similar extract, distinctly dressed, but subsequently in a package so similar to complainant's in color and general appearance as to show that deception was intended, and liable to result in the sale of the goods to ultimate purchasers; and it further used on such packages, the fictitious title of "Liebig Fluid Beef Co." Held, that it was guilty of unfair competition. Liebig's Extract of Meat Co. v. Libby, McNeill & Libby (C. C. 1900) 103 Fed. 87.

Where the designer of a package for use by one manufacturer admittedly had before him the package in prior use by another manufacturer, and the similarity between the two packages is such as is well calculated to confuse or deceive retail purchasers, the charge of unfair competition appears, from a comparison of the two packages, to be well founded. Hansen v. Siegel-Cooper Co. (C. C. 1900) 106 Fed. 690.

Where complainants had expended large amounts of money in advertising their "Welcome" soap, the word being registered, and defendant sold soap with labels bearing his name, "Welcome A. Smith," the cakes differing in size and shape and in the wording of the labels from complainant's, the use of the word "Welcome," segregated from the surname, or in larger type or letters than the surname, or so located as to admit the inference that the soap is Welcome Soap, manufactured by A. Smith, would be restrained. Lever Bros., Limited, Boston Works v. Smith (C. C. 1902) 112 Fed. 998.

Complainant, Liebig's Extract of Meat Company, Limited, manufactured and sold in the market extract of meat, put up in two-ounce jars, having a wrapper and a neck label, and capped with a metallic capsule. The label had printed thereon the name of the goods, "Liebig's Extract of Meat," its own name as maker, and a fac simile signature of "J. v. Liebig," in blue script, running diagonally across the printed matter. Defendant entered the market with an extract of meat put up in jars of the same size and shape, having a neck label and wrapper of substantially the same material and appearance, printed in the same colors. They contained the name of the goods, "Liebig's Extract of Beef," and the names "Liebig Fluid Beef Company" and "Liebig Beef Company," both shown by the evidence to be fictitious. Diagonally across the wrapper was the fac simile signature "J. T. Walker," in blue script, closely imitating in appearance the signature on complainant's wrappers. Where the dress of defendant's goods so simulated that of plaintiff as to be evidently intended to deceive the public, it constituted unfair competition, which entitled complainant to restrain defendant from using the name or simulating the name or labels of complainant in any manner which would deceive purchasers of ordinary intelligence, using ordinary care. Liebig's Extract of Meat Co. v. Walker (C. C. 1902) 115 Fed. 822.

Defendant, after having been agent for complainant for a number of years, entered the market as a competitor, using for the same form of package, color of wrapper, labels of the same general design and appearance, the general effect of the package as a whole being so nearly like complainant's as to require close scrutiny to distinguish between them. Held, such imitation evidenced a fraudulent design. Keuffel & Esser Co. v. H. S. Crocker Co. (C. C. 1902) 118 Fed. 187.

While defendants had the legal right to imitate the manufacture of complainants, which was not patented, the imitation of the packages was evidently with intent to deceive purchasers, and constituted unfair competition. Scriven v. North (C. C. 1903) 124 Fed. 894, decree modified (1904) 134 Fed. 366, 67 C. C. A. 348.

In a suit to restrain defendant from alleged unfair competition in the sale of "Toothache Gum" in packages similar to complainant's package, evidence held to show such a similarity as to entitle complainant to an injunction. Devlin v. McLeod (C. C. 1904) 135 Fed. 164.

Where defendants made replacing parts for complainant's machine, among others, selling them in packages marked to show for what machine they were made and by whom, but the parts themselves not identified by any mark, they were not entitled to do so without clearly marking the parts to prevent their being mistaken by retail purchasers for those made by complainant for its own machines. Enterprise Mfg. Co. v. Bender (C. C. 1906) 148 Fed. 313, decree reversed Bender v. Enterprise Mfg. Co. (1907) 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. (N. S.) 448, 13 Ann. Cas. 649.

Complainant was a manufacturer of stockings and socks sold and exten-

sively advertised under the name of "Holeproof Hosiery." Later, defendants established a similar one under the name of "No-Hole Hosiery Company," putting up their product in boxes similar in size and color, with the name of the company thereon, although having different printed matter, and each containing a guaranty card similar in general style and appearance and having thereon a verbatim copy of complainant's guaranty. Held, that such simulation of the name and the guaranty card was evidently with design, and constituted unfair competition. Holeproof Hosiery Co. v. Fitts (C. C. 1908) 167 Fed. 378.

Defendant could not be guilty of unfair competition in using a like cotton bag and similar letters for his product, where it appeared that they were used to prevent the ink from striking through into the product. Taylor Provision Co. v. Gobel (C. C. 1910) 180 Fed. 938.

Use of boxes and appearances closely resembling plaintiff's for a competing article, and selling it to customers who called for plaintiff's, although not actually representing it to be such, and though the trade-mark was different, evidenced an intention to obtain an advantage from the advertising and popularity of complainant's goods, and constituted unfair competition, which would be enjoined. Holeproof Hosiery Co. v. Wallach Bros. (C. C. 1911) 190 Fed. 606, decree modified (1911) 192 Fed. 534, 112 C. C. A. 655.

Equity will not interfere as between manufacturers of goods put up in similar packages, where ordinary attention by the purchaser would enable him to distinguish between the goods of the respective parties. American Tobacco Co. v. Globe Tobacco Co. (C. C. 1911) 193 Fed. 1015.

Defendants held, on the showing made, to have intentionally so imitated packages, dress, and advertisements of complainant's product as to constitute unfair competition and entitle complainant to an injunction. American Chicle Co. v. W. J. White Chicle Co. (D. C. 1912) 196 Fed. 977.

Use of a colored strand in the manufacture of cordage so as to make check marks or spots on the finished rope did not constitute a distinguishing mark, so as to make defendant's use of colored strands in its cordage unlawful competition. Samson Cordage Works v. Puritan Cordage Mills (D. C. 1912) 197 Fed. 205.

To authorize an injunction to restrain alleged unfair competition by imitation of complainant's packages, it must be shown that there is such resemblance as is likely to deceive ordinary purchasers of the article, exercising such care as is commonly used by them. Ben Levy Co. v. Tetlow (D. C. 1913) 209 Fed. 139.

Where defendant, after jobbing complainant's cigars sold under a tradename "108," ceased buying the same and put out a cigar of his own under the name "208" of similar size and shape but in a box so differently marked and labeled that it did not appear natural or probable that the public would be deceived, the facts did not sustain a cause of action for unlawful competition. Goldsmith Silver Co. v. Savage (D. C. 1914) 211 Fed. 751.

Even though "beaded" was descriptive of shoe lace tip, use by defendant of word "Nu-B-Ded" and a white label with gold lettering, complainant using a gold background with white lettering, held unfair competition. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

To prevent substitution, sales of whisky at bar held to be enjoined unless differently colored, but sales direct to the consumer in full bottles properly labeled to be permitted. Hiram Walker & Sons v. Grubman (D. C. 1915) 222 Fed. 478.

Where plaintiffs have used the words "Old Homestead" to designate their bread, the stamping into bread manufactured by defendant of the words "New Homestead," in letters and words of the same size, style, and arrangement, being for the purpose, and with the result of, appropriating plaintiffs' trade, will be enjoined, on the ground of fraud. Banzhaf v. Chase (Cal. 1907) 88 Pac. 704.

The law will protect one against another who seeks by imitation of label or package or other artifice to induce persons to deal with him in the belief that they are dealing with the former. Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 P. 913.

Similarity in the shape of the can in which coffee is sold to the can of a competitor, with the same color is adopted, does not sustain the conclusion that a trade-mark or label was selected to accomplish a fraudulent purpose. New Orleans Coffee Co. v. American Coffee Co. of New Orleans (1909) 49 So. 730, 124 La. 19.

Where a dealer has long put up his wares in packages of uniform and distinguishable shape, size, and contents, with marks or brands similarly distinguishable and uniform, equity will protect him against fraudulent imitation of his packages. Trask Fish Co. v. Wooster (1888) 28 Mo. App. 408.

A person having given value to a name which is not the subject of a trade-mark, by identifying it with the sale of his goods, is entitled to protection against the fraudulent imitation of it by a competitor. St. Louis Carbonating & Mfg. Co. v. Eclipse Carbonating Co. (1894) 58 Mo. App. 411.

A rival manufacturer is not restrained from selling cartons of the size, weight, and shape of plaintiff's, nor

from using the respective colors as wrappers, provided the cartons are so differentiated as not to deceive the ordinary purchaser. National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J. Ch. 1914) 91 A. 126.

A manufacturer of bakery products, which adopted the word "Uneeda" displayed on paper cartons containing its product, and so advertised its business as to make the name identify its product, thereby acquired the exclusive use of the word as applied to its product, and a rival could not use on its product the word "Abetta" displayed on its cartons and thereby confuse the purchasing public. Id.

When defendants employ a package bearing a general resemblance of form, color, words, and symbols, calculated to create the impression that their article was that sold by the plaintiff, and in that way to deceive the public, injunction will issue. Bininger v. Wattles (N. Y. 1865) 28 How. Prac. 206.

Where the resemblance between the packages used by defendant and those used by plaintiff was such as readily to mislead, plaintiff is entitled to an injunction. Schmid v. Mauerer (1887) 9 N. Y. St. Rep. 843.

An injunction prohibiting defendant from using disks, words, and labels similar to those adopted by plaintiff, none of which, by themselves, are the subject of a trade-mark, should be restricted to packages similar to those used by plaintiff, since defendant has a lawful right to use them in a manner not injurious to plaintiff. Fischer v. Blank (1893) 138 N. Y. 244, 33 N. E. 1040.

Where plaintiff's wrapper contains the words "Blizzard Soap," within an octagonal figure, in letters covered with snow, and plaintiff's name and address in another octagonal figure, and a picture of the Brooklyn Bridge during a blizzard, and defendant's wrapper contains two octagonal figures, and the words "Leader Soap," in clear-cut block letters, and presents a scene in which the air is filled with snow, and contains defendant's name and address, and a picture of his factory, the similarity of the labels is not sufficient to deceive the public. Brown v. Doscher (1895) 147 N. Y. 647, 42 N. E. 268, affirmed (1893) 73 Hun, 107, 26 N. Y. Supp. 951.

Use of a similar colored ribbon on packages, though differently arranged, such packages not having been devised so as to deceive, or with intent to deceive, or induce a belief that they were put up by plaintiff, could not be enjoined on the ground of unfair competition. T. B. Dunn Co. v. Trix Mfg. Co. (1900) 63 N. Y. Supp. 333, 50 App. Div. 75.

Injunction granted against the use of certain words stamped in the glass of which self-sealing jars were manufactured; the difference between the manner of stamping by defendant and by complainant being trivial, and it appearing that there was such a general resemblance as to deceive the public and escape notice of ordinary buyers. Rowley v. Houghton (Pa. 1868) 2 Brewst. 303.

Plaintiff and defendant were manufacturers of soap put up in bars of the same weight, size, and shape. A certain portion of defendant's wrapper was almost identical in appearance with plaintiff's label, except that the word "Prospect" was used, instead of "Process." Held that, though the two wrappers presented points of dissimilarity, the similarity on the top surface of the bars was so striking as to constitute an imitation of plaintiff's trademark, which plaintiff was entitled to restrain. Gowans v. Ahlborn Bros. (Pa. 1886) 4 Kulp, 31.

Where plaintiff adopted as a trademark for his tobacco a paper package having the picture of a ship, with the words "Havana Mixture" on one side, and a government stamp on one edge, and on the other edge a label bearing the words "Kohlberg Bros.," and defendant sold tobacco known by the same name, put up in a package of the same form and size as plaintiff's, and having on it the same devices, except the words "Kohlberg Bros.," defendant's use constitutes an infringement. Goodman v. Bohls (1893) 3 Tex. Civ. App. 183, 22 S. W. 11.

14. —— **Labels.**—An injunction will not be granted to restrain use of a label whose only resemblance to the complainant's label is that certain letters, which alone convey no meaning, are inserted in the center of each where no one will be misled as to the true origin or ownership of the merchandise. Amoskeag Mfg. Co. v. Trainer (1879) 101 U. S. 51, 25 L. Ed. 993.

Use of similar spools and labels, but with defendant's name, plaintiff having long acquiesced in the use of like labels by other makers, defendant's general advertising and packages differing widely from plaintiff's, does not amount to a representation that defendant's thread is that of the plaintiffs, so as to entitle the latter to an injunction. Coats v. Merrick Thread Co. (1893) 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, affirming (C. C. 1888) 36 Fed. 324, 1 L. R. A. 616.

While it is true, in the abstract, that every one has a right to use white paper, yet no one has a right to use it in such a way as to imitate another's labels, and thereby appropriate the good will of his business. Garrett v. T. H. Garrett & Co. (1891) 78 Fed. 472, 24 C. C. A. 173.

A statement on a label that the contents of defendant's package is "Chicorien Kaffee aus der Fabrik von E. B. Muller & Co., in Roulers (Belgien)," is misleading and unfair, when the only thing done in Belgium is to "harvest" the chicory root; the roasting, grinding, and further manufacturing being

done in this country. Scheuer v. Muller (1896) 74 Fed. 225, 20 C. C. A. 161.

One who purposely imitates the label of another, with intent to sell his goods on the other's reputation, will be enjoined, and required to respond in damages. Saxlehner v. Nielson (C. C. A. 1899) 91 Fed. 1004, modifying decree (C. C. 1898) 88 Fed. 71.

The trade wrappers and labels used by defendants compared with those in use by complainants, and held not to show such similarity as would deceive ordinary purchasers. Centaur Co. v. Marshall (1899) 97 Fed. 785, 38 C. C. A. 413.

Labels on bottles of artificial mineral water, describing it merely as "Vichy (Grand Grille)," imply that the bottles contain natural Vichy water from the Grand Grille spring, and the sale of such water in competition with the natural water constitutes unfair competition. La Republique Francaise v. Schultz (1900) 102 Fed. 153, 42 C. C. A. 233.

Where defendant had fraudulently appropriated complainant's trade-marks and labels used on mineral waters, defendant was estopped to say that it would have been equally successful in selling this water had it used honest trade-marks and labels. Saxlehner v. Eisner & Mendelson Co. (1905) 138 Fed. 22, 70 C. C. A. 452, affirming decree (C. C. 1904) 127 Fed. 1023.

Unfair competition cannot be predicated upon the use of a plain brown cigar band with white lettering thereon, because it is similar in color and shape to one previously in use by complainant, where there is no evidence of an intention to imitate. E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co. (1905) 142 Fed. 160, 73 C. C. A. 378, affirming decree (C. C. 1905) 136 Fed. 866.

Complainant and R. purchased parts of a tract of land containing springs known as "Healing Springs." R. named his the "Rubino Healing Springs," and sold the water under the name "Rubino Healing Springs Natural Lithia Water," while complainant's water was sold under another label until after R. began successfully to market his waters, when plaintiff imitated R.'s labels in various ways, and added the words, "Healing Springs, Bath County, Va." All of the springs were at a place having a post office known as "Healing Springs." Held, that R.'s labels so clearly differentiated the waters sold by him from those marketed by complainant that he was not guilty of unlawful competition. Virginia Hot Springs Co. v. Hegeman & Co. (1906) 144 Fed. 1023, 73 C. C. A. 612, affirming decree (C. C. 1905) 138 Fed. 855.

A stamp used by defendant on drawers of its manufacture and the boxes in which they were sold held not so similar to those in use by complainant as to deceive purchasers or to constitute unfair competition. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. (1908) 165 Fed. 639, 91 C. C. A. 475, writ of certiorari denied J. A. Scriven Co. v. Rice-Stix Dry Goods Co. (1909) 29 Sup. Ct. 692, 212 U. S. 582, 53 L. Ed. 660, and appeal dismissed (1911) 32 Sup. Ct. 518, 223 U. S. 708, 56 L. Ed. 622.

Where one has designedly and arbitrarily taken an unusual and ungrammatical combination of two words, even if they do suggest a correct idea of the construction or utility of the article, as his trade-mark, and by long use it has come to be so understood by the purchasers and users thereof, a competitor has no right to use it for the purposes of deceit. Rushmore v. Saxon (1909) 170 Fed. 1021, 95 C. C. A. 671, affirming decree (C. C. 1908) 158 Fed. 499.

Where defendants' labels were engraved by the same company, and were evidently copied from labels previously prepared and used by complainant on similar goods, defendants' use thereof after notice held to constitute unfair competition. Notaseme Hosiery Co. v. Straus (1912) 201 Fed. 99, 119 C. C. A. 134.

A label on whisky bottles which in size, shape, and color is an evident imitation of the label on a well-known brand of whisky, and which differs from it merely in some details of the inscriptions on the label, is a fraud, the use of which will be enjoined. Hiram Walker & Sons v. Mikolas (C. C. 1897) 79 Fed. 955; Hiram Walker & Sons v. Hockstaeder (C. C. 1898) 85 Fed. 776.

Defendant began selling a medicine under the same name as plaintiff's, with labels so different as to repel the charge of fraudulent or misleading imitation, but at the bottom thereof he placed conspicuously the words "New Label." Held, that he should be enjoined from so doing, as this might lead customary purchasers of complainant's article to think that complainant had adopted a new label. Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605.

Where plaintiff had long used a distinctive label, many of its retail customers being unable to read, and defendant later adopted a label differing only in wording and which was intended to, and did in fact, deceive customers, such simulation constituted unfair competition and entitled complainant to an injunction. R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co. (C. C. 1907) 151 Fed. 819.

Complainant owned and conducted a distillery, known as the "Mellwood Distillery," and had made and sold a brand of whisky under the name "Mellwood" as a trade-mark, widely and favorably known as a high-grade whisky and attained a large sale. Defendants began using labels containing the names "Mill Wood" and "Kentucky," all of which representations were false. Held, such labels were clearly intended and cal-

culated to mislead the public, and constituted infringement and unfair competition. Mellwood Distilling Co. v. Harper (C. C. 1909) 167 Fed. 389.

A red seal or label, containing a trade-mark, placed in the center of a talking machine disc record, is not imitated so as to give the maker a remedy in equity for infringement of trade-mark by the placing by another manufacturer of a label in the same place on his discs, or because it is surrounded by a red band, where it has no other resemblance to complainants'. Fonotipia Limited v. Bradley (C. C. 1909) 171 Fed. 951.

Defendant's use of a label so near like that previously used by complainant and registered as a trade-mark as to be likely to deceive a purchaser of ordinary intelligence and capacity constituted unlawful competition. Schwahn v. Miele (D. C. 1913) 203 Fed. 176.

Where defendant simulated complainant's labels in order to obtain a portion of his market, complainant was entitled to injunctive relief, though he was unable to establish a technically valid trade-mark. Id.

Defendant's use of a cow label, printed in blue ink on its packages of Neufchâtel cheese, similar to complainants' label, held an unlawful competition, entitling complainants to an injunction against defendant's further use thereof. Lawrence v. P. E. Sharpless Co. (D. C. 1913) 203 Fed. 762, decree affirmed P. E. Sharpless Co. v. William A. Lawrence & Son (1913) 208 Fed. 886, 126 C. C. A. 46.

A label, at common-law, is not a trade-mark, but when a manufacturer or seller of goods adopts a label to distinguish his goods from those of another, he will be protected in its use, and others enjoined from using even a colorable imitation thereof. Burke v. Cassin (1873) 45 Cal. 467, 13 Am. Rep. 204.

Where one, with intent to divert to himself the business of others, uses labels and devices so closely resembling those used by such others as to lead purchasers, while using ordinary care, to believe that they are purchasing the imitated article, he is liable in damages, and will be enjoined from continuing the use of such labels and devices, though these do not constitute a trade-mark. Schmidt v. Brieg (1893) 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Where plaintiff had labeled his cigars "She," which had acquired in that locality a peculiar secondary meaning, which stood for the brand of cigars made by plaintiff, defendant would be enjoined from using the label adopted by plaintiff so as to deceive those who wished to purchase plaintiff's goods, although plaintiff had no right to trade-mark the name, and the label was in use in other localities at the time plaintiff adopted it. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

Defendants will be enjoined from using a label so similar to plaintiffs' label in size, color, and arrangement of the words descriptive of the goods as to tend to deceive the public. Rains v. White (1899) 52 S. W. 970, 107 Ky. 114, 21 Ky. Law Rep. 742.

Where a label adopted by a merchant was simulated by defendant and placed on inferior goods which were put on the market, an action in the nature of deceit was properly maintainable. Conrad v. Joseph Uhrig Brewing Co. (1880) 8 Mo. App. 277.

Plaintiff had for some years manufactured a corset known as the "Williamson Corset," and the labels upon the corsets which defendant manufactured pursuant to its contract with the Williamson Co. so closely resembled the labels and brands used by plaintiff as to be calculated to deceive the public. The evidence authorized the conclusion that the Williamson Co. was organized for a fraudulent purpose and that the execution of the contract between it and defendants was properly enjoined. Corset & Brace Co. v. Corset Co. (1897) 70 Mo. App. 424.

Where defendant placed the imitative label on bottles containing an inferior whisky, the injury to plaintiff and the fraud on the public were such as to warrant interference by injunction. W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co. (1904) 107 Mo. App. 507, 81 S. W. 648.

Where plaintiff and defendant both used similar wording, except the name of the maker, on their labels, of the same shape and color, and the form of package and label, and the color of the letter, have been in use by a number of persons for 10 years, though the labels of plaintiffs and defendant are of a lighter shade than those of other dealers, defendant is not guilty of an actionable simulation of plaintiffs' packages. Fleischman v. Newman (1889) 51 Hun, 641, 4 N. Y. Supp. 642, affirming judgment Fleischmann v. Same (1888) 2 N. Y. Supp. 608.

Where defendant, formerly one of a firm selling plaintiff's oil, bought the firm's label, on dissolution, using it on the oil of another manufacturer, except that the name of the manufacturer was substituted for that of the firm, and attention was called to the change, by circulars, held there was no representation that the oil sold by defendant was manufactured by plaintiff. Société des Huiles d'Olive de Nice v. Rorke (1894) 82 Hun, 611, 31 N. Y. Supp. 51.

Where it appeared by affidavit that defendant was putting up cigarettes in packages having the color, style of lettering, and most noticeable word on the label identical with plaintiff's packages, and that defendant dictated the label from one of plaintiff's boxes,

plaintiff was entitled to restrain defendant from using such packages pending trial of a suit for permanent injunction. Anargyros v. Egyptian Amasis Cigarette Co. (1900) 66 N. Y. Supp. 626, 54 App. Div. 345; Kassel v. Jeuda (1901) 70 N. Y. S. 480, 61 App. Div. 613.

A manufacturer will be restrained from using a label in imitation of that of another manufacturer of the same product, so as to induce the public to believe that they are purchasing the product of the latter when they are purchasing the goods of the former. Roncoroni v. Gross (1904) 86 N. Y. Supp. 1112, 92 App. Div. 221.

Where defendant wrapped his manufactured article in a wrapper with a label exactly similar to plaintiff's label on a like article, and plaintiff was first in the field, defendant intentionally and fraudulently simulated plaintiff's label for the deception of the public, entitling plaintiff to an injunction. Day v. Walls (Pa. 1877) 34 Leg. Int. 418.

A fruit dealer cannot enjoin the use of a fruit label which resembles his own in the color and arrangement of the fruit, where there is no similarity in those parts which might be claimed as a trade-mark, and the evidence shows that no one has been deceived by the similarity, though both labels have been in use for some time in the same locality. Heinz v. Lutz (1892) 146 Pa. 592, 23 Atl. 314, 29 Wkly. Notes Cas. 317.

Defendant's label upon the containers of its brand of White Rose condensed milk with the color scheme of red, white, and green held not such unfair competition against plaintiff's Carnation brand with a red, white, and green color scheme as to entitle plaintiff to an injunction. Pacific Coast Condensed Milk Co. v. Frye & Co. (1915) 147 P. 865, 85 Wash. 133.

Plaintiff was engaged in the importation and sale of dyes under the label "German Household Dyes." Defendants subsequently began the importation and sale of dyes made by a different manufacturer, under the label "Excellent German Household Dyes," put up in packages similar in size, shape, color, etc., to the packages sold by plaintiff, and the resemblance was calculated to, and actually did, deceive the public, damaging plaintiff's trade. Held, that plaintiff was entitled to relief by injunction. Opperman v. Waterman (1896) 69 N. W. 569, 94 Wis. 583.

15. —— **Bottles.**—Use on bottles of the same size and shape as plaintiff's of labels and wrappers so slightly different from plaintiff's as not to attract attention will be deemed intended to deceive purchasers, and complainant is entitled to restrain the use of the same. Centaur Co. v. Hughes Bros. Mfg. Co. (1898) 91 Fed. 901, 34 C. C. A. 127; Centaur Co. v. Link (1901) 49 Atl. 828, 62 N. J. Eq. 147.

Use by defendant of the same colored and shaped bottles as plaintiff's, with labels identical, except for the wording, was an infringement, and an injunction restraining defendant from selling under such label until the further order of the court would not be set aside. Kostering v. Seattle Brewing & Malting Co. (1902) 116 Fed. 620, 54 C. C. A. 76; Cauffman v. Schuler (C. C. 1903) 123 Fed. 205.

The use of the phrase "Improved Fig Syrup," with bottles, wrappers, and devices which resemble a similar preparation named "Syrup of Figs," in such a way as to mislead the public, will be enjoined as an infringement. Improved Fig Syrup Co. v. California Fig Syrup Co. (1893) 54 Fed. 175, 4 C. C. A. 264, affirming judgment and order California Fig Syrup Co. v. Improved Fig Syrup Co. (C. C. 1892) 51 Fed. 296.

Defendant commenced using bottles similar to those of plaintiff for a like preparation, bearing labels which were an exact reproduction of those that had been used by complainant for 20 years, with the exception of certain signatures, which were similar in general appearance. Held, that such labels clearly evidenced an intention to deceive purchasers, and that complainant was entitled to a preliminary injunction against their use. Centaur Co. v. Neathery (1898) 91 Fed. 891, 34 C. C. A. 118.

Where a manufacturer of root beer adopted a new and peculiar form of bottle, by which, principally, its product became known and recognized by consumers, the intentional imitation of such form by a competing manufacturer commencing business subsequently, for the purpose of deception, in itself constitutes unfair competition. Charles E. Hires Co. v. Consumers' Co. (C. C. A. 1900) 100 Fed. 809.

Defendant held chargeable with unfair competition in imitating plaintiff's bottles and labels, and by falsely indicating by its labels that its product is made in France, whereas it is made in Chicago. A. Bauer & Co. v. Order of Carthusian Monks, Convent La Grande Chartreuse (1903) 120 Fed. 78, 56 C. C. A. 484.

Where defendants imitated both the name and bottles in which complainants' "Angostura" bitters were sold, the labels being similar, except as to the place where the bitters were made, defendants were guilty of unfair competition. Siegert v. Gandolfi (1906) 140 Fed. 100, 79 C. C. A. 142, reversing decree (C. C. 1905) 139 Fed. 917, writ of certiorari denied Gandolfi v. Siegert (1907) 27 Sup. Ct. 790, 205 U. S. 542, 51 L. Ed. 922.

A defendant held not chargeable with unfair competition because of the manufacture and sale of toy bottles for con-

taining candy, perfumery, etc., in miniature imitation of desk telephones, similar in appearance to the same articles previously made and sold by complainant. John H. Rice & Co. v. Redlich Mfg. Co. (1913) 202 Fed. 155, 122 C. C. A. 442, 44 L. R. A. (N. S.) 1057.

Defendant, in competition with complainant, not entitled to put out his product in bottles of such general resemblance to those of complainant as to assist in the fraudulent substitution of defendant's beverage for "Moxie." Moxie Co. v. Daoust (1913) 206 Fed. 434, 124 C. C. A. 316, reversing decree (D. C. 1912) 197 Fed. 678.

Defendant held not guilty of unfair competition in connection with sale of Glee-Nol in bottles similar to those used in the sale of Coca-Cola. Coca-Cola Co. v. Glee-Nol Bottling Co. (1915) 221 Fed. 61, 137 C. C. A. 83.

Where complainant owned and used a trade-mark, consisting of the word "Moxie," and had built up a trade thereunder in "Moxie Nerve Food," defendants would be enjoined from putting on the market any packages or bottles of the style in use by complainant, when such similar bottles contained a fluid resembling that manufactured and sold by complainant as Moxie nerve food, in taste, flavor, or appearance, and from using the words "Nerve Food," either alone or with other words, upon the outside or upon the wrapper of any package containing such a fluid. Moxie Nerve Food Co. v. Baumbach (C. C. 1887) 32 Fed. 205.

Plaintiff used on its bottles of bluing a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle; the cap having six perforations. Held, that defendant should be restrained from using for his bluing a similar cap on bottles of the same shape and appearance as those of plaintiff. Sawyer Crystal Blue Co. v. Hubbard (C. C. 1887) 32 Fed. 388.

Some time after the adoption by plaintiff of certain peculiar bottles, defendants, who had been dealing for some years in the same whisky, bottled by themselves, began to use a bottle of precisely similar shape and appearance to that used by plaintiff, though bearing labels which were in no sense imitations of plaintiff's labels. Held, that the use of such bottles by defendants constituted unfair competition with plaintiff, and should be restrained. Cook & Bernheimer Co. v. Ross (C. C. 1896) 73 Fed. 203.

Defendants sold in demijohns spurious bitters, labeling them "Hostetter's Bitters," with intent that they should be sold by the drink at the bar as "Hostetter's Bitters." Held, that this was unfair competition, and should be enjoined. Hostetter Co. v. Sommers (C. C. 1897) 84 Fed. 333.

Defendant commenced using bottles of the same shape, size, and color as plaintiff's, having thereon neck and body labels of the same shape, size, style, and colors, but having different words thereon, the resemblances between the two as a whole being much more noticeable to a person of ordinary intelligence and observation than the differences, and such as were calculated and evidently intended to deceive ordinary purchasers. Held, that such simulation of complainant's dressing constituted unfair competition. Kronthal Waters v. Becker (C. C. 1905) 137 Fed. 649.

Complainant, having sold water for many years under the name of "White Rock Lithia Water," entitled to restrain defendant from selling water taken from public wells under the name "Beacon Rock Lithia Water," in bottles of the same shape, size, and color as complainant's bottles, bearing labels raising a reasonable, but false, inference that defendant had no proprietary right in the source from which its water was derived, but was the "sole agent" of such a proprietor in vending the water. National Water Co. v. O'Connell (C. C. 1908) 159 Fed. 1001 (decree affirmed O'Connell v. National Water Co. [1908] 161 Fed. 545, 88 C. C. A. 487); National Water Co. v. Hertz (C. C. 1909) 177 Fed. 607.

The use by defendant, of boxes and labels similar in color and appearance, in the kind of type and color of printing thereon, to those previously in use by complainant, together with a similar mode of dressing the packages, and the fact that defendant's salesmen in some instances palmed off its goods on customers as those of complainant, held to constitute unfair competition. Holeproof Hosiery Co. v. Wallach Bros. (C. C. 1908) 167 Fed. 373, order modified (1909) 172 Fed. 859, 97 C. C. A. 263.

Bottles, labels, and capsules in which Guinness' Extra Stout, purchased by defendant for resale from William A. Ross & Bro., Importers, held so similar to the bottles, labels, and capsules previously devised and used by complainants, bottlers of the same stout, as to deceive the public, and therefore constituted unlawful competition. Edward & John Burke, Limited, v. Bishop (C. C. 1910) 175 Fed. 167.

Defendants held chargeable with unfair competition by using a name and symbol similar in connection with labels and bottles of such similarity to the special designs in use by complainant as to evidence design, and as to be calculated to deceive retail purchasers. Gulden v. Chance (C. C. 1910) 180 Fed. 178, decree reversed (1910) 182 Fed. 303, 105 C. C. A. 16.

Although every appropriation of the ideas of another as to style or dress of package does not amount to unfair competition, this is not to say that, notwithstanding the use of colors and designs common and appropriate to the particular article, a combination of color and style of package may not be so

distinct and have become so identified with the goods of some one dealer that a manifestly purposed imitation of them will not be regarded as fraudulent; but only that, before that result is reached, the combination must be so unusual and the imitation so clear that the similarity cannot be other than designed. Id.

Defendant's sale of gin or gin product in oblong bottles under the name "Gordon's Dry Gin" held to constitute unlawful competition with complainant's sale of "Gordon & Co.'s Dry Gin." Tangueray, Gordon & Co. v. Gordon Distilling & Distributing Co. (D. C. 1914) 213 Fed. 510.

Plaintiff manufactured gin in Holland and put it up in bottles with uniform and peculiar marks and labels containing the words "Wolfe's Schiedam Aromatic Schnapps," which expressed the origin and ownership of plaintiff's goods. Defendants put up and sold gin in bottles similar to those of plaintiff, with labels which were imitations of the name, mark, and devices of plaintiff, being headed "Wolfe's Schiedam Aromatic Schnapps," and signed at the foot, "Wolfe," instead of the "Udolpho Wolfe," of the genuine label, and with words blown on the sides of the bottles calculated to mislead the ordinary purchaser. Injunction should be granted to restrain defendants from using plaintiff's trade-mark. Wolfe v. Barnett (1872) 24 La. Ann. 97, 13 Am. Rep. 111.

Plaintiff cannot enjoin defendant from using bottle substantially similar to that of plaintiff, where bottles of this construction had been in general use for many years, and defendant employed a distinctive label and had distinctive markings blown into his bottle. Crystaleid Water Co. v. Schultz (1912) 135 N. Y. Supp. 273, 77 Misc. Rep. 26.

The fact that a manufacturer has adopted a particular style of bottle does not prevent a rival from using a bottle of the same style, if the bottle is sold to the public generally. Hoyt v. Hoyt (1891) 143 Pa. 623, 22 Atl. 755, 29 Wkly. Notes Cas. 309, 24 Am. St. Rep. 575, 13 L. R. A. 343.

16. Use of trade-mark or trade-name for purpose of competition.—Though a trade-mark or trade-name is such that it cannot be protected as a technical trade-mark, equity may afford protection if such mark or name is used so as to constitute unfair competition. Genesee Salt Co. v. Burnap (1896) 73 Fed. 818, 20 C. C. A. 27 (affirming [C. C. 1895] 67 Fed. 534); Pillsbury-Washburn Flour Mills Co. v. Eagle (1898) 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; Williams v. Mitchell (1901) 106 Fed. 168, 45 C. C. A. 265; Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Buzby v. Davis (1906) 150 Fed. 275, 80 C. C. A. 163, 10 Ann. Cas. 68; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1908) 165 Fed. 413, 91 C. C. A. 363 (writ of certiorari denied [1909] 29 Sup. Ct. 696, 214 U. S. 514, 53 L. Ed. 1063); Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192 (reversing judgment [D. C. 1912] 197 Fed. 476); Zittlosen Mfg. Co. v. Boss (1914) 219 Fed. 887, 135 C. C. A. 551; Gray v. Taper-Sleeve Pulley Works (C. C. 1883) 16 Fed. 436, 439; Leclanche Battery Co. v. Western Electric Co. (C. C. 1885) 23 Fed. 276; Jennings v. Johnson (C. C. 1889) 37 Fed. 364; Gage-Downs Co. v. Featherbone Corset Co. (C. C. 1897) 83 Fed. 213; Anheuser-Busch Brewing Ass'n v. Fred Miller Brewing Co. (C. C. 1898) 87 Fed. 864; Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C. 1901) 109 Fed. 317; Devlin v. Peek (C. C. 1904) 135 Fed. 167; Wm. A. Rogers v. International Silver Co. (1907) 30 App. D. C. 97; Pierce v. Guittard (1885) 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1; Kimball v. Hall (1913) 89 A. 166, 87 Conn. 563; Merchants' Detective Ass'n v. Detective Mercantile Agency (1887) 26 Ill. App. 250; People v. Rose (1905) 76 N. E. 42, 219 Ill. 46; State v. Hagen (1893) 33 N. E. 223, 6 Ind. App. 167; Dyment v. Lewis (Iowa, 1909) 123 N. W. 244; Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759; C. A. Briggs Co. v. National Wafer Co. (1913) 102 N. E. 87, 215 Mass. 100; Correro v. Wright (Miss. 1908) 47 So. 379; Regent Shoe Mfg. Co. v. Haaker (1906) 106 N. W. 595, 75 Neb. 426, 4 L. R. A. (N. S.) 447; International Silver Co. v. William H. Rogers Corp. (1905) 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506 (reversing orders [1904] 57 A. 725, 66 N. J. Eq. 140, and [1904] 57 A. 1037, 66 N. J. Eq. 119, 2 Ann. Cas. 407); Rosenthal v. Blatt (N. J. Ch. 1912) 83 A. 387; Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co. (1913) 88 A. 210, 81 N. J. Eq. 419, 519; Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599; Wolfe v. Burke (1874) 56 N. Y. 115, reversing (N. Y. 1873) 7 Lans. 151; Kinney v. Basch (N. Y. 1877) 25 Am. Law Reg. (O. S.) 569; Gebbie v. Stitt (1894) 82 Hun, 93, 31 N. Y. Supp. 102; Church v. Kresner (1898) 49 N. Y. Supp. 742, 26 App. Div. 349.

To entitle a name to equitable protection, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it; and this is so, although the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product. Delaware & H. Canal Co. v. Clark (1871)

80 U. S. (13 Wall.) 311, 20 L. Ed. 581.

An injunction against the use of terms which cannot be protected as trade-marks will not be granted where it does not appear that defendant has thereby represented to the public that the goods sold by him are those manufactured by plaintiff, but has persistently warned the public that it has no connection with plaintiff. Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co. (1888) 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535, reversing decree Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co. (C. C. 1884) 21 Fed. 276.

That plaintiff has used certain letters for many years on its sheetings does not entitle it to enjoin another corporation which uses them on its sheetings, where the brands are entirely dissimilar in appearance, and there is no evidence of fraudulent intent. Lawrence Mfg. Co. v. Tennessee Mfg. Co. (1891) 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, affirming decree (C. C. 1887) 31 Fed. 776.

Use of the word "Rubbero" is not unfair competition against the owner of the word "Ruberoid," where the only imitation lies in the similarity of names, since to grant equitable relief in such case would be to give the full effect of a trade-mark to a word which cannot be appropriated as such. Standard Paint Co. v. Trinidad Asphalt Mfg. Co. (1911) 31 Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (1908) 163 Fed. 977, 90 C. C. A. 195.

Using the name of a manufacturer of pills under a secret formula upon pills made by a competitor is not saved from being unfair because it is accompanied by a statement that the latter makes the pills, even if it be conceded that he is using the other's formula. Jacobs v. Beecham (1911) 31 Sup. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree Beecham v. Jacobs (1908) 159 Fed. 129, 86 C. C. A. 623.

Where the name "Vichy" was very prominently displayed on bottles purporting to contain "Saratoga Vichy Water," the "Saratoga" over it being in far less conspicuous type, so that, if the bottles stood on a table or shelf, the word "Vichy" was the marked and prominent object of sight, the use of the name in such form should be enjoined; but the word "Vichy" may be used where no attempt is made to simulate the labels on the imported water. La Republique Francaise et al v. Saratoga Vichy Springs Co. (1901) 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830, affirmed Same v. Saratoga Vichy Spring Co. (1903) 24 Sup. Ct. 145, 191 U. S. 427, 48 L. Ed. 247.

The name of the new concern, "Peck Bros. Co.," was unwarranted in fact, because there were no "Peck brothers" interested therein, was clearly adopted for obtaining the advantage of the reputation and established trade of the old company, and in violation of the duty which its organizers owed to the old company as stockholders, and the carrying on of business thereunder in the manner shown constituted unfair competition. The Peck Brothers & Company v. Peck Bros. Co. (1902) 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81, writ of certiorari denied Peck Bros. Co. of Illinois v. Peck Bros. & Co. of Connecticut (1902) 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

A manufacturer by the name of Baker, who had been required to insert on his labels, wrappers, etc., the name "W. H. Baker, of Winchester, Va.," and also, in as prominent type, the statement, "W. H. Baker is distinct from the old chocolate manufacture of Walter Baker & Co.," was entitled to be protected from a competitor endeavoring to market his own products by the use of the name "Baker" or "Baker's" on misleading circulars or otherwise. Baker v. Baker (1902) 115 Fed. 297, 53 C. C. A. 157.

The preparation known as "Hostetter's Bitters" has acquired a commercial value which entitles the proprietors to the protection of the courts in its sale, and they will not enter upon the question of its merits at the instance of a defendant who has been engaged in selling a spurious article for the genuine. Samuel Bros. & Co. v. Hostetter Co. (1902) 118 Fed. 257, 55 C. C. A. 111.

The law of unfair competition cannot be used to prevent one from adopting a trade-mark or label to attract attention and popularize the product, though it results in better enabling him to compete with complainant, where no deception or confusion of goods is caused or intended thereby. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

Complainant manufactured glue of different grades, which it sold under the trade-name of "Le Page." Defendants purchased certain of such glue in bulk, and bottled and sold it under the name of "Le Page's Glue," with a statement that it was manufactured by complainant and bottled by defendants. Held, that such use of the name by defendants did not constitute unfair competition. Russia Cement Co. v. Frauenhar (1904) 133 Fed. 518, 66 C. C. A. 500, affirming decree (C. C. 1903) 126 Fed. 228, writ of certiorari denied (1905) 25 Sup. Ct. 796, 196 U. S. 640, 49 L. Ed. 631.

Defendants, having the undisputed right to use the name "Eberhard Faber" on their goods are not chargeable with fraud constituting unfair competition because of the use of the name "E. Faber." Von Faber-Castell v. Faber (1905) 139 Fed. 257, 71 C. C. A. 383, reversing decree Von Faber v. Faber (C. C. 1903) 124 Fed. 603, and writ of certiorari denied (1905) 26 Sup. Ct. 750, 199 U. S. 609, 50 L. Ed. 331.

Where defendant terminated its con-

tract with plaintiff and sold a competing article, retaining plaintiff's tradename without color of right, such action tended to deceive the public and injure complainant, and constituted unfair competition which entitled complainant to an injunction. Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co. (1906) 143 Fed. 231, 74 C. C. A. 361, reversed Donnell v. Same (1908) 28 Sup. Ct. 288, 208 U. S. 267, 52 L. Ed. 481.

Where complainants adopted the name "Angostura" as the name of bitters originally manufactured by them in the town of that name in Venezuela, and continuously used the same thereafter, they were entitled to protection against persons using the name to create dishonest competition, though complainants could not obtain a monopoly in the use of the word as a trade-mark. Siegert v. Gandolfi (1906) 149 Fed. 100, 79 C. C. A. 142, reversing decree (C. C. 1905) 139 Fed. 917, and writ of certiorari denied Gandolfi v. Siegert (1907) 27 Sup. Ct. 790, 205 U. S. 542, 51 L. Ed. 922.

While every man is entitled to use his own name in connection with his business, equity will not permit its use in such a manner as to perpetrate a fraud. Rowley v. J. F. Rowley Co. (1908) 161 Fed. 94, 88 C. C. A. 258, reversing decree J. F. Rowley Co. v. Rowley (C. C. 1907) 154 Fed. 744.

The use of complainant's trade-mark on horseshoe nails to simulate complainant's nails, and produce confusion in the minds of dealers and users, was unfair competition. Capewell Horse Nail Co. v. Mooney (1909) 172 Fed. 826, 97 C. C. A. 248, affirming decree (C. C. 1909) 167 Fed. 575.

While the word "Chips" as applied to disks of chewing gum is a descriptive word which may not be exclusively appropriated by a manufacturer, yet, having been appropriated, a competitor may not use the word as describing its goods in connection with other words, and such a form of dress as will mislead the public to believe that its chips are complainant's product. H. E. Winterton Gum Co. v. Autosales Gum & Chocolate Co. (1914) 211 Fed. 612, 128 C. C. A. 212.

Marking by defendant Kelly & Jones Co. of the Jenkins valve, which it manufactured after the expiration of patents, on one side "Standard Jenkins Valve" and on the other "Made by Kelly & Jones Company," held insufficient to inform public of the real manufacturer. Jenkins Bros. v. Kelly & Jones Co. (C. C. A. 1915) 227 Fed. 211.

Where manufacturers at one place falsely mark or brand their goods as manufactured at another, for the purpose of diverting trade, such false marking will be considered as fraudulent and the infringing manufacturers enjoined from thus using the name of the place where the complainant carries on its business. Southern White-Lead Co. v. Cary (C. C. 1885) 25 Fed. 125.

Where the words used are not susceptible of appropriation as a trademark, complainant is not entitled to an injunction in the absence of proof that he first established a reputation for his goods by packing and labeling them in a certain manner, and that defendant has attempted to supplant him in the market by an unlawful use of such devices. Colgan v. Danheiser (C. C. 1888) 35 Fed. 150.

Complainants, on velvet ribbons manufactured and put up by them, used their trade-mark, "G. F." Defendants on some of their goods used their trademark, "G. & F.," with the ampersand greatly reduced in size as compared with the initials. Held, that such use of the trade-mark was with intent to mislead purchasers, and defendants should be restrained from using their trade-mark on ribbons, except with the ampersand of equal prominence with the initials. Giron v. Gartner (C. C. 1891) 47 Fed. 467.

A cigar manufacturer, to protect his trade-mark, may restrain a box maker from furnishing boxes with those trademarks to other cigar manufacturers, and against all who knowingly combine for that purpose. Cuervo v. Jacob Henkell Co. (C. C. 1892) 50 Fed. 471.

Where for 10 years a firm handled plaintiff's products, and introduced them to the trade in its territory under certain names, and defendants purchased its assets, advertised themselves as its successors, and as "manufacturers of American Wash Blue and American Ball Blue," selling thereunder, in the same territory, the product of a different manufacturer, such action was a fraud upon the public, and entitled plaintiff to injunction, regardless of the question whether it had a right to the exclusive use of the names as tradenames. Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882, decree affirmed Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878.

Use on an inferior grade of the tradename, which had become associated by the public with complainant's best grade, was fraudulent, and constituted unfair competition, which entitled complainant to an injunction. Russia Cement Co. v. Katzenstein (C. C. 1901) 109 Fed. 314.

Hostetter's Bitters presumptively have merit, entitling the owner to protection against unfair competition, having been sold for years with an increasing demand. Hostetter Co. v. Martinoni (C. C. 1901) 110 Fed. 524.

Defendants, through an arrangement with plaintiff, acquired the sole right to handle such plaintiff's preparation in certain localities; and plaintiff furnished it to them in specially colored envelopes, upon which their name appeared, but with plaintiff's as proprietor. Subsequently defendants began putting up and selling a similar preparation for

themselves under the same name and dress. Held, it was clear defendants were attempting to take advantage of their relation, and the trade thereby acquired, to substitute in such trade their own preparation for that of plaintiff, and plaintiff was entitled to restrain them from using, not only the simulated dress, but also the name. Draper v. Skerrett (C. C. 1902) 116 Fed. 206.

Where defendants used a label in such similitude to plaintiff's that it was at once calculated and intended to defraud both plaintiff and purchasers of the particular class of goods, and the differences in the labels were not such as would be recognized by ordinary inspection, plaintiff was entitled to enjoin the further use thereof. Cantrell & Cochrane v. Butler (C. C. 1903) 124 Fed. 290.

The use by one manufacturer to designate his product of a name previously in use by another does not alone constitute unfair competition, but, to justify a court of equity in interfering, there must also be such an imitation of display or dressing as to deceive purchasers into buying defendant's goods for those of complainant; fraud being the practical basis of any such relief. Heide v. Wallace & Co. (C. C. 1904) 129 Fed. 649.

The Elgin National Watch Company held to have used the word "Elgin" in connection with its trade, products, and place of business for such length of time that the word has acquired a secondary meaning indicating not only the place of manufacture, but also its own product, and to entitle it to restrain defendants from using the word in connection with their business as wholesale dealers in watches and jewelry for the purpose and with the effect of palming off their goods as manufactures of complainant. Elgin Nat. Watch Co. v. Loveland (C. C. 1904) 132 Fed. 41.

Complainant, J. & P. Coats, Limited, has an established business under the name of "Coats Thread." Defendant, the John Coates Thread Company, later commenced the manufacture and sale of thread. In many instances purchasers calling for Coats thread were given thread made by defendant, which it sold at a lower price than complainant charged for its product, but which retailed for the same price. There was little or nothing on the spools to attract the attention of the ordinary purchaser to the difference. Held, that defendant's name was apparently adopted for the purpose of unfair competition, and that its use would be enjoined. J. & P. Coats v. John Coates Thread Co. (C. C. 1905) 135 Fed. 177.

The use of names previously adopted and used by plaintiffs, by defendants on labels for other wines and brandies than those contained in the consignment which they were authorized to sell constituted unfair competition, which would be enjoined. Jewish Colonization Ass'n v. Solomon & Germansky (C. C. 1907) 154 Fed. 157.

Complainant, as exclusive licensee, manufactured a hose supporter under the trade-name of "Velvet Grip." Defendant made and sold wooden buttons or collets intended for similar use, colored in imitation of rubber, and used on hose supporters which were sold by dealers as rubber button supporters, and sometimes as "Velvet Grip" supporters. Held, such sales constituted unfair competition, and that defendant was chargeable as a contributor thereto and would be enjoined. George Frost Co. v. E. B. Estes & Sons (C. C. 1907) 156 Fed. 677.

The use of the name "American Wine Company" by a second corporation does not constitute unfair competition, unless it is used fraudulently, with the intent and the effect of deceiving the public, to the injury of the first user. American Wine Co. v. Kohlman (C. C. 1907) 158 Fed. 830.

A competitor may not use a name intended or calculated to represent to the world that his business is that of another, and by such fraudulent misstatements deprive the latter of business which would otherwise come to him. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

To entitle a manufacturer to an injunction to prevent a competitor from imitating a name used by him to designate his goods which is descriptive, and therefore not a valid trade-mark, the imitation must be with fraudulent intent or such as is calculated to deceive the public. Florence Mfg. Co. v. Dowd (C. C. 1909) 171 Fed. 122, decree reversed Florence Mfg. Co. v. J. C. Dowd & Co. (1910) 178 Fed. 73, 101 C. C. A. 565.

Where one so copies another's patented article as to pass off his article as that of such other manufacturer, the latter may sue both for infringement of the patent and for unfair competition, and, even though defendant may not be liable for infringement, he may still be chargeable with unfair competition. Allen v. Walton Wood & Metal Co. (C. C. 1910) 178 Fed. 287.

Complainants held not entitled to restrain defendant's use of the words "Old Crow" in connection with the sale of whisky either "straight" or "blends" on the theory of unlawful competition. W. A. Gaines & Co. v. Rock Spring Distilling Co. (D. C. 1913) 202 Fed. 989.

Where another maker of an article, after the patent thereon has expired, uses a trade-mark by which it has become identified, he must distinguish his goods clearly from those of the original maker; and if he copies the dress of such maker's goods, he is chargeable with unfair competition. Frank W. Whitcher Co. v. Sneierson (D. C. 1913) 205 Fed. 767.

The name of a patentee used to designate the patented article may become in some degree significant of ori-

gin with the public, and in such case its subsequent use by a competitor must be in such manner or in connection with such notice that purchasers will not be deceived as to the manufacturer. Yale & Towne Mfg. Co. v. Worcester Mfg. Co. (D. C. 1913) 205 Fed. 952.

The owner's right under a technical trade-mark, which is also descriptive of the article, is limited to restraining others from so using it as to mislead the public as to origin. National Lock Washer Co. v. Hobbs Mfg. Co. (D. C. 1914) 210 Fed. 516.

Where plaintiff had used the name "What Cheer House" for his hotel, later removing it to an adjoining building, and defendants then occupied the old building as a hotel under the name of the "Original What Cheer House," the word "original" being in small letters, likely to be overlooked, plaintiff had established an exclusive right to the name as the trade-mark for his new house, and was entitled to protection in the exclusive use of that name. Woodward v. Lazar (1863) 21 Cal. 448, 82 Am. Dec. 751.

Where one tradesman resorts to any artifice as to his goods or his business, thereby deceiving the public, a fraud is committed, which will be restrained on the ground of unfair competition, although the rival tradesman has no proprietary interest in the words or device imitated. Dodge Stationery Co. v. Dodge (1904) 78 P. 879, 145 Cal. 380.

Courts of equity have jurisdiction to grant relief in cases of inequitable and fraudulent competition by imitation of labels, names, etc., for the purpose of palming off goods as those of another, even when there is no exclusive and proprietary right in such labels, names, etc., as trade-marks. The Fair v. Jose Morales & Co. (1899) 82 Ill. App. 499.

Use of the name "New Mount Hope Cemetery," for one adjoining the original "Mount Hope Cemetery" was such a similarity as to be liable to cause confusion in the mind of the public, and the defendant should be enjoined from the use of the name "New Mount Hope Cemetery." Mount Hope Cemetery Ass'n v. New Mount Hope Cemetery Ass'n (1910) 92 N. E. 912, 246 Ill. 416.

Where a corporation selects an individual name of one in competition for the purpose of deceiving the public, there being no one in the new corporation by such name, its use will be enjoined. Bender v. Bender Store & Office Fixture Co. (1913) 178 Ill. App. 203.

The use of a similar name under such circumstances as to show an intention to deceive the public, and thereby deprive another of his property, is in fraud of the rights of such person. Computing Cheese Cutter Co. v. Dunn (Ind. App. 1909) 88 N. E. 93.

The exclusive or proprietary right in words is not necessary to obtain an injunction against unfair competition in trade by the deceptive use of words as a trade-name. Id.

Where descriptive and generic names have, by long use, become identified in the public mind with the goods of a trader, it is unfair competition for another trader to use them in connection with similar goods and business, so as to pass his goods off upon the public as those of his competitor. Hartzler & Goshen Churn & Ladder Co. (1914) 104 N. E. 34, 55 Ind. App. 455.

The issue of unfair trade in the use of a trade-name does not arise until there is a showing of fraud or deception, and unless there is competition between the articles sold by the respective parties. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

One using the ordinary name of a commodity, business, or occupation in connection with a name of a locality will be protected against a fraudulent use of the name and against one locating with a view of obtaining the advantage of the name to the detriment of the former. Dyment v. Lewis (Iowa, 1909) 123 N. W. 244.

A trade-name need not be identical with that of another to produce unfair competition, if it is so similar as to make it likely that ordinary and unsuspecting prospective purchasers will be deceived thereby, and, where there is a similarity in the main distinguishing features, it is usually sufficient to constitute unfair competition, and similarity in a number of points may tend to constitute unfair competition, though similarity in any one of the points may not do so. Newport Sand Bank Co. v. Monarch Sand Mining Co. (1911) 137 S. W. 784, 144 Ky. 7, 34 L. R. A. (N. S.) 1040.

Use of name, S. Company, by persons none of whom were named S., but who, under such name, engaged in the same business as C. & S., a long-established concern, held unfair competition, though S. Company was located in the S. building. Crutcher & Starks v. Starks (1914) 171 S. W. 433, 161 Ky. 690.

Where a manufacturer of stoves and ranges not patented, placed upon each of them a name and number as a trade-mark, and also upon such of their separate parts as were liable to be worn out rapidly the initial letter and the number of the stove or range to which it belonged, defendant had a right to manufacture and sell parts of stoves suitable to replace worn-out parts of the stoves made by plaintiffs. Magee Furnace Co. v. Le Barron (1879) 127 Mass. 115.

Where plaintiff has no trade-mark rights in the word "Dover," he cannot restrain the use by another of the same word as the name of a similar machine, as deception of the public. Dover Stamping Co. v. Fellows (1895) 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448.

Where words have acquired such a secondary meaning as to indicate in the trade the source of the goods to which they are applied, use thereof by another on similar goods, so as to be likely to deceive purchasers, will be restrained as unfair competition, within the territorial boundaries within which such secondary meaning is known. C. A. Briggs Co. v. National Wafer Co. (1913) 102 N. E. 87, 215 Mass. 100.

Redress for infringement must be had at common law if the trade-mark is unregistered and if no application has been made for its registration. Smith v. Imus (1885) 24 N. W. 830, 57 Mich. 456, rehearing denied Same v. Walker (1886) 26 N. W. 783, 57 Mich. 456.

Where one was not entitled to the exclusive use of certain words, he was not entitled to restrain defendant's similar use of the words, where he did not use them to mislead the public. Smith v. Library Tea Co. (Mich. 1913) 144 N. W. 489.

Where plaintiff manufactures knit underwear and defendant knit sweaters and heavy lumbermen's underwear, and shortly before the trial of the action to enjoin the use of a trade-name defendant ceased manufacturing articles of underwear and limited his product to sweaters, the fact that he abandoned this part of the work does not affect the question presented; both parties being engaged in manufacturing articles of knit wearing apparel of the same general character. Northwestern Knitting Co. v. Garon (Minn. 1910) 128 N. W. 288.

The use of a trade-name so like that of another person in the same business as to probably mislead and deceive the public, will be restrained. Sanders v. Jacob (1885) 20 Mo. App. 96.

Although plaintiff cannot acquire the exclusive right to use the word "American" as descriptive of beer, it is entitled to enjoin an imitation of its signs, bearing that word conspicuously, in size and colored lettering so as to deceive the public. American Brewing Co. v. St. Louis Brewing Co. (1891) 47 Mo. App. 14.

A jobbing corporation, which had established an extensive trade selling "Cristo Canon Coal," is entitled to an injunction against the use of that name by another as a trade-mark for the same coal. Consolidated Fuel Co. v. Brooks (Neb. 1912) 136 N. W. 60.

Evidence held to show that defendant's adoption and use of the word "Eureka" as part of its corporate title and otherwise was in fact for the purpose of availing itself to some extent of the trade reputation complainant had given to goods marketed under that name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (1906) 71 A. 1134, 71 N. J. Eq. 300.

A manufacturer who uses the word "Eureka" misleads the public, and gains an unmerited advantage from the trade reputation given to such word by another company will be restrained from the use thereof, not only in its corporate title, and in connection with competitive goods, but also in connection with noncompetitive goods manufactured by it, so long as it continues to manufacture any goods in competition with the company first using the word. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. (N. J. 1907) 65 A. 870.

The proprietor of a hotel managed as "The Hotel Dominion" is entitled to restrain the use by another proprietor of a hotel of the name "The New Dominion" on the ground that the name of the new hotel will aid in procuring guests theretofore patronizing the old one. O'Grady v. McDonald (N. J. 1907) 66 A. 175.

Equity will restrain the fraudulent use of trade-marks by injunction. Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586; Taylor v. Carpenter (N. Y. 1846) 2 Sandf. Ch. 603.

He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use the profits to which the superior skill of another has given him the exclusive title. Amoskeag Mfg. Co. v. Spear (1849) 4 N. Y. Super. Ct. (2 Sandf.) 599.

Where defendants, having connected themselves with plaintiffs in business, and having induced plaintiffs to expend large sums of money in advertising, suddenly, and without notice, severed their connection with plaintiffs, and set up the same business for themselves, defendants' use of plaintiffs' trade-mark constituted a willful attempt to deceive the public. Comstock v. White (N. Y. 1860) 18 How. Prac. 421, 10 Abb. Prac. 264.

Where it appears that defendant designed to appropriate, through a counterfeit label, the market obtained by the plaintiff, and that he has to some extent been successful, and thereby injured the plaintiff, an injunction will be granted restraining the use of the label. Smith v. Woodruff (N. Y. 1867) 48 Barb. 438.

Where one has adopted a word to designate an article which he is manufacturing and selling by that name, he acquires a property in the use of the word as applied to the article, although the article was previously sold in France by the same name; and an injunction will lie to restrain the use of the name by another manufacturer. Rillet v. Carlier (N. Y. 1870) 61 Barb. 435, 11 Abb. Prac. (N. S.) 186.

Plaintiff manufactured and vended an article called "Gouraud's Oriental Cream." Defendants, sons of plaintiff, but having a different surname, commenced to manufacture and vend an article of like nature with plaintiff's,

which they labelled "Dr. T. F. Gouraud's Sons' Crême Orientale." Held, that plaintiff was entitled to an injunction restraining the action of defendants. Gouraud v. Trust (N. Y. 1875) 3 Hun, 627, 6 Thomp. & C. 133.

Defendants manufactured and introduced in an original envelope a soap known as "Pride of the Kitchen." It did not sell, and they thereafter enveloped their soap in a wrapping substantially as plaintiff's, though having minute variations. There was evidence that on several occasions customers asking for "Sapolio," plaintiff's product, had been deceived, and purchased therefor defendant's article. Held, it was apparent that defendant's object was to gain custom by a general resemblance to the genuine article, and was therefore unlawful competition. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1879) 57 How. Prac. 121.

Defendant secured the services of a minor employé of one Colton and advertised conspicuously "Colton's Latest System," intending thereby to induce the public to believe that Colton's assistant had left and was carrying on business at plaintiff's stand. Held, such use of plaintiff's name constituted unlawful competition and entitled plaintiff to an injunction. Colton v. Deane (1887) 7 N. Y. St. Rep. 78.

Plaintiff put on the market a brand of hooks and eyes sewed on cards labeled, "The De Long Hook and Eye." Another person named De Long patented an alleged improvement in hooks and eyes, and defendants put these on the market on cards very similar to plaintiff's, and labeled, "Oscar A. De Long's Improved," and "De Long Hook and Eye Company, Makers, New York." Held, defendant's acts were intended to deceive the public, and to illegally gain plaintiff's trade. De Long v. De Long Hook & Eye Co. (1894) 89 Hun, 399, 35 N. Y. Supp. 509.

Plaintiff was an established corporation, organized and doing business under the name of the "International Society," engaged in publishing and selling books and periodicals. Defendants opened a rival establishment opposite plaintiff's place of business, adopting as trade names "International Society," and "The International Society of Literature and Bookbinders' League," to attract trade. Held, that plaintiff was entitled to an injunction prohibiting the use of these names. International Soc. v. International Soc. (1899) 59 N. Y. Supp. 785.

Where defendants within a month after their employment by plaintiffs was terminated opened a place of business on the same street, within two blocks of plaintiffs' place of business, under a similar name, and used plaintiffs' distinctive numbers on certain manufactured glass samples, and such use was with the design to deceive the public, and, if possible, divert part of plaintiffs' business to defendants, such acts constituted unlawful competition, entitling plaintiffs to an injunction. Brown v. Braunstein (1903) 83 N. Y. Supp. 1096.

Where plaintiffs filed a certificate setting forth their intention to do business under the name of the "American Watchman's Clock Company," and thereafter plaintiffs carried on their business under that name until May, 1902, when they incorporated by that name to carry on the business, but in the same month, and before plaintiff was incorporated, defendant organized a corporation under the same name for the purpose of engaging in the same business, and with the intent to deceive the public, and to appropriate the business and reputation of plaintiff, defendant was guilty of unlawful competition. Pettes v. American Watchman's Clock Co. (1903) 85 N. Y. Supp. 900, 89 App. Div. 345.

An executor sold to plaintiff's assignor the photograph business of the testator, with the right to use in connection therewith the well-known tradename "Sarony," the surname of the testator and likewise of the executor. A later use by a competitor of the name "Otto Sarony Company," the executor granting such right, was unfair competition in business, constituting a fraud on plaintiff. Burrow v. Marceau (1908) 109 N. Y. Supp. 105, 124 App. Div. 665.

While the name by which a patented article had become known could not be used as an exclusive trade-mark after the expiration of the patent, the use of the name in such a way as to mislead the public as to the manufacturer of the article would be enjoined. Prest-O-Lite Co. v. Ray (1914) 147 N. Y. Supp. 138, 162 App. Div. 62, reversing judgment (Mun. Ct. 1913) 147 N. Y. Supp. 219; Same v. Brockner (1914) 147 N. Y. Supp. 147, 162 App. Div. 75.

Though one cannot acquire a valid trade-mark in the words "Misfit Parlors," yet, where a competitor adopts such name and opens a store on the same street, and imitates the signs, cards, and notices of plaintiff, who had previously used such name, and by misrepresentations seeks to mislead customers to suppose that they were dealing with plaintiff when they in fact were not, plaintiff is entitled to an injunction to restrain such unlawful competition. Cohn v. Kahn (Ohio, 1882) 8 Wkly. Law Bul. 154.

The evidence showing that defendant's use of the name was because of its similarity to their competitor's and for the purpose of getting business intended for him, such competitor was entitled to have such use enjoined. Scanlan & Bartell v. Williams (Tex. Civ. App. 1908) 114 S. W. 862.

Where an alleged trade-mark has not been registered as required by statute, a complaint for infringement thereof must be tested by the rules of the common law. Woodcock v. Guy (1903) 74 P. 358, 33 Wash. 234.

Defendants have a right to advertise their experience and skill in the manufacture of wagons, but they have no right to represent their present business as the same they formerly conducted as the Fish Bros. Wagon Company, or to call the attention of customers to the change of firm name. Fish Bros. Wagon Co. v. La Belle Wagon Works (1892) 82 Wis. 546, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453.

Use of the same distinctive symbol as plaintiff's, with much the same wording and ornamentation, but only partially the same coloring, was an imitation, and constituted unfair competition in trade. Manitowoc Malting Co. v. Milwaukee Malting Co. (1903) 97 N. W. 389, 119 Wis. 543.

17. Right to use of name—In general.—A later competitor whose use of his own name on his goods will lead the public to understand the goods are the product of an established firm known under that name must take reasonable precautions to prevent mistake. L. E. Waterman Co. v. Modern Pen Co. (1914) 35 Sup. Ct. 91, 235 U. S. 88, 59 L. Ed. 142 (affirming decree [1912] 197 Fed. 534, 117 C. C. A. 30); Walter Baker & Co. v. Sanders (1897) 80 Fed. 889, 26 C. C. A. 220.

Every person is entitled to honestly use his own name in business, either alone or associated with others, but may not use it as an article to mislead the public as to the identity of the business or corporation or the article produced, and thereby unfairly divert the business of another, and such a use of one's own name may be enjoined. Royal Baking Powder Co. v. Royal (1903) 122 Fed. 337, 58 C. C. A. 499; Sheffield-King Mill. Co. v. Sheffield Mill & Elevator Co. (1908) 117 N. W. 447, 105 Minn. 315, 127 Am. St. Rep. 574.

One using the generic name of the article after the expiration of the patent must accompany the name with such indications that the article is of his manufacture as will unmistakably inform the public of that fact. Singer Mfg. Co. v. June Mfg. Co. (1896) 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

A mark consisting of a surname registered by virtue of the ten-year clause of section 9490, ante, is not imitated contrary to this section where one bearing the same name uses it in his own business, though dealing in similar goods, when not used in a manner to mislead as to the ownership of the goods. Thaddeus Davids Co. v. Davids (1914) 34 Sup. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, reversing decree (1912) 192 Fed. 915, 114 C. C. A. 355.

Where complainant has established a trade in a mixture known as "Bull's Cough Syrup" and "Dr. Bull's Cough Syrup," and defendant has placed on the market a mixture inclosed in similar wrappers, and designated as "Dr. B. L. Bull's Celebrated Cough Syrup," complainant is entitled to restrain defendant not only from using such name on such wrappers, but also from using such name on any wrappers so as to deceive the public. Meyer v. Dr. B. L. Bull Vegetable Medicine Co. (1893) 58 Fed. 884, 7 C. C. A. 558.

A corporation which, by arrangement with one R. W. R., takes his name and stamps it upon articles sold by it, with the purpose of inducing the public to think that they are purchasing the product of another "R." company, of established reputation, will be restrained from using such stamp. R. W. Rogers Co. v. Wm. Rogers Manuf'g Co. (1895) 70 Fed. 1017, 17 C. C. A. 576, affirming order Wm. Rogers Mfg. Co. v. R. W. Rogers Co. (C. C. 1895) 66 Fed. 56.

Where a corporation assumed the name of an employé holding a few shares of its stock, with the evident purpose of appropriating the trade of others of the same name, who had long used it in connection with their product, such corporation would be enjoined from using the name as part of its corporate name, or in its business. Garrett v. T. H. Garrett & Co. (1896) 78 Fed. 472, 24 C. C. A. 173.

Where the name, portrait, and fac simile signature of another are employed without his consent and against his will, and are so assumed with a view to deceive the public, an injunction will be granted. Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co. (1897) 82 Fed. 321, 27 C. C. A. 351.

Where the parties have an equal right under the law to the use of the same name for their products, purchasers must be presumed to know such fact, and the defendant discharges his full legal duty if he so dresses his product that one who seeks to know whose manufacture it is can readily learn by a reasonable examination. Centaur Co. v. Marshall (1899) 97 Fed. 785, 38 C. C. A. 413.

Where complainants were entitled to the exclusive use of the word "Chickering" as a trade-name in the sale of pianos, defendants, whose name was Chickering, were properly enjoined from advertising that they were the only "Chickerings" manufacturing pianos, and that theirs were the only pianos made by a Chickering. Chickering v. Chickering & Sons (1903) 120 Fed. 69, 56 C. C. A. 475; Id. (1914) 215 Fed. 490, 131 C. C. A. 538.

The right of individuals to use their own name in their business does not extend to the right to use it in the corporate name, or in marking the product of such corporation, in which they were only stockholders, where it must have been known and intended it would produce confusion. Wyckoff, Seamans & Benedict v. Howe Scale Co. of 1886 (1903) 122 Fed. 348, 58 C. C. A. 510, reversing decree Wyckoff v. Howe

Scale Co. of 1886 (C. C. 1901) 110 Fed. 520, which is reversed Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 49 L. Ed. 972.

Defendant, John Eberhard Faber, held not entitled to use the word "Faber" without the prefix "E." or "J. E." or "Eberhard" or "J. Eberhard" on lead pencils sold in competition with the German house of A. W. Faber. Von Faber-Castell v. Faber (1906) 145 Fed. 626, 76 C. C. A. 538.

Where plaintiff's copyright on the name "Webster," as used in the title of dictionaries, expired, and O. published dictionaries bearing that name, using a title-page, and printing on the back of the book similar to plaintiff's and likely to mislead the public, though O. printed his name on the back or cover and on the title page of his dictionaries, and used "Imperial" and "Universal" in the title, and not "International," as used by M., he was guilty of unfair competition. G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, modifying decree, Ogilvie v. G. & C. Merriam Co. (C. C. 1907) 149 Fed. 858, and writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Where one sold his patent rights and the right to use his name in connection therewith, but was entitled to describe himself as the inventor of the original article in connection with the sale of the articles made under the later patents, a corporation of which he was president and its licensees to manufacture, under such later patents, were entitled to the same right. Dr. A. Reed Cushion Shoe Co. v. Frew (1908) 162 Fed. 887, 89 C. C. A. 577.

Complainant held not entitled to injunctions restraining defendants from using the name Webster as part of the title of dictionaries published by them. G. & C. Merriam Co. v. Syndicate Pub. Co. (1913) 207 Fed. 515, 125 C. C. A. 177.

Whatever confusion to the public and injury to complainants results from the lawful use by defendants of their own name is not actionable; defendants being responsible only for the unlawful use of the name and for acts of unlawful competition. Chickering v. Chickering & Sons (1914) 215 Fed. 490, 131 C. C. A. 538.

Persons formerly connected with business conducted under their name held entitled to use their name, if they did not invade good will of purchaser of business or employ its trade-marks and trade-names. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

While any one may manufacture an article after patent expired, and designate it by its well-known name, no one has a right to represent that his goods are manufactured by the patentee. Frost v. Rindskopf (C. C. 1890) 42 Fed. 408.

One is entitled to sell his own goods under his own name, but must not so mark or label them as to mislead the public into the belief that they are the goods of another of the same name. Allegretti Chocolate Cream Co. v. Keller (C. C. 1898) 85 Fed. 643.

One entering a particular trade may not use his own name in a way calculated to cause confusion between his own goods and those of an old established manufacturer, having the same name. Walter Baker & Co. v. Baker (C. C. 1898) 87 Fed. 209.

A man is not deprived of the right to use his own name upon his goods by the fact that another has established a trade in the same class of goods under the same name, provided he does nothing designedly to cause confusion, but takes reasonable precautions to prevent it. Guth Chocolate Co. v. Guth (D. C. 1914) 215 Fed. 750.

Where an individual would be restrained from using a certain word, in which another has acquired the right of exclusive user for trade purposes, a corporation will not be allowed to use the word, although it is a part of its corporate name. Hainque v. Cyclops Iron Works (1902) 68 P. 1014, 136 Cal. 351.

Under Civ. Code Cal. § 991, a partnership which for many years had designated itself as the "Cyclops Machine Works" has acquired property rights in the use of the word "Cyclops" which a court of equity will protect. Id.

The outgoing stockholders of a corporation named the "Van Auken Company," whose names were Van Auken, could not organize a corporation under the name of "Van Auken Steam Specialty Company," and compete in business with the older corporation. Van Auken Co. v. Van Auken Steam Specialty Co. (1895) 57 Ill. App. 240.

Where the lessee of a store called it "Tower Palace," and put up a sign to that effect, he could not prevent the subsequent use of the term to designate the building, although attempting to carry it with him to designate his new place of business. Armstrong v. Kleinhans (1884) 82 Ky. 303, 56 Am. Rep. 894.

Where defendant was enjoined merely from simulating the brand of plaintiff, and defendant, "whether in conjunction with [his codefendants] or with others, had the right to use his name" on goods of his own manufacture, or of the firm to which he belonged, such defendant might use his name in the business of a corporation in which he held stock. Monarch v. Rosenfeld (1897) 39 S. W. 236, 19 Ky. Law Rep. 14.

Names which are mere descriptive terms, if they be odd, unusual, fanciful, or striking, may by long use become identified in the minds of the

public with the business of a particular trader, and in such case it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other. Furniture Hospital v. Dorfman (1914) 166 S. W. 861, 179 Mo. App. 302.

The lease of a boarding house known as "Norwood Cottage" for 5 months and 15 days gives the lessee no exclusive right to the use of that name. Wilcoxen v. McCray (1884) 38 N. J. Eq. (11 Stew.) 466.

Where a firm did business under the name of "Brand & Smith," and, after transferring its assets and good will to a corporation, Smith began a new similar business under the name of "William Smith & Bro." he was not entitled to restrain the corporation from using the name "Brand & Smith" on the ground that such use would lead the public to believe that it represented plaintiff's business. Smith v. David H. Brand & Co. (1904) 58 A. 1029, 67 N. J. Eq. 529.

Equity will restrain a man from so using his name on or in connection with his own goods as to suggest, except as the mere name itself may suggest, that his goods are the goods of a competitor, and pass them off as such. International Silver Co. v. Rogers (1906) 63 A. 977, 71 N. J. Eq. 560.

When an article has come to be known by a personal name one may not use it to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. International Silver Co. v. Rogers (N. J. 1907) 67 A. 105, reversing decree (1906) 63 A. 977, 71 N. J. Eq. 560.

Where a man's conduct has been such that he cannot engage in a particular business, in his own name, without profiting by his prior fraud, to the detriment of another's trade, he must so distinguish his name as to avoid confusion, and the words, "Not connected with any other of the same name," are insufficient. Id.

Where a name is one which has come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied by any indication, is an artifice calculated to deceive the public. Id.

Where the proprietor of a hotel had established a high reputation for his house under a certain name, another could be enjoined against using the same name for another house. Howard v. Henriques (1851) 5 N. Y. Super. Ct. (3 Sandf.) 725.

Where one has attached to his business a name indicating where it is carried on, he thereby acquires property in the name, which will be protected from invasion by a court of equity on principles analogous to those applicable in case of the invasion of a trademark. Glen & Hall Mfg. Co. v. Hall (1874) 61 N. Y. 226, 19 Am. Rep. 278, reversing (N. Y. 1871) 6 Lans. 158.

Where a well-known business is carried on under the name of "E. A. & G. R. Meneely," and a brother of plaintiffs, under the name of "Meneely & Kimberly," began the same kind of business in an adjoining county, there was not such a resemblance as would of itself tend to deceive the public or indicate a fraudulent purpose. Meneely v. Meneely (1874) 1 Hun, 367, 3 Thomp. & C. 540, affirmed (1875) 62 N. Y. 427, 20 Am. Rep. 489.

One Higgins sold to plaintiff, Chas. S. Higgins Co., a soap business long established at Brooklyn, together with the good will, labels, and trade-marks; reserving the right to engage in the same business. Thereafter Higgins organized a company to manufacture soap at Brooklyn under the name "Higgins Soap Company," and within four months thereafter received over 28 business letters intended for the other corporation. Held that, though the new company took its name from the family name of its organizers, and adopted it in good faith, without design to acquire plaintiff's trade, it would be restrained from using it. Charles S. Higgins Co. v. Higgins Soap Co. (1893) 71 Hun, 101, 24 N. Y. Supp. 801 (judgment reversed [1895] 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42); Charles S. Higgins Co. v. Amalga Soap Co. (1894) 10 Misc. Rep. 268, 30 N. Y. Supp. 1074.

One who has manufactured and sold an article under his name or combinations thereof until it has acquired an extensive reputation may enjoin another from placing such article on the market under the former's name, to his damage, even if the spurious goods are better than those which the trade-name owner had originally offered. Cutter v. Gudebrod Bros. Co. (1899) 55 N. Y. Supp. 298, 36 App. Div. 362.

One must use his own name honestly, and not as a means of pirating on the good will and reputation of a business rival; and where he cannot use his own name, without inevitably representing his goods as those of another, he cannot use his name. Kaufman v. Kaufman (1910) 123 N. Y. Supp. 699.

The right to publish uncopyrighted books with the nom de plume of the author carries with it the right to state the true name of the author, either upon the title page or otherwise. Ellis v. Hurst (1910) 128 N. Y. Supp. 144, 70 Misc. Rep. 122.

One may use his own name in his business, where he does so honestly, and does not resort to unfair methods to the injury of another, or commit a fraud on the public. Zagier v. Zagire (1914) 83 S. E. 913, 167 N. C. 616.

Where one has established a business and a reputation for an article under a particular name and label, whether

the words constitute a trade-mark or not, another cannot lawfully assume the same name, even though it be his own name and label, or the same with slight alterations, so as to induce the belief that his imitation is the original. Drake Medicine Co. v. Glessner (1903) 67 N. E. 722, 68 Ohio St. 337.

The inventor of a certain ware assigned to plaintiff's assignor the right to manufacture the same and use the inventor's name. The son of the inventor worked for plaintiff for a number of years, and thereafter withdrew from his employment, and sold ware, using his own name, with imitations of plaintiff's label, advertisements, and trade circulars, intending to deceive the public. Held, that he would be restrained even from the use of his own proper name under such circumstances, irrespective of his fraudulent intent. Van Stan's Stratena Co. v. Van Stan (1904) 58 A. 1064, 209 Pa. 564, 103 Am. St. Rep. 1018.

While a person has the right to use his own name for legitimate business purposes, although injury may incidentally result to another therefrom, yet he will not be permitted to use it in a manner to commit a fraud upon purchasers, and to palm off his wares as those of another. Robinson v. Storm (1899) 52 S. W. 880, 103 Tenn. 40.

18. —— Corporate names. — Unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators, where such use by the individuals themselves or in a partnership would not be open to that charge. Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict (1905) 25 Sup. Ct. 609, 198 U. S. 118, 116 O. G. 299, 49 L. Ed. 972, reversing decrees Wyckoff, Seamans & Benedict v. Howe Scale Co. of 1886 (1903) 122 Fed. 348, 58 C. C. A. 510, and (C. C. 1901) 110 Fed. 520.

Unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators, where such use by the individuals themselves or in a partnership would not be open to that charge. Id.

Persons seeking to form a corporation may not take the name of a corporation already existing, or one that is to be used to deceive the public, or to be passed off for that of some other person or firm in business. Bender v. Bender Store & Office Fixture Co. (1913) 178 Ill. App. 203; Munn & Co. v. Americana Co. (N. J. Ch. 1913) 88 A. 330, following L. Martin Co. v. L. Martin & Wilckes Co. (1908) 71 A. 409, 75 N. J. Eq. 39.

Borden's Condensed Milk Company not entitled to restrain the use by defendant of the name "Borden" in its corporate name of "Borden Ice Cream Company," where the two companies have never come into competition. Borden Ice Cream Co. v. Borden's Condensed Milk Co. (1912) 201 Fed. 510, 121 C. C. A. 200, reversing order Borden's Condensed Milk Co. v. Borden Ice Cream Co. (D. C. 1912) 194 Fed. 554.

Use of the word "Keystone" as part of corporate name, in connection with sale of lubricating oils and greases is improperly enjoined, though before defendant engaged in business plaintiff had sold lubricating greases known as Keystone greases, under the name of Keystone Lubricating Company. Keystone Oil & Mfg. Co. v. Buzby (1914) 219 Fed. 473, 135 C. C. A. 185, reversing decree Buzby v. Keystone Oil & Mfg. Co. (D. C. 1913) 206 Fed. 136.

Piano corporation, organized by persons formerly connected with original Knabe business, entitled to advertise and represent that its pianos were the only pianos made by a living Knabe. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

Corporation organized by persons formerly connected with plaintiff's business, and having name similar to plaintiff's trade-name and trade-marks, held entitled to use its corporate name on the fall-boards of its pianos. Id.

A corporation is not entitled to restrain another corporation from using the same corporate name, or from publishing a periodical having a name similar to one published by complainant, where defendant's paper published is in a state distant from complainant, and the names are used with distinguishing characteristics which render injury to complainant therefrom improbable, in the absence of proof that such injury has actually resulted. Investor Pub. Co. of Massachusetts v. Dobinson (C. C. 1897) 82 Fed. 56.

In a suit for unfair competition by the fraudulent use by defendants of the word "Elgin" in the trade-name assumed by them, a federal court has no power to enjoin completion of a corporation under the same name which has been duly authorized by the proper authorities of another state, and which, by its articles of incorporation, is authorized to do other kinds of business which would not compete with or injure complainant. Elgin Nat. Watch Co. v. Loveland (C. C. 1904) 132 Fed. 41.

In the absence of contract, fraud, or facts raising an estoppel, the fact that a person assists in forming a corporation in the name of which his own name is used does not preclude the use of his name as a part of that of another corporation in which he subsequently becomes interested, although it is organized to engage in competing business. Bates Mfg. Co. v. The Bates Mach. Co. (C. C. 1905) 141 Fed. 213.

A corporation formed by B., who was formerly connected with complainant, will not be enjoined from using B.'s name, which was also used by complainant as a part of its corporate name, in the absence of any contract limiting

B.'s right to use his name, or any unfair competition. W. F. & John Barnes Co. v. Vandyck-Churchill Co. (D. C. 1913) 207 Fed. 855.

Ford Motor Company held entitled to enjoin dealer in auto parts not manufactured by it from advertising them as Ford articles and issuing a publication entitled "Fordealer." Ford Motor Co. v. Wilson (D. C. 1915) 223 Fed. 808.

Although a corporation under a certain name no longer existed, the members thereof might nevertheless do a partnership business under any name not interfering with any earlier party's use thereof. Ottoman Cahvey Co. v. Dane (1880) 95 Ill. 203.

The Allegretti Chocolate Cream Company was engaged in the business of manufacturing chocolate creams. Afterwards a firm, one member of which was named Allegretti, placed chocolate creams on the market under the name Allegretti and Rubel. Held, that the use of the name was a fraud on the former company. Allegretti Chocolate Cream Co. v. Rubel (1900) 86 Ill. App. 600.

A corporation may acquire the right to use its name as a trade-mark, and it may be enjoined from doing so if some other person having the same name has previously acquired the right to use it as a trade-mark on his goods. Imperial Mfg. Co. v. Schwartz (1903) 105 Ill. App. 525.

The use of corporate names may be enjoined under the general principles of unfair competition. Hartzler v. Goshen Churn & Ladder Co. (1914) 104 N. E. 34, 55 Ind. App. 455.

Plaintiff, the "Travelers' Insurance Company of Hartford, Conn.," is engaged in the accident insurance business, specializing in the insurance of travelers against accident, and defendant the "Travelers' Insurance Machine Company" manufactures automatic machines for the sale and delivery of accident insurance policies. There is no mark on the machine suggestive of plaintiff's business, and the tickets issued are in the name of the "Daily Accident Insurance Company." Held, in view of the dissimilarity in the names and the businesses, defendant will not be enjoined from using the words "Travelers' Insurance" as a part of its name on the ground of unfair competition. Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (1911) 134 S. W. 877, 142 Ky. 523, judgment modified (1911) 136 S. W. 154, 143 Ky. 216.

Where a patentee, member of a corporation formed to manufacture his invention insisted that his name appear on such product, and be the name of the corporation; and he later withdrew, forming another corporation to manufacture the same product, the latter company will be enjoined from using patentee's name as a corporate name, or on its products, packages, and advertisements. Penberthy Injector Co. v. Lee (1899) 78 N. W. 1074, 120 Mich. 174.

A corporation is not entitled to use its corporate name in a business in which the use thereof is likely to lead purchasers to buy its goods for the goods of those by whose reputation it seeks to profit. International Silver Co. v. William H. Rogers Corp. (1905) 60 A. 187, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, reversing orders (1904) 57 A. 725, 66 N. J. Eq. 140, and (1904) 57 A. 1037, 66 N. J. Eq. 119.

The proprietor of a trade-mark consisting chiefly of the words, "The India Rubber Comb Company," is entitled to protection against an imitation consisting chiefly of the words, "The India Rubber Comb and Jewelry Co.," although this was the proper corporate name of the imitating party; there being strong evidence of intention to imitate. India Rubber Co. v. Rubber Comb & Jewelry Co. (1879) 45 N. Y. Super. Ct. (13 Jones & S.) 258.

The S. Howes Co. was organized in January, 1895; the Howes Grain-Cleaner Co. in February, 1896, the latter being named for its president. Both companies manufactured the same class of machinery. Held, that the latter company should be enjoined from using its corporate name. S. Howes Co. v. Howes Grain-Cleaner Co. (1897) 46 N. Y. Supp. 165, 19 App. Div. 625.

Where a spool-silk manufacturer merged his business into a corporation, giving it his name, he could not enjoin the use of the corporate name by others, there being nothing in the character of the article produced conveying the idea of personal ability and knowledge in its production superior to ordinary artisans skilled in the trade, so as to mislead the public. Cutter v. Gudebrod Bros. Co. (1899) 61 N. Y. Supp. 225, 44 App. Div. 605, judgment affirmed (1901) 61 N. E. 887, 168 N. Y. 512.

Where the S. M. Co., organized by one S. M., who was a grandson of S. M., who had organized a valuable business which he sold to plaintiff, was leading the public to believe that it was the original undertaking business, it was properly enjoined from using S. M.'s name or advertising that he was connected with it. Stephen Merritt Burial & Cremation Co. v. Stephen Merritt Co. (1913) 140 N. Y. Supp. 895, 155 App. Div. 565.

After expiration of patents under which the "Armington & Sims Engine Company" had made the Armington & Sims engines, a corporation subsequently engaging in the manufacture of such engines has no right to use the corporate name "Armington & Sims Company," and hold itself out as the successor of the "Armington & Sims Engine Company," which is still in existence, though there is no intention to deceive, and the latter corporation is

not at the time in business, and there may be no present damages. Armington v. Palmer (1898) 42 A. 308, 43 L. R. A. 95, 21 R. I. 109, 79 Am. St. Rep. 786.

Purchase of the manufacturing plant, machinery, and materials of a corporation does not give the purchaser the right to use as its name the name of such corporation. Id.

A retiring partner who has the right to use the old firm name may not give that name to a competing corporation located nearby without indicating its corporate character, nor advertise it as "our firm," "our new store," or "our store affords facilities for conducting our business at greatly reduced expenses." Fite v. Dorman (Tenn. 1900) 57 S. W. 129.

Where D. sold his interest to the other partners of the firm of D. & Co. and the right to use the old firm name for $150 per month, and afterwards the purchasing member and D. could not agree on a price for the continuation of the use of the old firm name, and D. and others then formed a corporation under the title of D. & Co., in the same business a block and a half from the old stand, such corporation had the right to use the name of D. & Co., in the absence of any agreement between D. and his former partners that he would not engage in the same business; such corporation not representing itself as the successor of the old firm, or in any sense as a continuation of it. Id.

Where a corporation and a firm adopted the same trade-name and engaged in the same general business at points remote from each other, they must be dealt with precisely as if the names were those of private firms, and no advantage accrues to the corporation because its trade-name was its name. Eastern Outfitting Co. v. Manheim (Wash. 1910) 110 P. 23.

Withdrawal of a stockholder held not to affect the right of a corporation to use the corporate trade-name, though such name was that of the outgoing stockholder. Wright Restaurant Co. v. Seattle Restaurant Co. (1912) 122 P. 348, 67 Wash. 690.

A corporation held entitled to enjoin an unfair use of its trade-name whether the corporate name or some other. Id.

Where Wright, after incorporation of his business as the Wright Restaurant Company, sold his interest in it to G., and used his name on the window of a restaurant started by him in the same neighborhood, there was no unfair competition; there having been no agreement for use of his name. Wright Restaurant Co. v. Wright (1913) 133 P. 464, 74 Wash. 230.

19. Fraudulent use of packages, bottles, wrappers, or labels.—Defendants' purchase and refilling of complainant's Prest-O-Lite auto gas tanks, when empty, with a different acetylene gas, and sale thereof to purchasers under conditions which might lead them to believe they were obtaining complainant's gas, held to constitute unlawful competition. Prest-O-Lite Co. v. H. W. Bogen (C. C. 1910) 209 Fed. 915; Same v. Davis (D. C. 1913) 209 Fed. 917.

Injunction does not lie to restrain use of a label not calculated to mislead purchasers as to the origin of goods, and which does not resemble the device of complainant, except that certain letters in defendant's label are the same as in that of complainant. Amoskeag Mfg. Co. v. Trainer (1879) 101 U. S. 51, 56, 25 L. Ed. 993.

Appropriating the name and imitating the bottles in which Angostura Bitters were sold, and the labels thereon, and in some cases using the bottles which originally contained such bitters as the name and dress of bitters made in Chicago, with the evident purpose of selling such imitation as the genuine bitters, is unfair competition. A. Bauer & Co. v. Siegert (1903) 120 Fed. 81, 56 C. C. A. 487.

Where defendant put out a soda water syrup in unlawful competition with coca-cola, complainant was entitled to restrain the marketing of defendant's product except through such branches or agencies as would charge defendant with their acts. Coca-Cola Co. v. Gayola Co. (1914) 211 Fed. 942, 128 C. C. A. 440.

Filling an empty tank bearing the trade-mark "Prest-O-Lite," or disposing of such tank so filled without obliterating the trade-mark and securely fastening on it a notice that it was not filled with Prest-O-Lite gas is unfair competition. Prest-O-Lite Co. v. Heiden (1915) 219 Fed. 845, 135 C. C. A. 515.

Where complainants have been using a printed label, giving their firm name and a statement that they were the sole agents for a certain brand of canned salmon, they may restrain the false and fraudulent use by defendants of that part of a label which represents that complainants are the sole agents for defendants' salmon, whether defendants' salmon be of an equal or inferior quality to those sold by complainants. Coleman v. Flavel (C. C. 1886) 40 Fed. 854.

Where both parties are manufacturers of liquid bluing, defendant may be restrained from using old bottles of the plaintiff having plaintiff's name upon them. Sawyer Chrystal Blue Co. v. Hubbard (C. C. 1887) 32 Fed. 388, following Evans v. Von Laer (C. C. 1887) 32 Fed. 153.

Where both parties are dealers in lime juice, the defendant has no right to sell lime juice in bottles stamped with complainant's name. Evans v. Von Laer (C. C. 1887) 32 Fed. 153.

In a suit for infringement, complain-

ant is entitled to the continuance of a temporary restraining order, where it appears that defendants have used boxes marked with such trade-mark for goods not made by complainant, although such use may have been not intentional. Cravenette Co. v. Benjamin (C. C. 1900) 105 Fed. 621.

Where plaintiffs have the sole right to use the trade-mark "Golden Wedding," as applied to their whisky, defendant will be restrained from refilling plaintiffs' barrels carrying such trade-mark, to palm off his product as that of the plaintiffs. Pontefact v. Isenberger (C. C. 1900) 106 Fed. 499.

One who refills plaintiff's bottles of a distinctive size and shape, having their firm name, address, and their registered monogram trade-mark blown in the glass, with an inferior product, which he sells without notice that it is not genuine, should be restrained. Van Hoboken v. Mohns & Kaltenbach (C. C. 1901) 112 Fed. 528.

Where defendant buys or exchanges for empty tanks of complainant and refills and resells the same without removing the trade-mark plate, but in some cases covering a part of the same by a paper label easily removed, stating that the tank had been refilled by it, this was an infringement of complainant's trade-mark, and entitled complainant to an injunction. Prest-O-Lite Co. v. Avery Lighting Co. (C. C. 1908) 161 Fed. 648.

Recharging acetylene gas tanks made and sold by complainant for use on automobiles, when brought to defendant by the owners for that purpose, or the exchanging of such recharged tanks for empty ones, in each case placing a label thereon showing by whom the recharging was done, held not to constitute unfair competition. Prest-O-Lite Co. v. Auto Acetylene Light Co. (C. C. 1910) 191 Fed. 90.

Defendant's use of complainant's glasses intended for the sale of complainant's beverage for the purpose of selling a competing beverage held unlawful. Moxie Co. v. Bagoian (D. C. 1912) 197 Fed. 680.

Where several of defendant's stores sold liquor in bulk to detectives employed by plaintiff and delivered to the purchasers empty bottles bearing plaintiff's labels, with the understanding that the liquor was to be used in refilling such bottles, plaintiff was entitled to an injunction against such unfair competition; it indicating that defendant was willing to make further sales, and the sales without knowledge that the purchasers were detectives disclosed the intent and purpose as if made to other purchasers. Hennessy v. Wine Growers' Ass'n (D. C. 1914) 212 Fed. 308.

Wholesalers who sell to retailers imitation Canadian whisky in the wood, knowing that most of that so purchased is used in fraudulently refilling bottles, held chargeable with unfair competition. Hiram Walker & Sons v. Grubman (D. C. 1915) 224 Fed. 725.

Party selling beverage under name of plaintiff's product and using plaintiff's labels, etc., held guilty of unfair competition, and to be enjoined, though using syrup manufactured by plaintiff, but not authorized to use it in that way. Coca-Cola Co. v. J. G. Butler & Sons (D. C. 1916) 229 Fed. 224.

Where defendant, with fraudulent purpose, places on the goods sold by him a wrongful imitation of the name and label borne by plaintiff's goods, an injunction will be awarded. Smail v. Sanders (1889) 118 Ind. 105, 20 N. E. 296.

An association which is entitled to the benefit of St. Mass. 1895, c. 462, relating to protection "from the use of counterfeit labels and stamps," is entitled to be protected against the use of real labels in a fraudulent way, as well as against the use of counterfeits. Tracy v. Banker (1898) 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

An infringement of trade-mark by the sale of cigars of another make from a box bearing plaintiff's registered trade-mark does not warrant the allowance of punitive damages. Lampert v. Judge & Dolph Drug Co. (1906) 100 S. W. 659, 119 Mo. App. 693.

One who had received for sale a receptacle filled by a manufacturer other than the owner of the trade-mark thereon, before such trade-mark was registered under General Business Law N. Y. § 367, held not denied a constitutional right by the prohibition of the sale after the registration, since such sale was contrary to the common law, and was a misdemeanor under Penal Law N. Y. § 2354. Prest-O-Lite Co. v. Ray (Mun. Ct. 1913) 147 N. Y. S. 219, judgment reversed (1914) 147 N. Y. Supp. 138, 162 App. Div. 62.

Where defendant, acting for a third person, sold a quantity of thread, under the belief that it was the best quality of complainants' manufacture, but it was discovered afterwards that the silk was of an inferior quality, and had been redyed, when defendant took back the silk and held it for the true owner, this would not be sufficient ground to restrain defendant from selling an inferior silk with the device used for complainants' best quality. Appeal of Wilcox (Pa. 1888) 12 Atl. 578.

20. Reference to previous connection with another.—An employé, on engaging in business, may advertise himself as late "of" the firm by which he was employed, nothing appearing from the way the sign is painted that it will mislead the public, and thereby injure the firm. Holbrook v. Nesbitt (1895) 163 Mass. 120, 39 N. E. 794; Sanders v. Bond (1891) 47 Mo. App. 363.

Complainant became the owner of the business and good will of "Best & Co.,

Liliputian Bazaar," in New York, which had a large mail order business throughout the country. Defendant, the son of a former proprietor of the New York business, established a similar business in Chicago, using the name "A. S. Best & Co.," and on his sign the words "Liliputian Outfitters," and "formerly with Best & Co., New York." He also engaged in the mail order business. Held, that complainant was entitled to an injunction restraining defendant from using the name "Best & Co.," with or without prefixes, and also the name "Liliputian" in connection therewith, in competition with his own business. Ball v. Best (C. C. 1905) 135 Fed. 434.

Defendant held entitled to advertise former connection of its officers with manufacture of Knabe pianos, provided it took precautions against confusion. Knabe Bros. Co. v. American Piano Co. (1916) 229 Fed. 23, 143 C. C. A. 325.

Where defendant displayed the names of S. L. & G. H. Rogers, with the assertion that they were "the only real Rogers Bros.," and that the goods were "the real Rogers goods," such action was clearly for the purpose of deceiving the public, and constituted unfair competition, against which the actual successor to the original business was entitled to a preliminary injunction. International Silver Co. v. Simeon L. & George H. Rogers Co. (C. C. 1901) 110 Fed. 955.

The use of a label stating that the manufacturer was a son of a successor of the "original Charles Emerson, Emerson Place," held no infringement on a label stating that a strop was made by "Charles Emerson, Emerson Place"; both parties having a right to manufacture the "Emerson strop." Emerson v. Badger (1869) 101 Mass. 82.

Where one transferred to a corporation his business, and the good will thereof, and was taken into its employ as an officer for four years, on the dissolution of his connection with the corporation, and engaging in a rival business, he would not be enjoined from advertising himself as formerly connected with such corporation. Newark Coal Co. v. Spangler (1896) 54 N. J. Eq. 354, 34 Atl. 932.

Where a firm engaged in business under a trade-name consisting of a portion of the names of both partners transferred its business, stock in trade, and good will to a corporation, such corporation was entitled to continue to advertise its business under the name of the old firm, and as "successor of" such firm, though it did so in such manner as to avoid so far as possible calling public attention to the successorship. Smith v. David H. Brand & Co. (1904) 58 A. 1029, 67 N. J. Eq. 529.

Where defendant used a sign with the name of his old firm in letters much larger than those stating his former connection therewith, and since there was no reason for such a distinction in the size of the words, it would be inferred that the sign was calculated to mislead the public, which constituted unfair competition which the retiring partners were entitled to restrain. Smith v. Cooper (N. Y. 1877) 5 Abb. N. C. 274.

A., having left B.'s service, may not be enjoined from using a sign stating that he was "late with" B. Van Wyck v. Horowitz (N. Y. 1886) 39 Hun, 237.

Where defendant learned the composition of a medicine while employed by the manufacturer, and after termination of the employment he compounded and sold such medicine on his own account, it was not unlawful competition to represent his previous connection with the manufacturer, and that the medicine he made and sold was the same in character and composition as that made by such manufacturer, if such was the case. Schmid v. Maeurer (1887) 9 N. Y. St. Rep. 843.

Plaintiff owned a collection of models known as "Dr. Kahn's Museum of Anatomy." Defendant falsely described his models in his advertisements as "lately forming the major part of Dr. Kahn's celebrated museum of anatomy." Held, that defendant would be enjoined from selling his models as part of the Kahn museum. Jordan v. O'Connor (1891) 27 Abb. N. C. 376, 17 N. Y. Supp. 462.

Defendant withdrew from the firm of Marcus Ward & Co., Limited, which was engaged in the manufacture of linen papers, and established the firm of Wm. H. Ward & Co., engaged in the same business. Plaintiff cannot enjoin defendants from placing the words "Marcus Ward's Son" on their goods, and the expression, "Late of the firm of Marcus Ward & Co.," on their letterheads. Marcus Ward & Co. v. Ward (1891) 61 Hun, 625, 15 N. Y. Supp. 913.

An employé and officer of plaintiff who opened a business of his own and used stationery and advertising cards so closely resembling those of plaintiff as to deceive, and published notices of removal calculated to lead persons to believe that reference was made to plaintiff, and not to defendant, will be enjoined. United States Frame & Picture Co. v. Horowitz (1906) 100 N. Y. Supp. 705, 51 Misc. Rep. 101.

Use of a circular deceptively headed, and containing untrue statements as to previous connection with plaintiff's concern should be viewed from the standpoint of deception to the ordinary purchaser, and plaintiff was entitled to an injunction to restrain such unlawful competition. Cincinnati Bell Foundry Co. v. Dodds (Ohio, 1887) 19 Wkly. Law Bul. 84.

21. Interference with business of another.—The use of imitative labels and devices, in connection with an inferior article, which is sold to retailers at a reduced price, with the purpose and result of enabling them to sell it to consumers as the goods of another, will be enjoined. Garrett v. T. H. Garrett &

Co. (1896) 78 Fed. 472, 24 C. C. A. 173.

Where defendant applied names adopted by plaintiff to goods of other manufacturers, and offered them for sale under these names for the purpose of diverting complainant's trade to themselves, the use of these names and of the word "American" therein by the defendants was properly enjoined. Shaver v. Heller & Merz Co. (1901) 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878, affirming decree Heller & Merz Co. v. Shaver (C. C. 1900) 102 Fed. 882.

That a defendant has been, and still it, a large purchaser of an article made by complainant as a jobber, does not preclude it from placing on the market a competing article of its own manufacture. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

Where complainant arbitrarily selected the name "Flare Front," and used it to designate and distinguish an automobile lamp made by him for so long a time that it became associated by purchasers with his lamps, defendant had no right to appropriate and use such name to aid him in palming off on purchasers as complainant's lamps of his own make. Rushmore v. Saxon (1909) 170 Fed. 1021, 95 C. C. A. 671.

Where defendant sold three bottles of spurious whisky bearing complainant's trade-mark to complainant's detectives, and also had in his possession a supply of labels carrying complainant's trade-mark, which might be easily affixed to spurious goods, so as to palm it off on the public for complainant's straight whisky, defendant's acts constituted a continuing menace to complainant's business, entitling complainant to injunctive relief. Julius Kessler & Co. v. Goldstrom (1910) 177 Fed. 392, 101 C. C. A. 476; Same v. Klein (1910) 177 394, 101 C. C. A. 478.

Where defendant has undertaken the representation of the full score of plaintiff's opera, and has hastened his preparations and changed the day to an earlier one for the purpose of anticipating the performance of plaintiff's assigns, a motion to enjoin its performance will be granted. Thomas v. Lennon (C. C. 1883) 14 Fed. 849.

The measure of damages is limited by the extent to which the unlawful use of the design by the defendant has interfered with the sale of plaintiff's commodity. Atlantic Milling Co. v. Robinson (C. C. 1884) 20 Fed. 217, appeal dismissed Rowland v. Atlantic Milling Co. (1889) 10 Sup. Ct. 1073, 136 U. S. 648, 34 L. Ed. 549.

Though complainant could not have an exclusive property in the words "St. Louis" as a trade-mark, or the exclusive right to designate his beer by the name of "St. Louis Lager Beer," yet, as his beer had always been made at that city, his use of the designation upon his labels was legitimate, and defendant, whose beer was made in New York, should be enjoined from diverting his trade by simulating his labels, or representing his products as those of complainant. Anheuser-Busch Brewing Ass'n v. Piza (C. C. 1885) 24 Fed. 149.

Sale by defendants of a deleterious substance, represented by the latter to be in part or in whole the same substance in which complainants are dealing, and of which they are the sole producers, and which is admittedly of a beneficial character, will be restrained. City of Carlsbad v. Tibbetts (C. C. 1892) 51 Fed. 852.

Where it clearly appears that defendants have closely imitated plaintiff's labels, patterns, and style, and have done obvious damage to his business from the business methods employed, plaintiff is entitled to relief on the ground of fraud, independently of the validity of his trade-marks. Cleveland Stone Co. v. Wallace (C. C. 1892) 52 Fed. 431.

The sale of whisky in bulk under a trade-mark by a distiller does not justify the vendee in bottling for retail, and in using on the bottles the trade label which the distiller uses on smaller bottles of the same brand of whisky when prepared by himself for the retail trade. Krauss v. Jos. R. Peebles' Sons Co. (C. C. 1893) 58 Fed. 585.

Where defendant, who had been in plaintiff's employ, began the manufacture and sale of certain toilet preparations, with the same names as plaintiff's, manufactured in the United States, but marked with labels in the French language, and devised to give the impression that the goods were French, also stating that he was "formerly with" the Parfumerie E. P., in such a manner as to give the impression that the latter was the name of the manufacturer, and he placed upon them a picture closely resembling a picture used on plaintiff's labels, defendant was attempting to palm off his goods as plaintiff's, and the use of such labels should be enjoined. Klotz v. Hecht (C. C. 1896) 73 Fed. 822.

One who makes stoves and ranges in the similitude of those long manufactured and sold by another, with the fraudulent purpose and result of palming them off upon the trade and public as the manufacture of such other, may be enjoined, whether the feature imitated constitutes a trade-mark or not. Buck's Stove & Range Co. v. Kiechle (C. C. 1896) 76 Fed. 758.

Complainant had long used labels having a white background and black lines around the margin, bearing in large black letters the word "Saponifier." Defendant adopted a similar package, a label with the same word in prominent black letters, placing his own trade-name on the label, and otherwise differentiating the reading matter appearing in small type. He deliberately sought out the localities in which complainant had created a demand for "Saponifier," with the pur-

pose and result of enabling retailers to pass off his article for complainant's. Held, that this was unfair competition, and defendant should be enjoined. Pennsylvania Salt Manuf'g Co. v. Myers (C. C. 1897) 79 Fed. 87, appeal dismissed Myers v. Pennsylvania Salt Mfg. Co. (1897) 82 Fed. 1003, 27 C. C. A. 683.

A retailer, whose clerks, on receiving requests for a particular brand of goods, wrap up and deliver competing goods, will be enjoined. Saxlehner v. Eisner & Mendelson Co. (C. C. 1898) 88 Fed. 61, decree modified (1899) 91 Fed. 536, 33 C. C. A. 291.

A bill to recover for losses may be maintained against one who has made and sold, labels and wrappers in imitation of complainant's, by the use of which, it is alleged, complainant's business has repeatedly been interfered with, and the goods of others sold as his. Hildreth v. Sparks Mfg. Co. (C. C. 1899) 99 Fed. 484.

The California Fig-Syrup Company is entitled to protection from unfair competition, irrespective of any question of trade-mark, and to an injunction against the production and sale of a similar article put up in such form that it can be sold to an ordinary purchaser as the preparation of such company. California Fig-Syrup Co. v. Worden (C. C. 1899) 95 Fed. 132.

Where defendant furnished bitters not made by complainant, in a demijohn marked "H. Bitters," and on another occasion, when the bulk bitters were called for, furnished an empty Hostetter's Bitters bottle, and filled it therewith, plaintiff was entitled to an injunction; he having the exclusive right to the name "Hostetter." Hostetter Co. v. Martinoni (C. C. 1901) 110 Fed. 524.

The manufacturer of an antiseptic, to which he gave the artificial name "Argyrol," held entitled to restrain a jobbing druggist from placing argyrol on his price list and supplying customers who called for the same with a different and cheaper preparation in its place. Barnes v. Pierce (C. C. 1908) 164 Fed. 213.

Where defendant sold a doll of similar design to that of plaintiff's "Billiken," called "Killiblues," put up in a similar carton, defendant's doll was intended to deceive ordinary purchasers, and hence plaintiff established a case of unlawful competition against the manufacturer, and against sellers of the "Killiblues" doll with the expectation that purchasers would buy them for "Billikens." Billiken Co. v. Baker & Bennet Co. (C. C. 1909) 174 Fed. 829.

Plaintiff held entitled to enjoin defendant from substituting product of other manufacturers, when plaintiff's product is ordered, but not to restrain use of plaintiff's name in its catalogue in advertising plaintiff's property. Vehicle Apron & Hood Co. v. American Tire & Rubber Co. (D. C. 1912) 193 Fed. 372.

Where one has established a business in his name, equity will restrain another of the same name from using it in the same line of business with the fraudulent intent of attracting custom intended for the first user. Allegretti v. Allegretti Chocolate-Cream Co. (1898) 52 N. E. 487, 177 Ill. 129, affirming decree Rubel v. Allegretti Chocolate-Cream Co. (1898) 76 Ill. App. 581.

Certain persons were engaged as partners in the express business between Boston and Somerville. Two of them sold to the other their share of all the property used in the business, and the interest and good will thereof, agreeing in writing not to do anything which should in any way impair or injure such good will. Held, an injunction should issue to restrain such outgoing partners from soliciting, doing, or obtaining any work, trade, or custom from any of the customers or persons who had formerly been customers of the firm, and from doing anything which would injure the purchasing partner's business. Angier v. Webber (1867) 96 Mass. (14 Allen) 211, 92 Am. Dec. 748.

There is a remedy at law against a business rival who injures his competitor by false representations, such as that he is dead or gone out of business, or that the former's goods are the same as the latter's. Smith v. Imus (1885) 24 N. W. 830, 57 Mich. 456, rehearing denied Same v. Walker (1886) 26 N. W. 783, 57 Mich. 456.

One who fraudulently represents that customers dealing with him are dealing with a rival merchant, held guilty of unfair competition. Joseph S. Baum Mercantile Co. v. Levin (Mo. App. 1915) 174 S. W. 442.

Where an employé and officer of plaintiff opened a place of business of his own and advertised in a manner containing no misleading references to his removal and to his previous location, it constituted fair competition. United States Frame & Picture Co. v. Horowitz (1906) 100 N. Y. Supp. 705, 51 Misc. Rep. 101.

A photographer may not enjoin the defendant, engaged in manifold reproductions, from using uncopyrighted photographs made by plaintiff for reproduction, when such photograph was given to defendant with the sitter's consent. White Studio v. Dreyfoos (1913) 142 N. Y. Supp. 37, 156 App. Div. 762.

Sales of defendant's traps to plaintiff's agents when they called for a trap like plaintiff's held not a sufficient foundation for damages in a suit for infringement. Onieda Community v. Onieda Game Trap Co. (Sup. 1914) 150 N. Y. Supp. 918, judgment affirmed (1915) 154 N. Y. Supp. 391, 168 App. Div. 769.

Complainants had been engaged for several years in the manufacture of muslin shirtings under the name "Wamsutta," and where defendants marked the name "Wamyesta" on shirts made of muslin of an inferior quality, declaring such shirts to be made of "Wamyesta" muslin, whereas no such brand of muslin existed, and defendants' acts tended to impair plaintiffs' reputation as manufacturers of muslin, such acts were illegal, and constituted an unlawful interference with plaintiffs' business, entitling it to an injunction. Wamsutta Mills v. Allen (Pa. 1878) 6 Wkly. Notes Cas. 189.

Plaintiffs, who owned the copyright of E. P. Roe's novels, published them in two editions; one printed on thin paper with paper covers, and retailing at 50 cents a copy, and the other handsomely finished, and bound in cloth, retailing at $1.50 a copy. Defendants purchased over 60,000 copies of the paper edition, and, binding them in cloth, offered them for sale at 40 cents each in 1,000 lots, and stated that they were "the paper E. P. Roe book bound in cloth, which is an exact copy of the genuine $1.50 edition." Held, that a preliminary injunction prohibiting such sales was properly denied. Dodd v. Smith (1891) 144 Pa. 340, 22 Atl. 710, 29 Wkly. Notes Cas. 6.

The adoption by a telephone company of the same number as a call for its Trouble Department as that used by a rival company previously established for its Trouble Department, enabling the newer company to learn through mistakes of subscribers of the older company of cases of trouble in the use of its telephones, was not unfair competition against which an injunction would issue. Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co. (Utah, 1906) 88 P. 26.

The fact that an article prepared according to a certain recipe, but not protected by a patent, has for some time been made and sold only by a certain manufacturer, does not render it unlawful for any other person acquainted with its composition to manufacture and sell the same. Marshall v. Pinkham (1881) 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

22. Disparagement of goods of another.—A circular containing garbled extracts from a competitor's statements, calculated to mislead the public, and which in fact created confusion which it was the purpose of complainant to prevent, was constructively fraudulent, even if not so intended, and its promulgation caused an injury to complainant, against which he was entitled to protection of injunction. Halstead v. Houston (C. C. 1901) 111 Fed. 376.

Notices of claims of infringement given by the owner of a patent to customers of a manufacturer of a similar article, or even threats of suit, if in good faith, are within its rights and not actionable as acts of unfair competition. Clip Bar Mfg. Co. v. Steel Protected Concrete Co. (D. C. 1913) 209 Fed. 874, decree affirmed (C. C. A. 1914) 213 Fed. 223.

A label is not objectionable, as denouncing other cigars than union-made ones, because it states that the cigars to which it is attached were made by "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship." Hetterman v. Powers (1897) 43 S. W. 180, 102 Ky. 133, 19 Ky. Law Rep. 1087, 39 L. R. A. 211, 80 Am. St. Rep. 348.

Where defendants, in order to injure plaintiff, falsely represented to certain of plaintiff's customers that plaintiff had no right to use a certain label, sign, and trade-mark, and that the defendants were the sole and exclusive owners thereof, and threatened to sue such customers of plaintiff and many others who purchased plaintiff's tobacco, by reason whereof plaintiff's trade was greatly lessened, plaintiff was entitled to sue and recover damages necessarily resulting from such acts. McElwee v. Blackwell (1886) 94 N. C. 261.

(C) Defenses

23. In general.—It is no defense that the name of one of the infringing firm accompanied the brand on the goods sold by them, instead of the name of complainants. Menendez v. Holt (1888) 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

Liability for infringement of a label and bottle is not avoided by the infringer's use of an additional label which is a mere importer's private mark. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

One member of a firm engaged, under the firm name of M. A. T. & Co., in the manufacture and sale of "Simmons' Liver Medicine," retired, and bound himself not to engage in manufacturing the said medicine "under any name or style." Afterwards he formed a partnership which made and sold a compound called "M. A. T.'s Liver Invigorator," in wrappers and packages calculated to induce the belief that it was the "Simmons' Liver Medicine." Held an infringement, and it was no defense that they had discontinued the use of the word "Simmons." Chattanooga Medicine Co. v. Thedford (1894) 66 Fed. 544, 14 C. C. A. 101, reversing M. A. T. & Co.'s Original and Only Genuine Liver Medicine, or Black Draught (C. C. 1891) 49 Fed. 949, and (C. C. 1893) 58 Fed. 347.

It is not a defense to infringement of a trade-mark that defendant's business is confined to a single state, and that complainant, which is a foreign corporation as to such state, has not complied with its laws to qualify itself to do business therein. Consolidated Ice

Co. v. Hygeia Distilled Water Co. (1907) 151 Fed. 10, 80 C. C. A. 506, affirming decree Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C. 1906) 144 Fed. 139.

No defense to a suit for infringement of plaintiff's trade-mark that such mark was produced while the article was being made; it not appearing that the pattern of the gripping surface of the roll was required to be the same as the trade-mark stamped on complainant's nails in order to their successful manufacture. Capewell Horse Nail Co. v. Mooney (1909) 172 Fed. 826, 97 C. C. A. 248.

It is no defense to a continuing infringement of a trade-mark that a third person before the infringement acquired the right to the trade-mark which he abandoned by assignment or nonuser, without the good will of his business years before the infringement, or that others who have renounced their right to the trade-mark or have conveyed it to plaintiff formerly infringed the owner's rights. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

That a complainant may conduct its business in a manner in violation of the anti-trust law is no defense to a suit for infringement of a trade-mark. Searchlight Gas Co. v. Prest-O-Lite Co. (1914) 215 Fed. 692, 131 C. C. A. 626.

Registration under the act of 1905 of a word as a trade-mark does not impair any defense available to one if there had been no registration. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531, 141 C. C. A. 287.

It is no defense that Spanish labels similar to plaintiff's trade-mark had been used by various manufacturers for many years, nor that imitations of the trade-marks were sold or used, in the absence of evidence that it was with the consent or acquiescence of the owner. Cuervo v. Jacob Henkell Co. (C. C. 1892) 50 Fed. 471.

No defense to a charge of infringement that the false mark has in practice been so accompanied by trade-names, designations, descriptions, or other accessories, not forming part of it, as to render it unlikely that the public has been deceived though such showing may affect the nature or measure of the relief to be granted. Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C. 1899) 96 Fed. 206.

Conformity of one label to another sufficient to attract and deceive is not excused by ability to analyze the offending label and point out differences which if known and recognized would avoid confusion, where the ensemble is sufficient to mislead the ordinary purchaser. Cantrell & Cochrane v. Butler (C. C. 1903) 124 Fed. 290.

That manufacturers of tobacco customarily allowed their trade-name for a smoking brand to be used by a manufacturer of cigarettes is no defense to a suit to restrain infringement of trade-name, unless the infringing use was notorious, and acquiesced in by complainant. American Tobacco Co. v. Polacsek (C. C. 1909) 170 Fed. 117.

Where complainant's patent was invalid and other manufacturers had placed exactly similar devices on the market without distinguishing labels, complainant could not recover for unlawful competition in the sale of similar articles by defendant, not as and for those manufactured by complainant. G. W. J. Murphy Co. v. Metal Stamping Co. (D. C. 1914) 214 Fed. 382.

It was no defense to a suit for unlawful competition in the sale of stuffed animal toys manufactured in Germany that defendant's acts were not violative of the German law. Margarete Steiff v. Bing (D. C. 1914) 215 Fed. 204.

In a suit for unlawful competition, the defendants' good faith is no defense. Howard Dustless Duster Co. v. Carleton (D. C. 1915) 219 Fed. 913.

That careful buyers may not have been deceived by alleged unlawful competition is no defense, but merely minimizes the loss. Id.

The fact that the products of both parties to an action for infringement of a trade-mark are on sale at the same or different places in the same city is immaterial. Hygeia Distilled Water Co. v. Hygeia Ice Co. (1898) 40 A. 534, 70 Conn. 516.

The fact that, after the infringement of a partnership trade-name, a change occurs in the personnel of the partnership is no defense to the infringer. Viano v. Baccigalupo (1903) 67 N. E. 641, 183 Mass. 160.

It is no defense to a suit for infringement that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious, or an imitation. Coats v. Holbrook (N. Y. 1845) 2 Sandf. Ch. 586.

Pasting a label over the registered trade-mark which indicated that the goods were those produced by a manufacturer other than the owner of the trade-mark is no defense to the penalty imposed by General Business Law N. Y. § 367. Prest-O-Lite Co. v. Ray (Mun. Ct. 1913) 147 N. Y. Supp. 219, judgment reversed (1914) 147 N. Y. Supp. 138, 162 App. Div. 62.

24. Deception of public as barring action or suit.—See notes under § 9506, post.

25. Laches.—Right to sue for violation of trade-mark is lost by long delay or gross laches. McLean v. Fleming (1877) 96 U. S. 245, 24 L. Ed. 828.

A right of action for fraudulent use of labels in this country is not defeated on the ground of laches by failure for many years to assert it, when the owner was making repeated, persistent, and, for a long time, unsuccessful, ef-

forts in his own country to establish his rights. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60 (reversing decree [1899] 91 Fed. 536, 33 C. C. A. 291); Same v. Nielsen (1900) 21 Sup. Ct. 16, 179 U. S. 43, 45 L. Ed. 77 (reversing decree [1899] 91 Fed. 1004, 34 C. C. A. 690).

One's rights are defeated when for 20 years he has permitted the use of the word by infringers in this country, until the name has become generic as indicative of the whole class of medicinal waters for which it is used. Id.

The supposition, on the part of a foreign owner of a trade-mark, that a person having the exclusive contract for the sale of his goods in this country will protect it against infringers, but who is not authorized to abandon it, will not relieve him from the effect of his laches when infringers are allowed to use the word for many years, until it becomes a generic name. Id.

The owner of a trade-mark is not chargeable with laches for failing to prosecute an infringer before he has notice that will put him on inquiry; the presumption being that parties will respect his rights. Layton Pure Food Co. v. Church & Dwight Co. (1910) 182 Fed. 24, 104 C. C. A. 464.

A long delay of alien manufacturers to prosecute after knowledge of a fraudulent use of their trade-mark may be competent proof to show their acquiescence in it; but is not an absolute bar to recovery unless extending to the period of the statute of limitation. Taylor v. Carpenter (C. C. 1846) Fed. Cas. No. 13,785.

Consent to the appropriation of one's trade-mark by another is not to be inferred from long knowledge and silence. The use of one's trade-mark by another is a continuing wrong, and the right to prevent its continuance can rarely be lost by mere delay of assertion. There must be some element of estoppel. Michigan Condensed Milk Co. v. Kenneweg Co. (1908) 30 App. D. C. 491.

Plaintiff sued for infringement of a trade-mark about two years after they discovered the imitation; but they had before brought suit against other infringers, and defendants had changed their label on account of a decision therein. Held, plaintiffs should not be denied damages because of delay in bringing suit. Schmidt v. Brieg (1893) 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

The right of action for infringement of a trade-mark or to an injunction is lost by long delay. New Orleans Coffee Co. v. American Coffee Co. of New Orleans (1909) 49 So. 730, 124 La. 19.

26. Estoppel.—Where one owns a valid trade-mark for natural bitter waters from Hungary, its use by defendant to designate bitter waters manufactured by him is an infringement, and complainant is not estopped to maintain a suit for such infringement by the fact that through laches she was so estopped as against certain importers of other Hungarian waters who had used the name for a number of years, where defendant began its use subsequently and after complainant had commenced a vigorous assertion of her rights. Thackeray v. Saxlehner (1903) 125 Fed. 911, 60 C. C. A. 562.

Acts of acquiescence in the use of complainant's alleged trade-mark by defendant will estop complainant to claim that the defendant has no right thereto. Delaware & H. Canal Co. v. Clark (C. C. 1870) Fed. Cas. No. 3,764.

Action for damages for alleged infringement of trade-mark brought three years after plaintiff acquired the patent, was not barred by limitation, where it was alleged in the complaint that she had always intended to engage in the business and still intended to do so. Julian v. Hoosier Drill Co. (1881) 78 Ind. 408.

Where defendants' right to use the words "Scientific American" in connection with the sale of a scientific encyclopedia depended on contract, defendants' right to use the same with reference to subsequent editions after the contract expired was barred, both under the doctrine of estoppel, and for the reason that to do so would mislead the public. Munn & Co. v. American Co. (N. J. Ch. 1913) 88 A. 330.

The consent of a manufacturer to the use or imitation of his trade-mark by another may be justly inferred from his knowledge and silence. Amoskeag Mfg. Co. v. Garner (N. Y. 1876) 54 How. Prac. 297.

(D) Procedure

27. Right to relief.—When complainant has no trade-mark right in the name under which an article is sold, and there is no misleading imitation of his labels or other indicia, he has no standing to complain that defendant is palming off a spurious article upon the public, or is using "fake" testimonials in his advertising. Centaur Co. v. Marshall (C. C. 1899) 92 Fed. 605.

Whether the use of a trade-name, as distinguished from a trade-mark, will be protected against infringement, depends on the facts of the particular case—such as whether a confusion of goods has been or is likely to be produced; whether there have been actual sales of one product for the other, and actual mistakes of one for the other; or whether there is such a similarity between the two as that one may readily be mistaken for the other. Sartor v. Schaden (1904) 101 N. W. 511, 125 Iowa, 696.

To sustain allegation of infringement of a trade-mark, two things are necessary: (1) An intent to injure the orig-

inator of the trade-mark, by passing off wares of the offender as those of the former; (2) if the trade-mark consists of words, they must indicate ownership and origin and not merely other attributes, such as quality, kind, texture, composition, utility, destined use, or class of consumers. Corwin v. Daly (1860) 20 N. Y. Super. Ct. (7 Bosw.) 222.

28. Persons entitled to sue.—An alien manufacturer abroad is entitled to protection in our courts against a fraudulent infringement of his trade-mark in this country. Taylor v. Carpenter (C. C. 1844) Fed. Cas. No. 13,784; Id. (C. C. 1846) Fed. Cas. No. 13,785; Taylor v. Carpenter (C. C. 1846) Fed. Cas. No. 13,785.

It is no bar to protection in our courts that a remedy is not reciprocally allowed to aliens in the country to which such owner belongs. Taylor v. Carpenter (C. C. 1846) Fed. Cas. No. 13,785.

An assignee or purchaser of a trade-mark from the original proprietor must in the use thereof indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned. Stachelberg v. Ponce (C. C. 1885) 23 Fed. 430, decree affirmed (1888) 9 Sup. Ct. 200, 128 U. S. 686, 32 L. Ed. 569.

Where the proprietor of a registered trade-mark made an assignment of the same, which was invalid, but itself discontinued the use of such mark, such discontinuance operated as an abandonment, and neither assignor nor assignee can maintain a suit for infringement after such abandonment. Eiseman v. Schiffer (C. C. 1907) 157 Fed. 473.

Where complainant employed the H. Co. to manufacture and sell for it a Billiken doll, in the sale of which it was claimed defendant was guilty of unlawful competition, the business of the H. Co. was complainant's business, and complainant was therefore the proper party to ask for protection. Billiken Co. v. Baker & Bennet Co. (C. C. 1909) 174 Fed. 829.

Where complainant sued for unlawful competition in the sale of Billiken dolls claimed to be manufactured for the H. Co. by a doll and toy company, a royalty being paid by the H. Co. to complainant, the business to be protected was that of the H. Co., and it was therefore the proper party complainant. Id.

A party, avowedly not the owner of a trade-mark, for the infringing use of which he had been sued has no standing in court to sue for damages as a vindication of such trade-mark, after the dismissal of plaintiff's action on his own motion. Lacroix v. Nodal (1889) 41 La. Ann. 1018, 6 South. 795.

One who has used a name as descriptive of a patented article, but in which he has no trade-mark, is not entitled, after the expiration of the patent, to protection under Massachusetts statute providing that trade-marks are not to be used without the consent of the owner. Dover Stamping Co. v. Fellows (1895) 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448.

One who has no more right in the trade-mark than has the alleged infringer has no cause of action. Weston v. Ketcham (1875) 39 N. Y. Super. Ct. (7 Jones & S.) 54.

The right to protection of the use of a trade-mark is not confined to the manufacturer, but extends to the person for whom goods are manufactured and to the person who sells the goods, though they may have no direct relation with the manufacturer. Godillot v. Hazard (N. Y. 1875) 49 How. Prac. 5.

One cannot be protected against an infringement of his trade-mark, unless he shows a prior and exclusive right. Thornton v. Crowley (1881) 47 N. Y. Super. Ct. (15 Jones & S.) 527.

Where the owner of a trade-mark transferred it detached from the business in which it had been used, the transferee cannot sue to enjoin its use and for damages for its infringement. Falk v. American West Indies Trading Co. (1905) 73 N. E. 239, 180 N. Y. 445, 1 L. R. A. (N. S.) 704, 105 Am. St. Rep. 778, reversing judgment (1904) 85 N. Y. Supp. 1130, 90 App. Div. 606.

Where complaint fails to show the transfer of anything to plaintiff except the naked trade-mark, and the proofs are silent on the subject, an exception to a conclusion of law that plaintiff was entitled to judgment raises the question of law as to his right to sue, though a short decision in his favor was unanimously affirmed. Id.

A labor union adopted and registered a label. The union had affiliated with it and subordinate to it various councils. The label adopted by the union was furnished to a council. Held, the union and the subordinate council properly united in an action for a wrongful use of the label. Lynch v. John Single Paper Co. (1906) 101 N. Y. Supp. 824, 115 App. Div. 911.

29. Persons liable.—Where defendant manufactured and sold dust cloths to C., which were used by C. to mislead the public to believe that they were cloths sold by complainant, defendant was a joint tort-feasor with C., and guilty of contributory infringement of complainant's rights. Howard Dustless Duster Co. v. Carleton (D. C. 1915) 219 Fed. 913.

30. Grounds of action.—A manufacturer of wines put them up under the name of "Tipo Chianti," and the word "Tipo" became known to consumers as indicating a wine manufactured by him. A rival manufacturer offered his prod-

uct to the public as "Tipo Barbera" and "Tipo Puglia." The bottles and labels of the two manufacturers were different except in the use of the word "Tipo," an Italian word in common use signifying type or kind. Held the right of the manufacturer to restrain his rival depended on his right to sue for an infringement of a trade-mark, and not on his right to protection against unfair competition. Italian Swiss Colony v. Italian Vineyard Co. (Cal. 1910) 110 P. 913.

One whose property rights in a trade-mark have been infringed and whose business interests have been damaged has an election of remedies, and may sue in equity for an accounting or injunction, or in law for damages. Hagan & Dodd Co. v. Rigbers (1907) 57 S. E. 970, 1 Ga. App. 100.

While ordinarily, only injunctive relief is granted where a trade-name is innocently used in a way which amounts to unfair competition, if such name is intentionally used with knowledge of the facts, or its use is continued after defendant learns of the facts, an action at law for damages for unfair competition may be maintained. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

31. **Joinder of causes of action.**—Where diverse citizenship exists between the parties and the requisite amount is involved to give a federal court jurisdiction, a cause of action for infringement of a trade-mark and one for unfair competition may be joined in one suit. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

32. **Parties.**—In a suit for infringement, a party was not entitled to intervene on the allegation that it owned the trade-mark in contest, and that it was used by defendant as petitioner's agents under its authority, especially where petitioner was bound by a contract to defend the suit on defendant's behalf and in fact was doing so. W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. 1910) 179 Fed. 544.

In a suit by a partner for the wrongful use of the firm name, the copartner is a necessary party. Longenecker v. Longenecker Bros. (Sup. 1913) 140 N. Y. Supp. 403.

33. **Pleading, indictment, or information.**—The declaration alleged that defendant, "since the 1st of November, 1888, knowingly, willfully, and fraudulently offered for sale, and is now selling, glue in packages," etc. Held that, as there was no continuando with reference to the matter of selling, only one actual sale could be proved under the common-law rule, which has not been changed by the Massachusetts statutes relating to pleadings. The Le Page Co. v. Russia Cement Co. (1892) 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

Where the original bill alleged that plaintiff's predecessors originated the trade-mark, describing it, and an amendment alleged that, 15 years after the first mark was adopted, plaintiffs originated the one now in question, and which is practically the same as that of their predecessors, the allegations were inconsistent, and the amendment constituted an admission that complainants pirated the mark previously belonging to L. and his successors. Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76.

A bill held insufficient to charge unfair competition. Van Kannel Revolving Door Co. v. American Revolving Door Co. (1914) 215 Fed. 582, 131 C. C. A. 650.

A bill which alleges that complainant and defendant are competitors; that defendant has assumed a trade-name similar to, and in imitation of, complainant's trade-name, and the public has been deceived thereby, and great confusion and injury have resulted to complainant's business therefrom; that defendant's incorporators, before it was organized, knew of the existence and character of complainant's business, and the trade-name under which it had for a number of years been conducted; and that defendant has refused, on complainant's request, to desist from the use of the name—states a cause of action against defendant for unfair competition. Block v. Standard Distilling & Distributing Co. (C. C. 1899) 95 Fed. 978.

A bill alleging that defendants make a medicinal preparation similar to one sold by complainant, which they have given a similar name, and have supplied to customers asking for complainant's preparation, states a cause of action. M. J. Breitenbach Co. v. Spangenberg (C. C. 1904) 131 Fed. 160.

In the absence of a statute, the court will not, in a trade-mark case, require defendant to embody in his pleading, the evidence as to prior use on which he relies to establish his defense. Gorham Mfg. Co. v. Weintraub (C. C. 1910) 180 Fed. 639.

Essentials of indictment under Act Aug. 14, 1876, set forth. U. S. v. Braun (D. C. 1889) 39 Fed. 775, 776.

Fraud being the basis of all actions of unfair competition, and as that is never presumed, the facts relied on to show fraud must be pleaded and proved. Motion Picture Patents Co. v. Eclair Film Co. (D. C. 1913) 208 Fed. 416.

A declaration alleging that plaintiffs were profitably engaged in the manufacture and sale of a certain valuable medicine; that defendant fraudulently, and with intent to injure plaintiffs' business, manufactured under a similar name a spurious and inferior medicine in imitation of that made by plaintiffs, and, by simulating wrappers used by plaintiffs, deceived the public and thus sold large quantities of the spurious

medicine as genuine, to plaintiffs' damage,—was sufficient on demurrer. M. A. Thedford Medicine Co. v. Curry (1895) 96 Ga. 89, 22 S. E. 661.

Complainant corporation was organized under the name "Merchants' Detective Association." Thereafter defendants organized another corporation, located in the same street, under the name "Detective Mercantile Agency," the effect of which was greatly to injure complainant and deceive the public. Held that, the fraudulent intent having been admitted, the bill was sufficient to justify relief by injunction. Merchants' Detective Ass'n v. Detective Mercantile Agency (1888) 25 Ill. App. 250.

Under the Illinois statute an allegation in an indictment that the labels were "duly filed for record as by law provided" sufficiently alleges that the required affidavit was filed. Vincendeau v. People (1906) 76 N. E. 675, 219 Ill. 474, reversing judgment (1905) 119 Ill. App. 603.

An information charging a violation of the Illinois statute protecting labels and trade-marks, which alleged that accused knowingly sold a bottle on which there was a counterfeit label, need not allege that the sale was unlawful, or to whom it was made. People v. Stricker (1913) 102 N. E. 216, 258 Ill. 618, reversing judgment (1912) 170 Ill. App. 485.

An information need not set out the counterfeited label, but it is sufficient to describe it in general terms, if it shows an invasion of a property right possessed by some legal entity. People v. Stricker (1913) 102 N. E. 216, 258 Ill. 618, reversing judgment (1912) 170 Ill. App. 485.

In an action for damages for an alleged infringement of plaintiff's right to the use of a certain trade-mark, any acquiescence by plaintiff's assignor in the use of such trade-mark by defendant must be shown by answer. Julian v. Hoosier Drill Co. (1881) 78 Ind. 408.

Under Indiana statute making it an offense to imitate a trade-mark, it must appear in the indictment that the label imitated was such as was entitled to registration, and the admission of it to registration by the Secretary of State on a mere ex parte showing was not conclusive. State v. Hagen (1893) 33 N. E. 223, 6 Ind. App. 167.

An indictment for illegally buying stamped bottles should allege facts showing that the dealer had, before the offense, fully complied with all the requirements of the statute. State v. Barnett (1902) 65 N. E. 515, 159 Ind. 432.

Where an indictment for violation of Burns' R. S. Ind. 1901, § 8680b, prohibiting the infringement of trade-marks on bottled beverages set out in the statute, failed to allege that defendant filled or caused to be filled the bottle charged to have been unlawfully filled, with any liquid mentioned in the statute, and that the act was with intent to defraud the owner of the bottle, it was insufficient. State v. Wright (1902) 65 N. E. 190, 159 Ind. 394.

The plaintiffs alleged that the use of the words "Poland Springs" by the defendant railway to designate its station in the town of Poland, where the plaintiffs have a spring of water with the same name, besides a large hotel, endangered their trade-mark in the name of "Poland Spring Water," and also alleged that water shipped from the defendant's station may be marked "Poland Spring Water," and sold in competition with the plaintiffs' water. The bill did not allege that this had been done, or was threatened to be done, by the defendant or any one else. Held that, conceding plaintiffs have a trade-mark, it has not been infringed, nor threatened to be infringed, by defendant. Ricker v. Portland & R. F. Ry. (1897) 38 A. 338, 90 Me. 395.

In a prosecution under Acts Mo. 1893, p. 260, it is not necessary to allege in the information an exclusive right in the union to the use of the label. State v. Bishop (1895) 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200, 49 Am. St. Rep. 569.

Under R. S. Mo. 1899, § 10369, an information which alleges that the label used by defendant imitated "in part" the label previously adopted and used by another, and contains a copy of each label, but does not allege what particular parts of defendant's label are claimed to be an imitation of the other, is fatally defective. State v. Thierauf (1902) 67 S. W. 292, 167 Mo. 429; Same v. Bick (1902) 167 Mo. 272, 67 S. W. 1101.

In proceedings, under the New Jersey act, "for the better protection of manufacturers and bottlers of, and dealers in, mineral waters, beer, ale, porter, and other beverages," no statement of demand is required or proper. The issue to be tried is as to the truth of the sworn complaint. Brant v. Froehlich (1887) 49 N. J. Law (20 Vroom) 336, 8 Atl. 283.

In such proceedings the complaint is defective if it charges in the alternative the commission of one or another of several offenses specified in that act. Id.

In an action for infringement, an answer denying knowledge of plaintiff's ownership of the trade-mark, and any intention to do wrong, and averring a single sale of the simulated article, is not frivolous; these allegations being important on the question of damages. Guilhon v. Lindo (1862) 22 N. Y. Super. Ct. (9 Bosw.) 605; Faber v. D'Utassey (N. Y. 1871) 11 Abb. Prac. (N. S.) 399.

A counterclaim by defendant, alleging that he is himself the owner of the name, and that plaintiff has wrongfully used it, and asking that plaintiff be restrained from such use, and required to pay damages for the infringement of the defendant's right thereto, is

proper. It is a cause of action connected with the subject of the action set forth in the complaint, and so falls within the definition of a counterclaim. Glen & Hall Mfg. Co. v. Hall (1874) 61 N. Y. Supp. 226, 19 Am. Rep. 278.

It is essential to state that there is a dealing in competitive goods or competing for patronage of the same class of customers. Longenecker v. Longenecker Bros. (Sup. 1913) 140 N. Y. Supp. 403.

An indictment for counterfeiting a label is sufficient which charges the offense substantially in the language of the statute, describes the instrument which was counterfeited by the name and designation by which it was known, and sets forth the fact of its registry with the secretary of the commonwealth. Commonwealth v. Norton (1901) 16 Pa. Super. Ct. 423.

An indictment averred an intent to use the labels and wrappers to aid in "vending the said goods, wares, and merchandise in imitation of, and intended to resemble and to be sold for, the goods, wares, and merchandise of the company aforesaid." There was no antecedent reference in the indictment to the goods manufactured by the defendant. Held, that the words "the said" should be considered either as mere surplusage or as referring to the goods of the company, and that in neither case was there anything in them to vitiate the indictment. Commonwealth v. Howells (1901) 18 Pa. Super. Ct. 323.

An indictment is not improper because in the first count it charges possession of genuine stamps, labels, and wrappers, with intent to use them to aid in the sale of goods in imitation of manufacturers' goods, and in the second count possesson of counterfeit stamps, labels, and wrappers, with the like intent. Id.

An indictment which avers that the labels and wrappers in question were used on medicines "manufactured and sold by the company," contains a sufficient averment as to the owner of the labels and wrappers being "a manufacturer," inasmuch as the averment necessarily implies that the company by which the medicines were manufactured is a manufacturer. Id.

An indictment which charges the possession of a forged label or wrapper substantially in the language of the act, and which charges the intent literally in the language of the act, is sufficient. Id.

In an indictment for forging a label or wrapper, it is unnecessary to specify the kind of merchandise on which the stamp, label, or wrapper is usually affixed or used. Id.

Laws Wash. 1897, c. 47, § 6, relating to trade-marks, provides that every person who shall use the genuine label of any other person, association, or union, in any manner, not being authorized so to do, shall be guilty of a misdemeanor, etc. Complaint under Washington statute concerning trade-marks, which in the charging part was in almost the exact words of such section, and which described the label as being the label of the Allied Printing Trades Council adopted, used and filed as provided by law, was sufficient. State v. Montgomery (1910) 106 P. 771, 56 Wash. 443.

34. Evidence—Presumptions and burden of proof.—The burden rests upon defendant when sued for an unfair use of the plaintiff's trade-name to justify his use of it. Jacobs v. Beecham (1911) 31 Sup. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree Beecham v. Jacobs (1908) 159 Fed. 129, 86 C. C. A. 623.

The fact that the defendant had formerly used an entirely different style of package, and, after being advised that complainant's goods were more popular, changed to his present style, while it raises a strong suspicion of fraudulent intent, is not conclusive, if the rest of the evidence seems to negative such intent. P. Lorillard Co. v. Peper (1898) 86 Fed. 956, 30 C. C. A. 496, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 690, 43 L. Ed. 1179.

To make a case of unfair competition, the burden is upon complainant to establish by clear and satisfactory proof that the use by another of its own initials on its goods is with fraudulent intent to mislead purchasers. A. Y. McDonald & Morrison Mfg. Co. v. H. Mueller Mfg. Co. (1910) 183 Fed. 972, 106 C. C. A. 312, modifying decree H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co. (C. C. 1908) 164 Fed. 1001.

In cases of unfair competition, the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the defendant. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409, reversing decree (C. C. 1912) 192 Fed. 930.

Where there is no exclusive right to the use of the mark, a technical trademark is not established, and unfair competition must be proved. Apollo Bros. v. Perkins (1913) 207 Fed. 530, 125 C. C. A. 192, reversing judgment (D. C. 1912) 197 Fed. 476.

Use of similar marks, wrappers, and printed matter, and general dress and appearance, is evidence of unfair competition, especially where defendant uses the genuine circulars to advance the sale of the spurious article. Noel v. Ellis (C. C. 1896) 89 Fed. 978.

Where parties act in such a manner as naturally tends to deceive the public, they must be presumed to have contemplated the natural consequences of their acts. R. Heinisch's Sons Co. v. Boker (C. C. 1898) 86 Fed. 765.

Proof that on two occasions, at the instigation of complainant, defendant's

employé sold to complainant's agents, in bulk, bitters resembling those sold by complainant, and advised them to put the same in empty bottles which had been used for complainant's bitters, and to sell the same as complainant's bitters, does not prove a course of wrongdoing on the part of defendant which should be enjoined, as against proof to the contrary and evidence that defendant repudiated the act of his employé. Hostetter Co. v. Brunn (C. C. 1901) 107 Fed. 707.

Two publications designed for, and reaching, different classes of readers were not competitors, and complainant was not entitled to an injunction restraining defendant from using the word "Comfort" in the name of his paper, in the absence of proof that deception or confusion actually resulted to his injury. Gannett v. Ruppert (C. C. 1902) 119 Fed. 221, decree reversed Gannert v. Same (1904) 127 Fed. 962, 62 C. C. A. 594.

Where, in a suit for unfair competition, it was apparent that confusion was likely to arise because of defendant's imitation of plaintiff's package, an intent to defraud would be presumed. Devlin v. McLeod (C. C. 1904) 135 Fed. 164.

In a suit for alleged unfair competition in the dress of goods, it should be clear that the complainant has an established and exclusive right to pack and dress his goods in the way he asserts, on which the defendant is deceptively trying to trade. Lamont, Corliss & Co. v. Hershey (C. C. 1905) 140 Fed. 763.

To justify relief against unfair use of descriptive word having secondary signification, use in such manner as to deceive and wrongful intent must be proved or shown inferentially; but, where the trade-mark is meaningless, except as indicating by whom goods were made, mere proof of use by another is sufficient. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

Mere proof of use of another's trade-mark entitles the owner to an injunction, where the trade-mark is an arbitrary term, meaningless except as indicating by whom goods were made. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1915) 221 Fed. 456.

In an action to restrain unfair and fraudulent business competition, complainant has the burden of proving such competition. Pippen v. Harris (Ala. 1913) 61 So. 890.

In an action to enjoin alleged unfair trade dealing with respect to a business name, fraud will not be presumed, but must be pleaded and shown. Dunston v. Los Angeles Van & Storage Co. (Cal. 1913) 131 P. 115.

In a suit to restrain the alleged wrongful use of a trade-name and trade symbol, fraud need not be directly proved, but may be inferred from the fact of imitation alone. Atlas Assur. Co. v. Atlas Ins. Co. (Iowa, 1907) 112 N. W. 232, judgment modified (Iowa, 1908) 114 N. W. 609.

In an action to restrain fraudulent usurpation of plaintiff's trade reputation, plaintiff need not make out a legal title to an exclusive trade-mark, if defendant sells his goods as those of plaintiff, and such fraudulent sales result, or are likely to result, in damage to plaintiff. Avery v. Meikle (1883) 81 Ky. 73, 4 Ky. Law Rep. 759.

Where one intentionally uses, or closely imitates, another's trade-marks on merchandise or manufactures, the law presumes that he did it fraudulently, for the purpose of misleading the public, and of supplanting such other in the good will of his trade or business. Taylor v. Carpenter (N. Y. 1846) 2 Sandf. Ch. 603.

Where plaintiff introduces no evidence except the respective labels, and experienced witnesses testify to the long-continued use of defendant's label on the market, and that they never heard of any one being deceived by it, no injunction can be granted, unless the labels are so similar as to make out a fraudulent intention on defendant's part to palm off its goods as those of the plaintiff. Day v. Webster (1897) 49 N. Y. Supp. 314, 23 App. Div. 601.

In an action based on the theory of unfair competition in using a certain label, and not on the theory of an infringement of a trade-mark, fraud must be affirmatively shown, where the labels used by defendants are totally dissimilar from those of plaintiff's in lettering and in general appearance. W. A. Gaines & Co. v. Leslie (1898) 54 N. Y. Supp. 421, 25 Misc. Rep. 20.

Fraudulent intention may be presumed from the mere fact of imitation of a trade-mark; but the presumption is not conclusive, and may be overcome by facts showing that the imitation was for other and innocent purposes. Hoeb v. Bishop (Ohio, 1889) 22 Wkly. Law Bul. 151.

35. —— **Weight and sufficiency.**—In the absence of evidence showing that the words "standard" or "computing," as applied to scales, either singly or together, have acquired a secondary meaning in the trade, as indicating a scale made or sold by complainant, it is not entitled to enjoin their use by another manufacturer or dealer, as constituting unfair competition. Computing Scale Co. v. Standard Computing Scale Co. (1902) 118 Fed. 965, 55 C. C. A. 459.

Evidence examined, and held not to sustain a charge of unfair competition in simulating complainant's marks or brands used on barrels of lubricating oil. Vacuum Oil Co. v. Climax Refin-

ing Co. (1902) 120 Fed. 254, 56 C. C. A. 90, writ of certiorari denied (1903) 24 Sup. Ct. 846, 191 U. S. 574, 48 L. Ed. 308.

The fact that a defendant adopted for a new product a label wholly distinctive from those previously used is no evidence of a fraudulent intention to compete unfairly with complainant, which had placed on the market a similar article, where its prior labels were also distinctive from each other, and the new product was different in quality from any it had previously made. G. W. Cole Co. v. American Cement & Oil Co. (1904) 130 Fed. 703, 65 C. C. A. 105.

Unfair competition is not established by proof of similarity in form, dimensions or general appearance alone, especially where such similarity appears not to result from any design to misrepresent its origin. Marvel Co. v. Pearl (1904) 133 Fed. 160, 66 C. C. A. 226.

Evidence merely that defendant used the name "Featherbone," to which it had the right, and the articles themselves from their character were not distinguishable, and there was no attempt to imitate the dress or labels of complainant, did not establish unfair competition. Warren Featherbone Co. v. American Featherbone Co. (1905) 141 Fed. 513, 72 C. C. A. 571.

While fraud alone is not sufficient to entitle the complainant to a decree restraining unfair competition, yet it is a fact to be taken into consideration by the court. United States Tobacco Co. v. McGreenery (1906) 144 Fed. 1022, 74 C. C. A. 682, affirming decree (C. C. 1906) 144 Fed. 531.

Evidence held insufficient to establish unfair competition by intentionally representing goods made by others as those of complainant, or by actually deceiving any purchaser. Newcomer & Lewis v. Scriven Co. (1909) 168 Fed. 621, 94 C. C. A. 77, writ of certiorari denied J. A. Scriven Co. v. Newcomer (1909) 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065.

Where complainant sold a wall covering under the name "Muresco," and defendant sold a similar material under the name "Murafresco," which was a shortening of an older trade-name used by others commercially before defendant had anything to do with the article, this did not constitute actionable unlawful competition; there being evidence that the public had not been deceived, and none to the contrary. Benjamin Moore & Co. v. Auwell (1910) 178 Fed. 543, 102 C. C. A. 53, affirming judgment (C. C. 1909) 172 Fed. 508.

On bill to enjoin the use by a competitor of a certain kind of package for hosiery, evidence held insufficient to show intent by defendant to deceive customers. Holeproof Hosiery Co. v. Wallach Bros. (1911) 192 Fed. 534, 112 C. C. A. 655, modifying decree (C. C. 1911) 190 Fed. 606.

Evidence considered, and held insufficient to sustain a claim of unfair competition by imitation of complainant's labels and boxes containing bill lacings. Bristol Co. v. Graham (1912) 199 Fed. 412, 117 C. C. A. 644.

Evidence held insufficient to sustain a bill for unfair competition in the adoption and use of a trade-name. Denver Chemical Mfg. Co. v. Lilley (C. C. A. 1914) 216 Fed. 869.

Evidence held insufficient to establish unfair competition. S. R. Feil Co. v. John E. Robbins Co. (1915) 220 Fed. 650, 136 C. C. A. 258.

Complainant was the proprietor of the word "Cuticura," as a trade-mark for a toilet soap. Defendant placed upon the market a "Cuticle Soap." In circulars defendant copied some of the reading matter from complainant's circulars. Held, that such facts did not establish unfair competition, where defendant's soap, wrappers, and boxes were so entirely dissimilar in color and general appearance that no purchaser of ordinary observation would be deceived thereby. Potter Drug & Chemical Corp. v. Pasfield Soap Co. (C. C. 1900) 102 Fed. 490, decree affirmed (1901) 106 Fed. 914, 46 C. C. A. 40.

Where the testimony showed that defendant manufactured bitters, and sold the same in bulk as Hostetter's Bitters, and advised purchasers to put the same in empty Hostetter bottles, which evidence was re-enforced by other testimony such evidence was sufficient to sustain complainant's charge of fraud and unfair competition. Hostetter Co. v. Conron (C. C. 1901) 111 Fed. 737.

Evidence considered, and held not to establish fraudulent conduct on the part of a manufacturer, or any acts constituting unfair competition in trade, which would entitle complainants to equitable relief. Siegert v. Gandolfi (C. C. 1905) 139 Fed. 917, decree reversed (1907) 149 Fed. 100, 79 C. C. A. 142, writ of certiorari denied Gandolfi v. Siegert (1907) 27 Sup. Ct. 790, 205 U. S. 542, 51 L. Ed. 922.

Evidence showing that defendant advertised to supply to its customers Hostetter's Bitters without limit as to quantity at a price only two-thirds of that at which such bitters are sold by the manufacturer, and that defendant did supply to its customers calling for such bitters an imitation, sometimes, when desired, placing the same in complainant's bottles, but without using its labels or trade-mark, is sufficient to establish unfair competition and to entitle complainant to an injunction and an accounting. Hostetter Co. v. Gallagher Stores (C. C. 1905) 142 Fed. 208.

The showing made held not to establish unfair competition by defendant by

imitating complainant's cartons and packages containing chewing gum, such as to warrant the granting of a preliminary injunction. William Wrigley, Jr., Co. v. Grove Co. (C. C. 1908) 161 Fed. 885.

Evidence held insufficient to establish unfair competition in the sale of cigarettes under a similar name. Perkins v. Apollo Bros. (D. C. 1912) 197 Fed. 476.

Evidence held not sufficient to show that the sending of notices by the owner of a patent to users of alleged infringing articles would warrant the granting of an injunction. United Electric Co. v. Creamery Package Mfg. Co. (D. C. 1913) 203 Fed. 53.

In a suit to restrain unfair competition in the sale of upright drills or drill presses, evidence held insufficient to show a sale by defendant in such a way as to mislead the purchaser to believe that the drill sold was one manufactured by complainant. W. F. & John Barnes Co. v. Vandyck-Churchill Co. (D. C. 1913) 207 Fed. 855.

Evidence held insufficient to establish the charge of unfair competition by making, advertising, and selling articles which were mere imitations of those made and sold by complainant so as to entitle complainant to an injunction. Hamilton Mfg. Co. v. Tubbs Mfg. Co. (C. C. 1908) 216 Fed. 401.

Fraud, constituting unfair competition, must be satisfactorily proven. Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co. (D. C. 1915) 225 Fed. 138.

Evidence held insufficient to show that defendant tire company was guilty of unfair competition in disposing of its tires as those of complainant. Id.

In suit to enjoin unfair competition, plaintiff's proof that defendant's trademark was such as would naturally and probably deceive ordinary buyers was sufficient although actual deception of buyers was not shown. Aluminum Cooking Utensil Co. v. National Aluminum Works (D. C. 1915) 226 Fed. 815.

Under a bill to restrain unfair and fraudulent trade competition, proof that defendants' employers or drivers had made such fraudulent representations as to product they sold as complainant's product was a variance. Pippen v. Harris (Ala. 1913) 61 So. 890.

Where defendant advertised that he had purchased goods which had been manufactured for a bankrupt firm, which fact there was testimony to support, and plaintiff had, in its advertisements, grossly misrepresented the value of the stock of such bankrupt firm so purchased by it, the facts were insufficient to justify interference by injunction to restrain defendant from so advertising, on the alleged ground that the public would be misled and deceived thereby. Schradsky v. Appel Clothing Co. (1897) 50 P. 528, 10 Colo. App. 195.

Where plaintiff and defendant manufactured spring beds under the same patent, plaintiff's signs being "N. H. Roll-up-Spring Bed," and an independent trader sold defendants' beds as "The only original N. H. Roll-up Spring Bed," there was no ground for injunction; no fraud or danger thereof or deception of the public being shown. New Haven Patent Rolling Spring Bed Co. v. Farren (1883) 51 Conn. 324.

In an action to enjoin unfair competition by deceiving the public as to the ownership of ladders, manufactured by both parties, evidence held to show fraud in the selection of defendant's corporate name. Hartzler v. Goshen Churn & Ladder Co. (Ind. App. 1914) 104 N. E. 34.

Evidence in an action to enjoin unfair competition in trade held to support findings that plaintiff did not consent to the use of defendant's corporate name, and that such corporate name was selected and used for an unfair and fraudulent purpose. Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co. (1908) 117 N. W. 447, 105 Minn. 315.

A label bearing six distinct points of resemblance to a label used by another person in the same business is such an imitation as should be enjoined, where it appears that at least two persons were deceived, and defendant's sales increased, without other cause being shown, since the adoption of the label. McCann v. Anthony (1886) 21 Mo. App. 83.

In a suit to enjoin use of packages and labels resembling those used by complainant, evidence held to show that defendant's action in simulating complainant's packages and labels tended to mislead the public as to the origin of the goods. Johnson & Johnson v. Seabury & Johnson (1905) 61 A. 5, 69 N. J. Eq. 696.

In a suit for an injunction against the unlawful use of a union label on a suit of clothes, evidence held to show that defendant used such label as alleged, and that plaintiff's agent did not furnish the label to defendant and order same inserted in the suit, and an injunction was authorized. United Garment Workers of America v. Davis (N. J. 1909) 74 A. 306.

Evidence held not to show that the use of the trade-name "Page of London" tended to deceive the public, so as to be unfair competition with plaintiff's "London Shop." Rosenthal v. Blatt (N. J. Ch. 1912) 83 A. 387.

Where one sets up a like business in an adjoining county, under his own name, which is the same as plaintiff's, the location of defendant's business was not of itself evidence of an attempt to deceive the public, or an interference with the business of plaintiffs. Meneely v. Meneely (N. Y. 1874) 1 Hun. 367, 3 Thomp. & C. 540, affirmed (1875) 62 N. Y. 427, 20 Am. Rep. 489.

Where it was proved that the public, asking for the genuine article from re-

tail grocers, was supplied with defendant's article in a simulated wrapper, and accepted the same without detecting the simulation, such evidence sufficiently showed that the public had been fraudulently deceived. Enoch Morgan's Sons Co. v. Troxell (N. Y. 1879) 57 How. Prac. 121.

Where defendant closely followed plaintiff's packages in size, form, and printing, only substituting the name "Nevada-Silicon Company" for plaintiff's "Electro-Silicon Company," the proof of simulation was sufficient to entitle the plaintiff to an injunction. Electro-Silicon Co. v. Levy (N. Y. 1880) 59 How. Prac. 469.

Where it is shown that defendant has in his store, and offers for sale, a spurious article, with an imitation of plaintiff's trade-mark thereon, although but a single sale is proved, it is sufficient to sustain an injunction against a continuance of the wrong. Low v. Hart (1882) 90 N. Y. 457.

Evidence that plaintiff had a license to use a device, though it remained under the control of the owner, was insufficient to show that he was entitled to an injunction restraining alleged unfair competition. Piaget v. Headley (1900) 68 N. Y. Supp. 351, 33 Misc. Rep. 204.

Where defendant's bottle in which cologne was sold in competition with plaintiff was a close imitation of complainant's bottle, such imitation was evidence of a fraudulent intent to deceive the public; proof of actual fraudulent intent not being necessary to an injunction. Hoyt v. Hoyt (1886) 43 Leg. Int. 151, 2 Pa. Co. Ct. R. 152.

In an action to restrain defendant from selling other malted milk as plaintiff's product, the formula of plaintiff's milk is material to determine whether plaintiff's product was as represented in order to ascertain whether substitutions had been made. Horlick's Malted Milk Co. v. A. Spiegel Co. (1913) 144 N. W. 272, 155 Wis. 201.

36. **Injunction.**—Procedure in injunction cases, see notes under § 9504, ante.

37. **Damages and profits.**—See notes under §§ 9501 and 9504, ante.

§ 9509. (Act Feb. 20, 1905, c. 592, § 24.) Pending applications for registration; amendment and prosecution thereof.

All applications for registration pending in the office of the Commissioner of Patents at the time of the passage of this Act may be amended with a view to bringing them, and the certificate issued upon such applications, under its provisions, and the prosecution of such applications may be proceeded with under the provisions of this Act. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

Notes of Decisions

Pending applications.—An application for registration of a trade-mark filed under the provisions of section 9485, ante, as formerly enacted, and which stood, at the date when this section and section 9499, ante, went into effect, rejected by the Commissioner of Patents on an appeal duly taken to him, is not a "pending" application. In re Mark Cross Co. (1905) 26 App. D. C. 101.

A trade-mark application which was involved in an interference at the time of the passage of section 9499, ante, and this section, is a pending application, such as may be amended to bring it under the act. Giles Remedy Co. v. Giles (1905) 26 App. D. C. 375.

§ 9510. (Act Feb. 20, 1905, c. 592, § 25.) Damages from registration procured by false or fraudulent declaration or means; recovery.

Any person who shall procure registration of a trade-mark, or entry thereof, in the office of the Commissioner of Patents by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable to pay any damages sustained in consequence thereof to the injured party, to be recovered by an action on the case. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

Notes of Decisions

Fraudulent registration.—A registration under the act of 1905 of a trade-mark for straight whisky held not fraudulent because of failure to give notice to one entitled to use the words on blended whisky. W. A. Gaines & Co. v. Rock Spring Distilling Co. (1915) 226 Fed. 531, 141 C. C. A. 287.

§ 9511. (Act Feb. 20, 1905, c. 592, § 26.) Regulations for proceedings for registration.

The Commissioner of Patents is authorized to make rules and reg-

ulations, not inconsistent with law, for the conduct of proceedings in reference to the registration of trade-marks provided for by this Act. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

Notes of Decisions

Rules.—Rule requiring the question of whether there is interference in fact in a trade-mark case to be raised within a stated time before the examiner of interferences was within the authority of the Commissioner of Patents to promulgate, and must be complied with; and this court will not entertain such a question at the instance of a defeated party in a trade-mark case, when he has not complied with the rule. Somers v. Newman (1908) 31 App. D. C. 193.

§ 9512. (Act May 4, 1906, c. 2081, § 2.) Classes of merchandise for purpose of trade-mark registration.

The Commissioner of Patents shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class. On a single application for registration of a trade-mark the trade-mark may be registered at the option of the applicant for any or all goods upon which the mark has actually been used comprised in a single class of merchandise, provided the particular descriptions of goods be stated. (34 Stat. 169.)

This section was part of an act entitled "An act to amend the laws of the United States relating to the registration of trade-marks."

Section 1 of the act amended section 1 of the Trade-Mark Act of 1905, and is incorporated in said section as set forth ante, § 9485.

Section 3 of the act is set forth ante, § 9486.

Section 4 of the act provided that the act should take effect July 1, 1906.

See notes to said Act Feb. 20, 1905, c. 592, § 1, ante, § 9485.

Notes of Decisions

Power of court of appeals.—The Court of Appeals has no power to make a system of classification under this section, nor pass on the question as to whether an applicant has stated the class of merchandise and the particular description of goods comprised in the class to which he seeks to appropriate his trade-mark, except as each case comes before it. In re A. G. Spalding & Bros. (1906) 27 App. D. C. 314.

§ 9513. (Act Feb. 20, 1905, c. 592, § 27.) Articles imported, copying or simulating, etc., trade-name or registered trade-mark, not admitted to entry.

No article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act, or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any custom-house of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this Act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury

shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

Provisions similar to those of this section were contained in the Dingley Tariff Act of July 24, 1897, c. 11, § 11, 30 Stat. 207.

Notes of Decisions

Entry of goods bearing foreign trade-marks.—The circuit court had no jurisdiction to grant a mandamus to compel a collector of customs to take evidence as to validity of a trade-mark, and that the question whether the decision of the proper customs officers was reviewable by the courts, and, if so, in what way, was not before the court in this proceeding. In re Vintschger (C. C. 1892) 50 Fed. 459.

A foreigner simulating a trade-mark of a domestic manufacturer cannot obtain the right to send fraudulently marked goods into the country merely by recording his fraudulent mark before the domestic manufacturer has taken the steps necessary to protect himself. (1895) 21 Op. Atty. Gen. 260.

The importation into the United States of an article bearing the genuine trade-mark of the maker, by one not the owner of the trade-mark, is not forbidden by section 11 of the tariff act of 1897, although such trade-mark has been properly registered in the United States and all rights thereunder have been transferred and belong to another party. (1902) 24 Op. Atty. Gen. 551.

The purpose of this section is twofold—to protect the domestic manufacturer against encroachment upon his trade-mark and the public from the imposition of imported articles assuming domestic names. It is the simulation or counterfeit, and not reality or genuineness, at which the section is aimed. Id.

§ 9514. (Act Feb. 20, 1905, c. 592, § 28.) Notice of registration to be affixed to trade-mark or to package inclosing article; notice of registration or of infringement requisite of recovery of damages.

It shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words "Registered in U. S. Patent Office," or abbreviated thus, "Reg. U. S. Pat. Off.," or when, from the character or size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this can not be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice. (33 Stat. 730.)

See notes to section 1 of this act, ante, § 9485.

When a trade-mark was to be deemed "affixed" to an article, within the meaning of this act, was defined by section 29 of this act, post, § 9515.

Notes of Decisions

Necessity of affixing notice.—The use of a certain name for a manufactured article in the advertisements of that article does not constitute an adoption of such name as a trade-mark, since a trade-mark must be actually affixed to the articles themselves. Walter Baker & Co. v. Delapenha (C. C. 1908) 160 Fed. 746; Hump Hairpin Co. v. De Long Hook & Eye Co. (1913) 39 App. D. C. 484; Consumers Co. v. Hydrox Chemical Co. (1913) 40 App. D. C. 284; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. (1892) 142 Ill. 494, 30 N. E. 339 (affirmed [1891] 40 Ill. App. 430); St. Louis Piano Mfg. Co. v. Merkel (1876) 1 Mo. App. 305.

To secure a trade-mark right in a name under which medical tablets are sold, it is not necessary to label each tablet with the name. The fixing of the name to each bottle containing a given number of the tablets is sufficient. Breitenbach v. Rosenberg (1911) 37 App. D. C. 102.

A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. William J. Moxley Co. v. Braun & Fitts Co. (1901) 93 Ill. App. 183.

To constitute a trade-mark, it must be annexed to and accompany the goods into the market so as to identify them. Westminister Laundry Co. v. Hesse Envelope Co. (Mo. App. 1913) 156 S. W. 767.

Where defendants did not affix the word "Delsarte" to shoes until after

they had been purchased by them for a consumer, they were not entitled to claim the right to use the word as a trade-mark. Medlar & Holmes Shoe Co. v. Delsarte Mfg. Co. (1905) 61 A. 410, 68 N. J. Eq. 706, affirming decree (1900) 46 A. 1089, 68 N. J. Eq. 706.

Notice to infringer.—The fact that a label registered as a trade-mark does not bear the notice of registration required by this section does not render a bill for infringement demurrable where its allegations are ample to let in proof under the exception. G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133.

Under this section where the registrant neither gave notice of the registration by affixing a notice to that effect to the articles sold under such trade-mark, nor notified defendant of the infringement, damages were not recoverable for the infringement. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

Where a manufacturer believes a dealer to be selling the goods of another as his, he should give the dealer notice, and an opportunity to desist, before bringing suit. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (C. C. 1899) 92 Fed. 774.

§ 9515. (Act Feb. 20, 1905, c. 592, § 29.) Construction of act; definitions.

In construing this Act the following rules must be observed, except where the contrary intent is plainly apparent from the context thereof: The United States includes and embraces all territory which is under the jurisdiction and control of the United States. The word "States" includes and embraces the District of Columbia, the Territories of the United States, and such other territory as shall be under the jurisdiction and control of the United States. The terms "person" and "owner," and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act, include a firm, corporation, or association as well as a natural person. The term "applicant" and "registrant" embrace the successors and assigns of such applicant or registrant. The term "trade-mark" includes any mark which is entitled to registration under the terms of this Act and whether registered or not and a trade-mark shall be deemed to be "affixed" to an article when it is placed in any manner in or upon either the article itself or the receptacle or package or upon the envelope or other thing in, by, or with which the goods are packed or inclosed or otherwise prepared for sale or distribution. (33 Stat. 731.)

See notes to section 1 of this act, ante, § 9485.

§ 9516. (Act Feb. 20, 1905, c. 592, § 30.) Time of taking effect of act; repeal; exception of certificates of registration issued under previous acts.

This Act shall be in force and take effect April first, nineteen hundred and five. All Acts and parts of Acts inconsistent with this Act are hereby repealed except so far as the same may apply to certificates of registration issued under the Act of Congress approved March third, eighteen hundred and eighty-one, entitled "An Act to authorize the registration of trade-marks and protect the same," or under the Act approved August fifth, eighteen hundred and eighty-two, entitled "An Act relating to the registration of trade-marks." (33 Stat. 731.)

See notes to section 1 of this act, ante, § 9485.

The Trade-Mark Act of March 3, 1881, c. 138, 21 Stat. 502, and Act Aug. 5, 1882, c. 393, 22 Stat. 298, mentioned in this section, were superseded by this act, except as provided by this section.

CHAPTER THREE

Copyrights

Sec.
9517. Exclusive rights as to copyrighted works; to print, etc., copy, and vend; to translate, dramatize, etc.; to deliver in public, if lecture, etc.; to perform, exhibit, etc., if drama or dramatic work; to perform, or make arrangement or record, if musical composition; and to control mechanical reproduction thereof.
9518. Rights of author or proprietor of unpublished work not annulled or limited.
9519. Copyright to protect component parts of work already copyrighted; copyright upon composite works or periodicals.
9520. Copyright upon all writings of author.
9521. Classification of applications for registration.
9522. Copyright upon compilations, etc., of works in public domain or of copyrighted works; subsisting copyrights not affected.
9523. Copyright not to subsist in works in public domain, or works published prior to act and not already copyrighted, or government publications; effect of publication by government of copyrighted material.
9524. Authors or proprietors, etc., entitled to copyright; alien authors or proprietors.
9525. Certificate of registration or of copyright to be issued to proprietor of certificate of registration, copyright, trade-mark, or patent issued by foreign government, protecting pattern, model, design, copyright, trade-mark, or manufactured article imported for and exhibited at Panama-Pacific International Exposition; branch office; registers of certificates issued; deposits of registers in Patent Office and Copyright Office.
9526. Infringement of rights protected in articles, etc., exhibited at exposition; injunction; damages; impounding of articles, etc., during pendency of action; destruction of articles, etc.
9527. Punishment for infringement of rights protected.
9528. Laws applicable to actions for infringement.
9529. Beginning and ending of protection to articles exhibited.
9530. Copyright secured by publication of work with notice of copyright affixed to copies.
9531. Registration of claim to copyright, and issuance of certificate thereof.
9532. Copyright of works not reproduced for sale.
9533. Deposit of copies of work after publication; action or proceeding for infringement not maintainable until after deposit of copies and registration.
9534. Failure to deposit copies; demand therefor; penalty for default after demand.
9535. Postmaster's receipt for articles deposited; transmission by mail without cost to claimant.
9536. Mechanical work, etc., of printed book or periodical accorded publication to be done within United States; exceptions.
9537. Affidavit to accompany copies of book deposited.
9538. Making false affidavit punishable; penalty.
9539. Form of notice of copyright.
9540. Place of application of notice of copyright; one notice in each volume or number of newspaper or periodical.
9541. Effect of accidental omission of notice of copyright from particular copy or copies of work.
9542. Ad interim protection of book published abroad.
9543. Extension of ad interim protection to full term of copyright.
9544. Duration of copyright; renewal by proprietor; renewal by author or his widow, widower, or children, etc.
9545. Renewal of copyrights subsisting at time act goes into effect.
9546. Infringement.
(a) Injunction restraining.
(b) Damages and profits; amount; other remedies.
(c) Impounding during action infringing articles.
(d) Destruction of infringing copies, etc., and plates, etc.
(e) Royalties for use of mechanical reproduction of musical works.
Rules of Procedure.
9547. Jurisdiction of courts in enforcing remedies provided.
9548. Joinder in one action of proceedings for different remedies.
9549. Willful infringement for profit punishable; penalty; exception of performance of musical works for charitable or educational purposes.
9550. Fraudulent notice of copyright, or removal or alteration of notice on copyrighted article, punishable; penalty.
9551. Importation of article bearing false notice of copyright, or

Sec.
piratical copies of copyrighted work, prohibited.
9552. Importation, during existence of copyright in book, of piratical copies thereof, or of copies not produced in accordance with provisions of section 15 of act; exceptions.
9553. Forfeiture and destruction of articles prohibited importation, brought into United States.
9554. Regulations to prevent importation in mails of articles prohibited; notice of such actual or contemplated importation.
9555. Jurisdiction of actions, etc., under copyright laws.
9556. District in which actions, etc., under act may be brought.
9557. Injunctions; service and enforcement thereof.
9558. Transmission of certified copies of papers for enforcement of injunction by other court.
9559. Review of orders, judgments, or decrees, under copyright laws, on appeal or writ of error.
9560. Limitation of criminal proceedings under act.
9561. Costs in actions, etc., under act; attorney's fees.
9562. Copyright distinct from property in object copyrighted; effect of sale, etc., of such object, and of assignment of copyright.
9563. Assignments, etc., of copyrights.
9564. Assignments executed in foreign country; acknowledgment and certificate thereof.
9565. Recording assignments.
9566. Certificate of record of assignment.
9567. Use of name of assignee in notice of copyright.
Sec.
9568. Copyright Office; preservation therein of records, etc.
9569. Register of Copyrights; appointment; salary; assistant register, subordinate assistants.
9570. Deposit by Register of Copyrights of moneys received as copyright fees; reports thereof.
9571. Bond of Register of Copyrights.
9572. Annual report of Register of Copyrights.
9573. Seal of Copyright Office.
9574. Rules for registration of claims to copyright.
9575. Record books in Copyright Office.
9576. Certificate of registration; effect as evidence; receipt for copies of work deposited.
9577. Catalogues of copyright entries; effect of catalogues as evidence.
9578. Distribution and sale of catalogues of copyright entries; disposal of proceeds.
9579. Records and works deposited in Copyright Office open to public inspection; taking copies of copyright entries.
9580. Disposition of articles deposited in Copyright Office.
9581. Destruction of articles deposited in Copyright Office remaining undisposed of; removal of such articles by author, proprietor, etc.; manuscripts of unpublished works.
9582. Fees.
9583. Definition of terms "the date of publication" and "author" in construction of act.
9584. Repeal; causes of action for infringements committed before act not affected.

(R. S. §§ 4948–4971. Superseded.)

These sections, constituting chapter 3 of this title of the Revised Statutes, as well as subsequent statutes amendatory thereof or additional thereto, were superseded by the provisions relating to the same subject of the Copyright Act of March 4, 1909, c. 320, post, §§ 9517–9524, 9530–9584, section 63 of which, post, § 9584, repealed all laws or parts of laws in conflict with the provisions of the act, but provided that causes of action for infringement of copyright theretofore committed should not be affected.

See notes to said Act March 4, 1909, c. 320, § 1, post, § 9517.

§ 9517. (Act March 4, 1909, c. 320, § 1.) Exclusive rights as to copyrighted works; to print, etc., copy, and vend; to translate, dramatize, etc.; to deliver in public, if lecture, etc.; to perform, exhibit, etc., if drama or dramatic work; to perform, or make arrangement or record, if musical composition, and to control mechanical reproduction thereof.

Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the Copyright Office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance

for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs. (35 Stat. 1075.)

This was the first section of the Copyright Act of 1909, entitled "An act to amend and consolidate the acts respecting copyright."

Sections 2–63 of the act are set forth post, §§ 9518–9524, 9530–9584.

Section 64 of the act provided that the act should go into effect July 1, 1909.

This act (Act March 4, 1909, c. 320) superseded R. S. §§ 4948–4971, which originally constituted this chapter of the Revised Statutes, and all subsequent provisions amendatory thereof or additional thereto.

R. S. § 4948, provided that copyrights should be under the charge of the Librarian of Congress, under the supervision of the joint committee of Congress on the Library.

R. S. § 4949, provided that the seal of the Librarian of Congress should be used for the authentication of all records, etc., connected with copyrights. It was superseded specifically by section 52 of this act, post, § 9573.

R. S. § 4950, related to the bond of the Librarian of Congress, and was superseded by subsequent provisions of the same nature of Act Feb. 19, 1897, c. 265, § 1, ante, § 131.

R. S. § 4951, required the Librarian of Congress to report annually to Congress the number and description of copyright publications entered during the year.

R. S. § 4952, as amended by Act March 3, 1891, c. 565, § 1, 26 Stat. 1106, and Act March 3, 1905, c. 1432, 33 Stat. 1000, prescribed what publications might be entered for copyright, and by whom such entries might be made.

R. S. § 4953, prescribed the term of copyrights.

R. S. § 4954, as amended by Act March 3, 1891, c. 565, § 2, 26 Stat. 1107, prescribed the term for which copyrights might be continued.

R. S. § 4955, provided for the assignment of copyrights, and the recording of such assignments.

R. S. § 4956, as amended by Act March 3, 1891, c. 565, § 3, 26 Stat. 1107, provided for the deposit of titles and published copies.

R. S. § 4957, provided for the record of entries of copyrighted books, etc., and for attested copies thereof.

R. S. § 4958, as amended by Act March 3, 1891, c. 565, § 4, 26 Stat. 1108, prescribed the fees to be paid for services rendered in the copyrighting of books, etc.

R. S. § 4959, as amended by Act March 3, 1891, c. 565, § 5, 26 Stat. 1108, provided for deposit with the Librarian of Congress of copies of copyrighted books, etc.

R. S. § 4960, prescribed the penalty for failure to comply with sections 4956 and 4959.

R. S. § 4961, required postmasters to give receipts for books, etc., deposited for forwarding to the Librarian of Congress, and to mail them to their destination.

R. S. § 4962, provided for the publication of notice of entry for copyright. It was superseded by the provisions for that purpose contained in Act June 18, 1874, c. 301, § 1, 18 Stat. 78.

R. S. § 4963, as amended by Act March 3, 1891, c. 565, § 6, 26 Stat. 1109, and Act March 3, 1897, c. 392, § 1, 29 Stat. 694, prescribed a penalty for the false publication of notices of entry or the importation of articles bearing such notices.

R. S. § 4964, as amended by Act March 3, 1891, c. 565, § 7, 26 Stat. 1109, authorized the recovery of damages for violations of copyrights of books.

R. S. § 4965, as amended by Act March 3, 1891, c. 565, § 8, 26 Stat. 1109, and Act March 2, 1895, c. 194, 28 Stat. 965, authorized the recovery of damages for violations of copyrights of maps, charts, prints, etc.

R. S. § 4966, as amended by Act Jan. 6, 1897, c. 4, 29 Stat. 481, authorized the recovery of damages for violations of copyrights of dramatic or musical compositions.

R. S. § 4967, as amended by Act March 3, 1891, c. 565, § 9, 26 Stat. 1109, authorized the recovery of damages for printing or publishing manuscripts without the consent of the author or proprietor.

R. S. § 4968, prescribed a limitation of actions in copyright cases.

R. S. § 4969, prescribed the defenses which might be made to actions in copyright cases.

R. S. § 4970, authorized the issue of injunctions in copyright cases.

R. S. § 4971, provided that the chapter should not be construed to prohibit the printing, publishing, importation, or sale of any book, etc., written, etc., by a person not a citizen or resident of the United States. It was expressly repealed by Act March 3, 1891, c. 565, § 10, 26 Stat. 1109.

Act June 18, 1874, c. 301, § 1, 18 Stat. 78, provided for the publication of notice of entry of copyright, and prescribed forms for such notices.

Act June 18, 1874, c. 301, § 3, 18 Stat. 79, provided that the words "engraving," "cut," and "print" should be applied only to pictorial illustrations or works connected with the fine arts, and that no prints or labels designed to be used for any other article of manufacture should be entered under the copyright law, but that they might be registered in the Patent Office.

Act Aug. 1, 1882, c. 366, 22 Stat. 181, provided that manufacturers of designs for molded decorative articles, tiles, placques, or articles of pottery or metal subject to copyright might put the copyright mark prescribed by R. S. § 4962, upon the back or bottom of such articles, etc.

Act March 3, 1891, c. 565, § 11, 26 Stat. 1109, provided that each volume of a book in two or more volumes, when such volumes were published separately, and each number of a periodical, should be considered an independent publication.

Act March 3, 1891, c. 565, § 13, 26 Stat. 1110, related to copyrights by citizens or subjects of foreign countries.

Act March 3, 1893, c. 215, 27 Stat. 743, provided that any author, etc., who had failed to deliver to the Librarian of Congress the copies, etc., required within the time limit prescribed, might deliver such copies, etc., before March 1, 1893, and thereby become entitled to his copyright, etc.

These acts were all superseded by this act.

No Government publication is to be copyrighted, by a provision of the Printing and Binding Act of Jan. 12, 1895, c. 23, § 52, ante, § 7020.

Provisions extending temporarily the time for filing application for registration of any print or label were made by Act Aug. 17, 1916, c. 350, ante, §§ 9438a–9438c.

Notes of Decisions

1. Constitutionality of act.
2. Applicability of prior act.
3. Nature of right.
4. Common-law rights.
5. "Exclusive right to vend."
6. Subjects of copyright—In general.
7. — Books.
8. — Designs.
9. — Dramatic compositions.
10. — Engravings, cuts, prints, or photographs.
11. — Maps or charts.
12. — Musical compositions.
13. — Newspapers.
14. — Paintings, drawings, or chromos.
15. Originality of work.
16. Statutes.
17. Law reports.
18. Literary or artistic qualities of work.
19. Illegal or immoral works.
20. Persons entitled to copyrights.
21. Extent of rights acquired—In general.
22. — Title of work.
23. — Distinct portions of work.
24. — Protection as to subject-matter.
25. Abandonment.
26. Property rights.
27. Rights of owners in general.
28. Infringement.

1. Constitutionality of act.—Congress has the power to prescribe the conditions on which an exclusive right in an author shall be enjoyed; and to enjoy such right one must substantially comply with the provisions of the law. Wheaton v. Peters (1834) 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055.

This section as formerly enacted, securing a copyright to the proprietor of a photograph, and imposing a penalty for infringement, held constitutional. Schreiber v. Thornton (D. C. 1883) 17 Fed. 603.

2. Applicability of prior act.—The rights and remedies of persons registering in the patent office prints and labels under the act of June 18, 1874 (18 Stat. 78), held regulated by R. S. §§ 4948–4971, relating to copyrights. Marsh v. Warren (C. C. 1877) Fed. Cas. No. 9,121.

3. Nature of right.—The rights of a party holding a copyright depend wholly on whether he has in fact complied with the terms of the copyright law. Wheaton v. Peters (1834) 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055; Ewer v. Coxe (C. C. 1824) Fed. Cas. No. 4,584; Chicago Music Co. v. J. W. Butler Paper Co. (C. C. 1884) 19 Fed. 758.

By the act of May 30, 1790, Congress gave to authors a new property right in their publications which can only be asserted through the securing of a copyright in compliance with such statute. Wheaton v. Peters (1834) 8 Pet. 591, 661, 8 L. Ed. 1055.

The law of copyright must be strictly construed, and cannot be extended, either by resort to equitable considerations or to a strained interpretation of the terms of the statute. White-Smith Music Pub. Co. v. Appollo Co. (1906) 147 Fed. 226, 77 C. C. A. 368, affirming decree (C. C. 1905) 139 Fed. 427, 77 C. C. A. 368, and decree affirmed (1908) 28 Sup. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628.

The exclusive right to multiply or control copies of a literary work or composition is only derived from the copyright statute of different governments. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

Section 4952, R. S., superseded by this section, made the exclusive right of authors and their assigns to dramatize and translate any of their copyrighted works a part of the copyright itself. Id.

The exclusive right of multiplying and

vending copies of an intellectual work is of statutory origin. Bentley v. Tibbals (1915) 223 Fed. 247, 138 C. C. A. 489.

The provisions of the copyright law must be followed strictly. G. & C. Merriam Co. v. United Dictionary Co. (C. C. 1905) 140 Fed. 768, reversed (1906) 146 Fed. 354, 76 C. C. A. 470.

The copyright statutes create a new right, and do not extend or continue a previously existing right. Hartman v. John D. Park & Sons Co. (C. C. 1906) 145 Fed. 358, decree reversed John D. Park & Sons Co. v. Hartman (1907) 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, writ of certiorari dismissed Hartman v. John D. Park & Sons Co. (1908) 29 Sup. Ct. 689, 212 U. S. 588, 53 L. Ed. 662.

Copyright is based on statute, while unfair competition, except as affected by legislative enactment, is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The law of copyright is statutory, and all the conditions prescribed are essential and must be observed. Freeman v. The Trade Register (C. C. 1909) 173 Fed. 419.

The subject of statutory copyright is wholly within the power of Congress, and actions for infringement may be restricted. New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

Copyright in the United States is the "exclusive right of printing or otherwise multiplying copies of a public literary work, and publishing and vending the same, with the right of preventing others from doing so." Davis v. Vories (1897) 141 Mo. 234, 42 S. W. 707.

The word "copyright" means the exclusive right of multiplying copies of a work already published, which is preserved by a compliance with the act of Congress. State v. State Journal Co. (Neb. 1906) 110 N. W. 763, denying rehearing (1905) 106 N. W. 434, 75 Neb. 275, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254.

4. Common-law rights.—Rights in unpublished works, see notes under § 9518, post.

The common-law right to a monopoly in the publication of an author's productions is superseded by statute in this country as well as in England. Holmes v. Hurst (1899) 19 Sup. Ct. 606, 607, 174 U. S. 82, 43 L. Ed. 904, affirming decree (1897) 80 Fed. 514, 25 C. C. A. 610.

At common law the exclusive right to copy existed in the author until he permitted a general publication; thus, when a book was published in print, the owner's common-law copyright was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right giving to the author after publication the exclusive right to multiply copies for a limited period. Caliga v. Inter Ocean Newspaper Co. (1909) 30 Sup. Ct. 38, 39, 215 U. S. 182, 54 L. Ed. 150.

At common law the author of a literary work or composition has the exclusive right to the first publication only. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

In the United States there is no common-law right of copyright. The protection of authors rests exclusively upon the statutes. Wheaton v. Peters (C. C. 1832) Fed. Cas. No. 17,486.

Where one takes the benefit of the copy-right law to protect his rights in literary property, he cannot rely upon his common-law right. Savage v. Hoffman (C. C. 1908) 159 Fed. 584.

The common-law right in literary material is superseded by right of copyright under this section. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The common-law rights of musical composers in their productions have been wholly superseded by statute. Stern v. Rosey (1901) 17 App. D. C. 562.

5. "Exclusive right to vend."—The phrases "exclusive right to vend," relating to patentees of inventions and "sole liberty to vend," as used in this section as formerly enacted, mean substantially the same thing. Free Sewing Mach. Co. v. Bry-Block Mercantile Co. (D. C. 1913) 204 Fed. 632.

6. Subjects of copyright—In general.—A system of indexes, constituting a letter file, being designed for use, and not for conveying information, is not a proper subject of copyright. Amberg File & Index Co. v. Shea Smith & Co. (1897) 82 Fed. 314, 27 C. C. A. 246, affirming decree (C. C. 1896) 78 Fed. 479.

A newspaper or price current was held not a subject of copyright. Clayton v. Stone (C. C. 1829) Fed. Cas. No. 2,872.

The fact that playing cards may be used by persons to violate the laws against gambling does not, of itself, deprive them of the protection of the copyright law relating to designs. Richardson v. Miller (C. C. 1857) Fed. Cas. No. 11,791.

The exclusive right to employ a particular method of advertising cannot be acquired under the statute. Ehret v. Pierce (C. C. 1880) 10 Fed. 553, 554.

There can be no copyright in any particular arrangement of the matter

which the California Code requires the assessors to deliver to each person as a blank form of property statement. Carlisle v. Colusa County (C. C. 1893) 57 Fed. 979.

A trade catalogue may be the subject of a copyright. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

Words which, in their ordinary and universal use, denote the virtues, such as "Charity," "Faith," cannot ordinarily be appropriated by any one as a title or designation for a book, play, etc., written by him. Isaacs v. Daly (1874) 39 N. Y. Super. Ct. (7 Jones & S.) 511, 6 Leg. Gaz. 175.

7. —— **Books.**—Exclusive property in a system of bookkeeping cannot be claimed under the law of copyright, by means of a book in which that system is explained. Baker v. Selden (1879) 101 U. S. 99, 101, 25 L. Ed. 841.

A price catalogue, constituting a volume containing illustrations of wares offered for sale, without ornamentation, and which cannot well be the subject of artistic treatment, is not the proper subject of a copyright. J. L. Mott Iron Works v. Clow (1897) 82 Fed. 316, 27 C. C. A. 250.

Literary production may be copyrighted, though printed on single sheet. Clayton v. Stone (C. C. 1829) Fed. Cas. No. 2,872; Scoville v. Toland (C. C. 1848) Fed. Cas. No. 12,553.

Labels used to designate certain medicines and the diseases cured by their use are not books, entitled to protection under the copyright act. Scoville v. Toland (C. C. 1848) Fed. Cas. No. 12,553.

A literary composition may be a book entitled to copyright, without being printed. Roberts v. Myers (C. C. 1860) Fed. Cas. No. 11,906.

A chart on a single sheet, containing diagrams representing a system of taking measures for and cutting women's dresses, with instructions for its use, is a "book," within the copyright law. Drury v. Ewing (C. C. 1862) Fed. Cas. No. 4,095.

An inchoate intended publication is not the subject of copyright, as such right extends to the book only. Centennial Catalogue Co. v. Porter (C. C. 1876) Fed. Cas. No. 2,546.

A compilation of information respecting railroads, express, telegraph, and post offices, etc., such as "Bullinger's Guide," is a proper subject of a copyright. Bullinger v. Mackey (C. C. 1879) Fed. Cas. No. 2,127.

The author cannot claim an exclusive right in a combination in his guidebook of old methods, previously separately published. Id.

A blank form of application for a license to sell liquor at retail, composed of three blanks,—a "petition," a "bond and warrant," and a "justification."—all intended to be filled up and filed by the applicant, is included in the term "book," and is the subject of a valid copyright. Brightley v. Littleton (C. C. 1888) 37 Fed. 103.

A book of credit ratings and financial standing of parties engaged in a particular line of business is entitled to protection. Ladd v. Oxnard (C. C. 1896) 75 Fed. 703.

The term "book," under the copyright laws, includes a musical or other composition, though printed on but one sheet. (1898) 22 Op. Atty. Gen. 29.

Typewritten pages fastened together and having a printed cover and title page are subject to registration under this section. (1910) 28 Op. Atty. Gen. 265.

Abstract books and books of indexes containing abstracts of title to lands, condensed and prepared from public records, may be subjects of copyright. Banker v. Caldwell (1859) 3 Minn. 94 (Gil. 46).

8. —— **Designs.**—A picture, representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, and delivered to the librarian of congress a description of the picture by the title "Nosegay," cannot be protected as a copyright, but may be registered only as a trademark under Act June 18, 1874. Schumacher v. Wogram (C. C. 1888) 35 Fed. 210.

9. —— **Dramatic compositions.**—A combination of dramatic events, although its success is largely dependent on what is seen, irrespective of the dialogue, is a dramatic composition, entitled to protection under the copyright laws. Daly v. Webster (1892) 56 Fed. 483, 4 C. C. A. 10, reversing decree (C. C. 1891) 47 Fed. 903, and following Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552, appeal dismissed Webster v. Daly (1896) 16 Sup. Ct. 961, 163 U. S. 155, 41 L. Ed. 111.

There may be several dramatizations of the same story, each capable of being copyrighted. Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429, decree affirmed Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

While the voice, motions and postures of actors and mere stage business cannot be copyrighted, a scene possessing literary quality may be so protected. Chappell & Co. v. Fields (C. C. A. 1914) 210 Fed. 864.

A dramatic composition is entitled to copyright as original, although a reproduction of old materials in a new form and combination. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691.

The act of August 18, 1856, relating to dramatic compositions suitable for public representation, does not include a mere exhibition or spectacle of scenic effects, but having no literary charac-

ter. Martinetti v. Maguire (C. C. 1867) Fed. Cas. No. 9,173.

A written play consisting of directions for its representation by action without the use of spoken language is a "dramatic composition," within Act Aug. 18, 1856. Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552.

A series of graceful movements, combined with an attractive arrangement of drapery, lights and shadows, but telling no story, portraying no character, and depicting no emotion, is not a "dramatic composition," which may be protected. Fuller v. Bemis (C. C. 1892) 50 Fed. 926.

The singing of well-known songs by a woman dressed to personate other singers, prefaced by a short dialogue having no reference to such performance, and with a kinetoscope exhibition during intervals of changing costume, is not a subject of copyright; the dialogue not being a dramatic composition, and neither the dialogue, performance nor exhibition being such as to "promote the progress of science" or "useful arts." Barnes v. Miner (C. C. 1903) 122 Fed. 480.

Copyrighted cartoons, which formed the basis of a farce comedy, embraced a dramatic right which could be made the subject of copyright. Empire City Amusement Co. v. Wilton (C. C. 1903) 134 Fed. 132.

A series of recitations and songs, with a very little dialogue and action, and with scenery, and lights thrown upon the singer, is a dramatico-musical composition, within the provisions of the copyright law. Green v. Luby (C. C. 1909) 177 Fed. 287.

A dramatic composition may be a book. (1901) 23 Op. Atty. Gen. 353.

10. —— Engravings, cuts, prints, or photographs.—Where a photographer so contrives the pose, costume, and expression of his subject as to produce an original and graceful effect, the picture is entitled to the benefit of the act providing for copyright of photographs. Burrow-Giles Lithographic Co. v. Sarony (1884) 4 Sup. Ct. 279, 281, 111 U. S. 53, 28 L. Ed. 349.

Whether a photograph is an original work of art, or a mere manual reproduction of subject-matter, is a question of fact. Bolles v. Outing Co. (1897) 77 Fed. 966, 23 C. C. A. 594, judgment affirmed (1897) 89 Fed. 1014, 32 C. C. A. 604, and (1899) 20 Sup. Ct. 94, 175 U. S. 262, 44 L. Ed. 156.

A colored photograph or picture of natural scenery may be the subject of a copyright. Cleland v. Thayer (1903) 121 Fed. 71, 58 C. C. A. 272.

A series of 4,500 pictures, taken by means of a camera on a celluloid film, and from this a positive reproduction made on another celluloid sheet, is a "photograph," and subject to copyright as such in its entirety. Edison v. Lubin (1903) 122 Fed. 240, 58 C. C. A. 604, reversing decree (C. C. 1903) 119 Fed. 993, and appeal dismissed (1904) Lubin v. Edison, 25 Sup. Ct. 790, 195 U. S. 625, 49 L. Ed. 349.

A series of photographs of a dramatization of a copyrighted story of Ben Hur, to be used in a moving picture machine, constituted a single picture. Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429, decree affirmed Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

A photograph is not a print, cut, or engraving, within Act Feb. 3, 1831, § 1. Wood v. Abbott (C. C. 1866) Fed. Cas. No. 17,938.

A chromolithograph is a print within the act of 1831 (4 Stat. 436, § 1), granting a copyright upon prints. Yuengling v. Schile (C. C. 1882) 12 Fed. 97.

Court is not warranted in declaring this section unconstitutional on the ground that a photograph is not a writing, nor a photographer, an author, unless such clearly appear. Sarony v. Burrow-Giles Lithographic Co. (C. C. 1883) 17 Fed. 591 (judgment affirmed Burrow-Giles Lithographic Co. v. Sarony [1884] 4 Sup. Ct. 279, 111 U. S. 53, 28 L. Ed. 349); Schreiber v. Thornton (D. C. 1883) 17 Fed. 603 (judgment reversed Thornton v. Schreiber [1888] 8 Sup. Ct. 618, 124 U. S. 612, 31 L. Ed. 577).

A photograph may be protected by copyright. Schumacher v. Schwencke (C. C. 1885) 25 Fed. 466, 468.

A photograph taken in positions best calculated, in the photographer's judgment, to produce an artistic effect, is subject to copyright. Falk v. Brett Lithographing Co. (C. C. 1891) 48 Fed. 678.

An artistic photograph of an actress, representing the photographer's ideal of a character which she is accustomed to impersonate on the stage, is entitled to the protection of the copyright law. Falk v. Donaldson (C. C. 1893) 57 Fed. 32.

Under Act 1874 there can be no copyright on cuts contained in a trade catalogue, and not offered for copyright or to the public as works of fine art. J. L. Mott Iron Works v. Clow (C. C. 1896) 72 Fed. 168.

A cut or print may be a proper subject of copyright, though the person by whom it is prepared is not entitled to copyright it. Rigney v. Dutton (C. C. 1896) 77 Fed. 176.

Engravings designed for use as show bills, or circus advertisements, are not copyrightable either under the constitutional provision giving to Congress copyright powers, or under this section as formerly enacted. Bleistein v. Donaldson Lithographing Co. (C. C. 1899) 98 Fed. 608.

A series of separate pictures printed on a positive film from a number of negatives taken by a camera, and designed for use in a moving picture machine, and which, taken together, tell

a connected story, constitute a photograph, within the meaning of this section. American Mutoscope & Biograph Co. v. Edison Mfg. Co. (C. C. 1905) 137 Fed. 262.

A photograph which is not only a light-written picture of some object, but also an expression of an idea, or thought, or conception of the one who takes it, is a "writing" within the constitutional sense, and copyrightable. Id.

Cuts of statuary and other articles for the decoration of churches and other religious edifices in a catalogue of such articles are proper subjects of copyright. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

Pictorial illustrations are proper subjects of copyright. National Cloak & Suit Co. v. Kaufman (C. C. 1911) 189 Fed. 215.

It was no objection to a copyright of pictures representing women attired in up-to-date costumes in a cloak and suit catalogue that the pictures represented visible actual persons and things, and that complainant could not monopolize the right to picture them, under the rule that, while others are free to copy the original, they may not copy the copy. Id.

Prints of balloons and hanging baskets, with printing on them for embroidery and cutting lines, showing how to make the different parts fit together, and not intended as a mere pictorial representation of something, are not copyrightable. Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 222.

The word "print" in this section is used in connection with "engraving, cut and photograph." It means, apparently, a picture, something complete in itself, similar in kind to an engraving, cut, or photograph. It does not mean something printed on paper, that is not intended for use as a picture, but is itself to be cut up and embroidered, and thus made into an entirely different article. Id.

An advertising catalogue, containing cuts, held a proper subject of copyright. J. H. White Mfg. Co. v. Shapiro (D. C. 1915) 227 Fed. 957.

The copyright act of March 4, 1909, did not relieve the Patent Office of its duty to register all prints heretofore registered therein under the act of June 18, 1874 (18 Stat. 78). (1909) 28 Op. Atty. Gen. 116.

11. —— **Maps or charts.**—A copyright cannot subsist in a chart as a general subject. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,580.

New editions of maps are included in the copyright laws. Farmer v. Calvert Lithographing, Engraving & Map Pub. Co. (C. C. 1872) Fed. Cas. No. 4,651.

An advertising card, devised for the purpose of displaying paints of various colors, is not the subject of a copyright. Ehret v. Pierce (C. C. 1880) 10 Fed. 553, 554.

The word "chart," as here used, does not include sheets of paper exhibiting tabulated or methodically arranged information. Taylor v. Gilman (C. C. 1885) 24 Fed. 632.

Each map contained in a statistical atlas need not be separately copyrighted, for they are all protected by a copyright of the entire work. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

An "official form chart," which consists of a list of race horses, and a compilation of facts and statistics relating to the performances of such horses on the track, is a proper subject of protection by copyright, where it is shown to be purchased and used by persons engaged in breeding, training, and racing horses. Egbert v. Greenberg (C. C. 1900) 100 Fed. 447.

12. —— **Musical compositions.**—The right of the author of a copyrighted musical composition to protection against infringement does not depend upon the musical merit of the piece, nor on the fact that he has borrowed in general from the style of his predecessors, unless he has so substantially copied from some other that to the ear of the average person the two melodies appear to be the same. Hein v. Harris (C. C. 1910) 175 Fed. 875, order affirmed (1910) 183 Fed. 107, 105 C. C. A. 399.

A pianoforte arrangement of an opera which is not a new and original production of the arranger cannot be the subject of a copyright. The Mikado, etc., Case (C. C. 1885) 183, 185.

The introduction, skeleton, and chorus of a song designed merely to amuse may be subject of copyright. Henderson v. Tompkins (C. C. 1894) 60 Fed. 758, 764.

Where a copyright is held invalid because of the use of a word of immoral significance the owners thereof may republish the song, omitting the objectionable matter, and obtain a valid copyright therefor. Broder v. Zeno Mauvais Music Co. (C. C. 1898) 88 Fed. 74.

Only the material embodiment of a musical composition, in the form of a writing or print, may be copyrighted. White-Smith Music Pub. Co. v. Appollo Co. (C. C. 1905) 139 Fed. 427, decree affirmed (1906) 147 Fed. 226, 77 C. C. A. 368, which is affirmed (1906) 28 Sup. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628.

The reprint of a musical composition may be a "book," a "lithograph," or "photograph," according to the mechanical process used. (1898) 22 Op. Atty. Gen. 29, 31.

13. —— **Newspapers.**—Where a newspaper in this country used, by permission, material from a newspaper of another country, and a copy of each issue was deposited for copyright as an en-

tirety, this was not such a copyright of the special matter obtained under the contract, nor such a simultaneous publication, as to give the American paper the exclusive right under the statute to publish the same in the United States. Tribune Co. of Chicago v. Associated Press (C. C. 1900) 116 Fed. 126.

There can be no general copyright, as an entirety, of a daily newspaper, which is composed in large part of matter not entitled to protection. Id.

14. —— **Paintings, drawings, or chromos.**—A reproduction of a small water color, designed as a box cover for holiday season, may properly be regarded as for use as an article of manufacture, and also as work of fine arts. Therefore it might be either copyrighted, or patented, but not both. Louis De Jonge & Co. v. Breuker & Kessler Co. (C. C. 1910) 182 Fed. 150, decree affirmed (1911) 191 Fed. 35, 111 C. C. A. 567.

Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright, under this section as formerly enacted as "pictorial illustrations." Bleistein v. Donaldson Lithographing Co. (1903) 23 Sup. Ct. 298, 300, 188 U. S. 239, 47 L. Ed. 460, reversing judgment Courier Lithographing Co. v. Donaldson Lithographing Co. (1900) 104 Fed. 993, 44 C. C. A. 296.

Pictorial illustrations are none the less within the protection of the copyright law, because they are drawn from real life. Id.

A chromo, if a meritorious work of art, may be copyrighted, though designed and used for gratuitous distribution as an advertisement for the purpose of attracting business. Yuengling v. Schile (C. C. 1882) 12 Fed. 97.

The fact that a painting is only 7 by 4½ inches in size, and could be readily lithographed and used as an advertising label, will not affect the copyright. Schumacher v. Schwencke (C. C. 1885) 25 Fed. 466.

Infringement of the copyright of a painting may be enjoined without regard to whether complainant had taken steps entitling him to import photographs of it. Werckmeister v. Pierce & Bushnell Mfg. Co. (C. C. 1894) 63 Fed. 445, decree reversed Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 18 C. C. A. 431.

15. **Originality of work.**—Complainant was not entitled to enforce a copyright on an article taken almost exclusively from a United States Bureau bulletin written by another, for want of original authorship. Du Puy v. Post Telegram Co. (1914) 210 Fed. 883, 127 C. C. A. 493.

Copyright law is intended to encourage learning, and not mere industry. Clayton v. Stone (C. C. 1829) Fed. Cas. No. 2,872.

Any new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old. Gray v. Russell (C. C. 1839) Fed. Cas. No. 5,728; Emerson v. Davies (C. C. 1845) Fed. Cas. No. 4,436; Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,763; Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Whosoever, by his own skill, labor, and judgment, writes a new work, may have a copyright therein, unless it be directly copied or evasively imitated from another work. Emerson v. Davies (C. C. 1845) Fed. Cas. No. 4,436.

A musical composition, to be the subject of a copyright, must be substantially a new and original work, and not a copy of an older piece, with additions or variations which a skilled writer might readily make. Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

The rule stated for determining whether a copyrighted work is an original one in the sense of the law. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691.

Labor bestowed on the production of another is enough to constitute a claim to copyright, and it is not necessary that complainant be the sole creator of the work sought to be protected. Schuberth v. Shaw (C. C. 1879) Fed. Cas. No. 12,482.

A series of forms, minor parts in each being old, but so combined with parts drawn in pursuance of the statute as to make a complete form possesses sufficient originality to be the subject of a copyright. Brightley v. Littleton (C. C. 1888) 37 Fed. 103.

An author is entitled to copyright where he has taken existing materials from sources open to all writers and arranged and combined them in a new form, if he has exercised skill and discretion, and has presented something new and useful, though his copyright cannot prevent others from using the old material under the rule that a new and different use of old material is not an infringement. West. Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Digest and syllabus paragraphs, stated in language substantially to be found in an official opinion of the court, are only subject to copyright so far as they vary from the statement of the point as contained in the original source. Id.

Material obtained from prior publications not copyrighted, if it constitutes a new arrangement of such old material and also contains new and original features subject to copyright. Woodman v. Lydiard-Peterson Co. (C. C. 1912) 192 Fed. 67.

To be entitled to a copyright, a composition must be original. Hoffman v. Le Traunik (D. C. 1913) 209 Fed. 375.

While a new and original plan, arrangement, or combination of old materials may be copyrighted, the author

must have created the composition without directly copying or imitating the work of another. Id.

A lecture on the administration of remedies, including the giving of hypodermic injections, as a part of a correspondence course on nursing, although complainant did not originate the method of giving such injections, is subject to copyright, under the rule that a copyright may be claimed where the author has taken material from common sources, if he has arranged and combined it in a new way. Chautauqua School of Nursing v. National School of Nursing (D. C. 1914) 211 Fed. 1014.

The addition of alto parts to well-known hymns, sung for years with only the three parts of soprano, tenor, and bass, is not such a new and original work as entitles the composer to a copyright. Cooper v. James (D. C. 1914) 213 Fed. 871.

16. Statutes.—While a compilation of the statutes of a state may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis, he cannot obtain a copyright for the publication of the laws alone, nor can the legislature of the state confer any such exclusive privilege upon him. Davidson v. Wheelock (C. C. 1866) 27 Fed. 61.

17. Law reports.—No court reporter has or can have any copyright in the written opinions delivered by the Supreme Court, nor can the Supreme Court judges confer any such right on any reporter. Wheaton v. Peters (1834) 8 Pet. 591, 668, 8 L. Ed. 1055.

What a copyright on law reports will cover. Callaghan v. Myers (1888) 9 Sup. Ct. 177, 185, 128 U. S. 617, 32 L. Ed. 547.

Reporters of judicial opinions delivered in writing cannot appropriate, by copyright, an exclusive property in the publication of such opinions. Gould v Hastings (C. C. 1840) Fed. Cas. No. 5,639.

Under Laws N. Y. 1850, c. 245, the reporter is entitled to copyright in the syllabi and the statement and arguments of counsel prepared by him, but not in the statements of facts which form the basis of the decisions reported. Little v. Gould (C. C. 1851) Fed. Cas. No. 8,394; Id. (C. C. 1852) Fed. Cas. No. 8,395.

A copyright in the original work of a state reporter of judicial decisions, who is paid a salary for such work, may be taken in the name of the secretary of state, for the benefit of the people, and the exclusive right of publishing such copyrighted matter may be vested in a publisher under contract with the state. Id.

Where the judges of the court prepared the headnotes to their opinions, the reporter has no copyright in the volumes he edits. Chase v. Sanborn (C. C. 1874) Fed. Cas. No. 2,628.

In the absence of express legislation to the contrary, a state reporter is entitled to a copyright in his volumes of reports for what is the work of his own mind and hand, notwithstanding it may be true that he can have no copyright in the opinions of the court. Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 729; Id. (C. C. 1883) 20 Fed. 441; Banks v. Manchester (C. C. 1885) 23 Fed. 143, affirmed (1888) 9 Sup. Ct. 36, 128 U. S. 244, 32 L. Ed. 425.

Whether a state under the common law, has, or by statute, can acquire, any property right in the opinions of the judges of its supreme court, discussed, but not decided. Banks & Bros. v. West Pub. Co. (C. C. 1886) 27 Fed. 50, 56.

Acts Gen. Assem. Conn. March 22, 1882, directing the reporter to publish the decisions of the supreme court of errors, and copyright the volumes, does not prohibit any one else from publishing the opinions separately or collectively, but restricts the exclusive right of publication to the Reports compiled and edited by the reporter. State of Connecticut v. Gould (C. C. 1888) 34 Fed. 319.

A law reporter's copyright is limited to the matter which is the result of his own intellectual labor, and, as to official reports, comprises only the syllabus and the statement by the reporter if not filed as a part of the decision. The opinion, the statement of facts if filed as part of the opinion, the arrangement of cases when printed in chronological order in an official publication, and the index are not subject to copyright. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The provision of Act Ind. March 13, 1875, that the reporter of the Supreme Court shall be entitled to the exclusive copyright of each volume published by him after the same is published, does not give him any copyright in the volumes. The copyrights can only be acquired by taking the steps required for that purpose by the acts of Congress. Black v. Merrill (1875) 51 Ind. 32.

R. S. Ohio, § 437, empowering the secretary of state to contract with any responsible person to publish the reports authorized by law, and further enacting that such contractor should have the sole and exclusive right to publish said reports, so far as the state could confer the same, protected only the work of the reporter (viz. the indexes, tables of cases, and statement of points made and authorities cited by counsel), and did not give authority to the reporter or to any other person to acquire a copyright in the opinions or decisions of the judges, since it was in accordance with sound policy to regard

the authoritative exposition of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who might choose to do so. Banks v. Manchester (Pa. 1886) 2 Del. Co. Rep. 372.

18. Literary or artistic qualities of work.—Matter distributed by ticker service to customers, being merely a notation of current events and having only a transient value, not copyrightable as literary property. National Tel. News Co. v. Western Union Tel. Co. (1902) 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805.

The novelty of a design may consist in the form, outline, or grouping, or in the use, combination, arrangement, or harmony of colors, or the combination of some or all of these attributes. Richardson v. Miller (C. C. 1877) Fed. Cas. No. 11,791.

A translation from the original Hebrew, of the Pentateuch, is subject to copyright. Lesser v. Sklarz (C. C. 1879) Fed. Cas. No. 8,276a.

The introduction, skeleton, and chorus of a "topical song," though possessing little literary merit or originality, may be subject to copyright, if of value for the purposes for which they were designed. Henderson v. Tompkins (C. C. 1894) 60 Fed. 758.

To be entitled to a copyright, a composition must be meritorious. Hoffman v. Le Traunik (D. C. 1913) 209 Fed. 375.

19. Illegal or immoral works.—To be entitled to a copyright, a composition must be free from immorality. Hoffman v. Le Traunik (D. C. 1913) 209 Fed. 375.

20. Persons entitled to copyrights.—See notes under § 9524, post.

21. Extent of rights acquired—in general.—Construing the exclusive right given to authors by this section as formerly enacted to dramatize their works, as extending to the public exhibition of moving pictures of the incidents of a copyrighted work does not render the statute invalid as exceeding the power given to Congress by Const. art. 1, § 8, to secure to authors for a limited time the exclusive right to their writings. Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20, 22, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, affirming decree Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429.

Protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title. Louis Dejonge & Co. v. Breuker & Kessler Co. (1911) 191 Fed. 35, 111 C. C. A. 567, affirming decree Louis De Jonge & Co. v. Same (C. C. 1910) 182 Fed. 150.

The holder of a copyright has no monopoly by virtue of the issued copyright itself, but solely by the statute provided he has complied therewith. Lydiard-Peterson Co. v. Woodman (1913) 204 Fed. 921, 123 C. C. A. 243, rehearing denied (1913) 205 Fed. 900, 126 C. C. A. 434.

Copyright only secures to the owner the exclusive right of multiplying copies. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

A mechanical contrivance used in the production of a play, being patentable, held not protected by the copyright of the play. Freligh v. Carroll (C. C. 1871) Fed. Cas. No. 5,092a.

Memorization of a play by its actors as it is represented in public will entitle them to reproduce it without authority from the owners of the copyright of the play. Shook v. Rankin (C. C. 1875) Fed. Cas. No. 12,805.

The representation of a pianoforte arrangement of an opera on the stage is not the representation of a dramatic composition, but of a musical composition, as to which the statutory title of the owner of the copyright consists in the sole right of printing, copying, etc., and not of public representation. The Mikado, etc., Case (C. C. 1885) 25 Fed. 183, 187.

The copyright of a book describing a monogram used on a campaign badge, which was sold pinned to the book, did not cover the monogram, which was not a subject of copyright. Royal Sales Co. v. Gaynor (C. C. 1908) 164 Fed. 207.

The extent of the right of copyright is that defined by this section, namely, "The sole liberty of printing, * * * publishing, * * * copying, * * * or of vending the same," or of "multiplying copies," and includes both the right to recover damages where they can be proven, and also to an injunction if such is an appropriate or necessary remedy. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

A manufacturer of unpatented articles cannot practically monopolize their sale by copyrighting a catalogue containing illustrations of them; nor can another manufacturer of identical articles be deprived of the right to illustrate them in his catalogue, providing his illustrations are not in fact copied from the copyrighted catalogue. National Cloak & Suit Co. v. Standard Mail Order Co. (C. C. 1911) 191 Fed. 528.

Where complainant sold copies of its copyrighted work to the public, its right to the exclusive sale of such particular copies thereby terminated, and it could not maintain an action against defendants, who purchased such secondhand books, rebound and resold them, either for infringement or for unfair competition, without proof that the restored copies were sold as and for complainant's goods, and as new and original

copies. Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379.

22. — **Title of work.**—The copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

The copy of the title of a play, filed to obtain a copyright, was, "Under the Gaslight, A Romantic Panorama of the Streets and Homes of New York." The title of the play published was, "Under the Gaslight, A Totally Original and Picturesque Drama of Life and Love in these Times, in Five Acts." Held, that there was no material variance. Daly v. Webster (1892) 56 Fed. 483, 4 C. C. A. 10, reversing (C. C. 1891) 47 Fed. 903, and Same v. Brady (C. C. 1889) 39 Fed. 265. Appeal dismissed Webster v. Daly (1896) 16 Sup. Ct. 961, 163 U. S. 155, 41 L. Ed. 111.

Under section 9524, post, the owner of the copyright of the novel "Trilby" is not entitled to protection against the use of that name in connection with a dramatic composition which does not present any scenes, plot, or dialogue adapted from the novel. Harper v. Ranous (C. C. 1895) 67 Fed. 904.

The copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired. Glaser v. St. Elmo Co. (C. C. 1909) 175 Fed. 276.

The holder of a copyright is entitled to protection in the copyright name as well as in the literary production where there is an infringement in whole or in part of the production which is the subject of the copyright, but the name alone is not protected by the copyright. Outcault v. Lamar (1909) 119 N. Y. S. 930, 135 App. Div. 110.

23. — **Distinct portions of work.**—The editor of a subsequent edition is entitled to a copyright on his notes and additions, where they can be clearly separated from those of a previous edition, but where they cannot thus be separated he cannot use them without violating the copyright of the former notes. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

A publication of revised rules of court is not a new edition of a previous publication of the rules before revision. Banks v. McDivitt (C. C. 1875) Fed. Cas. No. 961.

A mechanical contrivance representing a river into which in the course of a play the villain falls from a bridge above, not being a link in the chain of incident which constitute a series of events concededly novel, is not such a mechanical contrivance as will be protected by copyright of the play in which it is introduced. Serrana v. Jefferson (C. C. 1888) 33 Fed. 347.

The mere aggregation of weekly law reporters which have been singly copyrighted into volumes does not constitute a new work requiring a new copyright. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where a newspaper reporter wrote and had published in a copyrighted newspaper a report of an alleged incident which was in fact pure fiction, it was not covered by the copyright, and he as assignee of the publishers could not restrain the use of the alleged facts in a subsequent dramatization. Davies v. Bowes (D. C. 1913) 209 Fed. 53.

24. — **Protection as to subject-matter.**—One who has purchased unbound copyrighted volumes from the owner of the copyright or his licensee has the right, so far as the copyright statute is concerned, to bind and resell the same. Kipling v. G. P. Putnam's Sons (1903) 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873.

The copyright of a pamphlet containing articles of association and by-laws of a mutual burial association did not protect the system, considered merely as a system, so as to confer on the person owning the copyright or his transferees the exclusive right to organize associations under the plan described. Burk v. Johnson (1906) 146 Fed. 209, 76 C. C. A. 567.

Under this section protection against multiplication of copies and the incidents thereof constitute the only protection afforded by the copyright statutes to the publisher. Bobbs-Merrill Co. v. Straus (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, affirming decree (C. C. 1905) 139 Fed. 155, and affirmed (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086.

A copyright covering a novel gives the holder the exclusive right to dramatize the novel in the usual form, or in form of a motion picture play. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (C. C. A. 1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

The copyright act (Act 1831, § 9) protects the author's right to his manuscript, which includes private letters. Bartlett v. Crittenden (C. C. 1849) Fed. Cas. No. 1,076.

The author of a copyrighted dramatic composition is entitled to be protected against piracy, in whole or in part, by representation. Act 1856. Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552.

Selling to subscribers only, and not to dealers, in general protected by this section. Henry Bill Pub. Co. v. Smythe (C. C. 1886) 27 Fed. 914.

Plaintiffs were the exclusive owners of the manuscript copy of the operetta

"Nanon." Defendants were producing a play under the name of "Genee's Nanon, the Reigning Eastern and European Sensation," which they pretended to have translated and adapted from an old French story, "Nanon," and advertised their adaptation as "Genee's," and not as their own, from the French. Held, that plaintiffs were entitled to an order to restrain defendants from performing it as a whole, or the piano score, the libretto containing the dialogue, stage business, situations, etc., or any part as performed by defendants, except the orchestration, which was their own work, or any work under the name of "Nanon" or "Genee's Nanon, the Reigning Eastern and European Sensation." Goldmark v. Kreling (C. C. 1888) 35 Fed. 661.

A valid copyright of a German painting gives protection against any reproduction of it, as by photographs. Werckmeister v. Pierce & Bushnell Mfg. Co. (C. C. 1894) 63 Fed. 445, decree reversed Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 18 C. C. A. 431.

Under this section the unconditional sale of a story entitled the purchaser to protection from piracy on securing a statutory copyright. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

Under the law in force prior to Copyright Act March 4, 1909, a copyright of a musical composition, consisting of the music and the words, did not protect the words alone, and was not infringed by a reproduction of them. M. Witmark & Sons v. Standard Music Roll Co. (D. C. 1914) 213 Fed. 532.

Under the supplementary act of August 18, 1856, authors of dramatic compositions, in addition to the sole right to print and publish, are given the sole right to act, perform, and represent such composition, or to cause them to be acted or represented on any stage or public place during the period for which the copyright is obtained. Palmer v. De Witt (1870) 32 N. Y. Super. Ct. (2 Sweeney) 530, 40 How. Prac. 293, affirmed (1872) 47 N. Y. 532, 7 Am. Rep. 480.

25. Abandonment. — Under the copyright act of 1831 (4 Stat. 436), the printing of a literary composition in serial parts in a magazine constituted a publication, and the subsequent copyrighting of the work by the author in book form will not prevent another from reprinting the uncopyrighted parts from the magazine, numbering the pages consecutively, and publishing and vending them in book form. Holmes v. Hurst (1899) 19 Sup. Ct. 606, 174 U. S. 82, 43 L. Ed. 904, affirming judgment (1897) 80 Fed. 514, 25 C. C. A. 610.

Entering an original painting with the copyright reserved at an exhibition of the Royal Academy, whose by-laws prohibit copying, is not such a publication as defeats the right to take out a copyright. American Tobacco Co. v. Werckmeister (1907) 28 Sup. Ct. 72, 77, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

A painting which is publicly exhibited is "published," within the meaning of the copyright laws. Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 18 C. C. A. 431, reversing decree Werckmeister v. Pierce & Bushnell Mfg. Co. (C. C. 1894) 63 Fed. 445.

An author cannot acquire copyright of a literary work which has been published serially in a magazine, under a contract by which the publishers were to have no other right to it, unless previous to such publication he has taken the steps necessary to secure a copyright. Holmes v. Hurst (1897) 80 Fed. 514, 25 C. C. A. 610 (decree affirmed [1899] 19 Sup. Ct. 606. 174 U. S. 82, 43 L. Ed. 904); Id. (C. C. 1896) 76 Fed. 757; Holmes v. Donohue (C. C. 1896) 77 Fed. 179.

Where a photograph has become public property by being placed in the market and sold, the proprietor cannot obtain a valid copyright thereon by making a slight and merely colorable change therein by an alteration of the negative from which it is printed. Snow v. Laird (1900) 98 Fed. 813, 39 C. C. A. 311.

Where a literary work has been published serially with the consent of the author, and a copyright secured in the name of the publisher, if the author republishes it in book form, with a notice of a copyright in his own name, such republication, with such a notice, effects, under the statute, an abandonment of the copyright. Mifflin v. R. H. White Co. (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 769, 190 U. S. 260, 47 L. Ed. 1040); Same v. Dutton (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043).

Where defendant pleaded a subsequent exhibition of the painting at the Royal Academy in London as a publication thereof, and complainant took issue on the plea, evidence of restrictions on the exhibition of paintings at such exhibition, and that no permission to copy works during the exhibition could be granted, was competent as tending to negative the alleged publication. Werckmeister v. American Lithographic Co. (1904) 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, reversing decree (C. C. 1903) 126 Fed. 244.

Under this section and section 9530, post, the exhibition of an original copyrighted painting at an academy, at which no person was entitled to copy the same and to which the public, other than the members of the academy, were not admitted, except on payment of a fee,

without a notice of copyright thereon, did not constitute such a publication as avoided the copyright. Id.

The right to a common-law copyright has been superseded by statute, and hence where the owner of the common-law copyright elects to substitute the protection of the statute for that of the common law, he, on publication, abandons or surrenders his common-law rights, including his right of limited publication, in exchange for his exclusive statutory right to multiply copies. Bobbs-Merrill Co. v. Straus (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, affirmed (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086.

The common law gives an author the exclusive right to reproduce a painting so long only as he does not publish it; but by publication he loses such right, and can only continue it thereafter by copyright. Caliga v. Inter-Ocean Newspaper Co. (1907) 157 Fed. 186, 84 C. C. A. 634, affirmed (1909) 30 Sup. Ct. 38, 215 U. S. 182, 54 L. Ed. 150.

Copyright of a foreign photoplay in the United States held an abandonment of the owner's common-law property rights in the play within the United States. Universal Film Mfg. Co. v. Copperman (1914) 218 Fed. 577, 134 C. C. A. 305, affirming decree (D. C. 1914) 212 Fed. 301.

Copyright covering comic opera held lost as to vocal number by publishing and selling it separately, with nothing to show that the opera from which it was taken was copyrighted. Herbert v. Shanley Co. (C. C. A. 1916) 229 Fed. 340.

It is not an abandonment to the public to use one's manuscripts to instruct others who are permitted to take copies. Bartlette v. Crittenden (C. C. 1847) Fed. Cas. No. 1,082.

The performance, with the author's consent and for his benefit, of a play which has not been printed by him, is not an abandonment to the public, nor a publication, within the copyright act. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691; Same v. Wood (C. C. 1867) Fed. Cas. No. 1,693; Same v. Hart (C. C. 1875) Fed. Cas. No. 1,692.

Consent of the author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights to a copyright. Boucicault v. Wood (C. C. 1867) Fed. Cas. No. 1,693.

Representation of a play upon the stage is not, at common law, a publication depriving the author of his exclusive right to control the literary production. Crowe v. Aiken (C. C. 1870) Fed. Cas. No. 3,441.

But it is a publication entitling others to represent the play so far as they are enabled to do so by memorizing the same. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

Sending a number of copies of a work to booksellers and private individuals, for examination, before acquiring a copyright, and in one instance accepting the purchase money is a publication. Gottsberger v. Aldine Book Pub. Co. (C. C. 1887) 33 Fed. 381.

The delivery by the reporter of copies of law reports to the state for its use and distribution is not a publication, within the statute. Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 729.

Exhibition of a picture for several months in a public gallery is a publication, depriving the owner of the right to restrain another from publishing copies of such picture. Werckmeister v. American Lithographic Co. (C. C. 1902) 117 Fed. 360.

When the author of a literary work, who, after a portion has been published in a magazine without copyright, publishes it in book form, taking the proper steps to copyright the book in his own name, consents to the subsequent publication in such magazine of the portion which had not been published therein without other notice of copyright than a general notice of copyright by the publishers, such subsequent publication effects, under the statute, an abandonment of the author's copyright. Mifflin v. Dutton (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043); Mifflin v. R. H. White Co. (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 769, 190 U. S. 260, 47 L. Ed. 1040).

A United States copyright of a work of an English author by the American publishers is not abandoned or forfeited because of the foreign publication of the work by or with consent of, the author, without the copyright notice, and without consent of the owners of such copyright. Harper & Bros. v. M. A. Donohue & Co. (C. C. 1905) 144 Fed. 491.

A copyright is abandoned if the owner licenses the publication of the material by another under a new copyright. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The purchaser on an unconditional sale of an uncopyrighted painting has a right to reproduce the same by chromo, lithograph, etc., without obtaining the consent of the author. Parton v. Prang (C. C. 1872) Fed. Cas. No. 10,784.

Any copyright protection for a work, secured by entering for copyright in the name of the publishers the issues of a magazine which contain installments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name. Mifflin v. R. H. White Co. (1903) 23 Sup. Ct. 769, 771, 190 U. S. 260, 47 L. Ed.

1040 (affirming decree [1902] 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134); Same v. Dutton (1903) 23 Sup. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043 (affirming decree [1902] 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134).

Use of a card containing 100 miniature samples of different copyrighted photographs, without the word "copyright" thereon, for the sole purpose of enabling dealers to give orders, is not a publication, within the meaning of the copyright laws. Falk v. Gast Lithograph & Engraving Co. (1893) 54 Fed. 890, 4 C. C. A. 648, affirming decree (C. C. 1891) 48 Fed. 262.

One who neglects to perfect his copyright, and by such neglect abandons his right, cannot, 16 years afterwards, revive such right by authorizing somebody else to apply for and obtain a copyright in a name different from that of the real proprietor. Koppel v. Downing (1897) 11 App. D. C. 93.

It is not abandonment for owner of a copyrighted painting to publish lithographic copies thereof. Schumacher v. Schwencke (C. C. 1887) 30 Fed. 690.

Giving authority to publish a novel based upon the incidents of a drama does not constitute an abandonment of the right of exclusive representation of the drama. Shook v. Rankin (C. C. 1875) Fed. Cas. No. 12,805.

Though plaintiff did not insist upon his rights as sharply as he should have done during negotiations for the sale thereof to defendants, his conduct cannot be said to show an intent to abandon his rights, where he at the time was engaged in publishing some volumes, and gave notice of the publication of others,—especially since, during the negotiations, defendants seemed to concede plaintiff's rights. Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 729.

A person can secure to himself the exclusive right to his productions only by a copyright under the laws of the United States; and, if he publishes anything without so protecting it, any person may republish it and state the name of the author in such form in the book as he may choose, either upon the title-page or otherwise, as to show who was the author. Clemens v. Belford (C. C. 1883) 14 Fed. 728.

The publication of the libretto and vocal score of an opera abroad with the consent of the authors was a dedication of their entire dramatic property in the opera to the public, notwithstanding their retention of the orchestral score in manuscript, and the public representation would not be enjoined. The Mikado, etc., Case (C. C. 1885) 25 Fed. 183.

The printing in a salon catalogue, without notice of copyright, of a mere crayon sketch of a painting exhibited in the salon, not intended to serve as a copy of the painting, is not a publication which will work a forfeiture of the right to copyright. Werckmeister v. Springer Lithographing Co. (C. C. 1894) 63 Fed. 808.

The insertion of a print or cut, as an advertisement, in a trade paper, circulating among all who choose to pay for it, is a publication. Rigney v. Dutton (C. C. 1896) 77 Fed. 176.

The selling of copies of a book by the author to all persons paying him for a course of instruction connected therewith, during a number of years, constitutes a publication which deprives him of the right to subsequently obtain a copyright. Larrowe-Loisette v. O'Loughlin (C. C. 1898) 88 Fed. 896.

Giving away copies of a pamphlet by the author, or leaving copies in a public hotel office, constitutes a publication which renders a subsequent copyright ineffectual. D'Ole v. Kansas City Star Co. (1899) 94 Fed. 840.

An author does not lose his copyright by reason of publishing the book with the shorter title than filed to obtain copyright. Patterson v. J. S. Ogilvie Pub. Co. (C. C. 1902) 119 Fed. 451.

Where an author had type set up, plates taken therefrom, and sheets to the amount of 2,000 impressions struck off, and some of these were bound, distributed, and sold, and later the plates were levied on under execution and sold to a third person, the author, as against a purchaser of the plates from the third person, had not abandoned his copyright of the book, and was not estopped from enforcing his copyright right. Id.

Neither a book nor a photograph can continue to be the author's exclusive property after it has been printed and offered to the public for sale without being copyrighted. Bamforth v. Douglass Post Card & Machine Co. (C. C. 1908) 158 Fed. 355.

A copyright on the language of the headnotes, digest paragraphs, and index black-letter lines of a legal publication, and the entire material of digest advance sheets put out by a law publisher, was abandoned by publication of the copyrighted pamphlet numbers in advance of the completed volume where such volume did not carry the original copyright notices. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. 303.

The giving of license rights to publish copyrighted material is in the nature of a sale of the labor represented thereby, and constitutes an abandonment of the exclusive right of publication, unless the terms are such as to insure an insertion of appropriate copyright notices whenever the use by the licensee approaches the extent of an "edition." Id.

An author, who copyrighted a play under one title and thereafter adopted another title, under which it was produced, did not thereby forfeit her copyright as against an infringer with full knowledge of all the facts. Collier v.

Imp Films Co. (D. C. 1913) 214 Fed. 272.

Authors of a comic opera, who take out a copyright on a song with orchestral accompaniment, dedicate to the public the right to sing the words to the music, accompanied by an orchestra. Herbert v. Shanley Co. (D. C. 1915) 222 Fed. 344.

There is no provision in the United States copyright statute for securing to the author of a drama the exclusive right to perform it unless it is printed in a book, but the common-law rights apply, and, though in England the public representation of a manuscript play extinguished the author's common-law rights, such representation did not extinguish his rights in the United States. Frohman v. Ferris (1909) 87 N. E. 327, 238 Ill. 430, reversing decree Ferris v. Frohman (1907) 131 Ill. App. 307.

The right which an author has in his literary work exists only as long as the work is kept private; if it published without complying with the copyright act the right is abandoned. State v. State Journal Co. (1906) 110 N. W. 763, 77 Neb. 752, 9 L. R. A. (N. S.) 174, rehearing denied (1905) 106 N. W. 434, 75 Neb. 275, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254.

A book is not published merely by printing it and placing it in the hands of various persons under a contract restricting its use, and stipulating that it is not sold, and requiring its return to the owner. Jewellers' Mercantile Agency v. Jewellers' Weekly Pub. Co. (1895) 84 Hun, 12, 32 N. Y. Supp. 41.

The issue of a book twice a year by a mercantile agency, containing information as to the business and credit of persons engaged in the jewelry trade, a copy of which is sent to all who choose to subscribe under a contract providing that it shall be returned on the expiration of the subscription, constitutes a publication, and devests the agency of its exclusive property therein. Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. (1898) 49 N. E. 872, 155 N. Y. 241, 41 L. R. A. 846, 63 Am. St. Rep. 666, reversing judgment (1895) 32 N. Y. S. 41, 84 Hun, 12.

Leaving copies of a musical composition with a music dealer for sale, but with instructions not to sell any before a specified time, constitutes a publication and dedication to the public of such composition, though a copyright was in fact obtained before the date on which the dealer was authorized to sell. Wall v. Gordon (N. Y. 1872) 12 Abb. Prac. (N. S.) 349.

As to publication in compliance with copyright law, see, also, notes under § 9530, post.

26. Property rights. — The common-law right of an author in his manuscript gives him no right to assert a perpetual and exclusive property in the future publication of the work after he shall have published it to the world. Wheaton v. Peters (1834) 8 Pet. 591, 657, 8 L. Ed. 1055.

A copyright is a property in notion, and has no corporeal substance, and consequently is not the subject of seizure and sale by execution. Stephens v. Cady (1852) 14 How. 528, 529, 14 L. Ed. 528.

27. Rights of owners in general.—The sole right to vend a copyrighted book, secured by this section to the owner of the copyright, does not include the right to impose, by a notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. Bobbs-Merrill Co. v. Straus (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086, affirming decree (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766.

The legal title to a copyright vests in the person in whose name it is taken out; but it may be held by him in trust for the true owner. T. B. Harms & Francis, Day & Hunter v. Stern (C. C. A. 1916) 229 Fed. 42.

No private person has the right to publish official letters, addressed to the government, without its sanction. Folsom v. Marsh (C. C. 1841) Fed. Cas. No. 4,901.

A copyright obtained by a person for whom literary matter has been prepared gratuitously is valid without a written assignment. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Under this section the holder of the copyright of a song constituting a part of a dramatic sketch, and those claiming under him, have the exclusive right to publicly present it. Green v. Luby (C. C. 1909) 177 Fed. 287.

Under this section, owner of copyrighted work is not prevented from protecting his exclusive right merely because he has failed to file a notice of his licensing others to reproduce mechanically the work. F. A. Mills, Inc., v. Standard Music Roll Co. (D. C. 1915) 223 Fed. 849.

28. Infringement.—See notes under § 9546, post.

Cited without definite application. Ager v. Murray (1881) 105 U. S. 126, 128, 26 L. Ed. 942; Higgins v. Keuffel (1891) 11 Sup. Ct. 731, 733, 140 U. S. 428, 35 L. Ed. 470; Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096; Bauer & Cie v. O'Donnell (1913) 33 Sup. Ct. 616, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Bennett v. Boston Traveler Co. (1900) 101 Fed. 445, 446, 41 C. C. A. 445; Fraser v. Yack (1902) 116 Fed. 285, 53 C. C. A. 563; Donnelley v. Ivers (C. C. 1882) 18 Fed. 592, 593.

§ 9518. (Act March 4, 1909, c. 320, § 2.) Rights of author or proprietor of unpublished work not annulled or limited.

Nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. (35 Stat. 1076.)

See notes to preceding section of this act, ante, § 9517.

Notes of Decisions

Common-law rights.—By the common law authors were protected in the exclusive use of their literary or intellectual productions and in the enjoyment of the pecuniary benefits thereof. The right still exists, independent of all statutes concerning copyrights. Wheaton v. Peters (1834) 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055; Little v. Hall (1855) 59 U. S. (18 How.) 165, 15 L. Ed. 328; Press Pub. Co. v. Monroe (1896) 73 Fed. 196, 19 C. C. A. 429, 38 U. S. App. 410; Bartlette v. Crittenden (C. C. 1847) Fed. Cas. No. 1,082; Bartlett v. Same (C. C. 1849) Fed. Cas. No. 1,076; Pulte v. Derby (C. C. 1852) Fed. Cas. No. 11,465; Stowe v. Thomas (C. C. 1853) Fed. Cas. No. 13,514; Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691; Same v. Wood (C. C. 1867) Fed. Cas. No. 1,693; Parton v. Prang (C. C. 1872) Fed. Cas. No. 10,784; Boucicault v. Hart (C. C. 1875) Fed. Cas. No. 1,692; Werckmeister v. Springer Lithographing Co. (C. C. 1894) 63 Fed. 808; Ockenholdt v. Frohman (1895) 60 Ill. App. 300; Keene v. Kimball (1860) 82 Mass. (16 Gray) 545, 77 Am. Dec. 426; Jones v. Thorne (1843) 1 N. Y. Leg. Obs. 408; Hoyt v. Mackenzie (N. Y. 1848) 3 Barb. Ch. 320; Oertel v. Wood (N. Y. 1870) 40 How. Prac. 10; Palmer v. De Witt (1870) 32 N. Y. Super. Ct. (2 Sweeney) 530, 40 How. Prac. 293 (affirmed [1872] 47 N. Y. 532, 7 Am. Rep. 480); Isaacs v. Daly (N. Y. 1874) 6 Leg. Gaz. 175; French v. Maguire (N. Y. 1878) 55 How. Prac. 471; Potter v. McPherson (N. Y. 1880) 21 Hun, 559.

The common-law rights of authors run only to publication. Thereafter their sole protection is under the copyright statute. Wheaton v. Peters (C. C. 1832) Fed. Cas. No. 17.486; Boucicault v. Wood (C. C. 1867) Fed. Cas. No. 1,693; Banker v. Caldwell (1859) 3 Minn. 94 (Gil. 46).

The passage by congress of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript. Press Pub. Co. v. Monroe (1896) 73 Fed. 196, 19 C. C. A. 429, writ of error dismissed (1896) 17 Sup. Ct. 40, 164 U. S. 105, 41 L. Ed. 367.

The common law gives the author of a painting the exclusive right to reproduce the same so long as he does not make publication, but on publication such right is lost, and he can only acquire the right to further protection by a statutory copyright. Caliga v. Inter Ocean Newspaper Co. (1907) 157 Fed. 186, 84 C. C. A. 634.

One obtaining a statutory copyright has left no common-law literary property rights, notwithstanding this section. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (C. C. A. 1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

But the common law gives protection to the author for his manuscript only. Bartlett v. Crittenden (C. C. 1849) Fed. Cas. No. 1,076.

The representation of a play on a stage in England, there, by statute, made a publication, cannot affect the rights of the author or his assignees at common law in the United States. Crowe v. Aiken (C. C. 1870) Fed. Cas. No. 3.441.

The author's rights at common law have not been taken away or limited by any existing act of congress. Id.

An author's common-law right of property in his dramatic compositions aside from that given by copyright statutes, and piracy of such a composition exists when it is, in substance, reproduced without authority, either in whole or in a material part. Maxwell v. Goodwin (C. C. 1899) 93 Fed. 665.

The author of a literary work has by common law the exclusive right to the first publication of it; but he has no exclusive right to multiply copies, or to control the subsequent use of such rights by others, such right being a creation of statute. Palmer v. De Witt (1872) 47 N. Y. 532, 7 Am. Rep. 480.

The right of an author or artist in his work or design is simply in the unpublished work. After publication, the United States copyright law applies. Gendell v. Orr (Pa. 1879) 13 Phila. 191.

An author has at common law, and independent of and notwithstanding copyright statutes, a right of property in his manuscript, and before he publishes it he is entitled to its exclusive use. Vernon Abstract Co. v. Waggoner Title Co. (Tex. Civ. App. 1908) 107 S. W. 919.

Persons entitled to copyright.—See notes under § 9524, post.

Abandonment to public.—See notes under § 9517, ante, and § 9530, post.

Rights of owners in general.—Author held to have complete rights in unpub-

lished manuscript, with right to dispose thereof and invest grantee with full right of property, including right to secure a copyright. T. B. Harms & Francis, Day & Hunter v. Stern (C. C. A. 1916) 229 Fed. 42.

Assignment.—Assignment of inchoate right to copyright, see notes under § 9563, post.

Injunction.—This statute gives an author a remedy by injunction to protect his right to his unpublished manuscripts. Little v. Hall (1855) 18 How. 165, 170, 15 L. Ed. 328.

Cited without definite application, Ferris v. Frohman (1912) 32 Sup. Ct. 263, 264, 266, 223 U. S. 424, 56 L. Ed. 492.

§ 9519. (Act March 4, 1909, c. 320, § 3.) Copyright to protect component parts of work already copyrighted; copyright upon composite works or periodicals.

The copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act. (35 Stat. 1076.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Extent of rights acquired—Distinct portions of work.—Under this section, a copyright on a publication protects the pictures therein as component parts. Mail & Express Co. v. Life Pub. Co. (1912) 192 Fed. 899, 113 C. C. A. 377.

Under this section, the copyright of a catalogue of statuary and other articles for the decoration of churches and other religious edifices was entitled to the protection of the copyright law as to each cut contained therein. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

Under this section a copyright of a musical composition included a copyright of the words, and was infringed by a reproduction of them. M. Witmark & Sons v. Standard Music Roll Co. (D. C. 1914) 213 Fed. 532.

The phrase "component parts," as used in this section, does not mean subdivision of rights, licenses, or privileges, but refers to the separate chapters, subdivisions, acts, and the like of which most works are composed. New Fiction Pub. Co. v. Star Co. (D. C. 1915) 220 Fed. 994.

—— Protection as to subject-matter.—The copyrighting of the volumes of a particular edition of an author's works, which had been previously published some with and some without copyright, protects only what is original in the new edition, and does not enlarge the rights of the owner of the copyright as to any matter previously published. Kipling v. G. P. Putnam's Sons (1903) 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873.

§ 9520. (Act March 4, 1909, c. 320, § 4.) Copyright upon all writings of author.

The works for which copyright may be secured under this Act shall include all the writings of an author. (35 Stat. 1076.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Literary or artistic qualities of work.—That complainants' "Nic Carter" detective stories were not of the highest class of literature did not prevent them from being proper subjects of copyright. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

§ 9521. (Act March 4, 1909, c. 320, § 5, as amended, Act Aug. 24, 1912, c. 356.) Classification of applications for registration.

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations;

(b) Periodicals, including newspapers;

(c) Lectures, sermons, addresses (prepared for oral delivery);

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;
(g) Works of art; models or designs for works of art;
(h) Reproductions of a work of art;
(i) Drawings or plastic works of a scientific or technical character;
(j) Photographs;
(k) Prints and pictorial illustrations;
(l) Motion-picture photoplays;
(m) Motion pictures other than photoplays:

Provided, nevertheless, That the above specifications shall not be held to limit the subject matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act. (35 Stat. 1076. 37 Stat. 488.)

See notes to section 1 of this act, ante, § 9517.

This section, as originally enacted, did not contain the last two classifications, lettered (l) and (m). They were inserted by amendment by Act Aug. 24, 1912, c. 356, cited above, making the section read as set forth here.

Said amendatory Act Aug. 24, 1912, c. 356, also amended sections 11 and 25 of this act, to correspond with the amendment of this section to include motion pictures, making said sections read as set forth post, §§ 9532, 9546.

Notes of Decisions

Subjects of copyright—Books.—Typewritten pages fastened together and having a printed cover and title-page are subject to registration under the copyright law. (1910) 28 Op. Atty. Gen. 265.

The word "book," as used in sections 9542 and 9543, post, and in class (a) of this section and elsewhere in the act, means the entire book, and not a fragment thereof. (1911) 29 Op. Atty. Gen. 176.

—— **Dramatic compositions.**—Under this section, as amended in 1912, the rights to dramatize a novel in the usual form and in the form of a motion picture play are separable, and there may be a copyright for each dramatization. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (C. C. A. 1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

—— **Engravings, cuts, prints, or photographs.**—Under this section a book containing pictorial illustrations of women attired in the latest up-to-date styles depicting the fashions in dress, supplemented by information concerning the materials which plaintiff offered to make up in accordance therewith and the prices at which it would do so, though used entirely for advertising purposes, and not essentially a work of fine art, was a proper subject of copyright. National Cloak & Suit Co. v. Kaufman (C. C. 1911) 189 Fed. 215.

Literary or artistic qualities of work.—The Register of Copyrights has the authority to enter a claim to copyright in a published lithograph, not made within the United States, where the design, drawing, or painting which forms the first step in the production of such lithograph has been made for the purpose of being converted into a lithograph and is located in a foreign country, provided the design, drawing, or painting with reference to which the application is made is a work of art. (1911) 28 Op. Atty. Gen. 557.

Domestic manufacture.—Lithographic reproductions of original paintings, in the form of illustrated post cards, made in Germany, are subject to registration, provided the original paintings may properly be classified as works of art. (1910) 28 Op. Atty. Gen. 150.

Errors in classification.—Under this section the classification of a dramatico-musical composition as a dramatic composition does not affect the validity of the copyright. Green v. Luby (C. C. 1909) 177 Fed. 287.

§ 9522. (Act March 4, 1909, c. 320, § 6.) Copyright upon compilations, etc., of works in public domain or of copyrighted works; subsisting copyrights not affected.

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be

construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works. (35 Stat. 1077.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Compilation of public documents.—A compilation from voluminous public documents, so arranged as to show readily the date and order of battles fought during the civil war, together with a list of casualties, may be copyrighted. Hanson v. Jaccard Jewelry Co. (C. C. 1887) 32 Fed. 202.

Originality of work.—Under the copyright statutes as they formerly stood, as well as by the express provision of this section, the addition of new matter to a copyrighted book in a second or subsequent edition makes it a "new book" subject to copyright as an original work. West Pub. Co. v. Edward Thompson Co. (1910) 176 Fed. 833, 100 C. C. A. 303, modifying decree (C. C. 1909) 169 Fed. 833.

The compilation and rearrangement and reclassification of syllabi in digests into new and larger digests constitute new works entitled to copyright, which need only notice of their own entry for copyright. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Statutes.—While a compilation of the statutes of a state may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis, he cannot obtain a copyright for the publication of the laws alone, nor can the legislature of the state confer any such exclusive privilege upon him. Davidson v. Wheelock (C. C. 1866) 27 Fed. 61.

Law reports.—The arrangement of cases, and paging and distribution into volumes, are not features of such importance as to entitle the official reports to copyright protection. Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co. (1909) 169 Fed. 386, 94 C. C. A. 642, 17 Ann. Cas. 957, appeal dismissed (1911) 32 Sup. Ct. 530, 223 U. S. 738, 56 L. Ed. 636.

Under a statute enacting that "such contractor shall have the exclusive right to publish such reports, so far as the state can confer the same," a copyright obtained by the reporter on a volume of reports published by the contractor does not cover the syllabi, statements of the cases, and opinions, which were the work of the judges. Banks v. Manchester (1888) 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425, affirming (C. C. 1885) 23 Fed. 143.

§ 9523. (Act March 4, 1909, c. 320, § 7.) Copyright not to subsist in works in public domain, or works published prior to act and not already copyrighted, or government publications; effect of publication by government of copyrighted material.

No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: Provided, however, That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor. (35 Stat. 1077.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Government publications.—An article purporting to contain a proposed program for observance of "Peace Day" by public schools, taken almost exclusively from an official bulletin published by the United States Bureau of Education, held not copyrightable under this section, withdrawing from copyright publications of the United States government. Du Puy v. Post Telegram Co. (1914) 210 Fed. 883, 127 C. C. A. 493.

§ 9524. (Act March 4, 1909, c. 320, § 8.) Authors or proprietors, etc., entitled to copyright; alien authors or proprietors.

The author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall

have copyright for such work under the conditions and for the terms specified in this Act: Provided, however, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require. (35 Stat. 1077.)

See notes to section 1 of this act, ante, § 9517.

Provisions for the protection of foreign copyrighted books, etc., exhibited at the Panama-Pacific International Exposition, were made by Act Sept. 18, 1913, c. 14, §§ 2–6, post, §§ 9525–9529.

Notes of Decisions

1. Applicability of statutes.
2. Subjects of copyright.
3. Persons entitled to copyright—In general.
4. —— Citizens or residents.
5. —— Authors.
6. —— Assigns.
7. —— Proprietors.
8. Removal of copyrights.
9. International copyright.
10. Extent of rights acquired—In general.
11. —— Title of work.
12. —— Protection as to subject-matter.
13. Nature of property.
14. Rights of owners in general.
15. Assignments, licenses, and contracts.
16. Maps and charts.
17. Evidence.

1. Applicability of statutes.—Where a copyrighted newspaper published a short fiction story, its rights against an alleged subsequent infringer were measured by the statute in force at the time of the publication. Davies v. Bowes (D. C. 1913) 209 Fed. 53.

2. Subjects of copyright.—Complainant accepted and executed a commission to furnish, deliver, and put in place, complete two mosaic panels in the reading room of the Congressional Library Building, in Washington, from designs to be made by him. Held, that the failure of the officers to object to the placing of copyright notice upon the panels did not bind the government to a construction of the contract contrary to its legal effect, or entitle complainant to claim a copyright in such panels, in the absence of any reservation of such right. Dielman v. White (C. C. 1900) 102 Fed. 892.

3. Persons entitled to copyright—In general.—While every man is entitled to the fruits of his own labor, he can enjoy same only under statutes prescribing the rules of property regulating society and defining the rights of things in general. Wheaton v. Peters (1834) 8 Pet. 591, 658, 8 L. Ed. 1055.

A court reporter, though a sworn public officer, receiving a fixed salary for his labors, is not, in absence of statute, deprived of any privilege of taking out a copyright, which he would otherwise have. Callaghan v. Myers (1888) 9 Sup. Ct. 177, 184, 128 U. S. 617, 32 L. Ed. 547.

The action of the President is a condition of the right of a foreign citizen to the benefits of this section. Bong v. Alfred S. Campbell Art Co. (1909) 29 Sup. Ct. 628, 630, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126, affirming judgment (1907) 155 Fed. 116, 83 C. C. A. 576.

Prior to this act no foreign author or assignee of a foreign author could avail himself of the copyright law. West Pub. Co. v. Edward Thompson Co. (1910) 176 Fed. 833, 100 C. C. A. 303.

A person is not entitled to a copyright on an historical print composed and executed by artists employed and paid by him. Act April 28, 1802. Binns v. Woodruff (C. C. 1821) Fed. Cas. No. 1,424.

A person who accompanied a government expedition, upon the understanding that all sketches and drawings he might make were to be the exclusive property of the government, where the same, upon his return, were incorporated in his report, and published for distribution, held not entitled to a copyright therein. Heine v. Appleton (C. C. 1857) Fed. Cas. No. 6,324.

The translator of a play by a foreign author who has obtained a copy-

right upon it is entitled to protection against the use of any part of his translation by another. Shook v. Rankin (C. C. 1875) Fed. Cas. No. 12,804.

One who does business under a conventional or fictitious partnership name may obtain a copyright under that name. Scribner v. Henry G. Allen Co. (C. C. 1892) 49 Fed. 854.

So long as a state of war exists between Spain and the United States Spanish subjects have no right to the privilege of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war. (1898) 22 Op. Atty. Gen. 268.

Where a German citizen has complied with all the general provisions of the copyright act at any time subsequent to July 1, 1909, the date upon which the act became effective, there was vested in him the rights and privileges set forth in said act, except the right specified in section 1 (e), as Germany had at that time complied with one or more of the conditions enumerated in section 8, subsec. (b). (1911) 29 Op. Atty. Gen. 64.

A German citizen who has strictly complied with the provisions of the copyright act at any time between July 1, 1909, the date upon which the law became effective, and September 9, 1910, the date of the proclamation of the President, is not only vested with a copyright in his work or composition, but he may maintain an action for any infringement which occurred between said dates. Id.

A German citizen could not acquire the right specified in the proviso to section 1 (e) of said act prior to September 9, 1910, the date upon which the reciprocal condition provided for therein was complied with by Germany. Id.

4. —— **Citizens or residents.**—A state cannot be properly called a citizen within the meaning of R. S. §§ 4952, 4954 (superseded by this section and section 9544, post), which provided for the issue and renewal of copyrights to citizens of the United States. Banks v. Manchester (1888) 9 Sup. Ct. 36, 39, 128 U. S. 244, 32 L. Ed. 425.

Where an officer of the British navy files a declaration of intent to become a citizen, but, trouble with Canada seeming imminent, he offers his services to that province, he is not a resident. Carey v. Collier (C. C.) Fed. Cas. No. 2,400.

Residence entitling an alien to the benefit of the copyright laws is determined by the intention existing at the time of filing the title, and is unaffected by any change of intention. Boucicault v. Wood (C. C. 1867) Fed. Cas. No. 1,693.

A chromo is a print; and hence the proprietor of a chromo made by a person not a citizen nor a resident of the United States cannot obtain a copyright thereon. Yuengling v. Schile (C. C. 1882) 12 Fed. 97.

Where the certificate from the librarian described him as of New York, and the author testified that he was at the time of the trial a resident of New York, and that he had mailed the two copies to the librarian of congress in New York more than 10 years before, this was sufficient prima facie proof of the author's residence. Patterson v. J. S. Ogilvie Pub. Co. (C. C. 1902) 119 Fed. 451.

When Cuba, Porto Rico, and the Philippine Islands have been duly ceded to the United States, their respective inhabitants will not be entitled to the benfits of the copyright laws unless the treaty by its terms confers such right or Congress shall extend such laws to the inhabitants of those countries. (1898) 22 Op. Atty. Gen. 268.

The inhabitants of Hawaii, in the absence of affirmative legislation by Congress to that effect, are not entitled to the benefits of the United States copyright laws. Id.

Congress has not extended the copyright laws to the Philippines, but has enacted, in setting up a separate government for those islands (section 3804, ante), that section 3522, ante, extending the Constitution and applicable laws to organized territories, is not to be in force in the Philippines. (1903) 25 Op. Atty. Gen. 25.

Inhabitants of Philippine Islands may avail themselves of the benefits of the copyright laws within the United States. (1904) 25 Op. Atty. Gen. 179, overruling opinion of December 2, 1898 (22 Op. Atty. Gen. 268).

The proclamation issued by the President does not create the right of foreign authors or proprietors to enjoy the privileges of our copyright laws, but is only the evidence of the existence of conditions under which those rights and privileges may be exercised, and is conclusive evidence on that point. (1910) 28 Op. Atty. Gen. 222.

A foreign author or proprietor, not domiciled within the United States at the time of the first publication of his work, is not entitled to the benefits conferred by this section until after the President has issued a new proclamation declaring the existence of the reciprocal conditions set forth in that act. Id.

The new proclamations may be retroactive in terms and effect. Id.

The provision at the end of this section applies equally to the reciprocal condition specified in the proviso to section 9517 (e), ante, upon which an alien may acquire the right of controlling the parts of instruments serving to reproduce mechanically a musical work. (1911) 29 Op. Atty. Gen. 64.

Under this section the date when the reciprocal condition was actually met by the laws of any foreign state or nation is the one which should be insert-

ed in the President's proclamation. (1911) 29 Op. Atty. Gen. 209.

5. —— **Authors.**—The judge who prepares the headnotes, statement of the case, and opinion cannot be regarded as their author or proprietor so as to confer any title by assignment on the state or any other person, sufficient to authorize a copyright to it or him as the assignee of the author or proprietor. Banks v. Manchester (1888) 9 Sup. Ct. 36, 40, 128 U. S. 244, 32 L. Ed. 425.

Where an author's work is published serially, with his consent, which the publisher copyrights in his own name, the author cannot subsequently copyright the work. Mifflin v. Dutton (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043); Mifflin v. R. H. White Co. (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134 (decree affirmed [1903] 23 Sup. Ct. 769, 190 U. S. 260, 47 L. Ed. 1040).

The person who writes a book, and prepares it for publication, is the author, whom the copyright law was intended to protect, and not the one who employed him for such purpose. De Witt v. Brooks, Fed. Cas. No. 3,851.

An author is one who, by his own intellectual labor, produces an arrangement or compilation new in itself. Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640.

An agreement by an actor and stage manager, with the proprietor of a theater, to write a drama, which should be performed in his theater so long as it should draw good audiences, does not give the latter a right to the copyright. Roberts v. Myers (C. C. 1860) Fed. Cas. No. 11,906.

An agreement to write a play for another, and to act in it, with a share in the profits as compensation, does not create a legal or equitable title in the latter, which will prevent the author taking out a copyright. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691.

The copyright laws should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work. Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 732; Id. (C. C. 1883) 20 Fed. 441.

Some similarity to a previously published song, where it is not continuous enough or sufficiently extended to indicate that he was guided or aided by the former song will not prevent one being deemed the author. Blume v. Spear (C. C. 1887) 30 Fed. 629.

The validity of the copyright or the right of complainant to relief does not depend on the designation by the subject of a book of the author as his special biographer. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

Agreement by an American author to write an article for use in a foreign encyclopædia, and to obtain a copyright therefor amounted only to a license to use the article, and a copyright was properly taken in the author's name. Black v. Henry G. Allen Co., (C. C. 1893) 56 Fed. 764.

When an artist is commissioned to execute a work of art not in existence at the time the commission is given, there is a very strong implication that such work of art, when executed, sold, and delivered under the commission, is to belong unreservedly and without limitation to the patron; and the burden rests upon the artist to prove that he retains a copyright therein. Dielman v. White (C. C. 1900) 102 Fed. 892.

Under a contract whereby a publisher agrees to publish a copyrighted work, and pay the author for the copyright 7½ cents for every copy of the book published, the publisher does not obtain the exclusive right to publish the work. Willis v. Tibbals (1871) 33 N. Y. Super. Ct. (1 Jones & S.) 220.

6. —— **Assigns.**—An author of a painting, who is excluded by this section from the benefit of copyright, cannot convey such right to a person whose citizenship is such as to satisfy the section. Bong v. Alfred S. Campbell Art Co. (1909) 29 Sup. Ct. 628, 630, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126, affirming judgment (1907) 155 Fed. 116, 83 C. C. A. 576.

Where plaintiff engaged with defendant for 10 years as an author, and stipulated that the property in his productions should belong exclusively to defendant, there was no condition which could defeat defendant's title or reinvest plaintiff with any interest in a play written and copyrighted, nor authorize him to interfere with defendant's use of the property. Mackaye v. Mallory (C. C. 1882) 12 Fed. 328.

Under this section as formerly enacted, one to whom a German artist gives the exclusive right of reproduction and publication is entitled to copyright, he being within the term "assigns." Werckmeister v. Pierce & Bushnell Mfg. Co. (C. C. 1894) 63 Fed. 445, decree reversed Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 18 C. C. A. 431.

Under this section the assignee of the copyright of a painting may obtain a statutory copyright upon it in the United States, although not the owner of the painting itself; the common-law copyright being capable of assignment separately from the painting. Werckmeister v. American Lithographic Co. (C. C. 1905) 142 Fed. 827.

Under a contract granting exclusive rights of publication, but reserving the right of translation and dramatization, the publishers rightfully took out the copyright in their own name, as the only means by which they could protect their own rights in the work. Harper & Bros. v. M. A. Donohue & Co. (C. C. 1905) 144 Fed. 491.

The right to produce a play, which is made an incident to the ownership of the copyright, is not the subject of separate statutory protection, although it may be assigned to one person while the right to print resides in another. Lederer v. Saake (C. C. 1909) 166 Fed. 810, reversed (1909) 174 Fed. 135, 98 C. C. A. 571.

Assignment of the right to print and publish certain cartoons and to have them copyrighted, reserving dramatization rights to the author, did not authorize the assignee to copyright a drama or play based on the cartoons or the situations therein depicted, whether written at the time of the assignment or thereafter. Outcault v. Lamar (1909) 119 N. Y. Supp. 930, 135 App. Div. 110.

7. —— **Proprietors.**—A contractor for the publication of the decisions of the Court of Appeals of New York is not the legal owner of manuscripts and decisions in the hands of the reporter after the expiration of his term to be reported; and he is not entitled to an injunction to prevent the publication and sale thereof by the reporter. Little v. Hall (1855) 18 How. 165, 172, 15 L. Ed. 328.

Contract by court reporter in 1828 that the publishers should have the copyright of the reports forever gave the publishers a full right of property in the manuscript, and they could publish not only for the 28 years during which Act May 31, 1790, gave an author and his assigns the exclusive right to publish, but also during the 14 years granted by Act Feb. 3, 1831. Paige v. Banks (1871) 13 Wall. 608, 614, 20 L. Ed. 709.

A compiler and publisher of an annotated edition of the statutes of a state may copyright his volumes, and such copyright will cover and protect such part of their contents as may fairly be deemed the product of his own labor. Howell v. Miller (1898) 91 Fed. 129, 33 C. C. A. 407.

A contract by an American publisher "for the sole and exclusive use of advance sheets of said novel in the United States and dominion of Canada," made before the copyright act of 1891, conferred no rights of proprietorship in the manuscript of the work which entitled the American publisher to copyright the same in the United States, but only the right to the exclusive use of the advance sheets to enable him to publish the work in America coincidently with or in advance of its publication in England. Fraser v. Yack (1902) 116 Fed. 285, 53 C. C. A. 563.

Additions to a play made by an actor while in the employ of the owner, in adapting the play to the performance by him, belong to the owner. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

Where the publisher takes the copyright in his own name, with the knowledge and acquiescence of the author, he is the lawful owner, subject to conditions pursuant to the contract. Pulte v. Derby (C. C. 1852) Fed. Cas. No. 11,465.

The inflexible policy of Congress is that of protecting only native or resident authors and artists, and the word "proprietor" must be construed in a limited and restricted sense, viz. as the legal representative of a right derived from a native or resident author or artist. Yuengling v. Schile (C. C. 1882) 12 Fed. 97.

One who employed an artist to paint, from designs furnished by such employer, was the proprietor of the painting, within the meaning of the copyright law. Schumacher v. Schwencke (C. C. 1885) 25 Fed. 466.

The American agents of a foreign publishing firm, negotiating an agreement with an American author to write an article for use in a foreign encyclopædia, and have the same copyrighted, have authority to deposit the title of such article for copyright purposes. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

One who photographs an actress in her public character, free of charge, is the owner of the photograph and negative, and has the right to secure a copyright for his own exclusive benefit; and her right to free photographs, under the agreement does not extend to making copies, or permitting others to do so for their own benefit. Press Pub. Co. v. Falk (C. C. 1894) 59 Fed. 324.

A sale by an author of his painting, reserving the right of reproduction, does not transfer the right of copyright; the purchaser in such case not being a "proprietor," within the copyright law. Werckmeister v. Springer Lithographing Co. (C. C. 1894) 63 Fed. 808.

The literary product of a salaried employé, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it; but the employé is not debarred from making a new compilation from the same original sources, making use of the experience and information gained in his employment. Colliery Engineer Co. v. United Correspondence Schools Co. (C. C. 1899) 94 Fed. 152.

The proprietor of a magazine, who is also the owner of an article published in it, secures a valid copyright of such article by duly copyrighting the number of the magazine in which it is printed. Ford v. Charles E. Blaney Amusement Co. (C. C. 1906) 148 Fed. 642.

8. **Renewal of copyrights.**—Persons entitled to renewal of copyrights, see notes under § 9544, post.

This section does not entitle the proprietor and assignee of the author of a copyrighted musical composition to a renewal of the original term of his copyright. White-Smith Music Pub. Co. v.

Goff (C. C. 1910) 180 Fed. 256, affirmed (1911) 187 Fed. 247, 109 C. C. A. 187.

9. International copyright.—This section as formerly enacted, expressed the sanction of Congress to the procuring of copyright under the laws of a foreign country, and encouraged foreign nations to grant copyrights to our citizens. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470.

Under this section the President's proclamation amounted to a conclusive continuing determination of reciprocal rights until a new proclamation was made to the contrary. Chappell & Co. v. Fields (C. C. A. 1914) 210 Fed. 864.

There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas. Frohman v. Ferris (1909) 87 N. E. 327, 238 Ill. 430, reversing decree Ferris v. Frohman (1907) 131 Ill. App. 307.

10. Extent of rights acquired—In general.—A copyright covers only the right to make a multiplication of copies. Munson v. New York (C. C. 1880) 3 Fed. 338, reversed (1888) 8 Sup. Ct. 622, 124 U. S. 601, 31 L. Ed. 586.

The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. Mines v. Scribner (C. C. 1906) 147 Fed. 927.

11. —— Title of work.—Where an author of certain cartoons entitled "Buster Brown" authorized an assignee to print, publish, and copyright them, the assignee's copyright did not give to it the exclusive right to the use of the title. Outcault v. Lamar (1909) 119 N. Y. Supp. 930, 135 App. Div. 110.

12. —— Protection as to subject-matter.—The statute affords protection to proprietors of periodicals only in respect of such parts thereof as are copyrightable by the proprietors; and articles or pictures made by persons who have not transferred their rights to the publisher are not covered by such copyright. Mail & Exp. Co. v. Life Pub. Co. (1912) 192 Fed. 899, 113 C. C. A. 377.

The proprietor of the play will be protected against the communication by such actor to others of his unwritten additions, though they are not the subject of literary property. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

Where a story printed in a magazine was copyrighted with other material in the magazine, the author's right of dramatization not sold to the magazine was not interfered with. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

A copyrighted book, published by the consent and license of the author as a part of a foreign encyclopædia, does not thereby become public property, and cannot be used without the consent of the author in a reprint of the encyclopædia. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

Where A. purchased the copyright of a book to print and sell in the New England states, and B. purchased the right to print and sell in New York, it was held that, though B. employed A. to print copies for him in this state, yet he had no right to sell those copies in New England. Hudson v. Patten (Conn. 1789) 1 Root, 133.

Copyright protection does not extend to the proceeds of the sale which exist in the author's hands, or to choses in action held by another for his use, where he has sold the copyright and the matter to be printed, and delivered the same to the vendee. Cooper v. Gunn (1844) 43 Ky. (4 B. Mon.) 594.

13. Nature of property.—The legal title to a copyright may remain in the proprietor, while the beneficial interest, to the extent which is agreed upon, may be in another party. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764, following Id. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

One of joint authors of comic opera, though she did not consent to publication and copyrighting, held entitled to accept the wrongful publication and to insist upon her proprietary rights. Maurel v. Smith (D. C. 1915) 220 Fed. 195.

The copyright of a published work cannot be reached by the owner's creditors unless by statutory authority. Dart v. Woodhouse (1879) 40 Mich. 399, 29 Am. Rep. 544.

14. Rights of owners in general.—A usage among booksellers, to consider the second term as passing with the first, does not control the rights of the author, who was not a bookseller, nor shown to be conversant with such usage. Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152.

A publisher cannot transfer the copyright to a third person, but may sell his stereotype plates, and authorize the purchaser to publish, accounting to the author pursuant to the contract. Pulte v. Derby (C. C. 1852) Fed. Cas. No. 11,465.

The rights of a party holding a copyright depend wholly on whether he has in fact complied with the terms of the copyright law. Chicago Music Co. v. J. W. Butler Paper Co. (C. C. 1884) 19 Fed. 758.

Entry for copyright, by an American publisher, of a foreign encyclopedia shortly before entry of separate articles by American authors, gives such publisher a copyright only in trust, if at all; and does not affect the rights of the foreign owner and those of the

American authors. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

Equitable interest in a photograph and its copyright, by the subject thereof, does not empower him to permit another to make copies for his own benefit without the written consent from the owner of the copyright. Press Pub. Co. v. Falk (C. C. 1894) 59 Fed. 324.

The owner of a copyright after an absolute sale of the article covered thereby may, by virtue of the statute, retain control of the future trade in the article, as to prices of resale, etc., irrespective of conditions in the contract of sale; but the right to reserve future control by contract exists, if at all, by the common law. Hartman v. John D. Park & Sons Co. (C. C. 1906) 145 Fed. 358, decree reversed John D. Park & Sons Co. v. Hartman (1907) 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, writ of certiorari dismissed Hartman v. John D. Park & Sons Co. (1908) 29 Sup. Ct. 689, 212 U. S. 588, 53 L. Ed. 662.

Sale of the right to print and publish a production, with the right to copyright it, does not prevent the publishers from assigning all the rights secured by their statutory copyright, after publication, to the author, his heirs and assigns. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

An author may sell the exclusive right to print and publish his production, giving the buyer the right to copyright it, withholding the right to dramatize. Id.

Joint authors, who took out copyrights, held constructive trustees for another joint author, and accountable to her. Maurel v. Smith (D. C. 1915) 220 Fed. 195.

Contract among joint owners of a copyright as to printing and publishing a book prevents one of them from setting up, as against another, his original rights as a joint owner, in violation of such contract. Gould v. Banks (N. Y. 1832) 8 Wend. 562, 24 Am. Dec. 90.

15. Assignments, licenses, and contracts.—See notes under § 9563, post.

16. Maps and charts.—A purchaser under a sheriff's sale of a copper plate on which a copyrighted map is engraved, may take impressions therefrom and sell the same. Stevens v. Gladding (C. C. 1850) Fed. Cas. No. 13,400.

17. Evidence.—Where the bill alleged that plaintiffs are citizens of the United States, and this is not denied in the answer, it must be considered as admitted, although no other evidence of citizenship is offered. Webb v. Powers (C. C. 1847) Fed. Cas. No. 17,323.

Cited without definite application, Henderson v. Tompkins (C. C. 1894) 60 Fed. 758, 764; Mutual Advertising Co. v. Refo (C. C. 1896) 76 Fed. 961, 963; Ohman v. New York (C. C. 1909) 168 Fed. 953.

§ 9525. (Act Sept. 18, 1913, c. 14, § 2.) Certificate of registration or of copyright to be issued to proprietor of certificate of registration, copyright, trade-mark, or patent issued by foreign government, protecting pattern, model, design, copyright, trade-mark, or manufactured article imported for and exhibited at Panama-Pacific International Exposition; branch office; registers of certificates issued; deposits of registers in Patent Office and Copyright Office.

The Librarian of Congress and the Commissioner of Patents are hereby authorized and directed to establish a branch office under the direction of the Register of Copyrights and the Commissioner of Patents at the Panama-Pacific International Exposition, in suitable quarters to be furnished free of charge by the Panama-Pacific International Exposition Company, said office to be established not later than July first, nineteen hundred and fourteen, and maintained until the close of said exposition; and the proprietor of any certificate of registration, copyright, trade-mark, or patent issued by any foreign Government protecting any pattern, model, design, copyright, trade-mark, or manufactured article imported for exhibition and exhibited at said Panama-Pacific International Exposition may, upon presentation of satisfactory proof of such proprietorship, obtain without charge a certificate from said branch office, which shall be legal evidence of such proprietorship; and said branch office shall keep a register of all certificates of registration, trade-mark, or patent, and a register of all certificates of copyright issued, which shall be open to public inspection.

At the close of said Panama-Pacific International Exposition the register of certificates of registration, trade-mark, or patent shall be

deposited in the United States Patent Office at Washington, District of Columbia, and the register of certificates of copyright shall be deposited in the Copyright Office of the Library of Congress at Washington, District of Columbia. (38 Stat. 112.)

This section and the four sections next following were part of an act entitled "An act providing for the free importation of articles intended for foreign buildings and exhibits at the Panama-Pacific International Exposition, and for the protection of foreign exhibitors."

Section 1 of said act provided for the admission, free of payment of duty, of articles imported for said exposition, under regulations to be prescribed, and permitted the sale of goods, etc., on exhibition at the exposition, subject to regulations for the collection of duties thereon. The section is omitted, as temporary merely.

§ 9526. (Act Sept. 18, 1913, c. 14, § 3.) Infringement of rights protected in articles, etc., exhibited at exposition; injunction; damages; impounding of articles, etc., during pendency of action; destruction of articles, etc.

It shall be unlawful for any person without authority of the proprietor thereof to copy, imitate, reproduce, or republish any pattern, model, design, trade-mark, copyright, or manufactured article protected by the laws of any foreign country by registration, copyright, patent, or otherwise, which shall be imported for exhibition at the Panama-Pacific International Exposition, and there exhibited; and any person who shall infringe the rights protected under this Act shall be liable—

(a) To an injunction restraining such infringement;

(b) To pay to the proprietor such damages as the proprietor may have suffered due to the infringement, as well as all the profits which the infringer may have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just;

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe the rights herein protected;

(d) To deliver up on oath for destruction all the infringing articles, as well as all means and devices for making such infringing articles. (38 Stat. 113.)

See notes to section 2 of this act, ante, § 9525.

§ 9527. (Act Sept. 18, 1913, c. 14, § 4.) Punishment for infringement of rights protected.

Any person who willfully and for profit shall infringe any right protected under this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court. (38 Stat. 113.)

See notes to section 2 of this act, ante, § 9525.

§ 9528. (Act Sept. 18, 1913, c. 14, § 5.) Laws applicable to actions for infringement.

Sections twenty-five, twenty-six, twenty-seven, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, and forty of the copyright Act approved March fourth, nineteen hundred and nine, are hereby made applicable to civil actions authorized to be brought under the provisions of this Act. (38 Stat. 113.)

See notes to section 2 of this act, ante, § 9525.

Sections 25–27, 34–40 of the Copyright Act of March 4, 1909, c. 320, mentioned in this section, are set forth post, §§ 9546–9548, 9555–9561.

§ 9529. (Act Sept. 18, 1913, c. 14, § 6.) Beginning and ending of protection to articles exhibited.

The rights protected under the provisions of this Act shall begin on the date of the arrival of the pattern, model, design, copyrighted article, trade-mark, or manufactured article so imported for exhibition within the grounds of the Panama-Pacific International Exposition at San Francisco, and shall continue for a period of three years from the date of the closing of said exposition. (38 Stat. 113.)

See notes to section 2 of this act, ante, § 9525.

§ 9530. (Act March 4, 1909, c. 320, § 9.) Copyright secured by publication of work with notice of copyright affixed to copies.

Any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act. (35 Stat. 1077.)

See notes to section 1 of this act, ante, § 9517.

Section 21 of this act, mentioned in this section, is set forth post, § 9542.

Notes of Decisions

Notice of copyright.—As to contents of notice, see notes under § 9539, post.

As to place of notice, see notes under § 9540, post.

This section does not require such notice to be placed upon the original of a copyrighted painting or upon its mount, but only upon the copies thereof. American Tobacco Co. v. Werckmeister (1906) 146 Fed. 375, 76 C. C. A. 647, judgment affirmed (1907) 28 Sup. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

No restrictive notice is necessary to spectators to secure the author's rights. Crowe v. Aiken (C. C. 1870) Fed. Cas. No. 3,441.

Publication.—Publication as abandonment to public in general, see notes under § 9517, ante.

The publishers of a copyright book advertised and fixed a day of publication, and in advance thereof sent two lots of the books, in quires, to different publishers. The invoice accompanying one lot contained a request that the books be not exposed for sale until bound copies should be sent. Held, in the absence of evidence that the request was not complied with, there was no publication; nor did sending out copies to subscribers, by carriers, in the absence of proof that any books reached the subscribers before the day fixed, constitute advance publication, within the meaning of the copyright law. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

The issuance and loan merely to subscribers, without count as to number, of a book of credit ratings and the financial standing of persons and firms, is a publication, sufficient to give the compilers a right to the protection of the copyright statutes, where they have taken the necessary steps to secure a copyright. Ladd v. Oxnard (C. C. 1896) 75 Fed. 703.

A delay of the publication of a photograph for 2 months 18 days after the title was filed with the librarian of congress is not unreasonable. Falk v. Gast Lithograph & Engraving Co. (C. C. 1891) 48 Fed. 262, decree affirmed (1893) 54 Fed. 890, 4 C. C. A. 648.

This section provides for the ownership of a copyright, and a copyright is secured by publication with notice, etc. New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

Under this section publication with notice of copyright is the essence of compliance with the statute, and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection. Universal Film Mfg. Co. v. Copperman (D. C. 1914) 212 Fed. 301.

Where, before a photo play was copyrighted in the United States, photographic prints, films, or reels were sold in Great Britain and Europe, with knowledge that the play would be performed or the films shown, though each purchaser agreed not to use them out of his own country and not to sell for export, there was such a publication as prevented a valid copyright, since such a dissemination of a thing among the public as justifies the belief that it took place, with the intention of rendering the work common property, constitutes a "publication." Id.

Actual notice of the author's copyright is tantamount to a publication of the record, which is directory merely, and not mandatory, under the Connecticut statutes of 1793 and 1802. Nichols v. Ruggles (Conn. 1808) 3 Day, 145, 3 Am. Dec. 262.

A copyright is not acquired by depositing with the librarian of congress the title of the book, and two copies thereof, unless the book is afterwards published within a reasonable time. Jew-

ellers' Mercantile Agency v. Jewellers' Weekly Pub. Co. (1895) 84 Hun, 12, 32 N. Y. Supp. 41.

Decisions under the former law as to deposit of title to secure copyright.—The copyright act of 1802 requires the record made by the clerk to be published in the page next to the title page of the book, while under the prior act the right accrues from the time a copy of the title of the book is deposited in the clerk's office. Wheaton v. Peters (1834) 8 Pet. 591, 663, 8 L. Ed. 1055.

What is competent evidence of a deposit required by the statute. Merrell v. Tice (1881) 104 U. S. 557, 560, 26 L. Ed. 854.

Though the title and the work were deposited the same day, it will be presumed, in the absence of evidence to the contrary, that the former was deposited before, and the latter after, publication. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

The presumption will be that the deposit of the title was made before publication, and that, where the work purports to have been deposited within three months after the title, it was deposited within three months after publication; but this presumption will not hold as to a work deposited five months after its title. Id.

A memorandum, signed, but not sealed, by the clerk, at the foot of his certified copy of the title, that the work was deposited on a certain date, was a sufficient prima facie certificate of that fact, without further proof of the clerk's signature. Id.

Under this section as formerly enacted, the photograph required to be filed cannot constitute the description of a painting, which is required in addition thereto, and must be recorded; nor will "Four-in-Hand," as the name of a painting, constitute a sufficient description to entitle the painter to recover the statutory penalties for infringement. Bennett v. Carr (1899) 96 Fed. 213, 37 C. C. A. 453.

Depositing the name and description of a painting in the prescribed office did not acquire a copyright thereon, where a photograph of the same painting under a different name and description for the purpose of obtaining a copyright was previously deposited, unless it is shown by proof that such prior deposit was inoperative. Caliga v. Inter Ocean Newspaper Co. (1907) 157 Fed. 186, 84 C. C. A. 634, judgment affirmed (1909) 30 Sup. Ct. 38, 215 U. S. 182, 54 L. Ed. 150.

The filing of the title of a magazine for copyright and the insertion of the proper notice secures a copyright of a story published therein and protects the right to dramatize the same where the publisher is the owner of both the story and the dramatic rights. Dam v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173, affirming decree Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589.

While the author on communicating the contents of his manuscript may restrict its use as he pleases, an unqualified publication by printing and offering copies for sale is a dedication to the public. Bartlett v. Crittenden (C. C. 1849) Fed. Cas. No. 1,076; Parton v. Prang (C. C. 1872) Fed. Cas. No. 10,-784.

The title is an appendage to the work, and, where the latter is not protected by a copyright, the former is not. Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

The record of a copyright, made in the form prescribed by the statute of 1831, is at least prima facie evidence that a printed title to the book was duly deposited in the clerk's office. Roberts v. Myers (C. C. 1860) Fed. Cas. No. 11,906.

The title of a copyrighted publication, separate from the publication which it is used to designate, is not within the protection of the copyright. Osgood v. Allen (C. C. 1872) Fed. Cas. No. 10,-603.

Deposit of title of drama not original with depositor does not preclude its use by others, who have previously applied it to the dramatic composition. Benn v. Leclercq (C. C. 1873) Fed. Cas. No. 1,308.

Where the title of a book as published is briefer than that filed for entry, but substantially the same, the variance was not material, and the title published was deposited in compliance with this section. Donnelley v. Ivers (C. C. 1882) 18 Fed. 592.

If the published title of the book is sufficient to substantially identify it with the registered copyright, the copyright will not be forfeited on account of slight variations between the two. Carte v. Evans (C. C. 1886) 27 Fed. 861.

A bill to enjoin infringement, alleging disjunctively that orator "before publication delivered at the office of the librarian of congress, or mailed to said librarian, a copy of the title of said photograph," is ambiguous, and tenders no issue. Falk v. Howell (C. C. 1888) 34 Fed. 739.

When two names or descriptive terms are incorporated into the title, each becomes an integral part of it, and one part can no more be omitted from the publication than the other. Daly v. Brady (C. C. 1889) 39 Fed. 265, 266, reversed (1892) 56 Fed. 483, 4 C. C. A. 10.

A change of title, and the filing of such changed title after the filing of the original title, and before the publication of the book, does not render the copyright invalid. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

The title deposited for copyright purposes read: "An Outline of the Political and Economic History of the United States, with Maps and Charts. I.

History and Constitution. By Alexander Johnston, M. A. II. Population and Industry. By Francis A. Walker, LL. D." The title of one of the books deposited to complete the copyright read: "United States. Part III. Political Geography and Statistics. Copyright, 1888, by Francis A. Walker." Held, that the copyright was not invalid as against one not claiming to have been deceived or misled. Id.

An exhibition of a painting in a public salon is not a publication working a forfeiture of the right of copyright unless the general public is permitted to make copies at pleasure. Werckmeister v. Springer Lithographing Co. (C. C. 1894) 63 Fed. 808.

The right of copyright in a painting is not destroyed by a sale of a replica, or original study or model, differing from the painting in size and style. Id.

Copyright on a story in a magazine is secured by merely filing with the librarian of Congress the title page of the magazine and complying with the statute regulating copyrights, without filing a copy of the title of the story so published, or of the story. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

The addition of a word to the name of a periodical, for one issue only, and for a special purpose, did not necessarily make such words the title of the publication within the copyright law, and the depositing instead of the regular title of "Pacific Fisherman," cut from an inner page of the number, was a compliance with this section as formerly enacted. Freeman v. The Trade Register (C. C. 1909) 173 Fed. 419.

Evidence tending to show a mailing of copies of a publication, and statement of their receipt by the librarian of Congress, held sufficient to show deposit of title of book and of two copies thereof. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

The author of a copyrighted story, published in magazine and book form cannot enjoin use of the title for a play not connected with the story, where it appears the same title has been frequently used before for magazine articles, and for plays more than 40 years ago. Stringer v. Frohman (Sup. 1915) 152 N. Y. Supp. 935.

§ 9531. (Act March 4, 1909, c. 320, § 10.) Registration of claim to copyright, and issuance of certificate thereof.

Such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act. (35 Stat. 1078.)

See notes to section 1 of this act, ante, § 9517.

Section 55 of this act, mentioned in this section, is set forth post, § 9576.

§ 9532. (Act March 4, 1909, c. 320, § 11, as amended, Act Aug. 24, 1912, c. 356.) Copyright of works not reproduced for sale.

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale. (35 Stat. 1078. 37 Stat. 488.)

See notes to section 1 of this act, ante, § 9517.

This section, as originally enacted, was as follows:

"Copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of

copies under sections twelve and thirteen of this Act where the work is later reproduced in copies for sale."

It was amended by Act Aug. 24, 1912, c. 356, cited above, to read as set forth here.

See, also, notes to section 5 of this act, ante, § 9521.

Sections 12 and 13 of this act, mentioned in this section, are set forth post, §§ 9533, 9534.

Notes of Decisions

Literary or artistic qualities of work.—The meaning of the term "work of art" and its application to a particular design, drawing, or painting, etc., does not present a question of law, but one of fact, to be determined in each instance by the Register of Copyrights. (1911) 28 Op. Atty. Gen. 557.

The Register of Copyrights had authority to enter a claim in a painting which is made merely as a first step in the production of a lithograph as a "work of art," provided the painting itself is a work of art. Id.

Domestic manufacture.—A claim to copyright may be entered in a published lithograph, not made within the United States, where the design, drawing, or painting which forms the first step in the production of such lithograph has been made for the purpose of being converted into a lithograph, and is located in a foreign country, provided the design, drawing, or painting with reference to which the application is made is a work of art. (1911) 28 Op. Atty. Gen. 557.

Abandonment.—Assuming that this section creates a different kind of copyright from that covered by section 9530, ante, where photographic prints, films, or reels of a motion picture photo play were sold, there was such a reproduction of copies for sale as rendered the copyright under this section void. Universal Film Mfg. Co. v. Copperman (D. C. 1914) 212 Fed. 301.

§ 9533. (Act March 4, 1909, c. 320, § 12, as amended, Act March 28, 1914, c. 47, § 1.) Deposit of copies of work after publication; action or proceeding for infringement not maintainable until after deposit of copies and registration.

After copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with. (35 Stat. 1078. 38 Stat. 311.)

See notes to section 1 of this act, ante, § 9517.

This section was amended by Act March 28, 1914, c. 47, § 1, cited above, by inserting, after the words "two complete copies of the best edition thereof then published," the words "or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country," and by inserting, after the words "which copies," the words "or copy," making this section read as set forth here.

Section 2 of said Act March 28, 1914, c. 47, repealed all acts or parts of acts in conflict therewith.

Section 9 of this act, mentioned in this section, is set forth ante, § 9530.

Section 15 of this act, also mentioned in this section, is set forth post, § 9536.

Section 11 of this act, also mentioned in this section, is set forth ante, § 9532.

Notes of Decisions

Effect of alterations and additions.—No new copyright of the same book, because of alteration or additions, apparently was contemplated by R. S. § 4959. West Pub. Co. v. Edward Thompson Co. (1910) 176 Fed. 833, 100 C. C. A. 303.

R. S. § 4959, as amended by Act March 3, 1891, permitted rather than required a revised edition of a book by foreign authors theretofore published to be copyrighted. (1901) 23 Op. Atty. Gen. 371.

Effect on right to injunction.—Suit in equity to restrain infringement of a copyright and for an accounting cannot be lawfully commenced prior to the deposit of two copies of the best edition of the work in the Copyright Office or in the mail addressed to the Registrar of Copyrights. New York Times Co. v. Sun Printing & Publishing Ass'n (1913) 204 Fed. 586, 123 C. C. A. 54.

A bill which avers that two copies of the book were deposited in the librarian's office at Washington within 10 days after publication is sufficient. Scribner v. Henry G. Allen Co. (C. C. 1892) 49 Fed. 854.

An averment that "within the time and in the manner prescribed by law your orator did all the things required by law to be done in order to secure to himself the full enjoyment of all rights and privileges" granted by the copyright laws, was not sufficient as an averment that within 10 days after publication of the book two copies thereof were deposited in the office of the librarian of congress. Burnell v. Chown (C. C. 1895) 69 Fed. 993.

Under this section plaintiff could not enjoin publication of an alleged copyright work before copies of the work were deposited in the copyright office or mailed to the register. New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

Domestic manufacture.—That clause in this section which provides that the book "shall have been produced in accordance with the manufacturing provisions of section 15 of that act" means that the book shall not have been produced in violation of that act. (1910) 28 Op. Atty. Gen. 265.

Deposit of copies of work.—An author who has neglected to comply with the requirements of the copyright law by giving notice in a newspaper and depositing a copy in the state department is subsequently entitled to none of the rights of the holder of a copyright, though he has complied with the prior conditions. Wheaton v. Peters (1834) 8 Pet. 591, 664, 8 L. Ed. 1055.

The act of congress requiring the court reporter to deliver eighty copies of each volume of his reports to the department of state does not exonerate him from also depositing a copy as required by the act of 1790 as a prerequisite to obtaining a copyright. Id.

The deposit of two copies of the book, after its publication, either with the librarian, or in the mail addressed to him, is an essential condition of the proprietor's right, and must, in some way, be proved in an action for infringement. Merrell v. Tice (1881) 104 U. S. 557, 560, 26 L. Ed. 854.

Under this section as formerly enacted, a deposit of two copies of the article or work with the Librarian of Congress with the name of the author and its title page is all that is necessary to secure a copyright. Burrow-Giles Lithographic Co. v. Sarony (1884) 4 Sup. Ct. 279, 282, 111 U. S. 53, 28 L. Ed. 349.

A work deposited five months and five days after its title cannot be presumed to have been deposited within three months from publication. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

The deposit of two copies of a book in the mail, addressed to the librarian of congress one day before the publication of the work, is a sufficient compliance with this section as formerly enacted. Belford, Clarke & Co. v. Scribner (1892) 12 Sup. Ct. 734, 739, 144 U. S. 488, 36 L. Ed. 514.

A certificate by the librarian of congress as to date of receipt of two copies of a book mailed by the publisher is admissible in evidence, though not under seal. Id.

The provision of this section relative to the deposit of copies of a publication of a foreign country are but supplementary to the provisions of R. S. § 4952, as amended by Act March 3, 1891, c. 565, and should be limited to the purposes of that section. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470.

A delivery of a copy of the book to the secretary of state (Act 1790, § 4) is a condition precedent to the right of copyright. Wheaton v. Peters (C. C. 1832) Fed. Cas. No. 17,486.

The delivery to the secretary of state of the first volume of a work within six months after its publication, and the rest of the volumes before suit for infringement, is a sufficient compliance with the law. Dwight v. Appleton (C. C. 1843) Fed. Cas. No. 4,215.

Deposit of title page, and delivery of copy of book, as provided by law (Feb. 3, 1831) are indispensable conditions. Baker v. Taylor (C. C. 1848) Fed. Cas. No. 782; Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437; Struve v. Schwedler (C. C. 1857) Fed. Cas. No. 13,551.

The copies of a copyright work re-

quired to be deposited may be so deposited after the printing of the work and before its formal publication. Chapman v. Ferry (C. C. 1883) 18 Fed. 539.

The "printed" copy of the title of a book or other article, required to be delivered or mailed to the librarian of congress, may be "printed" with a pen as well as type, with or without the aid of tracing paper. Id.

Proof that one deposited two copies in the mail, and got a receipt from the librarian of congress acknowledging the receipt of two copies of the publication by its title in full, will be considered evidence that two copies were delivered to the librarian as required by the act of congress. Blume v. Spear (C. C. 1887) 30 Fed. 629.

This section does not prevent both the delivery and mailing of the copies; and, where a complaint for infringement avers that both these acts were done, complainant will not be required to elect which averment he will undertake to prove at the trial, and to abandon the other. Scribner v. Henry G. Allen Co. (C. C. 1890) 43 Fed. 680, distinguishing Falk v. T. P. Howell & Co. (C. C. 1888) 37 Fed. 202.

A deposit of two copies of the article or work with the Librarian of Congress with the name of the author and its title page is all that is necessary to secure a copyright. Falk v. Schumacher (C. C. 1891) 48 Fed. 222, 223, affirmed Same v. Seidenberg (C. C. 1891) 48 Fed. 224.

Evidence from the express company's delivery book, and also that the librarian's force of clerks was insufficient to handle the work of his office, and that sometimes books were not stamped until the day after their receipt, is sufficient to justify a finding that the books were received earlier than indicated by the official stamp. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

Deposit of the sheets or pages containing a separate article of an American author published in a foreign encyclopædia is a sufficient compliance with this section. Id.

In obtaining a copyright for a photograph, it is not necessary that the two copies required to be deposited with the librarian of congress should be mailed after publication. Falk v. Donaldson (C. C. 1893) 57 Fed. 32.

Where copies of a work of art or book desired to be copyrighted are mailed before publication, that is sufficient. Id.

Where it appears beyond a doubt that complainant forwarded copies for deposit so early that respondent could not possibly have been prejudiced by any delay therein, direct proof of seasonable mailing of such copies is unnecessary. Ladd v. Oxnard (C. C. 1896) 75 Fed. 703.

It is indispensable that existing statutes be strictly followed, as to time of depositing copies; and one who, without knowledge of the passage of a later act, deposited copies of his work within 10 days after publication, as required by the act of 1870, acquired no rights whatever. Osgood v. A. S. Aloe Instrument Co. (C. C. 1897) 83 Fed. 470.

Evidence in a suit for an infringement of a copyright held sufficient to show that the author had mailed two copies of the book addressed to the librarian of congress, notwithstanding the register of copyrights certified that he could not find any copies on file. Patterson v. J. S. Ogilvie Pub. Co. (C. C. 1902) 119 Fed. 451.

The deposit of two copies of a copyrighted song in the Library of Congress, certainly when coupled with an unrestricted sale of a single copy, without any effort to push the work commercially, constituted a sufficient publication to sustain the copyright. Stern v. Jerome H. Remick & Co. (C. C. 1910) 175 Fed. 282.

Suits in equity are included within the provisions of this section, and may not be maintained prior to the depositing or mailing of two copies of the copyrighted work. New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

A copy of a book may be deposited with the Secretary of State after six months from the time of its publication, if not done before, and it will avail from the time of such deposit. (1822) 1 Op. Atty. Gen. 532.

Notice of copyright.—Where one publishes a book in two countries simultaneously, each copyrighted in its country of publication, failure to insert a notice of the American copyright in the English work did not constitute a waiver of such American copyright. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470, reversing decree (C. C. 1905) 140 Fed. 768, and decree affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

It was not necessary under the former law that the copies deposited with the librarian of congress shall contain notice of the copyright. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291.

Publication.—See notes under §§ 9517 and 9530, ante.

Cited without definite application, Merrell v. Tice (1881) 104 U. S. 557, 26 L. Ed. 854; United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 291, 208 U. S. 260, 52 L. Ed. 478; Ohman v. New York (C. C. 1909) 168 Fed. 953.

§ 9534. (Act March 4, 1909, c. 320, § 13.) Failure to deposit copies; demand therefor; penalty for default after demand. Should the copies called for by section twelve of this Act not be

promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. (35 Stat. 1078.)

See notes to section 1 of this act, ante, § 9517.

Section 12 of this act, as amended by Act March 28, 1914, c. 47, § 1, mentioned in this section, is set forth ante, § 9533.

Notes of Decisions

Publication without notice.—As abandonment to public, see notes under §§ 9517 and 9530, ante.

Cited without definite application, Merrell v. Tice (1881) 104 U. S. 557, 26 L. Ed. 854.

§ 9535. (Act March 4, 1909, c. 320, § 14.) Postmaster's receipt for articles deposited; transmission by mail without cost to claimant.

The postmaster to whom are delivered the articles deposited as provided in sections eleven and twelve of this Act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant. (35 Stat. 1078.)

See notes to section 1 of this act, ante, § 9517.

Section 11, mentioned in this section, is set forth ante, § 9532.

Section 12, also mentioned in this section, as amended by Act March 28, 1914, c. 47, § 1, is set forth ante, § 9533.

§ 9536. (Act March 4, 1909, c. 320, § 15.) Mechanical work, etc., of printed book or periodical accorded publication to be done within United States; exceptions.

Of the printed book or periodical specified in section five, subsections (a) and (b) of this Act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this Act. (35 Stat. 1078.)

See notes to section 1 of this act, ante, § 9517.

Section 5 of this act, mentioned in this section, is set forth ante, § 9521.

Notes of Decisions

Domestic manufacture.—This section as formerly enacted does not include mere musical compositions, though published in book form or made by lithographic process. Oliver Ditson Co. v. Littleton (1895) 67 Fed. 905, 15 C. C.

A. 61, affirming Littleton v. Oliver Ditson Co. (C. C. 1894) 62 Fed. 597.

The provision relating to domestic manufacture was not intended to do more than prohibit the producing abroad of copyrighted books designed for sale in the United States, and had no application to the reproduction in the United States of a book copyrighted in Great Britain which contained no notice of copyright in the United States of a similar book intended for publication in the United States. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470, decree affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

This section does not require that the copies deposited shall be printed from type set in the United States, or from plates made therefrom, as a condition precedent to securing a valid copyright. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291.

Under this section pictures printed in successive colors from metal plates, from which part of the metal has been cut so as to leave portions thereof in relief, were not within the proviso because not "printed from drawings on stone." Hills & Co. v. Austrich (C. C. 1903) 120 Fed. 862.

Pictures printed in successive colors from metal plates from which parts have been cut out so as to leave portions of the print in relief are not within the proviso requiring chromos or lithographs to be printed from "drawings on stone made within the limits of the United States, or from transfers made therefrom," to be entitled to copyright. Hills & Co. v. Hoover (C. C. 1905) 136 Fed. 701.

A republication in this country of a foreign book imported in violation of this section was an infringement of the American copyright and would be enjoined. Harper & Bros. v. M. A. Donohue & Co. (C. C. 1905) 144 Fed. 491.

Under this section dramatic compositions, although printed in book form, need not be printed from type set or plates made in the United States to be entitled to copyright. Hervieu v. J. S. Ogilvie Pub. Co. (C. C. 1909) 169 Fed. 978.

Under this section entry will be refused to importations of a book printed in the original French from type not set within the United States nor from plates made therefrom, where the copyright for the United States was secured by the Paris publisher and afterwards by him assigned to an American house. A dramatic composition may be a book. (1901) 23 Op. Atty. Gen. 353.

The importation of books copyrighted in the United States prior to 1891, and subsequently printed abroad, is not prohibited by this section as formerly enacted, as it took effect prospectively. (1901) 23 Op. Atty. Gen. 371.

The provision of this section as to domestic manufacture is not complied with by depositing copies of publications printed from type set within the Philippine Islands. (1903) 25 Op. Atty. Gen. 25; (1904) 25 Op. Atty. Gen. 179.

Section 9533, ante, providing that the book "shall have been produced in accordance with the manufacturing provisions of section 15 of that act," means that the book shall not have been produced in violation of that act. This section means that, if the book is printed, the printing shall be done as required herein. (1910) 28 Op. Atty. Gen. 265.

Evidence.—Not necessary to prove that a book printed in 1890 was printed from type set within the United States, or from plates made therefrom; this section as formerly enacted being amended so as to require such proof by an act passed March 3, 1891. Patterson v. J. S. Ogilvie Pub. Co. (C. C. 1902) 119 Fed. 451.

Domestic printing of a copyrighted book is proved by showing employment of printing office within the United States and receipt of the book therefrom, printed and ready for the binder. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

Cited without definite application, Higgins v. Keuffel (1891 11 Sup. Ct. 731, 733, 140 U. S. 428, 35 L. Ed. 470; Bleistein v. Donaldson Lithographing Co. (1903) 23 Sup. Ct. 298, 299, 188 U. S. 239, 47 L. Ed. 460; Caliga v. Inter-Ocean Newspaper Co. (1909) 30 Sup. Ct. 38, 40, 215 U. S. 182, 54 L. Ed. 150; Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 56, 18 C. C. A. 431; Bennett v. Boston Traveler Co. (1900) 101 Fed. 445, 446, 41 C. C. A. 445; Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 729; Bleistein v. Donaldson Lithographing Co. (C. C. 1899) 98 Fed. 608, 610, 611; Werckmeister v. American Lithographic Co. (C. C. 1903) 126 Fed. 244, 246 (reversed [1904] 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591); Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 222.

§ 9537. (Act March 4, 1909, c. 320, § 16.) Affidavit to accompany copies of book deposited.

In the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representa-

tive residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication. (35 Stat. 1079.)

See notes to section 1 of this act, ante, § 9517.

§ 9538. (Act March 4, 1909, c. 320, § 17.) Making false affidavit punishable; penalty.

Any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited. (35 Stat. 1079.)

See notes to section 1 of this act, ante, § 9517.

§ 9539. (Act March 4, 1909, c. 320, § 18.) Form of notice of copyright.

The notice of copyright required by section nine of this Act shall consist either of the word "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this Act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four. (35 Stat. 1079.)

See notes to section 1 of this act, ante, § 9517.

Section 9 of this act, mentioned in this section, is set forth ante, § 9530.

Act June 18, 1874, c. 301, 18 Stat. 78, also mentioned in this section, was superseded by this act. Section 1 thereof prescribed a form of notice of entry for copyright.

The form prescribed by said Act June 18, 1874, c. 301, § 1, was as follows: "Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington;" or "Copyright, 18—, by A. B."

Notes of Decisions

Sufficiency of notice.—The words "Copyright, 1882, by N. Sarony," appearing upon each copy of a photograph, are sufficient notice of the copyright. Burrow-Giles Lithographic Co. v. Sarony (1884) 4 Sup. Ct. 279, 280, 111 U. S. 53, 28 L. Ed. 349.

The title having been deposited in 1867, it is immaterial as to third persons, that the notice printed in the work states that the copyright was entered in 1866; the proprietor being concluded by such notice as to the time when his copyright expires. Callaghan v. Myers (1888) 9 Sup. Ct. 177, 188, 128 U. S. 617, 32 L. Ed. 547.

Plaintiff could not sue for infringement of a copyright where his notice

omitted the year of the copyright and the name of the person taking it out, or stated only the former, though defendant himself had actual notice of such copyright. Thompson v. Hubbard (1889) 9 Sup. Ct. 710, 719, 131 U. S. 123, 33 L. Ed. 76.

It is not a compliance with the notice of copyright required by Act June 18, 1874, to state upon a label merely that it has been registered in the patent office. Higgins v. Keuffel (1891) 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470, affirming (C. C. 1887) 30 Fed. 627.

It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained. The person claiming a monopoly of publication must substantially pursue the statutory method of securing it. Mifflin v. R. H. White Co. (1903) 23 Sup. Ct. 769, 771, 190 U. S. 260, 47 L. Ed. 1040.

Inscribing the copyright notice upon the published copies without placing such inscription upon the original painting satisfies the requirement of this section. American Tobacco Co. v. Werckmeister (1907) 28 Sup. Ct. 72, 74, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

A single copyright notice on a paper containing a dozen copies of a copyrighted painting joined so as to form a harmonious whole is not a sufficient notice under this section. Dejonge & Co. v. Breuker & Kessler Co. (1914) 35 Sup. Ct. 6, 235 U. S. 33, 59 L. Ed. 113, affirming decree (1911) 191 Fed. 35, 111 C. C. A. 567.

The statutes refer to an edition offered to the public for sale or circulation and do not include an exhibition of a card of miniature samples to dealers only to enable them to give orders. Falk v. Gast Lithograph & Engraving Co. (1893) 54 Fed. 890, 893, 4 C. C. A. 648.

The word "copies," in this section, refers not to reproductions of an original, but to the individual copyrighted things, whether one or many; and a notice of copyright must have been inscribed upon some visible portion of a painting when it was published. Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 18 C. C. A. 431, reversing Werckmeister v. Pierce & Bushnell Mfg. Co. (C. C. 1894) 63 Fed. 445.

The words, "Copyright 93, by Bolles, Brooklyn," printed on the face of a photograph, are sufficient as the notice of copyright required by this section as formerly enacted. Bolles v. Outing Co. (1897) 77 Fed. 966, 23 C. C. A. 594, judgment affirmed (1897) 89 Fed. 1014, 32 C. C. A. 604, and (1899) 20 Sup. Ct. 94, 175 U. S. 262, 44 L. Ed. 156.

Whether the copyright notice on a photograph is sufficiently legible is a question for the jury. Id.

Where the plates of a copyrighted book are taken abroad, and copies are there published without notice of the American copyright, one who imports such foreign copy and reproduces it here is not guilty of infringement. G. & C. Merriam Co. v. United Dictionary Co. (C. C. 1905) 140 Fed. 768, decree reversed (1906) 146 Fed. 354, 76 C. C. A. 470, which is affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

Under this section as formerly enacted and section 9530, ante, as formerly enacted, a single notice on a sheet containing a dozen copies of a copyrighted painting is not such a compliance with the statute as will sustain a suit for infringement. Louis Dejonge & Co. v. Breuker & Kessler Co. (1911) 191 Fed. 35, 111 C. C. A. 567, affirming decree Louis De Jonge & Co. v. Same (C. C. 1910) 182 Fed. 150.

A copyright notice on a map of a lake and surrounding territory, "Copyright 1908, drawn by J. C. Woodman," was an insufficient compliance with this section as formerly enacted. Lydiard-Peterson Co. v. Woodman (1913) 204 Fed. 921, 123 C. C. A. 243, rehearing denied (1913) 205 Fed. 900, 126 C. C. A. 434.

The statutory requirements of notice of copyright must be strictly complied with. Bentley v. Tibbals (1915) 223 Fed. 247, 138 C. C. A. 489.

Omission to have the date of depositing the title of a map engraved thereon is fatal. King v. Force (C. C. 1820) Fed. Cas. No. 7,791.

Where title page was deposited in 1846, a notice stating entry as 1847 is fatal. Baker v. Taylor (C. C. 1848) Fed. Cas. No. 782.

The notice of copyright is sufficient, in the case of an engraving, when engraved on the plate, and printed from it in such a position as not to be covered when the picture is properly framed, with a reasonable margin. Rossiter v. Hall (C. C. 1866) Fed. Cas. No. 12,082.

The notice of copyright in a subsequent edition of a book need not specify the date of the original copyright in addition to the date of the subsequent one. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

The entry of the notice of copyright on the title page, with the date at the bottom, where the date of publication usually appears, with a notice of its assignment intervening, held insufficient. Tompkins v. Rankin (C. C. 1876) Fed. Cas. No. 14,090.

The object is to give notice of the copyright to the public, to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the

protecting copyright. Sarony v. Burrow-Giles Lithographic Co. (C. C. 1883) 17 Fed. 591, judgment affirmed Burrow-Giles Lithographic Co. v. Sarony (1884) 4 Sup. Ct. 279, 111 U. S. 53, 28 L. Ed. 349.

Inserting in a notice of copyright the initial of the Christian name, and the full surname, is sufficient. Id.

Where the notice of copyright does not contain the words prescribed by statute, the copyright is invalid. Jackson v. Walkie (C. C. 1886) 29 Fed. 15.

Giving part of the title of a song on the cover, and on the page where the music commenced the full title with the words, "Copyright, 1878," etc., was a sufficient notice of a claim of copyright. Blume v. Spear (C. C. 1887) 30 Fed. 629.

It is sufficient if the notice of copyright inscribed on a photograph reads, "1889. Copyrighted by B. J. Falk, New York," instead of as required by the literal directions of the statute. Falk v. Schumacher (C. C. 1891) 48 Fed. 222; Same v. Seidenberg, Id. 224.

The date 1890 on the title page of a reprint of an edition of 1847, the copyright having expired, indicates the date it was printed, and is not a representation that it is a new edition of that year, though the book does not represent itself to be a mere reprint. Merriam v. Texas Siftings Pub. Co. (C. C. 1892) 49 Fed. 944.

The following notice on a map: "Copyright entered according to act of Congress 1889, by T. C. Hefel, civil engineer"—is sufficient, since it differs from the prescribed formula only by including words which are surplusage. Hefel v. Whitely Land Co. (C. C. 1893) 54 Fed. 179.

The name "Photographische Gesellschaft" (Photographic Company), being the trade-name created and extensively used by the copyright owner for many years in his business, is a sufficient designation of the party by whom the copyright is taken out. Werckmeister v. Springer Lithographing Co. (C. C. 1894) 63 Fed. 808.

The residence of the party taking out a copyright, though a foreigner, need not be stated in the notice. Id.

A notice of copyright, in the following words: "Copyright, 1891. All rights reserved,"—is not a sufficient notice, under this section. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291; Osgood v. A. S. Aloe Instrument Co. (C. C. 1897) 83 Fed. 470.

In a notice of copyright inscribed on a photograph, the abbreviation "'94," representing the year, is a substantial compliance with this section. Snow v. Mast (C. C. 1895) 65 Fed. 995.

Where the contents of a book were first published in a magazine copyrighted by the publisher, a later copyright of the book, giving the author as the copyright owner, is invalid. Mifflin v. Dutton (C. C. 1901) 107 Fed. 708, decree affirmed (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134, which is affirmed (1903) 23 Sup. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043.

A copyright notice reciting, "Copyright, 1902, published by Hills & Co., Ltd., London, England," was sufficient. Hills & Co. v. Austrich (C. C. 1903) 120 Fed. 862.

The provision that notice of the copyright shall be inscribed "upon some visible portion thereof or of the substance on which the same shall be mounted" refers back to "the several copies," either of every edition of a book, or of a map and the other things mentioned in the section, including a painting. Werckmeister v. American Lithographic Co. (C. C. 1905) 142 Fed. 827, 832, affirmed (1906) 148 Fed. 1022, 79 C. C. A. 536.

A notice of copyright on a picture, reading: "Copyright 1902. Published by Hills & Co., Ltd., London England"—is sufficient. Hills & Co. v. Hoover (C. C. 1905) 136 Fed. 701.

A notice, printed on the face of a publication of an opera, that the songs and piano score could not be used for stage performances except with the consent of the owners' agents, does not prevent the publication being an abandonment of the words of the songs. Savage v. Hoffman (C. C. 1908) 159 Fed. 584.

Where the copyright notice was in two lines as follows:

Copyright by Real Estate Rec'd & Builders' G. Co.
Vol. LXXV. May 6, 1905. No. 1938.

The date—May 6, 1905—could not be regarded as a part of the copyright notice, which was therefore void for want of a date. Record & Guide Co. v. Bromley (C. C. 1910) 175 Fed. 156.

A copyright notice at the bottom of each page of a publication, "The text of these pages are copyrighted. All rights reserved. Notice is hereby given that infringement will lead to prosecution," was not a compliance with the form prescribed, and was therefore insufficient. Id.

A notice of copyright, "Copyrighted 1907 by C. W. Sweet," was a sufficient notice as prescribed by the copyright act. Id.

Under this section as formerly enacted, a copyright notice on the cover page of a periodical, above the title, "The entire contents of this paper covered by copyright," or "Contents covered by copyright," was insufficient. Id.

A copyright notice is not invalidated by the publication of the date of copyright in Roman instead of Arabic numerals. Stern v. Jerome H. Remick & Co. (C. C. 1910) 175 Fed. 282.

Where, in place of the copyright notice permitted by this section, there was a blurred and indistinct mark, held, that

there was an omission of the notice within section 9451, post, as to damages. Strauss v. Penn Printing & Publishing Co. (D. C. 1915) 220 Fed. 977.

Evidence.—Though compliance with the statutory requirement must be pleaded and proved as a prerequisite, complainant is not required to furnish separate, distinct, and specific proof as to each copy which he may have published. Falk v. Gast Lithographing & Engraving Co. (C. C. 1889) 40 Fed. 168.

Cited without definite application, Bleistein v. Donaldson Lithographing Co. (1903) 23 Sup. Ct. 298, 300, 188 U. S. 239, 47 L. Ed. 460; White-Smith Music Pub. Co. v. Apollo Co. (1908) 28 Sup. Ct. 319, 322, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628; Bennett v. Boston Traveler Co. (1900) 101 Fed. 445, 446, 41 C. C. A. 445; Myers v. Callaghan (C. C. 1881) 5 Fed. 726, 729; Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 221.

§ 9540. (Act March 4, 1909, c. 320, § 19.) Place of application of notice of copyright; one notice in each volume or number of newspaper or periodical.

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: Provided, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice. (35 Stat. 1079.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Title-page.—Each book must have a title, that is, some word or set of words by which it shall be known, and must contain one particular page devoted in full or in part especially to the title, and this page should be one that is readily found without examining every page of the work. Freeman v. The Trade Register (C. C. 1909) 173 Fed. 419.

Inserting or inscribing notice.—A celluloid sheet containing photographic reproductions of the launching of a vessel is sufficiently marked by the attaching of a plate at one end bearing the notice of copyright. Edison v. Lubin (1903) 122 Fed. 240, 58 C. C. A. 604, reversing decree (C. C. 1903) 119 Fed. 993, and appeal dismissed Lubin v. Edison (1904) 25 Sup. Ct. 790, 195 U. S. 625, 49 L. Ed. 349.

A map to be used in connection with, and placed in a pocket inside of, a book which contained a proper copyright notice, such notice was sufficient to cover the map also, though the notice on it was insufficient. Lydiard-Peterson Co. v. Woodman (1913) 204 Fed. 921, 123 C. C. A. 243, rehearing denied (1913) 205 Fed. 900, 126 C. C. A. 434.

The copyright notice may be inserted in a second edition of the same work published in a different number of volumes, without impairing the copyright. Dwight v. Appleton (C. C. 1843) Fed. Cas. No. 4,215.

In the case of a work published in several volumes at different dates, the copyright notice need only be inserted in the first volume. Id.

The publication of notice is an indispensable condition in procuring a copyright. Baker v. Taylor (C. C. 1848) Fed. Cas. No. 782; Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

This section as formerly enacted prevails over R. S. § 4962, with which it is in conflict, by virtue of R. S. § 5601, post, § 10598, which provides that acts passed after December 1, 1873, are to be taken as passed subsequent to the revision. Hefel v. Whitely Land Co. (C. C. 1893) 54 Fed. 179.

This section as formerly enacted does not require such notice to be inscribed upon the original painting or statuary copyrighted, but only on the "several copies" of the same; and a copyright of a painting is not invalidated by the fact that such notice is not inscribed on the original painting. Werckmeister v. American Lithographic Co. (C. C. 1905) 142 Fed. 827.

Under this section as formerly enacted, the copyrighting of a number of a periodical as a whole, with notice of such copyright given on the title page or the page following, covers and protects all the articles printed therein. Harper & Bros. v. M. A. Donohue & Co. (C. C. 1905) 144 Fed. 491.

Where copyrighted material originally published in pamphlets is thereafter combined in a bound volume, such volume should disclose the date of the copyright on each pamphlet to set in operation the period of exclusive enjoyment. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

In a copyrighted legal publication consisting of digest paragraphs, while no one paragraph, when reprinted in a different volume, would in itself be considered a different "edition" of the en-

tire original volume, yet, if any appreciable portion is republished indicating the use of the material of the earlier publication in a later work the later work must carry a notice of the earlier copyright. Id.

There can be but one copyright for the same book for the first term of 28 years, and notice of only a single entry for copyright is necessary therein. The notice of copyright in a subsequent edition must be either of the date of the original or of the date of the subsequent entry, depending upon whether or not such changes or additions have been made as to constitute the later edition a new book. Id.

A preliminary page in a periodical containing in display type the name of the publication and also the volume, number, and date of the issue, and a copy of which was deposited as the title to obtain copyright protection, must be considered the "title page" within the meaning of this section. Freeman v. The Trade Register (C. C. 1909) 173 Fed. 419.

Where a copyrighted weekly publication is consolidated into a quarterly and later into an annual publication, the copyright on the weekly numbers could be protected only by repeating the original notice whenever the copyrighted matter was afterwards published, under this section as formerly enacted. Record & Guide Co. v. Bromley (C. C. 1910) 175 Fed. 156.

A copyrighted publication which consists of a map, and also a directory with the name of the publisher printed on the map, and also the words "Copyright 1908," contains a sufficient notice to protect the copyright of the map. Woodman v. Lydiard-Peterson Co. (C. C. 1912) 192 Fed. 67.

Abandonment.—A copyright of a book is vitiated by its subsequent publication, with the author's consent, in a magazine with no other notice of copyright than that of the entry of the magazine in the name of its publishers. Mifflin v. R. H. White Co. (1903) 23 Sup. Ct. 769, 190 U. S. 260, 47 L. Ed. 1040, affirming decree (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134; Same v. Dutton (1903) 23 Sup. Ct. 771, 772, 190 U. S. 265, 47 L. Ed. 1043, affirming decree (1902) 112 Fed. 1004, 50 C. C. A. 661, 61 L. R. A. 134.

An American copyright is not lost by publishing a work abroad and selling it for use there without inserting the notice of copyright. United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478, affirming judgment G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470.

Cited without definite application, Pierce & Bushnell Mfg. Co. v. Werckmeister (1896) 72 Fed. 54, 56, 18 C. C. A. 431.

§ 9541. (Act March 4, 1909, c. 320, § 20.) Effect of accidental omission of notice of copyright from particular copy or copies of work.

Where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct. (35 Stat. 1080.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Omission of notice.—The owner of a copyrighted literary production does not lose the exclusive property therein given by the copyright because a licensee inadvertently omits to publish the copyright notice. American Press Ass'n v. Daily Story Pub. Co. (1902) 120 Fed. 766, 57 C. C. A. 70, 66 L. R. A. 444, appeal dismissed (1904) 24 Sup. Ct. 852, 193 U. S. 675, 48 L. Ed. 842.

Under this section omission by accident or mistake of notice of copyright held not to prevent recovery of profits, but to prevent allowance of statutory damages in lieu of damages and profits. Strauss v. Penn Printing & Publishing Co. (D. C. 1915) 220 Fed. 977.

Where, in place of the copyright notice permitted by section 9539, ante, there was a blurred and indistinct mark, held, that there was an omission of the notice within this section as to damages. Id.

Under this section, defect in copyright notice does not invalidate the copyright, but prevents owner recovering damages against one innocently infringing it. Alfred Decker Cohn Co. v. Etchison Hat Co. (D. C. 1915) 225 Fed. 135.

Publication without notice as abandonment to public.—See notes under §§ 9517 and 9530, ante.

§ 9542. (Act March 4, 1909, c. 320, § 21.) Ad interim protection of book published abroad.

In the case of a book published abroad in the English language before publication in this country, the deposit in the copyright office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the copyright office. (35 Stat. 1080.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Persons entitled to copyright.—The interim copyright act of January 7, 1904, passed for the protection of exhibitors of foreign literature at the Louisiana Purchase Exposition, did not apply to a foreign publisher of a book previously published in English, and sold by American publishers in the United States. Encyclopædia Britannica Co. v. Werner Co. (C. C. 1905) 135 Fed. 841, decree affirmed Same v. American Newspaper Ass'n (1906) 142 Fed. 966, 74 C. C. A. 228.

Deposit of copies of work.—Application for registration of copyright should be denied: (1) Where the ad interim deposit under this section is a complete book, and the permanent deposit under section 9543, post, is only a part of such book; (2) where both the ad interim and permanent deposits are fragments of the work; (3) where the copy, printed and bound in accordance with the manufacturing provisions of section 9536, ante, of the act and deposited in the first instance, is only a fragment of the work; and (4) where a complete book is deposited, but the affidavit correctly indicates that only a part of the work is printed in the United States. (1910) 28 Op. Atty. Gen. 176.

The word "book," as used in this section, and in class (a) of section 5 (section 9521, ante), and elsewhere in that act, means the entire book, and not a fragment thereof. Id.

§ 9543. (Act March 4, 1909, c. 320, § 22.) Extension of ad interim protection to full term of copyright.

Whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section fifteen of this Act, and whenever the provisions of this Act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act. (35 Stat. 1080.)

See notes to section 1 of this act, ante, § 9517.

Section 15 of this act, mentioned in this section, is set forth ante, § 9536.

§ 9544. (Act March 4, 1909, c. 320, § 23.) Duration of copyright; renewal by proprietor; renewal by author or his widow, widower, or children, etc.

The copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided fur-

ther, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. (35 Stat. 1080.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Term and extension.—The validity of a renewal of a copyright depends upon the validity of the copyright as first secured. Wheaton v. Peters (1834) 8 Pet. 591, 663, 8 L. Ed. 1055.

The right to use a copyrighted name on the expiration of the copyright becomes public property, but must not be used to deceive the public. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

A person employed to compile a book for a certain sum, and credited as author on the title page, the employer taking a conveyance of the copyright, has the sole interest in the additional term allowed to authors. Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152.

Upon expiration of a copyright on a dictionary obtained in 1847, both the work and the generic name "Webster" became public property. Ogilvie v. G. & C. Merriam Co. (C. C. 1907) 149 Fed. 858, decree modified G. & C. Merriam Co. v. Ogilvie (1908) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Under the statute, a renewal of copyright can be made only in the name of the author, "or his widow or children if he be dead," and not in the name of the assignee of the person entitled to such renewal. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The renewal or extension of copyrights under this section can be secured only by the person or persons specifically designated in the statute, and cannot, therefore, be granted to the assignee of the copyright. (1910) 28 Op. Atty. Gen. 162.

The privileges of copyright are purely statutory, and the right to a renewal or extension of a copyright must be found within the statute. Id.

See, also, notes under § 9524, ante.

Cited without definite application, Caliga v. Inter-Ocean Newspaper Co. (1909) 30 Sup. Ct. 38, 39, 215 U. S. 182, 54 L. Ed. 150; White-Smith Music Pub. Co. v. Goff (1911) 187 Fed. 247, 109 C. C. A. 187; Donnelley v. Ivers (C. C. 1882) 18 Fed. 592, 593; White-Smith Music Pub. Co. v. Goff (C. C. 1910) 180 Fed. 256, affirmed (1911) 187 Fed. 247, 109 C. C. A. 187.

§ 9545. (Act March 4, 1909, c. 320, § 24.) Renewal of copyrights subsisting at time act goes into effect.

The copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office

and duly registered therein within one year prior to the expiration of the existing term. (35 Stat. 1080.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Term and extension.—This section limits such right of renewal to the persons named therein and does not extend it to the "proprietor" of the work, although both under that and the prior statute an original copyright might be secured by such proprietor. White-Smith Music Pub. Co. v. Goff (1911) 187 Fed. 247, 109 C. C. A. 187, affirming decree (C. C. 1910) 180 Fed. 256.

§ 9546. (Act March 4, 1909, c. 320, § 25, as amended, Act Aug. 24, 1912, c. 356.) Infringement.

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction restraining.

(a) To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions ten dollars for every infringing performance;

(c) Impounding during action infringing articles.

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) Destruction of infringing copies, etc., and plates, etc.

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) Royalties for use of mechanical reproduction of musical works.

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Rules of procedure.

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States. (35 Stat. 1081. 37 Stat. 489.)

See notes to section 1 of this act, ante, § 9517.

This section, as originally enacted, was as follows:

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés;

"Second. In the case of any work enumerated in section five of this Act,

except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

"(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

"(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order;

"(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

"Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."

It was amended by Act Aug. 24, 1912, c. 356, cited above, to read as set forth here.

See, also, notes to section 5 of this act, ante, § 9521.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

I. Infringement in general

1. Nature of statutory copyright.
2. Title of work.
3. Statutes.
4. Extent of rights acquired—In general.
5. —— Protection as to subject-matter.
6. Licenses.
7. Contracts for sale or use of copyrighted works.
8. Nature and elements of injury.
9. Intent or purpose.
10. Copying constituting infringement in general.
11. Books or other literary works—In general.
12. —— Fair or unfair use.
13. —— Copying.
14. —— Extracts and quotations.
15. —— Compilations.
16. —— Abridgments.
17. —— Digests.
18. —— Translations.
19. —— Improvements and additions.
20. Maps and charts.
21. Dramatic compositions.
22. Musical compositions.
23. Pictorial works.
24. Violation of restrictions on sale of copyrighted articles.
25. Persons entitled to sue.
26. Persons liable.

II. Penalties in general

27. Construction of prior act.
28. Right of action.

III. Forfeitures of copies, sheets, or plates

29. Forfeiture in general.
30. Writ of seizure.

IV. Procedure

31. Nature of action for penalty.
32. Nature and form of remedy.
33. Accrual of right of action.
34. Election of remedies.
35. Grounds of suit.
36. Defenses.
37. Abatement of action.
38. Joinder of causes of action.
39. Jurisdiction.
40. Limitations and laches.
41. Parties.
42. Process.
43. Pleading—In general.
44. —— Bill.
45. —— Declaration.
46. —— Answer.
47. Evidence.
48. —— Presumptions and burden of proof.
49. —— Admissibility.
50. —— Weight and sufficiency.

IV. Procedure—Cont'd

51. Questions of law or fact.
52. Discovery.
53. Preliminary injunction.
54. Permanent injunction.
55. Hearing.
56. Damages and profits.
57. Decree.
58. Costs.

I. INFRINGEMENT IN GENERAL

1. Nature of statutory copyright.—Rights of one holding a copyright depend wholly on whether he has in fact complied with the terms of the copyright law. Wheaton v. Peters (1834) 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055; Ewer v. Coxe (C. C. 1824) Fed. Cas. No. 4,584; Chicago Music Co. v. J. W. Butler Paper Co. (C. C. 1884) 19 Fed. 758.

The requirements of the copyright statutes are not merely directory, but their performance is essential to a vesting of the copyright, and relief in equity for alleged infringement. Ewer v. Coxe (C. C. 1824) Fed. Cas. No. 4,584.

The copyright act should be liberally construed, with a view to protect the just rights of authors and to encourage literature and art. Ford v. Charles E. Blaney Amusement Co. (C. C. 1906) 148 Fed. 642.

The unauthorized use of the literary productions of another is no ground for recovery of damages, except through the copyright laws, and all persons are at liberty to print, publish, and sell such productions of others unless protected by such laws. State v. State Journal Co. (1905) 106 N. W. 434, 75 Neb. 275, 9 L. R. A. (N. S.) 174.

2. Title of work.—Where a dramatic composition has been copyrighted, another will be enjoined from using the same title, though the body of the composition is wholly different from that of the copyrighted play. Shook v. Wood (Pa. 1875) 10 Phila. 373, 32 Leg. Int. 264.

3. Statutes.—The publication by a state of a new compilation of its laws required by the public interests will not be enjoined on the ground that the compiler has appropriated the labor of a former compiler in infringement of his copyright, unless the right to the relief is clearly manifest from the evidence. Howell v. Miller (1898) 91 Fed. 129, 33 C. C. A. 407.

4. Extent of rights acquired—In general.—The ownership of a plate and the ownership of a copyright are distinct species of property, and the plate may be used without infringing upon the copyright of printing and publishing a map. Stevens v. Gladding (1854) 17 How. 447, 452, 15 L. Ed. 155.

This section as formerly enacted, R. S. § 4964, was intended to obviate some of the disadvantages arising under section 4965. Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, reversed (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096.

The copyright of a book describing a new system of stenography does not protect the system, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement. Griggs v. Perrin (C. C. 1892) 49 Fed. 15.

Where a picture was subject to copyright, and also patentable as a design, and the owner elected to copyright it, he was bound by his election, and was only entitled to protection under, and by complying strictly with, the copyright act. Louis De Jonge & Co. v. Breuker & Kessler Co. (C. C. 1910) 182 Fed. 150, decree affirmed (1911) 191 Fed. 35, 111 C. C. A. 567.

5. —— Protection as to subject-matter.—That the alien publishers of a foreign encyclopædia procured copyrighted articles from citizens of the United States, for the express purpose of preventing the work from being reprinted in the United States, does not affect their right to protect the copyright in the courts of the United States. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

The copyright laws should be liberally construed to carry out the intention declared by the Constitution. Werckmeister v. American Lithographic Co. (C. C. 1905) 142 Fed. 827.

6. Licenses.—By licensing the use of his song in a general compilation with no explicit declaration to the contrary, complainant consented that future editions might be issued containing his song, and might be characterized by omissions or additions of other matter, within fair limits, which had not been exceeded in this case. Gabriel v. McCabe (C. C. 1896) 74 Fed. 743.

7. Contracts for sale or use of copyrighted works.—Where by contract between the owner of a copyright and a firm of publishers the territory was divided between them, the breach of contract by complainants did not justify the owner of the copyright in assuming that the contract was canceled, and in selling in complainants' territory. His proper remedy was an action for damages. Baldwin v. Baird (C. C. 1885) 25 Fed. 293.

In a sale to canvassers upon agreement that they shall sell only by subscription, one must rely on the ordinary remedies for breach of that agreement, and it is not within the protection of the copyright act; but it is otherwise if he sell the copies directly to subscribers through agents having no ownership of the copies sold. Henry Bill Pub. Co. v. Smythe (C. C. 1886) 27 Fed. 914.

8. Nature and elements of injury.—The public exhibition of moving pictures of the incidents of a copyrighted

book constitutes an infringement of the exclusive right given to the author by this section as formerly enacted to dramatize his work. Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, affirming decree Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429.

The makers of moving picture films of the incidents of a copyrighted book, who sell the same with a view to their use for dramatic reproduction, infringe the exclusive right given to the author by this section as formerly enacted to dramatize his work. Id.

The copyright must be confined closely to the particular story, and a representation which dispensed with the presence of a principal character tells a substantially different story, and is not an infringement. Daly v. Webster (1892) 56 Fed. 483, 4 C. C. A. 10, reversing decree (C. C. 1891) 47 Fed. 903, and appeal dismissed Webster v. Daly (1896) 16 Sup. Ct. 961, 163 U. S. 155, 41 L. Ed. 111.

It is not essential to a recovery of the statutory damages that the giving of an infringing performance shall be a willful violation of the copyright. Brady v. Daly (1897) 83 Fed. 1007, 28 C. C. A. 253, judgment affirmed (1899) 20 Sup. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

An infringement of a copyright may result in the wrongful use of a part as well as the whole of a coprighted publication. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470, reversing decree (C. C. 1905) 140 Fed. 768, and decree affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

Under this section it is not necessary that the infringing copies of a painting shall be found in defendant's possession to authorize the recovery of the penalty named, as in case of a book or photograph, but it is sufficient if they were either so found or have been sold or offered for sale by defendant. American Lithographic Co. v. Werckmeister (1906) 146 Fed. 377, 76 C. C. A. 649.

Basing a play upon the copyrighted theme of another's story, though slightly changing some details, is an infringement. Dam v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173, affirming decree Dam v. Kirke La Shalle Co. (C. C. 1908) 166 Fed. 589.

Whether copyright obtained in 1908 on musical composition was infringed by distribution of words alone held governed by prior law, and not by this section. M. Witmark & Sons v. Standard Music Roll Co. (1915) 221 Fed. 376, 137 C. C. A. 184, affirming decree (D. C. 1914) 213 Fed. 532.

The taking of so much of a copyrighted work as to materially diminish its value, or the appropriation of the labors of its author to an injurious extent, constitutes infringement. Folsom v. Marsh (C. C. 1841) Fed. Cas. No. 4,901; Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,763; Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Every printing for sale is a new infringement, though the plates were engraved more than two years before the commencement of the suit. Reed v. Carusi (C. C. 1845) Fed. Cas. No. 11,-642.

An equity suit for infringement will be referred to a master to examine as to the nature and extent of the infringement, though infringement has been established on the principal hearing. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

To constitute infringement, it is not sufficient to show that a method of compilation was suggested by plaintiff's work; it must also appear that it was new and original with the plaintiff. Bullinger v. Mackey (C. C. 1879) Fed. Cas. No. 2,127.

A new orchestration of a copyrighted opera, using only such scores as had previously been published by sanction of the author, held, no infringement, The Iolanthe Case (C. C. 1883) 15 Fed. 439.

Misleading advertisements of a reprint of an old edition of Webster's Dictionary, the copyright having expired, will, on application of the owner of the copyright of subsequent editions, be enjoined. Merriam v. Texas Siftings Pub. Co. (C. C. 1892) 49 Fed. 944.

A photogravure company, under an agreement with defendants, made copies of copyrighted engravings and etchings, omitting the tint, title, and plate mark, shipped them to London, and there caused the tint, title, and plate mark to be put on, and delivered the finished pictures to defendants. Held that, under this section, the copyright was infringed, whether the unfinished copies were marketable or not. Fishel v. Lueckel (C. C. 1892) 53 Fed. 499.

A copyright of a single article bound up in a volume, the bulk of which is publici juris, is valid against an unpermitted reprint of the copyrighted book. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764, following Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

Use of the same method of gathering information through one's own efforts does not infringe upon the rights of him who first devised such method, although both gathered the information for the same purpose. Burnell v. Chown (C. C. 1895) 69 Fed. 993.

An imitation of an actress while singing a song by another actress, in which she, in good faith, attempted to mimic the postures and gestures of the original actress, etc., and used the chorus of the song only as a vehicle for the imitation, was not prohibited by this

section as formerly enacted. Bloom & Hamlin v. Nixon (C. C. 1903) 125 Fed. 977.

Where a publisher voluntarily parted with all control over copyrighted books by selling them to purchasers, such purchasers were neither licensees nor agents of the publisher, though buying the books for resale, and hence such resale did not constitute an infringement of the copyright, though the books so sold each contained a notice that no dealer was licensed to sell it at a less price than that fixed by the publisher, and that a sale at a less price would be treated as an infringement of the copyright. Bobbs-Merrill Co. v. Straus (C. C. 1905) 139 Fed. 155, decree affirmed (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, which is affirmed (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086.

A photograph of a copyrighted piece of sculpture is a "copy" thereof, within the meaning of this section, and, if made without authority from the proprietor of the copyright, is an infringement thereof. Bracken v. Rosenthal (C. C. 1907) 151 Fed. 136.

It is infringement to use another's copyrighted syllabus and digest paragraphs without original digesting or renoting of citations, though the material, citations, and paragraphs made use of could have been obtained by original work at the expense of greater effort. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Actionable infringement of copyright may consist of mere paraphrasing or avoidance of the appearance of copying while still appropriating the subject-matter. Id.

Existence of copyright and proof of copying held essential to a recovery in a suit for the infringement of a copyright, under this section. Davies v. Bowes (D. C. 1913) 209 Fed. 53.

Where defendants purchased secondhand copies of a copyrighted set of books put out by complainant, and after restoring and rebinding delivered them in fulfillment of orders taken for new sets, such act did not constitute an infringenment of complainant's copyright, but at most constituted unfair competition, in so far as it consisted of a palming off of restored goods as those of complainant. Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379.

Where a secondhand dealer purchased complainant's copyrighted schoolbooks from the public, and not only cleaned and rebound them, but also reproduced and incorporated therein any omitted parts, and sold the copies in such condition, such reproduction constituted an infringement of complainant's copyright. Ginn & Co. v. Apollo Pub. Co. (D. C. 1914) 215 Fed. 772.

The preparation and use of sheets of memoranda from a copyrighted textbook in tutoring students in the subject-matter of such book held an infringement. Macmillan Co. v. King (D. C. 1914) 223 Fed. 862.

9. Intent or purpose.—Defendant is not entitled to a charge that the original and copy must be "substantially identical"; it is sufficient if the charge makes the test of infringement the taking of the "substantial ideas—the distinctive characteristics"—of the original, regardless of intentional variations in minor particulars. Springer Lithographing Co. v. Falk (1894) 59 Fed. 707, 8 C. C. A. 224, writ of error dismissed (1896) 17 Sup. Ct. 998, 41 L. Ed. 1179.

Under this section it is no defense to a suit to enjoin infringement of such a copyright that defendant did not knowingly copy complainant's composition, but without knowledge of it independently produced substantially the same thing. Hein v. Harris (1910) 183 Fed. 107, 105 C. C. A. 399, affirming order (C. C. 1910) 175 Fed. 875.

Unlawful printing, copying, or selling of a copyrighted photograph, without the consent of the owner of the copyright having been proved, an intent to violate the law will be presumed. Journal Pub. Co. v. Drake (1912) 199 Fed. 572, 118 C. C. A. 46.

The result and not the intention at the time of doing the act complained of determines the question of infringement. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

When the infringement of copyright is established, the question of intent is immaterial. Reed v. Holliday (C. C. 1884) 19 Fed. 325; Harper v. Shoppell (C. C. 1886) 26 Fed. 519; Fishel v. Lueckel (C. C. 1892) 53 Fed. 499.

The efforts made to avoid infringement may be considered in determining whether equitable relief should be granted because of the unwitting profit and use which was gained from the insertion of material which violated the rights of others. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where complainants used the name "St. Elmo" as the name of a copyrighted play based on the plot and incidents of the novel by that name, it is not infringed by the use of the same name by defendants in the production of a different play constructed from the same novel, with a notice, that defendants were the authors and producers, and that it was not complainants'. Glaser v. St. Elmo Co. (C. C. 1909) 175 Fed. 276.

Where defendant published a copyrighted song with knowledge of the copyright in fact, his intent was not material to his liability for infringement. Stern v. Jerome H. Remick & Co. (C. C. 1910) 175 Fed. 282.

10. Copying constituting infringement in general.—Phonographic reproduction

of musical composition not a copying or publishing within the meaning of the copyright act. White Smith Music Pub. Co. v. Apollo Co. (1908) 28 Sup. Ct. 319; Stern v. Rosey (1901) 17 App. D. C. 562.

The privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication. Sampson & Murdock Co. v. Seaver-Radford Co. (1905) 140 Fed. 539, 72 C. C. A. 55.

Using lists of citations, for reference, taken from another's copyrighted work, but which might have been obtained elsewhere, is not such copying as will constitute infringement. Edward Thompson Co. v. American Law Book Co. (1908) 157 Fed. 1003, 85 C. C. A. 677, affirming decree (C. C. 1904) 130 Fed. 639.

Forms of advertisements for use by dealers which were misleading and contained untrue statements held not copyrightable, and use thereof not an infringement of a copyright. Stone & McCarrick v. Dugan Piano Co. (1915) 220 Fed. 837, 136 C. C. A. 583, affirming decree (D. C. 1914) 210 Fed. 399.

In a qui tam action for infringement of the copyright of a chart, the question whether defendant copied from plaintiff's survey is for the jury. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,579.

It is a proper question for the jury whether one production is a copy of the other or not, and, where there is a small variance, whether it is not merely colorable. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,580.

To constitute a piracy of copyright of a compilation of old materials, it must be shown that the original work has been either substantially copied, or has been so imitated as to be a mere evasion of the copyright. Emerson v. Davies (C. C. 1845) Fed. Cas. No. 4,-436.

A dictionary of flowers held not infringed by a much smaller dictionary on a different plan, copying 20 out of 148 definitions. Webb v. Powers (C. C. 1847) Fed. Cas. No. 17,323.

It is not necessary that a play, to infringe the copyright of another, should be identical, word for word. Boucicault v. Wood (C. C. 1867) Fed. Cas. No. 1,693.

Where two exhibitions, called "Black Crook" and "Black Rook," produced upon spectators the impression that they were substantially the same, held that one was a colorable imitation. Martinetti v. Maguire (C. C. 1867) Fed. Cas. No. 9,173.

It is an infringement of a copyrighted play to use a great part of a scene represented by actions alone, in the same order and sequence of events, in a manner to convey the same sensations and impressions to the spectators. Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552.

The spectators have no right to secure the reproduction of a play by phonographic or other means independent of memory. Crowe v. Aiken (C. C. 1870) Fed. Cas. No. 3,441.

A design for playing cards is infringed by the appropriation of those features which substantially embrace the novelty of the conception, and the value in the application of the art of the designer. Richardson v. Miller (C. C. 1877) Fed. Cas. No. 11,791.

What the copyright laws secure is the exclusive right to make and sell copies of copyrighted matter, but an advertising card for the display of paints which did not have the same words and sentences as the copyrighted card, nor any allusion to the plaintiff's paints, was not a copy thereof, and publication thereof could not be restrained. Ehret v. Pierce (C. C. 1880) 10 Fed. 553, 554.

It is difficult to say, in some cases, what constitutes an infringement of the copyright of a map; but where the subsequent map appears to have been substantially copied from the prior one, without alteration or revision, except in scale and color, there is clearly an infringement, which authorizes a court of equity to enjoin the sale of such infringing map, and to require the publisher to account for the profits arising from the sale thereof. Chapman v. Ferry (C. C. 1883) 18 Fed. 539.

One who makes a plate from which a copy of a picture in an illustrated paper that is copyrighted can be produced, and sells the plate to another, without knowledge or reason to suppose that the latter will use it in competition with the owner of the copyright, is not guilty of infringement. Harper v. Shoppell (C. C. 1886) 26 Fed. 519.

To infringe a copyright, defendant must have actually copied or "pirated" the production of plaintiff, and not merely, while ignorant of it, have made something similar. S. S. White Dental Co. v. Sibley (C. C. 1889) 38 Fed. 751.

The copyright of complainant's pamphlets and magazines containing pictures of "Old Sleuth" are not infringed by defendants' books having a picture of "Old Sleuth, the Detective," on the cover; the variations being sufficient to make the pictures very different. Munro v. Smith (C. C. 1890) 42 Fed. 266.

A copyrighted pamphlet containing advertisements and explaining a coupon system is not infringed by the issuance of a folded paper, which contained advertisements, and explained another coupon system, which was similar in some respects to that of the plaintiff, but which differed in material

respects. Mutual Advertising Co. v. Refo (C. C. 1896) 76 Fed. 961.

Where defendants took the infringing books and compared them with the authorities from which complainant's compilations were made, striking out the portions which were not there found, and republishing the remainder in a new edition, such use of the infringing publication was within defendants' rights. Colliery Engineer Co. v. Ewald (C. C. 1903) 126 Fed. 843.

Defendant published a book purporting to contain the summer and winter addresses of cottagers at Newport and other summer resorts, in the preparation of which he made use to some extent of the books of complainant, but it did not appear that he used the selections of prominent persons made therein. It is doubtful if the copying or verifying of a small number of winter addresses of persons or families from complainant's books would be an infringement, but that as to the special features, such as giving the members of households, or the maiden names of married women, complainant was protected by its copyrights. Social Register Ass'n v. Murphy (C. C. 1904) 128 Fed. 116.

Substantial identity between a copyrighted article and an alleged infringing one creates presumption against the publisher of the latter article, which he must overcome. Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460, order affirmed Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281.

To constitute an invasion of a copyright it is not necessary that the whole work should be copied, but is sufficient if so much is taken that the value of the original is sensibly diminished, or the labors of the author are substantially and injuriously appropriated by another. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The term "copying," when used with reference to infringement of copyrighted legal publications, includes not only paraphrasing, but also appropriation of the literary work and ideas of another, which includes arrangement and selection as well as language. Id.

On the expiration of the copyright of a novel, any person may use the plot for a play, copy or publish it, or make any other use of it he sees fit. Glaser v. St. Elmo Co. (C. C. 1909) 175 Fed. 276.

The copyrights covering the Digests of the American Digest System held infringed by the American and English Encyclopædia of Law and the Encyclopædia of Pleading and Practice. West Pub. Co. v. Edward Thompson Co. (C. C. 1911) 184 Fed. 749.

The copyrights covering the Reporters of the National Reporter System, and the Digests of the American Digest System, held valid. Id.

Whether an author of a book may use the form and wording of a prior index depends upon circumstances and the contents of the two books. White v. Bender (C. C. 1911) 185 Fed. 921.

Copying the whole or a substantial part of a copyrighted work is an essential element of infringement; it being insufficient that mere words or lines have been abstracted. Hoffman v. Le Traunik (D. C. 1913) 209 Fed. 375.

Defendant's printed lecture on the administration of medicines was practically identical with complainant's printed lecture on the same subject. The original sources of information were the same, but it appeared that the author of defendant's lecture had complainant's lecture in his possession at the time he was writing for defendant. Held, that infringement appeared, though there were differences in the phrasing of the material and some differences in style. Chautauqua School of Nursing v. National School of Nursing (D. C. 1914) 211 Fed. 1014.

A copyrighted work is subject to fair criticism, either serious or humorous, and for that purpose may be pictured or quoted, without infringing the copyright. Hill v. Whalen & Martell (D. C. 1914) 220 Fed. 359.

One test to determine whether a parody is a mere criticism or a reproduction is whether the parody given is such as will materially reduce the demand for the original by partially satisfying that demand. Id.

11. Books or other literary works—In general.—The publication in the United States of a photographic reprint of the copyrighted English edition of a work also copyrighted and published in this country, and imported for that purpose, constituted an infringement of complainant's copyright. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470, reversing decree (C. C. 1905) 140 Fed. 768, and decree affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

Photographs of a dramatization do not, as such, infringe the copyrighted book or drama. Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429, decree affirmed Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20. 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

A copyrighted book under a certain topic is infringed by a book in the same style under the same name, though the articles and pictures composing the books are taken from a common source, and although the title has formerly been used by others, provided that such

use has been confined to publications essentially different. Estes v. Williams (C. C. 1884) 21 Fed. 189.

Typewriting or mimeographing constitutes a "printing," within the meaning of the copyright statutes. Macmillan Co. v. King (D. C. 1914) 223 Fed. 862.

There is a "publication," within the meaning of the copyright statutes, though the number of persons to whom copies are delivered is limited. Id.

12. —— **Fair or unfair use.**—Where nearly one-third of defendant's work was pirated from plaintiff's copyrighted work, and half the remainder based, though not unfairly, upon plaintiff's work and difficult to segregate from original matter, the whole work, except the portion from original sources, will be enjoined; but defendants may show the portion prepared by fair use of plaintiff's work, and have it excluded from the injunction. West Pub. Co. v. Lawyers' Co-operative Pub. Co. (1897) 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, reversing decree (C. C. 1894) 64 Fed. 360, 25 L. R. A. 441.

A copyrighted syllabus to a legal opinion is infringed by an unfair appropriation of the compiler's labor, though his language is not reproduced. Id.

A large number of instances of copying from another's copyrighted work, sufficient to indicate systematic piracy, is proof of unfair use, though defendant denied any such use of plaintiff's work. Id.

When it is conclusively shown from internal evidence that a subsequent digester has made an unfair use of any part of a copyrighted syllabus, the presumption is that he made use of the whole. Id.

Utilization, with other citations, of those found in a previous copyrighted work on the same subject, in support of the author's own text—such text being original and in no part copied from the earlier work—is a fair use and does not infringe its copyright. Edward Thompson Co. v. American Law Book Co. (1903) 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, reversing order (C. C. 1903) 121 Fed. 907.

Use of another's copyrighted rating book merely for the purpose of checking names or in a few cases to compare ratings where there was reason to question the accuracy of those obtained by defendant, the facts published by defendant having in every case been obtained by independent investigation, was a fair use, and not an infringement of the copyright. Dun v. Lumbermen's Credit Ass'n (1906) 144 Fed. 83, 75 C. C. A. 241, judgment affirmed (1908) 28 Sup. Ct. 335, 209 U. S. 20, 52 L. Ed. 663, 14 Ann. Cas. 501.

Copies so taken for purposes of instruction cannot be applied to any other purpose. Bartlette v. Crittenden (C. C. 1847) Fed. Cas. No. 1,082.

Some similarities and some use of prior works, even to copying small parts, are tolerated in some kinds of books, such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopedias, itineraries, guide books, and similar publications. Webb v. Powers (C. C. 1847) Fed. Cas. No. 17,323.

A limited use of a copyrighted book may be made by a subsequent writer, but it is not necessary that the larger part of the work should be copied, to constitute an infringement. Drury v. Ewing (C. C. 1862) Fed. Cas. No. 4,095; Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Consulting and using the works of an earlier writer on the same subject is a fair use of them, when they have not been drawn from to a substantial degree. Simms v. Stanton (C. C. 1896) 75 Fed. 6.

Use of plaintiff's credit book for the purpose of discovering names of individuals, firms, and corporations engaged in business, to be inserted in defendant's publication which it was preparing, was not such an unfair use as to entitle complainant to an injunction pendente lite. Dun v. International Mercantile Agency (C. C. 1903) 127 Fed. 173.

Use of data from a copyrighted work, as a basis for investigation of original sources of information, the results of which are published, is a fair use. Sampson & Murdock Co. v. Seaver-Radford Co. (C. C. 1905) 134 Fed. 890, decree reversed (1905) 140 Fed. 539, 72 C. C. A. 55.

One who is compiling a general directory of a city has the right, after making his own canvass, to take a part of the names and addresses contained in another copyrighted general directory, go to the original sources of information, ascertain how far the existing facts concur with the statements of the first directory, and then to print and publish the result as his own, abandoning what is not found, and changing what his investigation shows should be changed, and printing without change what he has, by means of his own investigation, found to be correct at the time such investigation was made; and such right is not lost by the fact that a person, in going to the sources of information, takes with him memoranda of names and addresses copied from the first directory, changing them when his investigation shows they should be changed to correspond with the facts, and checking them as correct when they prove to be correct. Id.

It is not unfair to use a prior copyrighted directory for checking up another's own canvass, independently made, and to publish the result as so verified as his own. Hartford Printing Co. v. Hartford Directory & Publishing Co. (C. C. 1906) 146 Fed. 332.

A writer may be guided by earlier copyrighted work, may consult the original authorities, and may use those which he considers applicable in support of his own original text, without being guilty of infringement. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

A writer of a law text-book may use a copyrighted digest of decisions and may copy lists of cases therefrom, to assist him in running down the cases, and such use is a fair one and within the purpose for which the digest is sold; but extensive copying or paraphrasing of the language of the syllabi in the digest is an unfair use and constitutes an infringement of the copyright. Id.

The classification of a series of citations and notes which resembled the arrangement in the copyrighted digests, and in the making of which some assistance had been obtained from the use of such digests, did not constitute an unfair use. Id.

Use of copyrighted digest paragraphs and syllabus headnotes by a law writer, after he has verified them, in the official publications or in works as to which rights of copyright have been lost, is not an infringement. Id.

The owner of a copyrighted legal digest is not entitled to equitable relief against another publication, solely because the writer of the latter saved stenographic or manual handwriting by cutting or copying the words of the citations from the digest, where no literary ability is appropriated in the arrangement or collection of the cases themselves; but if such saving can be brought within the term "unfair use," the copyright owner is entitled to damages. Id.

Where a subsequent writer takes copyrighted work merely as a convenient and cheap method of transcribing his original material, or uses printed lists of words or names to make clear and legible copy, and it is shown that the entire subsequent work is original on the part of the writer, with the exception of the saving in handwriting or stenographic preparation, the remedy of the original copyright owner is not by injunction; but he is entitled to damages for the mere mechanical saving, if such mechanical use or saving could be brought within the term "unfair use," although it would not amount to literary piracy. Id.

Using plaintiff's copyrighted work in preparing a new one, and striking out all references to complainant's publication wherever reference to original sources could be substituted, was sufficient to raise an inference against defendant's good faith, and that its use of the material was unfair unless complainant's rights had been lost or abandoned. Id.

A law book author may copy the citation of a prior author, if he examines and verifies the cases cited, and may use them in the same order, and with additions or subtractions. White v. Bender (C. C. 1911) 185 Fed. 921.

A publisher and seller of copyrighted books held not entitled to restrain a secondhand dealer from purchasing the books from the public, renovating, rebinding and selling them again for what they were, on the ground of alleged unfair competition. Ginn & Co. v. Apollo Pub. Co. (D. C. 1914) 215 Fed. 772.

13. —— **Copying.**—A work of 866 pages, of which 353 were copies of official and private letters taken from a copyrighted work, which had published them under contract with the owners, held a piracy. Folsom v. Marsh (C. C. 1841) Fed. Cas. No. 4,-901.

One compiler cannot avail himself of the labor of another by copying from his book extracts from common sources. Story v. Holcombe (C. C. 1847) Fed. Cas. No. 13,497; Banks v. McDivitt (C. C. 1875) Fed. Cas. No. 961.

Piratical copying is not confined to literal repetition. Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,763.

It would not be an infringement of a book within these sections to prepare and arrange the type in exact imitation of the original so that a copy of the book might be produced by printing. Harper v. Shoppell (C. C. 1886) 26 Fed. 519, 520.

Where parts of a series of legal forms are identical with those of a former copyrighted series, except for a word or two inserted in several places, the whole series showing a substantial identity, and the counsel employed to draw up the second series acknowledges having had the first before him while so doing, the second series will be regarded as a copy of the first, and an infringement. Brightley v. Littleton (C. C. 1888) 37 Fed. 103.

Where defendant published a book, edited and compiled by the same person who compiled complainant's copyrighted work, and 11 errors, consisting of incorrect citations in complainant's work, appeared verbatim in defendant's compilation, such errors justified an inference of infringement of complainant's copyright entitling complainant to a preliminary injunction; the only explanation offered therefor being that the similarity of mistake was accidental. George T. Bisel Co. v. Welsh (C. C. 1904) 131 Fed. 564.

Copying names and information from another's copyrighted directory, and, after verifying such information, republishing it without alteration, is an infringement of complainant's copyright. Sampson & Murdock Co. v. Seaver-Radford Co. (1905) 140 Fed.

539, 72 C. C. A. 55, reversing decree (C. C. 1905) 134 Fed. 890.

The copying or paraphrasing of the syllabi from a copyrighted report of law case by a subsequent publisher of a similar report or a digest constitutes an infringement of the copyright. West Pub. Co. v. Edward Thompson Co. (1910) 176 Fed. 833, 100 C. C. A. 303, modifying decree (C. C. 1909) 169 Fed. 833.

14. —— **Extracts and quotations.**—A compiler or reviewer cannot extract from a copyrighted work so as to convey the same knowledge as the original book. Story v. Holcombe (C. C. 1847) Fed. Cas. No. 13,497.

Where complainant copyrighted a manual of salesmanship, designed to teach piano dealers how to advertise, the publication of a part of the book as an advertisement by a dealer did not constitute an infringement. Stone & McCarrick v. Dugan Piano Co. (D. C. 1914) 210 Fed. 399.

15. —— **Compilations.**—A compilation of matter in the form of notes to matter not subject to copyright is protected by a copyright of the entire book, and such copyright is infringed by the adoption of such notes in another edition of the same matter. Gray v. Russell (C. C. 1839) Fed. Cas. No. 5,728.

The use of annotations in a copyrighted book, or of citations from such annotations, though the extracts are not copied, without the author's consent in a subsequent edition, was an infringement. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

In printing court rules, it is an infringement to copy, from an annotated edition of such rules, citations of authorities contained in such annotations. Banks v. McDivitt (C. C. 1875) Fed. Cas. No. 961.

16. —— **Abridgments.**—The question of violation of copyright may depend upon the value, rather than the quantity, of the selected materials; as where, in an abridgment, only the unimportant parts are omitted, or, under pretense of a review, the substance of an original work is given. Gray v. Russell (C. C. 1839) Fed. Cas. No. 5,728.

An abridgment which is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute piracy; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy. Folsom v. Marsh (C. C. 1841) Fed. Cas. No. 4,901.

A fair abridgment, though it injure the sale of the original book, is lawful; otherwise as to a compilation. Story v. Holcombe (C. C. 1847) Fed. Cas. No. 13,497.

Where one-fifteenth of an abridgment was copied from the work abridged, it is an infringement. Id.

The doctrine of the right to abridge criticised, and held, that a copyright should be protected under the rule applicable to a patented machine. Id.

A booklet entitled "Opera Stories," consisting of mere fragmentary statements of the story and characters of the operas, taken from descriptions other than the librettos, was not an infringement of the copyrights on the librettos. G. Ricordi & Co. v. Mason (1913) 210 Fed. 277, 127 C. C. A. 125, affirming decrees (C. C. 1911) 201 Fed. 182, and (D. C. 1912) 201 Fed. 184.

17. —— **Digests.**—Law writers may consult copyrighted digests for clues to the holdings of cases as a means of locating cases relating to a particular subject and, subject to verification, collect cases cited, and classify them under the same legal head, without being guilty of infringement, if the literary work or arrangement of the digests is not appropriated. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where a legal writer has formulated a proposition, his direction to his stenographer to add the citations shown by all of the copyrighted digests does not constitute infringement, if he has previously verified the citations, and found them to be correct. Id.

18. —— **Translations.**—A translation of a copyrighted romance into another language is not an infringement of the copyright, though the author has herself a copyrighted translation. Stowe v. Thomas (C. C. 1853) Fed. Cas. No. 13,514.

19. —— **Improvements and additions.**—The fact that one publication is an improvement on the other will not prevent it being an infringement if a material part of the other publication is used. Drury v. Ewing (C. C. 1862) Fed. Cas. No. 4,095.

20. **Maps and charts.**—Under these sections a purchaser under execution of a copper plate of the map has no right to use the same to print maps. Stephens v. Cady (1852) 14 How. 528, 531, 14 L. Ed. 528.

A copyrighted map of one city is not infringed by publishing a map of another city, though using the same color scheme and key. Perris v. Hexamer (1878) 99 U. S. 674, 675, 25 L. Ed. 308.

The unauthorized use by a map maker of the surveys upon which a copyrighted map is based is an infringement of the copyright. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,579.

The copyright in a chart is violated only when another copies therefrom, and avails himself of the labor and skill of the author. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,580.

Taking the boundaries of townships from another map without going to the common source of information is an infringement. Farmer v. Calvert Lith-

ographing, Engraving & Map Pub. Co. (C. C. 1872) Fed. Cas. No. 4,651.

A copyright of a chart or compilation from common sources is infringed where the defendants have used the plan, arrangements, and illustrations of complainant's work as the model for their own work, with colorable alterations and variations only. Lawrence v. Cupples (C. C. 1875) Fed. Cas. No. 8,135.

Copyright of a chart showing "gum sections" of artificial teeth did not cover the plan or arrangement of the gum sections, and there was no infringement by another who made a similar chart, illustrating the teeth in the same manner. S. S. White Dental Co. v. Sibley (C. C. 1889) 38 Fed. 751.

Where every part of a map is copied from a copyrighted map, infringement is not avoided because certain features of the copyrighted map are omitted therefrom. Woodman v. Lydiard-Peterson Co. (C. C. 1912) 192 Fed. 67.

21. Dramatic compositions.—One who writes and copyrights a play based on a novel, the copyright on which has expired, and bearing the same title, cannot prevent another from giving the same name to a different play constructed from the same novel. Atlas Mfg. Co. v. Street & Smith (1913) 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, appeal dismissed Street & Smith v. Atlas Mfg. Co. (1913) 34 Sup. Ct. 73, 231 U. S. 348, 58 L. Ed. 262.

Dramatic composition, having a dual personality for its motif, held not an infringement or plagiarism of complainants' copyrighted play, having the same motif. Bachman v. Belasco (1915) 224 Fed. 817, 140 C. C. A. 263, affirming decree (D. C. 1913) 224 Fed. 815.

Owner of copyrighted play cannot deprive others from using similar situations obtained from a common source, and not from the play. Id.

Cases on the subject of literary property, especially in dramatic compositions, reviewed at great length by Cadwalader, District Judge. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

The right to a copyright in a musical composition depending upon authorship, and what constitutes an infringement therefor. Reed v. Carusi (C. C. 1845) Fed. Cas. No. 11,642.

The question of infringement of a copyrighted dramatic composition considered. Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552.

An opera is more like a patented invention than a common book, as to the rule that he who obtains similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer. Thomas v. Lennon (C. C. 1883) 14 Fed. 849.

Strictly the only invasion of a copyright consists in the multiplication of copies of the author's production without his consent. Any other use of it, such as for the purpose of public reading or recitation is not piracy. But the copyright laws of congress recognize the playright of the author or proprietor of a dramatic composition, and secure to him the exclusive privilege of its public representation on the stage. The Mikado, etc., Case (C. C. 1885) 25 Fed. 183, 185.

Where the only similarity is in the general plan of the entertainment, and the representation by pictures of the rapid changing of clothes by a person, neither of which can be protected by copyright, there is no infringement. Barnes v. Miner (C. C. 1903) 122 Fed. 480.

To constitute an infringement on a copyrighted story, it is sufficient if the essence of a play is taken from an original literary production. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

Two theatrical plays, although having different names, held so similar in characters, plot, action, and dialogue as to render the production of one by defendant a violation of a preliminary injunction restraining her from producing the other. Eisfeldt v. Campbell (C. C. 1909) 171 Fed. 594.

A copyrighted play based on a novel the copyright of which had expired cannot be used by another author in constructing a different play. Glaser v. St. Elmo Co. (C. C. 1909) 175 Fed. 276.

The copyright of cartoons of imaginary characters held infringed by a dramatic performance in which there were characters of similar names, appearance, and speech. Hill v. Whalen & Martell (D. C. 1914) 220 Fed. 359.

Copyright of play held not infringed, though there were some similar characters and phraseology in the two plays. Vernon v. Sam S. & Lee Shubert (D. C. 1915) 220 Fed. 694.

A performance in words and music only may infringe a dramatico-musical copyright, and it is immaterial whether the performance is only of a scene or a part thereof; nor need it be for profit to infringe the copyright. Herbert v. Shanley Co. (D. C. 1915) 222 Fed. 344.

22. Musical compositions.—Perforated rolls which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions under this section. White-Smith Music Pub. Co. v. Apollo Co. (1908) 28 Sup. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628, affirming judgment (1906) 147 Fed. 226, 77 C. C. A. 368, which affirmed (C. C. 1905) 139 Fed. 427.

Phonographic reproduction of music for which a copyright has been granted is not a violation of the copyright, such reproduction not being "publishing" or "copying" within the meaning of the copyright act. Id.

Under this section copyright on musical composition is not infringed by pub-

lication and distribution of words alone. M. Witmark & Sons Co. v. Standard Music Roll Co. (1915) 221 Fed. 376, 137 C. C. A. 184, affirming decree (D. C. 1914) 213 Fed. 532.

Under this section copyright of song is not infringed by rendering it in a public restaurant where no admission fee was charged, though performer was paid. Herbert v. Shanley Co. (1916) 229 Fed. 340, 143 C. C. A. 460.

The appropriation of the whole or any substantial part of a new air or melody is a piracy. Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

A new and original copyrighted pianoforte arrangement of an opera cannot be reconverted into an operatic score by a third person without infringing the copyright. The Mikado Case (C. C. 1885) 25 Fed. 183, 185.

Where the theme or melody of music is substantially the same in the copyrighted and the alleged infringing pieces, and the pieces are so much alike that when played by a competent musician they appear to be the same, the infringement is established. Blume v. Spear (C. C. 1887) 30 Fed. 629.

The manufacture and sale of perforated strips of paper to be used in organettes, and by which a certain tune is produced, is not a violation of the copyrighted sheet music of the same tune. Kennedy v. McTammany (C. C. 1888) 33 Fed. 584, appeal dismissed (1892) 12 Sup. Ct. 983, 145 U. S. 643, 36 L. Ed. 853.

The singing of a single verse and chorus of a copyrighted song, without musical accompaniment, in imitation of the voice, postures, and mannerisms of another, is not an "infringement," against which a temporary injunction will issue. Green v. Minzensheimer (C. C. 1909) 177 Fed. 286.

Where one sings an entire copyrighted song with musical accompaniment, she is guilty of infringement, though she purports merely to mimic another. Green v. Luby (C. C. 1909) 177 Fed. 287.

Copyrighted musical notations in writing or printing are not infringed by the mechanical reproduction of the music. M. Witmark & Sons v. Standard Music Roll Co. (D. C. 1914) 213 Fed. 532.

The same phrase, with practically identical music accompanying them, in two songs, otherwise considerably different in theme and execution, warrants a charge of piracy and infringement of copyright. Boosey v. Empire Music Co. (D. C. 1915) 224 Fed. 646.

Under this section as formerly enacted, the importation of any of the copyrighted articles mentioned in the statute, including music, is prohibited. (1901) 23 Op. Atty. Gen. 445.

The books of a copyrighted musical comedy are a separate work from the lyrics and music, so that its reproduction by moving pictures could be licensed without the consent of the composer. Herbert v. Fields (Sup. 1915) 152 N. Y. Supp. 487.

23. Pictorial works.—A single notice on a sheet containing several copies of a copyrighted painting is not such compliance with the statute as will sustain a suit for infringement. Louis De Jonge & Co. v. Breuker & Kessler Co. (1911) 191 Fed. 35, 111 C. C. A. 567.

Where an artist photographed a model and copyrighted the picture, another artist's conception, using the same model, did not constitute a copy or infringement, though by chance the pose, background, light, and shade were strikingly similar. Gross v. Seligman (1914) 212 Fed. 930, 129 C. C. A. 450.

Where, after an artist had copyrighted a photograph of a model and assigned his rights to complainant, he made a later photograph of the same model, the only marked difference being that in the first picture her face was in repose, while in the second she wore a smile with a cherry stem between her teeth, the second constituted an infringement. Id.

The copyright for an engraving is infringed by reproducing copies of it by the photographic process. Rossiter v. Hall (C. C. 1866) Fed. Cas. No. 12,082.

A copyright of an engraving of a patented design, where the patent is void for want of novelty, will not prevent a manufacturer from advertising the article covered by the design by publishing an engraving of it. Collender v. Griffith (C. C. 1873) Fed. Cas. No. 3,000.

The publication and sale of chromos designed from a picture found in a foreign publication do not constitute a breach of copyright of similar chromos where such copyright was obtained after the circulation of such foreign publication. Johnson v. Donaldson (C. C. 1880) 3 Fed. 22.

A copyright for a painting will protect its owner in the sale of copies thereof, even though they may appropriately be called prints, and a party who copies such copies will be guilty of infringement. Schumacher v. Schwencke (C. C. 1887) 30 Fed. 690.

A copyright of a photograph artiscally designed to illustrate a musical composition is infringed by stamping an imitation in raised figures on leathern chair bottoms and backs. Falk v. T. P. Howell & Co. (C. C. 1888) 37 Fed. 202.

Complainants published and copyrighted a book of engravings illustrating certain unpatented articles manufactured by them. Defendant manufactured similar articles from designs taken from complainants' illustrations, and published a book of engravings illustrating its manufactures, in which several pictures were very like those in complainants' book. Held not an infringement of complainants' copyright. Lamb v. Grand Rapids School Furniture Co. (C. C. 1889) 39 Fed. 474.

It is infringement to copy a copy-

righted photograph, by simply reversing it, for use as an advertising lithograph, though a few minor changes are made in the positions. Falk v. Brett Lithographing Co. (C. C. 1891) 48 Fed. 678.

A lithograph, which, to the eye of the ordinary observer, reproduces the material parts of a copyrighted photograph, is an infringement, although it is not an exact copy, and lacks the artistic excellence of the photograph. Falk v. Donaldson (C. C. 1893) 57 Fed. 32.

Crude illustrations or woodcuts of certain poses which the dancer assumes, but which do not appear to be copies of, or have any connection with, the petitioner's photographs, are not infringements. Falk v. City Item Printing Co. (C. C. 1897) 79 Fed. 321.

Where illustrations which were alleged to infringe the copyright on plaintiff's painting were reproductions of a copyrighted photograph of such painting, and not of the painting, such illustrations constituted an infringement of the copyright on the photographs only, and not on the copyright of plaintiff's painting. Champney v. Haag (C. C. 1903) 121 Fed. 944.

Where an artist painted a picture for complainant and copyrighted it in complainant's name, defendant's publication of pictures from a sketch made by the artist before making the painting held an infringement of the copyright. Beifeld v. Dodge Pub. Co. (C. C. 1911) 198 Fed. 658.

It is not infringement of a copyright to use a picture on the cover of a booklet issued for advertising purposes. McCarthy v. L. Adler Bros. & Co. (D. C. 1915) 227 Fed. 630.

24. Violation of restrictions on sale of copyrighted articles.—Agreements between associations embracing probably 75 per cent. of the book publishers and a majority of the booksellers in the United States to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and almost completely destroying competition in such books at retail, not protected by the copyright law. Straus v. American Publishers' Ass'n (1913) 34 Sup. Ct. 84, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369.

The owner of a copyright, who has transferred the title to copyrighted books under an agreement restricting their use, cannot restrain sales of said books in violation of the agreement; he is confined to his remedies for the breach of contract. Harrison v. Maynard, Merrill & Co. (1894) 61 Fed. 689, 10 C. C. A. 17.

Sale of books containing notices of conditions of sale, but no statement of any claim of right under the copyright law, the question was not one of infringement of copyright, but as to whether the publishers were entitled to relief in equity by virtue of their common-law rights independent of their statutory copyright. Scribner v. Straus (1906) 147 Fed. 28, 78 C. C. A. 122, affirming decree (C. C. 1905) 139 Fed. 193, and decree affirmed (1908) 28 Sup. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094.

Assent to a contract to maintain prices could not be implied from mere purchasers of books which might have been lawfully sold or bought on an express refusal to sign such agreement. Id.

In the absence of notice of the terms of the contract between an author and the agents employed by him for the sale of his books by subscription at a certain price, a publisher may buy, or contract to buy, such books from agents who have lawfully obtained them by purchase from the author or his publishers, and may advertise for sale and sell them at any price he may see fit. Clemens v. Estes (C. C. 1885) 22 Fed. 899.

Under a statute vesting the copyright of the supreme court decisions in the state, such copyright is intended to protect the completed volume only, and the exclusive right of the successful bidder for the publication contract is not violated by the publication of the opinions merely, without the headnotes, statement, etc., of the official reporter, by another person in advance of the official report. Banks v. West Pub. Co. (C. C. 1886) 27 Fed. 50.

If the owner of the copyright undertake by contract to attach conditions of restriction to his sale of copies of the work, as if he sells to canvassers upon agreement that they shall sell only by subscription, he must rely solely upon the ordinary remedies for a breach thereof, and it is not within the protection of the copyright act. But it is otherwise if he sells copies directly to subscribers, through agents having no ownership of the copies sold. Henry Bill Pub. Co. v. Smythe (C. C. 1886) 27 Fed. 914, 923.

A notice on the title-page of each copy that the price of the book at retail was $1 net, and that no dealer was licensed to sell it at a less price, and that such a sale would be treated as an infringement of the copyright, did not entitle the publishers to control the retail price of the book, so as to render a sale of the book at a reduced price an infringement of their copyright. Bobbs-Merrill Co. v. Snellenburg (C. C. 1904) 131 Fed. 530.

Where defendants purchased copyrighted books, and there was no notice given by complainant either to defendant or to the dealers, restricting or limiting the title conveyed, defendants legally acquired the full title to the books purchased, and were not liable for infringement of copyright by reason of the sale of the books at a less price than that fixed by complainant under an alleged restriction of which defendants

had notice. Scribner v. Straus (C. C. 1905) 139 Fed. 193, decree affirmed (1906) 147 Fed. 28, 78 C. C. A. 122, which is affirmed (1908) 28 Sup. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094.

The following, contained in catalogues and bills for books sold rendered to the purchasers for sale at retail: "Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association"—does not constitute a limitation or restriction of the title to the books. Id.

Where complainant issued and sold a copyrighted book only through authorized agents, who were permitted to sell only at retail at 50 cents per copy on the express condition that the books should not be resold prior to August 1, 1907, complainant was entitled to a preliminary injunction restraining a sale for less than 50 cents pendente lite. Authors & Newspapers Ass'n v. O'Gorman Co. (C. C. 1906) 147 Fed. 616.

25. Persons entitled to sue.—The assignee of the copyright taken out by one who furnishes the incidents and events of a person's life to another, who prepares them for publication, cannot maintain an action for infringement. De Witt v. Brooks Fed. Cas. No. 3,851.

The complainant which furnished the authors of its articles with paragraphs cut from copyrighted digests of other publishers, its authors in some instances copying the language of such paragraphs without the consent of the owners of the copyrights, has no standing in a court of equity to charge another with infringement of its own copyright. Edward Thompson Co. v. American Law Book Co. (1903) 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, reversing order (C. C. 1903) 121 Fed. 907.

The owner of an equitable title to a copyright may sue in equity in his own name for infringement, where the holder of the legal title is one of the infringers and occupies a position hostile to him. Wooster v. Crane & Co. (1906) 147 Fed. 515, 77 C. C. A. 211.

The assignee of a copyright may maintain a suit to enjoin infringement without first establishing his title at law. Gould v. Hastings (C. C. 1840) Fed. Cas. No. 5,639.

An assignee of an exclusive right of acting and representing a drama for one year throughout the United States, excepting five specified cities, may maintain a suit in his own name to enjoin a mere wrongdoer. Roberts v. Myers (C. C. 1860) Fed. Cas. No. 11,906.

The assignee of the exclusive right to use and protect a foreign publication in this country, may maintain his action against any other person who undertakes to publish books under that name in the United States. Estes v. Williams (C. C. 1884) 21 Fed. 189.

Trespass upon an author's rights before they have been acquired will not prevent him from acquiring and enforcing such right against third persons, provided such trespasses have not been so frequent and long continued that the work has lost identification as the work of the original author. Id.

One who grants to another the exclusive right to publish, and to protect such right by suit, is not thereby deprived of his interest in the result of the controversy so as to prevent his bringing suit. Banks v. Manchester (C. C. 1885) 23 Fed. 143, decree affirmed (1888) 9 Sup. Ct. 36, 128 U. S. 244, 32 L. Ed. 425.

Only the licensee of the general owner can bring suit for protection of a dramatic composition, where his exclusive licensee has for a definite period, and by the terms of his license is to bring all suits for the protection of his rights. Aronson v. Fleckenstein (C. C. 1886) 28 Fed. 75.

An action for the infringement of a copyright may be maintained by the holder of the legal title thereof, though the beneficial ownership be in another. Hanson v. Jaccard Jewelry Co. (C. C. 1887) 32 Fed. 202.

In a suit for the infringement of a copyright, where it is shown that the copyright was taken in the name of the complaining publisher as "proprietor," defendant cannot object that the author was a married woman, and that her husband was entitled to the fruits of her literary labor; for it will be presumed that the legal title of the author was properly vested in complainant. Scribner v. Clark (C. C. 1888) 50 Fed. 473.

Complainant's title is sufficiently made out to enable him to maintain an infringement suit where it is shown that he took the copyright in the name under which he did business,—the name of a firm, to all of whose rights he had succeeded on its dissolution. Id.

One who does business under a conventional or fictitious partnership name may sue to restrain an infringement of copyright under that name without averring the filing of the certificate required by the New York statutes. Scribner v. Henry G. Allen Co. (C. C. 1892) 49 Fed. 854.

Defendants bought certain copyrighted pictures, furnished them to a photogravure company, ordered copies to be made, and gave general directions as to how the work should be done; the company agreeing to take the risk of infringement. Held, that defendants were liable for infringement as joint tort feasors. Fishel v. Lueckel (C. C. 1892) 53 Fed. 499.

A publisher who, with color of right, has copyrighted a musical work, the composer later ratifying such act, is vested with the legal title to the copy-

right, which will support an action for its infringement. White-Smith Music Pub. Co. v. Apollo Co. (C. C. 1905) 139 Fed. 427, decree affirmed (1906) 147 Fed. 226, 77 C. C. A. 368, which is affirmed (1906) 28 Sup. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628.

Holder of copyright may sue for penalties for infringement of a copyrighted publication whether he is in fact the owner or holds as trustee. Lederer v. Saake (C. C. 1909) 166 Fed. 810, judgment reversed Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571.

Under this section and section 9556, post, a licensee who has manufactured rolls or records for mechanically producing a copyrighted musical composition may maintain a suit in equity to enjoin a subsequent maker from copying his records. Æolian Co. v. Royal Music Roll Co. (D. C. 1912) 196 Fed. 926.

The proprietor of a manuscript translation of a play licensed a theater manager to use the translation for a specific purpose. The licensee conferred on a publisher of the play the power to copyright it, which he did, but the copyright was invalid; and, in a suit by the publisher for infringing his alleged copyright, the proprietor cannot, by adoption, constitute plaintiff a trustee for himself, on an agreement to share the recovery with him. Koppel v. Downing (1897) 11 App. D. C. 93.

26. Persons liable.—Having control, as business manager, of sheets of a photograph, does not give a person such possession as to render him liable to the penalty imposed by this section. Thornton v. Schreiber (1888) 8 Sup. Ct. 618, 619, 124 U. S. 612, 31 L. Ed. 577.

One who prints an infringing book under a contract with the publisher is liable, with the publisher, to account for the profits realized. Belford, Clarke & Co. v. Scribner (1892) 12 Sup. Ct. 734, 740, 144 U. S. 488, 36 L. Ed. 514.

The infringing copies of a copyrighted painting need not be found in the infringer's possession in order to render him liable for the penalty imposed by this section "for any copy of the same in his possession, or by him sold or exposed for sale." American Lithographic Co. v. Werckmeister (1911) 31 Sup. Ct. 676, 677, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 Fed. 426, 91 C. C. A. 376.

The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented. Daly v. Palmer (C. C. 1868) Fed. Cas. No. 3,552.

One who makes a plate of a picture forming an important, substantial, and material part of an illustrated newspaper that is copyrighted, and sells it to the proprietors of a rival illustrated newspaper, with the knowledge that it will be published in that paper, is a joint tort feasor with such publishers, and is guilty of infringement of the copyright. Harper v. Shoppell (C. C. 1886) 28 Fed. 613.

The provisions of this section apply as well to corporations as to natural persons; and the possession of such copies by agents of the corporation, acting in its behalf, is the possession of the corporation. Falk v. Curtis Pub. Co. (C. C. 1900) 98 Fed. 989.

An agent of the defendant firm placed copies of a copyrighted photograph on the piece goods of the firm as a new and attractive design. After the copies had been affixed to the goods, one of defendants learned of it, and later sales were made of pieces bearing the design. Held, in a qui tam action brought by the owner of the copyright to recover the statutory penalty, that, the suit being against all the members of the firm, they could not be held responsible, in a qui tam action, for what was done by their agent without their knowledge. Schreiber v. Sharpless (D. C. 1881) 6 Fed. 175.

II. PENALTIES IN GENERAL

27. Construction of prior act.—As to construction of former statute imposing penalty for invasion of copyright, see Backus v. Gould (1849) 7 How. 798, 810, 12 L. Ed. 919.

28. Right of action.—The penalty for infringement of copyright imposed by this section, extends only to sheets found in defendant's possession, and does not extend to sheets which are merely proved to have been in his possession at some time within two years before the action began. Bolles v. Outing Co. (1899) 20 Sup. Ct. 94, 95, 44 L. Ed. 156, affirming judgment (1897) 77 Fed. 966, 23 C. C. A. 594, 46 L. R. A. 712.

A compliance with all the requirements of the statute to secure a valid copyright is a condition precedent to the recovery of the penalties imposed by such statute for infringement; and in an action for the recovery of penalties, which may be incurred unintentionally, and are often greatly in excess of the injury done, such requirements will be strictly construed. Bennett v. Carr (1899) 96 Fed. 213, 37 C. C. A. 453.

This section is penal in character, and must be strictly construed. The provision imposing a penalty of one dollar per sheet applies only to such sheets as have been found in the defendant's possession for the purpose of forfeiture and condemnation under the preceding clause, and until the sheets have been so found no right of action to recover such penalty accrues. Falk v. Curtis Pub. Co. (1901) 107 Fed. 126, 46 C. C. A. 201, affirming judgment (C. C. 1900) 102 Fed. 967.

Under this section, where two infringements of copyrighted photographs

were published on each sheet, the infringer was liable for a double penalty for each sheet found in its possession. Journal Pub. Co. v. Drake (1912) 199 Fed. 572, 118 C. C. A. 46.

The publisher of a newspaper who printed therein a piece of music which has been copyrighted is liable for the statutory penalty for infringement, of one dollar per sheet, although he knew nothing of the copyright, and copied the music from another newspaper. Millett v. Snowden (C. C. 1844) Fed. Cas. No. 9,600.

The statutory penalty for violation of a copyright is not incurred by printing so much of a book as amounts to an infringement, but only by a transcript of the entire work. Rogers v. Jewett (C. C. 1858) Fed. Cas. No. 12,-012.

The penalty or forfeiture given to a party aggrieved by the infringement of his copyright cannot be recovered from a principal whose agents have, without his knowledge, been guilty of such infringement. Taylor v. Gilman (C. C. 1885) 24 Fed. 632.

Under this section no penalty is recoverable for infringement of a copyrighted photograph or other publication, except for such sheets of the infringing publication as have been found in the defendant's possession, for the purpose of forfeiture and condemnation; and where two suits are brought (one in replevin to recover the sheets, and the other in assumpsit to recover the penalty) the cause of action in the latter suit does not accrue until the infringing sheets have been found in the defendant's possession and seized in the former, and a suit to recover the penalty, brought at the same time as the one in replevin, is premature. Falk v. Curtis Pub. Co. (C. C. 1900) 102 Fed. 967, judgment affirmed (1901) 107 Fed. 126, 46 C. C. A. 201.

Under this section as formerly enacted, no penalty is recoverable for infringement of a copyright for a photograph, except for such sheets of the infringing publication as have been found in the defendant's possession and seized for the purpose of forfeiture and condemnation under the preceding provisions of said section. Child v. New York Times Co. (C. C. 1901) 110 Fed. 527.

Where defendant had caused lithographic copies of the photograph to be made, of which 14,800 were found in his possession or control, he was liable to a penalty of one dollar for each copy so found in his possession or control. Schreiber v. Thornton (D. C. 1883) 17 Fed. 603.

III. FORFEITURES OF COPIES, SHEETS, OR PLATES

29. Forfeiture in general.—The remedies of forfeiture and penalty and injunction given in case of infringement of copyright of a map, are exclusive, and preclude resort to an action at law to recover damages. Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096, reversing judgment Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, which reversed (C. C. 1904) 130 Fed. 593.

Where it appeared that the pirated publication was substantially identical with that of complainant, the defendant was ordered to surrender all copies within her control, and the plates on which they were printed. Drury v. Ewing (C. C. 1862) Fed. Cas. No. 4,-095.

Where the great bulk of matter which might be copyrighted seemed to be made up independently of the infringed volume, and the similarity was trivial and unimportant, though there was technically an infringement of plaintiff's copyright, defendant was required to pay a small royalty, and a forfeiture of the whole edition was denied. Myers v. Callaghan (C. C. 1883) 20 Fed. 441.

Forfeiture of every copy of the book, and of such damages as may be recovered, when the infringement is without the proprietor's written consent, is not the sole provision on which a claim for relief may be founded, but there is a separate right to relief against violations of the "sole liberty of printing," etc., the copyrighted work, given by this section. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

Under this section as formerly enacted, the amount of the forfeiture is determined solely by the number of sheets, without regard to the number of the copies of the photograph that may be printed on each sheet. Falk v. Heffron (C. C. 1893) 56 Fed. 299.

Sheets seized in defendant's possession, after the first or outline impression only of the photograph had been taken, are not forfeitable, under this section; they must be so far perfected as to constitute an imitation of a substantial part, and so far perfected as to establish identity. Morrison v. Pettibone (C. C. 1897) 87 Fed. 330.

30. Writ of seizure.—Where, after the impounding of an article alleged to infringe a copyright, under this section, defendant has moved for and obtained the execution of a new and larger bond by complainant, he is not entitled to a vacation of the writ of seizure and a return of such article. Universal Film Mfg. Co. v. Copperman (D. C. 1913) 206 Fed. 69.

The court cannot entertain a motion for an order to show cause why articles impounded as alleged infringements of a copyright, under this section, should not be returned, unless a showing is made by affidavit that the articles seized are not infringing copies. Crown Feature Film Co. v. Bettis Amusement Co. (D. C. 1913) 206 Fed. 362.

IV. PROCEDURE

31. Nature of action for penalty.— A separate action to recover the penalty prescribed by this section for every infringing copy of a copyrighted painting found in the infringer's possession or sold by him cannot be maintained after judgment of forfeiture of the infringing copies has already been recovered, since such section contemplates but a single action in which may be had both a forfeiture and a recovery of penalties. Werckmeister v. American Tobacco Co. (1907) 28 Sup. Ct. 124, 126, 207 U. S. 375, 52 L. Ed. 254, affirming judgment (1906) 144 Fed. 1023, 74 C. C. A. 682.

An action to recover a penalty for infringement of a copyright, under this section, is a civil action. Journal Pub. Co. v. Drake (1912) 199 Fed. 572, 118 C. C. A. 46.

The action under R. S. § 4965, held penal. Newgold v. American Electrical Novelty & Mfg. Co. (D. C. 1901) 108 Fed. 341.

32. Nature and form of remedy.— Penalties cannot be enforced in a court of equity. Stevens v. Gladding (1854) 17 How. 447, 453, 15 L. Ed. 155.

The proceeding hereunder is merely a qui tam action subject to the arbitrary control of the executive officers of the United States until at least it is developed so far as to give a right beyond the mere possibility of suit; the action does not survive, cannot be brought out of the jurisdiction where the statute was enacted, and will not lie except against one in whose possession the infringing matter may be actually found. Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, reversed (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096.

An action brought under this section for a forfeiture of the plates and copies of an infringing publication, is not the statutory action of replevin, and the right to maintain it does not depend on plaintiff's ownership or previous right of possession. American Tobacco Co. v. Werckmeister (1906) 146 Fed. 375, 76 C. C. A. 647, judgment affirmed (1907) 28 Sup. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

Equity will settle a disputed title to a copyright in a suit to enjoin infringement. Binns v. Woodruff (C. C. 1821) Fed. Cas. No. 1,424.

Case, and not trespass, is the proper form of remedy to recover damages for violation of copyright. Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640.

There is no material difference between the principles and rules applicable to equity proceedings in copyright cases and those applicable to other suits in equity. Scribner v. Stoddart (C. C. 1879) Fed. Cas. No. 12,561.

The penalties and forfeitures given by this section for an infringement of a copyright cannot be enforced in a suit in equity. Chapman v. Ferry (C. C. 1882) 12 Fed. 693.

A suit in equity cannot be maintained to have a forfeiture declared under the copyright laws. The universal doctrine is that equity will relieve from, but never inflict, a forfeiture. U. S. v. White (C. C. 1883) 17 Fed. 561; Fletcher v. New Orleans N. E. R. Co. (C. C. 1884) 20 Fed. 345.

The actual infringing prints alone can be recovered, and when these are out of the possession and beyond the control of the infringer the proprietor of the copyright cannot recover of him their value in an action at law. Sarony v. Ehrich (C. C. 1886) 28 Fed. 79.

Complainant filed a bill to recover penalties and enforce forfeitures, under R. S. §§ 4963, 4965, for infringement of copyright on a photograph, and also prayed an injunction, and that defendants be required particularly to answer how many copies they had sold. Held, that there was an adequate remedy by action at law, and equity had no jurisdiction. Snow v. Mast (C. C. 1894) 63 Fed. 623.

This section, making one presenting a copyrighted dramatic composition liable, is a penal statute. Daly v. Brady (C. C. 1895) 69 Fed. 285.

Replevin is a proper remedy to enforce a forfeiture of infringing plates and sheets found in the possession of defendant. Morrison v. Pettibone (C. C. 1897) 87 Fed. 330; Rinehart v. Smith (C. C. 1903) 121 Fed. 148; Gustin v. Record Pub. Co. (C. C. 1904) 127 Fed. 603.

A defendant, who pirated a song from complainant, is not entitled to damages occasioned to him by a restraining order, though the court dissolves such order because of the invalidity of complainant's copyright. Broder v. Zeno Mauvais Music Co. (C. C. 1898) 88 Fed. 74.

The analogy between actions under the patent laws and actions under copyright laws is such that like rules of practice should be applied in both classes of cases. Scribner v. Straus (C. C. 1904) 130 Fed. 389.

Replevin cannot be availed of to seize lithographs alleged to infringe complainant's copyrights, to which lithographs complainant had neither title nor right to possession and which were desired only for the purposes of a suit in assumpsit to recover penalties under this section. Hillis & Co. v. Hoover (C. C. 1906) 142 Fed. 904.

A writ of seizure issued in, or preliminary to, an action to recover the penalty prescribed, is not strictly a writ of replevin, but only in the nature of such writ, and is not to be rendered inoperative by the technical provisions of a state statute. Richardson v. A. C. Bosselman & Co. (C. C. 1908) 164 Fed. 781.

The remedies provided by this section for infringement of copyright of a

map, etc., are exclusive, and an action for damages for infringement cannot be maintained other than one under such penalty provision, in which it must be alleged that copies were found in defendant's possession. Ohman v. City of New York (C. C. 1909) 168 Fed. 953.

The fact that a statutory penalty is made recoverable by a civil action instead of a criminal prosecution does not change the penal character of the recovery. McDonald v. Hearst (D. C. 1899) 95 Fed. 656.

This section held to apply to infringements of copyrights obtained prior to its passage where the infringements were subsequent thereto. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

33. **Accrual of right of action.**—The right of action at law as well as in equity may accrue after the filing of the title, and before actual publication. Boucicault v. Wood (C. C. 1867) Fed. Cas. No. 1,693.

34. **Election of remedies.**—A suit for an injunction, in which an accounting of profits is asked, but in which no evidence of profits is offered, or any decree or finding made concerning them, but in which a decree is made for an injunction only, does not constitute such an election of remedy as will preclude a subsequent action for the recovery of damages for the infringement. Brady v. Daly (1899) 20 Sup. Ct. 62, 67, 175 U. S. 148, 44 L. Ed. 109, affirming judgment (1897) 83 Fed. 1007, 28 C. C. A. 253.

The remedies of forfeiture and penalty and of injunction, given to the owner of a copyrighted map in case of infringement, are exclusive, and preclude any resort to an action at law to recover the damages sustained by reason of the infringement. Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096, reversing judgment Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, which reversed (C. C. 1904) 130 Fed. 593.

The institution of an action of replevin not prosecuted to judgment, to enforce the forfeiture of infringing copies, precludes him from subsequently bringing and maintaining an action of assumpsit to recover the penalty provided for by this section. Hills & Co. v. Hoover (1911) 31 Sup. Ct. 402, 220 U. S. 329, 55 L. Ed. 485, Ann. Cas. 1912C, 562.

35. **Grounds of suit.**—Whether the owners of the copyright in a book can have relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of an alleged conditional sale, is a question which the federal courts cannot consider in a suit to restrain the sale of the book at retail at less than the fixed price, in which there is no claim of damages in the sum of $2,000, and no diversity of citizenship. Scribner v. Straus (1908) 28 Sup. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094, affirming judgment (1906) 147 Fed. 28, 78 C. C. A. 122.

The attempted duplication of an existing copyright in a painting by depositing the same photograph of the same painting under a new title, and with but a slight change in description, is void, and cannot be made the basis of a suit for infringement. Caliga v. Inter Ocean Newspaper Co. (1909) 30 Sup. Ct. 38, 39, 215 U. S. 182, 54 L. Ed. 150, affirming judgment (1907) 157 Fed. 186, 84 C. C. A. 634.

An action under this section to recover the penalties thereby imposed for infringement of a copyrighted cut can only be maintained when the cut has been copyrighted as such; and copyrighting a newspaper containing such cut, as a whole, gives no right of action under that section. Bennett v. Boston Traveler Co. (1900) 101 Fed. 445, 41 C. C. A. 445.

A demand and refusal are not conditions precedent to the maintenance of an action for the forfeiture of infringing sheets of a copyrighted picture, and to recover the penalty imposed by the statute. Hegeman v. Springer (1901) 110 Fed. 374, 49 C. C. A. 86, judgment affirmed (1903) 23 Sup. Ct. 849, 189 U. S. 505, 47 L. Ed. 921.

Both the right of action for infringement of a copyright, and the copyright itself, are in this case statutory, and a compliance with such statutes is essential to a right of action. Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571, reversing judgment Lederer v. Saake (C. C. 1909) 166 Fed. 810.

Where two parties agree to use the same type, etc., with certain restrictions, the fact that defendants, inadvertently or otherwise, failed to observe such restrictions in all cases, thereby violating the contract, afforded no ground for a suit in a federal court by complainant for infringement of copyright; he having copyrighted his directory before defendant's was issued, but after it was printed. Maloney v. Foote (C. C. 1900) 101 Fed. 264.

A contract not to produce any part of a play without the music did not authorize an injunction to restrain moving picture reproductions of a copyrighted play not shown to have been written under that contract. Herbert v. Fields (Sup. 1915) 152 N. Y. Supp. 487.

36. **Defenses.**—Where the defense was that plaintiff's musical composition was a copy of a composition previously published abroad, the decision on the motion for injunction was suspended, and an issue at law directed, the defendant being required to keep an account of sales. Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

Defendants cannot claim hardship

from an injunction after the book is printed, where they were given notice not to print. Bunkley v. De Witt (C. C. 1855) Fed. Cas. No. 2,134.

Judgment against the lithographer who made the prints for the infringer of a copyright is a bar to further recovery by the proprietor of the copyright against the infringer for the value of the prints. Sarony v. Ehrich (C. C. 1886) 28 Fed. 79.

Prior publication of an original painting without notice thereon of copyright is good defense to bill for infringement, even though copies of such original contain notice of copyright. Werckmeister v. American Lithographic Co. (C. C. 1903) 126 Fed. 244, 246, reversed (1904) 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

That a complainant is a member of an illegal combination, in violation of the anti-trust laws, state or federal, is no defense to a suit for infringement of a copyright. Scribner v. Straus (C. C. 1904) 130 Fed. 389.

In an action for infringement of copyright, it was no defense that defendant instructed its editors to avoid use of copyrighted material if, in spite of such instructions, a greater or less use was made thereof. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

An action brought under this section as formerly enacted to recover for the unauthorized printing and publication of a copyrighted map is not an action for compensatory damages, but to enforce a penalty imposed for a violation of the copyright law; and it is a good defense to such an action that the publication was made by agents and servants of defendant, in his absence, and without his direction, consent, or knowledge. McDonald v. Hearst (D. C. 1899) 95 Fed. 656.

37. **Abatement of action.**—An action in a federal court for the penalty provided by R. S. § 4965, for the infringement of a copyright, abates by the death of defendant, though the statutes of the state in which the action was brought allows suits on state penal statutes to be prosecuted after the death of the offender, since such state statutes can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress. Ex parte Schreiber (1884) 3 Sup. Ct. 423, 110 U. S. 76, 28 L. Ed. 65.

An action for the penalty provided by this section abates by the death of the defendant. Schreiber v. Sharpless (D. C. 1883) 17 Fed. 589.

38. **Joinder of causes of action.**—Where it was convenient for the court that two causes of action for infringement of copyright, one with reference to certain cartoons and the other with reference to a play based thereon, should be joined in the same bill, it was within the discretion of the court to permit such joinder. Empire City Amusement Co. v. Wilton (C. C. 1903) 134 Fed. 132.

In a suit for infringement of copyrights of a number of books the complainant may properly be allowed by a supplemental bill to set up further infringements of other books of the same series, occurring subsequent to the filing of the original bill, the parties being the same, and the subject-matter of the same general character, which may appropriately be determined in the same suit. Banks Law Pub. Co. v. Lawyers' Co-Op. Pub. Co. (C. C. 1905) 139 Fed. 701.

A bill for infringement of copyrights of different pieces of sculpture will not be held demurrable for multifariousness where the parties and the general method of alleged infringement are the same, and especially where it appears from the bill that all of the acts of infringement were committed pursuant to a common purpose by the defendants. Bracken v. Rosenthal (C. C. 1907) 151 Fed. 136.

39. **Jurisdiction.**—See notes under § 9555, post.

40. **Limitations and laches.**—Where it appeared that complainants and their predecessors in title had no knowledge of the alleged infringing articles until December, 1902, less than a year and a half before suit brought, and were not charged with prior notice thereof, and the infringing articles did not appear in defendant's publication at first, complainants were not barred by laches. Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281, affirming order Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460.

Failure to sue for infringement until defendants have been proceeding openly therewith for about a year does not constitute laches barring a right to relief in equity, when during the time complainant was engaged in the defense of a suit to cancel his title prosecuted by one of the defendants. Wooster v. Crane & Co. (1906) 147 Fed. 515, 77 C. C. A. 211.

Plaintiff sued defendant in replevin to recover 20,000 copies of engravings alleged to offend plaintiff's copyright, and under the writ the marshal seized 4,673 copies and the stones from which the engravings were made. Pending this suit and before trial, plaintiff amended its declaration by setting up an additional claim to recover the penalty. Held, that such amendment pleaded a new and different cause of action from that alleged in the original declaration, and, not having been added within two years after the cause of action accrued, was barred by lim-

itations. Hills & Co. v. Hoover (1914) 211 Fed. 241, 127 C. C. A. 609.

An action at law for infringement must be brought within two years thereof. Reed v. Carusi (C. C. 1845) Fed. Cas. No. 11,642.

Long acquiescence in the infringement, or culpable negligence in seeking redress, will prevent relief in equity. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Delay in bringing suit is no defense, where there is no proof of acquiescence, in, or of failure to object to, the acts constituting infringement, and defendant's conduct has not been induced by any act or omission of those interested in the copyright. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

The failure of the publishers of a foreign encyclopædia to press to completion suits for infringement of copyrights of certain volumes does not estop them from prosecuting suits for infringement of parts of later volumes. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

R. S. § 4964, provides that every person who prints or sells a copyrighted book without the consent of the proprietor of the copyright shall forfeit every copy of the book, and "shall forfeit and pay such damages as may be recovered in a civil action by such proprietor." Section 4968 provides that no action shall be maintained in any case of forfeiture or penalty under the copyright laws unless begun within two years. The damages recoverable in a civil action based upon this section as formerly enacted are a forfeiture, and such an action is barred if brought more than two years after the cause of action arose. Wheeler v. Cobbey (C. C. 1895) 70 Fed. 487.

R. S. § 4968, limiting actions for forfeitures or penalties under the copyright laws, is not applicable to a suit for an injunction against and damages for an infringement of a copyright. Patterson v. J. S. Ogilvie Pub. Co. (C. C. 1902) 119 Fed. 451.

Laches cannot be successfully invoked when it does not appear that the owner of the copyrighted article had knowledge of the infringement, or notice of any facts sufficient to put him on inquiry. Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460, order affirmed Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281.

The fact that a complainant, with knowledge that its copyrights were being infringed by defendant, delayed bringing suit until defendant after 16 years of labor and at large expense had practically completed the publication of its work, constituted such laches as warrants the denial of an injunction and an accounting of profits; but in such a suit, although equitable relief is denied, the court has power to award the complainant damages as compensation for the violation of its rights. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where plaintiff first suspected, but was unable to verify, infringement of his copyright, and seven years later acquired information which resulted in bringing suit nine years after his first suspicions, complainant was not barred either by laches or acquiescence alone. Id.

41. Parties.—In a suit to restrain the sale of copies of phonograph records, the artist whose music is reproduced, and who receives a royalty on the number of records sold, is not a necessary or an indispensable party. Fonotipia Limited v. Bradley (C. C. 1909) 171 Fed. 951.

The owner of a copyrighted motion picture film and its lessees held properly joined as plaintiffs in a suit for its infringement under new equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii). Gaumont Co. v. Hatch (D. C. 1913) 208 Fed. 378.

Under equity rule 37, licensee of right to produce copyrighted drama on the stage is not proper party to suit for infringement by production of motion picture play. Tully v. Triangle Film Corp. (D. C. 1916) 229 Fed. 297.

42. Process.—Mere misdescription of date of approval of the statute, if the same is otherwise sufficient to indicate it, held not fatal in notice on the summons. Brown v. Church (D. C. 1880) 5 Fed. 41, 42.

43. Pleading—In general.—An averment that "the copyright was taken out by [plaintiff] previous to the publication thereof, in full accordance with the requirements of the laws of the United States," does not tender an issue of fact, but states a legal conclusion, and is insufficient. Trow City Directory Co. v. Curtin (C. C. 1888) 36 Fed. 829.

The petition alleged that on a certain day, and at divers times between that day and the commencement of the action, defendant engraved, etc., and sold to the number of 10,000 copies, a certain print, etc. Held, that but one cause of action for a single penalty of $100 was stated. Taft v. Stephens Lithographing & Engraving Co. (C. C. 1889) 38 Fed. 28.

Where a statement of claim properly alleges the copying, printing, publishing, and exposing for sale of the infringing copies by defendant, either of which constitutes the infringement under the statute, it need not allege that defendant was actually engaged in any of such acts at the time copies of the infringing publication were found in his possession. Falk v. Curtis Pub. Co. (C. C. 1900) 100 Fed. 77.

It need not be alleged that the copies were found in defendant's possession by the plaintiff, or some one acting in

his behalf; such fact not being made essential to recovery by the statute. Id.

It is not sufficient to allege generally that all conditions and requisites required by the laws of the United States to obtain a copyright have been complied with, but the specific acts done and necessary to constitute such compliance with the law must be affirmatively alleged, and the complaint must also show that the person in whose name the copyright was obtained was the person who owned the right and was entitled to it. Ford v. Charles E. Blaney Amusement Co. (C. C. 1906) 148 Fed. 642.

44. —— **Bill.**—A bill praying injunction and discovery in aid of a suit at law against one, though declared bad as a bill for discovery, is good on general demurrer, the remedy by injunction being independent. Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640.

The objection that a bill for infringement of copyright sets forth no title in plaintiff, and lays no legal foundation for a discovery, may be taken by general demurrer. Id.

Inconsistencies of allegations as to authorship in bill for infringement of copyright no ground of objection on general demurrer, if other allegations are sufficient. Id.

It is not a good ground of demurrer to a bill for infringement that the bill does not waive the statutory forfeitures and penalties. Farmer v. Calvert Lithographing Engraving & Map Pub. Co. (C. C. 1872) Fed. Cas. No. 4,651.

A bill for infringement which does not allege a publication or a delivery of copies to the librarian of congress or any reason for the failure, is demurrable. Boucicault v. Hart (C. C. 1875) Fed. Cas. No. 1,692.

A bill to restrain the infringement of a copyright which does not allege the performance of the acts required to be performed by the author to obtain a copyright is insufficient. Parkinson v. Laselle (C. C. 1875) Fed. Cas. No. 10,762.

A prayer in a bill that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction is demurrable, as asking for the enforcement of such forfeiture. Chapman v. Ferry (C. C. 1882) 12 Fed. 693.

A special demurrer to the parts of the bill which ask a court of equity to enforce penalties and a forfeiture, and for a discovery and delivery up to be destroyed of defendant's books, will be sustained. Trow City Directory Co. v. Curtin (C. C. 1888) 36 Fed. 829.

Failure to aver the deposit or mailing of the title, and of two copies of the work, and insertion of copyright notice on the title page makes the bill fatally defective. Id.

Though the bill prays the forfeiture of all the infringing books, and the plates used in their production, it is unnecessary to grant any other relief than damages, where it is shown that the infringer's place of business, with all the books and plates in question, has been destroyed by fire. Scribner v. Clark (C. C. 1888) 50 Fed. 473.

In a suit in equity, seeking account of profits only, it is not necessary to allege and prove the absence of written consent by the copyright owner. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

A bill which sets out the terms of an agreement and states that, if such agreement is not an assignment, it is an exclusive license, correctly pleads publishers' title to the copyright by thus alleging the facts, and stating the conclusions therefrom in the alternative. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

Where the bill positively avers the infringement of the copyright, it is sufficient, though it is not stated to be within the knowledge of affiant. Id.

An allegation that complainant "is the author, inventor, designer, and proprietor of a certain photograph and negative thereof, known and entitled 'Photograph No. 23 of Lillian Russell, by B. J. Falk, N. Y.,'" is sufficient without attaching a copy of the photograph to the bill. Falk v. Schumacher (C. C. 1891) 48 Fed. 222; Same v. Seidenberg (C. C. 1891) Id. 224.

In a suit for infringement of copyright in a dramatic composition, the court will not interpose its judicial knowledge to the extent of finding on demurrer against the allegations of the bill touching questions of originality. Henderson v. Tompkins (C. C. 1894) 60 Fed. 758.

A bill alleging that complainant was the proprietor of a certain dramatic composition "written or composed" by citizens of the United States sufficiently alleges authorship, in the absence of specific exception. Id.

An averment that the book was not copyrighted by defendant is not equivalent to an allegation that he had not obtained a copyright, and is demurrable. Rigney v. Raphael Tuck & Sons Co. (C. C. 1896) 77 Fed. 173.

A bill declaring on 30 different copyrights, each for an index covering a letter or portion of a letter of the alphabet, and all constituting one complete index system, is not multifarious. Amberg File & Index Co. v. Shea, Smith & Co. (C. C. 1896) 78 Fed. 479, decree affirmed (1897) 82 Fed. 314, 27 C. C. A. 246.

In a suit for infringement of alleged copyright in a photograph, it is necessary to allege the existence of facts of originality, intellectual production, thought, and conception. Falk v. City

Item Printing Co. (C. C. 1897) 79 Fed. 321.

A bill seeking to restrain the publication of a book, as infringing in its title a trade-mark right of the complainants, and in its text certain rights secured to them by four copyrights, is not multifarious. Harper v. Holman (C. C. 1897) 84 Fed. 222.

An averment that complainants were, prior to the time of securing copyright, proprietors of a certain book or periodical, is a sufficient averment of proprietorship of an article and engraving alleged to have been pirated therefrom. Lillard v. Sun Printing & Publishing Ass'n (C. C. 1898) 87 Fed. 213.

A bill will not be dismissed on demurrer where the cut or engraving pirated from complainants' copyrighted book is a close reproduction of complainants', even though it appears highly probable that the final proof will show that the engraving was not an original production of complainants. Id.

Where complainants' copyrighted book and defendant's article complained of are filed with, and referred to in, the bill, they need not be copied therein. Id.

An allegation that the infringing copies were made within two years next before the commencement of the suit, and were found in defendant's possession prior to the time it was brought, is sufficiently specific as to the time when they were so found. Falk v. Curtis Pub. Co. (C. C. 1900) 100 Fed. 77.

Where a bill alleged ownership of a copyrighted work, and charged that such work was edited, prepared, and published by and under complainant's direction, from original sources, at great expense in collecting the cases and authorities therein cited, and searching for judicial precedents, and in discussing and formulating the propositions of law therein contained, and in presenting, selecting, and arranging the matter contained in said books, the bill sufficiently alleged how complainant became the proprietor of the work. Edward Thompson Co. v. American Law Book Co. (C. C. 1902) 119 Fed. 217.

Where a bill for infringement charged that defendant has unfairly used the results of complainant's publications, has incorporated such results in defendant's publications, that such publications are to a large extent the product of complainant's original work, rewritten so as to conceal the piracy, and that defendant to a large extent has obtained the information contained in its publications from complainant's publications, it sufficiently alleged defendant's unfair competition, and that it was impossible to segregate the particular portions complained of. Id.

A bill for infringement failing to allege that the titles of the alleged copyrighted books had been recorded by the librarian of congress was demurrable. Id.

Bill alleging that the word "Copyright" was printed on every copy of a painting is defeated by a plea alleging a prior publication of the original painting without being inscribed with notice of the copyright. Werckmeister v. American Lithographic Co. (C. C. 1903) 126 Fed. 244, decree reversed (1904) 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

Where a bill is filed to enjoin the infringement of copyright in two dramatic compositions, a demurrer for want of proper parties plaintiff, on the ground that the assignor of one of the plays should have been made a party, cannot be sustained, where defendant has not pointed out specifically the parts of the bill objected to; and the demurrer cannot be sustained for want of parties as to the whole bill. Empire City Amusement Co. v. Wilton (C. C. 1903) 134 Fed. 132.

Where a bill stated a cause of action arising from the alleged infringement of two dramatic compositions, and a demurrer failed to point out specifically what sentences or paragraphs of the bill were demurred to, it could not be sustained. Id.

Where a bill for infringement prayed the usual discovery in defendant's answer both to the allegations and interrogatories, waiver of an answer under oath did not entitle defendant to file a mere general denial neither responding to the interrogatories nor stating "the circumstances of which defendant intends to avail himself by way of defenses." John Church Co. v. Zimmermann (C. C. 1904) 131 Fed. 652.

Where the bill makes profert of the copyrighted publication, it may be considered a part of the bill and examined on demurrer. American Mutoscope & Biograph Co. v. Edison Mfg. Co. (C. C. 1905) 137 Fed. 262.

Where a bill sufficiently alleges title in complainant by assignment, a supplemental bill otherwise good is not invalid because it alleges a further assignment in the nature of a confirmation or ratification of complainant's title. Banks Law Pub. Co. v. Lawyers' Co-Op. Pub. Co. (C. C. 1905) 139 Fed. 701.

Failure to allege that the copyright notice required by this section had been printed in all editions of the books published in foreign countries will not render the bill for infringement demurrable. Haggard v. Waverly Pub. Co. (C. C. 1905) 144 Fed. 490.

Where the entire issue was tried and submitted for decision on the merits without the defense of multifariousness being raised by demurrer, the defense was waived in a case where infringement of several thousand copyrights was alleged in one bill. West Pub. Co. v. Edward Thompson Co. (C. C. 1909)

169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where there was nothing to show that a copyright alleged to have been infringed was a sculpture or other similar work or that the production of a copy was not feasible, defendant was entitled to have a copy of the alleged infringement, and a copy of the work alleged to have been infringed upon, accompany the petition as required by Supreme Court Practice Rule 2, in effect July 1, 1909. Lesser v. George Borgfeldt & Co. (C. C. 1911) 188 Fed. 864.

Since copyright vests on publication with notice of copyright, a bill for infringement was not demurrable for failure to allege registration or entry of the title of the book, or volume of the publication. National Cloak & Suit Co. v. Kaufman (C. C. 1911) 189 Fed. 215.

An allegation that complainant was a corporation created under the laws of New York, and that it wrote, designed, and compiled, and caused to be written, designed and compiled by those employed by it for such purpose, all of them citizens and residents of the United States, or aliens domiciled within the United States at the time of the first publication of the book in question, sufficiently showed that complainant corporation was entitled to the copyright. Id.

Complainant's allegation that its assignor was the sole and exclusive owner and proprietor of the copyrighted productions is insufficient to show plaintiff's title or right to sue. Crown Feature Film Co. v. Levy (D. C. 1912) 202 Fed. 805.

A bill for alleged infringement of a copyrighted photograph must show that the photograph was a copyrightable work. Id.

A bill to restrain infringement of certain photograph copyrights alleging that plaintiff's assignor filed two complete copies of the photographs held insufficient. Id.

A motion to dismiss a bill to restrain infringement of a copyright for a motion picture film on various grounds considered and overruled. Gaumont Co. v. Hatch (D. C. 1913) 208 Fed. 378.

A bill alleging that complainant had copyrighted a work known as "Messages and Papers of the Presidents," and that defendants had obtained secondhand sets of the publication, which they had reconstructed and sold to the public as and for complainant's publication, etc., did not state a cause of action for infringement of copyright. Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379.

Under the express provisions of Supreme Court rule 2, in a suit for infringement. a copy of the work alleged to be infringed should accompany the complaint, or its absence should be explained. Tully v. Triangle Film Corp. (D. C. 1916) 229 Fed. 297.

Whether, because incorrect copy of work alleged to be infringed was filed with complaint, payment of expenses should be made a condition of amendment, held to be left for determination on the trial. Id.

45. —— **Declaration.**—A declaration for penalty in the name of two persons is bad on general demurrer. Ferrett v. Atwill (C. C. 1846) Fed. Cas. No. 4,747.

In a suit to recover for the infringement of a copyright, the declaration must set out in detail a substantial compliance with the various requirements of the copyright laws. Chicago Music Co. v. J. W. Butler Paper Co. (C. C. 1884) 19 Fed. 758.

A declaration in an action under this section to enforce the forfeiture, which fails to allege that any copies were found in the possession of defendant, is fatally defective; the omission being of a fact which is essential to any right of recovery. Falk v. Curtis Pub. Co. (C. C. 1900) 98 Fed. 989.

46. —— **Answer.**—An answer alleging that the copy of complainant's book is not a true copy of the copyrighted book, but that the title page thereof was removed and another page substituted therefor, containing matter materially different, is insufficient, unless it further allege that the substitution was made after the publication of the book. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291.

In an action to recover penalties for infringement of a copyright, brought in a federal court in a state which has adopted the code system of pleading, an answer containing a general denial, secures all rights reserved to the defendant under the federal statutes, and accordingly a common-law plea is inappropriate. Johnston v. Klopsch (C. C. 1898) 88 Fed. 692.

47. **Evidence.**—Certificate as evidence, see notes under § 9576, post.

48. —— **Presumptions and burden of proof.**—The burden of proof as to authorship and nonpublication before copyright is not sustained by offering in evidence the certificate of the Librarian of Congress, acknowledging that descriptions and photographs of the paintings had been deposited by plaintiff in his office, and concluding with the words, "the right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights." Bosselman v. Richardson (1909) 174 Fed. 622, 98 C. C. A. 127.

While the burden of proof of copying in copyright litigation is on the complainant, proof of common errors first occurring in complainant's publication shifts the burden of explanation to the defendant. Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (1912) 193

Fed. 991, 113 C. C. A. 609, affirming decree (C. C. 1911) 185 Fed. 941.

No suit can be maintained for infringement without evidence of copyright in complainant. Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,763; Chase v. Sanborn (C. C. 1874) Fed. Cas. No. 2,628.

While a court will not presume that all the money received by a piratical publisher on the sale of his books is profit, still, as the proof as to the cost of producing the work is wholly in the control of the defendant, the complainant makes a prima facie case of right to recover by showing the selling price and the usual manufacturers' cost. Myers v. Callaghan (C. C. 1885) 24 Fed. 636, decree modified Callaghan v. Myers (1888) 9 Sup. Ct. 177, 128 U. S. 617, 32 L. Ed. 547.

Where, in the compilation of two books similar in character, a close resemblance is the necessary consequence of the use of common materials, the existence of the same errors in the two publications is a presumption of piracy that can only be overcome by clear evidence to the contrary. List Pub. Co. v. Keller (C. C. 1887) 30 Fed. 772.

To sustain the defense of publication without the statutory notice of copyright, it must be shown that it lacked such notice when it left plaintiff's possession. Falk v. Gast Lithograph & Engraving Co. (C. C. 1891) 48 Fed. 262, decree affirmed (1893) 54 Fed. 890, 4 C. C. A. 648.

An author suing for infringement of a copyright has the burden of showing a literal compliance with each and every statutory requirement in the nature of conditions precedent to the acquisition of a valid copyright. Osgood v. A. S. Aloe Instrument Co. (C. C. 1897) 83 Fed. 470.

Where it is alleged that a copyrighted article has been infringed, such article and the infringing article, or so much thereof as may be necessary for intelligent comparison, must be included in the proofs. Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460, order affirmed Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281.

In an action for penalties for infringement of a copyright, the burden rests upon the plaintiff to prove title to the copyright by showing a strict compliance with every statutory requirement, as well as infringement. Lederer v. Saake (C. C. 1909) 166 Fed. 810, judgment reversed Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571.

Where it is proven from internal evidence that a subsequent law digester has made an unfair use of any part of the syllabi of his predecessor, it may be fairly presumed that he made use of more than appeared on the face of his work. Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (C. C. 1911) 185 Fed. 941, decree affirmed (1912) 193 Fed. 991, 113 C. C. A. 609.

Though there was no denial that complainant's book was duly copyrighted, he was bound to make proof of his copyright. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

One joint owner of a copyright cannot restrain the reproduction of the work, without proving that such reproduction was not licensed by one of the co-owners. Herbert v. Fields (Sup. 1915) 152 N. Y. Supp. 487.

49. —— Admissibility.—In a suit in equity for an infringement, defendants may be compelled to produce their books and papers on the accounting before the master, but defendants are not thus compelled to produce evidence against themselves in aid of a suit for forfeiture. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

Since it is immaterial where an alleged infringer obtained suggestions for making variations in a copyrighted photograph, another photograph, offered in evidence to show that a certain feature was taken from it, is irrelevant. Springer Lithographing Co. v. Falk (1894) 59 Fed. 707, 8 C. C. A. 224, writ of error dismissed (1896) 17 Sup. Ct. 998, 41 L. Ed. 1179.

Evidence of actual damage is immaterial in an action for the statutory penalty on infringing copies of a copyrighted photograph. Id.

Testimony as to comparisons made by witnesses not admissible; but pointing out similarities of language and other indicia of infringement may be used to assist the court in its examination. West Pub. Co. v. Lawyers' Co-operative Pub. Co. (1897) 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, reversing decree (C. C. 1894) 64 Fed. 360, 25 L. R. A. 441.

A decree in an equity suit that the copyright of a certain play is valid is conclusive in a subsequent action at law between the same parties to recover statutory damages. Brady v. Daly (1897) 83 Fed. 1007, 28 C. C. A. 253, judgment affirmed (1899) 20 Sup. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

In a suit to recover the penalty of $10 for each infringing copy of a copyrighted painting in defendant's possession, the judgment in a prior action in replevin brought under the same section, in which plaintiff recovered the infringing sheets, is not evidence that they were found in defendant's possession, although it recites that such was the fact. Werckmeister v. American Tobacco Co. (1906) 144 Fed. 1023, 74 C. C. A. 682, affirming judgment (C. C. 1905) 138 Fed. 162, and judgment affirmed (1907) 28 Sup. Ct. 124, 207 U. S. 375, 52 L. Ed. 254.

A statement by the compiler in the preface to a dictionary published in 1850 that he had adopted Webster's dictionary as the basis for his own held

admissible in evidence as within an exception to the rule which excludes hearsay. G. & C. Merriam Co. v. Syndicate Pub. Co. (1913) 207 Fed. 515, 125 C. C. A. 177.

A witness cannot testify as to identities between parts of a play and a book from which it is alleged to have been dramatized, where either the book or play is not produced in court or its absence accounted for. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691.

On the question of infringement, complainant may read affidavits in rebuttal, except in support of his title, on motion to dissolve the preliminary injunction. Farmer v. Calvert Lithographing, etc., Co. (C. C. 1872) Fed. Cas. No. 4,651.

Affidavits evidently intended to be used in a case, but not entitled in it, may be read on motion for an injunction. Shook v. Rankin (C. C. 1875) Fed. Cas. No. 12,804.

The fact that the plan, arrangement, and combination of a copyrighted work originated in the brain of its author may be proved by some other person than such author. Bullinger v. Mackey (C. C. 1879) Fed. Cas. No. 2,127.

In an action for penalties and forfeitures, for the breach of a copyright of certain chromos, defendant cannot be compelled to produce in evidence his books of account, photographic plates, and copies of printed chromos. Johnson v. Donaldson (C. C. 1880) 3 Fed. 22.

In connection with other evidences of infringement, the court will consider the arrangement of the books infringing the original edition, and such evidence will be entitled to weight in judging of the fact of infringement. Myers v. Callaghan (C. C. 1883) 20 Fed. 441.

In an action for damages for the infringement of a copyright, a statement by one of the defendants that he had disposed of a certain number of copies of their work is not available against the other defendant, a corporation, though he is an officer of such corporation. Chils v. Gronlund (C. C. 1890) 41 Fed. 145.

Where, in a suit for infringement of a copyright, defendant pleaded a publication of the original painting without marking the same as required by law, by exhibiting it at the Royal Academy, evidence of the exclusiveness of such exhibition was admissible without amendment of the bill bringing forward such allegations as would avoid the effect of the exhibition alleged by the plea to amount to a publication. Werckmeister v. American Lithographic Co. (C. C. 1903) 126 Fed. 244, decree reversed (1904) 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

Comparisons of expert witnesses in case of an alleged infringement of copyright may be received in evidence, but only as aids to the court, on whom is imposed the duty of making the final comparisons. Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460, order affirmed Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281.

50. —— **Weight and sufficiency.**— Where the record contained a list of 138 errors or inaccuracies, fairly shown to have been first published in complainant's copyrighted book and reproduced in subsequent issues, and also contained in defendant's works covering the same field, complainant established a prima facie case of infringement under the rule that, when a close resemblance is a necessary consequence of the use of common materials, the occurrence of the same errors in the two publications affords one of the surest tests of copying, and suggest such a cogent presumption of copying by the later compiler that it can be overcome only by clear proof to the contrary. Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (1912) 193 Fed. 991, 113 C. C. A. 609, affirming decree (C. C. 1911) 185 Fed. 941.

Verbal identities in 2 out of 7,000 cases digested from complainant's syllabi is only prima facie evidence of infringement; and the denial of such editor that he had made any use of the syllabi was sufficient to rebut complainant's prima facie case, so far as concerned his own work. West Pub. Co. v. Lawyers' Co-operative Pub. Co. (1897) 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, reversing decree (1894) 64 Fed. 360, 25 L. R. A. 441.

In an action to recover the statutory penalty for infringement of a copyright, proof that plaintiff caused an alteration to be made by etching in a negative from which photographs had previously been printed and sold, and had thus become public property, and then caused the picture printed from the altered negative to be copyrighted, does not sustain an allegation that plaintiff is the author, designer, and owner of such copyrighted photograph. Snow v. Laird (1900) 98 Fed. 813, 39 C. C. A. 311.

Strict construction and proof are required in an action to recover the penalty authorized for infringement of a copyright. Caliga v. Inter Ocean Newspaper Co. (1907) 157 Fed. 186, 84 C. C. A. 634, judgment affirmed (1909) 30 Sup. Ct. 38, 215 U. S. 182, 54 L. Ed. 150.

Evidence that witness saw the assignor frequently while painting certain pictures, but did not see him use any paintings, pictures, drawings, or other pictorial works in so doing, and that witness and plaintiff did not know that the assignor ever exhibited the paintings outside his own parlor, or ever gave any one permission to copy them during the 30 years before they were copyrighted, was incompetent and insufficient to establish original authorship and nonpublication before copyright, in an action for infringement.

Bosselman v. Richardson (1909) 174 Fed. 622, 98 C. C. A. 127.

Where common errors first occurring in complainant's work were unexplained by defendant, it will be presumed that the work was also used as to the matter which was correct. Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (1912) 193 Fed. 991, 113 C. C. A. 609, affirming decree (C. C. 1911) 185 Fed. 941.

Coincidence of errors furnishes the strongest proof of copying. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,-136.

The proof that a play was reproduced from memorizing it by a spectator must be so clear as to negative any other conclusion. Crowe v. Aiken (C. C. 1870) Fed. Cas. No. 3,441.

Where, though the volumes published by defendants were very much condensed as compared with plaintiff's reports, yet the paging of the volumes was substantially the same throughout, and it appeared that plaintiff's reports were used by them, and in some instances words and sentences were copied without change, or changed only in form, the evidence shows that resort was not had to original sources of information, but was obtained directly from plaintiff's reports, and that defendants' work was consequently an infringement. Myers v. Callaghan (C. C. 1881) 5 Fed. 726.

A prima facie case is not overthrown by affidavits that defendants produced their lithograph from one of complainant's photographs, without any notice of copyright, but similar in all respects to the cards used by complainant. Falk v. Gast Lithographing & Engraving Co. (C. C. 1889) 40 Fed. 168.

Where the evidence showed that, to make a profit, defendant must have received a certain sum, but did not show accurately how much he did actually receive, it failed to show any profit. Gilmore v. Anderson (C. C. 1890) 42 Fed. 267.

An allegation of an agreement by an American author, licensing foreign publishers to use his copyrighted article in an encyclopædia, is sufficiently proved by evidence of an oral agreement between the parties to write the article for use in such encyclopedia and to obtain a copyright therefor, existing at the time alleged. Black v. Henry G. Allen Co. (C. C. 1893) 56 Fed. 764.

Defendant offered to produce some of its editors, who, in the master's presence, with cases of average length to be selected by him, would, under conditions insuring fairness, show their rate of speed in original work. Held, that the rate of speed attained under such conditions would not fairly represent the average speed for weeks and months continuously, under varying conditions, mental and physical; and that, on the whole, not much weight was to be attached to the argument from the rate of speed, as, to be of much value, the character of the digest paragraphs would have to be carefully investigated. West Pub. Co. v. Lawyers' Cooperative Pub. Co. (1897) 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, reversing decree (C. C. 1894) 64 Fed. 360, 25 L. R. A. 441.

Where it appears that a large proportion of the errors in a copyrighted directory are also found in an infringing publication, such evidence is sufficient to refute the testimony of defendant's witnesses that the accuracy of all items in its directory was personally verified, and to show that direct copying had been done. Hartford Printing Co. v. Hartford Directory & Publishing Co. (C. C. 1906) 146 Fed. 332.

Evidence held to support a verdict awarding damages for the infringement of copyrights. Suderman v. Saake (C. C. 1909) 166 Fed. 815.

Actionable infringement may be proved either by internal evidence inevitably compelling the conclusion that the copyrighted work was the source of the infringing publication, or by direct testimony as to the manner in which the work has been done. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Evidence held to justify a finding that the entire Am. & Eng. Enc. Law (1st Ed.) and certain of the articles in the Am. & Eng. Enc. Law (2d Ed.) and Enc. Pl. & Pr. infringed antecedent digest copyrights in so far as the use of the material was concerned. Id.

Evidence held to show a custom and course of business by a publisher, from which it would be presumed that, except in occasional and unintentional instances, the requirements of the copyright statute were properly observed and the necessary acts performed to secure to the publisher the copyrights intended. Id.

Though conclusions and arguments in parallel column exhibits could not be taken as testimony, the examination of the publication by an expert could properly be accepted if the facts found were the subject-matter of testimony and findings could be fairly tested, so that the addition of such conclusions and arguments was not ground for the exclusion of the exhibits, but would be considered like statements in the briefs. Id.

In a suit for infringement of a copyright covering a weekly periodical, the court could take into consideration quarterly and annual republication of the matter under a copyright notice by another, after the commencement of the suit, under the rule that the chancellor is governed by the situation at the date of the decree, rather than at the date of the filing of the bill. Record & Guide Co. v. Bromley (C. C. 1910) 175 Fed. 156.

Failure of a law book author, whose citations are the same as a prior author's, to cite other existing cases on the same points, is evidence of copying,

as is his omission to note overruling or reversal of cases cited by both, or to correct errors appearing in the prior author's citations. White v. Bender (C. C. 1911) 185 Fed. 921.

Where it is proven that the defendant has copied one or more of the copyrighted cuts, a finding that the others as to which no explanation is made were also copied is supported by the evidence. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

In a suit for infringement of a copyright, evidence of copying held sufficient to justify continuance of a temporary injunction against the sale of defendant's work until final hearing. George T. Bisel Co. v. Bender (C. C. 1911) 190 Fed. 205.

In a suit for profits, evidence held to show negligence on the part of defendant, and that it was defiant after having its attention called to the infringing character of its publication. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

As the proclamation of the President does not recite that the condition in subdivision e had been met prior to the date of the proclamation, it would not afford evidence sufficient to sustain an action for infringement between certain given dates. (1911) 29 Op. Atty. Gen. 64.

Evidence of public representations from which the play might have been obtained by means of the memory is evidence from which the jury may infer, in the absence of proof of the manner in which the defendant actually obtained the play, that it was so obtained. Keene v. Clarke (1867) 28 N. Y. Super. Ct. (5 Rob.) 38.

The fact that defendant's directory contained the same errors as appeared in a similar book previously compiled by plaintiff is evidence that defendant used the matter contained in plaintiff's book. Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. (1895) 84 Hun, 12, 32 N. Y. Supp. 41.

Evidence that the author got a fixed fee that always reached him by an order to his banker, and that receipts were always sent in return, evidence established the fact of the author's consent to publication. Daly v. Walrath (1899) 57 N. Y. Supp. 1125, 40 App. Div. 220.

51. Questions of law or fact.—In an action for infringement of a copyright, the court held to have properly directed a verdict for plaintiffs for the penalty fixed by this section. Journal Pub. Co. v. Drake (1912) 199 Fed. 572, 118 C. C. A. 46.

Whether there is substantial similarity between a copyrighted literary composition and a dramatization thereof is a question of fact. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

52. Discovery.—On bill for infringement of copyright, waiving forfeiture, discovery may be compelled in aid of recovery of damages. Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640.

Where a bill for infringement prayed the usual discovery in an answer by the defendant both to the allegations and interrogatories, the waiver of an answer under oath did not entitle defendant to file a mere general denial neither responding to the interrogatories nor stating "the circumstances of which the defendant intends to avail himself by way of defense." John Church Co. v. Zimmermann (C. C. 1904) 131 Fed. 652.

53. Preliminary injunction.—Where it appeared that 67 errors in the annual business directory of complainant were followed in defendants' directory, containing 60,000 names, although defendants' canvassers testified that they made a personal canvass, and obtained the names from original sources, an order granting an injunction against the whole book should not be disturbed. Chicago Dollar Directory Co. v. Chicago Directory Co. (1895) 66 Fed. 977, 14 C. C. A. 213.

A preliminary injunction will be granted more readily to restrain the infringement of a copyright in dramatic productions than in other cases, since the delay involved in waiting for a final decree would generally amount to the denial of justice. Chappell & Co. v. Fields (1914) 210 Fed. 864, 127 C. C. A. 448.

Assuming that publisher of story held copyright as trustee for author, preliminary injunction against companies acquiring motion picture rights without notice of author's rights held properly denied, under this section as formerly enacted. Brady v. Reliance Motion Picture Corp. (1916) 229 Fed. 137, 143 C. C. A. 413.

A preliminary injunction restraining infringement should not be granted, where the question of infringement is in serious doubt. Blunt v. Patten (C. C. 1828) Fed. Cas. No. 1,580; Miller v. McElroy (C. C. 1839) Fed. Cas. No. 9,581; Lamb v. Grand Rapids School Furniture Co. (C. C. 1889) 39 Fed. 474; Nixon v. Doran (C. C. 1909) 168 Fed. 575; Benton v. Van Dyke (C. C. 1909) 170 Fed. 203.

A motion for a provisional injunction for alleged infringement of a copyright of a map will be disposed of on the moving papers and answering affidavits, without a reference to a master. Smith v. Johnson (C. C. 1859) Fed. Cas. No. 13,066.

Where an infringement is palpable, a provisional injunction will not be refused if not attended with serious injury. Banks v. McDivitt (C. C. 1875) Fed. Cas. No. 961.

A preliminary injunction refused where the answer denied the equities of the bill for infringement of a copy-

right of complainant's edition of the Bible, where there was nothing to identify the parts copyrighted. Flint v. Jones (C. C. 1875) Fed. Cas. No. 4,-872.

Temporary injunction to prevent performance of a comedy drama entitled "Round the World in Eighty Days" denied. Leech v. Freligh (C. C. 1875) Fed. Cas. No. 8,204a.

A preliminary injunction restraining defendant from publishing, in his reprint of a foreign encyclopædia, articles therein duly copyrighted in America, will be denied, where the injury to defendant from its granting would be far greater than the injury to plaintiff by its refusal. Scribner v. Stoddart (C. C. 1879) Fed. Cas. No. 12,561.

In a case of doubt as to the equities between the parties a preliminary injunction should be denied, but defendant may be required to give bond for damages and to keep an account of sales of the alleged infringing work. Hubbard v. Thompson (C. C. 1882) 14 Fed. 689, decree reversed (1889) 9 Sup. Ct. 710, 131 U. S. 123, 33 L. Ed. 76.

When plaintiff has failed to show that the book in evidence is a copy of the book copyrighted, and defendant denies that it is, there is no ground for a preliminary injunction. Humphreys' Homeopathic Medicine Co. v. Armstrong (C. C. 1887) 30 Fed. 66.

Where an authoress contracted to another the right to copyright and publish her work, and agreed not to cause to be published anything which might injure the sale of the book, the publication of the same work in a newspaper, after the sale of the book had quite or nearly ceased, and plaintiff had not continued his efforts to sell, will not be enjoined. Worthington v. Batty (C. C. 1889) 40 Fed. 479.

Where both an author and his assignee of the copyright sue to obtain a temporary injunction against the publication of certain lectures of the author, and the injunction was granted to the author, the court was not called upon to determine whether the assignee also had a right to a preliminary injunction. Pott v. Altemus (C. C. 1894) 60 Fed. 339.

A temporary injunction will not be granted unless complainant shows affirmatively, beyond any doubt, that he has complied with the copyright law. American Trotting Register Ass'n v. Gocher (C. C. 1895) 70 Fed. 237.

Although there was a clear infringement of a copyrighted compilation of the credit ratings and financial standing of persons engaged in a particular business, yet, as defendant's book would presumably not obtain much circulation to the prejudice of complainants, a preliminary injunction would only be granted in the event of the failure of defendant to file by a date fixed a bond in a specified penal sum conditioned for the payment of any damages ultimately decreed against him. Ladd v. Oxnard (C. C. 1896) 75 Fed. 703.

A preliminary injunction will not be granted on ex parte affidavits in a suit for the piracy of a copyright publication, where the fact of piracy is not clear. Colliery Engineer Co. v. United Correspondence Schools Co. (C. C. 1899) 94 Fed. 152.

Equity will not refuse an injunction against infringement of copyright of a chart consisting of a list of race horses and facts and statistics concerning them, on the ground that such chart is used for betting purposes as well as for breeding and training horses. Egbert v. Greenberg (C. C. 1900) 100 Fed. 447.

Proof that defendant had in its office three pages concededly taken from complainant's book, cut, pasted, and edited apparently for the purpose of being used as copy for defendant's book, is sufficient to entitle complainant to a preliminary injunction, unless a denial of the intention to use such pages as copy is supported by a clear showing of the method used by defendant, and the source from which its copy was obtained. Chicago Directory Co. v. United States Directory Co. (C. C. 1902) 122 Fed. 189.

A showing that a dozen erroneous names and addresses appearing in complainant's book have been duplicated in defendant's is sufficient to entitle complainant to a preliminary injunction, in the absence of a clear showing to overcome such prima facie case. Trow Directory Printing & Bookbinding Co. v. United States Directory Co. (C. C. 1903) 122 Fed. 191.

Where complainant insisted that defendant had appropriated complainant's ratings as well as the names of persons appearing in complainant's book, but the affidavits were conflicting, an injunction pendente lite restraining defendant's use of complainant's book would not be granted. Dun v. International Mercantile Agency (C. C. 1903) 127 Fed. 173.

An injunction against an infringing publication will be extended to all portions in which infringing and noninfringing mattter has been so blended that its separation is impracticable, but not to such distinct parts as do not infringe, and defendant may apply for its modification when he shall have expunged all infringing matter. Social Register Ass'n v. Murphy (C. C. 1904) 128 Fed. 116.

Where it appeared that defendant's directory contained infringing matter; that its sale would not interfere to any great extent with the sale of the copyrighted work, but that it would result in large loss to complainant in its general business as publisher of an annual directory, the amount of which could not be well determined; also that defend-

ant's directory was ready for sale; that it was different in size and appearance from complainant's, and not likely to be mistaken therefor; and that its sale would be to a great extent, lost, if delayed for any considerable time—a preliminary injunction would be refused on condition that defendant should give a bond to secure the payment of damages that might be recovered, and should keep an account of its sales. Sampson & Murdock Co. v. Seaver-Radford Co. (C. C. 1904) 129 Fed. 761.

Motion for a preliminary injunction to restrain the performance of a play as an infringement denied on the ground of insufficiency of evidence to show infringement. Hubges v. Belasco (C. C. 1904) 130 Fed. 388.

Where there is no doubt of an infringement of a copyright, and no defense rendering it inequitable to grant the relief prayed, a preliminary injunction will be granted. Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 460, order affirmed Werner Co. v. Encyclopædia Britannica Co. (1905) 134 Fed. 831, 1024, 67 C. C. A. 281.

Where there were four violations of a temporary injunction, two being due to a misunderstanding as to the exact scope of the order, and two through subordinate employés in the absence of the manager, and having no knowledge of the order, such facts do not warrant an adjudication that defendant was guilty of contempt, in the absence of any evidence that the violation was intentional. Encyclopædia Brittanica Co. v. American Newspaper Ass'n (C. C. 1904) 130 Fed. 493.

A preliminary injunction will not be granted where it is not clear whether defendant has in fact used or sold any copies of complainant's photograph, or has merely borrowed complainant's idea, and made other similar, but not identical, photographs of its own; so that an injunction following the allegations of the bill would have no operative effect. American Mutoscope & Biograph Co. v. Edison Mfg. Co. (C. C. 1905) 137 Fed. 262.

Preliminary injunction will not issue against the publication of defendant's arrangement of a musical composition, though it is practically a reproduction of complainants' copyrighted arrangement thereof, where complainants have also published uncopyrighted editions of the composition, and the extent of the dedication to the public cannot be determined on the affidavits and inspection of the respective scores, so that it is impossible to decide the extent of any trespass by defendant, and it not appearing that defendant is unable to respond in damages. Littleton v. Fischer (C. C. 1905) 137 Fed. 684.

A decree awarding a perpetual injunction, and an accounting by the defendant in copyright infringement proceedings and referring the cause to a master to ascertain the amount complainant is entitled to recover is a mere interlocutory decree, and is therefore not res judicata as to any issues involved. Hills & Co. v. Hoover (C. C. 1906) 142 Fed. 904.

A preliminary injunction which will interfere with defendant's business will not be granted where complainant's right is doubtful on the showing made; but defendant may be required to give a bond for complainant's protection in case he is successful on a full hearing. Louis De Jonge & Co. v. Breuker & Kessler Co. (C. C. 1906) 147 Fed. 763.

The showing on a motion for a preliminary injunction to restrain alleged infringement of complainant's copyrighted directory held not to warrant the granting of such injunction, but sufficient to make it proper to require defendant to give a bond for the payment of any damages complainant might recover. Gopsill v. C. E. Howe Co. (C. C. 1907) 149 Fed. 905.

A preliminary injunction to restrain defendant from producing a copyrighted opera denied, on evidence tending to show that defendant had orally been given or promised a license by complainant's authorized agent, and that there had been negotiations for such license, and that both complainant and its agent had full knowledge that defendant was engaging singers and expending large sums of money in preparing for the production, and did not make any objection or suggest any obstacle to the granting of a license until a considerable time after defendant's public announcement of the production. G. Ricordi & Co. v. Hammerstein (C. C. 1907) 150 Fed. 450.

The right of a complainant to a preliminary injunction and its scope considered in a suit for unfair competition in imitating a lamp made by complainant. Rushmore v. Saxon (C. C. 1907) 154 Fed. 213.

Nor will a preliminary injunction be granted to restrain infringement of the copyright of future numbers of a periodical publication which have not yet been published or copyrighted. Sweet v. G. W. Bromley & Co. (C. C. 1907) 154 Fed. 754.

The District Court will not temporarily enjoin a vaudeville performer from singing a song from, and using the orchestration of, an opera to which complainant's exclusive right is doubtful. Savage v. Hoffman (C. C. 1908) 159 Fed. 584.

On a motion to temporarily enjoin a vaudeville performer from singing a song from an opera, the court may consider the fact that the songs and pianoforte score of the opera had been published, as showing an abandonment of the words of the songs, though there is no proof that the publication was authorized by the composer and the authors of the opera. Id.

No temporary injunction will be grant-

ed where it does not appear with certainty that so much has been taken from the prior book that its value is materially diminished, or that the later book will supersede the other through infringement, and where the publisher is responsible. White v. Bender (C. C. 1911) 185 Fed. 921.

Complainant held not entitled to a preliminary injunction to restrain the infringement of a copyright on certain monologues because of the appropriation therefrom of certain lines or "gags"; defendants having filed a sworn answer alleging that the matter appropriated was not original with complainant but had been used on the stage prior to the preparation of complainant's monologues. Hoffman v. Le Traunik (D. C. 1913) 209 Fed. 375.

A preliminary injunction would not be granted where complainants' rights are denied, and they have introduced no evidence of their title, nor documentary proof of the copyrights, or of the agreement under which they acted. Ginn v. Apollo Pub. Co. (D. C. 1913) 209 Fed. 713.

Proof of actual damages is not necessary to warrant the granting of an injunction to restrain infringement of a copyright. Macmillan Co. v. King (D. C. 1914) 223 Fed. 862.

Where sale of defendant's song will not interfere with sale of plaintiffs', because of the difference of tastes to which they appeal, temporary injunction will be suspended, on the giving of bond and filing of statements of sale. Boosey v. Empire Music Co. (D. C. 1915) 224 Fed. 646.

54. **Permanent injunction.**—Where the copper plate engraving of a copyrighted map was seized and sold under execution, the purchaser not possessing the right to strike off and sell copies of the map, could be restrained from doing so without a return of the purchase money. Stephens v. Cady (1852) 14 How. 528, 530, 14 L. Ed. 528.

Injunctive relief will not be granted because of the improper use of a copyrighted work with respect to a few names in a similar book limited to those engaged in lumber and kindred trades, where the latter book contains 25 per cent. more names than the former, and the subjects of information given by it are six times as many as are given by the other work. Dun v. Lumbermen's Credit Ass'n (1908) 28 Sup. Ct. 335, 209 U. S. 20, 52 L. Ed. 663, 14 Ann. Cas. 501, affirming judgment (1906) 144 Fed. 83, 75 C. C. A. 241.

The remedies of forfeiture and penalty and injunction given for infringement of copyright of a map are exclusive, and preclude resort to an action at law for damages. Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096, reversing judgment Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, which reversed (C. C. 1904) 130 Fed. 593.

Where defendant's directory contained certain infringing matter of such character that it could be separated from the original matter, a decree is proper which merely restrains the sale of defendant's directory only so long as it contains any of the infringing matter therein enumerated. Sampson & Murdock Co. v. Seaver-Radford Co. (1905) 140 Fed. 539, 72 C. C. A. 55, reversing decree (C. C. 1905) 134 Fed. 890.

Injunction will not be granted where defendant's agents or correspondents made an improper use of complainant's publication, containing many thousands of names, but will remit complainant to his remedy at law. Dun v. Lumbermen's Credit Ass'n (1906) 144 Fed. 83, 75 C. C. A. 241, judgment affirmed 1908) 28 Sup. Ct. 335, 209 U. S. 20, 52 L. Ed. 663, 14 Ann. Cas. 501.

Where common errors first occurring in complainant's work were unexplained by defendant, the whole would be enjoined. Frank Shepard Co. v. Zachary P. Taylor Pub. Co. (1912) 193 Fed. 991, 113 C. C. A. 609, affirming decree (C. C. 1911) 185 Fed. 941.

An alien, securing a copyright under laws of the United States, and importing a larger work in violation of the Copyright Act of 1909, held not guilty of misconduct, justifying denial to him of injunction to restrain publication of the copyrighted book. Bentley v. Tibbals (1915) 223 Fed. 247, 138 C. C. A. 489.

An alien author, procuring a copyright in the United States on a work, and then publishing a larger work in the foreign country, may not restrain one from publishing the larger work, where no one inspecting the larger work can tell what part has been taken from the copyrighted work. Id.

Before granting an injunction on a charge of infringement, the court will generally refer the matter to a master with instructions to report the extent of the infringement, if any, that the court may act on the case. Story v. Derby (C. C. 1846) Fed. Cas. No. 13,-496.

An author has a common-law right in his manuscript, and is entitled to an injunction to restrain its publication. Bartlett v. Crittenden (C. C. 1847) Fed. Cas. No. 1082; Id. (C. C. 1849) Fed. Cas. No. 1,076.

Where notes are partly original and partly copied the former may be published if they can be distinguished and separated; otherwise, the whole publication will be restrained. Webb v. Powers (C. C. 1847) Fed. Cas. No. 17,323; Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

A representation, from an unauthorized copy, of a foreign author's play existing in manuscript only, will be restrained at the suit of an assignee of the rights in this country, notwithstanding a public representation of the play

by such assignee. Keene v. Wheatley (C. C. 1861) Fed. Cas. No. 7,644.

Where the case is a proper one for an injunction, the court will order it at the time the decision on the merits is announced, where the piracies are few and of a character easily determined without reference to a master; otherwise, where the charges require extended examination. Lawrence v. Dana (C. C. 1869) Fed. Cas. No. 8,136.

Equity will not interfere by injunction when the amount copied is small and of little value, if there is no proof of bad motive. Id.

A projected publication will not be protected by injunction. Centennial Catalogue Co. v. Porter (C. C. 1876) Fed. Cas. No. 2,546.

Where the affidavits against the injunction tend to disprove the allegations of the bill, an injunction simpliciter should be refused, but defendant should be required to give a bond to answer to any damages that might be adjudged against him, and he should be required to preserve an account of all the copies of said book which he had disposed of, and keep an account of all of said books which he might thereafter dispose of. Hubbard v. Thompson (C. C. 1882) 14 Fed. 689, decree reversed (1889) 9 Sup. Ct. 710, 131 U. S. 123, 33 L. Ed. 76.

Where the announcement of performance was not such as to indicate that the original orchestration of an opera was to be performed, the use of the composer's name and the title of the opera would not be enjoined. Carte v. Ford (C. C. 1883) 15 Fed. 439.

On proof of infringement of copyright, injunction should issue without proof of actual damage. Reed v. Holliday (C. C. 1884) 19 Fed. 325; Fishel v. Lueckel (C. C. 1892) 53 Fed. 499.

An injunction to prevent infringement may be granted, although a qui tam action for the penalty allowed by law is pending. Schumacher v. Schwencke (C. C. 1885) 25 Fed. 466.

Defendant procured copies of a copyrighted work from a dealer who had purchased them of an agent of plaintiff in violation of the agent's agreement and instruction, of which defendant had no notice; but he abstained from making inquiry, knowing that plaintiff refused to sell otherwise than by subscription. Held, that he should have made inquiry, and his failure so to do was equivalent to notice; that he would be enjoined from selling the copies he had, and to account for the profits; but that plaintiff had no foundation for an injunction restraining future dealing in the book, or interfering with its local agent. Henry Bill Pub. Co. v. Smythe (C. C. 1886) 27 Fed. 914.

The injunction to restrain the infringement of one directory by another is limited to the extent to which they are identical. List Pub. Co. v. Keller (C. C. 1887), 30 Fed. 772.

Cessation of the infringement removes the occasion, but not the right to an injunction, and such cessation does not deprive complainant of the right to equitable relief. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

When the legal and equitable owners of a copyright join in a complaint to enjoin its infringement, it is immaterial whether the equitable owners acquired their interest by instrument in writing or by parol. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

It is proper to attach to a bill praying an injunction against the infringement of a copyright copies of the infringed and infringing maps. Id.

Injunction will not lie to restrain the publication and sale of a cyclopædia of the same name as one published by complainants, and of the same contents, except as to certain copyrighted articles, when defendants have not infringed any copyright, and use no means to persuade the public that their publication is that of complainants. Black v. Ehrich (C. C. 1891) 44 Fed. 793.

A suit praying only for an injunction restraining the infringement of a copyright is permitted by this section. Falk v. Schumacher (C. C. 1891) 48 Fed. 222, 223, affirmed Same v. Seidenberg, Id. 224.

Where the shown instances of alleged piracy were very few, and some of those were denied; and where defendant's volume for the year was printed and ready for delivery; and complainant had supplied its customers with its own digest for the year, defendant would be restrained only from future infringement, and from selling its digest to any persons other than its regular subscribers and those with whom it had previously contracted to deliver the same; defendant to give bond to keep account of all digests sold, and to pay such damages as might be awarded to complainant. West Publishing Co. v. Lawyers' Co-Operative Publishing Co. (C. C. 1893) 53 Fed. 265.

Defendant copied, partially and incorrectly, the published reports of a part of a series of lectures and sold them in book form under a title importing that the whole series was there presented in the author's language. Held, that plaintiff was entitled to an injunction, independently of the copyright law. Drummond v. Altemus (C. C. 1894) 60 Fed. 38.

Where the paragraphs of a digest which infringe copyrighted matter can be separated from the paragraphs not subject to criticism, an injunction will be restricted to the infringing paragraphs. West Pub. Co. v. Lawyers' Co-op. Pub. Co. (C. C. 1894) 64 Fed. 360, 25 L. R. A. 441, reversed (1897) 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400.

An injunction will not be granted,

under the copyright laws, to protect a title alone, separate from the book or dramatic composition it is used to designate. Corbett v. Purdy (C. C. 1897) 80 Fed. 901.

In a suit for infringement by copying lists of names, where the moving affidavits for a preliminary injunction make a strong showing of infringement, and defendant fails to furnish the testimony of the canvassers whose work is attacked, or the lists returned by them, he will be required to give security to respond for any damages which may ultimately be recovered against him; otherwise, an injunction will be awarded. Trow Directory, Printing & Bookbinding Co. v. Boyd (C. C. 1899) 97 Fed. 586.

Where it is clearly apparent from inspection that matter has in numerous instances been pirated from a copyrighted directory published by complainant for a preceding year, complainant is entitled to an injunction restraining the publication of defendant's directory as a whole unless defendant can eliminate the portions which he has unlawfully appropriated. Williams v. Smythe (C. C. 1901) 110 Fed. 961.

Where defendants took the infringing books and compared them with the authorities from which complainant's compilations were made, striking out the portions which were not there found, and publishing the remainder in a new edition, they were not chargeable with a violation of the injunction against publishing infringing works, which had been formerly granted. Colliery Engineer Co. v. Ewald (C. C. 1903) 126 Fed. 843.

Proof of damages is not essential to entitle a complainant to an injunction restraining the infringement of a copyrighted publication. Sampson & Murdock Co. v. Seaver-Radford Co. (C. C. 1905) 134 Fed. 890, decree reversed (1905) 140 Fed. 539, 72 C. C. A. 55.

Where it appeared that defendant had copied certain specific matter from complainant's directory, and had also transferred to all parts of its directory from complainant's directory many names, and information connected therewith, which it did not obtain by its original canvass or from original sources, such findings entitled complainant to an injunction, but the same would be limited to restrain the sale only of any copy containing any of the infringing matter, including that indicated in such general finding. Id.

An injunction will not be granted in favor of one of two rival publishers of information respecting real estate transfers, where the alleged piracy is denied, as well as the right of complainant to copyright the matter, and a countercharge of piracy is also made in the same connection, and where, moreover, the alleged infringing publication is a year old. Sweet v. G. W. Bromley & Co. (C. C. 1907) 154 Fed. 754.

An injunction simply in terms restraining the defendants from making any unlawful use of the complainants' publication would be open to the objection that it was argumentative and inspecific; it should state with reasonable certainty what defendants are forbidden to do. Id.

The manufacturer of uncopyrighted post cards is not entitled to an order restraining the manufacture and sale of like cards by a rival manufacturer as unlawful competition. Bamforth v. Douglass Post Card & Machine Co. (C. C. 1908) 158 Fed. 355.

Where a play infringing a copyrighted novel had been staged at great expense, with elaborate scenery, etc., the entire play would not be enjoined, if it could be revamped, so as to eliminate the objectionable imitations. Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589, decree affirmed Same v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173.

The author of a copyrighted story is not entitled to restrain a dramatic production thereof, if the story is merely an old theme with a new dress; but contra if scenes and incidents are introduced, with stage situations, by which the kernel of the story is emphasized. Id.

In a suit to restrain a dramatic production as an infringement of an author's copyrighted story, the question of infringement depends on whether the substance of the literary composition has been taken, to complainant's injury. Id.

Where an infringing publication had become no longer a salable book at the time suit for infringement was instituted, complainant was not entitled to an injunction nor to an accounting as an incident to equitable relief; its remedy at law being adequate. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

An unfair saving of labor and expense by appropriation of copyrighted work, animo furandi, is ground for injunction against the infringing publication, if the unfair use permeates the work to any material extent. Id.

Injunction may be an appropriate remedy for copyright infringement, even after the copyright has expired, if the unfair taking occurred while the copyright was in force and no adequate legal remedy can be applied. Id.

Where the identity of a few errors, which would certainly have been detected if original work had been done, appeared, and there was evidence showing a similar method of editorial work for the entire infringing publication, the court, in the absence of evidence to

the contrary, should find that the entire practice and method of writing was improper, and enjoin the sale of the entire publication. Id.

Where damage by infringement embraced only expense of additional copying, or if the sale of the work in itself caused no unfair competition and no appropriation of literary work, complainant would not be entitled to an injunction, but would be limited to a recovery of damages. Id.

Where some substantial use of copyrighted material is shown, an injunction against the entire publication will be granted, unless the defendant can except from the decree such articles or volumes as are affirmatively freed from the accusation of infringement. Id.

Where it appeared that complainant's copyright on a large part of the material used had been abandoned or lost, and the amount of actionable infringement was small in comparison with the whole quantity of matter, and an adequate remedy at law existed for any damages, an injunction and an accounting of profits should be denied. Id.

Copying phonograph records from a matrix taken therefrom is an infringement, and will be enjoined. Fonotipia Limited v. Bradley (C. C. 1909) 171 Fed. 951.

Where a copyrighted play was taken from the novel "St. Elmo," the copyright of which had expired, the owners of the play were not entitled to restrain defendants from using the same name for an entirely different play constructed on the plot and incidents of the novel, on the theory that the name was protected by the copyright of the play. Glaser v. St. Elmo Co. (C. C. 1909) 175 Fed. 276.

Where a publication by defendant contains matter which infringes a copyright of complainant intermingled with other matter which does not, the entire publication may be enjoined, leaving it to defendant to apply for a modification of the injunction after he has eliminated the objectionable matter. Park & Pollard Co. v. Kellerstrass (C. C. 1910) 181 Fed. 431.

Where complainant's catalogue contained 2,813 cuts and of these 18 which were legally copyrighted were reproduced in defendant's catalogue which contained 393 cuts, this is sufficient to justify the granting of an injunction limited to the cuts that have been copied. Da Prato Statuary Co. v. Giuliani Statuary Co. (C. C. 1911) 189 Fed. 90.

The representation of a dramatic work, which has never been printed nor copyrighted, if made without license of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. Tompkins v. Halleck (1882) 133 Mass. 32, 43 Am. Rep. 480.

Where defendant printed and manufactured, to sell for its own benefit, certain volumes, and in so doing unlawfully used manuscripts and other property intrusted to its care, this would not give complainant title to books so unlawfully produced so as to enable it by injunction to prevent defendant from disposing of the books, or entitle complainant to an accounting of the proceeds of such sale. State v. State Journal Co. (1905) 106 N. W. 434, 75 Neb. 275, 9 L. R. A. (N. S.) 174.

Where a copyrighted play was conveyed on the condition that the transferee should perform such play at least 50 times within one year from the date of the agreement, he is entitled to an injunction restraining the transferrors from assigning the right to a third person, although he has not produced the play, and has refused to produce it in connection with a certain other actor, where time still remains within which the transferee may produce the play the requisite number of times. Widmer v. Greene (N. Y. 1878) 56 How. Prac. 91.

The purchaser of all rights of a drama in a foreign state, but not having taken out copyright, cannot enjoin its use there by one obtaining his version from the authorized publication, notwithstanding the author violated his contract with the buyer when he authorized the publications. Daly v. Walrath (1899) 57 N. Y. Supp. 1125, 40 App. Div. 220.

55. Hearing.—The allowance of a jury, to settle at law the question of infringement arising in a suit in equity, is not a right, but rests in the sound discretion of the court. Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,-152.

56. Damages and profits.—The right to an account of profits is incident to the right to an injunction in copyright cases. Belford v. Scribner (1892) 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514; Gast Lithograph & Engraving Co. v. Falk (1893) 54 Fed. 890, 4 C. C. A. 648, 14 U. S. App. 15; Stevens v. Cady (C. C. 1854) Fed. Cas No. 13,-395; Sanborn Map & Publishing Co. v. Dakin Pub. Co. (C. C. 1889) 39 Fed. 266.

The right to an account of profits is incident to the right of an injunction in a copyright case. Stevens v. Gladding (1854) 17 How. 447, 455, 15 L. Ed. 155.

When infringing law reports contain matter to which the copyright cannot extend, and this is so inextricably mingled with matter proper to be protected that the profits from each class cannot be distinguished, defendants must answer for the entire profits. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; Bel-

ford v. Scribner (1892) 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514.

Where the master on an accounting placed the average selling price of infringing volumes at $4.34, while the complainant insisted that the average price should be $4.588, the master, in consideration of the impossibility of ascertaining the exact price, acted correctly in splitting the difference between the prices, and fixing the selling price at $4.464. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, affirming (C. C. 1885) 24 Fed. 636.

An infringing firm will not be allowed on an accounting to charge the cost for stereotyping, editing, or producing the infringing volumes, and they will be charged with the profits of resales of the infringing volumes which they had purchased as secondhand books. Id.

Damages recoverable for infringement of law reports. Id.

A variation of seven-eighths of 1 per cent. on gross sales, between two findings as to expenses, is so slight that the findings were properly allowed to stand. Id.

Where only portions of an entire copyrighted work are copied, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. Belford, Clarke & Co. v. Scribner (1892) 12 Sup. Ct. 734, 740, 144 U. S. 488, 36 L. Ed. 514.

Knowingly publishing a copyrighted poem without the owner's consent, and with no inquiry as to the rights of ownership justified a verdict for exemplary damages. Press Pub. Co. v. Monroe (1896) 73 Fed. 196, 19 C. C. A. 429, writ of error dismissed (1896) 17 Sup. Ct. 40, 164 U. S. 105, 41 L. Ed. 367.

The unauthorized performance of a single scene in a copyrighted play may constitute a "dramatic composition," in the meaning of this section; and statutory damages may be recovered, though no other part of the play is taken. Brady v. Daly (1897) 83 Fed. 1007, 28 C. C. A. 253, following Daly v. Webster (1892) 56 Fed. 483, 4 C. C. A. 10, and affirmed (1899) 20 Sup. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

This section was not changed by the proviso added by the amendment that, in case of infringement of copyright of a photograph the recovery shall not be less than $100 nor more than $5,000, so far as the rule of Bolles v. Outing Co. (1905) 20 Sup. Ct. 94, 175 U. S. 262, 44 L. Ed. 156, is concerned. Boston Traveler Co. v. Purdy (1905) 137 Fed. 717, 70 C. C. A. 409.

This section was intended to give a practical rule of damages in behalf of the owners of copyrighted dramatic compositions. Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, reversed (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096.

The owner of the copyright of a story infringed by appropriating it as the basis of a play may recover as damages all of the profits made by the infringer from the production of such play. Dam v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173, affirming decree Dam v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589.

In an action for infringement of copyright, the court did not err in charging the jury to award at least $250 damages for each infringement. Mail & Express Co. v. Life Pub. Co. (1912) 192 Fed. 899, 113 C. C. A. 377.

An account of profits may be decreed to the owner of a copyright as incidental to an injunction, but it must be prayed for in the bill, and cannot embrace penalties. Stevens v. Cady (C. C. 1854) Fed. Cas. No. 13,395.

The right to an account does not depend upon the right to an injunction where the copyright has expired. Blank v. Manufacturing Co. (C. C. 1856) Fed. Cas. No. 1,532.

Commissions received from sales of a pirated map are profits to be accounted for by the commission merchant selling them. Stevens v. Gladding (C. C. 1856) Fed. Cas. No. 13,399.

Substantial damages cannot be allowed where the matters charged have not prejudiced complainant. Chase v. Sanborn (C. C. 1874) Fed. Cas. No. 2,628.

Under Act July 8, 1870, damages could not be recovered, as well as profits, in a suit in equity for infringement of copyright. Chapman v. Ferry (C. C. 1882) 12 Fed. 693, 695.

Under the statute the owner of a copyright may recover both profits and damages in the same suit for infringement; the measure of damages being the amount which he fixes as his copyright fee. Per Sawyer, J., concurring. Goldmark v. Kreling (C. C. 1885) 25 Fed. 349, 355.

The measure of damages is the amount of profits realized by the infringer, and not the amount of profits that would have been realized to the copyright owner by the sale of an equal number of copies of the copyright edition. Scribner v. Clark (C. C. 1888) 50 Fed. 473.

Damages not warranted for infringement of a copyright by the publication in a newspaper article of matter taken from a pamphlet, chiefly advertising in character, copyrighted by plaintiff, and of which a large number of copies had been distributed free, but none had ever been sold or offered for sale, and where the evidence leaves it doubtful whether the pamphlet has any commercial value. D'Ole v. Kansas City Star Co. (C. C. 1899) 94 Fed. 840.

There can be no recovery in the way of damages beyond the gains and profits which the defendant is shown to have

realized from the infringement. Social Register Ass'n v. Murphy (C. C. 1904) 129 Fed. 148.

R. S. § 4964, held not to enlarge the jurisdiction of a court of equity, and not to be analogous to R. S. § 4921 (section 9467, ante), which confers on courts power in patent cases to render a decree for damages in addition to profits to be accounted for. Social Register Ass'n v. Murphy (C. C. 1904) 129 Fed. 148.

Where the infringing parts of a directory are intermingled with other parts about which there is no evidence, and defendant makes no effort to separate them, it must account for all profits made on the entire sales. Hartford Printing Co. v. Hartford Directory & Publishing Co. (C. C. 1906) 146 Fed. 332.

Where a greater number of copies of the infringing publication were printed than were sold, defendant is entitled to have deducted from the gross receipts all of such items of cost as would have been the same, had no more copies been printed than were sold, such as providing the copy and composition. Hartford Printing Co. v. Hartford Directory & Printing Co. (C. C. 1906) 148 Fed. 470.

On an accounting by a defendant for profits, the amounts received from advertisers are to be included in the gross receipts, to be accounted for, less the necessary cost of producing and disposing of the copies sold. Id.

A court of equity, in a suit for infringment of copyright, may award complainant damages, to be assessed by a master, in lieu of an injunction and an accounting. West Pub. Co. v. Edward Thompson Co. (C. C. 1911) 184 Fed. 749.

On an accounting for profits made by defendant from the production of a play, which infringed a copyright of a story, where defendant made its contracts by the season, each season should be taken as a unit in computing such profits. Dam v. Kirk La Shelle Co. (C. C. 1911) 189 Fed. 842.

On such an accounting defendant is not entitled to charge as an expense against the profits made the sum paid by it for the play, but only the reasonable value of an exclusive license for the time the play was presented. Id.

Defendant is not entitled to credit, on accounting for profits received from infringement of copyright, on account of a salary of $25,000 per year which it contracted to pay the widow of a former manager, in addition to a salary as manager for her services as president, and for certain other considerations which she did not furnish, but was entitled to credit for a reasonable salary for her services only. Id.

This section does not compel the court to award damages to the amount of $250, if in its opinion the actual damages do not amount to so much. Woodman v. Lydiard-Peterson Co. (C. C. 1912) 192 Fed. 67.

That defendant gave away a certain number of copies of a map which infringed complainant's copyright does not create any presumption that complainant was thereby deprived of the same number of sales and entitle him to damages on that basis. Id.

In a suit for infringement, the court will refer the case to a master to take and state the account. Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885.

Complainant held to have made a case entitling him to an accounting for profits and damages. Id.

Under this section, licensee of right to use copyrighted musical work in manufacture of sound records, infringing copyright by distributing free copies of the words of the composition, is liable only to nominal damages. F. A. Mills, Inc., v. Standard Music Roll Co. (D. C. 1915) 223 Fed. 849.

Report of special master as to profits recoverable for infringement of copyrights reviewed. Ginn & Co. v. Apollo Pub. Co. (D. C. 1915) 228 Fed. 214.

57. **Decree.**—A part of a book may be an infringement and the other parts not. In such case the relief will only extend to the part considered an infringement. Story v. Holcombe (C. C. 1847) Fed. Cas. No. 13,497.

As three-fourths of the extracts from complainant's book, and practically all to which he could lay claim as original matter, were contained in the first 11 pages of the infringing pamphlet, and to enjoin the whole would cast a disproportionate pecuniary loss on defendant, the injunction should extend only to this portion. Farmer v. Elstner (C. C. 1888) 33 Fed. 494.

An account of profits may be decreed under the general prayer for relief. Gilmore v. Anderson (C. C. 1889) 38 Fed. 846.

A decree in a suit for the infringement of a copyright, entered upon compromise discharging liability for the infringement, settles all liability therefor. Edward Thompson Co. v. Pakulski (1915) 107 N. E. 412, 220 Mass. 96.

58. **Costs.**—See notes under § 9561, post.

CITED WITHOUT DEFINITE APPLICATION

Burrow-Giles Lithographic Co. v. Sarony (1884) 4 Sup. Ct. 279, 280, 111 U. S. 53, 28 L. Ed. 349; Thornton v. Schreiber (1888) 8 Sup. Ct. 618, 619, 124 U. S. 612, 31 L. Ed. 577; Brady v. Daly (1899) 20 Sup. Ct. 62, 64, 175 U. S. 156, 44 L. Ed. 109; Bolles v. Outing Co. (1899) 20 Sup. Ct. 94, 95, 175 U. S. 262, 44 L. Ed. 156; Bleistein v. Donaldson Lithographing Co. (1903) 23 Sup. Ct. 298, 299, 188 U. S. 239, 47 L. Ed. 460; White-Smith Music Pub. Co. v. Apollo Co. (1908) 28 Sup. Ct.

319, 323, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628; Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096; Bong v. Alfred S. Campbell Art Co. (1909) 29 Sup. Ct. 628, 629, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126; Ferris v. Frohman (1912) 32 Sup. Ct. 263, 266, 223 U. S. 424, 56 L. Ed. 492; Bennett v. Boston Traveler Co. (1900) 101 Fed. 445, 446, 41 C. C. A. 445; American Press Ass'n v. Daily Story Pub. Co. (1902) 120 Fed. 766, 768, 57 C. C. A. 70, 66 L. R. A. 444 (appeal dismissed [1904] 24 Sup. Ct. 852, 193 U. S. 675, 48 L. Ed. 842); Bobbs-Merrill Co. v. Strauss (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766 (affirmed [1908] 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086); American Lithographic Co. v. Werckmeister (1908) 165 Fed. 426, 91 C. C. A. 376 (affirmed [1911] 31 Sup. Ct. 676, 221 U. S. 603, 55 L. Ed. 873); Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429 (affirmed [1911] 32 Sup. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285); Bosselman v. Richardson (1909) 174 Fed. 622, 98 C. C. A. 127; Donnelley v. Ivers (C. C. 1882) 18 Fed. 592, 593; Henry Bill Pub. Co. v. Smythe (C. C. 1886) 27 Fed. 914, 928; May v. Logan (C. C. 1887) 30 Fed. 250, 257; Daly v. Brady (C. C. 1895) 69 Fed. 285, 290; Bleistein v. Donaldson Lithographing Co. (C. C. 1899) 98 Fed. 608; White-Smith Music Pub. Co. v. Apollo Co. (C. C. 1905) 139 Fed. 427 (affirmed [1906] 147 Fed. 226, 77 C. C. A. 368, and [1908] 28 Sup. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628); Kerns v. Lee (C. C. 1906) 142 Fed. 985, 989; Suderman v. Saake (C. C. 1909) 166 Fed. 815; Ohman v. New York (C. C. 1909) 168 Fed. 953; Hervien v. J. S. Ogilvie Pub. Co. (C. C. 1909) 169 Fed. 978; Pentlarge v. Kirby (D. C. 1884) 19 Fed. 501, 507; Newgold v. American Electrical Novelty & Mfg. Co. (D. C. 1901) 108 Fed. 341.

§ 9547. (Act March 4, 1909, c. 320, § 26.) Jurisdiction of courts in enforcing remedies provided.

Any court given jurisdiction under section thirty-four of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

Decree.—Decree in general, see notes under § 9546, ante.

§ 9548. (Act March 4, 1909, c. 320, § 27.) Joinder in one action of proceedings for different remedies.

The proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

§ 9549. (Act March 4, 1909, c. 320, § 28.) Willful infringement for profit punishable; penalty; exception of performance of musical works for charitable or educational purposes.

Any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court: Provided, however, That nothing in this Act shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed,

or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Intent or purpose.—Under this section the performance of a musical composition in a hotel dining room for the purpose of increasing patronage, but with no admission fee, is not a performance for profit. John Church Co. v. Hilliard Hotel Co. (1915) 221 Fed. 229, 136 C. C. A. 639.

The proviso in this section permits the performance of the specified compositions where an admission fee is charged, if the proceeds are applied to charitable or educational purposes. Id.

§ 9550. (Act March 4, 1909, c. 320, § 29.) Fraudulent notice of copyright, or removal or alteration of notice on copyrighted article, punishable; penalty.

Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this Act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

"Article."—Under R. S. § 4963, as amended, the words "or other article" held not to mean any article whatsoever, whether copyrightable or not, but must be taken as limited to other articles, which in the preceding sections are described as the proper subject of copyright, a part of which only are expressly enumerated in this section. The word "article" is used in the same sense in which it is employed in the other sections. Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 220.

False notice in general.—Where the title in the first 3 and last 34 pages of the copyrighted English edition of a dictionary was different from the copyrighted domestic edition, the publisher of the English edition was prohibited by this section from inserting therein a notice of the domestic copyright. G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 Fed. 354, 76 C. C. A. 470, decree affirmed United Dictionary Co. v. G. & C. Merriam Co. (1908) 28 Sup. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

This section does not require that the false notice of copyright of a book must be inserted on one of the pages named in section 9540, ante. Rigney v. Raphael Tuck & Sons Co. (C. C. 1896) 77 Fed. 173.

It is not a violation of the statute to impress, upon an imperfect miniature cut or print of a copyrighted picture, a notice of copyright, though such cut or print is not separately copyrighted. Rigney v. Dutton (C. C. 1896) 77 Fed. 176.

A false copyright notice to subject the person so impressing it to the penalty imposed by this section, must contain all the essentials of a valid notice, as prescribed by section 9539, ante, and a notice which omits the date of the alleged copyright will not sustain an action for the penalty. Hoertel v. Raphael Tuck Sons & Co. (C. C. 1899) 94 Fed. 844.

Penalties in general.—The act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States is not within the provision of this section. McLoughlin v. Raphael Tuck & Sons Co. (1903) 24 Sup. Ct. 105, 106, 191 U. S. 267, 48 L. Ed. 178, affirming judgment (1902) 115 Fed. 85, 53 C. C. A. 508.

This section as formerly enacted contained a proviso "that this act shall not apply to any importation of or sale of such goods brought into the United States prior to the passage hereof." The books in question were imported prior to the passage of the act, but part of them were sold in the United States after its passage. Held, that such sale did not make defendant liable to the penalty. McLoughlin v. Raphael Tuck & Sons Co. (1902) 115 Fed. 85,

53 C. C. A. 508, judgment affirmed (1903) 24 Sup. Ct. 105, 191 U. S. 267, 48 L. Ed. 178.

The penalty imposed and given to "the person who shall sue for the same," under this section as formerly enacted, cannot be recovered in the name of more than one person. Ferrett v. Atwill (C. C. 1846) Fed. Cas. No. 4,747.

Though, where one on different days under different circumstances prints separate copies, each separate transaction may constitute a separate offense, yet the printing of many copies as a single continuous act is but one offense, and each imprint is not a separate cause of action. Taft v. Stephens Lithographing & Engraving Co. (C. C. 1889) 38 Fed. 28.

Where a number of chromos, all bearing the word "copyrighted," in violation of this section were struck off each day on several succeeding days, such chromos being of the same kind, except that each respective issue bore the name of a different firm by way of advertisement, the penalty is recoverable for each issue. Id.

The amendment of a complaint by substituting this section as formerly enacted as the law under which action was brought for Act July 8, 1870, c. 230, § 98, which was repealed by R. S. § 5596, post, § 10593, did not change the cause of action; both statutes being substantially the same. Rosenbach v. Dreyfuss (D. C. 1880) 1 Fed. 391, 393.

This section is only applicable where the notice is so impressed or inserted in an article copyrightable under section 9517, ante. Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 220.

Persons liable.—Under the proviso in this section as formerly enacted, the sale in the United States of articles falsely stamped in a foreign country as copyrighted in the United States, which articles were imported into the United States prior to the enactment of this statute does not render the seller liable to the penalty. McLoughlin v. Raphael Tuck & Sons Co. (1903) 24 Sup. Ct. 105, 106, 191 U. S. 267, 48 L. Ed. 178.

This section as formerly enacted did not, prior to its amendment in 1897, apply to a person knowingly selling a book containing a fictitious copyright notice, where he did not make the book, nor cause the notice to be inserted. Ross v. Raphael Tuck & Sons Co. (1898) 91 Fed. 128, 33 C. C. A. 405.

Defendant imported and sold in the United States books bearing a false copyright notice, impressed on them in Germany by defendant's authorization. Held, that defendant was not liable to the penalty, the statute having no extraterritorial effect. McLoughlin v. Raphael Tuck & Sons Co. (1902) 115 Fed. 85. 53 C. C. A. 508, judgment affirmed (1903) 24 Sup. Ct. 105, 191 U. S. 267, 48 L. Ed. 178.

The penalty is incurred by one who causes the publication in a trade paper of an uncopyrighted print or cut, with a notice of copyright attached, though he does not himself insert or impress such notice. Rigney v. Dutton (C. C. 1896) 77 Fed. 176.

Jurisdiction.—The jurisdiction of a circuit court of the United States to enjoin the issuing, publishing, or selling of articles marked or imported in violation of the copyright laws, is derived solely from this section as formerly enacted, which by its terms, does not apply to any importation or sale of such articles brought into the United States prior to its passage. McLoughlin v. Tuck (C. C. 1900) 99 Fed. 562.

Pleading.—The article upon which the false notice was placed was described in the petition, the description showing it to be the subject-matter of copyright; but the petition further averred that the article was not subject to copyright. Held, that the court will not labor to reconcile inconsistencies in pleading, and, as the penalty is not recoverable for placing the notice on an article that cannot be copyrighted, the petition was bad. Taft v. Stephens Lithographing & Engraving Co. (C. C. 1889) 38 Fed. 28.

A complaint under this section alleging that on a certain date "the defendant, at the city of New York, in the state of New York, did publish and issue a certain book, entitled 'F. & C.,' and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: 'Copyright, 1896, by R.,'" is not insufficient because of failure to negative the possibility that the notice was attached to a copyrighted picture, map, or the like, in an uncopyrighted book, nor for insufficiently stating the place where the inserting or impressing of the notice was done. Rigney v. Raphael Tuck & Sons Co. (C. C. 1896) 77 Fed. 173.

Where an article mentioned in the complaint for falsely using a notice of copyright may or may not be within the statute, it should be averred to be within it. It must appear that defendant is liable if the complaint is true, not merely that he may be. Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 224.

In an action to recover a penalty incurred under this section, serving a declaration referring to the statute, at the same time a process is served on the defendant, will be a substantial compliance with the statute, although there be no indorsement on the process itself. Brown v. Pond (D. C. 1880) 5 Fed. 31.

Where the summons and the complaint did not correspond as to the

statute under which action was brought, and defendant moved to set aside the summons, on the ground that it was not indorsed with a reference to the statute under which the suit for penalties was brought, held, that the summons was defective in not containing such an indorsement, and must be set aside. Id.

Where the defendant was first informed of the nature of the plaintiff's claim in an affidavit accompanying the order extending plaintiff's time to serve the complaint, a motion to set aside the summons will be granted. Brown v. Pond (D. C. 1880) 5 Fed. 41.

In an action to recover penalties incurred under this section, although the summons misdescribed the date, there was a sufficient reference to the statute invoked; it appearing that the provisions imposing the penalty sued for were found in title 60, c. 3, of that act (this compilation, tit. 60, c. 3), and that it was the only act of congress containing a title 60 and chapter 3. Id.

Cited without definite application, Globe Newspaper Co. v. Walker (1908) 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096; Bleistein v. Donaldson Lithographing Co. (C. C. 1899) 98 Fed. 608, 612.

§ 9551. (Act March 4, 1909, c. 320, § 30.) Importation of article bearing false notice of copyright, or piratical copies of copyrighted work, prohibited.

The importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

International copyright.—The international copyright act of March 3, 1891, does not prohibit the importation of uncopyrighted lithographs, although they may be copies of the copyrighted paintings. (1894) 20 Op. Atty. Gen. 753.

The importation of foreign-made chromos, which are copies of a foreign painting that has been copyrighted, but which are not themselves copyrighted, but are protected only by the copyright of the original painting, is not prohibited by this section as formerly enacted. (1896) 21 Op. Atty. Gen. 416.

§ 9552. (Act March 4, 1909, c. 320, § 31.) Importation, during existence of copyright in book, of piratical copies thereof, or of copies not produced in accordance with provisions of section 15 of act; exceptions.

During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this Act, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photoengraving process not performed within the limits of the United States, in accordance with the provisions of section fifteen of this Act, shall be, and is hereby, prohibited: Provided, however, That, except as regards piratical copies, such prohibition shall not apply:

(a) To works in raised characters for the use of the blind;

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization;

(c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

First. When imported, not more than one copy at one time, for individual use and not for sale; but such privilege of importation shall

not extend to a foreign reprint of a book by an American author copyrighted in the United States;

Second. When imported by the authority or for the use of the United States;

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith, by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State, school, college, university, or free public library in the United States;

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale: Provided, That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this Act, and such unlawful use shall be deemed an infringement of copyright. (35 Stat. 1082.)

See notes to section 1 of this act, ante, § 9517.

Section 15 of this act, mentioned in this section, is set forth, ante, § 9536.

Notes of Decisions

Repeal of act.—Paragraph 503 of the free list of the tariff act of July 24, 1897, merely provides when and under what circumstances the articles therein specified are exempt from duty on importation, and does not repeal or modify any part of the copyright law. (1901) 23 Op. Atty. Gen. 445.

Domestic manufacture.—The prohibitive proviso of this section applies only to books, chromos, lithographs, or photographs copyrighted as thereinbefore directed, and cannot be held to include chromos or photographs protected merely by the copyright of the original painting. (1896) 21 Op. Atty. Gen. 416.

Importation of books copyrighted in the United States prior to 1891, and later printed abroad, not prohibited by this section. (1901) 23 Op. Atty. Gen. 371, distinguishing and criticizing (1895) 21 Op. Atty. Gen. 159.

Books copyrighted under the laws of the United States and printed from type set and plates made in this country, the printed sheets of which were sent to Belgium and there bound, cannot, under this section, be legally returned to or imported into the United States. (1909) 28 Op. Atty. Gen. 90.

That section embraces every American copyright in a book, regardless of whether the copyright was obtained under the copyright laws embodied in the Revised Statutes, the copyright act of 1891, or the act of 1909. Id.

A book is "produced" within the meaning of this section when it is printed and bound. Its manufacture is then completed, and it becomes entitled to all the protection offered by the copyright laws. (1910) 28 Op. Atty. Gen. 209.

Copyrighted books which have been printed from type set within the United States, and the printing and binding both performed within the limits thereof, may be rebound abroad and imported without violating this section (35 Stat. 1082). Id.

Extent of rights acquired—Protection as to subject-matter.—The exceptions in the case of persons purchasing for use, and not for sale, is not limited in its application to the "authorized editions" of such book. (1895) 21 Op. Atty. Gen. 159.

This section as formerly enacted is applicable to books copyrighted prior to the passage of the act. Id.

The importation of reprints of musical compositions or of music books, copyrighted in the United States is prohibited. (1898) 22 Op. Atty. Gen. 29.

An article which is prohibited importation cannot gain admission through being attached to an article which is not prohibited. Id.

Damages.—In the case of the importation from England and the sale of copies of a book copyrighted in America, the jury were authorized in finding a verdict of 50 cents for every sheet contained in the whole number of volumes imported. Dwight v. Appleton (C. C. 1843) Fed. Cas. No. 4,215.

§ 9553. (Act March 4, 1909, c. 320, § 32.) Forfeiture and destruction of articles prohibited importation, brought into United States.

Any and all articles prohibited importation by this Act which are brought into the United States from any foreign country (ex-

cept in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the court, as the case may be, shall direct: Provided, however, That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this Act may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve willful negligence or fraud. (35 Stat. 1083.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Destruction of prohibited articles.—Regulations for the forfeiture or destruction of imported prohibited articles may be so framed as to provide due process of law. (1898) 22 Op. Atty. Gen. 29.

If their nature and value demand a notice and hearing before destruction, the rules and regulations adopted may be framed to provide for the same. (1898) 22 Op. Atty. Gen. 70.

The Secretary of the Treasury and the Postmaster General are authorized to provide for the summary destruction, without notice, of musical compositions and music books imported in violation of the copyright laws. Id.

When property is of trifling value, and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction without obtaining a forfeiture by judicial proceedings. Id.

§ 9554. (Act March 4, 1909, c. 320, § 33.) Regulations to prevent importation in mails of articles prohibited; notice of such actual or contemplated importation.

The Secretary of the Treasury and the Postmaster-General are hereby empowered and required to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act, and may require notice to be given to the Treasury Department or Post-Office Department, as the case may be, by copyright proprietors or injured parties, of the actual or contemplated importation of articles prohibited importation by this Act, and which infringe the rights of such copyright proprietors or injured parties. (35 Stat. 1083.)

See notes to section 1 of this act, ante, § 9517.

§ 9555. (Act March 4, 1909, c. 320, § 34.) Jurisdiction of actions, etc., under copyright laws.

All actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

The circuit courts were abolished and their jurisdiction transferred to the district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268, and jurisdiction of all suits at law or in equity arising under the copyright laws was conferred on the district courts by Jud. Code, § 24, par. 7, ante, § 991 (7).

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

Jurisdiction—In general.—Under Act July 8, 1870, United States courts were given jurisdiction of actions arising under copyright laws including power to grant injunctions, and to direct an accounting of profits. Chapman v. Ferry (C. C. 1882) 12 Fed. 693, 695.

The circuit courts, under section 991, cl. 7, ante, as formerly enacted, have jurisdiction of qui tam actions for pen-

alties imposed by section 9550, ante, for violations of the law relating to copyright, though by section 991, cl. 9, ante, the district courts have jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. Taft v. Stephens Lithographing & Engraving Co. (C. C. 1889) 37 Fed. 726.

Under section 991, cl. 7, ante, as formerly enacted, the circuit courts have jurisdiction of suits brought under section 9546, ante, to recover the penalty thereby imposed, as such suit involves both the validity and infringement of the copyright on which it is founded, although the general jurisdiction over actions for penalties and forfeitures is vested in the district courts. Falk v. Curtis Pub. Co. (C. C. 1900) 100 Fed. 77.

Section 9557, post, as formerly enacted, which authorizes the service and enforcement of injunctions granted in infringement suits anywhere in the United States, and confers jurisdiction on circuit courts of circuits other than that in which the suit is brought to entertain motions for the dissolution of such injunctions, does not affect the jurisdiction of a court to entertain the suit or grant an injunction without reference to the question of the residence or citizenship of the defendants. Lederer v. Rankin (C. C. 1898) 90 Fed. 449.

Federal court, under section 1242, is without jurisdiction to restrain the prosecution of state court proceedings of which the state court had jurisdiction, because they incidentally involved the validity and effect of a copyright. Carl Laemmle Music Co. v. Stern (D. C. 1913) 209 Fed. 129.

—— **State courts.**—Suits for breach of contracts which have for their subject-matter copyrighted articles are within the jurisdiction of the state courts, although the direct question of the validity of the apparent grants may not be. Bird v. Thanhouser (1911) 160 Ill. App. 653.

Act Feb. 3, 1831, § 9, providing that the United States courts shall have power to restrain the publication of manuscripts without the consent of the respective authors, does not deprive the courts of general jurisdiction of this state of the right to enjoin the unlawful publication of a manuscript by a person not its owner. Woolsey v. Judd (1855) 11 N. Y. Super. Ct. 379, 11 How. Prac. 49.

The state courts have jurisdiction of an action to enjoin infringement of an author's common-law right of literary property in a manuscript, as distinguished from his copyright, under the acts of congress. Palmer v. De Witt (1872) 47 N. Y. 532, 7 Am. Rep. 480.

A state court has jurisdiction of an action to determine the rights of the respective parties as to the exclusive right to have and perform a drama in America, as it does not call on the court to determine whether the copyright, which is the subject of the controversy, is valid, or whether either party is entitled to a copyright. Widmer v. Greene (N. Y. 1878) 56 How. Prac. 91.

The United States courts have exclusive jurisdiction of actions for an infringement of a copyright. Potter v. McPherson (N. Y. 1880) 21 Hun, 559.

Where an action involves the question whether a combination to control the sale of copyrighted books is illegal, as in restraint of trade, the state court has jurisdiction, though it may be necessary to construe the rights of parties under the copyright law. Straus v. American Publishers' Ass'n (1904) 92 N. Y. Supp. 153, 45 Misc. Rep. 251, judgment affirmed (1905) 92 N. Y. Supp. 1052, 103 App. Div. 277.

A state court has jurisdiction of a suit for unlawful competition, unless it appears from the complaint that plaintiff is seeking to enforce a right based on the copyright laws of the United States, and, if this does not appear, the federal courts have no jurisdiction of the case in the absence of diversity of citizenship, though the answer presents a defense based on the copyright laws. Outcault v. Lamar (1909) 119 N. Y. Supp. 930, 135 App. Div. 110.

United States courts have not exclusive jurisdiction of suit to protect property right in original musical composition. Stern v. Carl Laemmle Music Co. (1911) 133 N. Y. Supp. 1082, 74 Misc. Rep. 262.

Cited without definite application, Ohman v. New York (C. C. 1909) 168 Fed. 953.

§ 9556. (Act March 4, 1909, c. 320, § 35.) District in which actions, etc., under act may be brought.

Civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

District in which suit must be brought.—The provision of section 1033, ante, that no suit shall be brought in any other district than that whereof the de-

fendant is an inhabitant, does not apply to suits arising under the copyright laws, and such a suit may be brought in any district in which the defendant can be found and served with process. Lederer v. Rankin (C. C. 1898) 90 Fed. 449; Spears v. Flynn (C. C. 1900) 102 Fed. 6; Lederer v. Ferris (C. C. 1906) 149 Fed. 250.

This section as formerly enacted does not authorize a suit to enjoin the unauthorized performance of a copyrighted dramatic or musical composition to be brought in any district in which the defendant may be found, but merely confers the right upon the circuit court of any such district to enforce, dissolve, or modify an injunction which has been issued in the original suit, which must be in the district of his residence. Fraser v. Barrie (C. C. 1900) 105 Fed. 787.

Cited without definite application, New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

§ 9557. (Act March 4, 1909, c. 320, § 36.) Injunctions; service and enforcement thereof.

Any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

Effect of section.—This section does not qualify the prohibition of section 9533, ante, relative to actions before deposit of copies of works. New York Times Co. v. Star Co. (C. C. 1912) 195 Fed. 110.

Suits for injunction and procedure therein in general.—See notes under § 9546, ante.

Cited without definite application, Bobbs-Merrill Co. v. Strauss (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086.

§ 9558. (Act March 4, 1909, c. 320, § 37.) Transmission of certified copies of papers for enforcement of injunction by other court.

The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

§ 9559. (Act March 4, 1909, c. 320, § 38.) Review of orders, judgments, or decrees, under copyright laws, on appeal or writ of error.

The orders, judgments, or decrees of any court mentioned in section thirty-four of this Act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

Section 34 of this act, mentioned in this section, is set forth ante, § 9555.

This section was made applicable to suits under the act protecting foreign

copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

§ 9560. (Act March 4, 1909, c. 320, § 39.) Limitation of criminal proceedings under act.

No criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

§ 9561. (Act March 4, 1909, c. 320, § 40.) Costs in actions, etc., under act; attorney's fees.

In all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

This section was made applicable to suits under the act protecting foreign copyright, trade-mark, or patent, etc., rights of exhibitors at the Panama-Pacific International Exposition, Act Sept. 18, 1913, c. 14, §§ 2–6, ante, §§ 9525–9529, by section 5 of said act, ante, § 9528.

Notes of Decisions

Attorneys' fees.—Under this section, attorney's fee allowed against innocent infringer, misled by accidental omission of notice, where he did not by his answer admit complainant's right to the relief granted. Strauss v. Penn Printing & Publishing Co. (D. C. 1915) 220 Fed. 977.

A defendant, unsuccessful in a suit against him for infringement of a copyright, is liable to reasonable counsel fees awarded to plaintiff, as provided by this section. F. A. Mills, Inc., v. Standard Music Roll Co. (D. C. 1915) 223 Fed. 849.

Division of costs.—Where, in suit for infringement, complainant prevailed only in part, division of costs held not an abuse of discretion. M. Witmark & Sons v. Standard Music Roll Co. (1915) 221 Fed. 376, 137 C. C. A. 184, affirming decree (D. C. 1914) 213 Fed. 532.

Where it appeared that complainants had lost their right to protection, but the infringement was established, defendant would not be allowed costs, but each party would be required to pay one-half the costs. Record & Guide Co. v. Bromley (C. C. 1910) 175 Fed. 156.

Cited without definite application, Huebsch v. Arthur H. Crist Co. (D. C. 1914) 209 Fed. 885, 894.

§ 9562. (Act March 4, 1909, c. 320, § 41.) Copyright distinct from property in object copyrighted; effect of sale, etc., of such object, and of assignment of copyright.

The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Rights passing by sale.—The sale of a copyrighted book by the owner of the copyright carries with it all the rights and incidents of ownership, including the right to resell; and the purchaser or any subsequent owner may rebind the book in exact imitation of its original binding, as regards the title and cover designs, including the name of the publisher, and may sell the same, as so rebound, without infringement of the copyright. Doan v. American Book Co. (1901) 105 Fed. 772, 45 C. C. A. 42.

§ 9563. (Act March 4, 1909, c. 320, § 42.) Assignments, etc., of copyrights.

Copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Nature of copyright assignable.—The copyright recognized by the act of congress as assignable, and intended to be protected by its provisions, is presumed to be the common-law property of the author in his manuscript; and the first section of the act of 1790, which provides that any author of any book, etc., already printed in the United States, he being a citizen, who has not transferred to any other person the copyright of such book, etc., shall have the sole right of printing, etc., the same for 14 years, was intended to extend the same protection to books published under such circumstances. Wheaton v. Peters (1834) 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055.

Assignments—In general.—An artist may, before publication of his painting assign, independently of the ownership of the painting itself, the right or privilege of taking out the copyright. American Tobacco Co. v. Werckmeister (1907) 28 Sup. Ct. 72, 76, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

Where the author or owner of a painting is a citizen or subject of a foreign nation having no reciprocal copyright relations with the United States, and therefore not entitled to copyright such painting under this section, he cannot, while retaining the painting itself, convey such right to another. Bong v. Alfred S. Campbell Art Co. (1907) 155 Fed. 116, 83 C. C. A. 576, judgment affirmed (1909) 29 Sup. Ct. 628, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

Assignee of motion picture rights in copyrighted novel held not charged with notice of prior assignment by assignor's statement that he had licensed another person to reproduce the story as a drama. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (C. C. A. 1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

A copyright may be assigned to be transferred to a person not entitled, under the act, to take out a copyright. Boucicault v. Fox (C. C. 1862) Fed. Cas. No. 1,691.

A copyright, or undivided part thereof, may be assigned to a nonresident foreigner. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433; Id. (C. C. 1893) 56 Fed. 764.

An inchoate right to a copyright may be transferred by parol prior to the taking of the copyright. Black v. Henry G. Allen Co. (C. C. 1890) 42 Fed. 618, 9 L. R. A. 433.

Intestate agreed to deliver to a corporation all his property and earnings in consideration of membership and his support and maintenance. He also agreed to execute any necessary transfers to perfect the title of the corporation. All of the royalties upon his books which accrued during his life were paid to the society, but no assignment of the royalties was ever made, whereupon suit was brought by his administrator against complainants to compel a second payment thereof. Intestate left no debts, but nephews and nieces surviving him. Held, that a bill alleging such facts sufficiently disclosed that the corporation was the equitable owner of the royalties, and that complainants were entitled to an injunction restraining the action at law until the equitable rights of the society had been established. Benziger v. Steinhauser (C. C. 1907) 154 Fed. 151.

The owner of a copyright may assign the exclusive right to sell the copyrighted work in specified territory. Davis v. Vories (1897) 42 S. W. 707, 141 Mo. 234.

Where plaintiff bought the exclusive right to produce a play, he might enjoin its production by moving pictures. Frohman v. Fitch (1914) 149 N. Y. Supp. 633, 164 App. Div. 231.

—— Requisites and validity.—Under Act Feb. 3, 1831, c. 16, § 4, permitting a proprietor as well as an author to copyright a work, the right of an author before publication might be transferred by parol. Callaghan v. Myers (1888) 9 Sup. Ct. 177, 188, 128 U. S. 617, 32 L. Ed. 547.

In a suit in equity for the violation of a copyright, brought by the assignees of copyright, the assignments, although not recorded, are still valid as between the parties, and as to all persons, like the defendants, not claiming under the assignors. Webb v. Powers (C. C. 1847) Fed. Cas. No. 17,323.

A copyright of a book, or an interest in such copyright, can be assigned or relinquished only by writing. But an oral agreement to assign or relinquish is a valid consideration for a promise. Gould v. Banks (N. Y. 1832) 8 Wend. 562, 24 Am. Dec. 90.

—— Construction and operation.—The owner of a copyrighted story, having assigned the right of performing a particular copyrighted drama therefrom, could lawfully give to another the sole right of performing a different

dramatic composition of the story, while the first dramatic assignee would have no right to make another dramatization. Harper & Bros. v. Kalem Co. (1909) 169 Fed. 61, 94 C. C. A. 429, decree affirmed Kalem Co. v. Harper Bros. (1911) 32 Sup. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

A sale by the author of a story to a magazine and delivery of the manuscript, and the acceptance of money "in full payment for story" without any further agreement, was an absolute sale without reservation, carrying with it the exclusive right to dramatize the story when copyrighted under this section as formerly enacted. Dam v. Kirk La Shelle Co. (1910) 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173, affirming decree Same v. Kirke La Shelle Co. (C. C. 1908) 166 Fed. 589.

A nonresident alien author cannot, by assignment of his work to a resident of the United States, give the latter a right therein subject to the protection of the copyright act. Keene v. Wheatley (C. C. 1861) Fed. Cas. No. 7,644.

Arrangement of an opera score with the consent of the nonresident foreign composers, which was transferred to a fellow citizen, and by him copyrighted, is not an evasion or violation of law, and the assignee of the copyright, acting as agent of the original composers, was entitled to the protection of the court against infringers. Carte v. Evans (C. C. 1886) 27 Fed. 861.

The rights of an assignee of a copyright are limited to the rights originally obtained by the filing of the copyright, the assignee being bound as the original author by failure to follow the statutory requirements, or through a publication of such a portion of the work as may require a repetition of the statutory notice if the material is not to be released. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

Where complainant wrote a story which was published in a copyrighted newspaper, (the publishers of which later assigned their rights under the copyright to complainant, his rights as against an alleged infringer were limited to those of his assignor. Davies v. Bowes (D. C. 1913) 209 Fed. 53.

An assignment of a part of the rights protected by a copyright, as of the right of serial publication, operates merely as a license, and does not carry the right to sue for infringement given to the "copyright proprietor." New Fiction Pub. Co. v. Star Co. (D. C. 1915) 220 Fed. 994.

Where a composer vests by valid contract in a musical publisher the exclusive publishing rights to all his works, neither he nor an assignee with notice may sue the publisher for infringement. T. B. Harms & Francis, Day & Hunter v. Stern (D. C. 1915) 222 Fed. 581.

—— **Recording.**—See notes under § 9565, post.

Licenses.—The copyright law does not prohibit a licensee of the owner of a copyright for books from selling the same in unbound sheets, nor can the rights of a purchaser of such sheets with respect to binding and reselling the same be affected by any private agreement between the licensee and owner. Kipling v. G. P. Putnam's Sons (1903) 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873.

Putting a copyrighted book on the market and selling it does not constitute a license to the purchaser to use and sell the same, which the publisher is entitled to restrict by a notice brought to the attention of the purchaser that the sale of the book at retail for less than the price fixed by the publisher shall be considered an infringement of the copyright. Bobbs-Merrill Co. v. Straus (C. C. 1905) 139 Fed. 155, decree affirmed (1906) 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, which is affirmed (1908) 28 Sup. Ct. 722, 210 U. S. 339, 52 L. Ed. 1086.

License agreement for use of copyrighted musical composition in manufacture of sound records does not permit licensee to distribute on separate sheets the words of the composition. F. A. Mills, Inc., v. Standard Music Roll Co. (D. C. 1915) 223 Fed. 849.

A licensee of the right to use a play for a specific purpose cannot confer on a printer and publisher of the play the power to copyright it, and a copyright so attempted to be taken out is invalid. Koppel v. Downing (1897) 11 App. D. C. 93.

A license given by one joint owner of a copyrighted musical play to reproduce the scenes in moving pictures is not a physical destruction of the property, amounting to a conversion, which the joint owner can restrain. Herbert v. Fields (Sup. 1915) 152 N. Y. Supp. 487.

An assignment of a copyright as to a particular territory amounts to nothing more than a license to sell within that territory. Davis v. Vories (1897) 141 Mo. 234, 42 S. W. 707.

Contracts relating to copyrights.—Where an artist contracts away his copyright in a painting, and there is no evidence that he intends to retain any further interest, it will be deemed a complete transfer of the property right of copyright in the painting, and not a mere license or personal privilege. American Tobacco Co. v. Werckmeister (1907) 28 Sup. Ct. 72, 76, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595, affirming judgment (1906) 146 Fed. 375, 76 C. C. A. 647.

A contract in respect to copyright between publisher and author will be construed liberally in favor of the author. Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152.

Where an author gave to a publisher the right to publish and sell the work

upon a royalty basis, he has no right to print an edition for himself, and take out a copyright, so long as the publisher complies with his contract. Pulte v. Derby (C. C. 1852) Fed. Cas. No. 11,465.

An author who renews the copyright for his own benefit cannot sue for infringement one who originally published the work under an agreement with him that he should have the copyright forever. Paige v. Banks (C. C. 1870) Fed. Cas. No. 10,671.

Where by contract defendant agreed to print and publish certain copyrighted books, owned jointly by plaintiff and F., and contribute $2,000 as further capital, to be returned at the termination of the contract, plaintiff was bound to return the $2,000 to defendant, though the latter had acquired F.'s rights under the copyright, and had equal rights with plaintiff to publish it, and was receiving the benefit of the extra capital. Holt v. Silver (1897) 48 N. E. 837, 169 Mass. 435.

Contracts for sale or use of copyrighted works.—An agreement between publishers and booksellers to maintain retail prices on copyrighted books presents a claim of federal right which is necessarily denied when the highest state court affirms a judgment below in favor of defendant, so as to sustain the appellate jurisdiction of the federal Supreme Court, under section 1214, ante, governing writs of error to a state court. Straus v. American Publishers' Ass'n (1913) 34 Sup. Ct. 84, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369.

A contract by which a foreign author of a dramatic composition granted the stage rights in the United States to another, and agreed to copyright the play in this country, did not convey the author's right of copyright. Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571, reversing judgment Lederer v. Saake (C. C. 1909) 166 Fed. 810.

The law governing contracts in the sale of copyrights being like the law which obtains in any case of contract, the minds of the parties must meet in a definite understanding of all the elements. Hubbard v. Thompson (C. C. 1885) 25 Fed. 188, decree reversed (1889) 9 Sup. Ct. 710, 131 U. S. 123, 33 L. Ed. 76.

Notice in a copyrighted book restricting the purchaser's title did not, without communication to the purchaser, become a part of the contract of sale so as to bind the purchaser with its provisions. Authors & Newspapers Ass'n v. O'Gorman Co. (C. C. 1906) 147 Fed. 616.

Under this section it is not necessary that an author should himself have taken out a copyright of his book in order to preserve the right of dramatizing it, but it is sufficient if a copyright has been secured by any one having the right to obtain it, and the author may reserve the right of dramatization while selling the right to publish the book to another, who, as proprietor, may copyright it in his own name. Ford v. Charles E. Blaney Amusement Co. (C. C. 1906) 148 Fed. 642.

The sale of the sole right of printing and publishing a novellette, reserving all rights of dramatization probably implies a sale of the copyright, although a mere contract authorizing the publication of a story in a magazine does not. Id.

A contract granting the stage right to produce the play in the United States does not vest the licensee with the right to sue in his own name for penalties for infringement. Lederer v. Saake (C. C. 1909) 166 Fed. 810, judgment reversed Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571.

A contract that "plainly bound copies" should not be sold below a certain price means that the cheapest edition shall not be sold below such price, and prevents better books being sold for less. Murphy v. Christian Press Ass'n Pub. Co. (1899) 56 N. Y. Supp. 597, 38 App. Div. 426.

Where the owner of the copyright of a book sells a set of the plates and the right to publish the book from such set, an agreement that the book shall not be sold at less than a certain price is binding on one who thereafter buys the copyright and other plates. Id.

As regards copyrighted books, an agreement between publishers and others to maintain fixed retail prices thereof, no retailer cutting prices to be allowed to handle them, is not subject to a state statute against monopolies and restraint of trade. Straus v. American Publishers' Ass'n (1908) 86 N. E. 525, 193 N. Y. 496, affirming judgment (1908) 111 N. Y. Supp. 830, 127 App. Div. 935.

That the licensee of the right to perform certain musical compositions had given no performances for profit, did not relieve him from his liability for the agreed monthly compensation. Maxwell v. Faust Co. (1915) 154 N. Y. Supp. 224, 90 Misc. Rep. 702.

Right to injunction.—See notes under § 9546, ante.

Cited without definite application. Ager v. Murray (1881) 105 U. S. 126, 128, 26 L. Ed. 942; Empire City Amusement Co. v. Wilton (C. C. 1903) 134 Fed. 132.

§ 9564. (Act March 4, 1909, c. 320, § 43.) Assignments executed in foreign country; acknowledgment and certificate thereof.

Every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer

or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

§ 9565. (Act March 4, 1909, c. 320, § 44.) Recording assignments.

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded. (35 Stat. 1084.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Record of assignments.—A formal transfer of a copyright by the act is required to be proved and recorded as deeds for the conveyance of land, and such record operates as notice. Little v. Hall (1855) 18 How. 165, 171, 15 L. Ed. 328.

Assignment of moving picture rights in copyrighted novel, not recorded pursuant to this section, held void as to subsequent assignee. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (C. C. A. 1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

The owner of the dramatic and motion picture rights in a copyrighted book may sell and assign the two separately, and notice to a purchaser of the motion picture rights alone that his assignor had previously sold the dramatic rights does not charge him with notice of an unrecorded assignment conveying both. Photo Drama Motion Picture Co. v. Social Uplift Film Corporation (D. C. 1914) 213 Fed. 374.

An instrument purporting to convey the dramatic and motion picture rights in a copyrighted book, to be valid as against a subsequent purchaser without notice, must have been recorded in the copyright office. Id.

The recording of an assignment of a copyright as provided for by this section, is not necessary to the protection of the rights of the assignee against an infringer. New Fiction Pub. Co. v. Star Co. (D. C. 1915) 220 Fed. 994.

§ 9566. (Act March 4, 1909, c. 320, § 45.) Certificate of record of assignment.

The register of copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this Act he shall furnish to any person requesting the same a certified copy thereof under the said seal. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9567. (Act March 4, 1909, c. 320, § 46.) Use of name of assignee in notice of copyright.

When an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this Act. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9568. (Act March 4, 1909, c. 320, § 47.) Copyright Office; preservation therein of records, etc.

All records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the copyright office, Library of Congress, District of Columbia, and shall be under the control of the register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9569. (Act March 4, 1909, c. 320, § 48.) Register of Copyrights; appointment; salary; assistant register; subordinate assistants.

There shall be appointed by the Librarian of Congress a register of copyrights, at a salary of four thousand dollars per annum, and one assistant register of copyrights, at a salary of three thousand dollars per annum, who shall have authority during the absence of the register of copyrights to attach the copyright office seal to all papers issued from the said office and to sign such certificates and other papers as may be necessary. There shall also be appointed by the Librarian such subordinate assistants to the register as may from time to time be authorized by law. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9570. (Act March 4, 1909, c. 320, § 49.) Deposit by Register of Copyrights of moneys received as copyright fees; reports thereof.

The register of copyrights shall make daily deposits in some bank in the District of Columbia, designated for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury, in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this Act, and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unapplied balances. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9571. (Act March 4, 1909, c. 320, § 50.) Bond of Register of Copyrights.

The register of copyrights shall give bond to the United States in the sum of twenty thousand dollars, in form to be approved by the Solicitor of the Treasury and with sureties satisfactory to the Secretary of the Treasury, for the faithful discharge of his duties. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

R. S. § 4950, which provided that the Librarian should give a bond in the sum of $5,000, conditioned to render to the proper officers a true account of moneys received by virtue of his office, was superseded by Act Feb. 19, 1897, c. 265, § 1, ante, § 131.

§ 9572. (Act March 4, 1909, c. 320, § 51.) Annual report of Register of Copyrights.

The register of copyrights shall make an annual report to the Librarian of Congress, to be printed in the annual report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works which have been deposited in the copyright office during the fiscal year, under the provisions of this Act. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9573. (Act March 4, 1909, c. 320, § 52.) Seal of Copyright Office.

The seal provided under the Act of July eighth, eighteen hundred and seventy, and at present used in the copyright office, shall continue to be the seal thereof, and by it all papers issued from the copyright office requiring authentication shall be authenticated. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

Act July 8, 1870, c. 230, § 85, mentioned in this section, which provided for a seal for the office of the Librarian of Congress, was incorporated into the Revised Statutes as section 4949 thereof, which was superseded by this act.

§ 9574. (Act March 4, 1909, c. 320, § 53.) Rules for registration of claims to copyright.

Subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act. (35 Stat. 1085.)

See notes to section 1 of this act, ante, § 9517.

§ 9575. (Act March 4, 1909, c. 320, § 54.) Record books in Copyright Office.

The register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof. (35 Stat. 1086.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Entries.—An entry, according to the usual custom of the office business, in the office of the clerk of the district court, showing the deposit, to obtain copyright under Act Feb. 3, 1831, of a copyright work, was in the absence of any proof to the contrary, sufficient evidence of such deposit, although such entry was not required by express statute or order of court, but by direction of his superior officers, and the rules and practice of the office. Daly v. Webster (1892) 56 Fed. 483, 4 C. C. A. 10.

§ 9576. (Act March 4, 1909, c. 320, § 55, as amended, Act March 2, 1913, c. 97.) Certificate of registration; effect as evidence; receipt for copies of work deposited.

In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration. (35 Stat. 1086. 37 Stat. 724.)

See notes to section 1 of this act, ante, § 9517.

This section, as originally enacted, was as follows:

"In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain his name and address, the title of the work upon which

copyright is claimed, the date of the deposit of the copies of such work, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same, and the said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration."

It was amended by Act March 2, 1913, c. 97, cited above, to read as set forth here.

Section 16 of this act, mentioned in this section, is set forth ante, § 9537.

Notes of Decisions

Certificate as evidence.—A certificate by the librarian of congress that two copies of a book mailed by the publisher were received at a date which was within the 10 days from publication allowed by the copyright law is admissible in evidence, though not under seal. Belford, Clarke & Co. v. Scribner (1892) 12 Sup. Ct. 734, 739, 144 U. S. 488, 36 L. Ed. 514.

The librarian's certificate does not per se establish the copyright; but the burden rests on the plaintiff to show compliance with the statutory requirements as conditions precedent. Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571.

The certificate of the Librarian of Congress is no proof of compliance with the law. Bosselman v. Richardson (1909) 174 Fed. 622, 98 C. C. A. 127.

Certificate of Register of Copyrights that copies of publication were received June 24th held not to show delivery or mailing on June 23d, the date of publication, within section 9533, ante, notwithstanding this section. Davies v. Bowes (1914) 219 Fed. 178, 134 C. C. A. 552, affirming decree (D. C. 1913) 209 Fed. 53.

Under this section certificate of Register of Copyrights held not prima facie evidence that copies of publication were received in time, but only that they were delivered in attempted compliance with the statute on the date specified. Id.

The certificate of the Librarian of Congress that two copies of a book were deposited with him is competent evidence of such fact, and is sufficient where the identity of such copies with the book in suit is shown. Lederer v. Saake (C. C. 1909) 166 Fed. 810, judgment reversed Saake v. Lederer (1909) 174 Fed. 135, 98 C. C. A. 571.

Where a printed lecture was copyrighted, such copyright was shown prima facie by the certificate with seal of the copyright registration and the receipt card stating that the register had received the affidavit conforming to the requirements of section 9537, ante. Chautauqua School of Nursing v. National School of Nursing (D. C. 1914) 211 Fed. 1014.

The certificate of the librarian of congress, which, after giving the title to a book of "Recipes," which title he certified had been deposited in his office, stated "2 of the above publication deposited July 8, 1878," was not evidence that the copies deposited were copies of the publication for which plaintiff claimed to have the copyright. McMurty v. Popham (1887) 8 Ky. Law Rep. 704.

Cited without definite application, Merrell v. Tice (1881) 104 U. S. 557, 26 L. Ed. 854; Bennett v. Carr (1899) 96 Fed. 213, 215, 37 C. C. A. 453; Donnelley v. Ivers (C. C. 1882) 18 Fed. 592, 593; Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 217, 219; Chautauqua School of Nursing v. National School of Nursing (D. C. 1914) 211 Fed. 1014, 1015.

§ 9577. (Act March 4, 1909, c. 320, § 56.) Catalogues of copyright entries; effect of catalogues as evidence.

The register of copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalogue of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence

of the facts stated therein as regards any copyright registration. (35 Stat. 1086.)

See notes to section 1 of this act, ante, § 9517.

§ 9578. (Act March 4, 1909, c. 320, § 57.) Distribution and sale of catalogues of copyright entries; disposal of proceeds.

The said printed current catalogues as they are issued shall be promptly distributed by the copyright office to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, and they shall also be furnished to all parties desiring them at a price to be determined by the register of copyrights, not exceeding five dollars per annum for the complete catalogue of copyright entries and not exceeding one dollar per annum for the catalogues issued during the year for any one class of subjects. The consolidated catalogues and indexes shall also be supplied to all persons ordering them at such prices as may be determined to be reasonable, and all subscriptions for the catalogues shall be received by the Superintendent of Public Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time. (35 Stat. 1086.)

See notes to section 1 of this act, ante, § 9517.

§ 9579. (Act March 4, 1909, c. 320, § 58.) Records and works deposited in Copyright Office open to public inspection; taking copies of copyright entries.

The record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the register of copyrights and approved by the Librarian of Congress. (35 Stat. 1086.)

See notes to section 1 of this act, ante, § 9517.

§ 9580. (Act March 4, 1909, c. 320, § 59.) Disposition of articles deposited in Copyright Office.

Of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein. (35 Stat. 1087.)

See notes to section 1 of this act, ante, § 9517.

§ 9581. (Act March 4, 1909, c. 320, § 60.) Destruction of articles deposited in Copyright Office remaining undisposed of; removal of such articles by author, proprietor, etc.; manuscripts of unpublished works.

Of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things

to be destroyed: Provided, That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in this Act: And provided further, That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it. (35 Stat. 1087.)

See notes to section 1 of this act, ante, § 9517.

§ 9582. (Act March 4, 1909, c. 320, § 61.) Fees.

The register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, one dollar, which sum is to include a certificate of registration under seal: Provided, That in the case of photographs the fee shall be fifty cents where a certificate is not demanded. For every additional certificate of registration made, fifty cents. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in section one, subsection (e), or for any copy of such assignment or license, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length, two dollars; if more than one thousand words in length, one dollar additional for each one thousand words or fraction thereof over three hundred words. For recording the notice of user or acquiescence specified in section one, subsection (e), twenty-five cents for each notice if not over fifty words, and an additional twenty-five cents for each additional one hundred words. For comparing any copy of an assignment with the record of such document in the copyright office and certifying the same under seal, one dollar. For recording the extension or renewal of copyright provided for in sections twenty-three and twenty-four of this Act, fifty cents. For recording the transfer of the proprietorship of copyrighted articles, ten cents for each title of a book or other article, in addition to the fee prescribed for recording the instrument of assignment. For any requested search of copyright office records, indexes, or deposits, fifty cents for each full hour of time consumed in making such search: Provided, That only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time. (35 Stat. 1087.)

See notes to section 1 of this act, ante, § 9517.

Sections 1, 23, and 24 of this act, mentioned in this section, are set forth ante, §§ 9517, 9544, 9545.

Notes of Decisions

Fee as dependent on citizenship.—The Librarian of Congress, in determining what fees should be charged for the recording, etc., of copyrights, should treat a citizen or resident of the Philippine Islands as "a person not a citizen or resident of the United States." (1904) 25 Op. Atty. Gen. 179.

Cited without definite application, Merrell v. Tice (1881) 104 U. S. 557, 26 L. Ed. 854; Pentlarge v. Kirby (D. C. 1884) 19 Fed. 501, 507.

§ 9583. (Act March 4, 1909, c. 320, § 62.) Definition of terms "the date of publication" and "author" in construction of act.

In the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his

authority, and the word "author" shall include an employer in the case of works made for hire. (35 Stat. 1087.)

See notes to section 1 of this act, ante, § 9517.

Notes of Decisions

Publication.—Delivering to the secretary of state, for the use of the state, the number of copies of a volume of law reports required by law to be so delivered, is a publication of that volume, duly evidenced by certificates of the auditor of public accounts and of the secretary of state that on such a date the reporter made such delivery. Callaghan v. Myers (1888) 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

Sale of book prior to deposit of copy of title page will defeat copyright, as actual publication is presumed from a sale. Baker v. Taylor (C. C. 1848) Fed. Cas. No. 782.

Public representation of a drama is not a publication, within the meaning of the act requiring a copy to be deposited within a certain time. Roberts v. Myers (C. C. 1860) Fed. Cas. No. 11,906.

The work must be published within a reasonable time after filing the title page. Carillo v. Shook (C. C. 1876) Fed. Cas. No. 2,407.

§ 9584. (Act March 4, 1909, c. 320, § 63.) Repeal; causes of action for infringements committed before act not affected.

All laws or parts of laws in conflict with the provisions of this Act are hereby repealed, but nothing in this Act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law. (35 Stat. 1088.)

See notes to section 1 of this act, ante, § 9517.

TITLE LXI.

BANKRUPTCY

This Title, as enacted in the Revised Statutes, included sections 4972–5132, in which were incorporated the provisions of the Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517, with amendments thereof and additional provisions. That act, this Title of the Revised Statutes, and all acts in amendment or supplementary thereto or in explanation thereof, were repealed by Act June 7, 1878, c. 160, 20 Stat. 99, to take effect September 1, 1878. Said repealing act, however, provided that pending cases were not to be affected by the repeal; but no bankruptcy law was in force otherwise until the passage of the Bankruptcy Act of July 1, 1898, c. 541.

This Title includes said Bankruptcy Act of July 1, 1898, c. 541, as amended by Act Feb. 5, 1903, c. 487, Act June 15, 1906, c. 3333, and Act June 25, 1910, c. 412.

(R. S. §§ 4972–5132. Repealed.)

These sections of the Revised Statutes incorporated the provisions of the bankruptcy laws in force at the time of the Revision. They were repealed by Act June 7, 1878, c. 160, 20 Stat. 99.

(Act July 1, 1898, c. 541, and its amendments)

Chap.		Sec.
1.	Definitions	9585
	Meaning of words and phrases (§ 1)	9585
2.	Creation of courts of bankruptcy and their jurisdiction	9586
	Courts of bankruptcy; jurisdiction and powers (§ 2, as amd. Act Feb. 5, 1903, § 1, and Act June 25, 1910, §§ 1, 2)	9586
3.	Bankrupt	9587
	Acts of bankruptcy (§ 3, as amd. Act Feb. 5, 1903, § 2)	9587
	Who may become bankrupts (§ 4, as amd. Act Feb. 5, 1903, § 3, and Act June 25, 1910, §§ 3, 4)	9588
	Partners (§ 5)	9589
	Exemptions of bankrupts (§ 6)	9590
	Duties of bankrupts (§ 7)	9591
	Death or insanity of bankrupts (§ 8)	9592
	Protection and detention of bankrupts (§ 9)	9593
	Extradition of bankrupts (§ 10)	9594
	Suits by and against bankrupts (§ 11)	9595
	Compositions, when confirmed (§ 12, as amd. Act June 25, 1910, § 5)	9596
	Compositions, when set aside (§ 13)	9597
	Discharges, when granted (§ 14, as amd. Act Feb. 5, 1903, § 4, and Act June 25, 1910, § 6)	9598
	Discharges, when revoked (§ 15)	9599
	Co-debtors of bankrupts (§ 16)	9600
	Debts not affected by a discharge (§ 17, as amd. Act Feb. 5, 1903, § 5)	9601
4.	Courts and procedure therein	9602
	Process, pleadings, and adjudications (§ 18, as amd. Act. Feb. 5, 1903, § 6)	9602
	Jury trials (§ 19)	9603
	Oaths, affirmations (§ 20)	9604
	Evidence (§ 21, as amd. Act Feb. 5, 1903, § 7)	9605
	Reference of cases after adjudication (§ 22)	9606
	Jurisdiction of United States and State courts (§ 23, as amd. Act Feb. 5, 1903, § 8, and Act June 25, 1910, § 7)	9607
	Jurisdiction of appellate courts (§ 24)	9608
	Appeals and writs of error (§ 25)	9609
	Arbitration of controversies (§ 26)	9610
	Compromises (§ 27)	9611
	Designation of newspapers (§ 28)	9612
	Offenses (§ 29)	9613

Chap. Sec.
4. Courts and procedure therein—Continued.
Rules, forms, and orders (§ 30) ... 9614
Computation of time (§ 31) ... 9615
Transfer of cases (§ 32) ... 9616
5. Officers, their duties and compensation ... 9617
Creation of two offices (§ 33) ... 9617
Appointment, removal, and districts of referees (§ 34) ... 9618
Qualifications of referees (§ 35) ... 9619
Oaths of office of referees (§ 36) ... 9620
Number of referees (§ 37) ... 9621
Jurisdiction of referees (§ 38) ... 9622
Duties of referees (§ 39) ... 9623
Compensation of referees (§ 40, as amd. Act Feb. 5, 1903, § 9) ... 9624
Contempts before referees (§ 41) ... 9625
Records of referees (§ 42) ... 9626
Referee's absence or disability (§ 43) ... 9627
Appointment of trustees (§ 44) ... 9628
Qualifications of trustees (§ 45) ... 9629
Death or removal of trustees (§ 46) ... 9630
Duties of trustees (§ 47, as amd. Act Feb. 5, 1903, § 10, and Act June 25, 1910, § 8) ... 9631
Compensation of trustees, receivers, and marshals (§ 48, as amd. Act Feb. 5, 1903, § 11, and Act June 25, 1910, § 9) ... 9632
Accounts and papers of trustees (§ 49) ... 9633
Bonds of referees and trustees (§ 50) ... 9634
Duties of clerks (§ 51) ... 9635
Compensation of clerks and marshals (§ 52) ... 9636
Duties of Attorney-General (§ 53) ... 9637
Statistics of bankruptcy proceedings (§ 54) ... 9638
6. Creditors ... 9639
Meetings of creditors (§ 55) ... 9639
Voters at meetings of creditors (§ 56) ... 9640
Proof and allowance of claims (§ 57, as amd. Act Feb. 5, 1903, § 12) 9641
Notices to creditors (§ 58, as amd. Act June 25, 1910, § 9½) ... 9642
Who may file and dismiss petitions (§ 59, as amd. Act June 25, 1910, § 10) ... 9643
Preferred creditors (§ 60, as amd. Act Feb. 5, 1903, § 13, and Act June 25, 1910, § 11) ... 9644
7. Estates ... 9645
Depositories for money (§ 61) ... 9645
Expenses of administering estates (§ 62) ... 9646
Debts which may be proved (§ 63) ... 9647
Debts which have priority (§ 64, as amd. Act Feb. 5, 1903, § 14, and Act June 15, 1906) ... 9648
Declaration and payment of dividends (§ 65, as amd. Act Feb. 5, 1903, § 15) ... 9649
Unclaimed dividends (§ 66) ... 9650
Liens (§ 67, as amd. Act Feb. 5, 1903, § 16, and Act June 25, 1910, § 12) ... 9651
Set-offs and counterclaims (§ 68) ... 9652
Possession of property (§ 69) ... 9653
Title to property (§ 70, as amd. Act Feb. 5, 1903, § 16) ... 9654
Bankruptcy records; duty of clerks to keep; inspection (§ 71, as amd. Act Feb. 5, 1903, § 17) ... 9655
Restriction of compensation of referees, receivers, marshals, and trustees (§ 72, as amd. Act Feb. 5, 1903, § 18, and June 25, 1910, § 13) ... 9656

CHAPTER ONE

Definitions

§ 9585. (Act July 1, 1898, c. 541, § 1.) Meaning of words and phrases.

Meaning of Words and Phrases.—a The words and phrases used in this act and in proceedings pursuant hereto shall, unless the

same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a

nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things. (30 Stat. 544, 545.)

This was the first section of the Bankruptcy Act of July 1, 1898, c. 541, entitled "An act to establish a uniform system of bankruptcy throughout the United States."

The act was divided into 7 chapters, of which chapter 1 contained this section only, and chapters 2–7 contained the remaining sections 2–70 of the act as originally enacted. Said sections are set forth, as amended by subsequent acts, post, §§ 9586–9654. Two additional sections, added to the act as sections 71 and 72 thereof, are set forth at the end of chapter 7, post, §§ 9655, 9656.

Notes of Decisions

I. Constitutionality of national bankruptcy law.—Under the clause of the federal constitution from which the power of congress in this behalf is derived, it is within the competence of the national legislature, untrammeled by any state laws, to enact any and all forms of legislation tending to promote the distribution of an insolvent's estate among his creditors and his discharge from their demands, providing only that its enactments are not wanting in the character of uniformity. Hurley v. Devlin (D. C. 1907) 151 Fed. 919, 18 Am. Bankr. Rep. 627; In re Silverman (D. C. 1870) 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12,855; Keene v. Mould (1847) 16 Ohio, 12; Rowan v. Holcomb (1847) 16 Ohio, 463; Pope v. Title Guaranty & Surety Co. (1913) 152 Wis. 611, 140 N. W. 348.

The authority of congress over the subject of bankruptcy is not to be gauged or limited by the British statutes of bankruptcy which were in force at the time of the adoption of our constitution. Though those statutes, as then in force, applied only to persons engaged in trade, congress is not obliged to limit its laws on the subject to merchants or traders. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Kunzler v. Kohaus (1843) 5 Hill (N. Y.) 317; In re Silverman (D. C. 1870) 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12,855.

The bankruptcy act is not unconstitutional because it applies to corporations as well as to natural persons. In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315.

The bankruptcy act is not unconstitutional in providing for an adjudication of bankruptcy on the voluntary petition of the debtor. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; In re Klein (1843) 1 How. (U. S.) 277, note; Id. (C. C. 1843) Fed. Cas. No. 7,865; State Bank v. Wilborn (1845) 6 Ark. 35; Lalor v. Wattles (1846) 8 Ill. (3 Gilman) 225; Loud v. Pierce (1845) 25 Me. 233; Thompson v. Alger (1847) 12 Metc. (Mass.) 428; Kunzler v. Kohaus (1843) 5 Hill (N. Y.) 317; Morse v. Hovey (1846) 1 Barb. Ch. (N. Y.) 404.

Those provisions of the act which provide for compositions in bankruptcy are not unconstitutional; it is none the less, for this reason, a "law on the subject of bankruptcies." In re Reiman (C. C. 1875) 13 N. B. R. 128, Fed. Cas. No. 11,675; Id. (D. C. 1874) 11 N. B. R. 21, Fed. Cas. No. 11,673.

In enacting a law on the subject of bankruptcy, it was within the constitutional power of congress to attach conditions or limitations to the granting of a discharge in bankruptcy. In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315.

The authority of congress to enact a uniform law on the subject of bankruptcy includes the authority to provide for its administration, to select and designate the courts which are to have jurisdiction under it, and to regulate the modes of procedure. Goodall v. Tuttle (D. C. 1872) 7 N. B. R. 193, Fed. Cas. No. 5,533; Mitchell v. Great Works Mill. & Mfg. Co. (C. C. 1843) Fed. Cas. No. 9,662; McLean v. Lafayette Bank (C. C. 1843) Fed. Cas. No. 8,885.

The bankruptcy act does not deprive creditors of their property without due

process of law because it does not provide for notice to them of the filing of a voluntary petition nor require personal service of notice of the application for discharge in voluntary proceedings, nor on the theory that the notice provided for is unreasonably short or the right to oppose the discharge unreasonably restricted. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

The penal and criminal provisions of the bankruptcy act do not render it unconstitutional, since it is competent for congress to enforce, by suitable penalties, all legislation necessary or proper to the execution of the powers with which it is intrusted, and any act committed with a view to evading such legislation, or fraudulently securing its benefits, may be made an offense against the United States. U. S. v. Fox (1877) 95 U. S. 670, 24 L. Ed. 538.

With reference to the constitutional requirement that bankruptcy laws shall be "uniform throughout the United States," it is held that the uniformity required is geographical and not personal, and that no limitation is imposed upon congress as to the classification of persons who are to be affected by such laws, provided only that the laws shall have uniform operation throughout the United States. For this reason, the present bankruptcy act is not lacking in the "uniformity" required by the constitution, although it discriminates, in respect to the right to file a voluntary petition, between natural and artificial persons, withholding that right from all corporations. Neither is it invalid because, in respect to amenability to involuntary proceedings, it distinguishes between different classes of corporations, being made applicable only to those of a certain character or engaged in certain pursuits, and also between different classes of natural persons, exempting wage-earners and farmers. Nor is the classification actually adopted by congress unreasonable or beyond the limits of its discretion. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

The bankruptcy act is not deprived of the uniformity required by the constitution because it adopts the exemption laws of the several states, to the extent of according to the bankrupt the exemptions allowed him by the law of the state of his domicile. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; In re Deckert (C. C. 1874) 10 N. B. R. 1, Fed. Cas. No. 3,728; Darling v. Berry (C. C. 1882) 13 Fed. 659; In re Beckerford (C. C. 1870) 4 N. B. R. 203, Fed. Cas. No. 1,209; In re Jordan (D. C. 1873) Fed. Cas. No. 7,514; In re Duerson (D. C. 1876) 13 N. B. R. 183, Fed. Cas. No. 4,117; Dozier v. Wilson (1890) 84 Ga. 301, 10 S. E. 743.

The provisions of the bankruptcy act applying to an estate in bankruptcy the varying laws of the states with reference to the bankrupt's wife's right of dower and the priority of claims, do not deprive the act of the requisite uniformity, nor amount to an unlawful delegation of the legislative power of congress to the several states. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Thomas v. Woods (1909) 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132.

Although the bankruptcy act invades and annuls vested rights, and impairs or destroys the obligation of contracts, by releasing debtors from their obligations upon a partial payment or without any payment at all, even in respect to debts contracted before the enactment of the law, and making its provisions compulsory upon creditors, it is not for that reason unconstitutional. In re Kean (D. C. 1873) 8 N. B. R. 367, Fed. Cas. No. 7,630; In re Smith (D. C. 1873) 8 N. B. R. 401, Fed. Cas. No. 12,986; Evans v. Eaton (C. C. 1816) Fed. Cas. No. 4,559; In re Owens (D. C. 1875) 12 N. B. R. 518, Fed. Cas. No. 10,632; Keene v. Mould (1847) 16 Ohio, 12; Morse v. Hovey (1846) 1 Barb. Ch. (N. Y.) 404; In re Klein (C. C. 1843) Fed. Cas. No. 7,865; Loud v. Pierce (1845) 25 Me. 233; Cutter v. Folsom (1845) 17 N. H. 139.

Congress is not prevented by anything contained in the constitution from destroying any lien upon the property of the bankrupt, if it shall be deemed necessary for the effective working of the law and for preserving the equal rights of creditors, whether such lien was created by contract, statute, or judgment. In re Jordan (D. C. 1873) 8 N. B. R. 180, Fed. Cas. No. 7,514. If the prohibition against laws impairing the obligation of contracts could be construed as applying to congress, the bankruptcy act would not be liable to this objection, in respect to that part of it which operates to dissolve liens acquired within four months prior to the proceedings, for such liens relate only to the remedy for the enforcement of the contract, and not to the obligation of the contract. In re Rhoads (D. C. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380; Corner v. Miller (Md. Ct. Com. Pleas) 1 N. B. R. 403.

2. Policy and purpose of act.—In respect to the distribution of property, it is the intention of the bankruptcy act to divide the estate of the bankrupt between himself, his wife, and his children on the one hand, and his creditors on the other hand, as the laws of the state of his domicile authorize its division under like circumstances. In re McKenzie (1905) 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; Hurley v. Devlin (D. C. 1907)

151 Fed. 919, 18 Am. Bankr. Rep. 627. It is the intention to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing claims by ordinary judicial process. In re Cohn (D. C. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761. It is the further purpose of the act to relieve an honest debtor, who shows himself entitled to its benefits, from any further legal prosecution for his debts, in order to enable him to start afresh in business life. In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282.

The primary and principal purpose of the law regards the rights of creditors, and it is its intent to secure an absolutely equal and impartial distribution of the assets among the creditors, as speedily as possible, preventing all preferences and favoritism, defeating all fraudulent attempts to secrete property, and providing a remedy against every act by which a failing debtor seeks an unequal distribution. Pirie v. Chicago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; In re Blount (D. C. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282; Webb's Trustee v. Lynchburg Shoe Co. (1908) 107 Va. 807, 60 S. E. 130; Whitwell v. Wright (Sup. 1909) 115 N. Y. Supp. 48; Hewitt v. Boston Straw Board Co. (1913) 214 Mass. 260, 101 N. E. 424; Pope v. Title Guaranty & Surety Co. (1913) 152 Wis. 611, 140 N. W. 348; Utah Ass'n of Creditmen v. Boyle Furniture Co. (Utah, 1913) 136 Pac. 572. It is the duty of the courts to carry this purpose into effect to the extent which the language of the statute justifies, and not to tolerate any scheme or artifice to evade the letter and spirit of the law. In re Blount (D. C. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97. No state court has power to suspend the operation of the bankruptcy law, or to restrain a judgment debtor from availing himself of its provisions. In re Kepecs (Sup. 1910) 123 N. Y. Supp. 872.

A municipal ordinance which required members of the city's fire department to make prompt payment of all necessary personal and household expenses, and provided that the failure of a fireman to do so should be ground for discharging him, was held to be superseded and invalidated by the bankruptcy law, in so far as it affected debts of a fireman which would be dischargeable in a bankruptcy proceeding pending against him. In re Hicks (D. C. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654.

The maker of a judgment note containing a waiver of "all rights under the bankruptcy laws of the United States" is not thereby estopped from setting up a subsequent discharge in bankruptcy as a defense to his liability, since the waiver is void as contrary to public policy. May v. Merchants' & Mechanics' Bank (1885) 109 Pa. 145.

3. Interpretation and construction of bankruptcy act.—The bankruptcy law is a remedial statute and should not be subjected to a narrow or illiberal interpretation; it should be construed reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice. Botts v. Hammond (1900) 99 Fed. 916, 40 C. C. A. 179, 3 Am. Bankr. Rep. 775; Blake, Moffitt & Towne v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; Norcross v. Nathan (D. C. 1900) 99 Fed. 414, 3 Am. Bankr. Rep. 613; Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Mallory (D. C. 1871) Fed. Cas. No. 8,991, 6 N. B. R. 22; Mims v. Lockett (1856) 20 Ga. 474; Campbell v. Perkins (1853) 8 N. Y. 430. Statutory provisions as to the conditions on which bankrupts may be discharged are remedial, and the strict rules of construction appropriate to retrospective laws are not applicable to them. In re Scott (D. C. 1904) 126 Fed. 981, 11 Am. Bankr. Rep. 327.

Where provisions of the bankruptcy act of 1867 were construed by the courts, a court is justified in giving the same construction to similar provisions in the present bankruptcy act. In re Levin (1910) 176 Fed. 177, 99 C. C. A. 531, 23 Am. Bankr. Rep. 845.

Those provisions of the act which confer jurisdiction and powers on the courts of bankruptcy are to be construed liberally, not narrowly, in order that the act may have the beneficial effect intended by congress and be capable of harmonious execution. Murray v. Beal (D. C. 1899) 97 Fed. 567, 3 Am. Bankr. Rep. 284; Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315.

The provisions of the act prescribing the requisites of a composition with creditors are to be strictly construed as against those who seek by this means to deprive nonassenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings. In re Rider (D. C. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

A provision in the first section of the bankruptcy act that a given word "shall" include a certain thing, does not necessarily exclude other meanings. In re Harper (D. C. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918. On questions of the construction of the bankruptcy act, opinions expressed by individual members of congress in the debates on the passage of the act, as to the object and effect of its particular

clauses, are entitled to little or no weight. Carter v. Hobbs (D. C. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215.

The proceeding contemplated by the bankruptcy act is not a mere personal action against the bankrupt for the collection of debts, but is also a proceeding in rem to impound all of his nonexempt property and to distribute it equitably among his creditors; and hence the court must, if possible, so construe the act as to secure uniformity in its administration. Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012, 26 Am. Bankr. Rep. 329. In construing its terms giving or excluding its benefits, resort must be had to their meaning in the common law, rather than in the local law of the state where the proceedings are had. Austill v. Crawford (1845) 7 Ala. 335.

In construing the bankruptcy law, the federal courts are not bound by decisions of state courts upon similar terms in the insolvency law of the state. In re Knight (C. C. 1871) 8 N. B. R. 436, Fed. Cas. No. 7,880; In re Plotke (1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171. The construction or interpretation of the various provisions of the bankruptcy act, as settled by the decisions of the federal courts, particularly the Supreme Court, will be accepted and applied by the state courts, in all cases before them arising under or involving that statute, without an independent consideration of the question presented, if applicable rulings of the federal courts are brought to their notice. Rugely v. Robinson (1851) 19 Ala. 404; Burnham v. Ft. Dodge Grocery Co. (1909) 144 Iowa, 577, 123 N. W. 220; Stewart v. Hoffman (1905) 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Mount v. Manhattan Co. (1886) 41 N. J. Eq. 211, 3 Atl. 726; Wagner v. Burnham (1909) 224 Pa. 586, 73 Atl. 990; Ferrell v. Madigan (1882) 76 Va. 195; Bank of Garrison v. Malley (1910) 103 Tex. 562, 131 S. W. 1064; Broadnax v. Bradford (1874) 50 Ala. 270; Russell v. Cheatham (1847) 8 Smedes & M. (Miss.) 703; Kreitz v. Egelhoff (1910) 231 Mo. 694, 132 S. W. 1124.

4. **Repealing acts.**—Section 60b, as amended June 25, 1910 (post, § 9644), did not repeal section 67f (post, § 9651), and hence a petition by a bankrupt's trustee to enjoin the enforcement of the judgment recovered against the bankrupt within four months was not defective for failure to charge that the creditor at the time he recovered the judgment had reasonable cause to believe its enforcement would effect a preference. In re Petersen (1912) 200 Fed. 739, 119 C. C. A. 183.

5. **Retroactive operation.**—A retrospective effect will not be given to Act June 25, 1910, § 8, amending § 47a, subd. 2 (post, § 9631), by giving trustee in bankruptcy the rights of a creditor holding a lien so as to defeat title of conditional vendor under a contract of sale, which because unregistered was, under Code Va. 1904, § 2462, void as to lien creditors without notice. Holt v. Henley (1914) 34 S. Ct. 459, 232 U. S. 637, 58 L. Ed. 767, reversing decree (1912) 193 Fed. 1020, 113 C. C. A. 87.

Section 47a(2), as amended by Act June 25, 1910, § 8 (post, § 9631), is purely remedial and may properly be given a retroactive effect and applied to contracts of conditional sale made prior to its enactment which by the state law are void as to certain classes of creditors. In re Farmers' Co-operative Co. of Barlow, N. D. (D. C. 1913) 202 Fed. 1008.

CHAPTER TWO

Creation of Courts of Bankruptcy and Their Jurisdiction

§ 9586. (Act July 1, 1898, c. 541, § 2, as amended, Act Feb. 5, 1903, c. 487, § 1, and Act June 25, 1910, c. 412, §§ 1, 2.) Courts of bankruptcy; jurisdiction and powers.

The courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or

the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. (30 Stat. 545. 32 Stat. 797. 36 Stat. 838, 839.)

In this section, as originally enacted, clause 5 thereof was as follows:

"(5) authorize the business of bankrupts to be conducted for limited periods

by receivers, the marshals, or trustees, if necessary in the best interests of the estates;"

It was amended by Act Feb. 5, 1903, c. 487, § 1, cited above, by adding to clause 5, at the end thereof, the words "and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

It was further amended by Act June 29, 1910, c. 412, § 1, by changing the provision added by said previous amendment so as to read "and allow such officers additional compensation for such services, as provided in section forty-eight of this act;" making said clause 5 read as set forth here.

In the section, as originally enacted, also, the numbered clauses ended with clause 19, as follows:

"and (19) transfer cases to other courts of bankruptcy."

It was amended by said Act June 29, 1910, c. 412, § 2, cited above, by striking from clause 19 the word "and," and adding a new clause, to be known as clause 20, making the section read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Further as to extradition of bankrupts see post, § 9594. See, also, ante, § 1695.

Notes of Decisions

I. Jurisdiction of courts of bankruptcy

1. Courts of bankruptcy.
2. General principles of jurisdiction in bankruptcy.
3. Jurisdiction of bankruptcy courts exclusive.
4. Waiver of objections to jurisdiction.
5. Territorial limits of jurisdiction.
6. Jurisdiction dependent on residence or domicile.
7. —— Principal place of business.
8. —— Length of duration of residence or domicile.
9. Jurisdiction dependent on amount of debts.
10. Jurisdiction of bankrupt's person.
11. Summary jurisdiction.
12. Equitable jurisdiction and powers.
13. Ancillary jurisdiction.
14. Jurisdiction to reverse or set aside former proceedings.
15. Conflicts of jurisdiction with state courts.
16. —— Effect of appointment of receiver by state court.
17. —— Property in possession of sheriff.
18. —— Power to enjoin proceedings in state courts.
19. Practice in bankruptcy.
20. Powers and authority of judge.

II. Receiverships in bankruptcy proceedings

21. Appointment of receiver.
22. Powers and duties of receiver.
23. Continuing bankrupt's business.
24. Claims of third persons against receiver or estate.
25. Actions by and against receiver.
26. Ancillary receiverships.
27. Accounts and compensation of receiver.
28. —— Fees of receiver's attorney.
29. Sales of property by receivers.

III. Taxation of costs and fees

30. Power to award costs.
31. Amount and items of costs.
32. —— Costs on appeal.
33. Persons entitled to costs.
34. Persons, property, or funds liable for costs.
35. Taxation of costs.
36. Fees of attorneys.
37. —— Attorney for bankrupt.
38. —— Attorneys for petitioning and other creditors.
39. —— Attorney for receiver.

I. JURISDICTION OF COURTS OF BANKRUPTCY

1. Courts of bankruptcy.—The bankruptcy act intends and provides for only one court of bankruptcy within each judicial district, although there may be several district judges attached to, or authorized to hold, the court. In re Steele (D. C. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 687.

A district court does not cease to exist because of a vacancy in the office of judge, in such sense that proceedings in bankruptcy may not be instituted therein; but in such a case it is the duty of the clerk to receive and file the petition when offered, and it seems that he may also issue a subpœna thereon, tested in his own name. In re Urban & Suburban Realty Title Co. (D. C. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687.

2. General principles of jurisdiction in bankruptcy.—A court of bankruptcy derives all its jurisdiction from the statute which creates it. In re Williams (D. C. 1903) 120 Fed. 38, 9 Am. Bankr. Rep. 741; Jobbins v. Montague (D. C. 1872) 6 N. B. R. 509, Fed. Cas. No. 7,330. Its proceedings are open to collateral impeachment on questions of jurisdiction. Adams v. Terrell (D. C. 1878) Fed. Cas. No. 796. The record of a bankruptcy court must disclose the facts necessary to confer jurisdiction in any particular case. Smith v. Engle (1876) 44 Iowa, 265. But compare In re Columbia Real Estate Co. (D. C. 1900) 101 Fed. 965, 4 Am.

Bankr. Rep. 411; Allen v. Thompson (D. C. 1882) 10 Fed. 116. When the jurisdiction of a court of bankruptcy is shown to have attached, the subsequent proceedings are presumed to have been regular, and the decision of the court, whether correct or not, on every question properly arising in the case, is binding and conclusive on all other courts until reversed on appeal. In re Casey (D. C. 1912) 195 Fed. 322, 28 Am. Bankr. Rep. 359; In re Marion Contract & Construction Co. (D. C. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Columbia Real Estate Co. (D. C. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411.

In a bill filed in a state court by a bankrupt to enjoin a judgment which had been included in his schedule, it was not necessary to plead the jurisdiction of the court which granted the discharge. Reed v. Vaugn (1847) 10 Mo. 447.

A court of bankruptcy has unlimited jurisdiction in respect of its powers over proceedings in bankruptcy, conferred by this section. Sabin v. Larkin-Green Logging Co. (D. C. 1914) 218 Fed. 984, judgment affirmed Larkin-Green Logging Co. v. Sabin (C. C. A. 1915) 222 Fed. 814. But it has no jurisdiction under the bankruptcy act of independent suits at law or in equity. Maryman v. S. G. Dreyfus Co. (Ark. 1915) 174 S. W. 549.

The jurisdiction of bankruptcy courts includes everything necessary to settle, administer, and distribute the bankrupt's estate, but it does not include the protection of property set over to the bankrupt as exempt from adverse liens. Jeffries v. Bartlett (C. C. 1884) 20 Fed. 496, 498.

The general rule that a court has no power to set aside or modify its judgments or decrees after the term does not apply to orders and decrees in a bankruptcy proceeding as to which there are no separate terms. In re Burr Mfg. & Supply Co. (1914) 217 Fed. 16, 133 C. C. A. 126, reversing order (D. C. 1913) 209 Fed. 138.

The fact that a state is a creditor of the bankrupt, and therefore in a certain sense a party to the proceeding, does not affect the jurisdiction of the bankruptcy court. In re Greenville & C. R. Co. (D. C. 1872) Fed. Cas. No. 5,787.

Where proceedings in bankruptcy affect property not embraced in the assets of the bankrupt, they can bind only such persons in interest as have actual notice of them; but in so far as the proceedings affect only the assets in bankruptcy, they are in the nature of proceedings in rem and conclusive upon all persons, actual notice not being essential to the jurisdiction of the court. Hanover Nat. Bank v. Moyses (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; In re Judkins (D. C. 1875) Fed. Cas. No. 7,-560; Rayl v. Lapham (1875) 27 Ohio St. 452.

3. Jurisdiction of bankruptcy courts exclusive.—The jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is exclusive of all other courts, and such proceedings include all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of trustees and others who are employed to assist them. United States Fidelity & Guaranty Co. v. Bray (1912) 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, 28 Am. Bankr. Rep. 207.

The jurisdiction of a court of bankruptcy over the property of a bankrupt estate is exclusive from the time of the filing of the petition, and it has no power to surrender its exclusive control over the administration of such property to any other court. Hence a court of bankruptcy will not direct the surrender of vessels, in the possession of its receiver and admittedly belonging to a bankrupt estate, to an admiralty court to answer to the suit of a libelant, who desires to enforce maritime liens against them, although for a liability which arose before the bankruptcy. The Casco (D. C. 1916) 230 Fed. 929.

Upon a valid adjudication of bankruptcy, the jurisdiction of the court of bankruptcy, which attaches from the time of the filing of the petition, to administer the property of the bankrupt, is exclusive, and no other court, after the filing of such petition, can make any order or decree which will deprive it of such exclusive jurisdiction, nor can the court of bankruptcy itself properly surrender it to another court. In re Sage (D. C. 1915) 224 Fed. 525, 35 Am. Bankr. Rep. 436; Commercial Trust & Savings Bank v. Busch-Grace Produce Co. (C. C. A. 1916) 228 Fed. 300.

In all matters which properly concern the administration of an estate in bankruptcy, the jurisdiction of the proper federal court is exclusive and not to be shared with any state court, and is plenary and not to be interfered with. In re Anderson (1885) 23 Fed. 482; In re Barrow (D. C. 1868) 1 N. B. R. 481, Fed. Cas. No. 1,057; Newman v. Fisher (1873) 37 Md. 259.

The purpose of the bankruptcy law is to bring all the property of the bankrupt into the court of bankruptcy for administration, and that court is furnished with all the needful power to collect the assets, settle all conflicting claims or liens upon such property, and cause it to be distributed to those who are entitled to share in it. In re Sacchi (C. C. 1872) Fed. Cas. No. 12,-200.

All the property and estate of the bankrupt are considered as in custodia legis from the date of the adjudication, if not from the time of filing the petition. In re Weinger, Bergman & Co. (D. C. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; In re Wells (D. C. 1902) 114 Fed. 222, 8 Am. Bankr. Rep. 75; Beekman Lumber Co. v. Acme Harvester Co. (1908) 215 Mo. 221, 114 S. W. 1087; Zeigler v. Shomo (1875) 78 Pa. 357. And all such property is under the jurisdiction and control of the court of bankruptcy, in which court alone all persons who claim rights in the property so sequestrated, or who seek to participate in its distribution, must assert their claims, the jurisdiction of the federal court in this particular being not only paramount but exclusive. Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Carter v. Hobbs (D. C. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; In re Fisher (D. C. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Anderson (D. C. 1885) 23 Fed. 482; Davis v. Anderson (D. C. 1872) 6 N. B. R. 145, Fed. Cas. No. 3,623; Zeigler v. Shomo (1875) 78 Pa. 357.

All the property which is brought within the administration of the court of bankruptcy is subject to its sole orders and disposition, and so remains during the entire time the proceeding in bankruptcy is pending. Markson v. Haney (1874) 47 Ind. 31.

An adjudication of bankruptcy vests the bankruptcy court with exclusive jurisdiction to administer the property of the bankrupt, as against any state court which may have obtained possession of such property through proceedings instituted within four months prior to the adjudication, and it is immaterial that the proceedings in the state court were for the enforcement of valid liens not affected by the bankruptcy act. In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1.

When the lien of an attachment from a state court is annulled by an adjudication in bankruptcy, such court loses jurisdiction of the property, which passes into the exclusive jurisdiction of the court of bankruptcy, and the question of comity cannot affect such jurisdiction. In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

When a general assignment for the benefit of creditors is made by a debtor, the same being an act of bankruptcy, the right immediately arises in his creditors to have the estate administered under the bankruptcy law; and where the enforcement of this right is demanded by a proper proceeding within four months after its inception, no action by any court in any suit brought after the commission of the act of bankruptcy can defeat it, without the consent of the court of bankruptcy, whose jurisdiction is exclusive, and, on the making of the adjudication, relates back to the act of bankruptcy. In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1.

The bankruptcy law gives to courts of bankruptcy full power to enjoin all persons within their jurisdiction from doing any act that will interfere with or prevent its due administration, whether such persons are parties to the proceedings or not; and where they are litigants in a state court, no rule of comity requires the court of bankruptcy to compel persons whose rights under the bankruptcy law as jeopardized by such litigation to resort to the state court for protection. In re Hornstein (D. C. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308.

4. Waiver of objections to jurisdiction.—An alleged bankrupt who files a motion to dismiss the petition against him, and appears in court to testify in support of allegations made therein, thereby waives any merely technical objection to the jurisdiction of the court over his person and estate. In re Smith (D. C. 1902) 117 Fed. 961, 9 Am. Bankr. Rep. 98.

In a proceeding in bankruptcy against stockholders of a corporation to compel the delivery of their stock to the bankrupt's trustee, the stockholders, by answering to the merits, waive any objection to the jurisdiction of the court to determine the issue of title to the stock. In re Mills (D. C. 1910) 179 Fed. 409, 25 Am. Bankr. Rep. 278.

5. Territorial limits of jurisdiction.—When the jurisdiction of a court of bankruptcy has attached in a particular case by the filing of a petition and an adjudication thereon, the authority of the court in respect to the case is not territorially restricted to the boundaries of the judicial district or of the state, but it has jurisdiction of the debtor's entire property and estate, wherever situated, of debts and claims, wherever payable, and of creditors, wherever they reside. Babbitt v. Dutcher (1910) 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519; Wood v. Henderson (1908) 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1; Thomas v. Woods (1909) 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132; Staunton v. Wooden (1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736; In re Dempster (1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751; In re Muncie Pulp Co. (1907) 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56; Guardian Trust Co. v. Kansas City Southern Ry. Co. (1909) 171 Fed. 43, 96 C. C. A. 285; In re Granite City Bank (1905) 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; Markson v. Heaney (C. C. 1871) 4 N.

B. R. 510, Fed. Cas. No. 9,098; Whitridge v. Taylor (1872) 66 N. C. 273.

A court of bankruptcy may issue citations to persons in another jurisdiction to appear before it in respect to matters arising in the administration of an estate in bankruptcy. Staunton v. Wooden (1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

The jurisdiction of courts of bankruptcy is confined to their respective districts, but extends to all matters and proceedings in bankruptcy. The jurisdiction is to be exercised within their respective districts. Each court, within its own district, may exercise the powers conferred, but those powers extend to all matters of bankruptcy without limitation. Lathrop v. Drake (1875) 91 U. S. 516, 23 L. Ed. 414.

A court of bankruptcy cannot issue process to be enforced in another territorial jurisdiction, nor make a summary order for the delivery of property which must be there enforced, but such an order can only be obtained by ancillary proceedings by the trustee in the court of the district where it must be executed. Staunton v. Wooden (1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736; In re Waukesha Water Co. (D. C. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715; In re Williams (D. C. 1903) 120 Fed. 38, 9 Am. Bankr. Rep. 741; In re Steele (D. C. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446; In re Alphin & Lake Cotton Co. (D. C. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

An order of a bankruptcy court of the district of Massachusetts against the Bank of Commerce, located in New Mexico, was without efficacy there; the process of a bankruptcy court being restricted to the territorial limits of the district. In re Boston-Cerrillos Mines Corporation (D. C. 1913) 206 Fed. 794.

The right of extraterritorial jurisdiction in bankruptcy follows the jurisdictional title to property, and the bankrupt's estate, wherever located, only in so far as outside parties submit to or are found within the jurisdiction of the court, or where, in order to share in the administration of the estate, they submit to the jurisdiction of the court in the district where the proceedings are located. In re J. & M. Schwartz (D. C. 1913) 204 Fed. 326.

6. Jurisdiction dependent on residence or domicile.—Under this section, in order to confer jurisdiction, it is essential that the alleged bankrupt either had his principal place of business, or his residence or his domicile, within the division of the district in which jurisdiction is invoked. In re Lemen (D. C. 1912) 208 Fed. 80.

The residence or domicile of the bankrupt within the territorial jurisdiction of the court, for the prescribed period of time before the filing of a petition by or against him, is an essential jurisdictional fact, without the existence of which the court will have no authority to proceed, as it is the fact which determines the court in which the proceedings are to be taken. Fogarty v. Gerrity (D. C. 1870) 4 N. B. R. 450, Fed. Cas. No. 4,895; In re Leighton (D. C. 1871) 5 N. B. R. 95, Fed. Cas. No. 8,221; In re Little (D. C. 1868) 2 N. B. R. 294, Fed. Cas. No. 8,391; In re Palmer (D. C. 1867) 1 N. B. R. 213, Fed. Cas. No. 10,680.

The jurisdictional fact of the bankrupt's residence or domicile within the territorial limits of the court for the prescribed length of time must appear affirmatively and distinctly in the proceedings, and not be left to presumption or conjecture. In re Plotke (1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

The requirement of the statute as to residence or domicile within the district, as a basis of jurisdiction, cannot be waived by the bankrupt or the creditors. Neither consent nor failure to object can confer authority to proceed upon a court which would not have jurisdiction under the express language of the statute. Fogarty v. Gerrity (D. C. 1870) Fed. Cas. No. 4,895; In re Palmer (D. C. 1867) 1 N. B. R. 213, Fed. Cas. No. 10,680.

An alleged bankrupt, by pleading to the merits in its answer and otherwise submitting to the jurisdiction, held to have waived its objection that the proceeding was not brought in the division of its domicile. Clark-Herrin-Campbell Co. v. H. B. Claflin Co. (1914) 218 Fed. 429, 134 C. C. A. 229.

A bankrupt who has procured the dismissal of involuntary proceedings against him, on his sworn plea denying his residence within the district and asserting it to be within another district which he names, may be estopped to object to the jurisdiction of the court in the latter district, when fresh proceedings are commenced against him there by the same creditors. Long v. Lockman (D. C. 1905) 135 Fed. 197, 14 Am. Bankr. Rep. 172.

When the jurisdiction of a court of bankruptcy is invoked on the ground of residence or domicile, or the location of the principal place of business, it must be within the judicial district where the petition is filed. It is not enough that it should be within the same state. If a debtor resides or has his principal place of business in the northern district of New York, a petition filed by or against him in the southern district of New York will be dismissed for want of jurisdiction. In re Palmer (D. C. 1867) 1 N. B. R. 213, Fed. Cas. No. 10,680; Fogarty v. Gerrity (D. C. 1870) Fed. Cas. No. 4,895.

Residence and domicile are not the same, and an averment of residence

is not the equivalent of an averment of domicile for the purpose of supporting jurisdiction in the courts of the United States. Marks v. Marks (C. C. 1896) 75 Fed. 321. And see In re Watson (D. C. 1871) 4 N. B. R. 613, Fed. Cas. No. 17,272; Haskell v. Bailey (1894) 63 Fed. 873, 11 C. C. A. 476; Danahy v. National Bank of Denison (1894) 64 Fed. 148, 12 C. C. A. 75; Poppenhauser v. India Rubber Comb Co. (C. C. 1883) 14 Fed. 707; McDonald v. Salem Flour Mills Co. (C. C. 1887) 31 Fed. 577; Bartlett v. New York (1851) 5 Sandf. (N. Y.) 44; In re Garneou (1904) 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679; Anderson v. Anderson (1869) 42 Vt. 350, 1 Am. Rep. 334; Salem v. Lyme (1860) 29 Conn. 74; In re Lemen (D. C. 1912) 208 Fed. 80, 30 Am. Bankr. Rep. 638.

The meaning of the word "residence" as used in this section is fulfilled by relationship to the territory arising from location, which does not rise to the dignity of a domiciliary condition, and which, if continued for the requisite proportion of the six months immediately preceding the filing of the petition, is sufficient to confer jurisdiction. In re Lemen (D. C. 1912) 208 Fed. 80.

A court of bankruptcy has jurisdiction of a petition filed by a debtor who has had his domicile within the district for the preceding six months, although, during the greater portion of that time he has resided elsewhere, either in another state or in foreign countries, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district, before the filing of the petition, with the intention of making his permanent home there. In re Williams (D. C. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677; In re Walker (D. C. 1868) Fed. Cas. No. 17,061.

One who went from New York to acquire a residence in New Jersey to bring an action for divorce relinquished his residence and domicile in New York within this section. In re Lipphart (D. C. 1912) 201 Fed. 103.

Evidence held insufficient to show that an alleged bankrupt had changed his residence from Minnesota to Texas and had not resided in Minnesota for the greater part of six months next preceding the filing of the petition. In re Hurley (D. C. 1913) 204 Fed. 126.

For the purposes of jurisdiction in bankruptcy the domicile of a wife follows that of her husband during the continuance of the marriage relation, but a divorce leaves the wife at liberty to choose and fix her own domicile. Bennett v. Bennett (D. C. 1867) Fed. Cas. No. 1,318; Knickerbocker Life Ins. Co. v. Gorbach (1871) 70 Pa. 150.

A minor may acquire a separate domicile from that of his father during the latter's life-time, but only by the emancipation of the minor and a complete surrender of the parental control either to the minor himself or to some one standing in the place of the parent as to the choice of domicile. Woolridge v. McKennna (1881) 8 Fed. 650; Dresser v. Edison Illuminating Co. (1892) 49 Fed. 257. See In re Kingsley (D. C. 1908) 160 Fed. 275, 20 Am. Bankr. Rep. 427.

To give jurisdiction of proceedings in bankruptcy it is requisite that residence within the district should be bona fide; and the removal of a person from one district to another for the express purpose of filing a petition in bankruptcy therein, and with the intention of leaving the district as soon as he obtained a discharge, does not make him a resident so as to confer jurisdiction on the court. In re Garneau (1904) 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679.

But if there is an actual intention to take up a permanent residence in the district to which the removal is made, it is no sufficient reason for refusing to take jurisdiction that the party was primarily actuated by a desire to file his petition in bankruptcy in that particular court, or, generally speaking, to get a case into a federal court which otherwise would not have had jurisdiction of it. See Gardner v. Sharp (C. C. 1826) Fed. Cas. No. 5,236; Robertson v. Carson, 19 Wall. 94, 22 L. Ed. 178; Catlett v. Pacific Ins. Co. (C. C. 1826) Fed. Cas. No. 2,517; Briggs v. French (C. C. 1835) Fed. Cas. No. 1,871; Case v. Clarke (C. C. 1828) Fed. Cas. No. 2,490; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399.

7. —— Principal place of business.— When a petition in bankruptcy is filed in the district within which the alleged bankrupt has had his principal place of business for the requisite length of time, jurisdiction is not dependent on the place of his residence or domicile, which, in this case is immaterial. In re Alabama & C. R. Co. (C. C. 1872) Fed. Cas. No. 124; Ex parte Hall (C. C. 1842) Fed. Cas. No. 5,919. But if the alleged bankrupt is not shown to have any place of business, or to have had a place of business within the district for the prescribed length of time, then jurisdiction must depend upon either residence or domicile. In re Plotke (1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; In re Lipphart (D. C. 1912) 201 Fed. 103, 28 Am. Bankr. Rep. 705.

When the same person is engaged in various occupations or pursuits, it becomes necessary to determine as a question of fact which is his "principal" business, or that in which the major part of his capital is invested, which engages the chief part of his time and efforts, or on which he principally depends for his income. In re Mackey

(D. C. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577. See In re Foster (D. C. 1869) Fed. Cas. No. 4,962.

Where a petitioner in voluntary bankruptcy resides in one district and is there employed as a clerk in a store, but is engaged in trade on his own account, as a general merchant, in another district, the court in the latter district has jurisdiction of his petition, the bankrupt's principal place of business being within its territorial limits. In re Brice (D. C. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

The bankrupt may be said to have his principal place of business within the district, though the only business carried on there is that which he transacts as agent and attorney for another person. In re Baily (D. C. 1868) Fed. Cas. No. 753. Or though he merely works there as a clerk to the successors in the business in which he had previously failed. In re Belcher (D. C. 1868) Fed. Cas. No. 1,237. One employed at small salary as rate clerk and attorney in fact, and to indorse bank paper, has no "place of business" within this section. In re Lipphart (D. C. 1912) 201 Fed. 103.

In the case of a corporation organized under the laws of one state but which carries on business in another state or in several other states, it is not necessary that proceedings in bankruptcy should be instituted in the federal court in the state from which it derives its charter (though that court would have jurisdiction by reason of the "domicile" of the corporation), but may be maintained in that district, wherever it may be, in which the company has its chief or principal place of business. In re Munger Vehicle Tire Co. (1908) 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; In re Alaska American Fish Co. (D. C. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712; Dressel v. North State Lumber Co. (D. C. 1901) 107 Fed. 255, 5 Am. Bankr. Rep. 714; In re Magid-Hope Silk Mfg. Co. (D. C. 1901) 110 Fed. 352, 6 Am. Bankr. Rep. 610; Tiffany v. La Plume Condensed Milk Co. (D. C. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; Home Powder Co. v. Geis (C. C. A. 1913) 204 Fed. 568, 29 Am. Bankr. Rep. 580.

The whereabouts of the principal place of business of a corporation, for the purposes of jurisdiction in bankruptcy proceedings against it, is a question of fact, and the decision of it is not controlled either by the place of incorporation or by any provision in the charter of the company as to where its principal office shall be located. In re San Antonio Land & Irr. Co. (D. C. 1916) 228 Fed. 984; In re R. H. Pennington & Co. (D. C. 1915) 228 Fed. 388; In re E. & G. Theater Co. (D. C. 1915) 223 Fed. 657; In re Pennsylvania Consol. Coal Co. (D. C. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872; In re Guanacevi Tunnel Co. (1912) 201 Fed. 316, 29 Am. Bankr. Rep. 229; In re Wenatchee-Stratford Orchard Co. (D. C. 1913) 205 Fed. 964, 30 Am. Bankr. Rep. 540; In re Beiermeister Bros. Co. (D. C. 1913) 208 Fed. 945.

In determining in what jurisdiction the principal place of business of a bankrupt corporation is located, doubt should be resolved in favor of that jurisdiction where it obtained its corporate existence, and where it is usually required to maintain an office. Where the assets and most of the creditors of a Missouri corporation were in that state, and it was required to keep an office there, and the only business transacted in New York during the last six months was trying to reorganize, it not being in active business, its principal place of business was not in New York, and the court there will not assume jurisdiction to declare it bankrupt. In re Tennessee Const. Co. (D. C. 1913) 207 Fed. 203.

It is immaterial that a corporation which maintains its principal place of business in a state other than that in which it was incorporated has not complied with the laws of the foreign state, as to filing its articles of incorporation, paying a license fee, or other requirements necessary to its lawful right to do business therein. In re Duplex Radiator Co. (D. C. 1906) 142 Fed. 906, 16 Am. Bankr. Rep. 324; In re Perry Aldrich Co. (D. C. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

In order that a corporation shall have a principal place of business within a district of another state than that of its incorporation, so as to make it subject to bankruptcy proceedings in such district, it must have been actually doing business at such place during the greater portion of the preceding six months, and where a foreign corporation had in fact done no business in a district for more than three years, owing to the appointment of receivers for its property, the mere fact of its having filed a certificate in a public office, designating a place in the district as its principal place of business, is not sufficient to give the court in such district jurisdiction of proceedings against it. In re Thomas McNally Co. (D. C. 1913) 208 Fed. 291.

Though a corporation may have its "home office" in one state, where its officers are to be found, and where its directors meet, its records are kept, and its finances administered, this is not its principal place of business if its actual operations are conducted in another state, where its shops, factories, mills or other works are located. In re Alabama & C. R. Co. (C. C. 1874) Fed. Cas. No. 124.

A corporation engaged in the business of mining and selling coal whose lands and mining operations are all in the state by which it is chartered is not subject to bankruptcy proceedings in another state, although it may maintain its principal office there. In re

Tygarts River Coal Co. (D. C. 1913) 203 Fed. 178.

But if a corporation shuts down its factory, or ceases to do any active business at the place where its plant is located, but still maintains a head office in another state or district, where its executive and financial business is transacted, the latter becomes its principal place of business, so as to give jurisdiction to the federal court there. In re Munger Vehicle Tire Co. (1908) 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; In re Marine Machine & Conveyor Co. (D. C. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421. Compare In re Little (D. C. 1868) Fed. Cas. No. 8,391.

But numerous decisions now hold that, where a corporation operates factories, mills, mines, or other works in one state, but maintains a head office in another state, from which supreme direction and control are exercised over all its business, and where its directors hold their meetings, its records and accounts are kept, its correspondence conducted, and its banking business mainly done, it is the latter place, and not the former, which constitutes the company's principal place of business, and where proceedings in bankruptcy against it may be instituted. Burdick v. Dillon (1906) 144 Fed. 737, 75 C. C. A. 603; In re Marine Machine & Conveyor Co. (D. C. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421; In re Mathews Consol. Slate Co. (D. C. 1905) 144 Fed. 724, 15 Am. Bankr. Rep. 779, 16 Am. Bankr. Rep. 350; In re Pennsylvania Consol. Coal Co. (D. C. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872.

Where a company having both its executive offices and its plant in one state ceases to manufacture any products, the fact that it continues to make sales of its finished goods through an agent in another state does not operate to transfer its principal place of business to the latter state. In re Elmira Steel Co. (D. C. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484.

Where a company, incorporated in one state and doing business in another, sold most of its stock and gave up its place of business, and went into the hands of receivers appointed by a court of the state of its domicile, who took charge of the remaining property in the other state, all about six months before the filing of a petition in bankruptcy against it, it was held that a federal court in the latter state had no jurisdiction of the petition. In re Perry Aldrich Co. (D. C. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

Where the same corporation enjoys a corporate existence by legislative recognition in two states at once, and successive petitions in bankruptcy are filed against it in the federal courts within each of those states, that court which first acquires jurisdiction by the filing of the petition will retain it, and must be permitted to exercise it to the fullest extent, without interference by any other court. In re Boston, H. & E. R. Co. (C. C. 1871) Fed. Cas. No. 1,677.

Where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts will have concurrent jurisdiction of involuntary proceedings in bankruptcy against it. In re United Button Co. (D. C. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

8. —— Length of duration of residence or domicile.—For the purpose of jurisdiction in bankruptcy founded on the residence or domicile of the debtor within the district, it is settled, first, that it is not necessary that the residence or domicile should have begun six months before the petition in bankruptcy, but it is sufficient if it commenced at such a time that it may be said to have included "the greater portion thereof," that is, the greater portion of the preceding six months, and second, that it must have continued in the particular district for at least one or more days over three months, for it is not sufficient that the debtor should have resided within the district for a longer time than he has resided in any other district; in addition to that, his residence must have continued more than three months; and if, during the period of the preceding six months, the debtor has neither resided, had his domicile, nor maintained a principal place of business in any one district for so long a period as three months, then there is no court in which a petition by or against him can be filed. In re Plotke (1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; In re Williams (D. C. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736; In re Berner (1900) 2 Nat. Bankr. News, 330; Longley Bros. v. McCann (1909) 90 Ark. 252, 119 S. W. 268; In re Leighton (D. C. 1871) 5 N. B. R. 95, Fed. Cas. No. 8,221. And see In re Hurley (D. C. 1913) 204 Fed. 126, 29 Am. Bankr. Rep. 567.

A court of bankruptcy has jurisdiction of a voluntary petition for adjudication in bankruptcy, filed by a debtor who has had his domicile within the district for the preceding six months, although, during the greater portion of that time, he has resided abroad, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district before the filing of the petition, with the intention of making his permanent home there. In re Williams (D. C. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677.

Where a traveling gambler had resided in a particular district for only two months prior to the filing of a petition to have him adjudged a bank-

rupt, the bankruptcy court of that district had no jurisdiction of such petition. In re Williams (D. C. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736.

Under the provisions of this section and of section 18 (post, § 9602), a person who is beyond the territorial limits of a bankruptcy court at the time of the filing of a petition, but who has for more than a year prior to a few days before the filing of the petition resided within the district, may be adjudged a bankrupt on personal service and publication without the district, although he does not appear in the proceedings. Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012, 26 Am. Bankr. Rep. 329.

The bankrupt established his domicile within the district some time in May, 1910. He continued to reside there until August 2d, when, being heavily involved, and his property having been attached, he absconded and has not since been heard from. His wife and family continued to reside within the district, and on August 17th, a petition in involuntary bankruptcy was filed against him. Held, that under the rule that a domicile once acquired is presumed to continue until it is shown to have been changed, there being no evidence of an intent to change the domicile, by objecting creditors, the bankrupt had acquired a domicile within the district for the greater portion of six months at the time of the filing of the petition, and the court therefore had jurisdiction to declare him a bankrupt. In re Oldstein (D. C. 1910) 182 Fed. 409, 25 Am. Bankr. Rep. 138. And see In re Filer (D. C. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332.

9. Jurisdiction dependent on amount of debts.—When proceedings in bankruptcy are involuntary and are instituted by creditors, it is a jurisdictional requisite that the person or corporation proceeded against should "owe debts to the amount of one thousand dollars or over." Post, § 9588.

Under former bankruptcy laws, it was held that the jurisdiction, in so far as it depended on the amount of indebtedness, must exist at the time of the trial and adjudication, and that, although the debts might amount to the requisite sum at the time of filing the petition, yet if they were thereafter reduced by payments made, so as to amount to less than the jurisdictional sum, the court lost jurisdiction and could not make an adjudication. In re Skelley (D. C. 1871) Fed. Cas. No. 12,921. But see In re Jacobson (D. C. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927, holding that the statute should be construed as having reference to the amount of indebtedness at the time of the commission of the act of bankruptcy charged, on the ground that, when a debtor commits an act of bankruptcy denounced by the statute, his creditors immediately acquire a vested right to avail themselves of it, to file a petition, and to have the estate administered by the court of bankruptcy.

Where a petition was filed against a partnership after its dissolution, and its indebtedness was not shown to reach the required amount, except by including some debts which accrued after the dissolution and which became obligations of the firm only on the ground of estoppel in favor of such creditors as had no notice of the dissolution, it was held that the court should not make an adjudication of bankruptcy. In re Pinson & Co. (D. C. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

In computing the amount of indebtedness of an alleged bankrupt, the claims of preferred creditors must be included, if their preferences were given under such circumstances as to be voidable, since they will be entitled to prove their claims in the bankruptcy proceedings when they have surrendered their preferences or when the same have been voluntarily relinquished. In re McMurtrey & Smith (D. C. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; In re Tirre (D. C. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 493; In re Norcross (1899) 1 Am. Bankr. Rep. 644, 1 Nat. Bankr. News, 257; In re Cain (1899) 2 Am. Bankr. Rep. 379.

The act of bankruptcy charged was the making of a general assignment by a debtor who, at the time, owed much more than the required amount. Some of the creditors assented to the assignment and released the debtor on receiving their proportional part of the assets covered by the assignment. But other creditors, refusing to assent, filed a petition in bankruptcy. The settlement with assenting creditors had then reduced the amount of unreleased indebtedness below the sum of one thousand dollars. Nevertheless the court held that it had jurisdiction and that an adjudication should be made, on the ground that the released debts should be regarded as still existing and unpaid, at least for the purpose of the present proceeding and in order to secure to the nonassenting creditors the rights and remedies with which they became vested upon the commission of the act of bankruptcy. In re Jacobson (D. C. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927.

10. Jurisdiction of bankrupt's person.—It is not the petition in bankruptcy which confers upon the court jurisdiction of the subject-matter, but such jurisdiction is conferred by the statute, and does not depend upon the freedom of the petition from defects in form or substance. Jurisdiction of the person of the bankrupt is acquired by the filing

of the petition and serving a copy of it, with a subpœna, upon the bankrupt. In re Brett (D. C. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

11. Summary jurisdiction.—The federal district courts in bankruptcy are authorized by summary proceedings to administer all the relief which a court of equity could administer under like circumstances upon regular proceedings. In re Wallace (D. C. 1868) Fed. Cas. No. 17,094.

Where persons have forcibly and unlawfully seized and taken out of the judicial custody of a court of bankruptcy property which had lawfully come into its possession as part of a bankrupt's estate, the court has power summarily to require them to restore the property. White v. Schloerb (1900) 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178. For the purpose of this rule the possession of a receiver appointed by the court, or its marshal, or a trustee in bankruptcy, is the possession of the court. In re Landis (D. C. 1907) 151 Fed. 896, 18 Am. Bankr. Rep. 483. But where a receiver in bankruptcy delivered certain goods in the possession of the bankrupt to a claimant, on the ground that the title to the property was in the claimant and not in the bankrupt, the court's custody of the property was thereby surrendered, and the trustee was not thereafter entitled to recover the value of the property against the claimant in summary proceedings on an order to show cause. Hinds v. Moore (1905) 134 Fed. 221, 67 C. C. A. 149, 14 Am. Bankr. Rep. 1.

Property which is in the actual possession of the bankrupt at the time of the filing of the petition and the appointment of a receiver is constructively in the possession of the bankruptcy court, and a stranger who thereafter takes the property on a writ of replevin from a state court may be cited before the referee and his rights determined in a summary proceeding. In re Briskman (D. C. 1904) 132 Fed. 201, 13 Am. Bankr. Rep. 57.

Where a court of bankruptcy by its trustee has possession of a bankrupt's property, it has jurisdiction to determine all conflicting claims thereto. In re Wegman Piano Co. (D. C. 1915) 228 Fed. 60.

Custody of property by the bankruptcy court, though acquired by agreement of the person in possession, nevertheless confers jurisdiction to have and determine claims to the ownership thereof. In re Traunstein (D. C. 1915) 225 Fed. 317.

When property has become subject to a bankruptcy court, jurisdiction exists to determine the extent and character of liens thereon and rights therein, and to bring in additional parties when necessary to a complete determination of a matter in controversy. In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208.

Where a mortgage held by a creditor, and alleged to have been given by way of a preference, is foreclosed, the property sold, and the proceeds deposited in the bankruptcy court, that court may determine the validity of the mortgage on a petition filed by the trustee. In re Noel (D. C. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715.

The court of bankruptcy has summary jurisdiction over all contracts made with itself respecting the bankrupt's property, and where a forthcoming bond has been given for the release of goods under seizure, the court may summarily order the goods or their value to be brought into court by the parties to the bond. Rosenbaum v. Garnett (C. C. 1879) Fed. Cas. No. 12,053.

The bankrupt himself is always subject to the orders of the court, and a proceeding to compel him to surrender money or property which is claimed as assets of his estate need not be by a bill in equity, but a summary petition is sufficient. In re Ettinger (D. C. 1878) Fed. Cas. No. 4,543. And the same rule applies where the property is held for him by an agent, trustee, or other representative not setting up an independent claim of title thereto. Clay v. Waters (1910) 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

As a trustee in bankruptcy is an officer of the court, and his possession is that of the court, any claimant may proceed, if he so chooses, by summary petition against the trustee in respect to any property or funds in the latter's hands. Ex parte Christy (1845) 3 How. 292, 11 L. Ed. 603; Ferguson v. Peckham (D. C. 1872) 6 N. B. R. 569, Fed. Cas. No. 4,741; In re Evans (D. C. 1871) Fed. Cas. No. 4,551. Compare Hurst v. Teft (C. C. 1874) Fed. Cas. No. 6,939.

Jurisdiction to foreclose a mortgage on the estate of the bankrupt, at the instance of the mortgagee or holder, is not included in the powers to be exercised summarily by the court of bankruptcy. In re Casey (C. C. 1873) Fed. Cas. No. 2,495.

Where property which has been seized as the property of the bankrupt, and has thus come to the trustee's hands, is claimed as a stranger as his own, it is proper for the claimant to proceed for its recovery in specie by petition to the court of bankruptcy. Krippendorf v. Hyde (1884) 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Keegan v. King (D. C. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re Moses (D. C. 1880) 1 Fed. 845; In re Clark (C. C. 1872) Fed. Cas. No. 2,802; In re Harthill (D. C. 1871) Fed. Cas. No. 6,161.

A court of bankruptcy held to have jurisdiction of a petition by lessors of the alleged bankrupts to recover the leased premises, although they had been sublet with the lessors' consent, and before the hearing a composition

offered by the bankrupts had been confirmed. In re Larkey (D. C. 1914) 214 Fed. 867.

A trustee in bankruptcy cannot be compelled to resort to a plenary suit to recover the possession of property where his right is not contested, but any one withholding the possession, while making no claim to the property for himself, may be dealt with summarily. In re Moore (D. C. 1900) 104 Fed. 869, 5 Am. Bankr. Rep. 151.

Where the trustee claims, as assets of the estate, property which is in the actual possession of a third person who asserts his own title thereto in opposition to the bankrupt or the trustee, whether such title was derived from the bankrupt himself before the proceedings, or from an independent source, the rights of such adverse claimant cannot be adjudicated in a summary manner in the bankruptcy proceeding but only in a plenary suit brought against him by the trustee. Marshall v. Knox (1872) 16 Wall. 551, 21 L. Ed. 481; Smith v. Mason (1871) 14 Wall. 419, 20 L. Ed. 748; In re Abraham (1899) 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266; Camp v. Zellars (1899) 94 Fed. 799, 36 C. C. A. 501; In re Rockwood (D. C. 1899) 91 Fed. 363, 1 Am. Bankr. Rep. 272; In re Kelly (D. C. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306; In re Brodbine (D. C. 1899) 93 Fed. 643, 2 Am. Bankr. Rep. 53; In re Cohn (D. C. 1899) 98 Fed. 75, 3 Am. Bankr. Rep. 421; In re Griffith (D. C. 1899) 1 Nat. Bankr. News, 546; In re Fowler (D. C. 1899) 1 Nat. Bankr. News, 215; In re Carter (D. C. 1899) 1 Nat. Bankr. News, 162; In re Staib (D. C. 1880) 3 Fed. 209; In re Waitzfelder (D. C. 1878) 18 N. B. R. 260, Fed. Cas. No. 17,048; In re Stevens (D. C. 1877) Fed. Cas. No. 13,390; In re Evans (D. C. 1871) Fed. Cas. No. 4,551.

A trustee of a bankrupt corporation cannot enforce a liability for an unpaid stock subscription in a summary proceeding. In re Howe Mfg. Co. (D. C. 1912) 193 Fed. 524, 27 Am. Bankr. Rep. 477.

The court of bankruptcy has jurisdiction to summarily try and determine the merits of a proceeding to punish relator for an assault on a trustee in bankruptcy in the performance of his duties as such, as a contempt of such court. Ex parte O'Neal (C. C. 1903) 125 Fed. 967.

12. Equitable jurisdiction and powers.—A court of bankruptcy, as such, does not possess the chancery powers of a court of unlimited jurisdiction, its equity jurisdiction being limited to that conferred by this section of the bankruptcy act, namely, such as is necessary to "enable them to exercise original jurisdiction in bankruptcy proceedings." Nelson v. Svea Pub. Co. (D. C. 1910) 178 Fed. 136.

Within the limits of their own particular subject-matter, the courts of bankruptcy possess the powers of courts of equity, and may take cognizance of equitable rights and claims, follow equitable modes of procedure, and administer equitable relief. In re Gillaspie (D. C. 1911) 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282; In re Appel (1908) 163 Fed. 1002, 90 C. C. A. 172, 20 Am. Bankr. Rep. 890; In re Siegel-Hillman Dry Goods Co. (D. C. 1901) 111 Fed. 980, 7 Am. Bankr. Rep. 351; In re Rochford (1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; In re Fendley (D. C. 1874) 10 N. B. R. 250, Fed. Cas. No. 4,728; Fowler v. Dillon (D. C. 1875) 12 N. B. R. 308, Fed. Cas. No. 5,000; Ex parte Foster (C. C. 1842) Fed. Cas. No. 4,960; In re Wallace (D. C. 1868) 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Anderson (D. C. 1885) 23 Fed. 482.

This section of the statute may be availed of to compel anything which ought to be done, or prevent anything which ought not to be done against the enforcement of the bankruptcy law, provided the court of bankruptcy otherwise has jurisdiction of the person or subject-matter, and for such purposes the court has the plenary powers of a court of equity, and can exercise them for the ascertainment and enforcement of the rights and equities of the various parties interested in the bankrupt's estate; and where the bankrupt's estate was undergoing administration, and a proposition was made to buy the assets for a certain sum prior to the termination of the year allowed for filing claims, the court could restrain any proceeding which would disturb or change the matter in process of administration. In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282.

Where a court of bankruptcy has acquired jurisdiction to determine the right of a lessor to a forfeiture under the terms of the lease, it will proceed on equitable principles and will refuse to enforce a forfeiture, if inequitable, even though, as strict matter of law, the lessor may be entitled to it. In re Larkey (D. C. 1914) 214 Fed. 867.

A proceeding in bankruptcy being in equity, and the court having all the inherent powers of a court of equity to enforce and protect its jurisdiction, it may be appealed to by supplementary and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured under it, where jurisdiction is reserved or still retained, or even afterwards where the result of the interference would be a relitigation of the same subject-matter between the same parties. In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282.

A court of bankruptcy has no con-

cern with an action against a bankrupt corporation and its president, who had previously offered and had had accepted by the bankruptcy court a proposition to buy the assets of the company, for an accounting, based on the claim that the president, through his purchase and settlement with the trustee, had secured assets largely exceeding the amount paid by him to the trustee, and had secured a great advantage for which he, in equity, should be required to account to the bankrupt corporation and its stockholders, so long as it does not involve the impairment of the orders, decrees, and other proceedings in bankruptcy. Id.

The court of bankruptcy may exercise its general equity jurisdiction to protect receivers appointed by it and enforce contracts made by them. Mason v. Wolkowich (1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709.

The court of bankruptcy has full equity powers in dealing with partnership matters, and may do as a court of equity would do in marshalling partnership property for the benefit of firm creditors, and other such matters. In re Filmar (1910) 177 Fed. 170, 100 C. C. A. 632, 24 Am. Bankr. Rep. 194.

The jurisdiction of the courts of bankruptcy extends to bills in equity in behalf of the trustee in bankruptcy, in regard to the recovery of assets, as well as to actions at law. Flanders v. Abbey (C. C. 1874) Fed. Cas. No. 4,851. The court has jurisdiction to entertain a suit in equity to establish a trust in funds claimed to belong to the bankrupt's estate. Shainwald v. Davids (D. C. 1895) 69 Fed. 687.

The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of congress it becomes a branch of equity jurisprudence. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. In re Rochford (1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; Chauncey v. Dike Bros. (1902) 119 Fed. 1, 55 C. C. A. 579.

The plenary form of proceedings common to suits in equity is not always necessary in the exercise of the equity powers of a court of bankruptcy. In re Wallace (D. C. 1868) Fed. Cas. No. 17,094.

A court of bankruptcy, in virtue of the peculiar nature of its jurisdiction, may entertain a proceeding in equity, although an action at law could have been maintained. Chemung Canal Bank v. Judson (1853) 8 N. Y. 254. But see Sessler v. Nemcof (D. C. 1910) 183 Fed. 656, 25 Am. Bankr. Rep. 618.

A proceeding by a trustee in bankruptcy to set aside a fraudulent conveyance or an illegal preference, when brought in a federal court, is a suit in equity, and must be governed by the rules of pleading and practice in equity which obtain in the United States courts, independently of the practice in the courts of the particular state. Westall v. Avery (1909) 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 678.

Generally speaking, proceedings in bankruptcy proper are governed by the rules of practice in equity, where the act of congress and the general orders do not prescribe a specific course of procedure. In re Irwin (D. C. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165; In re Gillaspie (D. C. 1911) 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Hawks (D. C. 1913) 204 Fed. 309, 30 Am. Bankr. Rep. 365.

13. Ancillary jurisdiction.—Under former bankruptcy acts it was held that any United States district court might, in the exercise of its ancillary jurisdiction, and in aid of the court in which the proceedings were pending, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court of bankruptcy, as to persons or property within the district, if the relief sought was such as the court in which the proceedings were pending would grant if the person or property to be affected were within reach of the process of that court, provided that court was disabled from giving the same by reason of the person or property not being subject to its process. In re Tifft (D. C. 1879) 19 N. B. R. 201, Fed. Cas. No. 14,034; Sherman v. Bingham (C. C. 1872) 7 N. B. R. 490, Fed. Cas. No. 12,762; McGehee v. Hentz (D. C. 1879) 19 N. B. R. 136, Fed. Cas. No. 8,794; Moore v. Jones (D. C. 1848) 23 Vt. 739, Fed. Cas. No. 9,768; Ex parte Martin (C. C. 1842) Fed. Cas. No. 9,149.

Under the present statute, as originally enacted, it was held that no provision had been made for any ancillary or auxiliary jurisdiction or proceedings in any district court other than that in which the bankruptcy proceedings were pending. In re Williams (D. C. 1903) 120 Fed. 88, 9 Am. Bankr. Rep. 741; In re Granite City Bank (1905) 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; In re Dempster (1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751; In re Tybo Mining & Reduction Co. (D. C. 1904) 132 Fed. 697, 13 Am. Bankr. Rep. 62.

Clause 20 of this section was added

by amendment in 1910, and authorizes the courts of bankruptcy to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

Where bankruptcy proceedings were pending against a corporation in the proper federal court in Massachusetts, and the treasurer of the corporation, who was cognizant of its affairs, resided in New York, this situation was sufficient to sustain ancillary proceedings in the federal court in New York, to compel the treasurer to file schedules, and such ancillary proceedings might be instituted by a creditor, where the trustee had not taken any steps to obtain the schedules. In re Brockton Ideal Shoe Co. (1912) 200 Fed. 745, 119 C. C. A. 189, 29 Am. Bankr. Rep. 76.

District courts exercising ancillary jurisdiction in bankruptcy are vested with the power and charged with the duty to hear and adjudge the adverse claims of parties who pray their determination of such claims to the title to, or to legal or equitable liens upon, the specific property they seize as the property of the bankrupt, and, according to their adjudications, to send the property or its proceeds to the court of primary jurisdiction, or to apply them to the satisfaction of such claims. Fidelity Trust Co. v. Gaskell (1912) 195 Fed. 865, 115 C. C. A. 527, 28 Am. Bankr. Rep. 4.

It seems that a suit by a trustee in bankruptcy to recover assets or to set aside a preference or a fraudulent conveyance, against a defendant beyond the territorial jurisdiction of the bankruptcy court in which the proceedings are pending, cannot be maintained in another court of bankruptcy, as an exercise of its ancillary jurisdiction, but must be brought in a state court of competent jurisdiction. See Jobbins v. Montague (D. C. 1872) 6 N. B. R. 509, Fed. Cas. No. 7,330; Lamb v. Damron (D. C. 1873) 7 N. B. R. 509, Fed. Cas. No. 8,014; Markson v. Heaney (C. C. 1871) 4 N. B. R. 510, Fed. Cas. No. 9,098. Compare Goodall v. Tuttle (D. C. 1872) 7 N. B. R. 193, Fed. Cas. No. 5,533; Sherman v. Bingham (C. C. 1872) 7 N. B. R. 490, Fed. Cas. No. 12,762; Payson v. Dietz (C. C. 1873) 8 N. B. R. 193, Fed. Cas. No. 10,861.

14. Jurisdiction to reverse or set aside former proceedings.—The rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy, but any order, decision, or decree made in the progress of such a cause remains subject to the control of the court until the final close of the case, and, saving only vested rights which may have accrued under it, may be corrected if found to be erroneous, modified to suit the facts, or vacated and set aside, without regard to the fact that one or more of the periods appointed for the stated terms of the court may have elapsed. Sandusky v. Bank (1874) 23 Wall 289, 23 L. Ed. 155; In re Ives (1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; In re Tucker (C. C. A. 1906) 153 Fed. 91, 18 Am. Bankr. Rep. 378; In re Henschel (D. C. 1902) 114 Fed. 968, 8 Am. Bankr. Rep. 201; Mahoney v. Ward (D. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770.

An application for the re-examination of an order or decree in bankruptcy may be made by motion or petition, according to the circumstances of the case; and such a motion or petition will not have the effect of a new suit, but of a proceeding in an old one. Sandusky v. Bank (1874) 23 Wall. 289, 23 L. Ed. 155.

The vacation or modification of an order in bankruptcy can be effected only by a proceeding taken directly for the purpose in the same bankruptcy case in which the order was made, not by an order or decision affecting the same subject-matter, but made in a subsequent and different bankruptcy case. In re Lemmon & Gale Co. (1901) 112 Fed. 296, 50 C. C. A. 247, 7 Am. Bankr. Rep. 291.

15. Conflicts of jurisdiction with state courts.—Where the rights of the parties, urging claims that conflict with one another on the same property or fund, would be the same whether presented in the state court or in the bankruptcy court, the court which first had jurisdiction of the property or fund may retain it all for the purpose of a decision. Pietri v. Wells (La. 1915) 69 So. 847.

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine in any degree the manner of its disposition. In re Barrow (D. C. 1868) 1 N. B. R. 481, Fed. Cas. No. 1,057; Zeigler v. Shomo (1875) 78 Pa. 357; Hall v. Chicago, B. & Q. R. Co. (1910) 88 Neb. 20, 128 N. W. 645; In re Ross (1877) 11 R. I. 427.

Where a court of bankruptcy has taken possession of property, the property is thereby withdrawn from the jurisdiction of all state courts. Loeb v. Fischer (1915) 68 So. 383, 137 La. 132.

A bankruptcy court having first acquired jurisdiction of the bankrupt's estate by the filing of a petition in bankruptcy, such jurisdiction is exclusive of the right of the state court to entertain

jurisdiction of an action in detinue by a claimant to recover property alleged to belong to the estate. Corbett v. Riddle (1913) 209 Fed. 811, 126 C. C. A. 535.

Actual possession by the bankruptcy court of the property of a bankrupt is an indispensable condition of its exclusive jurisdiction. Tube City Min. & Mill. Co. v. Otterson (Ariz. 1915) 146 P. 203.

When the bankruptcy law cannot be properly administered by the court of bankruptcy, in consequence of the interference of a state court and its determination to adjudicate upon the rights of parties and property in the bankruptcy court, the latter ought not to hesitate to assert its authority; for in this matter they are not independent, but the federal court is the superior. In re Miller (C. C. 1874) Fed. Cas. No. 9,551.

A bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, so far as to prevent a state court, which subsequently seizes it, from being held to have first obtained exclusive jurisdiction. In re Weinger, Bergman & Co. (D. C. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424.

After an adjudication in bankruptcy, the person and estate of the bankrupt are within the exclusive jurisdiction and control of the court of bankruptcy, which jurisdiction cannot be interfered with by any other court or by any person acting under its process. In re Cobb (D. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129.

A writ of replevin, issued from a state court and executed after the filing of a petition in bankruptcy, but before an adjudication thereon, draws the property into the custody and control of the state court, which may proceed and determine the replevin suit free from interference by the court of bankruptcy. In re Wells (D. C. 1902) 114 Fed. 222, 8 Am. Bankr. Rep. 75; McFarlan Carriage Co. v. Wells (1903) 99 Mo. App. 641, 74 S. W. 878. But compare In re Iron Clad Mfg. Co. (D. C. 1912) 193 Fed. 781. See, also, Austin v. Hayden (1912) 171 Mich. 38, 137 N. W. 317; Texas Fidelity & Bonding Co. v. First State Bank of Channing (Tex. Civ. App. 1912) 149 S. W. 779.

After an adjudication in bankruptcy, a writ of replevin issuing from a state court at the suit of a stranger, claiming particular items of property as his own, is void process, and a seizure under it is unlawful and a contempt of the court of bankrupty, which has authority summarily to order the restoration of the property, where such property, at the time of its seizure, was in the actual or constructive possession of a receiver appointed by the bankruptcy court or of a trustee in bankruptcy. White v. Schloerb (1900) 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178; Murphy v. John Hofman Co. (1909) 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, 21 Am. Bankr. Rep. 487; Freeman v. Howe (1860) 24 How. 450, 16 L. Ed. 749; Buck v. Colbath (1865) 3 Wall. 334, 18 L. Ed. 257; In re Endl (D. C. 1900) 99 Fed. 915, 3 Am. Bankr. Rep. 813; In re Cobb (D. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; Keegan v. King (D. C. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re Rosenberg (D. C. 1869) 3 N. B. R. 130, Fed. Cas. No. 12,055; Mishawaka Woolen Mfg. Co. v. Powell (1903) 98 Mo. App. 530, 72 S. W. 723; John Hofman Co. v. Murphy (Sup. 1909) 116 N. Y. Supp. 506; Crosby v. Spear (1904) 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424.

Where a referee in bankruptcy, to whom the case had been referred after an adjudication, ordered the store which contained the bankrupt's stock of goods to be locked, the property was then in the custody of the referee as the representative of the court, and the action of a sheriff, acting under a writ of replevin from a State court, is breaking into the store and seizing the goods was unlawful. White v. Schloerb (1900) 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178.

When a court of bankruptcy, having jurisdiction in the premises, through its receiver or a trustee in bankruptcy, has taken actual possession of property scheduled by the bankrupt as assets of his estate, and holds the same for administration in bankruptcy, it is not competent for a stranger, claiming to be the owner of such property, to maintain a suit in a state court against the trustee for the purpose of establishing his title and restraining the officer from selling the property but his remedy is by petition in the court of bankruptcy. Keegan v. King (D. C. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79. But see Crosby v. Spear (1904) 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424, holding that such a claimant may maintain an action in a State court merely for the purpose of establishing his title to the property in question.

Property of an estate in bankruptcy cannot be taken from the custody or possession of the court of bankruptcy or its officers under a writ of attachment issuing from a State court. French v. White (1905) 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479.

A mere threat by a judgment creditor of a bankrupt to levy execution on his property pending the bankruptcy proceedings does not constitute a contempt of the court of bankruptcy or its process, where there has been no actual levy made on such property, nor any interference with it by the creditor after the adjudication in bankruptcy. In re McBryde (D. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

After the institution of proceedings

adjudication, and the property is already in the possession of a receiver of a state court, notice of the application should be given to the latter. Sidney L. Bauman Diamond Co. v. Hart (1911) 192 Fed. 498, 113 C. C. A. 104, 27 Am. Bankr. Rep. 632.

Where property of an estate in bankruptcy is in the actual custody and control of a state court of competent jurisdiction, through its receiver, its possession of the property will not be interfered with. nor its disposition of the same restrained, by any process from the court of bankruptcy, nor will such receiver be ordered to surrender the property in his hands to a trustee or receiver in bankruptcy. In re Kavanaugh (D. C. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832; Southern Loan. & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Heckman (1905) 140 Fed. 859, 72 C. C. A. 8, 15 Am. Bankr. Rep. 500; In re Bay City Irr. Co. (D. C. 1905) 135 Fed. 850, 14 Am. Bankr. Rep. 370; Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; In re Price (D. C. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; Alden v. Boston, H. & E. R. Co. (D. C. 1871) 5 N. B. R. 230, Fed. Cas. No. 152; Goodrich v. Remington (C. C. 1869) Fed. Cas. No. 5,546; Bradley v. Healey (C. C. 1875) Fed. Cas. No. 1,781; In re Clark (D. C. 1870) 3 N. B. R. 491, Fed. Cas. No. 2,798; Davis v. Railroad Co. (C. C. 1873) 13 N. B. R. 258, Fed. Cas. No. 3,648; Sedgwick v. Menck (C. C. 1868) 1 N. B. R. 675, Fed. Cas. No. 12,616; Appleton v. Bowles (1874) 2 Thomp. & C. 568, 9 N. B. R. 354. CONTRA, see Hooks v. Aldridge (1906) 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658; In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1; In re J. W. Zeigler Co. (D. C. 1911) 189 Fed. 259, 26 Am. Bankr. Rep. 761; In re Lengert Wagon Co. (D. C. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535; In re Whipple (D. C. 1876) Fed. Cas. No. 17,512; Lea v. George M. West Co. (D. C. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261.

An order by the state court for the delivery, to the receiver in bankruptcy of the defendant corporation, of possession of land, the title to which was in issue in an insolvency action brought against the corporation in the state court by creditors, held error, though an order for the delivery to the receiver of all assets clearly belonging to the bankrupt and not in controversy would have been proper. Harris v. Luxury Fruit Co. (Ga. 1914) 82 S. E. 447.

That one appointed receiver, to hold funds subject to order of the court, and the firm of which he was a member, were declared bankrupts, after he had turned receivership funds over to the firm, held not to exempt him from rule to pay over the funds on demand of creditors of the estate of which he was receiver. Carr v. Hardeman & Phinizy (Ga. 1915) 86 S. E. 215.

Where property which was rightfully in the possession of a receiver appointed by a State court has been unlawfully taken from his custody, the court of bankruptcy will not summarily order its sale by the trustee in bankruptcy against the protest of such receiver. Frazier v. Southern Loan & Trust Co. (1900) 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710; In re Hulst (D. C. 1873) Fed. Cas. No. 6,863.

Where property unlawfully taken by a trustee in bankruptcy from the possession of a receiver appointed by a state court has been sold under the direction of the court of bankruptcy, the sale will be set aside as against one having notice of the illegality, and the purchase money ordered refunded. Davis v. Railroad Co. (C. C. 1873) 13 N. B. R. 258, Fed. Cas. No. 3,648.

Where property claimed as assets of an estate in bankruptcy is in the possession and custody of a receiver appointed in proceedings in a state court, the trustee in bankruptcy should file his petition in the state court and ask for an order requiring the receiver to surrender to him the property in his possession. In re Price (D. C. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; McGahee v. Cruickshank (1909) 133 Ga. 649, 66 S. E. 776; Ex parte Waddell (D. C. 1842) Fed. Cas. No. 17,027; Loudon v. Blandford (1876) 56 Ga. 150. But compare Southwell v. Church (1908) 51 Tex. Civ. App. 547, 111 S. W. 969. Pending such application, the court of bankruptcy may enjoin the receiver appointed by the state court from disposing of the property otherwise than as asked by the trustee. In re Lengert Wagon Co. (D. C. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535; Ross-Meeham Foundry Co. v. Southern Car & Foundry Co. (D. C. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; In re Electric Supply Co. (D. C. 1909) 175 Fed. 612, 23 Am. Bankr. Rep. 647; In re Price (D. C. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

The granting of such a petition is not obligatory upon the state court, but rests in its discretion and is a matter of comity, though it is not reversible error for it to recognize the jurisdiction of the bankruptcy court as paramount and order the surrender of the property. Hanson v. Stephens (1902) 116 Ga. 722, 42 S. E. 1028; McGahee v. Cruickshank (1909) 133 Ga. 649, 66 S. E. 776; Davis v. Coe (1899) 19 Ohio Cir. Ct. R. 639; I. Trager Co. v. Cavaroc Co. (1909) 123 La. 319, 48 South. 949; First Nat. Bank v. Zangwill (1911) 61 Fla. 596, 54 South. 375; Bloch v. Bloch (1903) 42 Misc. Rep. 278, 86 N. Y. Supp. 1047; Gay v. Ray

(1907) 195 Mass. 8, 80 N. E. 693; Mauran v. Crown Carpet Lining Co. (1901) 23 R. I. 324, 50 Atl. 331. See and compare State v. Superior Court of King County (1902) 28 Wash. 35, 68 Pac. 170, 92 Am. St. Rep. 826; Porter v. Cummings (1899) 108 Ga. 797, 33 S. E. 986; Myer v. Crystal Lake Pickling Works, 14 N. B. R. 9 (decision by an inferior court in Illinois); Freeman v. Fort (1874) 52 Ga. 371, 14 N. B. R. 46; Watson v. Citizens' Sav. Bank (1874) 5 S. C. 159, 9 N. B. R. 458.

If a state court having possession of property through its receiver declines to recognize the paramount jurisdiction of the court of bankruptcy, and refuses the trustee's application for a surrender of the assets to him, the court of bankruptcy will not seek to coerce it nor to obtain possession of the property under its own process. In re Watts (1903) 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, 10 Am. Bankr. Rep. 113; Hooks v. Aldridge (1906) 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658; In re Clark (D. C. 1870) Fed. Cas. No. 2,798.

Upon refusal of his petition for a surrender to him of assets of the estate in bankruptcy, held by a receiver of a state court, the trustee in bankruptcy should apply, by petition filed in the state court, for leave to intervene in the action there pending, in order that he may assert and protect the interests of the general creditors of the estate, and ask that the administration proceed in accordance with the provisions of the bankruptcy law, for the benefit of creditors, as by avoiding preferences and the like. Scheuer v. Smith & Montgomery Book & Stationery Co. (1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; In re Klein (D. C.) 97 Fed. 31, 3 Am. Bankr. Rep. 174. To enable the trustee thus to intervene in the state court, the court of bankruptcy may temporarily order a stay of proceedings, or restrain all parties, for a reasonable length of time, from the further prosecution of the action in the state court. In re Klein (D. C.) 97 Fed. 31, 3 Am. Bankr. Rep. 174.

Where property is in the possession of a receiver appointed by a state court, but under a title which is impeachable under the bankruptcy act, and the trustee in bankruptcy has a legal right to it, he should apply to the state court, not to the bankruptcy court, for an order for its surrender to him, and if his petition is denied by the state court, he has a remedy by carrying the case to the highest court of the state and thence to the Supreme Court of the United States. Johnson v. Bishop (C. C. 1868) Fed. Cas. No. 7,373.

A state court, upon granting the petition of a trustee in bankruptcy for the surrender to him of property in the possession of its own receiver, will settle the receiver's accounts, order the transfer of the assets, and close its connection with the matter. Loveless v. Southern Grocer Co. (1908) 159 Fed. 415, 86 C. C. A. 395, 20 Am. Bankr. Rep. 180; In re Board of Directors of Suburban Const. Co. (Sup. 1913) 143 N. Y. Supp. 363.

When a state court orders its receiver to surrender property in his possession to a trustee in bankruptcy, the latter claiming the same as assets of the estate in bankruptcy, it is in the rightful authority of such court to deduct from the assets so to be surrendered a sum sufficient to cover the commissions or fees of its receiver and the other expenses of the proceedings before it. Wilson v. Parr (1902) 115 Ga. 629, 42 S. E. 5; McGahee v. Cruickshank (1909) 133 Ga. 649, 66 S. E. 776; State v. German Exchange Bank (1902) 114 Wis. 436, 90 N. W. 570.

An accounting of the receipts and disbursements of a receiver appointed by a state court, at instance of, and to protect property sued for by, a trustee in bankruptcy, involves a fixation of his compensation, so far as such court can fix it. Hull v. Fifty-Second St. Storage House (1915) 153 N. Y. S. 850, 167 App. Div. 860.

Where a receiver of an insolvent corporation is appointed by a state court, and within four months the corporation is adjudged a bankrupt, the state court has jurisdiction to allow the receiver's account and to fix the compensation for his services and for those of his attorney. In re Board of Directors of Suburban Const. Co. (Sup. 1913) 143 N. Y. S. 363.

But other authorities maintain that such an order by the state court is void, and that the receiver must apply to the court of bankruptcy for an allowance for his fees, as that court alone has authority to dispose of the assets, and no other court can incumber them with charges or expenses. In re Standard Fuller's Earth Co. (D. C. 1911) 186 Fed. 578, 26 Am. Bankr. Rep. 562; In re Rogers (D. C. 1902) 116 Fed. 435, 8 Am. Bankr. Rep. 723; Bloch v. Bloch (1903) 42 Misc. Rep. 278, 86 N. Y. Supp. 1047; Hanson v. Stephens (1902) 116 Ga. 722, 42 S. E. 1028.

Under Act May 12, 1891, § 1 (P. L. 54), a receiver of the property of a corporation, who was supplanted by a trustee in bankruptcy, cannot properly pay claims for wages incurred by the company before receivership; no sale of corporate property having taken place. Appeal of Pramuk (1915) 95 A. 326, 250 Pa. 45.

A trustee in bankruptcy of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in the mortgage foreclosure suit by a state court of competent jurisdiction, is entitled to

the possession of any property not covered by the mortgage, and also to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure. Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29.

17. —— **Property in possession of sheriff.**—Property in the hands of a sheriff under execution or attachment from a state court levied before the proceedings in bankruptcy were commenced, and where the lien did not attach under such circumstances as to be automatically avoided by the adjudication in bankruptcy (under section 67f of the act [post, § 9651]), cannot be taken out of the possession of the sheriff by the court of bankruptcy at the instance of the trustee; but in such a case the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it. Marshall v. Knox (1872) 16 Wall. 551, 21 L. Ed. 481; Townsend v. Leonard (C. C. 1873) Fed. Cas. No. 14,117; Goddard v. Weaver (C. C. 1872) 6 N. B. R. 440, Fed. Cas. No. 5,495; In re Shuey (D. C. 1874) 9 N. B. R. 526, Fed. Cas. No. 12,821; Mollison v. Eaton (1871) 16 Minn. 426 (Gil. 383), 10 Am. Rep. 150; State v. Taylor (1877) 3 Mo. App. 351.

Where a state court has first obtained rightful jurisdiction over the property through the creation of a preferential lien, the bankruptcy court will not interfere therewith; but where the property has been taken from the sheriff holding it under execution by a receiver in bankruptcy, the court of bankruptcy will cause it to be turned back to the custody of the state court. In re Pilcher & Son (D. C. 1915) 228 Fed. 139.

Where an action is begun in a state court and a writ issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy, and the court of bankruptcy has jurisdiction to order the surrender of the property on a petition by the trustee. In re Francis-Valentine Co. (1899) 94 Fed. 793. 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co. (D. C. 1899) 93 Fed. 953. 2 Am. Bankr. Rep. 188; In re Schnepf (D. C. 1867) 1 N. B. R. 190, Fed. Cas. No. 12.471; Goodnough Mercantile Co. v. Galloway (1906) 48 Or. 239. 84 Pac. 1049; Lindner v. Brock (1879) 40 Mich. 618.

Where actions are begun in a State court, and writs issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in involuntary bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy, notwithstanding the pendency of an action of replevin in a state court against the sheriff by a stranger claiming ownership of the property, and the court of bankruptcy has jurisdiction to order the surrender of the property on summary petition by the trustee. In re Francis-Valentine Co. (1899) 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522.

A sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the proceedings in bankruptcy, has no right, as against the trustee, to retain possession of the property until payment of his fees. Such fees are taxable in the court from which the writs issued, and, when there taxed and allowed, may be made the basis of a claim in the court of bankruptcy. In re Francis-Valentine Co. (1899) 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522.

Where a sheriff took possession of certain personal property under a writ of replevin, in an action pending in a state court prior to the filing of a petition in bankruptcy against the defendant, the plaintiff in such replevin suit claiming title on the ground that the property was purchased by means of the bankrupt's fraudulent representations, the court of bankruptcy had no jurisdiction by a summary order to compel the sheriff to deliver the property to a receiver in bankruptcy. In re L. Rudnick & Co. (1908) 160 Fed. 903, 88 C. C. A. 85, 20 Am. Bankr. Rep. 33; Rock Island Plow Co. v. Western Implement Co. (1911) 21 N. D. 608, 132 N. W. 351.

Where, within four months before the filing of a petition in bankruptcy against an insolvent judgment debtor, an execution has been issued and levied, and sale made, the title of one purchasing at such sale in good faith and without notice will not be affected by the subsequent bankruptcy; but the proceeds of the sheriff's sale, remaining in the hands of that officer, do not belong to the judgment creditor, but to the estate of the bankrupt, and must be paid over to the trustee when appointed. In re Kenney (D. C. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494, same case on rehearing (D. C. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Franks (D. C. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634.

As against a sheriff holding in his possession the proceeds of a sale made

under a writ issuing from a state court and levied within four months before the institution of bankruptcy proceedings against the judgment debtor, there is no necessity for resorting to plenary proceedings for their recovery by the trustee in bankruptcy, but the same may be ordered by the court of bankruptcy upon the summary petition of the trustee. In re Kenney (D. C. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Francis-Valentine Co. (1899) 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; Mills v. Davis (1873) 3 Jones & S. (N. Y.) 355. But compare In re Easley (D. C. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715; In re Franks (D. C. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; People v. Brennan (1875) 3 Hun (N. Y.) 666, 12 N. B. R. 567.

Where, at the time of an adjudication in bankruptcy, the sheriff held in his hands the proceeds of a sale on execution of the property of the bankrupt, levied within four months prior to the filing of the petition in bankruptcy, and therefore annulled by the adjudication, and was ordered, after due hearing of all parties concerned, to pay over such proceeds to the trustee when appointed, and thereafter the judgment creditor filed a bill in equity in the United States circuit court to enjoin the sheriff from paying the money to the trustee and to require him to pay it to complainant, held, that such bill was obstructive and without merits, and an attempt to oust the jurisdiction of the court of bankruptcy, and constituted no reason why the sheriff should not be required to obey the order of the latter court. In re Kenney (D. C. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353.

The pendency of proceedings in bankruptcy, unknown to any of the parties concerned or to the court, does not prevent a territorial court having the custody of perishable property through its receiver appointed under an attachment levied before the petition in bankruptcy was filed, from ordering a sale thereof, on finding that (in the words of the local statute) "the interests of both plaintiff and defendant will be promoted by the sale," but such sale is valid and the claim of the trustee in bankruptcy is transferred to the proceeds. Jones v. Springer (1912) 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. 161, 29 Am. Bankr. Rep. 204.

18. —— **Power to enjoin proceedings in state courts.**—Compare section 9595, post, providing that "a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; and if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if, within that time, such person applies for a discharge, then until the question of such discharge is determined." Note also the provision in clause 15 of this section, giving the courts of bankruptcy authority to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." And see, also, Judicial Code, § 265 (R. S. § 720, ante, § 1242), providing that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The foregoing statutory provisions amply support the jurisdiction of a court of bankruptcy to stay or suspend all proceedings in the State courts, founded on claims provable and dischargeable in bankruptcy, or, without reference to the nature of the claim, where the object of the proceeding is to withdraw from the custody and administration of the bankruptcy court any part of the assets of the bankrupt, either then pending or thereafter commenced, by any creditor or any person having an adverse interest, to enforce his rights or to obtain redress against the bankrupt or his assets after the bankruptcy, by acting on such parties through the instrumentality of an injunction or restraining order, upon due application made by the bankrupt or his trustee, and a proper case being shown for such interference. Ex parte Christy (1845) 3 How. 292, 11 L. Ed. 603; Blake v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; Penny v. Taylor (D. C. 1874) 10 N. B. R. 200, Fed. Cas. No. 10,957; In re Mallory (D. C. 1871) 6 N. B. R. 22, Fed. Cas. No. 8,991; Platt v. Archer (C. C. 1872) 6 N. B. R. 465, Fed. Cas. No. 11,213; In re Schwarz (D. C. 1882) 14 Fed. 787; Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Kimball (D. C. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; In re Kletchka (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Jackson (D. C. 1881) 9 Fed. 493; In re Lady Bryan Min. Co. (D. C. 1870) 6 N. B. R. 252, Fed. Cas. No. 7,980; In re Atkinson (D. C. 1872) 7 N. B. R. 143, Fed. Cas. No. 606; In re Citizens' Sav. Bank (C. C. 1873) 9 N. B. R. 152, Fed. Cas. No. 2,735; In re Duryea (D. C. 1878) 17 N. B. R. 495, Fed. Cas. No. 4,196; Samson v. Burton (D. C. 1871) 5 N. B. R. 459, Fed. Cas. No. 12,286; Fowler v. Dillon (D. C. 1875) 12 N. B. R. 308, Fed. Cas. No. 5,000; Morehouse v. Giant Powder Co. (C. C. A. 1913) 206 Fed. 24.

The bankruptcy courts may not only

enjoin the officers of the state courts but may stay the proceedings of the courts themselves when necessary to enforce their jurisdiction to administer bankrupt estates. McLoughlin v. Knop (D. C. 1913) 214 Fed. 260.

Where proceedings supplementary to execution against a bankrupt, in a state court, begun within four months before the commencement of proceedings in bankruptcy, are pending at the time of the adjudication therein, the court of bankruptcy will, by injunction, stay all further proceedings in the action in the state court. In re Kletchka (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Cefola (D. C. 1915) 222 Fed. 171.

A proceeding in a state court to wind up an insolvent corporation in which a receiver is appointed tends to defeat the operation of the bankruptcy law, and may be stayed by injunction by the bankruptcy court. Morehouse v. Giant Powder Co. (1918) 206 Fed. 24, 124 C. C. A. 158.

A bankruptcy court has no power to enjoin sale of bankrupt's property to be made by state officer, pursuant to decree of foreclosure of a state court, entered before petition in bankruptcy was filed, to permit trustee to attempt to secure purchaser and advertise sale more extensively. In re Schmidt (D. C. 1915) 224 Fed. 814.

A court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, although the action was begun after the filing of the petition. In re Basch (D. C. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235.

The power to stay the prosecution of pending suits may be exercised in a proper case where the right of the bankrupt to certain property is involved in a suit pending in a state court between two parties who are not parties to the proceedings in bankruptcy, at least where the trustee cannot obtain leave to intervene in such suit. Wilkinson v. Barnard (D. C. 1877) Fed. Cas. No. 17,669.

Application for an injunction to stay proceedings against the bankrupt or which involve an interference with the administration of his estate, or for the dissolution of such an injunction, may be made by motion or petition in the court of bankruptcy, stating the necessary facts. In re Wallace (D. C. 1868) Fed. Cas. No. 17,094; Ex parte Carlton (C. C. 1842) Fed. Cas. No. 2,415. Compare In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671.

Where a petition in involuntary bankruptcy charged that certain creditors of the alleged bankrupt had gained an unlawful preference by attachments on his property, and had procured the appointment of a receiver by a state court, who had sold the property and held the proceeds, and prayed for an injunction against such creditors and the receiver, forbidding them to take proceedings in the state court for the distribution of the fund so held, but it was not shown that such creditors were insolvent, or that, for any other reason, a suit against them by the trustee in bankruptcy, subsequently to be appointed, would not be an adequate remedy for the avoidance of the alleged preference and the recovery of its fruits, quære, whether the injunction should not be refused, and the parties left to work out their rights through the trustee when appointed. In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671.

Attaching creditors of an alleged bankrupt, and a receiver of his property appointed at their instance by a state court, do not become amenable to the control of the bankruptcy court by the mere filing of the petition against the debtor, though it is therein charged that they have received an unlawful preference, and if they are not regularly made parties to the petition and served with process, and have not voluntarily appeared thereto, the court cannot issue an injunction forbidding them to dispose of the property of the alleged bankrupt in their hands, held and claimed by them adversely to the debtor and to the petitioning creditors. In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671.

A federal district court cannot enjoin proceedings in a state court on the ground that proceedings in bankruptcy are pending in some other court of bankruptcy. In re Richardson (D. C. 1868) Fed. Cas. No. 11,774; Markson v. Heaney (C. C. 1871) Fed. Cas. No. 9,098; In re Hirsch (D. C. 1868) Fed. Cas. No. 6,529.

Where a petition in bankruptcy was filed against a defendant, and an injunction was issued to restrain a plaintiff from prosecuting a garnishment action against him in a state court, but no adjudication of bankruptcy was made and the proceedings for that purpose were abandoned, it was thereafter held that the injunction was not a bar to the action in the state court. Beekman Lumber Co. v. Acme Harvester Co. (1908) 215 Mo. 221, 114 S. W. 1087.

19. Practice in bankruptcy.—"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for

taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing." General Order in Bankruptcy No. 37.

A review of the bankruptcy law as a whole, and of the general orders promulgated under and in pursuance of it, and to carry its provisions into effect, will show that, ample as are the powers vested in the courts and in the judges who are to administer it, these powers are to be exercised, so far as may be, and when no special provision is otherwise made, in accordance with settled and well-known forms of judicial procedure. In re Hunt (D. C. 1869) 2 N. B. R. 539, Fed. Cas. No. 6,881.

State laws regulating practice have no reference to proceedings in bankruptcy and cannot control them. In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

A proceeding in bankruptcy is equivalent to a general creditors' bill in chancery, and is a plenary proceeding, its practice being prescribed by the statute, and to that extent variant from the chancery practice obtaining in creditors' bills. So far as not varied by statute, the practice should be the same. The collateral proceedings incident to and arising in the course of a bankruptcy proceeding, in the form of petitions and motions nisi, against persons already parties to the bankruptcy proceeding, are of the same character as like collateral proceedings incident to and arising in a creditor's bill in chancery, and are summary only where they would be so in a creditor's bill, except where allowed by the statute. In re Anderson (D. C. 1885) 23 Fed. 482.

Proceedings in any pending bankruptcy suit are at all times open for re-examination upon proper application being made, and any order made in the progress of a cause may be subsequently set aside or modified upon cause shown, provided rights have not become vested under it which would be disturbed by such action. Sandusky v. First Nat. Bank (1874) 23 Wall. 289, 23 L. Ed. 155; Boutwell v. Allderdice (C. C. 1876) Fed. Cas. No. 1,708; In re Peabody (D. C. 1877) 16 N. B. R. 243, Fed. Cas. No. 10,866.

It is not necessary for the clerk of a district court to make an entry showing the opening and closing of the court on days when he enters proceedings in bankruptcy cases. Keatley v. U. S. (1909) 45 Ct. Cl. 36.

20. Powers and authority of judge.—Where there are two judges in the same federal district, either may hold a court of bankruptcy and perform all the duties thereof, at the same place or a different place within the district, while the other judge is also holding a court of bankruptcy. Ex parte Steele (D. C. 1908) 162 Fed. 694, 20 Am. Bankr. Rep. 575. But see Ex parte Steele (D. C. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446. And compare Judicial Code, § 23 (ante, § 990), providing that "in districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

A judge who was a creditor of the bankrupt at the time of his failure, but who has since sold and assigned his claim, and has taken no part in the proceedings other than to prove such claim, is not thereby disqualified from sitting in the bankruptcy case, although the motive on the part of the purchaser of the claim may have been to remove the disqualification and enable the particular judge to act. In re Sime (C. C. 1872) Fed. Cas. No. 12,860.

II. RECEIVERSHIPS IN BANKRUPTCY PROCEEDINGS

21. Appointment of receiver.—Both under the express grants of authority in the act, and in the exercise of the general equity powers possessed by a court of bankruptcy, such court has authority to appoint a receiver to take charge of the property of a person against whom a petition in involuntary bankruptcy has been filed and hold the same until a trustee is appointed. In re De Lancey Stables Co. (D. C. 1909) 170 Fed. 860, 22 Am. Bankr. Rep. 406; Horner-Gaylord Co. v. Miller & Bennett (D. C. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; Lansing v. Manton (D. C. 1876) 14 N. B. R. 127, Fed. Cas. No. 8,077.

Whether a receiver should be appointed for a bankrupt, whether, if appointed, he should continue the bankrupt's business, whether he shall retain counsel, and the amount to be allowed to the receiver for his fees and for the services of counsel, are matters within the sound discretion of the district court. In re Cash-Papworth; Grow-Sir (1913) 210 Fed. 24, 126 C. C. A. 604.

The appointment of a receiver without bond to take possession of an alleged bankrupt's property is a conservatory proceeding for the benefit of both debtor and creditors. Harvey v. Gartner (1915) 67 So. 197, 136 La. 411.

An application for the appointment of a receiver is distinct from, and ancillary to, the proceedings in bankruptcy, and may be made by any creditor having a provable debt that would be affected by the bankrupt's discharge. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194,

265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528.

Where the bankrupt and a purchaser of his exempt property were enjoined from taking or disposing of it, held, that the appointment of a receiver was not error. Floyd v. Johnson (1914) 83 S. E. 943, 142 Ga. 833.

After an adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where creditors and other persons interested make no objection. In re Huddleston (D. C. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669.

The jurisdiction to appoint a receiver in bankruptcy attaches upon the filing of the petition, and though the petition may be afterwards dismissed or the adjudication refused, this does not make the order of appointment void or even erroneous. In re T. E. Hill Co. (1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73; In re Wentworth Lunch Co. (D. C. 1911) 189 Fed. 831.

The jurisdiction of the court of bankruptcy to appoint a receiver is exclusive and final, and the order making such appointment cannot be collaterally attacked in the same or any other court. Ross v. Stroh (1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Moore Bros. v. Cowan (1911) 173 Ala. 536, 55 South. 903. And a state court, when asked to direct its own receiver to turn over property to the receiver in bankruptcy, has no jurisdiction to review the order of appointment and pass upon its wisdom or necessity. White v. Davis (1910) 134 Ga. 274, 67 S. E. 716.

A referee in bankruptcy may, in a proper case, appoint a receiver, and it is unnecessary that process should first issue against the bankrupt requiring him to show cause against such appointment. In re Standard Cordage Co. (D. C. 1910) 184 Fed. 156, 30 Am. Bankr. Rep. 448.

A receiver should not be appointed by a referee ex parte and without notice or hearing, except in a case of imperious necessity, and when the petitioner's rights cannot be secured and protected in any other way. T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623. And see In re Florcken (D. C. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

Ex parte appointment of a receiver for property of an alleged bankrupt, then in possession of a state receiver, held erroneous. Ingram v. Ingram Dart Lighterage Co. (D. C. 1915) 226 Fed. 58.

The appointment of a receiver is an extraordinary remedy, and will only be made on a showing of a clear case of right and pressing necessity. T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

No appointment of a receiver will be made unless the court is satisfied that it is necessary for the protection of the property and that it will inure to the benefit of all the creditors. In re Desrochers (D. C. 1911) 183 Fed. 991, 25 Am. Bankr. Rep. 703; Horner-Gaylord Co. v. Miller & Bennett (D. C. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; M. & M. Nat. Bank of Pittsburgh v. Brady's Bend Iron Co. (D. C. 1871) 5 N. B. R. 491, Fed. Cas. No. 9,018.

In involuntary proceedings, receivers should never be appointed without full compliance with all requirements of the Bankruptcy Act, including a showing that it is absolutely necessary for the preservation of the estate. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co. (C. C. A. 1915) 228 Fed. 470.

Consent of an alleged bankrupt to the appointment of a receiver does not authorize such appointment, where it is not absolutely necessary for the preservation of the estate. T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

A petition for the appointment of a receiver must clearly and positively allege the existence of an "absolute" necessity therefor, and not merely a belief that the appointment will be for the benefit of the parties in interest. T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; In re Rosenthal (D. C. 1906) 144 Fed. 548, 16 Am. Bankr. Rep. 448.

Where, after the filing of a petition in involuntary bankruptcy against a retail trader, an application was made for the appointment of a receiver to take charge of his property until a trustee should be qualified, wherein it was alleged that he had been fraudulently induced to sell his entire stock in trade to a certain corporation for an entirely inadequate price, the major part of the same consisting of notes of such corporation, which it could not pay, and its own stock, which was worthless, and that the corporation, or its vendee, was rapidly selling off the stock at sacrifice prices, so that it would probably all be disposed of before a trustee could be appointed, leaving nothing for the creditors of the bankrupt but the inadequate remedy of actions for damages and for stockholders' liabilities, it was held that the petition showed sufficient grounds for the appointment of a receiver. In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

Where proceedings in bankruptcy are instituted against a corporation, on the ground of its having made a general assignment for the benefit of creditors, and the answer admits the insolvency of the company and the making of the

assignment, and the assignee is in possession of the estate, and is proceeding to administer the same under the direction of a state court, in accordance with the insolvency law of the state, the court of bankruptcy has jurisdiction to appoint a receiver to take charge of the estate pending the adjudication in bankruptcy. In re John A. Etheridge Furniture Co. (D. C. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112.

A petition for the appointment of a receiver must be supported by clear, certain, and positive proof of the necessity of such action for the preservation of the estate. In re Oakland Lumber Co. (1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181.

A receiver in bankruptcy may properly be appointed where the apparent titles to property are such, on their face, that the marshal cannot act efficiently under the usual warrant. Keenan v. Shannon (C. C. 1874) 9 N. B. R. 441, Fed. Cas. No. 7,640. Or where there is such delay in the prosecution of the bankruptcy proceedings as to make it necessary that measures should be taken for the conservation of the property. In re Cooke (D. C. 1873) Fed. Cas. No. 3,167.

On an application to the court of bankruptcy for the appointment of a receiver of the property of an insolvent corporation, against which proceedings in involuntary bankruptcy are pending, the act of bankruptcy charged being the making of a general assignment for creditors, where it appears that the assignee is a creditor of the corporation, and desires the appointment of a receiver, and that he is perfectly solvent, is in possession of the assigned property, and has had the same inventoried and appraised, such assignee may himself be appointed receiver, upon giving a bond, to be approved by the court, for the faithful performance of his duties as such receiver. In re John A. Etheridge Furniture Co. (D. C. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112.

In proper cases, a woman may be appointed receiver in bankruptcy, if competent to perform the duties of that office. In re Huddleston (D. C. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669.

Where a receiver in bankruptcy is designated by the court, the subsequent election by the creditors of the same person as trustee is evidence of his fitness and competency. In re Huddleston (D. C. 1908) 167 Fed. 428, 21 Am. Bankr. 669.

Where it appears that the receiver was in fact selected by the alleged bankrupt and nominated at his instance, he will not be appointed, or if the fact is shown after his appointment, he will be removed. Birmingham Coal & Iron Co. v. Southern Steel Co. (D. C. 1908) 160 Fed. 212, 20 Am. Bankr. Rep. 151.

The improper appointment of a receiver for a bankrupt should not be permitted to delay or affect the trial of the issues between the creditors filing an involuntary petition and intervening and opposing creditors as to whether the petition should be granted. T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

It is in the discretion of the court of bankruptcy to vacate the receivership and discharge the receiver, or refuse an application on that behalf, depending on the circumstances of the case and the necessity of continuing the receivership or the propriety of terminating it. Latimer v. McNeal (1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; In re Church Const. Co. (D. C. 1907) 157 Fed. 298, 19 Am. Bankr. Rep. 549.

A receivership will not necessarily be vacated or the property taken out of the hands of the receiver, though the court dismisses the petition in bankruptcy, where an appeal from its decision therein has been taken and is pending. In re Ward (D. C. 1911) 194 Fed. 179, 28 Am. Bankr. Rep. 36.

22. Powers and duties of receiver.—A receiver in bankruptcy is not invested with the bankrupt's title to his property, but is a mere custodian of the estate, with authority to receive, collect, and retain all the assets, the purpose of his appointment being only to gather in and preserve the property and protect it from loss until a trustee can be appointed. In re Leonard (D. C. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97; In re Rubel (D. C. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; Freehold Const. Co. v. Bernstein (1908) 60 Misc. Rep. 363, 113 N. Y. Supp. 368.

The authority of a receiver in bankruptcy dates from the entry of the decree appointing him. In re Alton Mfg. Co. (D. C. 1908) 158 Fed. 367, 19 Am. Bankr. Rep. 805. The title of a receiver in bankruptcy relates back to the filing of the petition, and the rights of the parties as to an incumbrance issued by the bankrupt to delay and hinder his creditors must be determined as of the time of the filing of the petition. Clement v. Saratoga Holding Co. (1914) 145 N. Y. S. 628, 161 App. Div. 898. Duties of a receiver of a bankrupt's assets are limited by the powers given in the order of appointment. In re Metropolitan Motor Car Co. (D. C. 1915) 225 Fed. 274.

It is the duty of a receiver in bankruptcy to take into his possession and custody all the property of the bankrupt which may constitute assets of his estate, including property held by a third person as the agent or bailee of the bankrupt. In re Rieger, Kapnar & Altmark (D. C. 1907) 157 Fed. 609, 19 Am. Bankr. Rep. 622. And including property previously transferred by the bankrupt in fraud of his creditors, in

case the court of bankruptcy so directs, which it has power to do if the fraudulent nature of the transaction clearly appears. In re Haupt Bros. (D. C. 1907) 153 Fed. 239, 18 Am. Bankr. Rep. 585. In receiving a surrender of property claimed by a conditional vendor of the bankrupt, the receiver has power to make a stipulation as to its nature and extent which will be binding on the trustee subsequently appointed. Bryant v. Swofford Bros. Dry Goods Co. (1909) 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111. In pursuance of his duty to seek out and collect the assets, the receiver has the right to apply for an order summoning designated persons to appear and submit to an examination in the bankruptcy proceedings. In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

In the discharge of his duty of taking care of the property and preserving it from loss or dissipation, the receiver has authority to employ a watchman or other custodian at the expense of the estate. Weller v. Stengel (1911) 146 App. Div. 317, 130 N. Y. Supp. 707; Rumsey v. Wolcott (1875) 1 Wyo. 259. And to pay the overdue wages of employés when necessary to prevent delay in carrying on a current piece of work. In re Ferguson Contracting Co. (1911) 187 Fed. 940, 109 C. C. A. 662. And to have the property appraised. In re Kyte (D. C. 1907) 158 Fed. 121, 19 Am. Bankr. Rep. 768. And to keep it insured. In re Kyte (D. C. 1907) 158 Fed. 121, 19 Am. Bankr. Rep. 768; Simpson v. Kerkeslager (1909) 41 Pa. Super. Ct. 347. Proofs of loss under a fire insurance policy running to a bankrupt who had absconded may lawfully be made by a receiver appointed by the court of bankruptcy and expressly authorized and directed by the order appointing him to make such proofs. Sims v. Union Assur. Soc. (C. C. 1903) 129 Fed. 804. And see Day v. Home Ins. Co. (Ala. 1912) 58 South. 549, 40 L. R. A. (N. S.) 652. If the receiver continues to occupy premises leased by the bankrupt, he should pay rent therefor at the reasonable value for the time he remains in possession. In re Youdelman-Walsh Foundry Co. (D. C. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509; Alexis v. Koehler (Sup. 1909) 119 N. Y. Supp. 664.

A policy obtained by a receiver on the property of the bankrupt, who had personally covenanted to insure for the benefit of mortgagees, is a personal contract for the benefit of the receiver. Reilley v. Buffalo German Ins. Co. (1914) 147 N. Y. S. 1086, 86 Misc. Rep. 69.

A court of bankruptcy is not authorized to confer upon a receiver appointed by it the power to exercise his official functions in respect to property in any other district, and under the general rule governing courts of equity and their receivers appointed in creditors' suits, such receiver has no authority to act officially outside of the district of his appointment. In re Benedict (D. C. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232.

Where a receiver has been appointed in proceedings in involuntary bankruptcy, a district court of another district, in which property of the alleged bankrupt is situated, has power to appoint an ancillary receiver to aid the court of original jurisdiction in preserving such property pending the selection of a trustee, the necessity of such appointment being shown. Id.

Temporary receivers appointed for an alleged bankrupt corporation before adjudication have no such interest as entitles them to institute ancillary proceedings in the court of another district to secure a confirmation of their appointment and be put in possession of the property of the corporation in such district. In re Tygarts River Coal Co. (D. C. 1913) 203 Fed. 178, 30 Am. Bankr. Rep. 183.

It is at least doubtful whether a receiver appointed for the property of an alleged bankrupt on the filing of an involuntary petition against him, in the absence of an express provision to that effect, can delegate to another his authority originally to take possession of the property; and in any event the alleged bankrupt or members of his family cannot be held in contempt of court for a refusal to surrender property or books and papers to one claiming to represent the receiver, but who produces no written evidence of his autority. Skubinsky v. Bodek (C. C. A. 1909) 172 Fed. 340, 22 Am. Bankr. Rep. 699.

Where the bankrupt corporation was defendant in a suit for the infringement of a patent, and the receiver in bankruptcy was appointed after an interlocutory decree against it and a reference for an accounting as to damages and profits, held that the receiver could not be required to prepare a statement of profits from the company's books for use before the master, or to render any other active assistance to the complainant at the expense of the estate in bankruptcy, unless he should elect to become a party to the suit. American Graphophone Co. v. Leeds & Catlin Co. (C. C. 1909) 174 Fed. 158, 23 Am. Bankr. Rep. 337.

The attorney for the petitioning creditor, at whose instance the receiver was appointed, should not be employed as attorney for the receiver. In re Strobel (C. C. A. 1908) 160 Fed. 916, 20 Am. Bankr. Rep. 22. And a bargain for a division of fees between the receiver, the attorney whom he desired to appoint, and the attorney for the petitioning creditors, is illegal and unprofessional, and will be ground for the removal of the receiver and the appointment of a new one. In re Osh-

witz (D. C. 1910) 183 Fed. 990, 25 Am. Bankr. Rep. 594. The court of bankruptcy always has power to direct the receiver to dismiss the attorney employed by him and to retain other counsel, and will do so if it appears that the attorney originally employed is incompetent, or that he is acting in the interests of one creditor or set of creditors as against others, instead of for the good of all, or that he is seeking to serve some purpose of his own in any way antagonistic to the interests of general creditors. In re Champion Wagon Co. (D. C. 1912) 193 Fed. 1004, 28 Am. Bankr. Rep. 51.

Upon the appointment of a trustee for the estate, the receiver in bankruptcy should at once turn over to him all assets and money in his hands, except such as will probably be required to pay the expenses of the receivership, and it is not necessary that he should wait until his accounts have been passed and he is discharged. In re College Clothes Shop (D. C. 1911) 192 Fed. 80. Where a receiver of a bankrupt corporation withholds its books from inspection by the bankrupt's trustee appointed in the same court, the latter may obtain access to the books by an order on an informal application. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am. Bankr. Rep. 749. A particular fund may be permitted to remain in the hands of the receiver after the qualification of a trustee, when the final disposition of it is doubtful, on account of pending litigation, unsettled questions of title, or the assertion of a lien upon it. In re Vogt (D. C. 1908) 159 Fed. 317, 20 Am. Bankr. Rep. 243. A balance remaining in the hands of the receiver after all creditors have been satisfied, by the carrying out of a composition approved by the court, may be ordered turned over to a claimant who is clearly entitled to it as against the bankrupt himself. In re J. C. Winship Co. (1903) 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638.

23. Continuing bankrupt's business.—An order authorizing a receiver in bankruptcy to carry on the business of the bankrupt rests largely in the discretion of the court and cannot be collaterally attacked, and it would require a most extraordinary showing to persuade an appellate court that such discretion had been abused. In re Isaacson (1909) 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

When a receiver is authorized to continue the business of the bankrupt, he may either accept an unfilled contract for supplies to be furnished to the bankrupt, or reject it if he deems it burdensome, but in the latter case the other party has his claim against the estate for damages for the breach of the contract. Southern Steel & Iron Co. v. Hickman, Williams & Co. (C. C. 1911) 190 Fed. 888, 27 Am. Bankr. Rep. 208.

An unliquidated claim for damages for breach of a contract by receivers of a bankrupt is not entitled to priority as against antecedent liens against the estate. In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

The receiver appointed for a bankrupt manufacturing company was expressly authorized by the court to continue the business and to assume a contract under which the company was to receive monthly deliveries of iron ore, for which it was to have a credit of 30 days. Pursuant to such authority, the receiver notified the seller that he assumed such contract and would make payment for the ore as delivered, and a similar notice was given by him after his appointment as trustee. Held, that he succeeded to all the rights of the bankrupt under such contract, and that the seller was liable in damages for a failure and refusal to make deliveries as required thereby. In re Niagara Radiator Co. (D. C. 1908) 164 Fed. 102, 21 Am. Bankr. Rep. 55.

When a receiver in bankruptcy persists in carrying on the business, under a former order of the court, when he knew it to be unprofitable from the beginning and capable of being conducted only at a loss, he should be surcharged with a portion of the loss sustained. In re Consumers' Coffee Co. (D. C. 1908) 162 Fed. 786, 20 Am. Bankr. Rep. 835. Where a receiver in bankruptcy did not account for the proceeds of the sale of certain fixtures belonging to the bankrupt, his account should be surcharged with that amount, but not with the value of supplies which the bankrupt had on hand at the time the receiver was appointed, and which were used up in continuing the business, in the absence of proof that the money derived from the use thereof did not appear in the receipts with which the receiver was charged; nor should he be charged with the difference between the appraised and sale value of fixtures of another place of business operated by the bankrupt. Id.

The power to continue the business of a bankrupt corporation through a receiver or trustee implies the power to make debts, to provide for their payment, and to borrow money for urgent necessities. In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689. The court of bankruptcy has power to authorize the receiver to borrow money and to issue receivers' certificates therefor, having the usual priority of lien. In re Restein (D. C. 1908) 162 Fed. 986, 20 Am. Bankr. Rep. 832; In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

A mortgagee who participates in the bankruptcy proceedings and makes no objection to the appointment of a receiver to carry on the business, will be precluded from insisting on the priority of his mortgage over the operating

expenses and other obligations incurred by the receiver under the orders of the court. In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

Where the court authorizes the receiver to borrow a specified sum of money, any loans made in excess of that amount are made in violation of the authority conferred, and will bind the estate only on a showing that the proceeds were used in conducting the business, and then only ratably with the claims of other creditors of the receiver. In re C. M. Burkhalter & Co. (D. C. 1910) 182 Fed. 353, 25 Am. Bankr. Rep. 378.

Where an order appointing receivers to continue the business of a bankrupt authorized them to borrow money and incur obligations in an amount not exceeding $3,000, as might thereafter be directed by the court, and the court subsequently authorized them to issue receivers' certificates to the amount of $3,000, such order was notice to all dealing with the receivers that they had no authority to contract further indebtedness, and persons who thereafter sold them property on credit in excess of that amount cannot have priority of their claims therefor against the estate. In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

24. Claims of third persons against receiver or estate.—Property in the possession of a receiver in bankruptcy is in the custody of the law, and an attachment or garnishment levied upon it is void. McAffee v. Arnold & Mathis (1908) 155 Ala. 561, 46 South. 870.

An attorney who is in possession of securities belonging to a bankrupt corporation will be required to turn them over to the receiver, and if he claims a lien on them his rights may be determined in the bankruptcy court. In re Eurich's Ft. Hamilton Brewery (D. C. 1908) 158 Fed. 644, 19 Am. Bankr. Rep. 798. If the receiver occupies a store or other building leased by the bankrupt, and the landlord desires to have the bankrupt's goods removed and the premises vacated by the receiver, his remedy is by petition to the court of bankruptcy. In re Kleinhans (D. C. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604. The question of the right to property or funds in custodia legis is one which the bankruptcy court may determine summarily and without the formality of technical pleadings or a plenary suit. In re J. C. Winship Co. (1903) 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638. And third persons may in this manner be required to surrender to the receiver property which they hold in possession as agents or bailees of the bankrupt. In re Muncie Pulp Co. (1905) 139 Fed. 546, 71 C. C. A. 530, 14 Am. Bankr. Rep. 70; In re Friedman (C. C. A. 1908) 161 Fed. 260, 20 Am. Bankr. Rep. 37.

A receiver in bankruptcy has no authority to take possession of property held and claimed adversely by a third person, and on a petition by such adverse claimant to recover property alleged to have been taken from his possession by the receiver without his consent, the invalidity of his title is no defense. In re Kolin (1905) 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531. The court of bankruptcy has no jurisdiction, on a mere summary petition, to determine the question of right and title as between a stranger holding property by an adverse claim, asserted in good faith, and a receiver alleging that he acquired it by a fraudulent or preferential transfer. In re Eurich's Ft. Hamilton Brewery (D. C. 1908) 158 Fed. 644, 19 Am. Bankr. Rep. 798; Copeland v. Martin (1910) 182 Fed. 805, 25 Am. Bankr. Rep. 268; In re Darlington Co. (D. C. 1908) 163 Fed. 389, 20 Am. Bankr. Rep. 805; Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355; In re Mundle (D. C. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680.

Where an issue was raised between a bankrupt's trustee and his landlord as to the ownership of certain machinery placed on the rented premises, she waived her right to have such issue determined in a plenary suit by appearing without objection and submitting the question to a master and the bankruptcy court. In re Howard Laundry Co. (1913) 203 Fed. 445, 121 C. C. A. 555.

But the court has jurisdiction to entertain the proceeding so far as to ascertain whether the claimant is in fact an adverse claimant, or whether he holds the property as an agent or bailee of the bankrupt. In re Andre (1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132.

An order of a district court, referring a petition by a trustee for an order for a third person to turn over property as part of the bankrupt's estate to a special master, held not a final determination that the claim was colorable, and the court could permit litigation of the claim in a state court. In re Auerbach (1913) 202 Fed. 192, 120 C. C. A. 406.

Where a bankrupt would have been entitled to possession of goods in the hands of a carrier consigned to him, on payment of the freight on the day demand was made by his receiver in bankruptcy, in case bankruptcy had not intervened, the receiver was entitled to the same, and the wrongful refusal of the carrier's agent to deliver the goods constituted him the agent of the receiver, terminating the right of stoppage in transitu. In re White (D. C. 1913) 205 Fed. 393.

Where goods sold to a bankrupt were in possession of the carrier's agent at destination, notice by the seller to the carrier's agent at the point of shipment

of its election to exercise his right of stoppage in transitu, not made in sufficient time to be reasonably communicated to the agent in possession of the goods prior to demand by the bankrupt's receiver in bankruptcy, held insufficient. Id.

In proceedings to reclaim certain goods from the receiver of an alleged bankrupt, evidence held insufficient to warrant a master's finding that the goods were consigned to the bankrupt and not sold. In re Balkind & Joseph (1914) 215 Fed. 697.

Where property has once come into the possession of the receiver as a part of the bankrupt's estate, and has been taken from him by an adverse claimant, either with or without his consent, the court of bankruptcy has power to protect its possession by a summary order requiring the return of the property, or its proceeds if sold, and jurisdiction to adjudicate with respect to all claims thereto. In re Rose Shoe Mfg. Co. (C. C. A. 1909) 168 Fed. 39, 21 Am. Bankr. Rep. 725.

Where a bankrupt's receiver, having completed certain repairs on boats in the bankrupt's possession, offered to deliver them to the owner on receiving the amount due for the repairs, but instead the owner's servant at his direction took the boats away by force without paying the claim, they were both guilty of contempt. In re Dialogue (D. C. 1914) 215 Fed. 462.

Where a receiver of a bankrupt corporation withholds its books from inspection of the bankrupt's trustee, appointed in the same court, he may obtain access to the books by an order on an informal application. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780.

25. Actions by and against receiver.—Where the court of bankruptcy appoints a receiver to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified, as authorized by this section, the functions of such receiver are not limited to the receipt and custody of such property as may be voluntarily surrendered to him, but it is his duty to collect and recover the property, by suit if necessary, and the court has jurisdiction, in appointing such receiver, to authorize him to institute all necessary actions at law or in equity for the recovery of the bankrupt's property. In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822. The order authorizing the receiver to sue is not conclusive on the question whether he has any cause of action. Greenhall v. Hurwitz (1913) 80 Misc. Rep. 186, 141 N. Y. Supp. 914. A receiver in bankruptcy may be authorized to sue a carrier for negligence in the handling of freight. Slaughter v. Louisville & N. R. Co. (1911) 125 Tenn. 292, 143 S. W. 603.

The receiver may maintain summary proceedings in the court of bankruptcy in a case proper for that mode of procedure. In re Muncie Pulp Co. (1905) 139 Fed. 546, 71 C. C. A. 530, 14 Am. Bankr. Rep. 70. He may maintain replevin, where that form of action would otherwise be appropriate. Unmack v. Douglass (1903) 75 Conn. 633, 55 Atl. 12. He may sue in State courts as well as federal courts, and the decree authorizing him to sue will not be open to collateral impeachment in an action brought by him. Slaughter v. Louisville & N. R. Co. (1911) 125 Tenn. 292, 143 S. W. 603.

Where, in proceedings by bankrupts' receiver to recover funds alleged to belong to the estate, it appeared that defendants had no just adverse claim to the money, the bankruptcy court had jurisdiction to order its surrender in summary proceedings. Musica v. Prentice (C. C. A. 1914) 211 Fed. 326, affirming decree In re A. Musica & Son (D. C. 1913) 205 Fed. 413. Appeal dismissed Lazarus, Michael & Lazarus v. Prentice (1914) 34 Sup. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305.

A receiver in bankruptcy is not authorized to bring suit for the recovery of assets in a jurisdiction other than the one in which he was appointed; that is, he cannot maintain an action in a federal court in another district or in a state court of another state. Clark v. Booth (1854) 17 How. 327, 15 L. Ed. 164; Hale v. Allinson (1903) 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; In re Dunseath & Son Co. (D. C. 1909) 168 Fed. 973, 21 Am. Bankr. Rep. 742, 22 Am. Bankr. Rep. 75; In re National Mercantile Agency (D. C. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 189; In re Schrom (D. C. 1899) 97 Fed. 760, 3 Am. Bankr. Rep. 352. Compare in re Dempster (C. C. A. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751. See Fletcher v. Murray Commercial Co. (1913) 72 Wash. 525, 130 Pac. 1140.

If assets of the bankrupt are discovered in another state, the proper course is for the petitioning creditors to apply to the proper court, federal or state, in such other state, setting up the pending proceedings in bankruptcy as the basis of their action, and asking for protection for their rights in the property of the debtor within that state, by injunction, receivership, or other appropriate remedy, in which proceedings the trustee in bankruptcy, subsequently appointed, may appear and take charge. In re Schrom (D. C. 1899) 97 Fed. 760, 3 Am. Bankr. Rep. 352.

If a receiver in bankruptcy procures an order of the court which appointed him, requiring the surrender of property in another state, it appears that he may apply to the court of bankruptcy in such other state for its assistance in the enforcement of the order. In re Peiser (D. C. 1902) 115 Fed. 199, 7 Am. Bankr. Rep. 690.

A receiver in bankruptcy has no authority to maintain suits to vacate al-

leged preferential transfers or payments, to dissolve liens, or to recover property alleged to have been conveyed away in fraud of the bankrupt's creditors. Boonville Nat. Bank v. Blakey (1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; Frost v. Latham & Co. (C. C. 1910) 181 Fed. 866, 25 Am. Bankr. Rep. 313; Guaranty Title & Trust Co. v. Pearlman (D. C. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; Lansing v. Manton (D. C. 1876) 14 N. B. R. 127, Fed. Cas. No. 8,077. Compare In re Alexander (D. C. 1911) 193 Fed. 749. Where the bankrupt had sold certain of his assets to his attorney, and the latter had sold the same to another person, it was held that a receiver in bankruptcy was entitled to sue to vacate such sales, without waiting for the appointment of a trustee. In re Alexander (D. C. 1911) 193 Fed. 749. And where goods of a bankrupt alleged to have been fraudulently conveyed had been taken into the possession of an ancillary receiver, it was held that the court appointing such receiver acquired jurisdiction to determine the validity of the transfer and the rights of the parties. In re Lipman (D. C. 1912) 201 Fed. 169, 29 Am. Bankr. Rep. 139.

Judicial Code, § 66, which authorizes a receiver appointed by a federal court to be sued without previous leave of such court "in respect of any act or transaction of his in carrying on the business connected with" the property in his charge, applies to receivers in bankruptcy. In re Kalb & Berger Mfg. Co. (1908) 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393; In re Kanter & Cohen (1903) 121 Fed. 984, 58 C. C. A. 260; In re Smith (D. C. 1903) 121 Fed. 1014; In re Kelley Dry Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528. But it does not authorize a suit without leave against such receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate. In re Kalb & Berger Mfg. Co. (1908) 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393.

A bill is properly dismissed for want of equity where no relief is asked by complainant for himself, but an accounting by the receiver in bankruptcy of defendant company is prayed, and certain of his actions and a composition settlement are complained of, and it is not stated that the proceedings are terminated and the receiver discharged, and where it is further prayed that certain amounts collected from certain defendants be distributed among the creditors of defendant company, but complainant is a stockholder and not injured by alleged fraudulent acts of the officers of defendant company; it not being claimed that the assets of the company were sufficient to pay creditors when it ceased to do business. Quait v. Wortham Bros. Co. (1913) 176 Ill. App. 273.

It may be proper for a receiver in bankruptcy to enter his appearance in a suit pending against the bankrupt at the time of his appointment. In re Muncie Pulp Co. (1907) 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56. But in respect to claims which will be provable in the bankruptcy proceedings, the receiver is not the proper person to adjust such claims or to defend suits thereon, and an action on such a claim, against the receiver as such, will not be authorized or allowed by the bankruptcy court in any event. In re Heim Milk Product Co. (D. C. 1910) 183 Fed. 787, 25 Am. Bankr. Rep. 746.

The court of bankruptcy has no jurisdiction to stay or prevent the maintenance of an action against the receiver to enforce a personal liability against him for acts done beyond the scope of his authority. In re Spechler Bros. (D. C. 1911) 185 Fed. 311, 26 Am. Bankr. Rep. 97; In re Kalb & Berger Mfg. Co. (1908) 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393.

If a receiver in bankruptcy takes possession not only of the property designated in the order appointing him, but also of other goods, the property of a third person, and which never were owned by the bankrupt, the owner thereof may maintain trespass in a state court against the receiver as an individual, for thus interfering with property which was outside the order of the court. In re Young (D. C. 1881) 7 Fed. 855. A state court has jurisdiction of an action against a receiver in bankruptcy to recover rent for premises occupied by the bankrupt under a lease which the receiver elected to accept. Brooklyn Improvement Co. v. Lewis (1910) 136 App. Div. 861, 122 N. Y. Supp. 111. A receiver in bankruptcy is not personally liable for negligence of a person employed by him to remove property which he was authorized to remove, where the receiver was not guilty of any negligence in the selection of such employé. Frederick A. Stokes Co. v. Carell (Sup. 1912) 138 N. Y. Supp. 536.

26. Ancillary receiverships.—A court of bankruptcy possesses jurisdiction to appoint an ancillary receiver for property found within its territory and belonging to a debtor against whom a petition in involuntary bankruptcy has been filed in another district. In re Dunseath & Son Co. (D. C. 1909) 168 Fed. 973, 21 Am. Bankr. Rep. 742; In re John L. Nelson & Bro. Co. (D. C. 1907) 149 Fed. 590, 18 Am. Bankr. Rep. 66; In re Benedict (D. C. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232. Compare Ross-Meeham Foundry Co. v. Southern Car & Foundry Co. (D. C. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; In re Dempster (C. C. A. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751.

The power to appoint an ancillary receiver in bankruptcy ought not to be exercised without such notice to the persons in possession of the property, and to other parties in interest, as will answer the requirement of due process of law. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co. (D. C. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624.

The court of bankruptcy appointing an ancillary receiver has jurisdiction to hear and determine the claims of third persons asserting title to the property in question or liens upon it. Fidelity Trust Co. v. Gaskell (1912) 195 Fed. 865, 115 C. C. A. 527, 28 Am. Bankr. Rep. 4. Such court also has authority to settle the ancillary receiver's accounts, affording to creditors, or to the trustee of the primary jurisdiction, an opportunity to question the correctness of the accounting in the ancillary court, the receiver not being bound to account to the court of primary jurisdiction. Loeser v. Dallas (1911) 192 Fed. 909, 114 C. C. A. 349, 27 Am. Bankr. Rep. 733.

The duty of an ancillary receiver in bankruptcy is limited to the collection of assets and to holding the same to await the appointment of a trustee, and he will not ordinarily be authorized to sell any of the property in his custody. In re Brockton Ideal Shoe Co. (D. C. 1912) 194 Fed. 233, 27 Am. Bankr. Rep. 577.

An application to vacate the receivership, on a ground going to the root of the whole matter, as, that the alleged bankrupt was solvent and had not committed an act of bankruptcy, should not be made in the first instance to the court of ancillary jurisdiction (the same person having been appointed receiver in both districts), but to the court of original jurisdiction. In re Hayes (D. C. 1912) 192 Fed. 1018, 27 Am. Bankr. Rep. 713.

27. Accounts and compensation of receiver.—Exceptions to the account filed by a receiver in bankruptcy should be verified, but the omission of a verification is an amendable defect. In re Ketterer Mfg. Co. (D. C. 1907) 156 Fed. 719, 19 Am. Bankr. Rep. 638.

When the accounts of a receiver have been settled by a court having jurisdiction, he may be summarily ordered to pay over the balance due, and his surety may be held liable therefor. In re Reliable Bottle Box Co. (D. C. 1912) 199 Fed. 670, 29 Am. Bankr. Rep. 371.

A receiver in bankruptcy will be surcharged with the value of any property coming into his hands and not accounted for. In re Consumers' Coffee Co. (D. C. 1908) 162 Fed. 786, 20 Am. Bankr. Rep. 835.

Though a petition in bankruptcy is dismissed, on the ground that the alleged bankrupt was not amenable to the law, yet as the court had jurisdiction to determine that question, its appointment of a receiver was not void, and hence it may in its discretion allow and pay the expenses of the receivership out of the funds in the receiver's hands, where his services were beneficial to the estate. In re Wentworth Lunch Co. (D. C. 1911) 189 Fed. 831.

It was formerly held that the question of allowing commissions or compensation to the receiver in bankruptcy, and the amount, was committed entirely to the sound judicial discretion of the court, as in ordinary cases in courts of equity, to be determined upon a consideration of the services rendered in the particular case. In re Schoenfeld (1910) 183 Fed. 219, 105 C. C. A. 481, 25 Am. Bankr. Rep. 748; In re Kirkpatrick (1906) 148 Fed. 811, 78 C. C. A. 501, 17 Am. Bankr. Rep. 594; In re Martin Borgeson Co. (D. C. 1907) 151 Fed. 780, 18 Am. Bankr. Rep. 178; In re Leonard (D. C. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97. But this matter was specifically regulated by an amendment to the bankruptcy act adopted June 25, 1910, c. 412, 36 Stat. 838. See infra, § 48.

28. —— Fees of receiver's attorney.—Ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify the employment of an attorney, and hence no claim for the services of an attorney so employed is chargeable per se against the estate, predicated alone on the fact of employment and service rendered. In re T. E. Hill Co. (1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73; In re Leonard (D. C. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97; In re Union Bank (1883) 37 N. J. Eq. 420.

A receiver in bankruptcy is entitled to the assistance of counsel, and a reasonable allowance (keeping in view the economy enjoined by the general policy of the bankruptcy act, and taking into consideration the value of the estate) will be made to him in the settlement of his accounts for services rendered in the administration of the estate while in his hands. He is not entitled to an allowance for services rendered by the attorney for the petitioning creditors in instituting the proceedings and obtaining the receiver's appointment, or for other services rendered primarily in the interests of his clients, and the former is a matter for consideration (if at all) on the settlement of the estate in the hands of the trustee, with which the receiver has nothing to do. In re Oppenheimer (D. C. 1906) 146 Fed. 140, 17 Am. Bankr. Rep. 59; In re Falkenberg (D. C. 1913) 206 Fed. 835, 30 Am. Bankr. Rep. 718.

Where attorneys for the receiver of an alleged bankrupt were also actively engaged in a protracted contest in

bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, as contemplated by an order granting leave to the receiver to employ counsel, and the bankruptcy proceeding was thereafter dismissed, an order declining to make an allowance to such attorneys for services rendered to the receiver was correct, such expense being rightfully chargeable against the petitioning creditors. In re T. E. Hill Co. (1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

Since a receiver in bankruptcy is required to stand independent of the parties to the litigation, he will not be allowed to charge the estate for services rendered to him by the attorney for either party during the continuance of such relation. In re T. L. Kelly Dry Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

Fees to the attorney for a receiver in bankruptcy should be allowed only to the extent that his services were rendered for the direct benefit of the entire estate, and not of any particular creditor. In re Ketterer Mfg. Co. (D. C. 1907) 156 Fed. 719, 19 Am. Bankr. Rep. 638; Platt v. Archer (D. C. 1876) Fed. Cas. No. 11,214.

The number of attorneys employed by a receiver in bankruptcy is not an element to be considered in allowing fees, but the allowance should be made as though but one attorney had been employed. In re Falkenberg (D. C. 1913) 206 Fed. 835, 30 Am. Bankr. Rep. 718.

29. Sales of property by receivers.—A receiver appointed by the court of bankruptcy to take charge of the property of the bankrupt, pending the election and qualification of a trustee, may be ordered to sell the property or any part of it, when such a course is necessary for the preservation of its value. In re Becker (D. C. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; In re B. D. Garner & Co. (D. C. 1907) 153 Fed. 914, 18 Am. Bankr. Rep. 733; In re De Lancey Stables Co. (D. C. 1909) 170 Fed. 860, 22 Am. Bankr. Rep. 406. If the receiver is not in possession of particular property, the court of bankruptcy has no jurisdiction to order its sale and determine the rights of adverse claimants in the proceeds. First Nat. Bank v. Chicago Title & Trust Co. (1905) 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, 14 Am. Bankr. Rep. 102. But this may be done with the consent of the claimant who has the possession of the property. Ommen v. Talcott (D. C. 1909) 175 Fed. 261, 23 Am. Bankr. Rep. 572. Where a corporation is adjudged bankrupt in Massachusetts and an ancillary receiver appointed in New York, he will not be authorized to sell the bankrupt's stock in trade in New York, in the absence of any proceedings therefor in the domiciliary jurisdiction. In re Brockton Ideal Shoe Co. (D. C. 1912) 194 Fed. 233, 27 Am. Bankr. Rep. 577. A sale by a receiver in bankruptcy without the order of the court conveys no title. In re Styer (D. C. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; In re Fulton (D. C. 1907) 153 Fed. 664, 18 Am. Bankr. Rep. 591; Muschel v. Austern (1904) 43 Misc. Rep. 352, 87 N. Y. Supp. 235. A receiver in bankruptcy has no authority to sell at private sale on his own responsibility, but if he reports to the court an offer made by an outside party for the purchase of property in his charge, and the court makes an order authorizing him to accept the offer and sell the property, the transaction becomes a judicial sale, and the purchaser can be compelled, by rule or attachment, to comply with its terms. In re J. Jungmann, Inc. (1911) 186 Fed. 302, 108 C. C. A. 380, 26 Am. Bankr. Rep. 401.

In view of the temporary nature of the functions of a receiver in bankruptcy, sales of property by him should be authorized only when the property is perishable or is rapidly depreciating in value. In re Desrochers (D. C. 1911) 183 Fed. 991, 25 Am. Bankr. Rep. 703; In re Harris (D. C. 1907) 156 Fed. 875, 19 Am. Bankr. Rep. 635. Where the receiver acquires possession of a leasehold as part of the bankrupt's estate, he should not attempt to make a sale of it. In re Fulton (D. C. 1907) 153 Fed. 664, 18 Am. Bankr. Rep. 591. The sale of goods as perishable is for the benefit of all concerned, the money realized standing in place of the property itself, against which the parties interested may assert their rights the same as if the sale had not taken place. In re Le Vay (D. C. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114.

"Perishable property," as used in General Bankruptcy Order 18 (post, § 9614), permitting the court in its discretion to direct sale of perishable property, held not limited to the property which deteriorates physically, but includes that liable to deteriorate in value and price by reason of delay in the disposition thereof. In re Pedlow (1913) 209 Fed. 841, 126 C. C. A. 565.

III. TAXATION OF COSTS AND FEES

30. Power to award costs.—The obvious policy of the Bankruptcy Act, manifest in all of its provisions touching on the subject, is to reduce to a minimum the expense of administering estates, and the courts are bound to give the statute such a construction and application as will fulfill the intention of congress in this regard. In re J. W. Harrison Mercantile Co. (D.

C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Fullick (D. C. 1912) 201 Fed. 463, 28 Am. Bankr. Rep. 634.

In cases of involuntary bankruptcy, where the debtor resists adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditors shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner. General Order in Bankruptcy, No. 34 (post, § 9614). And see In re Ghiglione (D. C. 1899) 93 Fed. 186, 1 Am. Bankr. Rep. 580; In re Morris (D. C. 1902) 115 Fed. 591, 7 Am. Bankr. Rep. 709. As regards the case where the petition is dismissed, it is held that this applies only in cases where the jurisdiction of the court was not questioned, or was sustained, and the decision was on the merits, and not to cases where the petition was dismissed for want of jurisdiction or because the defendant was not amenable to the law. In re Philadelphia & Lewis Transp. Co. (D. C. 1904) 127 Fed. 896, 11 Am. Bankr. Rep. 444.

Upon the dismissal of a petition in bankruptcy, the respondent is entitled to costs, but not to an allowance for counsel fees or expenses or damages, unless there was an application to seize and hold his property. In re Williams (D. C. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736; In re Morris (D. C. 1902) 115 Fed. 591, 7 Am. Bankr. Rep. 709; In re Ghiglione (D. C. 1899) 93 Fed. 186, 1 Am. Bankr. Rep. 580. And the fact that a temporary injunction was granted to restrain supposed debtors from paying money into the hands of the alleged bankrupt does not bring the case within the provisions of Bankruptcy Act, § 3e (post, § 9687). In re Williams (D. C. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736.

The court of bankruptcy has authority under its general equity powers to order the petitioning creditors to pay the expenses of a receivership, where the receiver was appointed on their application on the filing of their petition, which petition was subsequently dismissed as unfounded. In re Lacov (1905) 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290. See In re Eagle Steam Laundry Co. (D. C. 1911) 184 Fed. 949, 25 Am. Bankr. Rep. 868. And such order may be enforced by proceedings in contempt. In re Lacov (1905) 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290. But if the receiver has continued in the possession of the property until after the defendant has been adjudged bankrupt by the court in another district, the authority to compensate the receiver passes to the court making the adjudication, which takes exclusive jurisdiction of the estate. In re Sears, Humbert & Co. (1904) 128 Fed. 275, 62 C. C. A. 623.

Where creditors successfully oppose the bankrupt's application for discharge, and incur costs and expenses in so doing, they would ordinarily be taxable against the bankrupt; but if he is entirely without money, the court will not make a useless order upon him to pay such costs, and there is no warrant in law to tax such costs against the estate. In re Kyte (D. C. 1911) 189 Fed. 531, 26 Am. Bankr. Rep. 507.

31. Amount and items of costs.—On dismissal of an involuntary bankruptcy petition, only such costs, counsel fees, expenses, and damages as are occasioned by the seizure and detention of the bankrupt's property can be recovered; the recovery of all other costs and expenses depending on their being brought within clause 18 of this section and General Order 34 (post, § 9614), which are merely declaratory of the general equity power over cost. In re Ward (D. C. 1913) 203 Fed. 769.

Petitioning and intervening creditors and alleged bankrupt may stipulate for an apportionment as between themselves of the costs and expenses, and a creditor may not then set off against the amount of expenses taxed against him his demand against the bankrupt. King Hardware Co. v. J. G. Christopher Co. (1915) 222 Fed. 224, 138 C. C. A. 54.

Customers of a bankrupt stockbroker, carrying stocks on a margin, are not entitled to any docket fee in reclamation proceedings. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889.

A trustee in bankruptcy, bringing an action to recover stock alleged to have been fraudulently transferred by the bankrupt, and taking possession thereof as provided by Code Civ. Proc. Cal. § 510 et seq., held not entitled, as a part of his costs, to the expenses incurred in keeping and feeding the stock pending the action. Meyer v. Perkins (Cal. App. 1913) 130 P. 206, rehearing denied by Supreme Court, Id. 208.

Extra compensation to expert witnesses, above the statutory witness fee and mileage, cannot be taxed as costs or allowed against a losing party in a court of bankruptcy; and the court will not be bound to make such an allowance because counsel have so agreed, especially where the agreement is not in writing. In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 604.

As to the expense of taking down and preserving testimony, it is held that, except where a stenographer is employed on the application of the trustee, as provided by section 38, cl. 5 (post, § 9622), or there has been a stipulation of parties, or money has

been deposited for the expense, as provided by General Order in Bankruptcy No. 10 (post, § 9614), the referee cannot be allowed for the expense of a stenographer. In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651. In any event, the compensation allowed to stenographers will be scrutinized by the court, and reduced if deemed excessive. In re Ellett Electric Co. (D. C. 1912) 196 Fed. 400, 28 Am. Bankr. Rep. 453.

32. —— **Costs on appeal.**—Where proceedings for review of an order of the court of bankruptcy are dismissed for want of jurisdiction, without any motion therefor, neither party will be allowed costs. Hutchinson v. Le Roy (1902) 113 Fed. 202, 51 C. C. A. 159, 8 Am. Bankr. Rep. 20. No costs should be allowed to either party where, on appeal against a trustee from an order in bankruptcy, such order is reversed on a ground not assigned or urged by the appellant. In re Dickson (1901) 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186.

Although a decree in bankruptcy is reversed on review in the circuit court of appeals, no costs should be allowed when the petition for review was delayed nearly six months, and the estate has probably deteriorated through the delay, and where further proceedings are necessary. In re Endlar (1911) 192 Fed. 762, 113 C. C. A. 48, 27 Am. Bankr. Rep. 758.

Where an appeal is taken from an order overruling respondent's demurrer to a bill of complaint brought by the trustee in bankruptcy, and pending the appeal the bill is voluntarily dismissed by the complainant, on leave of court, without prejudice, and at his own cost, thereby making necessary the dismissal of the appeal, he should be required to pay the costs on appeal. In re Orman (1901) 107 Fed. 101, 46 C. C. A. 165, 5 Am. Bankr. Rep. 698.

33. **Persons entitled to costs.**—Where a petition for adjudication in involuntary bankruptcy is contested, costs will be awarded to the successful party, that is, to the alleged bankrupt if he defeats the petition, or to the petitioning creditors if the adjudication is made. In re Sheehan (D. C. 1873) 8 N. B. R. 353, Fed. Cas. No. 12,738.

The bankrupt is entitled to his disbursements in proceedings to obtain his discharge. In re Dibblee (D. C. 1870) Fed. Cas. No. 3,887. If the bankrupt advances the money necessary to pay for the issuance and publication of notices of his application for discharge, he is entitled to repayment of the same out of the estate. In re Hatcher (D. C. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722. In a proceeding to revoke or annul the discharge of a bankrupt, costs may be awarded to the prevailing party. In re Holgate (D. C. 1876) Fed. Cas. No. 6,601.

A trustee in bankruptcy is entitled to costs on bringing to a successful conclusion an action to recover assets of the bankrupt, set aside an unlawful assignment or transfer of his property, avoid a fraudulent conveyance, or recover an illegal preference. Ommen v. Talcott (D. C. 1909) 175 Fed. 261, 23 Am. Bankr. Rep. 572; Stackhouse v. Holden (1901) 66 App. Div. 423, 73 N. Y. Supp. 203; Clowe v. Seavey (1911) 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Parker v. Travers (1908) 74 N. J. Eq. 812, 71 Atl. 612.

Claimants having claims against the estates of bankrupts must ordinarily establish them at their own expense, and they will not be allowed their costs and expenses out of the estate, unless where it appears that the defense made by the trustee was captious or unwarranted. In re Stewart (D. C. 1910) 178 Fed. 463, 24 Am. Bankr. Rep. 474. But see In re Waterloo Organ Co. (1907) 154 Fed. 657, 83 C. C. A. 481, 18 Am. Bankr. Rep. 752. Where issues in the bankruptcy proceedings, arising out of the involved conditions of the claims, were caused entirely by the methods of the creditor, the trustee should not be charged with costs. Dowse v. Hammond (1904) 130 Fed. 103, 64 C. C. A. 437.

On referee's finding for claimant, seeking to reclaim property from trustee in bankruptcy, allowance of costs and disbursements to claimant held within the referee's discretion. In re Reeves (D. C. 1915) 227 Fed. 711.

Costs in bankruptcy, to be paid out of proceeds of specific property covered by a lien before payment of the lien creditor, specified. In re Rauch (D. C. 1915) 226 Fed. 982.

In the case of proceedings taken by parties other than the trustee, such as judgment creditors, mortgagees, or other lien claimants, to set aside fraudulent conveyances, or otherwise to rescue or reclaim property alleged to belong to the estate in bankruptcy, the general rule is that they may be allowed compensation out of the estate for costs, expenses, and counsel fees, in so far as their efforts have inured to the benefit of the general creditors, in the way of creating or preserving a fund for distribution, but not otherwise. In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re J. C. H. Claussen & Co. (D. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; In re Dumahaut (D. C. 1879) 19 N. B. R. 394, Fed. Cas. No. 4,126.

A sheriff or other person who has had the custody of property of a bankrupt estate may be reimbursed for his expenses in caring for and preserving it. In re Fortune (D. C. 1869) 2 N. B. R. 662, Fed. Cas. No. 4,955; In re Williams (D. C. 1868) 2 N. B. R. 229, Fed. Cas. No. 17,705.

Where property of the bankrupt was attached within four months before the filing of the petition, it is error to require, as a condition of delivery of the attached property to the trustee, that he shall pay counsel fees and costs to the attorney for the attaching creditors and the costs of the attachment. In re Shoemaker (1913) 205 Fed. 113, 123 C. C. A. 345, 30 Am. Bankr. Rep. 349.

34. Persons, property, or funds liable for costs.—It is the duty of every one connected with the administration of the bankruptcy laws to make sure that no fees or charges, except those intended by the facts of Congress, are paid out of the estate. In re Metallic Specialty Mfg. Co. (D. C. 1914) 215 Fed. 937.

Where an alleged bankrupt appealed from an involuntary adjudication, he was not entitled to an order requiring a receiver of his property to pay the costs of the transcript and the printing of the record out of the proceeds of the bankrupt's estate in his hands, merely because the bankrupt was without the means to bear such expenses. Herman Keck Mfg. Co. v. Lorsch (1910) 179 Fed. 485, 103 C. C. A. 65, 24 Am. Bankr. Rep. 705.

Under a stipulation between petitioning and intervening creditors and the bankrupt for apportionment of expenses, including allowances to accountants, the bankrupt held liable for its part of the allowances to the accountants. King Hardware Co. v. J. G. Christopher Co. (1915) 222 Fed. 224, 138 C. C. A. 54.

Since counsel fees, expenses and damages provided by section 3e (post, § 9587), on dismissal of involuntary proceedings, are for special services or damages occasioned by the wrongful taking of the property of an alleged bankrupt, such fees and damages are not taxable in the bankruptcy proceedings, but are recoverable in a suit on petitioners' bond. In re Wise (D. C. 1914) 212 Fed. 567.

Where a petition in bankruptcy is dismissed because it is found that the bankrupt was insane at the time of committing the alleged act of bankruptcy, the costs may be charged against the petitioning creditors. In re Ward (D. C. 1913) 203 Fed. 769, 29 Am. Bankr. Rep. 547.

Where an execution creditor intervenes and opposes the adjudication, on the ground that the debtor is not insolvent, but unsuccessfully, the costs of the proceeding, in so far as the same was rendered necessary by his opposition, may be taxed against such intervener, including the fees of witnesses summoned by him and of any witnesses summoned by the petitioning creditors whose examination would not have been necessary but for the intervention. In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 604.

Petitioning creditors who succeed in procuring an adjudication of bankruptcy are entitled to be reimbursed out of the estate for their expenditures and to the allowance of a reasonable attorney's fee. In re Mitteldorfer (C. C. 1869) 3 N. B. R. 1, Fed. Cas. No. 9,675.

Where, on the application of creditors accompanying the petition in involuntary bankruptcy, property of the bankrupt is seized and held pending the adjudication, and the result is the securing or preserving for the estate of valuable property which otherwise would have been lost or dissipated, the petitioning creditors are entitled to reimbursement for their costs and expenses. In re Schwab (D. C. 1869) Fed. Cas. No. 12,498. But where, such a course having been taken, the petition is dismissed, the damages occasioned by the seizure and detention of the property are recoverable, not against the petitioning creditors generally, but against that creditor on whose application the property was seized. In re Ward (D. C. 1913) 203 Fed. 769, 29 Am. Bankr. Rep. 547.

Costs may be awarded against a particular creditor who has insisted on and procured an unnecessary and fruitless examination of the bankrupt in the hope of discovering concealed assets. In re Rozinsky (D. C. 1900) 101 Fed. 229, 3 Am. Bankr. Rep. 830. Or against one who has procured the appointment of a receiver, when such appointment proves to have been unauthorized or unnecessary. In re Wentworth Lunch Co. (C. C. A. 1911) 191 Fed. 821, 27 Am. Bankr. Rep. 515; In re Charles W. Aschenbach Co. (1910) 183 Fed. 305, 105 C. C. A. 517, 25 Am. Bankr. Rep. 502. Or one who has unsuccessfully opposed the bankrupt's application for discharge. In re Miers (D. C. 1912) 193 Fed. 288, 27 Am. Bankr. Rep. 870.

If on the appointment of a receiver no bond, or an inadequate bond, is given, the applicant for the appointment is nevertheless liable for the costs and expenses of the receivership. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194, 265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528.

Where, on re-examination of the allowance of certain claims against a bankrupt's estate, it was found on sufficient evidence that the claims were unsustainable, the referee properly required the claimant to pay the costs of the hearing, but he was not authorized to require that the claimant should also pay a fee to the trustee's attorney. In re Rome (D. C. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820. And see In re Todd (D. C. 1901) 109 Fed. 265, 6 Am. Bankr. Rep. 88. Even where the claimant succeeds in establishing his claim, as against opposition, the court will not allow him costs and attorneys' fees out of the estate. In re Coventry Evans Furniture Co. (D.

C. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. Especially where the costs on the contest of a claim grew out of a controversy between creditors, entirely carried on for the purpose of controlling the election of the trustee, they will not be allowed out of the estate. In re Worth (D. C. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566.

Where a claimant of property in the hands of a bankrupt's trustee filed a reclamation petition which was subsequently dismissed as fraudulent and unsustainable, the proceeding being analogous to a suit in equity, the trustee was entitled to an allowance against the petitioner, as a part of the costs, of the charges and expenses properly incurred in preserving the property during the pendency of the petition and directly resulting from such proceedings. In re Schocket (D. C. 1910) 177 Fed. 583, 24 Am. Bankr. Rep. 47.

A proceeding by petitioning creditor of bankrupt to reclaim surplus proceeds of collaterals sold by another creditor and proceeds of a stock exchange seat of bankrupt held not a part of the distribution of the estate between creditors as affecting the award of costs. In re H. B. Hollins & Co. (D. C. 1915) 225 Fed. 618.

A customer of a bankrupt stockbroker, finding his stock in loans, held not liable to disbursements in reclamation proceedings, but expenses should be borne by general creditors. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889.

Where a mortgagee or other lien claimant files and proves his claim in the bankruptcy proceedings for allowance and payment out of the proceeds of the property affected, he is properly chargeable with his pro rata share of the costs of the bankruptcy proceedings. In re Franklin (D. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218.

Where a mortgagee of a bankrupt asserts a lien for an excessive amount, which is contested by the trustee, part or all of the expense thereby incurred, including an attorney's allowance, may be charged against the fund that would otherwise go to the mortgagee. In re Howard (D. C. 1913) 207 Fed. 402.

Only costs incidental to preservation of property, its conversion, and payment to the landlord, held to be paid out of property on which a landlord has a lien. In re Rauch (D. C. 1915) 226 Fed. 982.

Where the court of bankruptcy, for the sake of realizing the supposed value of the equity of redemption in the mortgaged property, takes control of the same and causes it to be sold by the trustee, the creditor assenting to, but not inviting, such a course, the proceeds should not be charged with any part of the costs and expenses of the bankruptcy proceeding in general, incurred solely for the benefit of unsecured creditors, but since the mortgagee is benefited to the extent of having his lien foreclosed for him by the bankruptcy sale, he may properly be called upon to bear the actual costs and expenses of the sale. In re Williams' Estate (1907) 156 Fed. 934, 84 C. C. A. 434, 19 Am. Bankr. Rep. 389; In re Howard (D. C. 1913) 207 Fed. 402; The Bethulia (D. C. 1912) 200 Fed. 879; Mills v. Virginia-Carolina Lumber Co. (C. C. A. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Goldville Mfg. Co. (D. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Peabody (D. C. 1877) 16 N. B. R. 243, Fed. Cas. No. 10,866. And also, if equitable considerations justify it, to contribute towards the expense of caring for and preserving the property before the sale. In re Evans Lumber Co. (D. C. 1910) 176 Fed. 643, 23 Am. Bankr. Rep. 881. Compare In re Vulcan Foundry & Machine Co. (1910) 180 Fed. 671, 103 C. C. A. 637, 24 Am. Bankr. Rep. 825.

Where mortgaged property was operated by the receiver without the procurement of the mortgagee, and sold for less than the mortgage debt, neither the fees, or costs of administering the general bankruptcy estate nor of operating the property could be charged against the proceeds to the prejudice of the mortgagee. In re Elmore Cotton Mills (D. C. 1914) 217 Fed. 808.

Where a mill, conducted by a bankrupt corporation on mortgaged property, was operated by the bankrupt's receiver at a loss without the knowledge of the mortgagees, and they proved their claims in bankruptcy to enforce their lien against the proceeds of the mortgaged property, which were insufficient to pay the mortgage debt, such proceeds were not liable for the loss incurred by the receiver, nor for the expense of general administration. In re Elmore Cotton Mills (D. C. 1914) 217 Fed. 810.

Cost of bankruptcy proceeding held not payable from proceeds of mortgaged property, though there were practically no other assets: such proceeds being insufficient to pay the secured indebtedness. In re Cutler & John (D. C. 1916) 228 Fed. 771.

The bankruptcy act, authorizing the payment of commissions from the proceeds of the sale of incumbered property of a bankrupt, applies only to cases in which the bankruptcy court rightfully exercised its jurisdiction to sell free from liens, or where the lienholder consented to a sale; but where the incumbered property brought much less than the amount of the liens upon it, the estate in bankruptcy must pay the commissions of the referee and trustee. In re Holmes Lumber Co. (D. C. 1911) 189 Fed. 178, 26 Am. Bankr. Rep. 119.

Where the trustees of a bankrupt corporation do not receive possession

of its assets, because the same have been placed in the hands of receivers of another court in foreclosure proceedings, but they conceive it to be their duty to defend the foreclosure suits, and file a cross bill looking to the administration of the entire assets, they are entitled to have the compensation for themselves and their attorneys made a direct charge on the property prior to the claims of creditors and stockholders. Meddaugh v. Wilson (1894) 151 U. S. 333, 14 Sup. Ct. 356, 38 L. Ed. 183.

When the trustee brings suit to set aside a fraudulent conveyance, recover a preference, or the like, the costs are to be borne by the unsuccessful defendant, and not to be taken out of the property or fund recovered. Bunch v. Smith (1906) 116 Tenn. 201, 93 S. W. 80; Collins v. Bryan (1905) 40 Tex. Civ. App. 88, 88 S. W. 432. But in an action by a trustee in bankruptcy to set aside an assignment by the bankrupt of his interest in remainder, the taxable cost of an infant defendant, who was impleaded in the action and defended by a guardian ad litem, should be paid out of the funds of the estate. Clowe v. Seavey (1911) 74 Misc. Rep. 254, 131 N. Y. Supp. 817. In an action by the trustee to set aside a preference or a fraudulent conveyance, if he is unsuccessful, the expense falls upon the estate in bankruptcy. Ommen v. Talcott (D. C. 1909) 175 Fed. 261, 23 Am. Bankr. Rep. 572; In re Babcock (C. C. 1845) Fed. Cas. No. 697.

Where a trustee in bankruptcy paid attorney's fees, leaving an insufficient amount in his hands to pay a watchman employed to care for the property of the estate, he would have to stand the loss, unless he could obtain a refund from the attorneys. In re Mitchell (1914) 212 Fed. 932, 129 C. C. A. 452.

35. Taxation of costs.—Claims for costs, expenses, and fees should be filed with the referee in bankruptcy, in order that they may be examined by parties in interest and that any person aggrieved by the ruling of the referee may have the same reviewed. In re Stoddard Bros. Lumber Co. (D. C. 1909) 169 Fed. 190. 22 Am. Bankr. Rep. 435; In re Rosenberg (D. C. 1869) 3 N. B. R. 73, Fed. Cas. No. 12,056. The question of allowance may be determined by the referee ex parte, and notice to creditors of the hearing on such claims is not a prerequisite to the validity of his order. In re Stotts (D. C. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641. The amount to be allowed as a fee to the attorney of a voluntary bankrupt rests largely in the discretion of the referee, and his allowance will not be disturbed by the judge in the absence of evidence that it was unjust or excessive. In re Tebo (D. C. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235.

A judgment taxing bankrupt's costs and disbursements on dismissal of petition held not to prevent subsequent assessment of costs, expenses, and damages of receivership. In re McKenzie (D. C. 1915) 219 Fed. 630.

Where a contest over an involuntary bankruptcy petition was submitted to a master, a direction that expenses incident to a receivership and the taking of testimony should be paid out of funds in the hands of the receiver was provisional only, and did not constitute an adjudication as to all persons ultimately chargeable therewith. In re Ward (D. C. 1913) 203 Fed. 769.

Stipulation between petitioning and intervening creditors and an alleged bankrupt held to leave to the court how allowances shall be apportioned between intervening creditors and the petitioning creditors primarily liable. A stipulation between petitioning and intervening creditors and an alleged bankrupt for the payment of expenses and costs held to require one-half of the net amount of an expense to be charged against the bankrupt and the balance against the creditors. King Hardware Co. v. J. G. Christofer Co. (1915) 222 Fed. 224, 138 C. C. A. 54.

Costs will be allowed to an alleged bankrupt on the dismissal of an involuntary petition against him only after the filing of his bill of costs with the clerk and notice to the petitioning creditors. In re Haeseler-Kohlhoff Carbon Co. (D. C. 1905) 135 Fed. 867, 14 Am. Bankr. Rep. 381.

No fee to the attorney of the bankrupt can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt in doing the things which the law requires of him. In re Terrill (D. C. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625. The statute does not make the allowance of an attorney's fee in involuntary cases a matter of right, but gives the court discretionary power and where such an allowance is asked for, the attorney must disclose his dealings with his client, in order that the court may act intelligently in the matter. In re Carr (D. C. 1902) 117 Fed. 572, 9 Am. Bankr. Rep. 58.

Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of such vouchers. In re Comstock (D. C. 1874) 9 N. B. R. 88, Fed. Cas. No. 3,075. The claim of the marshal for expenditures must be supported by his own oath as to their amount and the necessity for them. In re Hellmar (D. C. 1877) Fed. Cas. No. 6,342. Such affidavit is not conclusive, so as to preclude any further inquiry into the items charged. In re Pace (D. C. 1878) Fed. Cas. No. 10,640.

36. Fees of attorneys.—In bankruptcy cases, compensation may be allowed to an attorney, at law out of a particular property or fund before the court only when his services have had the effect of preserving it for the true own-

er, and out of the estate in general only when his services have resulted in adding to it, increasing its value, freeing it from claims, or otherwise benefiting the general body of creditors. Gillespie v. J. C. Piles & Co. (1910) 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re Huddleston (C. C. A. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669; In re Covington (D. C. 1904) 132 Fed. 884, 13 Am. Bankr. Rep. 150; In re Irwin (D. C. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165.

While the amount of compensation to be allowed for the services of an attorney in bankruptcy proceedings rests largely in the sound judicial discretion of the court, yet this discretion must be exercised in view of the general purpose of the statute, which requires that, as far as possible, all the assets shall be available for the creditors, and that estates shall be administered with economy and at a minimum of expense. In re Iron Clad Mfg. Co. (1914) 215 Fed. 877, 132 C. C. A. 11; Dunlap Hardware Co. v. Huddleston (C. C. A. 1908) 167 Fed. 433, 21 Am. Bankr. Rep. 731; In re Young (D. C. 1906) 142 Fed. 891, 16 Am. Bankr. Rep. 106; In re Goldville Mfg. Co. (D. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Lang (D. C. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794. Only a reasonable fee will be allowed to an attorney in any event. In re Talton (D. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617. Where a rule of court fixes the scale of fees allowable, such allowance will not be increased except in most unusual cases. In re Keller (D. C. 1913) 207 Fed. 118, 31 Am. Bankr. Rep. 51.

The referee in bankruptcy is not bound to allow the fee claimed by the attorney, or agreed upon between the attorney and the trustee, but he may and should reduce it if he thinks it too great. In re Ferreri (D. C. 1911) 188 Fed. 675, 26 Am. Bankr. Rep. 658. The question of allowing a fee may be determined by the referee ex parte, and he is not required to notify creditors of the pendency of the question and an opportunity to be heard thereon. In re Stotts (D. C. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641. The referee should be satisfied by evidence of the character and value of the attorney's services, and may suspend action on the application until satisfactory evidence is produced. In re Dreeben (D. C. 1900) 101 Fed. 110, 4 Am. Bankr. Rep. 146; In re Curtis (1900) 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17. The decision of the referee, depending largely upon the exercise of judgment and discretion, will not be disturbed by the judge in the absence of evidence to show that the fee allowed was exorbitant or excessive. In re Tebo (D. C. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235. But the referee's discretion is judicial, and not arbitrary, and, though he recommends the allowance of a particular fee, it will be reduced by the judge if the latter regards it as extravagant. In re Carr (D. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635. The appellate court may reduce the fee allowed by the referee and approved by the judge, if the judge has failed to exercise his own discretion with a due regard to the policy of the statute and the rights of the parties. In re Curtis (1900) 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

In a proceeding in a court of bankruptcy to determine the amount to be allowed as a fee to the attorney of a creditor, out of such creditor's distributive share of the estate, a trial by jury may be allowed in the discretion of the court, but cannot be claimed as a matter of right, proceedings in bankruptcy being equitable in character. In re Rude (D. C. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

Where more than one attorney or set of attorneys render services for the benefit of an estate in bankruptcy, there must be a division of the allowable fee, rather than a duplication or multiplication of fees. In re Coney Island Lumber Co. (D. C. 1912) 199 Fed. 197, 29 Am. Bankr. Rep. 91.

In voluntary proceedings, the attorney for the bankrupt may properly be allowed a docket fee for filing the application for discharge, if there is no contest. If there is a contest made by the trustee at the instance of the creditors, which is unsuccessful, he may be given a larger allowance from the estate. But where an unsuccessful contest is made by one or more creditors, the question of costs and fees should be treated as one arising inter partes, and the estate generally ought not to suffer from an ill-advised contest. In re Keller (D. C. 1913) 207 Fed. 118, 31 Am. Bankr. Rep. 51.

37. —— **Attorney for bankrupt.**—In determining the reasonable value of services rendered to a bankrupt by his attorney, neither the assets nor the liabilities of the estate represent or measure the value of the matter involved. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am. Bankr. Rep. 749. The allowance of a fee can be made only for the reasonable value of services actually required, irrespective of the services actually rendered. In re Connell & Sons (D. C. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474. The attorney cannot claim compensation for all legal work he may do for the bankrupt in the proceedings, but only for that which the referee or the court may consider was required by the provisions of the law and the necessities of the particular case. In re Payne (D. C. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192. It is necessary that the attorney's professional services should have been reasonably necessary to enable the bankrupt to discharge his duties under the law. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am.

Bankr. Rep. 749. It is necessary that the attorney's services should have conduced to the benefit of the estate, or to its prompt, efficient, or economical administration. In re Duran Mercantile Co. (D. C. 1912) 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Goldville Mfg. Co. (D. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Rosenthal & Lehman (D. C. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626.

Where an alleged involuntary bankrupt successfully resists adjudication, he is entitled to have a $20 attorney's fee taxed as part of the costs in his favor. In re Wise (D. C. 1914) 212 Fed. 567. On dismissal of an involuntary bankruptcy proceeding against respondent, he was not entitled to have an allowance for counsel fees taxed in his bill of costs, though the proceeding was not instituted in good faith. In re Shon (D. C. 1913) 212 Fed. 797. Where the amount paid by a corporation in contemplation of bankruptcy amply compensated its attorneys, where no petition to return is filed, they will not be required to pay back any excess. In re Union Dredging Co. (D. C. 1915) 225 Fed. 188.

Under the provision that the court may allow a reasonable fee to the attorney for the bankrupt in involuntary cases "while performing the duties herein prescribed," no such allowance will be made in a case where it is not shown that the bankrupt has performed the duties laid upon him by the law; but where it appears, on the contrary, that he has been actively engaged in trying to defeat or delay the proceedings. In re Woodard (D. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692. But the fact that the bankrupt has disobeyed an order of the court requiring him to turn over money to his trustee, and has fled the jurisdiction, and is in contempt, will not prevent the allowance of a proper fee to his attorney for services rendered in the course of the proceedings before the occurrence of the contempt, such misconduct on the part of the bankrupt having been without the attorney's privity or complicity. In re Mayer (D. C. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 238.

The "duties" referred to in Bankruptcy Act, § 64b, to perform which the bankrupt is entitled to the service of an attorney to be paid out of the estate, are those imposed by section 7. Whitla & Nelson v. Boyd (1914) 213 Fed. 587, 130 C. C. A. 167, affirming judgment (D. C. 1913) In re Lane Lumber Co., 206 Fed. 780. Under § 64b, subsec. 3, and section 7, subsecs. 1 and 9 (post, § 9648), bankrupt held not entitled to attorney's fees for attending first meeting of creditors and the hearing on his application for a discharge. Attending sale of assets held not a duty within Bankruptcy Act. Getting his discharge held not a duty of bankrupt. In re Hammel (D. C. 1914) 211 Fed. 238.

The preparation of the bankrupt's petition and schedules is a work necessary to enable him to perform his duties under the act, and a proper and moderate fee should be allowed to his attorney out of the estate for this work, both in voluntary and involuntary cases. In re Fullick (D. C. 1912) 201 Fed. 463, 28 Am. Bankr. Rep. 634; In re Anderson (D. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; In re Mayer (D. C. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Kennedy (D. C. 1873) Fed. Cas. No. 7,700; In re Thompson (D. C. 1876) 13 N. B. R. 300, Fed. Cas. No. 13,938; In re Mansfield (D. C. 1872) Fed. Cas. No. 9,048; In re Averill, 1 Nat. Bankr. News, 544. Compare In re Matthews (D. C. 1899) 97 Fed. 772, 3 Am. Bankr. Rep. 265. The amount to be allowed for this service is not to be determined by the mere clerical labor involved, since the proper preparation of a schedule in bankruptcy requires a special kind of skill and knowledge. The systematizing, arrangement, and condensation of the matter should be considered. In re Andrews (D. C. 1875) 11 N. B. R. 59, Fed. Cas. No. 370. But where the work involves nothing that would be beyond the powers of any competent accountant, the fact that it was done by the bankrupt's attorney does not entitle him to charge, as against the estate, on a scale which would be strictly appropriate only for professional services properly so called. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am. Bankr. Rep. 749. The bankrupt's attorney is not entitled to a fee for posting up the bankrupt's books and making extra copies of the schedules. In re Connell & Sons (D. C. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474.

Where involuntary petition was brief, and bankrupt had consented to adjudication, and schedules were brief, an allowance to attorneys of petitioning creditors of $100 held sufficient. In re Atkins (D. C. 1915) 225 Fed. 639. An allowance of $25 to the attorney for an involuntary bankrupt, who only prepared the bankrupt's schedules, held sufficient. In re Fullick (D. C. 1912) 201 Fed. 463. Evidence of an attorney as to certain services rendered for the bankrupt after bankruptcy proceedings had been instituted and prior to the filing of the schedule held too vague to serve as a basis of a conclusion that the services were reasonably necessary to enable the bankrupt to perform its duties or a finding as to the value thereof. Whitla & Nelson v. Boyd (1914) 213 Fed. 587, 130 C. C. A. 167, affirming judgment In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780.

It is said that a bankrupt is not ordinarily entitled to the aid and presence of his counsel when attending before the referee or court for the purpose of giving information or undergoing ex-

amination, and hence his attorney should not be allowed fees out of the estate for such attendance upon the bankrupt, unless it is shown that there was some unusual contingency making his assistance really necessary. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am. Bankr. Rep. 749; In re Kross (D. C. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187. But see In re Mayer (D. C. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Michel (D. C. 1899) 95 Fed. 803; In re Clark (D. C. 1872) 43 How. Prac. 70, Fed. Cas. No. 2,803.

The bankrupt's attorney is not entitled to a fee for assisting in making good the bankrupt's claim to exemptions and procuring the setting apart of the same. In re Bohrman (D. C. 1915) 224 Fed. 287; In re O'Hara (D. C. 1909) 166 Fed. 384, 21 Am. Bankr. Rep. 508; In re Castleberry (D. C. 1906) 143 Fed. 1021, 16 Am. Bankr. Rep. 430. Nor for services rendered in proceedings to confirm a composition. In re Fogarty (1911) 187 Fed. 773, 109 C. C. A. 621, 26 Am. Bankr. Rep. 568. Nor for services in obtaining a judgment in favor of the bankrupt before the bankruptcy, though he may have a fee for collecting the judgment for the trustee. In re Blum (D. C. 1912) 193 Fed. 304, 28 Am. Bankr. Rep. 60. The allowance to the attorney should not include a fee for defending the bankrupt against charges of fraud or concealment of assets, or other matters involving his personal liability, civil or criminal. In re Mayer (D. C. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Felson (D. C. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185. Where the trustee in bankruptcy is opposing the allowance of a claim against the estate, as are also some of the bankrupt's creditors, the bankrupt's attorney is not entitled to assist in such proceeding at the expense of the estate. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780, 30 Am. Bankr. Rep. 749.

Services for which an attorney's fee is to be allowed in involuntary bankruptcy held such only as are proper professional service, and not to include conferring with creditors to induce them to join in the petition. In re Sage (D. C. 1915) 225 Fed. 397. Claim of a bankrupt's receiver appointed by a state court for fees and expenses held a matter for the bankrupt's trustees and creditors to determine, and hence the bankrupt's attorney was not entitled to fees for resisting such a claim. Whitla & Nelson v. Boyd (1914) 213 Fed. 587, 130 C. C. A. 167, affirming judgment In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780.

On the bankrupt's application for discharge, an allowance has generally been made to the attorney for his services in supporting the application, to the extent of a docket fee if there is no substantial opposition, which may be materially increased if opposition develops. In re Christianson (D. C. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710; In re Kross (D. C. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; In re Eidom (D. C. 1869) 3 N. B. R. 160, Fed. Cas. No. 4,315. But compare In re Brundin (D. C. 1901) 112 Fed. 306, 7 Am. Bankr. Rep. 296; In re Duran Mercantile Co. (D. C. 1912) 199 Fed. 961, 29 Am. Bankr. Rep. 450; Ex parte Hale (C. C. 1842) Fed. Cas. No. 5,910. But a contest over the discharge waged between certain individual creditors on the one side and the bankrupt on the other, and not conducted by the trustee as the representative of all the creditors, is a matter which should not involve the estate in liability for costs and fees, if the opposition proves unsuccessful. In re Keller (D. C. 1913) 207 Fed. 118, 31 Am. Bankr. Rep. 51. See In re Gillardon (D. C. 1911) 187 Fed. 289, 26 Am. Bankr. Rep. 103.

The allowance of a fee to the bankrupt's attorney in voluntary cases, and its amount, rest entirely in the sound judicial discretion of the court of bankruptcy. In re Smith (D. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re O'Connell (D. C. 1899) 98 Fed. 83, 3 Am. Bankr. Rep. 422; In re Burrus (D. C. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; In re Stotts (D. C. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Beck (D. C. 1899) 92 Fed. 889, 1 Am. Bankr. Rep. 535; In re Goodwin (1900) 2 Nat. Bankr. News, 445. The attorney of a voluntary bankrupt may be allowed a fee, payable out of the estate, for such professional services as were necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate, and perform his duties for the benefit of creditors, and receive his discharge if entitled thereto; and the fee is not necessarily to be restricted to such services as were specially beneficial to the estate or rendered primarily in its interest. In re Kross (D. C. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187. There can be no fixed fee for all cases, but the character and condition of the estate, the orders necessary to be secured for its protection, and the corresponding amount of time and attention required of the attorney, are all matters to be considered by the court in determining what is a reasonable amount in the circumstances. In re Burrus (D. C. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296.

A claim for attorney's fees for services rendered to the bankrupts after the institution of the bankruptcy proceedings must be determined by the court having jurisdiction of the administration of the estate, and cannot be determined by a bankruptcy court

exercising ancillary jurisdiction. Musica v. Prentice (C. C. A. 1914) 211 Fed. 326, affirming decree In re A. Musica & Son (D. C. 1913) 205 Fed. 413. Appeal dismissed Lazarus, Michel & Lazarus v. Prentice (1914) 34 Sup. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305.

38. —— **Attorneys for petitioning and other creditors.**—The court of bankruptcy is authorized to allow a reasonable fee to the attorney for the petitioning creditors in a case of involuntary bankruptcy, to be included in the costs of administration and paid out of the estate. Post, § 9648, cl. 3. And see In re Harrison Mercantile Co. (D. C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Silverman (D. C. 1899) 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re New York Mail S. S. Co. (C. C. 1870) 3 N. B. R. 627, Fed. Cas. No. 10,208; In re King (D. C. 1869) Fed. Cas. No. 7,780; In re O'Hara (D. C. 1868) Fed. Cas. No. 10,465; In re Jones (D. C. 1873) 9 N. B. R. 491, Fed. Cas. No. 7,451; Gordon v. Scott (D. C. 1868) 2 N. B. R. 86, Fed. Cas. No. 5,620; Dundore v. Coates (D. C. 1873) 6 N. B. R. 304, Fed. Cas. No. 4,142; In re Mead (D. C. 1871) Fed. Cas. No. 9,364. But such fee is allowable only in case an adjudication of bankruptcy is made upon the petition, for if the debtor successfully resists it there can be no allowance to the creditors. In re Black Diamond Copper Min. Co. (1906) 10 Ariz. 42, 85 Pac. 653. In case of an adjudication, the attorney for the creditors is entitled to this fee as of right, and its allowance or refusal is not a matter within the discretion of the court of bankruptcy. In re Curtis (1900) 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17. But the amount to be allowed is a question for the exercise of a sound judicial discretion, and to be determined upon a consideration of the nature and character of the services rendered, but if the sum allowed is deemed excessive, it will be reduced on appeal or review. In re Curtis (1900) 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; In re Sanger (D. C. 1871) 5 N. B. R. 54, Fed. Cas. No. 12,318. The fee will be paid out of the general funds of the estate, and lien creditors cannot be required to bear the expense of it or contribute to it. In re Freeman (D. C. 1911) 190 Fed. 48, 27 Am. Bankr. Rep. 16; In re Gillaspie (D. C. 1911) 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Allert (D. C. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101.

Petitioning creditors cannot be allowed, out of the estate, sums paid to their attorneys as retainers. In re Comstock (D. C. 1874) 9 N. B. R. 88, Fed. Cas. No. 3,075. Nor fees for services rendered in preserving the special and individual interests of such creditors, but only for such as were for the common benefit of all the creditors. In re Mead (D. C. 1871) Fed. Cas. No. 9,364.

If two separate petitions in involuntary bankruptcy are filed by different sets of creditors, the one fee allowable should go to the attorneys in that petition on which the adjudication is made. In re Southern Steel Co. (D. C. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476; Frank v. Dickey (1905) 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155. And if the petitions are consolidated, the fee must be divided between them according to the relative value of the services and the amount of work done by each. In re McCracken & McLeod (D. C. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95.

No allowance can be made out of the estate to the creditors who presented the petition, for services of an attorney rendered after the appointment of the trustee, as, in examining the bankrupt, sending out notices, attending sales, or the like, for such services are either for the benefit of the trustee or of the creditors individually. In re Silverman (D. C. 1899) 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re Harrison Mercantile Co. (D. C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Comstock (D. C. 1874) 9 N. B. R. 88, Fed. Cas. No. 3,075. But where the attorney for the petitioning creditors, concurrently with the petition or directly after it, prepared and presented a petition for an injunction restraining a mortgage trustee of the bankrupt from disposing of the property affected pendente lite it was held that he might be allowed a fee for this service. In re Harrison Mercantile Co. (D. C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419.

Counsel employed by creditors of a bankrupt to represent them in the bankruptcy proceedings must look to their clients for compensation and not to the estate of the bankrupt or to the court. In re Evans (D. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; Mechanics'-American Nat. Bank v. Coleman (C. C. A. 1913) 204 Fed. 24, 29 Am. Bankr. Rep. 396; In re Smith (D. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559. Especially where professional services are rendered for the benefit of a particular creditor, and not for all the creditors of the estate, or where they are in opposition to the interests of the general creditors, they cannot be compensated out of the estate in bankruptcy. In re Baxter (C. C. 1886) 28 Fed. 452; In re Hope Min. Co. (D. C. 1873) Fed. Cas. No. 6,682. But where the attorney for a particular creditor succeeds in an undertaking which materially benefits the estate as a whole, as, in discovering concealed assets or recovering property fraudulently transferred, he may be allowed a reasonable fee out of the estate, for though he may have

acted primarily in the interest of his own client, yet the result inures to the benefit of all. In re Medina Quarry Co. (C. C. A. 1911) 191 Fed. 815, 27 Am. Bankr. Rep. 466; In re E. I. Fidler & Son (D. C. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16; In re Medina Quarry Co. (D. C. 1910) 182 Fed. 508, 25 Am. Bankr. Rep. 405; Smith v. Cooper (1903) 120 Fed. 230, 56 C. C. A. 578, 9 Am. Bankr. Rep. 755; In re Evans (D. C. 1902) 117 Fed. 574.

There is no authority for allowance in bankruptcy proceedings of compensation from the estate for services of an attorney employed by a secured or nonsecured creditor. Mechanics'-American Nat. Bank v. Coleman (C. C. A. 1913) 204 Fed. 24. The right of creditors of a bankrupt to the allowance of attorney's commissions under their contracts considered. In re Hershberger (D. C. 1913) 208 Fed. 94.

Where notes of the bankrupt are placed in the hands of an attorney for collection before maturity, but are paid in due course of the bankruptcy proceedings and without suit, the holder is not entitled to an allowance for attorneys' fees thereon. In re Jenkins (D. C. 1912) 192 Fed. 1000, 27 Am. Bankr. Rep. 860.

Where proceedings for the recovery of property concealed or fraudulently transferred have been instituted by the trustee, who is represented therein by competent counsel, it is not the privilege of creditors to have their own counsel assist in such proceedings, and if they do, they are not entitled to fees out of the estate. In re Felson (D. C. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185.

The court will not charge the estate with fees to be allowed to attorneys for creditors, where the services rendered consisted in opposing the allowance of improper or fictitious claims against the estate, or securing their expunction after allowance, or defeating claims to priorities. In re Medina Quarry Co. (C. C. A. 1911) 191 Fed. 815, 27 Am. Bankr. Rep. 466; In re George Watkinson & Co. (D. C. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Harrison Mercantile Co. (D. C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419. But it seems that this may be done in cases where the trustee in bankruptcy has refused to make defense against such claims or to take the proper steps to defeat them. In re Roadarmour (1910) 177 Fed. 379, 100 C. C. A. 611, 24 Am. Bankr. Rep. 49; In re Little River Lumber Co. (D. C. 1900) 101 Fed. 558.

Where a creditor claims priority of payment out of the estate of the bankrupt, on the ground of his having a lien on particular property, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy and secures its allowance, though he cannot of course claim a fee out of the estate, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property. In re Rude (D. C. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319. And see In re Hershberger (D. C. 1913) 208 Fed. 94, 30 Am. Bankr. Rep. 635.

39. —— **Attorney for receiver.**—The number of attorneys employed by a bankrupt's receiver is not an element to be considered in allowing fees, but the allowance should be made as though but one attorney had been employed. Where attorneys for moving creditors and for a bankrupt's trustee were also attorneys for the receiver, they were only entitled to charge the receiver for services rendered to him after his appointment. In re Falkenberg (D. C. 1913) 206 Fed. 835.

CHAPTER THREE

Bankrupt

Sec.
9587. Acts of bankruptcy.
9588. Who may become bankrupts.
9589. Partners.
9590. Exemptions of bankrupts.
9591. Duties of bankrupts.
9592. Death or insanity of bankrupts.
9593. Protection and detention of bankrupts.
9594. Extradition of bankrupts.
9595. Suits by and against bankrupts.
9596. Compositions, when confirmed.
9597. Compositions, when set aside.
9598. Discharges, when granted.
9599. Discharges, when revoked.
9600. Co-debtors of bankrupts.
9601. Debts not affected by a discharge.

§ 9587. (Act July 1, 1898, c. 541, § 3, as amended, Act Feb. 5, 1903, c. 487, § 2.) Acts of bankruptcy.

Acts of Bankruptcy.—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or re-

moved, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses,

and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. (30 Stat. 546. 32 Stat. 797.)

In this section, as originally enacted, in subdivision a thereof, clause 4 was as follows:

"or (4) made a general assignment for the benefit of his creditors;"

It was amended by Act Feb. 5, 1903, c. 487, § 2, cited above, by adding to the clause the further provision, beginning with the words "or, being insolvent," etc., to the end of clause 4 as set forth here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

A conveyance, etc., by a person adjudged bankrupt, made within four months prior to the filing of the petition, with intent to hinder, delay, or defraud his creditors, is void as against them, by section 67 of this act, post, § 9651.

The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, by section 70 of this act, post, § 9654.

A preference, as defined by section 60 of this act, post, § 9644, given by a bankrupt within four months before the filing of a petition, or after the filing of the petition and before the adjudication, if the person receiving it, or to be benefited thereby, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference, is voidable by the trustee, by said section of this act.

Notes of Decisions

I. Acts of bankruptcy

(A) *Acts of bankruptcy in general and by individuals*

1. Construction of statute.
2. Nature and effect of an act of bankruptcy.
3. Insolvency as an element in acts of bankruptcy.
4. Fraudulent conveyances.
5. —— Wrongful or fraudulent intent.
6. —— Presumption and proof of fraudulent intent.
7. Concealment or removal of property.
8. Giving a preference.
9. —— Intention to give a preference.
10. —— Form of transfer or conveyance.
11. —— Payment in money.
12. —— Intention of debtor when presumed.
13. Suffering a preference through legal proceedings.
14. —— Attachment.
15. —— Failure to vacate or discharge lien.
16. —— Meaning of "suffer or permit."
17. —— Entry of judgment on warrant of attorney.
18. Assignment for creditors.
19. —— What constitutes general assignment.
20. —— Invalid assignment.
21. —— Solvency no defense.
22. Appointment of receiver or trustee.
23. —— On application of debtor.
24. —— On application of creditors or others.
25. Admission of insolvency and willingness to be adjudged bankrupt.

(B) *Acts of bankruptcy by partnerships*

26. In general.
27. Transfers of property and preferences.
28. Assignment for creditors.
29. Insolvency of firm and of partners.

(C) *Acts of bankruptcy by corporations*

30. Assignment for creditors.
31. Transfers of property.
32. Appointment of receiver.
33. Suffering preference through legal proceedings.
34. Admission of insolvency and willingness to be adjudged bankrupt.
35. —— Who authorized to make admission.

II. Time for filing petition in bankruptcy

36. Commission of act of bankruptcy.
37. Recording or registering of transfer or assignment.
38. Taking notorious, exclusive, or continuous possession.

III. Issue and proof of insolvency

39. Existence and date of insolvency.
40. Issue of insolvency.
41. What constitutes insolvency.
42. —— Fair valuation of property.
43. —— Comparison of assets and liabilities.
44. —— Deduction of property fraudulently transferred or concealed.
45. Burden of proof and evidence.
46. Examination of alleged bankrupt.

I. ACTS OF BANKRUPTCY

(A) *Acts of bankruptcy in general and by individuals*

1. Construction of statute.—The statute must be strictly construed with reference to the commission of an act of bankruptcy. No one can be adjudged bankrupt on the ground of his having committed an act which, though not among those enumerated by the statute, produces equivalent results. The acts of bankruptcy defined and classified by the statute cannot be enlarged by construction so as to include transactions similar or analogous to, but not identical with those specified. In re Empire Metallic Bedstead Co. (C. C. A. 1899) 98 Fed. 981, 3 Am. Bankr. Rep. 575.

2. Nature and effect of an act of bankruptcy.—Ignorance of the law is no defense to a proceeding founded on the

commission of an act of bankruptcy, and an adjudication cannot be avoided on the ground that the respondent did not know that there was such a statute in existence as the bankruptcy law. In re Craft (D. C. 1868) 1 N. B. R. 378, Fed. Cas. No. 3,316.

Legal liability for the commission of an act of bankruptcy cannot be avoided by the subsequent rescission of the transaction constituting the act of bankruptcy. In re Ryan (D. C. 1873) Fed. Cas. No. 12,183.

Where the execution of a general assignment for the benefit of creditors is proved or admitted, an adjudication of bankruptcy will be made, though the respondent denies that he had any actual intention to defeat or delay the operation of the bankruptcy act. In re Smith (D. C. 1869) 3 N. B. R. 377, Fed. Cas. No. 12,974.

A payment of money by an insolvent debtor to one creditor in preference to others is none the less an act of bankruptcy on which a petition and adjudication may be based because it was made in good faith, and was a judicious act and necessary to preserve valuable property. In re Merchants' Ins. Co. (D. C. 1871) 6 N. B. R. 43, Fed. Cas. No. 9,441.

It is not sufficient ground for dismissing a petition in involuntary bankruptcy, against a debtor who has given a preference, that he only yielded to the pressure or urgent solicitation of the creditor, or to threats of legal process or arrest and to the fear of disgrace. Clarion Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542; In re Batchelder (D. C. 1869) 3 N. B. R. 150, Fed. Cas. No. 1,098; In re Dibblee (D. C. 1869) 2 N. B. R. 617, Fed. Cas. No. 3,884; Campbell v. Traders' Nat. Bank (D. C. 1871) 3 N. B. R. 498, Fed. Cas. No. 2,370.

An act of bankruptcy committed by one of two persons who are jointly and severally liable for a debt, but who are not partners, is no ground for an adjudication of bankruptcy against the other. James v. Atlantic Delaine Co. (C. C. 1875) 11 N. B. R. 390, Fed. Cas. No. 7,179.

3. Insolvency as an element in acts of bankruptcy.—In determining the question of the commission of an act of bankruptcy, where insolvency is a necessary element, that term is to be understood in the sense in which it is defined by the first section of the bankruptcy act, namely, that "a person shall be deemed insolvent, when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son (1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; In re Golden Malt Cream Co. (1908) 164 Fed. 326, 90 C. C. A. 258, 21 Am. Bankr. Rep. 36; Hewitt v. Boston Straw Board Co. (1913) 214 Mass. 260, 101 N. E. 424.

In respect to the transfer, concealment, or removal of property with intent to delay or defraud creditors, the test of liability to be adjudicated a bankrupt is insolvency at the time of the filing of the petition. If the debtor was insolvent at the time the fraudulent conveyance or concealment was made, yet regains a condition of solvency before a petition is filed, the petition must be dismissed. Conversely, if he was not insolvent at the time of the fraudulent transfer or concealment, yet becomes insolvent within the next four months, and is insolvent at the time creditors file a petition, he may be adjudged bankrupt. George M. West Co. v. Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; Acme Food Co. v. Meier (1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

A conveyance or transfer of property by a debtor with intent to hinder, delay, or defraud his creditors, or any of them, constitutes an act of bankruptcy, although he may have been solvent at the time. In re Larkin (D. C. 1908) 168 Fed. 100, 21 Am. Bankr. Rep. 711.

Where the act of bankruptcy charged is the giving or suffering of a preference, the debtor cannot be adjudged bankrupt if he was solvent at the time the preference was given, though insolvent at the time of the filing of the petition, nor when he is solvent at the date of the petition, though insolvent when the act of bankruptcy was committed. In re Rome Planing Mill Co. (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; George M. West Co. v. Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; In re Dunham (D. C. 1868) 2 N. B. R. 17, Fed. Cas. No. 4,143. But see Acme Food Co. v. Meier (1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550, holding that, if the act of bankruptcy charged is the giving or permitting a preference, insolvency must have existed at the time of the preference, but that solvency or insolvency at the time of the filing of the petition can have only a reflex importance as evidence. Compare Johansen Bros. Shoe Co. v. Alles (C. C. A. 1912) 197 Fed. 274, 116 C. C. A. 636, 28 Am. Bankr. Rep. 299.

When the act of bankruptcy charged is the making of a general assignment for the benefit of creditors, it is not necessary to show that the debtor was insolvent either at the date of the assignment or at the time of the filing of the petition. George M. West Co. v. Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr.

Rep. 463; Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

To render a transfer of property void under the statute, it is not necessary that the debtor should have known or believed himself to be insolvent. The act treats insolvency as a condition of fact, not of belief. Hence, when a man, insolvent in fact, gives a mortgage to an existing creditor, he necessarily does so with a view to giving him a preference. Hall v. Wager (C. C. 1871) 5 N. B. R. 181, Fed. Cas. No. 5,951.

4. Fraudulent conveyances.—A voluntary conveyance of all his property by an insolvent debtor to a trustee, to be converted into money and distributed to the creditors of the grantor, though it is made for the equal benefit of all the creditors, without preferences and without actual fraud, and though it would be good at common law, is nevertheless an act of bankruptcy, as being a transfer of property with intent to hinder, delay, and defraud creditors, since its necessary operation is to deprive the creditors of the rights, advantages, and safeguards provided for them by the bankruptcy law. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704. And see Gassett v. Morse (D. C. 1843) 21 Vt. 627, Fed. Cas. No. 5,264. But compare Githens v. Shiffler (D. C. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453.

A voluntary general assignment for the benefit of creditors, with or without preferences, by an insolvent debtor, is a fraud upon the bankruptcy act, and made with intent to "hinder, delay, and defraud his creditors," since its necessary effect is to defeat the operation of the bankruptcy act, and the right of creditors to such an administration of the assets as that act provides. In re Gutwillig (1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388.

One who, being insolvent, applies to the court for the appointment of a receiver for personal property, transfers his property within the meaning of section 1, cl. 25 (ante, § 9585), defining "transfer." In re Muir (D. C. 1914) 212 Fed. 495.

A gift by an insolvent debtor of all his property to his wife is an act of bankruptcy. In re Alexander (D. C. 1870) Fed. Cas. No. 161; In re Hughes (D. C. 1910) 183 Fed. 872, 25 Am. Bankr. Rep. 556. So is a deed of valuable property to any person made without consideration. In re Leland (D. C. 1910) 185 Fed. 830, 25 Am. Bankr. Rep. 209. And see In re Donnelly (D. C. 1912) 193 Fed. 755, 27 Am. Bankr. Rep. 504. So is a conveyance of property by a father to his sons in consideration of their agreement to support him. Avery v. Johann (D. C. 1869) 3 N. B. R. 144, Fed. Cas. No. 675. So is the giving of a mortgage of the whole of a debtor's estate and effects to one creditor, with intent to hinder and delay the others. Baldwin v. Rosseau (C. C. 1843) Fed. Cas. No. 803; In re Cowles (D. C. 1867) 1 N. B. R. 280, Fed. Cas. No. 3,297; In re McKibben (D. C. 1875) 12 N. B. R. 97, Fed. Cas. No. 8,859.

A conveyance made in good faith and intended only as security for an existing debt, or to secure the grantee as a surety for the grantor, does not constitute an act of bankruptcy. Acme Food Co. v. Meier (1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550. Paying a bonus to secure a loan on a chattel mortgage, the proceeds of which are used to pay off a prior mortgage, is not an act of bankruptcy. In re Hallin (D. C. 1912) 199 Fed. 806, 28 Am. Bankr. Rep. 708. Where a bill in equity asking for the appointment of a receiver is brought against a corporation, and the defendant makes no opposition to the suit, but tacitly permits the receiver to be appointed and to take charge of its property, this cannot be said to be a transfer or conveyance within the meaning of the bankruptcy law. In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; In re Henry Zeltner Brewing Co. (D. C. 1902) 117 Fed. 799, 9 Am. Bankr. Rep. 63; In re Harper & Bros. (D. C. 1900) 100 Fed. 266, 3 Am. Bankr. Rep. 804. The exchange of goods covered by a warehouse receipt in the warehouse of the vendor for others of equal or less value is not an act of bankruptcy. Sharp v. Philadelphia Warehouse Co. (C. C. 1880) Fed. Cas. No. 12,709a. A transfer of firm property from one member of a solvent firm to another is not an act of bankruptcy. In re Munn (D. C. 1873) Fed. Cas. No. 9,925. A transfer of property by an individual member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership which will sustain a petition in bankruptcy against it. In re Stovall Grocery Co. (D. C. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537. But the withdrawal of money from an insolvent firm by one of the partners, and its secret transfer to a third person, in connection with other concurrent transactions between the partners, held a conveyance and transfer of property with intent to hinder and delay creditors, by both partners, which constituted an act of bankruptcy. In re Shapiro (D. C. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839.

Where a retail merchant had ordered goods for a customer, but the latter, on inspection, refused to accept them,

whereupon the merchant returned the goods to the seller, held, that this was not an act of bankruptcy, not being done with a view to giving a preference or defrauding his creditors, but as a prudent and proper business transaction. Doan v. Compton (D. C. 1869) 2 N. B. R. 607, Fed. Cas. No. 3,940.

An indorsement of a bill of lading to a third person, to protect the property from attachment and save it for the benefit of all the creditors, is not an act of bankruptcy. Ex parte Potts (D. C. 1842) Fed. Cas. No. 11,344.

It is not an act of bankruptcy for a person to transfer property, after he has become involved, in pursuance of an agreement made while he was in prosperous circumstances, to transfer specific property as collateral security for advances made. Id.

5. —— **Wrongful or fraudulent intent.**—An actual, wrongful or fraudulent intent to hinder and delay creditors, or to defraud them, is an essential element of this act of bankruptcy. In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; In re McLoon (D. C. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719. An intent to hinder and delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone them in the collection or enforcement of their claims. In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581. An act of bankruptcy is committed by the making of a transfer or conveyance with the intention of obstructing creditors in their endeavor to collect their claims, or of putting the property temporarily out of their reach, although there is no intention to defraud them, and although it is the intention of the debtor that ultimately all crediors shall receive full satisfaction. In re Hughes (D. C. 1910) 183 Fed. 872, 25 Am. Bankr. Rep. 556. To constitute this act of bankruptcy, it is not necessary that there should be an intent both to hinder, to delay, and to defraud creditors, but it is sufficient if either of these results is intended. In re Muir (D. C. 1914) 212 Fed. 495.

While one may not connive with others to get his property out of the way, yet a fair and open disposition of it on a full consideration cannot be given a fraudulent character, although it may incidentally have the effect of leaving nothing which creditors can reach, and even though the debtor does this in order to meet some of his obligations rather than others. Githens v. Shiffler (D. C. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453.

The statute nowhere denounces a mere intention on the part of an insolvent debtor not to become a bankrupt; and the doing or permitting of any of the things specified in this section of the act, for the purpose and with the intention of escaping being thrown into bankruptcy, is not necessarily doing or permitting them with intent to hinder, delay, or defraud creditors. In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 453.

It is not necessary to show that any creditor actually was hindered or delayed by the debtor's proceedings. Williams v. Nunn, 1 Taunt. 270. If the conveyance was made with intent to delay or defraud one particular creditor, but its necessary effect is to delay or defraud all, it is an act of bankruptcy. In re Williams (D. C. 1869) Fed. Cas. No. 17,703. But a conveyance by a debtor of property to certain creditors cannot be charged as an act of bankruptcy, when he had at the time no other creditors. Brake v. Callison (1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797.

6. —— **Presumption and proof of fraudulent intent.**—The fraudulent intention actuating a transfer or conveyance is not necessarily to be proved explicitly, but it may be made out by inference from the circumstances of the transaction, attention being given to all the acts done and all the circumstances surrounding the transaction. Merchants' Nat. Bank v. Cole (1907) 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44; In re Larkin (D. C. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711; In re Minard (D. C. 1907) 156 Fed. 377, 19 C. C. A. 485. An intention to delay or defraud creditors may be inferred from the fact that that is the natural and necessary result of the transfer in question. Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (1904) 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610.

Where a partnership is dissolved, and the whole stock in trade is transferred to the only solvent partner, for the purpose of settling the affairs of the firm, a sale of the whole stock by such partner is not an act of bankruptcy, for the circumstances rebut any presumption of fraud. In re Weaver (D. C. 1874) 9 N. B. R. 132, Fed. Cas. No. 17,307. The sale of a stock of goods will not be considered an act of bankruptcy where there is no evidence of the seller's insolvency at the time of the sale, and it appears that his only object in making the sale was to change his business. In re Valliquette (D. C. 1870) 4 N. B. R. 307, Fed. Cas. No. 16,823.

7. **Concealment or removal of property.**—Concealment is the doing of an act, whether by way of conveyance or transfer, by which the true title and ownership of the debtor is kept from the view of the creditor, when done with the intent and purpose of preventing its being attached or taken on execution. O'Neil v. Glover (Mass. 1855) 5 Gray 144.

Within the meaning of this section,

the word "conceal" means to hide or withdraw from observation, to carry or keep from sight, to prevent discovery of, or to withhold knowledge of; and hence a petition alleging that the bankrupt did deny and conceal his ownership of a particular bank, so that the creditors, by virtue of deposits carried by them in the bank, were, by the acts and declarations of the bankrupt, mislead into the belief that the bank belonged to another, and that within four months the bankrupt concealed the assets of the bank by turning the same over to the executor of a decedent, to be by the latter administered as property of the decedent, sufficiently alleges concealment of property with intent to defraud creditors, constituting an act of bankruptcy. In re Glazier (D. C. 1912) 195 Fed. 1020, 28 Am. Bankr. Rep. 391.

Where a bankrupt assigned to the executor of a decedent, to be administered as property of the estate, the assets of a bank which was in fact owned by the bankrupt, and did this undoubtedly for the purpose of conserving it in some manner for his own use, retaining an equity in the same to redeem in case there was more property than enough to pay the creditors, the bankrupt's intent concerning the bank and its assets must be regarded as an intent to conceal his property, whether he had any right to or control of all of his property during the time of such concealment not being material on the question of intent. Id.

Where a debtor sells his property for the purpose of investing the proceeds in a legitimate business enterprise, into which he expects to enter, and shows good faith in respect to the care of the money received therefor, he is not to be adjudged bankrupt simply because he kept the proceeds in cash in his own hands, instead of converting the fund again into tangible property such as could have been levied on under legal process, for this is not a concealment of his property with intent to defraud creditors. Fox v. Eckstein (D. C. 1871) 4 N. B. R. 373, Fed. Cas. No. 5,009.

Consigning property to a person out of the district, by one who contemplates bankruptcy, and with the intent to keep the property from the trustee, amounts to removing it from the district with intent to defraud his creditors. In re Hammond (D. C. 1869) Fed. Cas. No. 5,999.

Where a debtor procured an attachment to issue upon a fictitious debt and to be levied on the property, for the purpose of preventing the levy of an attachment by a genuine creditor, this amounted to a concealment of the property. In re Williams (D. C. 1869) Fed. Cas. No. 17,703; In re Hussman (D. C. 1869) 2 N. B. R. 437, Fed. Cas. No. 6,951. But see In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581, holding that the word "removed," as used in this section of the statute, whether taken by itself or viewed in the light of the context, signifies an actual or physical change in the position or locality of the property constituting the subject of the removal, and is not an apt expression for the taking possession of the property by a receiver under competent authority. And the failure of the debtor to oppose and contest the appointment of a receiver is not "permitting" his property to be concealed or removed. Vaccaro v. Security Bank (1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

Where a partner in an insolvent firm withdrew from the firm's bank account a certain sum of money, by a check which he at once deposited to his personal account in another bank, but thereupon drew a larger check upon that bank and deposited it to the firm's credit in its bank, the transaction was held not to constitute a withdrawal of firm funds nor an act of bankruptcy. In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576.

Where a debtor absconds, taking with him his available assets, he may be adjudged bankrupt on the ground of having "removed" his property with intent to defraud his creditors. In re Filer (D. C. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332. But it is not an act of bankruptcy on the part of one partner to influence or procure the departure of another from the state, although the circumstances are such that the absconding partner makes himself liable to the law. In re Terry (D. C. 1870) Fed. Cas. No. 13,836.

Whereas this section makes it an act of bankruptcy if one shall have "permitted" the concealment or removal of his property, one does not permit a removal of property who has neither the power nor the right to prevent its being taken away. In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581. Where a creditor of a bankrupt removed goods from the bankrupt's store during the latter's absence, and retained possession of them against his protest, the bankrupt's failure to take legal proceedings to recover the possession of the goods did not amount to "permitting" their removal, so as to constitute an act of bankruptcy, in the absence of any evidence of collusion. In re Belknap (D. C. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326.

8. Giving a preference.—The bankruptcy law does not prohibit an insolvent debtor from dealing with or exchanging his property before proceedings in bankruptcy are instituted against him, provided there is no purpose to delay or defraud his creditors, or to give a preference to any one, and the value of his estate is not thereby im-

paired. Stewart v. Platt (1879) 101 U. S. 731, 25 L. Ed. 816.

Where a corporation conveys all its property in trust, with directions to the trustee to sell the same, and, out of the proceeds, to pay first the costs and expenses, second, debts entitled to priority under the laws of the state, third, the claims of the creditors of the company, whose names, with the amounts due them, are all set forth in the deed, and fourth, to pay over to the grantor any balance which may remain, the deed does not effect a preference to any creditor, since all are treated alike, and it cannot be made the basis of a petition in involuntary bankruptcy on allegations of preferences. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704.

To constitute an act of bankruptcy by the giving of a preference, the transfer or payment must have been made at a time when the debtor was insolvent. Wilder v. Watts (D. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57. And it must have been made within four months before the filing of a petition in bankruptcy against him. In re Bogen (D. C. 1904) 134 Fed. 1019, 13 Am. Bankr. Rep. 529.

A transfer of property, though made by an insolvent person to a creditor, is not an act of bankruptcy, unless there was, at the time of the transfer, some other creditor holding a claim or demand against the insolvent which would be provable in bankruptcy. Beers v. Hanlin (D. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745. A transfer of property by the bankrupt to his wife, she being a creditor, is as much a preference as if made to any other creditor. In re McCartney (D. C. 1911) 188 Fed. 815, 26 Am. Bankr. Rep. 548. An accommodation indorser of notes, even before payment, is a creditor of the maker, in the sense that a transfer of property to him may be a preference. In re O'Donnell (D. C. 1904) 131 Fed. 150, 12 Am. Bankr. Rep. 621. And so is a surety on the bond of a contractor for government work, who, under the federal statute, is directly liable to laborers to whom the contractor is indebted for labor performed under the contract. United Surety Co. v. Iowa Mfg. Co. (1910) 179 Fed. 55, 102 C. C. A. 623.

The payment of a debt of three dollars by a firm engaged in trade is not such a substantial preference as will constitute an act of bankruptcy sufficient in itself to sustain an involuntary petition. In re Stovall Grocery Co. (D. C. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537. The payment of a $50 note to a bank, in discharge of a just debt, and made in the ordinary course, and in the expectation by the bankrupt of continuing in business and of ultimately paying all his debts, this amount being trifling in comparison with the total amount of his debts, does not constitute a preference sufficient to justify an adjudication in bankruptcy. In re Hallin (D. C. 1912) 199 Fed. 806, 20 Am. Bankr. Rep. 708.

Where a debtor sold some of his property, for nearly its full value, for the purpose of raising money to satisfy a creditor who was threatening him with a criminal prosecution, but the creditor refused to receive the money, and so derived no benefit from the transaction, the mere sale, though made with the intention of preferring that creditor, was not an act of bankruptcy. In re Belknap (D. C. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326.

The retirement of one partner from the firm, and the consequent transfer of assets and liabilities to the other, are not necessarily acts of bankruptcy by the partnership, but may be so if intended to give a preference to separate creditors over partnership creditors, or in any other way to cover actual or legal fraud. Ex parte Shouse (D. C. 1842) Fed. Cas. No. 12,815; In re Waite (D. C. 1868) Fed. Cas. No. 17,044.

Where a debtor, being the owner of a leasehold interest in land having a term of years to run but not assignable without the consent of the landlord, sells the same and applies part of the proceeds in paying the arrears of rent due, taxes on the property, and the incidental expenses of the sale, such payment does not constitute a preference of the creditors paid, but merely a means of realizing the value of the leasehold, and therefore is not an act of bankruptcy on which a petition against the debtor may be maintained. In re Pearson (D. C. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 482.

9. —— Intention to give a preference.—To constitute an act of bankruptcy by the giving of a preference, there must be an intention on the part of the debtor to prefer one or more creditors over others. Goodlander-Robertson Lumber Co. v. Atwood (1907) 152 Fed. 978, 82 C. C. A. 109, 18 Am. Bankr. Rep. 510.

A payment made, in the establishment of an insolvent partnership, out of its funds, by the recognized agent of the partners, without objection on their part, which has the effect to produce a preference, will be regarded as having been made by the partnership with the intention of giving a preference. Sedgwick v. Sheffield (D. C. 1872) Fed. Cas. No. 12,624. Where a wife is the owner of a business, but intrusts its entire management and control to her husband, his acts and intentions, in the giving of preferences to creditors, may constitute acts of bankruptcy on which she may be adjudged bankrupt. Graham v. Stark (D. C. 1869) Fed. Cas. No. 5,676. And see In re Berkebile (D. C. 1905) 144 Fed. 572.

Where a transfer of property by an insolvent debtor with intent to prefer

a creditor is made the basis of a petition in involuntary bankruptcy against him, the intent of the debtor is alone material; it is not necessary to show the intent with which the creditor received the transfer, nor that he had reasonable cause to believe a preference was intended. In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Ed. W. Wright Lumber Co. (D. C. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; Thompson v. First Nat. Bank (1904) 84 Miss. 54, 36 South. 65; In re Truitt (D. C. 1913) 203 Fed. 550, 29 Am. Bankr. Rep. 570.

Under § 60b, when a trustee in bankruptcy sues to set aside a conveyance of property on the ground of its being an unlawful preference, he must show, not only that the bankrupt intended to give a preference, but also that the creditor receiving it had reasonable cause to believe that a preference was intended. But as regards the commission of an act of bankruptcy, no such knowledge or belief on the part of the creditor is required, nor any unlawful intent on his part. In this case, the law looks only to the intention of the debtor. Hence it follows that a transaction may constitute an act of bankruptcy, such as to warrant an adjudication against the debtor, although the conveyance is not voidable under the law. Alter v. Clark (D. C. 1911) 193 Fed. 153; In re Drummond (D. C. 1873) 1 N. B. R. 231, Fed. Cas. No. 4,093; In re Williams (D. C. 1869) 3 N. B. R. 286, Fed. Cas. No. 17,703; In re Locke (D. C. 1868) 2 N. B. R. 382, Fed. Cas. No. 8,439; In re Beck (D. C. 1868) 1 N. B. R. 588, Fed. Cas. No. 1,205. The verdict on the question as to whether an act of bankruptcy has been committed in giving a preference will not affect the question of the right to recover back the property transferred or the right to a discharge. In re Dibblee (D. C. 1869) 2 N. B. R. 617, Fed. Cas. No. 3,884; Harmanson v. Bain (D. C. 1877) 15 N. B. R. 173, Fed. Cas. No. 6,072.

10. —— Form of transfer or conveyance.—A preference may be given by an insolvent debtor by a conveyance of property by way of absolute sale or gift. Peckham v. Burrows (C. C. 1844) Fed. Cas. No. 10,897; In re Warner (D. C. 1871) 5 N. B. R. 414; Fed. Cas. No. 17,177. Or by a mortgage, pledge, or other form of security. In re Edelman (1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238; In re Riggs Restaurant Co. (1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; Arnold v. Maynard (C. C. 1842) Fed. Cas. No. 561; Baldwin v. Rosseau (C. C. 1843) Fed. Cas. No. 803; In re Ryan (D. C. 1873) Fed. Cas. No. 12,183; Jones v. Sleeper (D. C. 1843) Fed. Cas. No. 7,496; In re Rogers (D. C. 1869) 2 N. B. R. 397, Fed. Cas. No. 12,002. But see Martin v. Hulen (1906) 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510. Where a deed, originally intended to operate as a mortgage, was withheld from record by agreement of the parties, and was afterwards allowed by their agreement to stand as security for any balance in favor of the grantee, and later, at a time when the grantor was insolvent and within four months of the filing of a petition in bankruptcy against him, the deed was placed on record, and shortly thereafter the parties agreed that it should operate as an absolute transfer of the property, an act of bankruptcy was committed when the deed was recorded, as it then operated as a forbidden preference. In re Donnelly (D. C. 1912) 193 Fed. 755, 27 Am. Bankr. Rep. 504. But the giving of a mortgage by the debtor upon a present consideration and in good faith, to raise a contested attachment and to pay overdue paper, to enable the debtor to continue in business, is not an act of bankruptcy. In re Sanford (D. C. 1873) 7 N. B. R. 351, Fed. Cas. No. 12,310. Nor is the giving of a chattel mortgage to secure an antecedent debt, where it is given in good faith in renewal of a prior mortgage covering the same property, nor even where it includes additional property, if the mortgagor receives a present further consideration sufficient to warrant the additional security. In re Cutting (D. C. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751.

Execution of deed of trust or assignment of mortgaged property for payment of the mortgages and payment of any balance to general creditors held an act of bankruptcy, within subdivision a(4) of this section. In re Cutler & John (D. C. 1916) 228 Fed. 771.

Where an alleged bankrupt was a stockholder in an insolvent bank, in the hands of the bank commissioner, and he executed a note to the commissioner for his double liability, secured by a mortgage on nonexempt real property, he was guilty of an act of bankruptcy. Under subdivision a(2) of this section a transfer to a trustee for creditors will be treated as if made direct to the creditors. Fulkerson v. Shaffer (1914) 217 Fed. 355, 153 C. C. A. 271.

An assignment by an insolvent debtor to a creditor of earnings to become due under a building contract, with intent to prefer that creditor, is an act of bankruptcy. In re O'Donnell (1904) 131 Fed. 150, 12 Am. Bankr. Rep. 621.

11. —— Payment in money.—Money is property within the meaning of the bankruptcy law, and the payment of a debt in money is a transfer of property, such as will constitute an act of bankruptcy, if the other elements are present. Pirie v. Chicago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; Boyd v. Lemon & Gale Co. (1902) 114 Fed. 647, 8 Am. Bankr. Rep. 81; In re Pinson (D. C. 1910) 180 Fed. 787,

24 Am. Bankr. Rep. 804; In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Foley (D. C. 1905) 140 Fed. 300, 15 Am. Bankr. Rep. 830; In re Ft. Wayne Electric Corp. (D. C. 1899) 96 Fed. 803; In re Conhaim (D. C. 1899) 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Wise (D. C. 1900) 2 Nat. Bankr. News, 151; Payne v. Solomon (D. C. 1876) 14 N. B. R. 162, Fed. Cas. No. 10,856. If the debtor was insolvent and a preference was intended, it is immaterial that the debt was a just one and that no fraud was perpetrated or designed. Brock v. Terrell (D. C. 1869) 2 N. B. R. 643, Fed. Cas. No. 1,914. It is no defense to a petition founded on a preferential payment that it was made in the ordinary course of business. In re Oregon Bulletin Printing & Pub. Co. (D. C. 1876) 13 N. B. R. 503, Fed. Cas. No. 10,559. But payments made by an alleged bankrupt to creditors in the due course of business and without an intent to prefer such creditors, and without knowledge of a claim subsequently made, which, if sustained, might render the debtor insolvent, do not constitute acts of bankruptcy. In re Morgan (D. C. 1911) 184 Fed. 938, 25 Am. Bankr. Rep. 861.

Where an alleged bankrupt while hopelessly insolvent paid a creditor in settlement of an antecedent debt, such payment was a preference and an act of bankruptcy, though the insolvent had no actual intent to prefer. In re Condon (1913) 209 Fed. 800, 126 C. C. A. 524, affirming judgment (D. C. 1912) 198 Fed. 947.

It is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid, the transaction being in effect a transfer of property with intent to give a preference. Boyd v. Lemon & Gale Co. (1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81.

The payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor and an act of bankruptcy. Johnson v. Wald (1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84. And see Goldman v. Smith (D. C. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266.

The settlement of a suit brought on a note, by the attorney for an alleged bankrupt, who himself paid the money and had not been repaid when the petition was filed, held not an act of bankruptcy. In re Kerlin (1913) 209 Fed. 42, 126 C. C. A. 184.

Payments made to cover the ordinary and necessary running expenses of the debtor's business, of comparatively small amounts, or not larger than the debtor has been in the habit of making, do not constitute the giving of preferences, where there was no design to give the payees an advantage over other creditors, but merely an endeavor to keep the business alive. In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Union Feather & Wool Mfg. Co. (1902) 112 Fed. 774, 50 C. C. A. 524, 7 Am. Bankr. Rep. 472; In re Columbia Real Estate Co. (D. C. 1913) 205 Fed. 980, 30 Am. Bankr. Rep. 471; Smith v. Teutonia Ins. Co. (D. C. 1872) Fed. Cas. No. 13,115. CONTRA, see In re Kenyon (1871) 1 Utah, 47, 6 N. B. R. 238.

12. —— Intention of debtor when presumed.—When a transfer of property, or the giving of security, or the payment of a debt, by an insolvent debtor to one of his creditors, actually and necessarily operates to give that creditor a preference over others, it will be presumed that the debtor intended to bring about that result, on the principle that every man is presumed to intend the natural and necessary consequences of his voluntary acts. Toof v. Martin (1871) 13 Wall. 40, 20 L. Ed. 481; Traders' Nat. Bank v. Campbell (1871) 14 Wall. 87, 20 L. Ed. 832; Johnson v. Wald (1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; Rex Buggy Co. v. Hearick (1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; In re Flint Hill Stone & Const. Co. (D. C. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; In re Smith (D. C. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; In re McGee (D. C. 1901) 105 Fed. 895, 5 Am. Bankr. Rep. 262; Catlin v. Hoffman (C. C. 1874) 9 N. B. R. 342, Fed. Cas. No. 2,521; Campbell v. Traders' Nat. Bank (D. C. 1871) 3 N. B. R. 498, Fed. Cas. No. 2,370; Haughey v. Albin (D. C. 1869) 2 N. B. R. 399, Fed. Cas. No. 6,222; Morgan v. Mastick (D. C. 1869) 2 N. B. R. 521, Fed. Cas. No. 9,803; In re Black (D. C. 1869) 1 N. B. R. 353, Fed. Cas. No. 1,457; In re Craft (D. C. 1868) 1 N. B. R. 378, Fed. Cas. No. 3,316; Webb v. Sachs (D. C. 1877) 15 N. B. R. 168, Fed. Cas. No. 17,325; In re Perry (D. C. 1873) Fed. Cas. No. 10,999; Warren v. Delaware, L. & W. Ry. Co. (D. C. 1872) 7 N. B. R. 451, Fed. Cas. No. 17,194; Warren v. Tenth Nat. Bank (C. C. 1873) 7 N. B. R. 481, Fed. Cas. No. 17,202; Vanderhoof v. City Bank (C. C. 1871) 5 N. B. R. 270, Fed. Cas. No. 16,842; Martin v. Toof (D. C. 1870) 4 N. B. R. 488, Fed. Cas. No. 9,167; In re Silverman (D. C. 1870) 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12,855; Vogle v. Lathrop (C. C. 1870) 4 N. B. R. 439, Fed. Cas. No. 16,985; Rison v. Knapp (D. C. 1868) 4 N. B. R. 349, Fed. Cas. No. 11,861; In re Alexander (D. C. 1870) 4 N. B. R. 178, Fed. Cas. No. 161.

Where a petition in involuntary bank-

ruptcy charges the debtor with having transferred property with intent to give a preference, his intent to prefer may be presumed from the fact of his having made a transfer of a large part of his property, while insolvent, to a single creditor; and when this is shown, the burden is on the debtor to show that he was ignorant of his insolvency and had reason to believe he could pay his debts in full. In re Rome Planing Mill Co. (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123.

The presumption of an intent to give a preference is not conclusive, but the debtor may prove that he was actuated by a different motive and had no such intention, and if this is satisfactorily established, an adjudication of bankruptcy will not be made on that ground. In re Frantzen (C. C. 1884) 20 Fed. 785; In re Seeley (D. C. 1879) 19 N. B. R. 1, Fed. Cas. No. 12,628. It is ordinarily sufficient to rebut the presumption for the debtor to show that he actually did not know himself to be insolvent. In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101. Payments of comparatively small sums of money to each of a number of creditors, made by a corporation in the usual course of its business, though at a time when it was actually insolvent, do not raise a presumption of an intent to prefer those creditors over others so as to establish an act of bankruptcy. In re Douglas Coal & Coke Co. (D. C. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539.

13. Suffering a preference through legal proceedings.—In order that a creditor may establish the third act of bankruptcy, he must show that a preference has actually resulted. In re Truitt (D. C. 1913) 203 Fed. 550. Suffering a creditor to obtain a preference through legal proceedings, involves insolvency, suffering the preference, not avoiding it within five days before sale, and a sale of the property affected. In re Fisher (D. C. 1915) 219 Fed. 638.

Under the provision that an insolvent debtor shall be deemed to have committed an act of bankruptcy if he shall have "suffered or permitted any creditor to obtain a preference through legal proceedings," no motive or intention on the part of the debtor to give a preference need be shown, nor that he meant to evade or defeat the bankruptcy act, nor that he did or attempted anything in furtherance of the transaction from which a preference results. Wilson Bros. v. Nelson (1901) 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; In re Truitt (D. C. 1913) 203 Fed. 550; In re Craft (D. C. 1868) Fed. Cas. No. 3,316. But this provision of the statute does not apply to liens acquired by legal proceedings more than four months before the filing of the petition in bankruptcy, and which therefore will not be dissolved by an adjudication. Colston v. Austin Run Min. Co. (C. C. A. 1912) 194 Fed. 929, 28 Am. Bankr. Rep. 92; In re Chapman (D. C. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; In re Ferguson (D. C. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; In re Deer Creek Water & Water Power Co. (D. C. 1913) 205 Fed. 205, 29 Am. Bankr. Rep. 356; Owen v. Brown (1903) 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717. See In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123, where it is suggested by Judge Coxe that the gaining of an advantage by one creditor over other creditors by seizing the debtor's property, which the debtor suffers or permits, may be an act of bankruptcy, and yet not be voidable by the trustee. See also In re Schick (D. C. 1867) 1 N. B. R. 177, Fed. Cas. No. 12,455, where it was held that, although the judgment complained of was entered against the bankrupt before the passage of the bankruptcy act, yet if it was fraudulent and fictitious, and the debtor has taken no steps to set it aside, and, after the enactment of the law, the judgment being still in force, his property is seized on an execution issuing thereon, it is a "procuring or suffering his property to be taken on legal process."

The phrase "legal proceedings" means any proceeding in a court of justice, either interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123. The levy of an execution or attachment on property of the debtor is a legal proceeding through which a preference may be obtained. In re Storm (D. C. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; In re Ferguson (D. C. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; Barnes v. Billington (C. C. 1803) Fed. Cas. No. 1,015. The phrase includes all liens obtained by legal proceedings which are valid under state laws. In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449. It includes the lien on real estate of a judgment duly docketed, particularly when followed by an execution and levy. Zugalla v. International Mercantile Agency (1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; Bogen v. Protter (1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; In re Tupper (D. C. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824. But not a livery stable keeper's lien, given by a state statute, but not established by any proceeding in the courts. In re Mero (D. C. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

In order that a debtor should commit an act of bankruptcy by failing to discharge the lien of an execution on his property, it is necessary that there should have been an actual and valid levy by a proper officer, and he may

contradict the recitals of the sheriff's return by showing that there was no actual levy, or that a pretended levy was wholly void. In re Bodek (D. C. 1911) 188 Fed. 817, 26 Am. Bankr. Rep. 476. A void execution levy on the equity of redemption of an alleged bankrupt in mortgaged personal property held not to diminish his estate or constitute a final disposition of his property, and hence was not an act of bankruptcy. In re Moark-Nemo Consol. Mining Co. (D. C. 1915) 219 Fed. 340.

It is also held that the phrase "legal proceedings" may include the appointment of a receiver by a state court and the vesting of the debtor's property in him. But to make this an act of bankruptcy, it must be shown, first, that the receiver was appointed at the instance of the debtor, or that the latter tacitly permitted and acquiesced in the appointment, and second, that the effect of the receivership and the distribution of the estate under his administration will be to give a preference to one or more creditors, as, where creditors who are entitled to priority under the laws of the state will receive a greater amount under the receivership than they would receive under the bankruptcy act. Mather v. Coe (D. C. 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; In re Merchants' Ins. Co. (D. C. 1871) 6 N. B. R. 43, Fed. Cas. No. 9,441; In re Bininger (C. C. 1870) Fed. Cas. No. 1,420. In another case it was held that, where a corporation makes no defense to a bill in equity against it in a state court, and tacitly permits the appointment of a receiver and the vesting of its property in him, it is not an act of bankruptcy by the corporation, although certain classes of persons may be entitled to larger dividends under the receivership proceedings than they would obtain in bankruptcy, if it does not appear that any such persons are concerned, or that any sale or final disposition of the property affected by the receivership has been made. In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605.

14. —— **Attachment.**—The levy of an attachment on mesne process, in pursuance of any proceeding at law or in equity, upon property of an insolvent debtor, in advance of any determination of the validity of the claim or of any judgment upon it, constitutes the obtaining of a preference through legal proceedings, so that the failure of the debtor to discharge the attachment will constitute an act of bankruptcy. Folger v. Putnam (1912) 194 Fed. 793, 114 C. C. A. 513, 28 Am. Bankr. Rep. 173; Parmenter Mfg. Co. v. Stoever (1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; In re Putnam (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Reichman (D. C. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17. But see, as holding that an attachment on mesne process, before any trial of the action or the rendition of any judgment, is not enough in itself to constitute a preference obtained by the plaintiff through legal proceedings, within the meaning of the statute. In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449; Seaboard Steel Casting Co. v. William R. Trigg Co. (D. C. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594; In re Vetterman (D. C. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245.

Where, prior to bankruptcy, a creditor had obtained a lien by attachment, and the property was sold under an order of court, not to satisfy the creditor's claim, but to save disproportionate expense in keeping the property, the fact that the bankrupt failed to discharge the attachment at least five days before such sale did not indicate that the enforcement of the attachment would ultimately operate to prefer the attaching creditor in case subsequent proceedings were taken in support of the attachment, and therefore did not constitute an act of bankruptcy. In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449.

15. —— **Failure to vacate or discharge lien.**—The act of bankruptcy described in this clause does not consist merely in permitting a creditor to secure a lien through legal proceedings, but in the failure to vacate or discharge the preference within five days before a sale or other final disposition of the property affected. Parmenter Mfg. Co. v. Stoever (1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; In re Windt (D. C. 1910) 177 Fed. 584, 24 Am. Bankr. Rep. 536; In re R. L. Radke Co. (D. C. 1911) 193 Fed. 735, 27 Am. Bankr. Rep. 504.

Creditors seeking an adjudication of bankruptcy on this ground need not wait until a sale has taken place. If the debtor, five days before the advertised day of sale, has not discharged the preference, creditors may then file a petition against him and have the sale enjoined. In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123.

The debtor has the whole of the fifth day preceding that appointed for the sale in which to discharge the lien, and is not guilty of an act of bankruptcy until that day has expired without effective action. Pittsburgh Laundry Supply Co. v. Imperial Laundry Co. (1907) 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756.

An independent act of bankruptcy is committed by the failure to discharge the lien on each succeeding day, including the day of the sale. In re Nusbaum (D. C. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

Where a debtor permitted a judgment against him to remain unsatisfied after execution had been issued thereon, and

garnishment proceedings instituted on the judgment proceeded so far that the garnishee answered admitting a sum to be due from him to the debtor, it was held that an act of bankruptcy had been committed where more than five days had elapsed after the time when the garnishee might have answered under the statute and paid the money into court. In re Harper (D. C. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567.

As used in this clause, the term "final disposition" does not mean a gift of the property to some third person or a voluntary transfer to creditors in satisfaction of a preferential judgment, but includes every other method than that specified of passing the control and dominion of the property of an insolvent debtor to another or others either absolutely or as security to the preferred creditor to the exclusion of other creditors. In re Tupper (D. C. 1908) 163 Fed. 767, 20 Am. Bankr. Rep. 811.

Failure of an insolvent judgment debtor for one day less than four months after the levy of execution to discharge it is not final disposition of the property levied on within subdivision a (3) of this section. An insolvent debtor does not commit an act of bankruptcy by inaction for four months after levy of execution, in view of subdivision a (3) of this section, which means that it would be sufficient to avoid an act of bankruptcy if the lien is lifted five days before final disposition of any property affected; such meaning not being affected by subdivision b limiting to four months after the act of bankruptcy the time for filing petitions in bankruptcy, and sections 67c and 67f, post, § 9651 dealing with the retrospective effect of adjudications in bankruptcy. Citizens' Banking Co. v. Ravenna Nat. Bank (1914) 34 S. Ct. 806, 234 U. S. 360, 58 L. Ed. 1352, answering certified questions (1912) 202 Fed. 892, 121 C. C. A. 250. Failure to release levy of attachment on supposed interest in property transferred by alleged bankrupt nearly seven years previously held not an act of bankruptcy, though transfer was alleged to be fraudulent. In re Murphy (D. C. 1914) 228 Fed. 1018.

The commencement of voluntary proceedings for the dissolution of a corporation does not have the effect of extinguishing the liens of levies on executions against the corporate property, so as to relieve the corporation from the operation of this clause of the bankruptcy law. In re Storm (D. C. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601.

16. —— Meaning of "suffer or permit."—The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him on an irrevocable power of attorney given years before constitutes the suffering or permitting of the creditor to obtain a preference, which amounts to an act of bankruptcy, although the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by filing his petition in bankruptcy. Wilson Bros. v. Nelson (1901) 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, 7 Am. Bankr. Rep. 142; In re Putnam (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Cliffe (D. C. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Moyer (D. C. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577. Compare Duncan v. Landis (1901) 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

In order to commit an act of bankruptcy by suffering or permitting a creditor to obtain a preference through legal proceedings against him, it is not necessary that the debtor should do any affirmative act. It is enough if he remains passive and allows his property to be taken by one creditor to the exclusion of the others. In re Rung Furniture Co. (1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Moyer (D. C. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577; In re Cliffe (D. C. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Meyers (D. C. 1899) 1 Nat. Bankr. News, 207; In re Reichman (D. C. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17. Compare In re Nelson (D. C. 1899) 98 Fed. 76, 1 Am. Bankr. Rep. 63; In re Truitt (D. C. 1913) 203 Fed. 550, 29 Am. Bankr. Rep. 570. An insolvent corporation which suffers or permits a creditor to obtain a preference by means of an attachment on its property and a sale thereunder, commits an act of bankruptcy, notwithstanding the fact that one method of preventing such a result, viz., filing a voluntary petition in bankruptcy, was prohibited to corporations as the law stood at that time. Parmenter Mfg. Co. v. Stoever (1899) 38 C. C. A. 200, 97 Fed. 330, 3 Am. Bankr. Rep. 220.

The intent of the debtor is immaterial, and where an insolvent corporation fails to cause a preference by legal proceedings obtained by one creditor to be vacated or discharged by showing that the claim is illegal or unfounded, or by paying the debt, such insolvent commits an act of bankruptcy. White v. Bradley Timber Co. (D. C. 1902) 119 Fed. 989, 9 Am. Bankr. Rep. 441.

If the debtor directly or indirectly instigates or assists or facilitates the recovery of a judgment against him and the issuance of process thereon, he is guilty of "suffering" the creditor to obtain a preference through legal proceedings. Sage v. Wyncoop (1881) 104 U. S. 319, 26 L. Ed. 740; In re Woods (D. C. 1873) 7 N. B. R. 126, Fed. Cas. No. 17,990; Fisher v. Currier (D. C.

1842) Fed. Cas. No. 4,818; In re Dunkle (D. C. 1870) 7 N. B. R. 72, Fed. Cas. No. 4.160; Wight v. Muxlow (D. C. 1875) Fed. Cas. No. 17,629; Sage v. Wyncoop (C. C. 1877) 16 N. B. R. 363, Fed. Cas. No. 12,215.

Where the members of an insolvent firm appeared in a suit against them for the appointment of a receiver, and proposed candidates for the office of receiver, they "suffered or permitted" any preference obtained by the creditors through such suit. In re Kersten (D. C. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516.

Where an insolvent corporation has allowed some of its creditors to obtain preferences through legal proceedings, and then its stockholders and officers sue for and obtain a dissolution for the express purpose of hindering and delaying creditors, and the effect of such proceedings is to permit the preferences obtained to stand in full force, it has committed an act of bankruptcy, by permitting effective preferences to be fastened upon its property. Scheuer v. Smith & Montgomery Book & Stationery Co. (1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384.

A debtor suffers the obtaining of a preference through legal proceedings when he permits it to be done, although his failure to resist was due to the pressure or insistence of the creditor. In re Craft (D. C. 1868) 1 N. B. R. 378, Fed. Cas. No. 3,316.

17. —— Entry of judgment on warrant of attorney.—For a debtor while insolvent to confess a judgment with intent to prefer a creditor is to aid the creditor to obtain a preference, and constitutes an act of bankruptcy. In re Truitt (D. C. 1913) 203 Fed. 550, 29 Am. Bankr. Rep. 570.

Where a creditor actually obtains a preference by entering judgment on a warrant of attorney previously given by the debtor, and levying execution on his stock in trade, the debtor being then insolvent, such debtor commits an act of bankruptcy if he fails to discharge such preference by filing his voluntary petition in bankruptcy (having no valid defense against the debt or the lien obtained by the levy) though he does not in any degree procure the entry of the judgment. In re Moyer (D. C. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577.

Within the meaning of the bankruptcy act, a creditor obtains a preference by entering judgment on a warrant of attorney, and levying an execution thereunder, within the time limited by the act, the debtor being then insolvent, notwithstanding that the warrant of attorney was given more than four months before the filing of the petition in bankruptcy against such debtor, and at a time when he was solvent. Id.

Where an insolvent owning mortgaged real estate confessed a judgment to a preferred creditor and permitted a sale under foreclosure subject to the judgment, there was a sale of property affected by the preference. In re Fisher (D. C. 1915) 219 Fed. 638.

The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney (though given years before) constitutes the suffering or permitting the creditor to obtain a preference, which amounts to an act of bankruptcy, although the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by going into voluntary bankruptcy. Wilson Bros. v. Nelson (1901) 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, 7 Am. Bankr. Rep. 142.

18. Assignment for creditors.—To constitute an assignment for the benefit of creditors, within the bankruptcy act, there must be an absolute transfer by the debtor of both the legal and equitable titles to his property. But the assignment need not be formal, and need not even be valid for all purposes. In re Ambrose Mathews & Co. (D. C. 1916) 229 Fed. 309.

A general assignment for the benefit of creditors, though it embraces all the property of the debtor and is made for the equal and common benefit of all his creditors, without preferences, and without any actual fraudulent intent, either as to creditors or as to an evasion of the bankruptcy law, and though it would be valid under the laws of the state, is nevertheless an act of bankruptcy, on which an adjudication may be made if a petition therefor is duly presented within the prescribed time. Boese v. King (1883) 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; Griffin v. Dutton (1908) 165 Fed. 626, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; In re Salmon (D. C. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; Whittlesey v. Philip Becker & Co. (1911) 142 App. Div. 313, 126 N. Y. Supp. 1046; Costello v. Harbaugh (1899) 83 Ill. App. 29 (affirmed Harbaugh v. Costello [1900] 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147); In re Burt (C. C. 1870) Fed. Cas. No. 2,210; Cragin v. Thompson (C. C. 1873) 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Smith (D. C. 1869) 3 N. B. R. 377, Fed. Cas. No. 12,974; Spicer v. Ward (D. C. 1870) 3 N. B. R. 512, Fed. Cas. No. 13,241; In re Randall (D. C. 1869) 3 N. B. R. 18, Fed. Cas. No. 11,551; Jones v. Sleeper (D. C. 1843) Fed. Cas. No. 7,496; In re Kasson (D. C. 1878) 18 N. B. R. 379, Fed. Cas. No. 7,617; In re Pierce (D. C. 1869) 3 N. B. R. 258, Fed. Cas. No. 11,141; Barnes v. Rettew (C. C. 1871) Fed. Cas. No. 1,019; Barton v. Tower (D. C. 1842) Fed. Cas. No. 1,085; In re Chamberlain (D. C. 1870) 3 N. B. R.

710, Fed. Cas. No. 2,574; In re Croft (D. C. 1878) 17 N. B. R. 324, Fed. Cas. No. 3,404; In re Mendelsohn (D. C. 1875) Fed. Cas. No. 9,420; In re Frisbee (C. C. 1877) 15 N. B. R. 522, Fed. Cas. No. 5,129; McLean v. Meline (C. C. 1843) Fed. Cas. No. 8,-890; Hobson v. Markson (C. C. 1871) Fed. Cas. No. 6,555; Harding v. Crosby (C. C. 1879) Fed. Cas. No. 6,050; In re Kraft (D. C. 1881) 4 Fed. 523; Wald v. Wehl (C. C. 1881) 6 Fed. 163. An adjudication of bankruptcy thereon will avoid the assignment and subject the assigned property to the jurisdiction of the court of bankruptcy. Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Curtis (D. C. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440; Cohen v. American Surety Co. (1908) 192 N. Y. 227, 84 N. E. 947.

A general assignment by an insolvent debtor for the benefit of certain preferred creditors is an act of bankruptcy, though made without moral fraud and under the importunity of the creditors. Ex parte Breneman (D. C. 1842) Fed. Cas. No. 1,830; Hutchins v. Taylor (C. C. 1842) Fed. Cas. No. 6,953; In re Broome (D. C. 1870) 3 N. B. R. 444, Fed. Cas. No. 1,967.

An absolute and unconditional sale and conveyance of his property by a debtor, free from all reservation, in payment and satisfaction of antecedent debts, cannot be declared a general assignment though it may embrace all of his property and though he may be insolvent. Otis v. Maguire (1884) 76 Ala. 295. A direct transfer to creditors, without the intervention of a trustee, is not an assignment for the benefit of creditors, although it may be a act of bankruptcy as giving a preference. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200. A deed of trust directing the trustee to sell the property and pay the debts of the grantor, and turn over to the latter any balance that may remain, is not a general assignment, if made in good faith and without an intent to evade the provisions of the bankruptcy law. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; Fidelity Trust Co. v. Kline (1908) 74 N. J. Eq. 445, 70 Atl. 151. CONTRA, see In re Thomlinson Co. (1907) 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691; In re Salmon (D. C. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122. A confession of judgment by a debtor to a trustee for all his creditors amounts to a general assignment for the benefit of creditors, under the law of Pennsylvania, and constitutes an act of bankruptcy. In re Green (D. C. 1901) 106 Fed. 313, 5 Am. Bankr. Rep. 848.

A mortgage given by a corporation to secure all its creditors equally out of its earnings, or to pay to such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy. In re Union Pac. R. Co. (D. C. 1874) 10 N. B. R. 178, Fed. Cas. No. 14,376. Where a corporation, under the provisions of a state statute, files in a state court its voluntary application for dissolution and for the appointment of a receiver to wind up its affairs and distribute its assets, on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not a general assignment for the benefit of its creditors. In re Empire Metallic Bedstead Co. (1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605. A resolution of the stockholders of a corporation, authorizing a committee of the directors to advertise and sell the corporate property at auction at not less than a stated price, and to pay the debts of the corporation with the proceeds, with power to declare such sale revoked or not to take place in a certain contingency, is not an assignment for creditors. In re Hartwell Oil Mills (D. C. 1908) 165 Fed. 555, 21 Am. Bankr. Rep. 586. The mere preparation of a deed of general assignment, not signed nor out of escrow, is not an act of bankruptcy, nor is the mere adoption by a corporation of resolutions authorizing its treasurer to convert the corporate assets into cash and to deposit the same with a trust company for the benefit of its creditors, where the plan is not carried out. In re Federal Lumber Co. (D. C. 1910) 185 Fed. 926, 26 Am. Bankr. Rep. 438

An instrument executed by a corporation, denominated a mortgage, held to constitute a general assignment for the benefit of creditors, and an act of bankruptcy, under subdivision a(4) of this section. In re Heleker Bros. Mercantile Co. (D. C. 1914) 216 Fed. 963.

19. —— What constitutes general assignment.—An assignment of all of a debtor's property to an assignee, to convert into money and apply to the discharge of debts owing to such creditors as may assent thereto and agree to accept the dividend thereunder in full of their claims, is a "general" assignment for the benefit of creditors, such as to constitute an act of bankruptcy. Courtenay Mercantile Co. v. Finch (1912) 194 Fed. 368, 114 C. C. A. 328, 27 Am. Bankr. Rep. 688.

An assignment by a partnership for the benefit of its creditors, purporting to transfer all the property of the firm, is a general assignment, such as to constitute an act of bankruptcy by the firm and on which the firm may be adjudged bankrupt, although, considered as an assignment by the individual partners, it would be but partial, by reason of not including their separate property. In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

Instrument appointing trustees to wind up corporation's affairs held not a general assignment for the benefit of creditors, within the bankruptcy act. In re Ambrose Matthews & Co. (D. C. 1916) 229 Fed. 309.

20. —— **Invalid assignment.** — This clause of the act applies to any instrument which is or purports to be a general assignment without distinguishing between valid and invalid instruments, and it is no defense to a petition in involuntary bankruptcy, based on this ground, that the instrument in question would not be valid or enforceable under the state law or in the state courts. Griffin v. Dutton (1908) 165 Fed. 626, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; In re Courtenay Mercantile Co. (D. C. 1911) 186 Fed. 352, 26 Am. Bankr. Rep. 365; In re Federal Lumber Co. (D. C. 1910) 185 Fed. 926, 26 Am. Bankr. Rep. 438; Canner v. Webster Tapper Co. (D. C. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872; In re Lawrence (D. C. 1878) 18 N. B. R. 516, Fed. Cas. No. 8,133. Though an assignment for creditors may be invalid under the state law and so defective in its execution that it cannot be enforced, yet if it was designed and used as a means of giving a preference to certain creditors over others, it is an act of bankruptcy on that ground. In re Mendelsohn (D. C. 1875) 12 N. B. R. 533, Fed. Cas. No. 9,420.

On a petition in involuntary bankruptcy against a firm, alleging, as an act of bankruptcy, the making of an assignment for the benefit of its creditors, which purports to transfer all the property of the firm, though it was executed by one partner only, the question of the validity of the assignment as to the partners not joining is immaterial. In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

An assignment for the benefit of such creditors only as should accept its terms and release their claims on receiving the dividend to be paid by the assignee is an act of bankruptcy, and it is not necessary that the assignment should be valid as to dissenting creditors. In re Courtenay Mercantile Co. (D. C. 1911) 186 Fed. 352, 26 Am. Bankr. Rep. 365.

21. —— **Solvency no defense.**—The making of a general assignment for the benefit of creditors is an act of bankruptcy without regard to the solvency or insolvency of the debtor, either at the time of its execution or at the time of the filing of the petition. George M. West Co. v. Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; Day v. Beck & Gregg Hardware Co. (1902) 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175; Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Green River Deposit Bank v. Craig (D. C. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; Couts v. Townsend (D. C. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126; In re Sully (D. C. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; Lea v. George M. West Co. (D. C. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; In re Farthing (D. C. 1913) 202 Fed. 557, 29 Am. Bankr. Rep. 732; Corbett v. Riddle (1913) 209 Fed. 811, 126 C. C. A. 535.

22. **Appointment of receiver or trustee.**—Prior to the amendatory act of February 5, 1903, c. 487, § 2, providing that it shall be an act of bankruptcy if a debtor, while insolvent, shall have "applied for a receiver or trustee for his property or where, because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States," the appointment of a receiver to take charge of the affairs of an insolvent corporation or partnership, whether on its voluntary application for a dissolution or receivership, or on its consent or acquiescence in hostile proceedings against it, was not an act of bankruptcy, not being a "general assignment for the benefit of creditors." In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; In re Empire Metallic Bedstead Co. (D. C. 1899) 95 Fed. 957, 2 Am. Bankr. Rep. 329; In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; Vaccaro v. Security Bank (1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; Seaboard Steel Casting Co. v. William R. Trigg Co. (D. C. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594. And the consent of partners or of a corporation to the appointment of a receiver was not an act of bankruptcy as involving a fraudulent transfer or concealment or removal of their property. In re Burrell (1903) 123 Fed. 414, 59 C. C. A. 508, 9 Am. Bankr. Rep. 625. It might amount to "suffering a creditor to obtain a preference through legal proceedings," but only where it appeared that there were one or more creditors interested in the property who would be entitled to larger dividends under the receivership proceedings than they would receive if the estate were administered and distributed in bankruptcy. In re Baker-Ricketson Co. (1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; Mather v. Coe (1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504. The said amendatory act was not retroactive, and the appointment of a receiver for a firm or corporation because of insolvency, prior to the passage of the amendatory act, will not support a petition in involuntary bankruptcy filed after that time, although the receivership

still continues. Seaboard Steel Casting Co. v. William R. Trigg Co. (D. C. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594.

The appointment of merely temporary receivers for a corporation, by a court acting under its general equity powers, in a pending suit which has not been heard, and in which there has been no adjudication of insolvency, does not constitute an act of bankruptcy. Zugalla v. International Mercantile Agency (1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; In re Columbia Real Estate Co. (D. C. 1913) 205 Fed. 980, 30 Am. Bankr. Rep. 471; In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191. But see Blue Mountain Iron & Steel Co. v. Portner (1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; In re William S. Butler & Co. (C. C. A. 1913) 207 Fed. 705, 30 Am. Bankr. Rep. 502, holding that it is immaterial whether receivers appointed for an alleged bankrupt corporation are temporary or permanent, with reference to the commission of an act of bankruptcy. A state court is not deprived of jurisdiction to appoint receivers for an alleged bankrupt corporation (thereby causing it to commit an act of bankruptcy) by the fact that, prior to the filing of the bill under which the appointment is made, another bill was filed in another court for the same purpose, where it appears that the prior proceeding was collusive, and that nothing was done or intended to be done therein beyond filing the bill. Blue Mountain Iron & Steel Co. v. Portner (1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559.

To render the appointment of a receiver an act of bankruptcy, the defendant must have been insolvent, as insolvency is defined by the bankruptcy act. Maplecroft Mills v. Childs (C. C. A. 1915) 226 Fed. 415. A receivership is not an act of bankruptcy, unless the receiver was appointed "because of insolvency," as insolvency is defined in the bankruptcy act. In re Butte Duluth Mining Co. (D. C. 1915) 227 Fed. 334.

Under the bankruptcy act declaring the appointment of an insolvency receiver or trustee by the state courts to be an act of bankruptcy, "insolvency" means only that condition of financial affairs which exists when the aggregate of the bankrupt's property is at a fair valuation insufficient to pay his debts. Karst v. Black Diamond Range Co. (N. J. Ch. 1913) 88 A. 692.

23. —— **On application of debtor.**— An application by insolvent debtor to state court for appointment of receiver held an "act of bankruptcy." In re Rankin (D. C. 1913) 210 Fed. 529, order affirmed Hill v. Western Electric Co. (C. C. A. 1914) 214 Fed. 243. Where an insolvent applied for a receiver of his assets, he thereby committed an act of bankruptcy, though his purpose in doing so was not to have his assets liquidated and distributed among his creditors. Hill v. Western Electric Co. (1914) 214 Fed. 243, 130 C. C. A. 613, affirming order In re Rankin (D. C. 1913) 210 Fed. 529.

The fact that an application by an insolvent corporation to a state court for the appointment of a receiver for its property was not authorized by the laws of the state does not prevent it from constituting an act of bankruptcy. Exploration Mercantile Co. v. Pacific Hardware & Steel Co. (1910) 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216.

The consent of a corporation to the appointment of a receiver for its property, on an application by others, is not equivalent to its having "applied for" a receiver, as an act of bankruptcy. In re Gold Run Mining & Tunnel Co. (D. C. 1912) 200 Fed. 162, 29 Am. Bankr. Rep. 563. In involuntary bankruptcy proceedings, findings by the master that an application for receiver nominally filed by a creditor was actually filed by the debtor held to support a conclusion that the debtor applied for the appointment of the receiver. Where the defendant in proceedings for the appointment of a receiver was the real plaintiff also, hiding behind the nominal plaintiff, there was no cause before the court, and the proceedings did not prevent the bankruptcy court from determining the issue of insolvency at the time the application for the receiver was made. In re Muir (D. C. 1914) 212 Fed. 495.

In order that an application for the appointment of a receiver by a corporation or a partnership should constitute an act of bankruptcy it is essential that the applicant should be insolvent, within the meaning of that term as used in the bankruptcy law. In re Electric Supply Co. (D. C. 1909) 175 Fed. 612, 23 Am. Bankr. Rep. 647. Where a bill in equity filed by creditors against a corporation alleges that it is unable to meet its obligations as they mature, and that it will be for the advantage of creditors and stockholders that its affairs shall be wound up, but that it is solvent, the filing of an answer by the corporation, admitting such allegations and joining in the request for a receiver, is not an act of bankruptcy, as there is no showing of insolvency and no application by the corporation. In re Edward Ellsworth Co. (D. C. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284. But where the proceedings are instituted by the voluntary application for a receiver, preferred by the corporation itself, while the fact of insolvency must exist in order to constitute an act of bankruptcy, it is not necessary that the receiver should have been appointed and put in charge "because of insolvency," as required by the

other clause of the amendatory statute. Exploration Mercantile Co. v. Pacific Hardware & Steel Co. (1910) 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216; Blackstone v. Everybody's Store (1913) 207 Fed. 752, 125 C. C. A. 290, 30 Am. Bankr. Rep. 497.

24. —— On application of creditors or others.—The appointment of a receiver or trustee for the property of a debtor is not an act of bankruptcy, when made on the application of his creditors or others, unless made on the ground of his insolvency. In re Spalding (1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; Schumert & Warfield v. Security Brewing Co. (D. C. 1912) 199 Fed. 358, 28 Am. Bankr. Rep. 676. The appointment of receivers for a corporation on the ground that it is unable to meet its obligations as they mature in the ordinary course of business, is not an appointment because of insolvency, and therefore not an act of bankruptcy. In re Wm. S. Butler & Co. (1913) 207 Fed. 705, 125 C. C. A. 223, 30 Am. Bankr. Rep. 502.

It is not necessary, in order to constitute an act of bankruptcy, that it should appear of record that insolvency was the sole reason which moved the court to appoint a receiver, if the appointment was in fact made on that and other grounds. Beatty v. Andersen Coal Min. Co. (1906) 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738. The appointment of a receiver for a corporation under a state statute which authorizes proceedings for the dissolution of a corporation and the appointment of a receiver therein on various statutory grounds, which do not include insolvency by name, or for "other good and sufficient reason," may constitute an act of bankruptcy, where the record and findings in the state court show that the appointment was in fact, though not in name, made because of insolvency. In re Belfast Mesh Underwear Co. (D. C. 1907) 153 Fed. 224, 16 Am. Bankr. Rep. 620. If the decree of the court recites the ground for the appointment of the receiver, it is conclusive, and if it states that the receivership was ordered on the ground that the defendant had conveyed property and was threatening to make further conveyances of property in fraud of the plaintiff's rights, it is decisive against the commission of an act of bankruptcy. In re Spalding (1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129.

Where the bill or complaint alleges insolvency, and it is confessed by the defendant, or the receiver is appointed by the consent of both parties, this is sufficient evidence that he was appointed because of insolvency. In re Pickens Mfg. Co. (D. C. 1908) 158 Fed. 894, 20 Am. Bankr. Rep. 202; Lowenstein v. Henry McShane Mfg. Co. (D. C. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; In re Wenatchee Heights Orchard Co. (D. C. 1913) 204 Fed. 674, 30 Am. Bankr. Rep. 401. But an act of bankruptcy is not shown where the prayer for a receiver in the bill or complaint is based on allegations of fraud and mismanagement by the officers or majority stockholders of a corporation. In re Boston & Oaxaca Min. Co. (D. C. 1909) 181 Fed. 422, 24 Am. Bankr. Rep. 923. Nor where, in addition to such charges, it is alleged that the corporation is in danger of becoming insolvent, without averring that it is now insolvent. In re Perry Aldrich Co. (D. C. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244. The appointment of a receiver for the property of a corporation in a suit to foreclose a mortgage, in which the bill does not allege insolvency, but a breach of the covenants of the mortgage, does not authorize an adjudication of bankruptcy against the corporation, although it may in fact have been insolvent and such insolvency may have caused its default. In re Douglas Coal & Coke Co. (D. C. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539.

The appointment, by a state court, of a receiver for an insolvent domestic corporation, at the suit of a stockholder, is an act of bankruptcy. Roberts Cotton Oil Co. v. F. E. Morse & Co. (1911) 97 Ark. 513, 135 S. W. 334. And so is the appointment of a receiver in proceedings instituted by the officers and directors of a corporation, holding a majority of the stock. Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C. 1913) 206 Fed. 813, 30 Am. Bankr. Rep. 604. The provision of the statute that it shall be an act of bankruptcy where, because of insolvency, a "receiver or trustee has been put in charge" of the property does not mean exclusively that a trustee must have been put in charge by order of a court, but embraces as well a case where liquidating trustees have been elected by an insolvent corporation and put in charge of its property for the purpose of winding up its affairs. In re Hercules Atkin Co. (D. C. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; In re C. H. Bennett Shoe Co. (D. C. 1905) 140 Fed. 687, 15 Am. Bankr. Rep. 497. Where a state statute provides that, on the return of an execution against a corporation unsatisfied, the judgment creditor may procure a special writ of fieri facias, on which all the property of the corporation, except real estate held in fee, shall be sold and the proceeds distributed by the sheriff among all its creditors, such a proceeding results in placing the sheriff, in the character of a receiver or trustee, in charge of the property of the corporation because of its insolvency, so as to constitute an act of bankruptcy. In re International Coal Min. Co. (D. C.

1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

25. Admission of insolvency and willingness to be adjudged bankrupt.—Where a corporation admits in writing its inability to pay its debts and its willingness to be adjudged bankrupt on that ground, it is subject to adjudication over the objections of creditors, though it is not insolvent. In re Northampton Portland Cement Co. (D. C. 1910) 179 Fed. 726, 24 Am. Bankr. Rep. 61; In re Kersten (D. C. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516. A letter, written by the president of an alleged bankrupt corporation to its creditors, held not an admission that the corporation had committed an act of bankruptcy. Lackawanna Leather Co. v. La Porte Carriage Co. (C. C. A. 1914) 211 Fed. 318.

The filing of a voluntary petition in bankruptcy is not of itself an act of bankruptcy, but simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy if the facts warrant it. In re J. M. Ceballos & Co. (D. C. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459. See Van Nostrand v. Carr (1869) 30 Md. 128.

Under this provision of the law it is held that where a corporation, by the unanimous vote of its stockholders, authorizes one of its officers to appear on behalf of the company in the federal court and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," this is not in itself such an unqualified admission as is required by the act, and is therefore not an act of bankruptcy on the part of the corporation. Further, where such officer makes a written admission that the company is not able to pay its debts and is willing to be adjudged bankrupt on that ground, but this writing is not executed until after the filing of a petition in involuntary bankruptcy against the corporation it constitutes no ground for an adjudication on that petition. In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605.

(B) Acts of bankruptcy by partnerships

26. In general.—Under the bankruptcy act, a partnership is a "person" or entity which may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings, if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners as bankrupts. In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

Where an act of bankruptcy has been committed by an insolvent partnership as such, it may be adjudged bankrupt on the petition of its creditors, although neither of the partners has done any act upon which he, as an individual, could be adjudged bankrupt. Chemical Nat. Bank v. Meyer (D. C. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565, affirmed, In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, the other partner making no attempt to prevent such assignment, it is an act of bankruptcy upon which the firm, as such, may be adjudged bankrupt. Chemical Nat. Bank v. Meyer (D. C. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565, affirmed, In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

Where a petition in bankruptcy is filed by one member of a firm against the firm and his partners, it is involuntary in so far as it affects the nonconsenting partners, and they cannot, as individuals, be adjudged bankrupts, unless it is alleged and shown that they personally have committed acts of bankruptcy within four months before the petition was filed. The filing of a petition in bankruptcy by one partner against his copartners is not an act of bankruptcy on the part of the firm. In re J. M. Ceballos & Co. (D. C. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

27. Transfers of property and preferances.—A transfer of property by an individual member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership which will sustain a petition in bankruptcy against it. In re Stovall Grocery Co. (D. C. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537.

A conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy against the firm, even though such conveyance was made with intent to hinder, delay, or defraud firm creditors, or with a view to give a preference to a firm creditor. Mills v. J. H. Fisher & Co. (1908) 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237; Hartman v. John Peters & Co. (D. C. 1906) 146 Fed. 82, 17 Am. Bankr. Rep. 61; In re Redmond (D. C. 1874) 9 N. B. R. 408, Fed. Cas. No. 11,632. Where the members of a firm jointly owning real estate convey or incumber the same, without consideration, in fraud of the creditors of the firm, such transaction is an act of bankruptcy by the firm. Lastrapes v. Blanc (C. C. 1878) Fed. Cas. No. 8,100. When a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer the partnership property to be taken on legal process, with intent to prefer a creditor of the firm. In re Black (D. C. 1868) Fed. Cas. No. 1,457. The taking of firm property, when the firm is insolvent, to pay a debt not of the firm, is an act of bankruptcy, although each of the partners may be liable therefor. In re

Matot (D. C. 1877) 16 N. B. R. 485, Fed. Cas. No. 9,282.

A transfer of property from one member of a solvent firm to another is not an act of bankruptcy as being a conveyance or transfer with intent to defraud creditors. In re Munn (D. C. 1873) Fed. Cas. No. 9,925. But a sale by one partner to his copartner, when the firm is insolvent and on the eve of bankruptcy, is presumptively fraudulent as to firm creditors, the effect of such transfer being to change the order of payment and prefer private creditors to partnership creditors, and the court should set it aside and distribute the property as firm property. In re Cook (D. C. 1871) Fed. Cas. No. 3,150; Collins v. Hood (C. C. 1846) Fed. Cas. No. 3,015.

The withdrawal of money from an insolvent firm by one of the partners, and its secret transfer to a third person, in connection with other concurrent transactions between the partners, held a conveyance and transfer of property with intent to hinder and delay creditors, by both partners, which constituted an act of bankruptcy. In re Shapiro (D. C. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839.

28. **Assignment for creditors.**—An assignment by a partnership for the benefit of its creditors, purporting to transfer all the property of the firm, is a general assignment, such as to constitute an act of bankruptcy by the firm and on which the firm may be adjudged bankrupt, although, considered as an assignment by the individual partners, it would be but partial, by reason of not including their separate property. In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559. A voluntary assignment of all the property and assets of a firm operating a private bank constitutes an act of bankruptcy, though done by one of the partners and not participated in by the other. Yungbluth v. Slipper (1911) 185 Fed. 773, 108 C. C. A. 106, 26 Am. Bankr. Rep. 265. Where a partnership and the individuals composing it make an assignment for the benefit of creditors, the act of bankruptcy is committed by all. Green River Deposit Bank v. Craig (D. C. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

29. **Insolvency of firm and of partners.**—Where insolvency is a necessary element of the particular act of bankruptcy charged, a partnership cannot be adjudged bankrupt on a petition filed against it, on the allegation and showing of its insolvency, unless all its members are also shown to be insolvent, and it is not enough to show that the assets of the firm, as such, are insufficient to pay its debts, if some or all of the partners, residing within the jurisdiction, are personally solvent. Vaccaro v. Security Bank (1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; Tumlin v. Bryan (1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, 21 Am. Bankr. Rep. 319; In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576; Washington Cotton Co. v. Morgan (1911) 192 Fed. 310, 112 C. C. A. 568, 27 Am. Bankr. Rep. 638; Francis v. McNeal (C. C. A. 1911) 186 Fed. 481, 26 Am. Bankr. Rep. 555; In re Perley & Hays (D. C. 1905) 138 Fed. 927, 15 Am. Bankr. Rep. 54; Davis v. Stevens (D. C. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; In re Kobre (D. C. 1915) 224 Fed. 106; Abbott v. Anderson (1914) 265 Ill. 285, 106 N. E. 782; In re Young (D. C. 1915) 223 Fed. 659; In re Samuels (C. C. A. 1914) 215 Fed. 845, reversing decree In re Samuels & Lesser (D. C. 1913) 207 Fed. 195. But see, CONTRA, In re Everybody's Grocery & Meat Market (1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; In re McMurtrey & Smith (D. C. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; In re Bertenshaw (C. C. A. 1907) 157 Fed. 363, 19 Am. Bankr. Rep. 577; In re Solomon & Carvel (D. C. 1908) 163 Fed. 140, 20 Am. Bankr. Rep. 488; In re Morgan & Williams (D. C. 1911) 184 Fed. 938, 25 Am. Bankr. Rep. 861; In re Samuels & Lesser (D. C. 1913) 207 Fed. 195, 30 Am. Bankr. Rep. 293.

(C) Acts of bankruptcy by corporations

30. **Assignment for creditors.**—The act of bankruptcy involved in making a general assignment for the benefit of creditors can be committed by a corporation without a formal deed of assignment, but some corporate act purporting to transfer all the property of the corporation must be shown, and the mere adoption of resolutions authorizing the treasurer to convert the property into cash and deposit it with a trustee for the creditors does not constitute an act of bankruptcy, where the plan was not executed. In re Federal Lumber Co. (D. C. 1910) 185 Fed. 926, 26 Am. Bankr. Rep. 438. An assignment by the corporation does not require the unanimous consent of the stockholders; it constitutes an act of bankruptcy if directed by a majority vote at a stockholder's meeting, and then by resolution of the board of directors. Clark v. American Mfg. & Enameling Co. (1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351.

When a corporation, under the provisions of a state statute, files in a state court its voluntary application for dissolution and for the appointment of a receiver to wind up its affairs and distribute its assets, on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not a "general assignment for the benefit of its creditors," within the meaning of the bankruptcy act. In re Empire Metallic Bedstead Co. (1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575.

It is not an act of bankruptcy for a

corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts, the same being done in good faith, and with a view to enable the company to continue in business, though it may be technically insolvent or likely soon to be so. In re Union Pac. R. Co. (D. C. 1874) 10 N. B. R. 178, Fed. Cas. No. 14,376.

31. Transfers of property.—Whether the act of an insolvent corporation in voluntarily applying to a state court for a decree dissolving the corporation and winding up its affairs, pursuant to a state law, through the agency of a receiver, is a transfer of its property with intent to hinder and defraud its creditors, because operating to deprive them of the remedies provided by the bankruptcy law, quære. In re Harper & Bros. (D. C. 1900) 100 Fed. 266, 3 Am. Bankr. Rep. 804. The sale of property by an insolvent corporation, and the use of the proceeds in paying the current salary of its president, is not a transfer with intent to prefer a creditor, such salary being a legitimate current expense so long as the corporation is a going concern. Richmond Standard Steel Spike & Iron Co. (1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583.

Instrument appointing trustees to wind up corporation's affairs held not a conveyance or transfer with intent to defraud creditors within the Bankruptcy Act. In re Ambrose Matthews & Co. (D. C. 1916) 229 Fed. 309. It is no defense to a proceeding in bankruptcy against a corporation that the act of bankruptcy charged was not within its charter powers. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co. (C. C. A. 1915) 228 Fed. 470.

32. Appointment of receiver.—The appointment by a state court of a receiver for a corporation is not an act of bankruptcy unless the appointment was made "because of its insolvency." In re Valentine Bohl Co. (1915) 224 Fed. 685, 140 C. C. A. 225. If the appointment is based on the ground that the corporation is "in imminent danger of insolvency," it is made because of insolvency. In re Maplecroft Mills (D. C. 1914) 218 Fed. 659. But otherwise if it is on the ground that the corporation is unable to pay its debts in the ordinary course of business. In re Wm. S. Butler & Co. (C. C. A. 1913) 207 Fed. 705. An act of bankruptcy is not committed if it does not appear on what ground the receiver was appointed. In re Columbia Real Estate Co. (D. C. 1913) 205 Fed. 980; In re Commonwealth Lumber Co. (D. C. 1915) 223 Fed. 667. If the facts appearing of record do not show an appointment because of insolvency, an act of bankruptcy is not proved. Maplecroft Mills v. Childs (C. C. A. 1915) 226 Fed. 415.

Record of a state court showing the appointment of a receiver for a corporation held insufficient to show that the appointment was made because of insolvency, which constituted an act of bankruptcy. In re Butte Duluth Mining Co. (D. C. 1915) 227 Fed. 334. Appointment of receiver by a state court for an insolvent corporation on a petition alleging insolvency, on the finding of insolvency, subsequently proved, held to constitute an act of bankruptcy. In re Wenatchee Heights Orchard Co. (D. C. 1913) 204 Fed. 674. That the proceedings, pleadings, or orders in a state court by which a receiver was appointed for a corporation do not state the ground for such appointment held not to defeat the jurisdiction of a court of bankruptcy to adjudge it a bankrupt on the ground that it was because of insolvency. In re Maplecroft Mills (D. C. 1914) 218 Fed. 659.

The president of a corporation instituted a suit against it in a state court, the purpose of which was to have it wound up. The petition alleged that it was largely indebted to plaintiff and to others, that it was unable to meet its liabilities or to carry on its business, and was in imminent danger of insolvency, and, in general, that it was in a failing condition. A statement was made that its assets slightly exceeded its liabilities, and the appointment of a receiver was prayed for and granted. By an amended petition it was alleged that the property of the company when the suit was begun was insufficient to pay the indebtedness to plaintiff. Held, sufficient to show that the receiver was appointed because of the insolvency of the company, and therefore constituted an act of bankruptcy. Hooks v. Aldridge (1906) 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658.

That the consent of a corporation to the appointment of a receiver by a state court because of its insolvency was not authorized by formal corporate action does not prevent such appointment from being an act of bankruptcy. In re Maplecroft Mills (D. C. 1914) 218 Fed. 659. If a receivership for an insolvent corporation, although procured in a suit against it, was actually procured by and in behalf of the corporation, it constitutes an act of bankruptcy. James Supply & Hardware Co. v. Dayton Coal & Iron Co. (1915) 223 Fed. 991, 139 C. C. A. 367.

Suit by minority stockholders to dissolve corporation and appoint a receiver pursuant to Revisal N. C. 1905, §§ 1196, 1219, held not to entitle creditors to relief in the bankruptcy court until the corporation became insolvent and committed an act of bankruptcy. Bank of Andrews v. Gudger (C. C. A. 1914) 212 Fed. 49. Filing of petition for receivership by majority stockholder, to which company filed no answer, held not an act of bankruptcy by the corporation. In re Valentine Bohl Co. (1915) 224 Fed. 685, 140 C. C. A. 225.

If the appointment of a receiver for an insolvent corporation, although made in a suit to which it was defendant, was in fact procured by the corporation and in its behalf, it is immaterial that the receivership was not ordered because of insolvency, but it is sufficient if the corporation was actually insolvent. James Supply & Hardware Co. v. Dayton Coal & Iron Co. (1915) 223 Fed. 991, 139 C. C. A. 367.

33. Suffering preference through legal proceedings.—An insolvent corporation occupying leased premises does not commit an act of bankruptcy by permitting its property on such premises, which is subject to a mortgage given to secure its bonds, to be sold under a distress warrant lawfully issued for rent past due, which by the state statute is made a lien on such property, as this does not operate to give any creditor a preference throught legal proceedings. Richmond Standard Steel Spike & Iron Co. v. Allen (1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583.

34. Admission of insolvency and willingness to be adjudged bankrupt.—Where it is apparent that an admission of insolvency by a corporation was made for the purpose of inducing creditors to take measures to put the corporation into bankruptcy (the corporation itself, under the bankruptcy act as then in force, being forbidden to file its voluntary petition), and that the real motive was the desire of the managers of the company to liquidate its affairs through the court of bankruptcy, that court should discourage the attempt to evade the law. In re Bates Machine Co. (D. C. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129. But see In re C. Moench & Sons Co. (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; In re T. L. Kelly Dry Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

The question whether the corporation is actually unable to pay its debts or not is immaterial, and a creditor intervening to oppose the petition cannot prove its solvency as a defense. In re Duplex Radiator Co. (D. C. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; In re C. Moench & Sons Co. (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

The admission of insolvency need not be made in the form of a resolution of the directors or stockholders or of a published notice or letter to creditors. Where the company itself files a bill in a state court asking for the appointment of a receiver, this may constitute an effectual admission of insolvency. Moody v. Port Clyde Development Co. (1907) 102 Me. 365, 66 Atl. 967. Where hostile proceedings are instituted against a corporation in a state court, its answer may constitute an act of bankruptcy if it thereby admits both its insolvency and its willingness to be adjudged bankrupt, though the former admission is not enough without the latter. In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 179, 9 Am. Bankr. Rep. 579. If a petition in involuntary bankruptcy is filed by creditors against a corporation, and its answer waives process, admits the allegations of the petition, and declares its willingness to be adjudged bankrupt, it is an act of bankruptcy within the meaning of the statute. In re Columbia Real Estate Co. (D. C. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411. But where a corporation authorizes one of its officers to appear on behalf of the company in the federal court and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," this is not in itself such an unqualified admission as is required by the act, and is therefore not an act of bankruptcy on the part of the company. An admission of insolvency, made in answer to an involuntary petition filed by creditors, cannot be availed of as a ground of adjudication on the pending petition, but may constitute the foundation of a new petition. In re Baker-Ricketson Co. (D. C. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605.

Where a petition in bankruptcy is filed against a corporation, it is not necessary, in order to authorize counsel to appear and admit the acts of bankruptcy charged, that the corporators or stockholders should previously vote to authorize that act or direct it to be done. Leiter v. Republic Fire Ins. Co. (C. C. 1873) 9 N. B. R. 205, Fed. Cas. No. 8,227. A corporation has the same privilege of becoming a voluntary bankrupt as an individual has, and a resolution of its board of directors need not strictly conform to subdivision 5 of this section. Bell v. Blessing (C. C. A. 1915) 225 Fed. 750.

35. —— Who authorized to make admission.—No officer of a corporation can commit an act of bankruptcy in its name and behalf, by admitting its inability to pay its debts and its willingness to be adjudged bankrupt, without express authority from some competent source. In re Southern Steel Co. (D. C. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476; In re Jefferson Casket Co. (D. C. 1910) 182 Fed. 689, 25 Am. Bankr. Rep. 663. The unauthorized admission of an officer of a corporation cannot be made effective by subsequent ratification by the directors. In re Burbank Co. (D. C. 1909) 168 Fed. 719, 21 Am. Bankr. Rep. 838. A written admission signed by a majority of the directors, but individually and not in their official capacity, is ineffective. In re Gold Run Mining & Tunnel Co. (D. C. 1912) 200 Fed. 162, 29 Am. Bankr. Rep. 563. Acts of bankruptcy by a corporation

may be shown by proof of acts of its officers in authority, although for their own individual benefit. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co. (C. C. A. 1915) 228 Fed. 470.

A resolution adopted at meetings both of the board of directors and of the stockholders of a corporation, admitting its insolvency and its willingness to be adjudged bankrupt, will constitute an act of bankruptcy. In re American Guarantee & Security Co. (D. C. 1911) 192 Fed. 405, 27 Am. Bankr. Rep. 640.

The power of the board of directors of a corporation to throw it into bankruptcy by admitting its inability to pay its debts and its willingness to be adjudged a bankrupt depends on the laws of the state issuing its charter. In re Russell Wheel & Foundry Co. (D. C. 1915) 222 Fed. 569. But they may do so in the absence of any restrictive provision in the laws of the state or the charter of the corporation. Rudebeck v. Sanderson (C. C. A. 1915) 227 Fed. 575.

Authorization to a corporation to file a petition in bankruptcy, given by its board of directors, a member of which practically owned all the stock, is sufficient, notwithstanding Civ. Code Cal. § 361a. Bell v. Blessing (C. C. A. 1915) 225 Fed. 750. Proceeding instituted by the officers and directors of a corporation, holding a majority of the stock in number of shares and amount, for the appointment of a receiver of its assets, held the act of the corporation. Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C. 1913) 206 Fed. 813.

Under the laws of Massachusetts, the directors of a manufacturing corporation have no authority to make a written admission of its inability to pay its debts and its willingness to be adjudged bankrupt. Such an admission is in excess of their authority, and therefore does not constitute an act of bankruptcy; nor will a vote of the stockholders ratifying the action of the directors, but taken after the filing of the petition, relate back so as to validate it, at least where creditors other than the petitioners have already entered an appearance and opposed the adjudication. In re Bates Machine Co. (D. C. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129. And a similar ruling has been made in the case of an Oregon corporation. In re Quartz Gold Min. Co. (D. C. 1907) 157 Fed. 243, 19 Am. Bankr. Rep. 667; Van Emon v. Veal (1908) 158 Fed. 1022, 85 C. C. A. 547.

The directors of a New York corporation have power and authority to put it into bankruptcy in this way, without the concurrence or authorization of the stockholders, and this is not a corporate function, to be exercised by the whole body of corporators, but an administrative act, and that the act of bankruptcy in question may be committed by the board of directors alone, unless there is something in the statute law of the particular state to forbid it. In re C. Moench & Sons Co. (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; In re Rollins Gold & Silver Min. Co. (D. C. 1900) 102 Fed. 982, 4 Am. Bankr. Rep. 327; In re Mutual Mercantile Agency (D. C. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; In re Guanacevi Tunnel Co. (C. C. A. 1912) 201 Fed. 316, 29 Am. Bankr. Rep. 229. This rule is also applied in the case of corporations organized under the laws of Minnesota and of Arizona. In re Kenwood Ice Co. (D. C. 1911) 189 Fed. 525, 26 Am. Bankr. Rep. 499; Dodge v. Kenwood Ice Co. (C. C. A. 1913) 204 Fed. 577, 29 Am. Bankr. Rep. 586; Home Powder Co. v. Geis (C. C. A. 1913) 204 Fed. 568, 29 Am. Bankr. Rep. 580. Directors of a Pennsylvania corporation without special authority from stockholders have power to authorize the filing of a petition to have the corporation declared a bankrupt. In re Foster Paint & Varnish Co. (D. C. 1914) 210 Fed. 652. Board of directors of Michigan corporation held authorized to admit inability to pay debts and willingness to be adjudicated a bankrupt. In re Russell Wheel & Foundry Co. (D. C. 1915) 222 Fed. 569.

The appointment of receivers for an insolvent corporation does not dissolve it nor vacate the offices of the directors to such an extent as to make it legally impossible for them to make the admission of insolvency contemplated by the bankruptcy act. Cresson & Clearfield Coal & Coke Co. v. Stauffer (1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; In re C. Moench & Sons Co. (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240. Where the court appointing the receivers granted an injunction restraining the officers of the company from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, or incumbering or embarrassing the same, held, that the subsequent action of the board of directors in adopting a resolution confessing the insolvency of the company and its willingness to be adjudged bankrupt was a violation of the injunction and unauthorized, and therefore did not constitute an act of bankruptcy. In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191.

A resolution adopted by the board of directors of a corporation, at a meeting called and held in the usual manner, at which a quorum was present, admitting the insolvency of the corporation and its willingness to be adjudged bankrupt, is sufficient, in the absence of fraud or collusion, to authorize creditors to institute bankruptcy proceed-

ings, and to warrant an adjudication, although some of the directors in a distant state were not notified of the meeting, especially where neither the stockholders nor a new board of directors elected by them have taken any steps during several months to vacate a receivership obtained by the petitioning creditors with the consent of counsel for the corporation. In re Lisk Mfg. Co. (D. C. 1908) 167 Fed. 411, 21 Am. Bankr. Rep. 674. So also where the directors not notified were only nominal members of the board and had never taken part in the meetings of the directors nor given any attention to the affairs of the company. In re Marine Machine & Conveyor Co. (D. C. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421. And the action of the board is not invalidated by failure to give notice of the meeting to a single director, constituting the minority, where it appears that notice to him would have been entirely perfunctory and of no avail in the way of securing his attendance at the meeting or his concurrence in the views of the majority, as he had had a violent quarrel with the other directors, and had instituted a suit to rescind his contract for the purchase of stock in the company on the ground of fraud, and would have resisted the proceeding to put the company into bankruptcy in order to sustain an attachment of the company's property in his own favor. In re Kenwood Ice Co. (D. C. 1911) 189 Fed. 525, 26 Am. Bankr. Rep. 499.

II. TIME FOR FILING PETITION IN BANKRUPTCY

36. Commission of act of bankruptcy.—The period of four months allowed for the filing of a petition, after the commission of an act of bankruptcy, is to be computed by excluding the day on which the act of bankruptcy was committed and including that on which the petition is filed. In re Stevenson (D. C. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree (D. C. 1899) 97 Fed. 28.

The four months' limitation applies to the filing of the petition as the commencement of the proceedings, and if the petition is filed in due time, the proceedings will not be vitiated by a delay in the issuance of process thereon. In re Lewis (D. C. 1899) 91 Fed. 632, 1 Am. Bankr. Rep. 458. It is not material that certain creditors, who joined in the petition subsequent to its filing and before an adjudication, and who are to be reckoned in making up the requisite number of creditors and amount of claims, did not enter their appearance, for the purpose of such joinder, until more than four months after the act of bankruptcy. In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461. The four months' limitation does not apply to an amendment of the petition, and if the original petition was filed in due time, it is no objection to an amendment that it is allowed more than four months after the act of bankruptcy charged, provided it does not introduce a wholly new act of bankruptcy. International Bank v. Sherman (1879) 101 U. S. 403, 25 L. Ed. 866; Hark v. C. M. Allen Co. (1906) 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr. Rep. 3; In re Shoesmith (1905) 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; In re R. L. Radke Co. (D. C. 1911) 193 Fed. 735, 27 Am. Bankr. Rep. 950.

Both the original and the duplicate petition required by the statute must be filed within the four months; it is not enough to file the original, and then, after the four months, the duplicate. In re Stevenson (D. C. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree (D. C. 1899) 97 Fed. 28.

When the preference alleged as an act of bankruptcy was obtained by an attachment of the defendant's property and a sale thereunder, a petition in involuntary bankruptcy may be filed within four months after the seizure and sale of the property, though it be more than four months after the attachment was levied. Parmenter Mfg. Co. v. Stoever (1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; In re Nusbaum (D. C. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

Where the act of bankruptcy alleged is a concealment of property, rather than a transfer of it, this is a continuing act, and the time begins to run from its discovery by the creditors. Citizens' Bank v. W. C. De Pauw Co. (1901) 105 Fed. 926, 45 C. C. A. 130, 5 Am. Bankr. Rep. 345.

When the act of bankruptcy charged is the appointment of a receiver, he is to be regarded as "put in charge" of the property of defendant when the decree appointing him is entered, and the four months' limitation begins to run from the date of the decree, rather than from the time when the receiver qualifies and takes possession. In re Perry Aldrich Co. (D. C. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

37. Recording or registering of transfer or assignment.—The bankruptcy act is not retroactive, and a conveyance of property is not an act of bankruptcy when made before the passage of the law, though not recorded until after that time. The deed is operative from its date, and the act of creditors in recording it cannot be taken as the act of the grantor. In re Wynne (C. C. 1868) Fed. Cas. No. 18,117. But a petition in involuntary bankruptcy could be maintained upon an act of bankruptcy committed before November 1, 1898, the earliest day on which such a petition, under the present statute could be filed, provided the act was

committed after July 1, 1898, the date when the law took effect. Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

In determining whether a transfer of property was made within the time limited, it will be held to have taken place at the time of the actual execution and delivery of the deed, and not at its date. In re Rooney (D. C. 1871) 6 N. B. R. 163, Fed. Cas. No. 12,-032. Where an insolvent corporation sold its real estate and used the proceeds in paying some of its creditors to the exclusion of others, and a petition in bankruptcy against it, alleging the transaction as an act of bankruptcy, not on the theory of its being a transfer of property with intent to delay and defraud creditors, but on the ground that the payments out of the price received were a transfer of property with intent to prefer certain creditors, was filed more than four months after such payments were made, though within four months after the recording of the deed, held, that the petition was too late and must be dismissed. In re Mingo Valley Creamery Ass'n (D. C. 1900) 100 Fed. 282, 4 Am. Bankr. Rep. 67.

38. Taking notorious, exclusive, or continuous possession.—The word "notorious" does not mean that the fact of taking possession of property by the beneficiary in a preferential conveyance of it should be advertised or made public by any active efforts on the part of those concerned, but only that there should be nothing secret or hidden in the transaction; the change of possession need only be such that creditors could have discovered it by proper inquiry. In re Woodward (D. C. 1899) 1 Nat. Bankr. News, 352.

III. ISSUE AND PROOF OF INSOLVENCY

39. Existence and date of insolvency.—The bankruptcy act does not make insolvency an essential prerequisite in every case to an adjudication in involuntary bankruptcy. George M. West Co. v. Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

Solvency at the time of the filing of a petition in involuntary bankruptcy is important as a defense only when the act of bankruptcy charged is the conveyance, transfer, or concealment of property with intent to hinder, delay, or defraud creditors. If the act of bankruptcy charged is the giving or permitting of a preference, insolvency must have existed at the time of the preference, and solvency or insolvency at the time of the filing of the petition can only have a reflex importance as evidence. Acme Food Co. v. Meier (1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

40. Issue of insolvency.—In proceedings in involuntary bankruptcy against a corporation, stockholders may obtain leave to intervene, file an answer, and take issue on the question of its insolvency. Ogden v. Gilt Edge Consol. Mines Co. (C. C. A. 1915) 225 Fed. 723.

41. What constitutes insolvency.—The definition given in clause 15 of section 1 (ante, § 9585) makes the question depend upon the balance between total assets and total liabilities, and it establishes the fixed and invariable rule to be applied in bankruptcy proceedings, and which must be strictly adhered to. Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; In re Rome Planing Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766; Mackel v. Bartlett (1907) 36 Mont. 7, 91 Pac. 1064; Plymouth Cordage Co. v. Smith (1907) 18 Okl. 249, 90 Pac. 418, 11 Ann. Cas. 445. And see Harmanson v. Bain (D. C. 1877) 15 N. B. R. 173, Fed. Cas. No. 6,072; In re Wells (D. C. 1869) 3 N. B. R. 371, Fed. Cas. No. 17,388; Hewitt v. Boston Straw Board Co. (1913) 214 Mass. 260, 101 N. E. 424.

42. —— Fair valuation of property.—The fair valuation of property is its market value, that is, what the property will probably bring or is worth in the general market where everybody buys, not what it is worth to a person specially circumstanced, or having use for a particular article, but what it is worth as a marketable commodity at a given time, with no special conditions prevailing other than such as affect the market generally in the locality where the commodity is for sale. In re Hines (D. C. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295. The fair market value of a corporation's assets, for the purpose of determining its solvency when it committed an alleged act of bankruptcy, is the value which the corporation might have realized on them for itself. In re Marine Iron Works (D. C. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390. "Fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Stern v. Paper (D. C. 1910) 183 Fed. 228, 25 Am. Bankr. Rep. 451.

The term "fair valuation," as used in the bankruptcy act, means the present market value and the value that the debtor might realize thereon if permitted to continue in business. Arnold v. Knapp (W. Va. 1915) 84 S. E. 895.

The "fair valuation" of real estate, for the purpose of determining the question of solvency or insolvency, where no definite market value can be established, and expert testimony must be relied on, is the amount which the property ought to give to a going con-

cern as a fair return, if sold to some one who is willing to purchase under ordinary selling conditions, and not what it might probably bring at a forced sale or an auction sale. The fair valuation of mortgage securities held by a bank, in determining the question of insolvency in bankruptcy proceedings, is to be based on what could be realized therefrom by the bank as a going concern in the usual course of business, and not the so-called market value which could be obtained by treating them as quick assets. In re Kobre (D. C. 1915) 224 Fed. 106.

The fair value of property may be what it has actually brought at a sale on execution, where the sale is shown to have been in all respects fair and reasonable. In re Martin (C. C. 1899) 93 Fed. 990.

Where the assets of an alleged bankrupt include notes, book debts, or other accounts, their value is the sum which could have been realized from their collection, by the exercise of reasonable diligence, within a reasonable time after the date of the proceeding, and not necessarily their face or par value. In re Coddington (D. C. 1902) 118 Fed. 281, 9 Am. Bankr. Rep. 243; Louisiana Nat. Life Assur. Soc. v. Segen (D. C. 1912) 196 Fed. 903, 28 Am. Bankr. Rep. 407; Plymouth Cordage Co. v. Smith (1907) 18 Okl. 249, 90 Pac. 418, 11 Ann. Cas. 445.

43. —— **Comparison of assets and liabilities.**—Unpaid subscriptions to the stock of a corporation are part of its assets, in determining whether or not it is insolvent. In re Commonwealth Lumber Co. (D. C. 1915) 223 Fed. 667. But not the liability of stockholders of a corporation for stock claimed to have been issued without payment, which claim is disputed. First Nat. Bank v. Wyoming Valley Ice Co. (D. C. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448. Nor prospective profits on goods which had been ordered from abroad, but not shipped or paid for, and for which orders had been taken to be delivered six months later. In re Bloch (1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300.

A bankrupt who is the manager and ostensible head of a business cannot avoid liability for the debts contracted in the business, on the ground that another was the real party in interest and he was merely an employé, where that fact was not stated to or known by the creditors. Strellow v. Schloss (D. C. 1906) 149 Fed. 907, 17 Am. Bankr. Rep. 881. A note secured by mortgage is to be reckoned as one of the bankrupt's debts, though he has fraudulently conveyed away the property on which the mortgage rests. In re Shoesmith (C. C. A. 1905) 135 Fed. 684.

In determining the solvency of an alleged bankrupt, liability as surety or indorser for a solvent principal is not to be counted as a liability. In re Bowers (D. C. 1914) 215 Fed. 617.

A judgment in a state court against the alleged bankrupt, which has been opened and the bankrupt permitted to appear generally and defend without conditions, cannot be reckoned as an established debt on the issue of his solvency. McGowan v. Knittel (1905) 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1. A corporation cannot be charged, for this purpose, with the outstanding individual debts of a merchant whose business it bought and continued, but without assuming liability for the debts. In re C. W. Aschenbach Co. (1909) 174 Fed. 396, 98 C. C. A. 290, 23 Am. Bankr. Rep. 95.

The failure of a Pennsylvania corporation to pay the tax due to the state on an increased issue of stock, which had been duly reported to the state authorities as required by law, was an irregularity of which advantage could only be taken by the state, which waived its right by subsequently accepting the tax, and the delay in making the payment did not affect the validity of the stock, or of bonds based thereon, which could only be issued under the state law to the amount of half the capital stock, so as to exclude such bonds from consideration in determining the question of the corporation's insolvency in bankruptcy proceedings against it. First Nat. Bank v. Wyoming Valley Ice Co. (D. C. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

44. —— **Deduction of property fraudulently transferred or concealed.**—Where the bankrupt is shown to have sold property for a large sum in cash, which he retained for several months, and where he gives no information about it except to say that, since the filing of the petition, he has invested it in different states, such sum should be treated as concealed assets and deducted from his available property in determining the question of his solvency. In re Shoesmith (1905) 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645.

Property is not to be deducted which has been pledged as security for a just debt, or paid away in discharge of it, although the transaction would constitute a preference under the bankruptcy law, if it were made the basis of a petition. Acme Food Co. v. Meier (1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550; In re Doscher (D. C. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547.

Property which is exempt from execution under the laws of the state is not to be excluded in computing the assets of the alleged bankrupt. In re Hines (D. C. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; In re Crenshaw (D. C. 1907) 156 Fed. 638; In re

Baumann (D. C. 1899) 96 Fed. 946, 3 Am. Bankr. Rep. 196.

45. Burden of proof and evidence.—If the act of bankruptcy charged in the petition is a fraudulent transfer or concealment of assets, the solvency of the defendant at the time of filing the petition is a matter of defense, and the petitioners are not called upon to prove insolvency, but on the contrary, the burden of proving his solvency at that date is on the defendant. In re West (1901) 108 Fed. 940, 48 C. C. A. 155, 5 Am. Bankr. Rep. 734; In re Crenshaw (D. C. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502. If the act of bankruptcy charged is the giving or suffering a preference, and the bankrupt appears in court and submits to examination touching his solvency, the burden of proving insolvency is on the petitioning creditors; but if the defendant fails to obey the statute in this respect, he must assume the burden of proving his solvency. Cummins Grocer Co. v. Talley (1911) 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484; McGowan v. Knittel (1905) 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1. When the burden of proof rests on the creditors, they are not required to make full and absolute proof of the debtor's insolvency, but may offer evidence tending to show that fact, sufficient at least to make out a prima facie case, and the debtor must then explain or contradict the evidence if possible, as he is best acquainted with the condition of his own affairs. In re Iron Clad Mfg. Co. (1912) 197 Fed. 280, 116 C. C. A. 642, 28 Am. Bankr. Rep. 628; In re Doyle (D. C. 1912) 199 Fed. 247, 29 Am. Bankr. Rep. 102; In re Kassel (C. C. A. 1912) 195 Fed. 492, 28 Am. Bankr. Rep. 233; In re Oregon Bulletin Printing & Pub. Co. (D. C. 1876) 13 N. B. R. 503, Fed. Cas. No. 10,559.

The insolvency of a person at a particular time cannot be proved by general reputation. Hurley v. Smith (D. C. 1870) Fed. Cas. No. 6, 920; Stewart v. McMurray (1886) 82 Ala. 269, 3 South. 47. See Lakin v. First Nat. Bank (D. C. 1875) Fed. Cas. No. 7,999. Nor by the opinion of witnesses, unless the testimony also shows that they are stating conclusions based on their own knowledge of the circumstances. Brundred v. Paterson Machine Co. (1843) 4 N. J. Eq. 294; Royall's Adm'r v. McKenzie (1854) 25 Ala. 363. But the inability of a person engaged in business to meet his debts, as shown by his submitting to suit on claims against which he has no defense, especially when coupled with such circumstances as his suspension of business, or the dissolution of a partnership, is strong evidence of insolvency, and may be sufficient, unless completely explained. In re Elmira Steel Co. (D. C. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; In re Miller (D. C. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; Mayer v. Hermann (C. C. 1872) Fed. Cas. No. 9,-344. But failure to pay a single debt when due is not sufficient to establish insolvency. Driggs v. Moore (C. C. 1870) Fed. Cas. No. 4,083.

A letter written by defendant, stating that he was unable to pay his debts, and calling a meeting of his creditors for the purpose of inducing them to accept a compromise, is prima facie proof of his insolvency, and sufficient to sustain a finding against him on that issue, unless overcome by countervailing proof. In re Lange (D. C. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231. So a statement of indebtedness, drawn from the books of a corporation, is admissible in evidence in proceedings in bankruptcy against it. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co. (C. C. A. 1915) 228 Fed. 470. And a statement made by an officer of a corporation to its creditors, with request for a settlement at 35 cents on the dollar, may be considered on the question of its insolvency, though his authority is not clear. In re Brown Commercial Car Co. (C. C. A. 1915) 227 Fed. 387. But a petition filed in a state court by the directors of a corporation, alleging its insolvency and praying for its dissolution and the appointment of a receiver, is not sufficient ground for a finding of insolvency by a court of bankruptcy in involuntary proceedings subsequently instituted against it, where the rule obtaining in the state courts as to what constitutes insolvency differs from that prescribed by the bankruptcy act. In re Doscher (D. C. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547. And see In re Pickens Mfg. Co. (D. C. 1908) 158 Fed. 894, 20 Am. Bankr. Rep. 202.

Where a portion of the stock of goods of an alleged bankrupt was destroyed by fire shortly before the filing of the petition, and his insurance thereon was unadjusted, it was competent, on the issue of insolvency, to show the value of his stock before the fire as well as that remaining, and evidence was admissible to contradict or impeach his own estimates or appraisals. Bogen & Trummel v. Protter (1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288. And see In re Bloch (1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; Troy Wagon Works v. Vastbinder (D. C. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352. If there is a wide discrepancy in the opinion of witnesses, all equally trustworthy, as to the value of assets, the doubt must be resolved against the party having the burden of proof. In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101. The court will not, at the outset, determine a question of title, to reduce the alleged bankrupt's apparent assets and show insolvency. Blackstone v. Everybody's Store (C. C. A.

1913) 207 Fed. 752, 30 Am. Bankr. Rep. 497.

The issue of solvency or insolvency may depend upon a single circumstance, to which the evidence should be confined, as, whether or not defendant was a partner in a certain firm. Buffalo Milling Co. v. Lewisburg Dairy Co. (D. C. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279. Or whether or not all his creditors had entered into and bound themselves by a composition agreement. Kinsing v. Bartholew (C. C. 1871) Fed. Cas. No. 7,831.

A finding of insolvency by a referee in bankruptcy, on the evidence taken before him as a special master, on a petition in involuntary bankruptcy, will be sustained, under the rule that such findings are presumptively correct, unless it appears that it rests upon an erroneous theory of valuation or that controlling testimony was disregarded. Chicago Motor Vehicle Co. v. American Oak Leather Co. (1905) 141 Fed. 518, 72 C. C. A. 576, 15 Am. Bankr. Rep. 804.

46. Examination of alleged bankrupt.—In involuntary cases, a bankrupt may be examined on oath touching his estate and property, and the disposition thereof by him prior to adjudication. U. S. v. Coyle (D. C. 1916) 229 Fed. 256.

Referee in bankruptcy, appointed as special master, held to have full power and authority to administer oath and conduct examination of bankrupt concerning his property and its disposition. Id.

A simple denial of the fact of insolvency in the answer by an alleged bankrupt, who had previously assigned all his property for the benefit of his creditors, not accompanied by any affidavits, schedules, or other evidence, does not raise such an issue of solvency as is contemplated by the act. Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

The failure of the bankrupt to appear and submit to examination will justify the presumption of insolvency against him. In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576. If the bankrupt does not appear voluntarily, he may be called and cross-examined by the creditors. In re Coddington (D. C. 1902) 118 Fed. 281, 9 Am. Bankr. Rep. 243. But see In re Thompson (D. C. 1910) 179 Fed. 874, 24 Am. Bankr. Rep. 655, where it is held that an alleged bankrupt cannot be subjected to examination on written interrogatories before adjudication at the instance of petitioning creditors.

If the bankrupt is engaged in trade, he is required to produce such books, invoices, and other accounts as should properly be kept in his business and which are necessary to show the character and amount of his assets and liabilities, and his failure to do so, without satisfactory explanation, casts upon him the burden of proving his solvency. Bogen & Trummel v. Protter (1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288. Where the nature of his business is not such as to require him to keep books of account, in the ordinary or mercantile sense, yet the rule of the statute applies to such papers and accounts as he actually does keep, these being usually the best evidence of the existence of the assets which he claims and relies on to establish his solvency. Cummins Grocer Co. v. Talley (1911) 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484.

Where the bankrupt appears with other witnesses and is examined, and books are produced, but neither the testimony of the witnesses nor the matters shown by the books disclose the actual financial condition of the bankrupt, this is not a compliance with the requirement of the statute. In re American Pub. Co. (1905) 15 Okl. 177, 79 Pac. 762.

§ 9588. (Act July 1, 1898, c. 541, § 4, as amended, Act Feb. 5, 1903, c. 487, § 3, and Act June 25, 1910, c. 412, §§ 3, 4.) Who may become bankrupts.

Who May Become Bankrupts.—a Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of

a State or Territory or of the United States. (30 Stat. 547. 32 Stat. 797. 36 Stat. 839.)

This section, as originally enacted, was as follows:

"Who May Become Bankrupts.—a Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

It was amended by Act Feb. 5, 1903, c. 487, § 3, cited above, by adding at the end of the section as originally enacted, the paragraph beginning "The bankruptcy of a corporation," etc., as set forth here.

Clauses a and b of the section were amended, by Act June 25, 1910, c. 412, §§ 3, 4, also cited above, to read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Notes of Decisions

I. Persons subject to bankruptcy law
1. Voluntary bankruptcy.
2. Involuntary bankruptcy.
3. Aliens and Indians.
4. Married women.
5. Insane persons.
6. Infants.
7. Decedents' estates.
8. Executors.
9. Wage-earners.
10. Farmers.
11. Second bankruptcy.

II. Corporations subject to bankruptcy law
12. Jurisdiction of corporations.
13. Effect of proceedings for dissolution under state law.
14. Corporations amenable to bankruptcy law.
15. Trading and mercantile corporations.
16. Manufacturing corporations.
17. Banking corporations.
18. Insurance companies.
19. Mining and quarrying companies.
20. Public service corporations.
21. Moneyed, business, and commercial corporations.
22. Charitable, religious, and other corporations not for profit.
23. Unincorporated companies.

I. PERSONS SUBJECT TO BANKRUPTCY LAW

1. Voluntary bankruptcy.—The right of voluntary bankruptcy is open to all natural persons, without distinction as to occupation or pursuit, including an officer in the United States army. Audubon v. Shufeldt (1901) 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829. A state court will not grant an injunction restraining a party from applying for the benefits of the bankruptcy law on his voluntary petition. Fillingin v. Thornton (1873) 49 Ga. 384. No creditor can either compel a debtor to go into voluntary bankruptcy or compel a partner to petition for the adjudication of his copartners. Nor can any man lawfully be called upon to show cause why he should not go himself, or put anybody else, into voluntary bankruptcy. In re Harbaugh (D. C. 1877) 15 N. B. R. 246, Fed. Cas. No. 6,045.

Proceedings in voluntary bankruptcy cannot be conducted in the united names of parties who have no common interest and do not seek a common decree, and individuals cannot associate and make a joint and several petition with a view to a separate decree in favor of each applicant. In re Moritz (D. C. 1842) Fed. Cas. No. 9,814. But where the system of community property prevails, a husband and wife may file a joint petition in voluntary bankruptcy, in the nature of a partnership petition, for though they are not exactly partners, yet where joint debts and obligations are contracted, there is a joint liability such as will sustain a joint petition. In re Ray, 1 Nat. Bankr. News, 276.

The fact that a petitioner in voluntary bankruptcy owes debts of a fiduciary character, which would not be affected by his discharge, is no objection to his being adjudged bankrupt and obtaining the benefit of the act, if he owes other debts not of a fiduciary character. In re Tebbetts (C. C. 1842) Fed. Cas. No. 13,817. If the existence of at least one debt is a jurisdictional necessity, it must be of such a kind as to be provable in bankruptcy, and an unliquidated claim for damages for a personal tort is not such a debt. In re Yates (D. C. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69.

A petition in voluntary bankruptcy which schedules no property except such as is exempt under the law of the state, and only one debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject-matter upon which the court can act, and should be dismissed for want of jurisdiction. In re Maples (D. C. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426.

A person who owes but one debt, and has no assets to which a trustee could take title, is nevertheless entitled to become a voluntary bankrupt. In re Schwaninger (D. C. 1906) 144 Fed. 555, 16 Am. Bankr. Rep. 427.

Where a petition in involuntary bankruptcy was filed, and the debtor, before an adjudication thereon, filed his voluntary petition and was duly adjudged bankrupt, held, that the pendency of the first proceeding was no bar to the institution of the second, and that the court would proceed in the latter, and the further prosecution of the former would be stayed. In re Flanagan (D. C. 1878) Fed. Cas. No. 4,850.

The pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, when it appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted. In re Mussey (D. C. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592.

The default of the defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into a case of voluntary bankruptcy, and hence, if he belonged to one of the exempt classes, and therefore could not be adjudged in involuntary proceedings, he cannot be adjudged on default, though he might have filed his voluntary petition had he so chosen. In re Taylor (C. C. A. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

2. **Involuntary bankruptcy.**—A natural person may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," the quoted clause qualifying the words "any corporation" only. Cleage by Laidley (1906) 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598. See In re Excelsior Cafe Co. (D. C. 1910) 175 Fed. 294, 23 Am. Bankr. Rep. 701.

A man who regularly follows two occupations is not at the time of the commission of an act of bankruptcy chiefly engaged in one of them merely because at that time he is giving his principal attention to it rather than to his other pursuit. In re Disney (D. C. 1915) 219 Fed. 294.

Whether an alleged bankrupt is within a class of persons exempt from adjudication in involuntary bankruptcy is to be determined as of the date of the commission of the act of bankruptcy charged in the petition. Flickinger v. First Nat. Bank (1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; In re Leland (D. C. 1910) 185 Fed. 830, 25 Am. Bankr. Rep. 209; In re Disney (D. C. 1915) 219 Fed. 294; Virginia-Carolina Chemical Co. v. Shelhorse (C. C. A. 1915) 228 Fed. 493; In re Folkstad (D. C. 1912) 199 Fed. 363, 29 Am. Bankr. Rep. 77. Compare, as holding that the question must be determined as of the time when the debts to the petitioning creditors were contracted. Tiffany v. La Plume Condensed Milk Co. (D. C. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; In re Burgin (D. C. 1909) 173 Fed. 726, 22 Am. Bankr. Rep. 574; In re Crenshaw (D. C. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502.

While the primary burden is on the petitioning creditors to show that the alleged bankrupt is not among the exempt classes, yet where it appears that the debtor, who claimed to be a farmer, had left his farm more than 14 years ago, and had gone into other active business, in which he continued for several years, the burden shifted to the contestants to show that he again regained an exempt status. In re Leland (D. C. 1910) 185 Fed. 830, 25 Am. Bankr. Rep. 209.

3. **Aliens and Indians.**—An alien, as well as an American citizen, may be adjudged bankrupt in either voluntary or involuntary proceedings. In re Goodfellow (D. C. 1870) Fed. Cas. No. 5,536; In re Burton (D. C. 1878) Fed. Cas. No. 2,214; In re Boynton (D. C. 1882) 10 Fed. 277; Judd v. Lawrence (Mass. 1848) 1 Cush. 531; Cutter v. Folsom (1845) 17 N. H. 139.

An Indian, maintaining his tribal relations and not being a citizen, may be adjudged bankrupt on his voluntary petition. In re Russie (D. C. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; In re Rennie, 1 Nat. Bankr. News, 335.

4. **Married women.**—If, by the laws of the state of her domicile, a married woman is allowed to make valid and enforceable contracts in the way of trade or business, she is amenable to the bankruptcy law, and in any case where a plea of coverture would not avail her in an action on the debt, she may be proceeded against in bankruptcy. In re Kinkead (D. C. 1873) Fed. Cas. No. 7,824; In re O'Brien (C. C. 1873) 1 N. B. R. 176, Fed. Cas. No. 10,397; In re Lyons (D. C. 1874) Fed. Cas. No. 8,649; In re Collins (D. C. 1873) Fed. Cas. No. 3,006; In re Rud-

dell (D. C. 1872) Fed. Cas. No. 12,-109.

A married woman who is a partner in her husband's business, or who engages in business in her own name, by her husband acting as her agent, he exercising the entire control and management of the same in his discretion, may be adjudged bankrupt. Graham v. Stark (D. C. 1869) Fed. Cas. No. 5,676; In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549.

Where a married woman has entire control over her separate estate, whether owned before marriage or since acquired, and may make contracts in respect to the same, enforceable either at law or in equity, and may engage in trade, using her own name, and she forms a business partnership with her husband, contributing her separate money to the capital of the concern and her time and skill to the management of its affairs, the firm may be adjudged bankrupt, and semble that the wife may be so adjudged individually. In re Kinkead (D. C. 1873) Fed. Cas. No. 7,824.

Where a married woman was authorized by her husband to carry on business as a partner with other members of a firm, and was separate in property from her husband, it was not necessary to make the husband a party to a proceeding in involuntary bankruptcy against the firm. Lastrapes v. Blanc (C. C. 1878) Fed. Cas. No. 8,-100.

The bankruptcy act authorizes the adjudication of a married woman as an involuntary bankrupt, where she is engaged in business on her own account and owes business obligations of the amount required by the statute, for which her separate property would be liable in equity though not at law. MacDonlad v. Tefft-Weller Co. (1904) 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800.

If the laws of the particular state have not removed the common-law disabilities of a married woman, so that she is still incompetent to contract, a petition in bankruptcy will not lie against her, at least where it is not shown that she has a separate estate. In re Goodman (D. C. 1873) Fed. Cas. No. 5,540.

If the laws of the state are such that a married woman had no power to contract the particular debts claimed by the petitioning creditors, and such debts are not legally binding upon her, such debts are not provable in bankruptcy and will not support a petition, and therefore she may plead her coverture to defeat them, and cannot be adjudged bankrupt. In re Slichter (D. C. 1869) 2 N. B. R. 336, Fed. Cas. No. 12,943.

A petition in involuntary bankruptcy was filed against an alleged bankrupt, a married woman having a separate estate, founded on the nonpayment of certain promissory notes made by her. Held, that inasmuch as it did not appear on the face of the notes that it was her intention to bind her separate estate, and there being no allegation that they were given for the benefit of her separate estate, or in the course of trade, the petition must be dismissed, but with leave to amend on payment of costs. In re Howland (D. C. 1868) 2 N. B. R. 357, Fed. Cas. No. 6,791.

A married woman, where no fraud is intended, may take advantage of bankruptcy with respect to debts contracted while she was sole. Lawver v. Gladden (Pa. 1885) 1 Atl. 659.

5. Insane persons.—A court of bankruptcy is not deprived of jurisdiction in an involuntary proceeding by an adjudication in a state court, in proceedings instituted after the filing of the petition, that the alleged bankrupt is insane, and has been insane since a time prior to the alleged act of bankruptcy set out in the petition, nor is such adjudication conclusive on the bankruptcy court, but the issue of insanity may be tried under the defense that the defendant did not commit the alleged act of bankruptcy. In re Ward (D. C. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; In re Kehler (D. C. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596.

It is a good defense to a petition in involuntary bankruptcy that the defendant was insane at the time of the commission of the alleged act of bankruptcy, and therefore legally incapable of forming an intent to defraud creditors, give a preference, or otherwise commit an act of bankruptcy. In re Ward (D. C. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; In re Kehler (D. C. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596; In re Funk (D. C. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; In re Marvin (C. C. 1871) Fed. Cas. No. 9,178; In re Weitzel (D. C. 1876) Fed. Cas. No. 17,365; In re Pratt (D. C. 1872) Fed. Cas. No. 11,371.

An insane person is not capable of maintaining a voluntary petition in bankruptcy, since he is incapable of performing the duties and assuming the burdens and obligations which accompany the benefits to be derived from the operation of the bankruptcy law. In re Eisenberg (D. C. 1902) 117 Fed. 786, 8 Am. Bankr. Rep. 551.

The fact that a person has been declared a lunatic by the proper court of a state, and a guardian appointed for him, will not invalidate the action of the bankruptcy court in subsequently passing an adjudication of bankruptcy upon him on his own petition; for the decree of the state court merely establishes the fact that he was a lunatic at the time it was made, and does not exclude the supposition that he may since have become sane. Saunders v. Mitchell (1883) 61 Miss. 321.

But compare In re Funk (D. C. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96.

6. **Infants.**—An infant cannot be adjudged bankrupt either upon his own petition or upon the prosecution of his creditors. In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Derby (D. C. 1872) Fed. Cas. No. 3,815. Compare In re Book (C. C. 1843) Fed. Cas. No. 1,637. No person can be made bankrupt on the basis of his owing debts which he is not liable at law to pay. In re Eidemiller (D. C. 1900) 105 Fed. 595, 5 Am. Bankr. Rep. 570. The giving of a mortgage, or a transfer of property, by an infant cannot constitute an act of bankruptcy on which he may be adjudged bankrupt, since it is subject to be avoided or disaffirmed by him on reaching his majority. In re Derby (D. C. 1872) Fed. Cas. No. 3,815.

A minor cannot come into court after attaining his majority, and, by a petition to that effect, ratify and confirm involuntary proceedings begun against him during his minority. If the court of bankruptcy never acquired jurisdiction of his person, jurisdiction cannot be thus retroactively conferred upon it. In re Derby (D. C. 1872) Fed. Cas. No. 3,815.

Where the law of the state (Code Iowa 1897, § 3190) provides that a minor may not disaffirm his contracts on reaching full age when, "from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting," if a minor engages in business as a merchant, and parties consequently assume that he is of full age, and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and may be adjudged bankrupt on his own petition, though still an infant. In re Brice (D. C. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

The provision of the bankruptcy act that it shall be applicable to a person who "owes debts" has reference to an obligation for which a debtor is legally liable, and hence the act includes an infant if he owes debts for which his property is legally chargeable. In re Walrath (D. C. 1910) 175 Fed. 243, 24 Am. Bankr. Rep. 541.

Where proceedings in bankruptcy are instituted against a firm, and it appears that one of the partners is a minor, an adjudication may be made against the adult partners and against the firm as such, and the partnership property and the separate estates of the adult partners may be administered in bankruptcy, but no adjudication can be made against the infant partner, as to whom the petition must be dismissed. Jennings v. Stannus (1911) 191 Fed. 347, 112 C. C. A. 91, 27 Am. Bankr. Rep. 384; In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Dunnigan (D. C. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628.

7. **Decedents' estates.**—The bankruptcy act does not authorize the institution of proceedings against the estate of a deceased person, nor provide for the administration of such an estate in the court of bankruptcy, nor does the court acquire jurisdiction of the estate of a decedent by proceedings against a partnership of which he was a member. Adams v. Terrell (C. C. 1880) 4 Fed. 796; In re Daggett (D. C. 1873) 8 N. B. R. 287, Fed. Cas. No. 3,535.

An adjudication in bankruptcy against a firm, on the voluntary petition of one of the partners, is void when it appears that the firm had been dissolved by the death of the other partner. In re Temple (D. C. 1876) Fed. Cas. No. 13,825.

8. **Executors.**—A testator, who was engaged in business as a private banker, made his wife his general executrix, but by a codicil to his will nominated two other persons as his executors for the limited purpose of winding up his business, and clothed them with the powers necessary to carry on the business to effect that object without injury to his estate or to his customers. These persons qualified and carried on the business for some time, until forced by a financial panic to suspend business and stop payment, and a petition in bankruptcy was filed against them. Held, that it must be dismissed, as this was not one of the class of executorships designed to be administered under the bankruptcy act. Graves v. Winter (D. C. 1874) 9 N. B. R. 357, Fed. Cas. No. 5,710.

9. **Wage-earners.**—The question whether a person petitioned against in involuntary bankruptcy is exempt in the character of a wage-earner depends upon his status as to occupation at the time the alleged act of bankruptcy was committed. Virginia-Carolina Chemical Co. v. Shelhorse (C. C. A. 1915) 228 Fed. 493.

While a farmer is exempt from involuntary bankruptcy, whatever may be his other interests, if farming is his chief occupation, a wage-earner is exempt only when he actually pursues the calling which that term prescribes, and a wage-earner is an employé, and this implies service for another which is substantially exclusive. Id.

One who is engaged in manufacturing and trading pursuits does not become a wage-earner, so as to be exempt from involuntary bankruptcy, merely because, while so engaged, he also earns wages by working for another in a different occupation. In re Naroma Chocolate Co. (D. C. 1910) 178 Fed. 383, 24 Am. Bankr. Rep. 154.

One whose occupation is that of secretary and financial manager for a corporation at a salary of $100 a month, and who has no other business, is ex-

empt from adjudication in bankruptcy, as a wage-earner, though he is also a stockholder in the corporation, from which, however, he derives no income. In re Pilger (D. C. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244.

One who owns a team of horses and wagons and a plow, and who works by the day for different employers as he can obtain work, earning usually not more than $15 a week, and who works alone when he cannot find work for his team, is not an independent contractor, but a wage-earner. In re Yoder (D. C. 1904) 127 Fed. 894, 11 Am. Bankr. Rep. 445.

Alleged bankrupt held not a bona fide wage-earner when acts of bankruptcy were committed, though business formerly conducted by him had dwindled in volume and about that time he entered the employment of another. Virginia-Carolina Chemical Co. v. Shelhorse (C. C. A. 1915) 228 Fed. 493.

A teacher of music, who charges and receives a fixed price per lesson or per hour of instruction, is not exempt from proceedings in bankruptcy in the character of a wage-earner, though his earnings do not exceed $1,500 per annum. First Nat. Bank v. Barnum (D. C. 1908) 160 Fed. 245, 20 Am. Bankr. Rep. 439.

Where an alleged bankrupt had engaged in a mercantile business in which he had contracted debts, and thereafter acquired property by inheritance, worth $40,000, which he immediately assigned to his brother for $180, and during the year the assignment was made received wages for his services exceeding $1,500 per annum, he was not exempt from adjudication in bankruptcy as a wage-earner. In re Wakefield (D. C. 1910) 182 Fed. 247, 25 Am. Bankr. Rep. 118.

Where the defendant in a petition in involuntary bankruptcy nominally drew a salary of $900 a year as president of a corporation, but owned two-thirds of the stock of the corporation, and drew more than $2,000 a year from its earnings, preceding the institution of the bankruptcy proceedings, and he was also in the business of buying and selling real estate, his holdings outside the corporation being worth nearly $90,000, he was not exempt as a wage-earner. Carpenter v. Cudd (1909) 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463.

Where an alleged bankrupt received $100 a month and his expenses while traveling and it was proved that his employer's agreement to pay his expenses was worth $40 a month to him, his compensation exceeded $1,500 a year, and he was therefore not exempt as a wage-earner from bankruptcy adjudication under Bankr. Act 1898, § 1, subsec. 27. In re Hurley (D. C. 1913) 204 Fed. 126.

10. Farmers.—The provision of the act exempting from involuntary bankruptcy persons engaged chiefly in farming or the tillage of the soil applies only to natural persons and partnerships, not to corporations. In re Lake Jackson Sugar Co. (D. C. 1904) 129 Fed. 640.

A person "engaged chiefly in farming or the tillage of the soil" does not commit an act of bankruptcy, nor become subject to adjudication in bankruptcy, by making a general assignment for the benefit of his creditors. Olive v. Armour (C. C. A. 1909) 167 Fed. 517, 21 Am. Bankr. Rep. 901.

A person engaged in trade or some other nonexempt pursuit, and who commits an act of bankruptcy, cannot evade the statute by engaging in farming and making that his chief occupation, after the act of bankruptcy and before the filing of the petition against him. In re Mackey (D. C. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; In re Luckhardt (D. C. 1900) 101 Fed. 807, 4 Am. Bankr. Rep. 307.

A man who regularly follows two occupations, one of them being farming, is not, at the time of the commission of an act of bankruptcy, chiefly engaged in one of those occupations merely because at that time he is giving his principal attention to it rather than to his other pursuit. In re Disney (D. C. 1915) 219 Fed. 294.

If a person's main occupation is some form of agriculture, he is exempt from the bankruptcy law, though he may devote some minor part of his time to incidental pursuits, and thereby supplement his income. In re Mackey (D. C. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577.

In determining whether one sought to be adjudged an involuntary bankrupt is chiefly engaged in the exempt occupation of farming, all his pursuits must be considered as a whole, though he is merely a partner as to some of them. American Agricultural Chemical Co. v. Brinkley (1912) 194 Fed. 411, 114 C. C. A. 373, 27 Am. Bankr. Rep. 438.

One who resides with his family on a farm and cultivates it, and derives his main support from it, is a farmer, though he is also the publisher of a weekly newspaper and the proprietor of patent medicines. McCue v. Tunstead (1884) 65 Cal. 506, 4 Pac. 510. Or the owner of a small store, from which he derives a profit, but small in comparison with the income from his farm. Rise v. Bordner (D. C. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297.

A person whose principal occupation is the raising of cattle, sheep, hogs, or other live stock for the market, his farm being devoted to use as pasture land and for raising grass, hay, and corn with which to feed and fatten the stock, is exempt from the bankruptcy law, being a "farmer" though not a tiller of the soil, and does not lose this character by the fact that he incidental-

ly supplements the products of his own farm by the purchase of fodder for the stock, nor by the fact that he does not entirely restrict his operations to cattle raised on his own land. In re Dwyer (C. C. A. 1911) 184 Fed. 880, 25 Am. Bankr. Rep. 913; In re Thompson (D. C. 1900) 102 Fed. 287, 4 Am. Bankr. Rep. 340. But one whose chief occupation is the purchase and sale of live stock, and who uses his lands as a mere feeding station, and, even for the maintenance of the cattle while on his lands, relies chiefly on purchased supplies, is not engaged in either farming or the tillage of the soil, but is a trader. Bank of Dearborn v. Matney (D. C. 1904) 132 Fed. 75, 12 Am. Bankr. Rep. 482; In re Brown (D. C. 1904) 132 Fed. 706, 13 Am. Bankr. Rep. 140.

A farmer does not cease to be engaged chiefly in farming because he establishes a dairy as one of the branches of his industry, to utilize the products of his farm and convert them to profitable uses, nor because he may sell the products of his dairy at retail. But one is not exempt as a farmer whose business is to maintain a herd of cows and sell the milk, owning no farm, but only the barn in which they are kept, and buying from others the grain and other forage to maintain them. Gregg v. Mitchell (1909) 166 Fed. 725, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 21 Am. Bankr. Rep. 659.

Evidence held to require a finding that a bankrupt firm, operating a canning factory and canning produce partially raised on its farm, was not chiefly engaged in farming, nor were the members of the firm, except one, so chiefly engaged, and hence the firm and the partners, with such exception, were subject to adjudication in bankruptcy. In re Disney (D. C. 1915) 219 Fed. 294.

Persons who reside upon and cultivate land as partners, on which they raise fruit and vegetables of the value of several thousand dollars a year, which constitutes by far the greater part of their income, are engaged chiefly in farming or the tillage of the soil, within the meaning of the bankruptcy act, and are not subject to adjudication in bankruptcy, although they may also realize a few hundred dollars each year from other and incidental occupations. In re Terry (D. C. 1913) 208 Fed. 162.

If a man's principal occupation is the management and control of a large plantation, which he owns, upon which he resides, and upon which he relies for his income, he is engaged chiefly in farming, and it is not material that part of the property is rented to tenants, the owner exercising supervision and control of their operations, nor that, as to the rest, the manual labor is performed by hired servants, the owner himself not personally working on the land. Wulbern v. Drake (1903) 120 Fed. 493, 56 C. C. A. 643, 9 Am. Bankr. Rep. 695.

One having regular clerical employment in a city, but whose home is upon a farm, where he spends his Sundays and one night in each week, the management of which is, in his absence, in the hands of men hired by him for the purpose, is not a farmer. Johnson v. London Guaranty & Accident Co. (1897) 115 Mich. 91, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549.

The owner of a farm, who does not work it himself, but lets it to a tenant, retaining a general supervision to the extent of seeing that the tenant carries on the work as agreed, but taking no active direction or control, and who has no active business of any kind except looking after his investments, is not "engaged in farming" so as to be exempt from involuntary bankruptcy. In re Leland (D. C. 1910) 185 Fed. 830, 25 Am. Bankr. Rep. 209; In re Matson (D. C. 1903) 123 Fed. 743, 10 Am. Bankr. Rep. 473. And see In re Hoy (D. C. 1905) 137 Fed. 175, 14 Am. Bankr. Rep. 648.

Where the title to a farm stands in the name of a wife, and she performs only such services as are generally performed by the wives of farmers, the husband taking full charge of the farming operations, the wife is not "engaged chiefly in farming." In re Johnson (D. C. 1907) 149 Fed. 864, 18 Am. Bankr. Rep. 74.

Whether an alleged bankrupt was chiefly engaged in farming, and therefore exempt from involuntary bankruptcy adjudication, must be determined as of the time when he committed the act of bankruptcy charged. In re Disney (D. C. 1915) 219 Fed. 294.

11. Second bankruptcy.—The provision of the bankruptcy act which forbids the granting of a discharge if the bankrupt has, in voluntary proceedings, been granted a discharge within six years, is not retroactive as applied to cases where the first proceedings were had prior to its enactment, as it creates no new offense and imposes no new penalties, but only fixes new conditions of discharge in the case of petitions filed after its passage. In re Carleton (D. C. 1904) 131 Fed. 146, 12 Am. Bankr. Rep. 475.

A bankrupt who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts sufficient in amount to give the court jurisdiction, may file a second petition in bankruptcy; but a discharge under such new petition will apply only to new debts and to such old debts as had been proved anew. In re Drisko (D. C. 1875) Fed. Cas. No. 4090.

The denial of a bankrupt's application for discharge renders the issue as to his right to a discharge res judicata as to debts which were provable in that proceeding, and his failure to apply for a discharge has the same effect. In re

Pullian (D. C. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513. Hence where, in a subsequent voluntary proceeding, the bankrupt schedules the same debts and the same assets, the second proceeding is a manifest attempt to evade the effect of the former, and should be dismissed, or the bankrupt should be restrained by the court from prosecuting a second application for a discharge. But where a considerable time has elapsed, and new debts are also scheduled, the bankrupt has the right to maintain the proceeding as to those, and an order granting a stay should be limited accordingly. In re Kuffler (1907) 151 Fed. 12, 80 C. C. A. 508, 18 Am. Bankr. Rep. 16; In re Pullian (D. C. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513.

II. CORPORATIONS SUBJECT TO BANKRUPTCY LAW

12. Jurisdiction of corporations.—A petition in involuntary bankruptcy against a corporation which does not show that it belongs to one or other of the classes of corporations enumerated in the statute as being subject to proceedings in bankruptcy is not sufficient to support an adjudication. In re Oregon Bulletin Printing & Pub. Co. (C. C. 1876) Fed. Cas. No. 10,561.

It is within the jurisdiction of the court of bankruptcy to determine whether or not the respondent corporation is amenable to involuntary bankruptcy, in view of the nature of its business or occupation. T. E. Hill Co. v. Contractors' Supply & Equipment Co. (1910) 156 Ill. App. 270.

The same proportion of creditors, in number and amount, must join in a petition in involuntary bankruptcy against a corporation as are required in the case of a natural person. In re Leavenworth Sav. Bank (C. C. 1876) Fed. Cas. No. 8,165; In re Oregon Bulletin Printing & Pub. Co. (C. C. 1876) Fed. Cas. No. 10,561.

Jurisdiction of voluntary proceeding by corporation having domicile and residence in district held to be taken, notwithstanding earlier filing of involuntary petition in another district, where it was claimed to have a place of business. In re R. H. Pennington & Co. (D. C. 1915) 228 Fed. 388.

Insolvency is not a necessary prerequisite to the filing of a voluntary petition for bankruptcy adjudication against a corporation. In re Foster Paint & Varnish Co. (D. C. 1914) 210 Fed. 652.

13. Effect of proceedings for dissolution under state law.—A corporation which is subject to the provisions of the act, and has committed an act of bankruptcy, and which is in existence when the petition against it is filed and when the proper papers are served on its proper officer, cannot oust the jurisdiction of the court of bankruptcy to proceed to an adjudication on the return day, because a decree dissolving the corporation has been made after such service and before such return day. Scheuer v. Smith & Montgomery Book & Stationery Co. (1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; Platt v. Archer (C. C. 1872) Fed. Cas. No. 11,213.

The federal court has power to declare a corporation bankrupt, notwithstanding its dissolution by decree of a state court, and the appointment of a receiver to wind up its affairs, before the commencement of the proceedings in bankruptcy, provided that such proceedings are begun within four months after such dissolution, that being the time within which an act of bankruptcy must be alleged. Morehouse v. Giant Powder Co. (C. C. A. 1913) 206 Fed. 24; In re Munger Vehicle Tire Co. (1908) 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; Tiffany v. La Plume Condensed Milk Co. (D. C. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; In re Belfast Mesh Underwear Co. (D. C. 1907) 153 Fed. 224, 18 Am. Bankr. Rep. 620; White Mountain Paper Co. v. Morse (1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; In re Independent Ins. Co. (D. C. 1872) 6 N. B. R. 169, Fed. Cas. No. 7,018; In re Green Pond R. Co. (D. C. 1876) 13 N. B. R. 118, Fed. Cas. No. 5,786; In re Safe Deposit & Sav. Inst. (D. C. 1872) 7 N. B. R. 392, Fed. Cas. No. 12,211; In re Washington Marine Ins. Co. (D. C. 1868) 2 N. B. R. 648, Fed. Cas. No. 17,246; Thornhill v. Bank of Louisiana (C. C. 1870) Fed. Cas. No. 13,992; In re Merchants' Ins. Co. (D. C. 1871) Fed. Cas. No. 9,441; In re New Amsterdam Ins. Co. (C. C. 1873) Fed. Cas. No. 10,140. And see In re Storck Lumber Co. (D. C. 1902) 114 Fed. 360, 8 Am. Bankr. Rep. 86.

Where an insolvent corporation commits an act of bankruptcy by preferring certain of its creditors, the jurisdiction of a court of bankruptcy to adjudge it bankrupt and administer its property attaches, and the company cannot avoid such jurisdiction and validate its preferences by instituting proceedings for its dissolution in a state court before proceedings in bankruptcy against it are commenced. In re Adams & Hoyt Co. (D. C. 1908) 164 Fed. 489, 21 Am. Bankr. Rep. 161; Scheuer v. Smith & Montgomery Book & Stationery Co. (1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384.

Proceedings taken by a state to forfeit the charter of one of its corporations for nonpayment of a license tax or other state tax, or to suspend its corporate activity until such delinquency is removed, do not deprive a court of bankruptcy of jurisdiction to adjudge it bankrupt and administer its assets. In re Double Star Brick Co. (D. C. 1913) 210 Fed. 980; In re Munger Vehicle Tire Co. (1908) 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785.

Proceedings under Act Pa. April 7, 1870 (P. L. 58), by which all of the property of an insolvent corporation is sold under a special writ of fieri facias for distribution among its creditors, do not work a dissolution of the corporation so as to defeat subsequent bankruptcy proceedings against it based on such proceedings as an act of bankruptcy. Cresson & Clearfield Coal & Coke Co. v. Stauffer (1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; In re International Coal Min. Co. (D. C. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

The court of bankruptcy is not deprived of jurisdiction by the appointment of receivers for a manufacturing corporation, and its ceasing to do business in consequence thereof, before the filing of a petition in bankruptcy against it. In re C. Moench & Sons Co. (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240. Nor by the act of a corporation in electing liquidating trustees, as authorized by a state statute, which further provides that, upon their giving notice by publication, the company "shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof." In re Hercules Atkin Co. (D. C. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369.

14. Corporations amenable to bankruptcy law.—The bankruptcy act is to be strictly construed with reference to the amenability of corporations to its provisions, and cannot be held to include any corporation not clearly within the enumerated classes. In re New York & New Jersey Ice Lines (1906) 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832.

The court of bankruptcy in which a petition against a corporation is filed has jurisdiction to determine whether or not the corporation comes within the terms of the law. T. E. Hill Co. v. Contractors' Supply & Equipment Co. (1911) 149 Ill. 304, 94 N. E. 544. See In re Broadway Savings Trust Co. (C. C. A. 1907) 152 Fed. 152, 18 Am. Bankr. Rep. 254.

A corporation chartered for a certain purpose is to be regarded (in bankruptcy proceedings) as engaged in the business contemplated by the charter from the time it starts to put itself in shape to pursue the object for which it was incorporated, and is amenable to bankruptcy proceedings although it has not yet completed its plant, or started its works, or turned out any finished product. Bollinger v. Central Nat. Bank (1910) 177 Fed. 609, 101 C. C. A. 235, 24 Am. Bankr. Rep. 44; In re Bloomsburg Brewing Co. (D. C. 1909) 172 Fed. 174, 22 Am. Bankr. Rep. 625; White Mountain Paper Co. v. Morse (1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; In re White Mountain Paper Co. (D. C. 1903) 127 Fed. 180, 11 Am. Bankr. Rep. 491. But numerous decisions maintain that, to authorize an adjudication against a corporation on the ground of its being "engaged principally" in some line of business within the terms of the statute, it is not sufficient that its charter authorizes it to engage in such business, nor that it may have the intention of so engaging. If, up to the time of the filing of a petition against it, it has never done any business, except of a preparatory kind, it is not subject to adjudication. In re Coolidge Refrigerator & Car Co. (D. C. 1911) 190 Fed. 908, 27 Am. Bankr. Rep. 209; In re New England Breeders Club (D. C. 1908) 165 Fed. 517, 21 Am. Bankr. Rep. 349; In re Chicago-Joplin Lead & Zinc Co. (D. C. 1900) 104 Fed. 67, 4 Am. Bankr. Rep. 712; In re Tontine Surety Co. (D. C. 1902) 116 Fed. 401, 8 Am. Bankr. Rep. 421; In re Toledo Portland Cement Co. (D. C. 1907) 156 Fed. 83, 19 Am. Bankr. Rep. 117.

The liability of a corporation to bankruptcy proceedings depends on the business it actually transacts, and not on the business it is empowered by its charter to do. In re Kingston Realty Co. (1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845. But see In re H. J. Quimby Freight Forwarding Co. (D. C. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424, holding that, while the liability to bankruptcy of a corporation does not depend wholly on its charter, yet it cannot be brought within the scope of the act by a principal business outside its charter, and therefore a company whose only authorized business is that of a carrier is not liable to bankruptcy on the ground that its principal business is in fact that of a trader. But compare In re Kingston Realty Co. (D. C. 1907) 157 Fed. 299, 19 Am. Bankr. Rep. 465, holding that, if the occupation which the corporation pursues is one that brings it within the terms of the act, it is no defense to a petition against it that such business was ultra vires.

Where a corporation is engaged in two or more distinct lines of business, one of which would subject it to the operation of the bankruptcy act, while the other would not, the question of its liability to involuntary bankruptcy depends on the nature of that business which is its chief or principal pursuit. Cate v. Connell (1909) 173 Fed. 445, 97 C. C. A. 647; In re Interstate Paving Co. (D. C. 1909) 171 Fed. 604, 22 Am. Bankr. Rep. 572. Where a corporation was organized to publish, distribute, and place advertising matter in railroad cars, waiting rooms, and depots along the right of way and in and around other property of railroads and in other places, and also to own and place and operate vending machines and other self-acting mechanical devices, and the corporation carried on both lines of business extensively up to the time of the filing of the petition in bankruptcy against it, so that neither

could be said to be its principal business and the other incidental, the advertising business not being within the bankruptcy act, the corporation was not subject to adjudication. In re Humphrey Advertising Co. (1910) 177 Fed. 187, 101 C. C. A. 1, 24 Am. Bankr. Rep. 41. If a company is carrying on two lines of business, both of which are within the terms of the act, it is immaterial which is to be considered its principal business. Burdick v. Dillon (1906) 144 Fed. 737, 75 C. C. A. 603. If the business of the corporation was of one of the kinds enumerated in the statute, it is none the less liable to be adjudged bankrupt because it has ceased to operate before the commencement of the proceedings. Robertson v. Union Potteries Co. (D. C. 1909) 177 Fed. 279, 22 Am. Bankr. Rep. 121. See J. W. Calnan Co. v. Doherty (1909) 174 Fed. 222, 98 C. C. A. 130, 23 Am. Bankr. Rep. 297.

15. Trading and mercantile corporations.—Under the bankruptcy act, as it stood prior to the amendment of June 25, 1910 (36 Stat. 838), providing for proceedings in involuntary bankruptcy against corporations "engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits," the term "mercantile pursuits" is to be given its common and generally understood meaning, and includes only corporations engaged in the buying and selling of commodities. Zugalla v. International Mercantile Agency (1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67.

A corporation is not subject to proceedings in involuntary bankruptcy, as engaged principally in trading or mercantile pursuits, because authorized to engage in such pursuits by its charter, when it has never in fact been so engaged. In re Tontine Surety Co. (D. C. 1902) 116 Fed. 401.

To be a trader or to engage in a mercantile pursuit, within the meaning of the Bankruptcy Act, a corporation must both buy and sell. In re Tontine Surety Co. (D. C. 1902) 116 Fed. 401, 8 Am. Bankr. Rep. 421. The mere purchase of articles and their subsequent sale will not make one a merchant or trader, within the meaning of the law, if the commodities were not bought for the purpose of being sold again. In re Rogers (D. C. 1870) Fed. Cas. No. 12,001.

The purchase by a freight forwarding company of horses, wagons, harness, etc., necessary to carry on its business, and the occasional incidental sale of horses and wagons, does not transform it into a trading or mercantile corporation. In re H. J. Quimby Freight Forwarding Co. (D. C. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424.

Electricity generated for the purpose of furnishing light, heat, and power is a product of manufacture and a commercial commodity, and a corporation whose business it is to buy electricity and resell it to consumers for such purposes at a profit is engaged principally in "trading," and may be adjudged bankrupt. In re Charles Town Light & Power Co. (D. C. 1910) 183 Fed. 160, 25 Am. Bankr. Rep. 687. CONTRA, In re Wilkes-Barre Light Co. (D. C. 1915) 224 Fed. 248.

Proceedings in involuntary bankruptcy will lie against a corporation conducting the business of a mercantile agency, and chiefly occupied in gathering information and printing and publishing a book of ratings with respect to the standing of merchants. In re Mutual Mercantile Agency (D. C. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607. But compare Zugalla v. International Mercantile Agency (1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67.

A corporation having for its sole or chief business the boarding of horses is engaged in trading or mercantile pursuits. In re Morton Boarding Stables (D. C. 1901) 108 Fed. 791, 5 Am. Bankr. Rep. 763; In re Odell (D. C. 1877) Fed. Cas. No. 10,426. CONTRA, In re Willis Cab & Automobile Co. (D. C. 1910) 178 Fed. 113, 23 Am. Bankr. Rep. 593.

A corporation whose business was chiefly that of a carrier, and to a less degree that of letting teams by the hour, day, or week, with a subordinate business of taking horses to board, cannot be held to have been principally engaged in trading, within the meaning of the Bankruptcy Act. In re H. J. Quimby Freight Forwarding Co. (D. C. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424.

Although a water company may be authorized by its charter to "buy, sell, use, and deal in water for power, manufacturing, and hydraulic purposes," yet if its business is actually confined to supplying water for domestic consumption and to municipal fire departments, it cannot be said to be "engaged principally in trading or mercantile pursuits." In re New York & W. Water Co. (D. C. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508.

A corporation engaged in buying and selling stocks, bonds, and other securities cannot be adjudged an involuntary bankrupt as a trader, or as engaged in mercantile pursuits. In re Surety Guarantee & Trust Co. (1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129. Where a corporation was organized to carry on a general stock, bond, grain, and brokerage business, and was authorized to trade on its own behalf in stocks, bonds, etc., and to lease and dispose of real and personal property, it was subject to adjudication as a bankrupt engaged in trading and mercantile pursuits. In re H. R. Leighton & Co. (D. C. 1906) 147 Fed. 311, 17 Am. Bankr. Rep. 275.

A corporation which owns and maintains a private hospital for consumptives, conducting its business for profit and not as a charity, furnishing to its

patients the usual accommodations of a hotel, and treating their disease chiefly by the inhalation of an antiseptic vapor chemically prepared on the premises, though it is not a "manufacturing" corporation, within the meaning of the statute, is "engaged principally in trading or mercantile pursuits," and may therefore be adjudged bankrupt in involuntary proceedings against it. In re San Gabriel Sanatorium Co. (D. C. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408.

A corporation organized to conduct a general livery and boarding stable business, and engaged in buying, keeping, and hiring its horses and vehicles for profit, and keeping, feeding, and caring for the horses and vehicles of others for hire, not being engaged in buying and selling horses and vehicles or feed as a business, is not a trading corporation or one engaged in mercantile pursuits. Gallagher v. De Lancey Stables Co. (D. C. 1908) 158 Fed. 381, 19 Am. Bankr. Rep. 801.

A corporation chiefly engaged in conducting the business of a general fire insurance agency is not engaged in a trading or mercantile pursuit, and is not subject to adjudication in bankruptcy. In re Moore & Muir Co. (D. C. 1909) 173 Fed. 732, 23 Am. Bankr. Rep. 122.

A corporation is not liable to adjudication in bankruptcy, as being engaged in trading or mercantile pursuits, which is occupied in buying and selling improved and unimproved real estate. In re Kingston Realty Co. (1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845. Nor one operating for profit a circulating library. In re Parmelee Library (1903) 120 Fed. 235, 56 C. C. A. 583, 9 Am. Bankr. Rep. 568. Nor one whose business is renting films for moving pictures. In re Imperial Film Exchange (1912) 198 Fed. 80, 117 C. C. A. 188, 28 Am. Bankr. Rep. 815. Nor a building and loan association. In re New York Building Loan Banking Co. (D. C. 1904) 127 Fed. 471, 11 Am. Bankr. Rep. 51. Nor a corporation conducting a public warehouse. In re Pacific Coast Warehouse Co. (D. C. 1903) 123 Fed. 749. Nor one engaged in the business of soliciting advertisements and placing them in newspapers at rates previously obtained. In re Snyder & Johnson Co. (D. C. 1904) 133 Fed. 806, 13 Am. Bankr. Rep. 325. Nor a company incorporated for the purpose of giving theatrical performances and engaged solely in that business. In re Oriental Society (D. C. 1900) 104 Fed. 975, 5 Am. Bankr. Rep. 219. Nor a common carrier. In re Philadelphia & Lewes Transp. Co. (D. C. 1902) 114 Fed. 403, 7 Am. Bankr. Rep. 707; In re H. J. Quimby Freight Forwarding Co. (D. C. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424. Nor a corporation operating a laundry. In re Eagle Steam Laundry Co. (D. C. 1911) 184 Fed. 949, 25 Am. Bankr. Rep. 868. Nor a corporation engaged in conducting a hotel, a restaurant, or a saloon. Toxaway Hotel Co. v. J. L. Smathers & Co. (1910) 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558, 23 Am. Bankr. Rep. 626; Nollman & Co. v. Wentworth Lunch Co. (1910) 217 U. S. 591, 30 Sup. Ct. 694, 54 L. Ed. 895; In re United States Hotel Co. (1904) 134 Fed. 225, 67 C. C. A. 153, 13 Am. Bankr. Rep. 403; In re Wentworth Lunch Co. (1908) 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29; In re Chesapeake Oyster & Fish Co. (D. C. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 173; In re Barton Hotel Co. (1904) 12 Am. Bankr. Rep. 335.

16. Manufacturing corporations.—A corporation engaged principally in manufacturing is subject to adjudication under the bankruptcy act as it stood on September 21, 1908. In re Culgin-Pace Contracting Co. (D. C. 1915) 224 Fed. 245.

A corporation which makes an article for profit is a manufacturer of that article within the meaning of the bankruptcy act, and it makes no difference whether the thing so made or manufactured is affixed to the realty or a part of the realty or is a chattel. In re Church Const. Co. (D. C. 1907) 157 Fed. 298, 19 Am. Bankr. Rep. 549; In re Rutland Realty Co. (D. C. 1907) 157 Fed. 296.

The term "manufacturing," as used in the bankruptcy act, authorizing involuntary proceedings against corporations engaged in manufacturing, embraces only such corporations as are engaged in manufacturing as a business and selling their wares on the market, doing those things usually done by those who not only manufacture their wares, but place them on the market for sale at wholesale or retail. Walker Roofing & Heating Co. v. Merchant & Evans Co. (1909) 173 Fed. 771, 97 C. C. A. 495, 23 Am. Bankr. Rep. 185.

A corporation organized to buy, gather, store, and preserve ice, to ship and vend the same, and which carried on its business by renting small bodies of water, from which it cut the ice which it stored, shipped, and sold, only two or three times in a number of years buying small quantities of ice when its own supply ran short, was not engaged principally in manufacturing, trading, or commercial pursuits, within the meaning of the bankruptcy act and was not subject to involuntary proceedings in bankruptcy. In re New York & New Jersey Ice Lines (1906) 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832. A corporation chartered for the purpose of carrying on a wholesale and retail ice business, and which in fact sold not only ice of its own harvesting, but also large quantities which it purchased from others, is engaged chiefly in trading and mercantile pursuits, and may be adjudged an involuntary bankrupt. First Nat. Bank v. Wyoming

Valley Ice Co. (D. C. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

A corporation organized for carrying on the business of catching and preserving by salt and marketing salt water fish, and which owns and operates a plant for the preparing, preserving, and packing of such fish, is "principally engaged in manufacturing," and is subject to adjudication as an involuntary bankrupt. In re Alaska American Fish Co. (D. C. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712.

A corporation engaged in the business of building and construction is engaged in manufacturing, for the purposes of the bankruptcy act, whether its products be ships and vessels, concrete piers, waterworks and sewers, bridges, houses, or other structures, although such company makes its product, and gives it form and shape, at the place where it is to remain. Friday v. Hall & Kaul Co. (1910) 216 U. S. 449, 30 Sup. Ct. 261, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475, 23 Am. Bankr. Rep. 610; United Surety Co. v. Iowa Mfg. Co. (1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; In re First Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Marine Construction & Dry Dock Co. (1904) 130 Fed. 446, 64 C. C. A. 648, 11 Am. Bankr. Rep. 640; Columbia Ironworks v. National Lead Co. (1904) 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; In re Niagara Contracting Co. (D. C. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643. But compare In re T. E. Hill Co. (1906) 148 Fed. 832, 78 C. C. A. 522, 17 Am. Bankr. Rep. 517; Butt v. C. F. MacNichol Const. Co. (1905) 140 Fed. 840, 72 C. C. A. 252, 15 Am. Bankr. Rep. 515, affirming In re MacNichol Const. Co. (D. C. 1905) 134 Fed. 979, 14 Am. Bankr. Rep. 188; In re New York Tunnel Co. (1908) 166 Fed. 284, 92 C. C. A. 202, 21 Am. Bankr. Rep. 531. But a company which merely constructs houses on its own land is not engaged in manufacturing. In re Kingston Realty Co. (1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845.

Where the principal business of a corporation was the roofing of buildings and other structures, the installation of heating apparatus, the construction of houses and other structures, and the carrying on of a general roofing, heating, and construction business, its manufacturing being only incidental thereto, it was not engaged in manufacturing and was not subject to adjudication in bankruptcy. Walker Roofing & Heating Co. v. Merchant & Evans Co. (1909) 173 Fed. 771, 97 C. C. A. 495, 23 Am. Bankr. Rep. 185.

A corporation engaged in producing plays and giving theatrical entertainments is not "engaged principally in manufacturing," within the meaning of the bankruptcy act. In re J. J. Reisler Amusement Co. (D. C. 1909) 171 Fed. 283, 22 Am. Bankr. Rep. 501. Nor one conducting the business of a cold storage warehouse. In re Philadelphia Freezing Co. (D. C. 1909) 174 Fed. 702, 23 Am. Bankr. Rep. 508. Nor one occupied in the business of operating a laundry. In re Eagle Steam Laundry Co. (D. C. 1910) 178 Fed. 308, 24 Am. Bankr. Rep. 457; In re White Star Laundry Co. (D. C. 1902) 117 Fed. 570, 9 Am. Bankr. Rep. 30. But see In re Troy Steam Laundering Co. (D. C. 1904) 132 Fed. 266, 13 Am. Bankr. Rep. 97. Nor one operating a restaurant. In re Wentworth Lunch Co. (1908) 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29.

17. Banking corporations.—A national bank is not liable to be proceeded against in involuntary bankruptcy. In re Manufacturers' Nat. Bank (D. C. 1873) Fed. Cas. No. 9,051. And no corporation organized under the laws of a state can be adjudged an involuntary bankrupt under the description of a "private banker." In re Surety Guarantee & Trust Co. (1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129. But one who carries on the business of banking without being incorporated is a private banker, whether a natural person or an unincorporated company, and as such is subject to adjudication as an involuntary bankrupt. In re Sage (D. C. 1915) 224 Fed. 525.

An association of individuals, formed to carry on the business of a private bank, as authorized by a state statute, but not incorporated, is a partnership, and as such is subject to be adjudged bankrupt, though entitled to exercise some of the attributes of a corporation. Burkhart v. German-American Bank (D. C. 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222.

The provision of the bankruptcy act excluding from liability to involuntary proceedings any "banking corporation" applies to a corporation organized for the purpose of carrying on a banking business under the general incorporation laws of a state which has no special laws relating to the formation of banking corporations. In re Oregon Trust & Sav. Bank (D. C. 1907) 156 Fed. 319, 19 Am. Bankr. Rep. 484.

18. Insurance companies.—A corporation which merely collects from such of its members as are willing to contribute funds which it thereafter distributes to the beneficiaries of deceased members, which was not an insurance company under the laws of the state where and when it was organized, and which belonged to a class of corporations well known at the time the bankruptcy act was passed as fraternal benefit associations, is not an "insurance corporation," within the provision of the bankruptcy act excepting such corporations from the benefits thereof. In re Grand Lodge A. O. U. W. (D. C. 1916) 232 Fed. 199.

A petition in involuntary bankruptcy cannot be maintained against an incorporated mutual fire insurance company, such a corporation not being "engaged in manufacturing, trading, or mercantile pursuits," within the meaning of the bankruptcy act as originally enacted. In re Cameron Town Mut. Fire Ins. Co. (D. C. 1899) 96 Fed. 756, 2 Am. Bankr. Rep. 372.

19. Mining and quarrying companies.—Under the bankruptcy act prior to the amendment of February 5, 1903 (32 Stat. 797), and that of June 25, 1910 (36 Stat. 838), proceedings in involuntary bankruptcy would not lie against corporations engaged in the business of mining gold, silver, or other metals, or coal, or operating quarries for the extraction of marble, stone, or slate, since they were not engaged in "manufacturing, trading, or mercantile pursuits." Horn Silver Min. Co. v. New York (1892) 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; In re Rollins Gold & Silver Min. Co. (D. C. 1900) 102 Fed. 982, 4 Am. Bankr. Rep. 327; In re Keystone Coal Co. (D. C. 1901) 109 Fed. 872, 6 Am. Bankr. Rep. 377; In re Woodside Coal Co. (D. C. 1900) 105 Fed. 56, 5 Am. Bankr. Rep. 186; In re Elk Park Mining & Milling Co. (D. C. 1899) 101 Fed. 422, 4 Am. Bankr. Rep. 131; In re Chicago-Joplin Lead & Zinc Co. (D. C. 1900) 104 Fed. 67, 4 Am. Bankr. Rep. 712. But see In re Mathews Consol. Slate Co. (D. C. 1905) 144 Fed. 724, 15 Am. Bankr. Rep. 779; Commonwealth v. East Bangor Slate Co. (1894) 162 Pa. 599, 29 Atl. 706; In re Tecopa Mining & Smelting Co. (D. C. 1901) 110 Fed. 120, 6 Am. Bankr. Rep. 250.

20. Public service corporations.—The bankruptcy act does not include in the classes of corporations made subject to proceedings in involuntary bankruptcy public utility corporations, such as gas and electric companies principally engaged in supplying means for lighting in cities and other communities. In re Hudson River Power Transmission Co. (1910) 183 Fed. 701, 106 C. C. A. 139, 25 Am. Bankr. Rep. 504.

A corporation organized under a state statute to manufacture electricity, and supply light, heat, and power by electricity, with the right to a certain extent to exercise the power of eminent domain, and with authority from the state to use the highways of a municipality, subject to reasonable regulations of the municipality, and engaged in the business of manufacturing and supplying electricity for light, heat, and power, is a public service corporation, and is not liable to adjudication as an involuntary bankrupt. In re Wilkes-Barre Light Co. (D. C. 1915) 224 Fed. 248.

A corporation, otherwise amenable to the bankruptcy law, is not exempt from its operation on the ground of being a quasi public corporation and subserving a public use, if its franchise is assignable, so that its functions might be exercised by any transferee to whom its powers might pass through proceedings in bankruptcy. In re New York & Westchester Water Co. (D. C. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508, affirmed In re Morris (1900) 102 Fed. 1004, 43 C. C. A. 91.

A corporation is not liable to proceedings in involuntary bankruptcy, as "engaged in manufacturing, trading, or mercantile pursuits," which is engaged in the business of obtaining, transporting, and supplying pure water for domestic and municipal use. In re New York & Westchester Water Co. (D. C. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508, affirmed, In re Morris (1900) 102 Fed. 1004, 43 C. C. A. 91. Nor a corporation engaged in making and distributing illuminating gas, and also in generating, transmitting, and selling electricity for light and power. In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191. Contra, In re Charles Town Light & Power Co. (D. C. 1910) 183 Fed. 160, 25 Am. Bankr. Rep. 687. A company organized to furnish water for irrigation is not engaged in trading or mercantile pursuits. In re Bay City Irrigation Co. (D. C. 1905) 135 Fed. 850, 14 Am. Bankr. Rep. 370.

21. Moneyed, business, and commercial corporations.—The word "business," as applied to corporations, has a broader meaning than the word "commercial," but it was not the intention of congress to give such a scope to the word "business" as to supersede the words "moneyed" and "commercial" and leave them without any practical signification. Sweatt v. Boston, H. & E. R. Co. (C. C. 1871) Fed. Cas. No. 13,684.

A corporation engaged in leasing its own property and collecting rents therefor, with power to sue and be sued, to contract debts, and to dispose of its property, is a "moneyed, business, or commercial corporation" against which proceedings in involuntary bankruptcy may be had. In re R. L. Radke Co. (D. C. 1911) 193 Fed. 735, 27 Am. Bankr. Rep. 950.

A corporation engaged in conducting a restaurant, which was not subject to adjudication as a bankrupt prior to the amendment by Act June 25, 1910, cannot be subjected to bankruptcy proceedings because of a general assignment made prior to that date, the amendment not being retroactive. In re United States Restaurant & Realty Co. (1911) 187 Fed. 118, 109 C. C. A. 36, 25 Am. Bankr. Rep. 915.

22. Charitable, religious, and other corporations not for profit.—In making

the provisions of the bankruptcy act applicable to all "moneyed, business, or commercial corporations," it was the intention of congress to bring within the scope of the act all corporations except those organized for religious, charitable, social, literary, educational, municipal, or political purposes. Alabama & C. R. Co. v. Jones (C. C. 1871) 5 N. B. R. 97, Fed. Cas. No. 126.

An incorporated club, of which the principal object is social intercourse, any business conducted by it being merely incidental, is not subject to proceedings in involuntary bankruptcy, as a "moneyed, business or commercial corporation." In re Fulton Club (D. C. 1902) 113 Fed. 997, 7 Am. Bankr. Rep. 670.

23. **Unincorporated companies.**—A trust association, created by an instrument of trust providing that the property acquired shall be held and managed by a trustee, but the capital of which is contributed by certificate holders, who have power to elect a trustee in case of vacancy, each share having one vote, also to amend the declaration of trust, increase the number of shares, and by a three-fourths vote terminate the trust, is an "unincorporated company" within the meaning of the bankruptcy act, and is subject to adjudication as a bankrupt. In re Associated Trust (D. C. 1914) 222 Fed. 1012.

A partnership is not an "unincorporated company," within the provision of the bankruptcy act that any unincorporated company may be an involuntary bankrupt, so as to authorize its adjudication, though it would otherwise be exempt as a person engaged chiefly in farming. H. D. Still's Sons v. American Nat. Bank (1913) 209 Fed. 749, 126 C. C. A. 473.

An unincorporated Lloyd's association of fire underwriters is subject to adjudication in involuntary bankruptcy. In re Seaboard Fire Underwriters (D. C. 1905) 137 Fed. 987, 13 Am. Bankr. Rep. 722.

A mercantile association organized under act Pa. 1874 (P. L. 271), providing for the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, is within the terms of the bankruptcy act, and subject to be adjudged an involuntary bankrupt, whether regarded as an unincorporated company or a corporation. In re Hercules Atkin Co. (D. C. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369.

Where the laws of the state make no provision for the incorporation of banks, an association of persons claiming to be incorporated as a bank, and which conducts a banking business under the corporate name assumed, is not a corporation within the meaning of the bankruptcy act, but may be proceeded against as a partnership. Davis v. Stevens (D. C. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763.

§ 9589. (Act July 1, 1898, c. 541, § 5.) Partners.

Partners.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to pre-

vent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. (30 Stat. 547, 548.)

Notes of Decisions

I. Bankruptcy of partnerships

1. Jurisdiction in partnership cases.
2. — Exempt occupation.
3. — Minority or insanity of one partner.
4. Proceedings in partnership cases.
5. What constitutes partnership.
6. — Secret and presumptive partners.
7. Involuntary proceedings against firm.
8. Effect of dissolution of firm.
9. — Dissolution by death of partner.
10. Bankruptcy of firm without adjudication of any partner.
11. Voluntary petition by one or more partners.
12. Individual bankruptcy of one or more partners.
13. Effect of adjudication of one or more partners.
14. Continuing or liquidating partner.
15. Statutes and rights of retiring partner.

II. Partnership and individual estates and debts

16. Election and appointment of trustee.
17. Distribution of estate.
18. — Where no partnership assets exist.
19. Marshaling assets.
20. What constitute partnership assets.
21. What constitute individual assets.
22. Partnership debts and claims.
23. Separate debts of partners.
24. Joint and several liability—Double proof.
25. — Liability for torts.
26. Claims of partners against each other and the firm.

I. BANKRUPTCY OF PARTNERSHIPS

1. Jurisdiction in partnership cases.—For the purposes of the bankruptcy act, a partnership is a legal entity, which may be adjudged bankrupt, separately from the individuals composing it, as though it were an independent legal person. In re Samuels (1914) 215 Fed. 845, 132 C. C. A. 187; Francis v. McNeal (1911) 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555; In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Everybody's Grocery & Meat Market (D. C. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; In re L. Stein & Co. (1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. But it must be shown that a partnership exists in fact, and who are the members of it, before the court can act intelligently upon a petition against it, and an adjudication will be denied until these matters are before the court. In re McLaren (D. C. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 141.

A bankruptcy court, having jurisdiction over one partner, may take jurisdiction of the firm without reference to whether it is six months old, and without a specific allegation as to its principal place of business. In re Mitchell (1914) 219 Fed. 690, 135 C. C. A. 362, affirming order In re Mitchell & Co. (D. C. 1914) 211 Fed. 778.

If one of the partners has been a resident of the district for the required length of time, he may there file a petition for the adjudication of the firm, notwithstanding the fact that the business of the firm is carried on in another district or state, or that the other partners reside elsewhere, though, in such a case, the other members of the firm must be given an opportunity to join in the petition or to oppose it. In re J. & M. Schwartz (D. C. 1913) 204 Fed. 326, 30 Am. Bankr. Rep. 344; In re Penn (D. C. 1871) 5 N. B. R. 30, Fed. Cas. No. 10,927; Ex parte Hall (C. C. 1842) Fed. Cas. No. 5,919; Whitson v. Farber Bank (1904) 105 Mo. App. 605, 80 S. W. 327.

Where a nonresident partner of an alleged bankrupt firm is joined, he may be served by publication, and an ancillary proceeding brought against him in the district where he resides; but he cannot be so adjudicated in the original proceedings, unless he interposes a petition or endeavors to administer the estate, under Bankr. Act July 1, 1898, § 5, subd. "h." In re J. & M. Schwartz (D. C. 1913) 204 Fed. 326, 30 Am. Bankr. Rep. 344.

When a petition by creditors against a firm is based on the ground of residence or domicile, it will be dismissed, where it is shown that none of the members of the firm had his domicile or resided within the district long enough to support the jurisdiction of the court. In re Blair (D. C. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588.

If the principal place of business of a partnership has been within a given district for the requisite length of time, the court of bankruptcy of that district will have jurisdiction of a voluntary or involuntary petition against the partnership, irrespective of the fact that some of the partners may be nonresidents. Cameron v. Canieo (D. C. 1874) 9 N. B. R. 527, Fed. Cas. No. 2,340.

Where a partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition, although, during a part of that time, the only business carried on was in the way of winding up the affairs of the firm by two of the partners, the others having retired. In re Blair (D. C. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588.

Where partners are domiciled in different bankruptcy court districts, and the firm maintains a business establishment in each district, both bankruptcy courts will have jurisdiction of proceedings against the firm and the individual partners. But the court in which the first petition is filed is vested with exclusive jurisdiction to determine the question which of the two courts can proceed with the case for the greatest convenience of the parties in interest. In re Sterne & Levi (D. C. 1911) 190 Fed. 70, 26 Am. Bankr. Rep. 259.

Where the same persons constitute two separate partnerships engaged in business, similar or dissimilar, in different states, each partnership having a distinct firm name, an adjudication of bankruptcy in either jurisdiction, on petition of creditors of one firm only, will apply to all the debts and assets of both partnerships. Ballin v. Ferst (1875) 55 Ga. 546. But the adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm only in part composed of the same persons. In re Jewett (C. C. 1877) Fed. Cas. No. 7,-307.

2. —— **Exempt occupation.**—A partnership, in so far as the administration of its assets in bankruptcy proceedings is concerned, is not an entity separate and distinct from its partners, but is a natural person within § 4b (ante, § 9588), providing that a natural person other than a wage-earner or one chiefly engaged in farming may be adjudged an involuntary bankrupt. Bankr. Act, § 5a, authorizing bankruptcy adjudication against a partnership, is to be construed in connection with section 4b, and hence does not authorize bankruptcy adjudication against a partnership engaged chiefly in farming. H. D. Still's Sons v. American Nat. Bank (1913) 209 Fed. 749, 126 C. C. A. 473.

3. —— **Minority or insanity of one partner.**—Under this section the insanity of a partner and the appointment of a conservator of his estate will not prevent an adjudication of bankruptcy against the partnership on petition of its creditors. In re L. Stein & Co. (1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536.

A partnership in which one member is a minor may be adjudged bankrupt, as also the adult members of the firm, and the partnership property and the separate estates of such adult partners may be administered in bankruptcy, although no adjudication can be made against the infant partner individually. Jennings v. Stannus (1911) 191 Fed. 347, 112 C. C. A. 91, 27 Am. Bankr. Rep. 384; In re Dunnigan (D. C. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628.

4. **Proceedings in partnership cases.**—A partnership owns its property and owes its debts apart from the individual property of its members and apart from their individual debts, and it may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners; and the adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy. Fidelity Trust Co. v. Gaskell (1912) 195 Fed. 865, 115 C. C. A. 527, 28 Am. Bankr. Rep. 4; In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; In re Bertenshaw (1907) 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; Mills v. Fisher (1908) 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237; New Orleans Acid & Fertilizer Co. v. Guillory & Co. (1906) 117 La. 821, 42 South. 329; Lacey v. Cowan (1909) 162 Ala. 546, 50 South. 281.

Where a petition in voluntary bankruptcy is presented both in the name of a partnership and in the names of the individual partners, and is accompanied by schedules setting forth the debts and assets of the firm and also of the partners, and thereupon the petitioners are adjudged bankrupts as prayed, it is not necessary that each partner should also file an individual petition, in order to be relieved from his individual debts, but the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and may grant to the partners a discharge from both separate and joint debts. In re Gay (D. C. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529.

Where a voluntary petition in bankruptcy by partners prays that "the petitioners" may be adjudged bankrupts, instead of "the said firm," but otherwise follows the official form for a partnership petition, describing the petitioners as the members of the firm, and the schedules show that all their debts are firm debts, and the order of adjudication corresponds with the petition, the defect of form in the petition and adjudication is not material on opposition to the application for discharge, but may be amended nunc pro tunc. In re Meyers (D. C. 1899) 97 Fed. 757, 8 Am. Bankr. Rep. 260.

Though one of the members of a firm has not been, and could not be, adjudicated a bankrupt individually, the court

of bankruptcy has jurisdiction to take possession of his property and to administer the same so far as necessary to a settlement of the partnership estate. Dickas v. Barnes (1905) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566; In re Samuels & Lesser (D. C. 1913) 207 Fed. 195, 30 Am. Bankr. Rep. 293; In re R. F. Duke & Son (D. C. 1912) 199 Fed. 199, 29 Am. Bankr. Rep. 93.

In a proceeding in involuntary bankruptcy against a partnership, where the act of bankruptcy charged is one which involves the insolvency of the partnership, there can be no adjudication against it, unless it and all of its members are insolvent, and in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration. Francis v. McNeal (1911) 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555 (affirmed 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029); Menke v. Sunderman (1911) 186 Fed. 486, 108 C. C. A. 464; In re Hansley & Adams (D. C. 1916) 228 Fed. 564.

5. What constitutes partnership.—Persons who attempt to organize a limited partnership, but fail in law to accomplish that result, for lack of compliance with the statutes governing such associations, may be proceeded against in bankruptcy as partners. In re Merrill (C. C. 1874) Fed. Cas. No. 9,467. Where persons associate themselves together, intending to form a corporation, or assuming to be a corporation and using a corporate name, but without authority of law, they are individually liable as partners for the debts of the association, and a creditor who has dealt with them as a corporation is not thereby estopped from setting up his claim against them individually in bankruptcy. Manson v. Williams (1907) 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674; In re Hudson Clothing Co. (D. C. 1906) 148 Fed. 305, 17 Am. Bankr. Rep. 826; In re Mendenhall (D. C. 1874) 9 N. B. R. 497, Fed. Cas. No. 9,425. But the directors or stockholders of a corporation, who have made themselves personally liable for its debts by failure to obey the laws governing corporations of that class, are not subject to be proceeded against in bankruptcy as partners. James v. Atlantic Delaine Co. (C. C. 1875) 11 N. B. R. 390, Fed. Cas. No. 7,179.

To warrant an adjudication of bankruptcy against an alleged partnership, or against an individual as a member of a partnership, the existence of a partnership in fact must be shown, and the burden of proof on this issue rests on the petitioning creditors. Buffalo Milling Co. v. Lewisburg Dairy Co. (D. C. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279; Jones v. Burnham, Williams & Co. (1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; In re Beckwith & Co. (D. C. 1904) 130 Fed. 475, 12 Am. Bankr. Rep. 453. Whether a partnership exists as between the parties themselves, depends on their intention, and that intention must be ascertained from the whole evidence and the circumstances in the case. In re Hirth (D. C. 1911) 189 Fed. 926, 26 Am. Bankr. Rep. 666. Where two or more parties are engaged in a joint business enterprise, to which they contribute their capital, skill, or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law, both between themselves and as to creditors. In re C. F. Beckwith & Co. (D. C. 1904) 130 Fed. 475, 12 Am. Bankr. Rep. 453. For the purposes of an adjudication in bankruptcy, participation in the profits of a business is presumptive or primary proof that the participator is a partner in such business, and in the absence of other proof, is sufficient evidence thereof; but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed, or interest for money loaned to the persons carrying on the business. In re Francis (D. C. 1872) Fed. Cas. No. 5,031. Under Civ. Code S. D. § 1723, which provides that a partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them, a business conducted in the name of a bankrupt and his brother as partners, was not a partnership business, but the individual business of the bankrupt, where his brother had no capital invested and worked for a salary, and there was no agreement between them that he should share in either profits or losses. In re Gibson (D. C. 1911) 191 Fed. 665, 27 Am. Bankr. Rep. 401.

To sustain proceedings in involuntary bankruptcy against a firm or against a person as a member of a firm, a partnership in fact must be shown, and a mere holding out, by which one may have become liable to some creditors on the principle of estoppel is not sufficient. In re C. F. Beckwith & Co. (D. C. 1904) 130 Fed. 475, 12 Am. Bankr. Rep. 453; In re Hudson Clothing Co. (D. C. 1906) 148 Fed. 305, 17 Am. Bankr. Rep. 826; Moore v. Walton (D. C. 1874) 9 N. B. R. 402, Fed. Cas. No. 9,779; In re Murray (D. C. 1882) 13 Fed. 550.

In an action by the trustee in bankruptcy of a partnership, the issue being as to whether all the persons composing the firm were included in the adjudication of bankruptcy, the trustee is not bound or concluded by the record of a prior judgment wherein the persons composing the firm were ascer-

tained and determined, although he, in his private capacity, was a party to that judgment. Abendroth v. Durand (D. C. 1880) 1 Fed. 849.

A person who is not actually a member of the firm cannot properly be adjudged bankrupt in proceedings by or against the firm. In re Berryman (D. C. 1878) Fed. Cas. No. 1,360. But the proceedings will not be rendered invalid as to the actual partners by the inclusion of persons who are not partners; but on the application of a person thus wrongly included, the proceedings may be vacated so far as they relate to him. Hanson v. Paige (1855) 3 Gray (Mass.) 239. But they will not be so vacated in cases where there has been a slothful acquiescence in the proceedings for such a length of time that rights and interests of third persons have grown up under the adjudication and been adapted to it. In re Griffith (D. C. 1878) 18 N. B. R. 510, Fed. Cas. No. 5,820; In re Gilbert (D. C. 1843) Fed. Cas. No. 5,411.

Where an issue is raised as to the persons who constitute a bankrupt partnership, the court of bankruptcy has power and jurisdiction to determine it. In re Griffith (D. C. 1878) 18 N. B. R. 510, Fed. Cas. No. 5,820.

Where the evidence established that two bankrupts were, at the time of their bankruptcy, and had been for more than twenty years, partners in all their business, that all of their property, whether held in the name of the firm or of either or both partners, was partnership property, and all of their debts partnership debts, whether evidenced by obligations of the firm or either or both partners, held a case of "universal" partnership, to which the bankruptcy act is applicable. In re Culver (D. C. 1909) 176 Fed. 450, 23 Am. Bankr. 779. The act is also applicable to a special partnership formed for the single purpose of prosecuting some special adventure or enterprise. Thrall v. Crampton (D. C. 1877) Fed. Cas. No. 14,008.

Where two firms shared in a certain venture, and kept an account in a bank in the name of one firm with the addition of the word "Co.," and so signed the checks, it was held that these checks did not establish a copartnership between the two firms, and that a holder of a check so signed could not file a petition in bankruptcy against the members of both firms. In re Warner (D. C. 1871) 7 N. B. R. 47, Fed. Cas. No. 17,178.

A judgment procured against three persons as partners may be proved against the estate of two, regarding the other as a surety, where the third has been held, in the bankruptcy proceedings, not a partner. In re Kitzinger (D. C. 1879) 19 N. B. R. 152, Fed. Cas. No. 7,861.

6. —— **Secret and presumptive partners.**—It is not essential to the validity of an adjudication in bankruptcy against a partnership that a secret or dormant partner should have been made a party defendant; where only the ostensible partners are served and proceeded against, this will at least bind the partnership property. In re Gibson (D. C. 1911) 191 Fed. 665, 27 Am. Bankr. Rep. 401; In re Harris (D. C. 1899) 108 Fed. 517; Metcalf v. Officer (C. C. 1879) Fed. Cas. No. 9,496; In re Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Lane (D. C. 1874) 10 N. B. R. 135, Fed. Cas. No. 8,044. And see In re Samuels & Lesser (D. C. 1913) 207 Fed. 195, 30 Am. Bankr. Rep. 293.

Where the petitioning creditors, at the time the indebtedness was incurred, knew that a person was a secret partner in a firm, and such partner is a guarantor on commercial paper of the firm, he may, although solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt on a petition filed against him and his partners. In re Ess (C. C. 1872) 7 N. B. R. 133, Fed. Cas. No. 4,530. Where a firm has committed an act of bankruptcy, the personal estate of an undisclosed partner is subject to administration in such proceeding, whether he is insolvent or not. In re Samuels & Lesser (D. C. 1913) 207 Fed. 195, 30 Am. Bankr. Rep. 293, decree reversed In re Samuels (C. C. A. 1914) 215 Fed. 845. A bankruptcy court, neither under § 21a (post, § 9605), nor independent thereof, had authority, on a creditor's petition in bankruptcy proceedings against a firm, to try the question of the membership in the firm of an alleged secret partner against his will, and to compel him to file schedules of assets and liabilities. In re Samuels (C. C. A. 1914) 215 Fed. 845, reversing decree In re Samuels & Lesser (D. C. 1913) 207 Fed. 195.

To charge a person as a silent partner in the business of a bankrupt, so as to debar him from the rights of a creditor of the estate, where there has been no holding out as such, an actual and definite agreement must be proved binding on all the parties thereto. In re Clark (D. C. 1901) 111 Fed. 893, 7 Am. Bankr. Rep. 96. This decision was reversed in Rush v. Lake (1903) 122 Fed. 561, 58 C. C. A. 447, 10 Am. Bankr. Rep. 455, but on the evidence and not on the proposition of law laid down.

The trustee in bankruptcy of a dormant partner is not entitled to the possession of the partnership effects, as against attaching creditors of the partnership. Talcott v. Dudley (1843) 5 Ill. (4 Scam.) 427.

Where the adjudication in bankruptcy has been made against the ostensible partner, his trustee cannot be kept out of possession of property of the firm by one who claims title under a mortgage given by the secret partner.

White v. Farnham (1904) 99 Me. 100, 58 Atl. 425, 105 Am. St. Rep. 261.

Where a partner has retired from the firm, but permits his name to remain in the style of the firm and to be used for the benefit of the other partners, he is liable to a person who takes notes of the new firm, or gives it credit, in ignorance of the dissolution and in reliance on the name of the retiring partner; and on the petition of such creditors for an adjudication of bankruptcy against the firm, the retiring partner will be made bankrupt with the others. In re Krueger (D. C. 1871) Fed. Cas. No. 7,941.

7. Involuntary proceedings against firm.—A court of bankruptcy has jurisdiction to adjudge a partnership bankrupt on the petition of one of its members and against the objection of the others. In re J. M. Ceballos & Co. (D. C. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459. When the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the partnership, if they are creditors of the partners. In re Matot (D. C. 1877) 16 N. B. R. 485, Fed. Cas. No. 9,282.

A partnership cannot be adjudged bankrupt in a proceeding to which one of its members is not a party, and the petition cannot be amended by adding a new party after the testimony has been taken and the case is on hearing before the court. In re Pitt (D. C. 1876) Fed. Cas. No. 11,188. An adjudication of bankruptcy against a firm must be made in one proceeding and on one petition. The adjudication of one member of a firm in one proceeding, and of the remaining members of it in a separate proceeding, with such effect as to bring the firm into bankruptcy, is not contemplated by the statute. In re Plumb (D. C. 1878) Fed. Cas. No. 11,231. Compare In re Kelley (D. C. 1878) 19 N. B. R. 326, Fed. Cas. No. 7,656. Distinct firms, consisting of three persons, one of whom was a partner in both, cannot be joined in one proceeding in bankruptcy, though one was the successor of the other and undertook to pay its debts. In re Wallace (D. C. 1875) 12 N. B. R. 191, Fed. Cas. No. 17,095.

In a petition in involuntary bankruptcy against a firm, it is not sufficient merely to allege that "the partnership is insolvent," but there must also be an averment as to the insolvency of each of the partners. In re Blair (D. C. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588.

8. Effect of dissolution of firm.—Although a partnership has been dissolved by mutual consent, yet if the members continue to treat each other as partners after the alleged dissolution, and to act as such in their business transactions with third parties, a petition in bankruptcy may be filed against the firm as if there had been no dissolution. In re McFarland (D. C. 1874) 10 N. B. R. 381, Fed. Cas. No. 8,788; In re Tomes (D. C. 1878) 19 N. B. R. 36; Fed. Cas. No. 14,084. The formal dissolution of a partnership will not prevent the bankruptcy court from taking jurisdiction of proceedings against the firm so long as any unfinished business, debts, credits, or assets remain. In re Crockett (D. C. 1868) 2 N. B. R. 208, Fed. Cas. No. 3,402; In re Noonan (C. C. 1873) 10 N. B. R. 330, Fed. Cas. No. 10,292; In re Williams (D. C. 1869) 3 N. B. R. 286, Fed. Cas. No. 17,703; Hunt v. Pooke (D. C. 1872) 5 N. B. R. 161, Fed. Cas. No. 6,896; In re Gorham (D. C. 1878) 18 N. B. R. 419, Fed. Cas. No. 5,624.

There can be no final settlement of the affairs of a firm until its debts are paid or in some other way extinguished, and an adjudication of bankruptcy may be made against it when it appears that there are any firm debts remaining unsatisfied, although the assets of the firm have been entirely consumed, and it has been dissolved by the partners and has ceased to do business. Holmes v. Baker & Hamilton (1908) 160 Fed. 922, 20 Am. Bankr. Rep. 252; In re Hirsch (D. C. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; In re Levy (D. C. 1899) 95 Fed. 812. The "continuance" of a partnership, within the meaning of the bankruptcy act, is its actual status as a firm, as distinguished from a status created by estoppel against a partner, and it is essential that the partnership should exist as such, or that its affairs should be still unsettled at the time of filing a petition, in order to subject it to an adjudication in bankruptcy. And although the affairs of a partnership are "unsettled" so long as the partnership debts are unpaid, yet debts which are binding on partners only by way of estoppel as to creditors without notice of dissolution are not firm debts in this sense. In re Pinson & Co. (D. C. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804. Where an agreement that the accounts of a firm should be used to pay firm debts was not incorporated in a partnership dissolution agreement, an outgoing partner is not entitled to enforce such provision as against partnership creditors in bankruptcy. In re Wilson (D. C. 1912) 194 Fed. 564, 27 Am. Bankr. Rep. 867.

A petition by a partner of a dissolved firm against his copartners will be dismissed where it appears that the firm was dissolved by judicial decree, and all its assets transferred to a receiver. In re Oehninger (D. C. 1876) Fed. Cas. No. 10,441; Hopkins v. Carpenter (D. C. 1878) 18 N. B. R. 339, Fed. Cas. No. 6,686. Compare In re Hathorn (C. C. 1875) Fed. Cas. No. 6,214.

9. —— Dissolution by death of partner.—A partnership, after its dissolu-

tion by the death of one of the partners, may be adjudged bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner, nor disclose the fact that the partners named were surviving partners, where the business was being continued as provided in the partnership agreement. In re Coe (D. C. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618; In re Stevens (D. C. 1870) Fed. Cas. No. 13,393; Briswalter v. Long (C. C. 1881) 14 Fed. 153. CONTRA, In re Evans (D. C. 1908) 161 Fed. 590, 20 Am. Bankr. Rep. 406; In re Temple (D. C. 1876) Fed. Cas. No. 13,825.

The court of bankruptcy will not take from the custody and control of the executor of the deceased partner the individual estate of the latter nor any of the partnership assets which may have been committed to the hands of such executor for administration. In re Daggett (D. C. 1873) 8 N. B. R. 287, Fed. Cas. No. 3,535, affirmed (C. C. 1873) 8 N. B. R. 433, Fed. Cas. No. 3,536; French v. Grenet (1881) 57 Tex. 273. But compare Hewitt v. Hayes (1910) 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154, where it was held that the trustee in bankruptcy of a surviving partner may sue the executors of the deceased partner for whatever firm assets and property have come into their hands; and that, where the executors of a deceased partner acted individually under a power of attorney given by the surviving partner, and they deposited in a bank in their names, "for the benefit of whom it may concern," funds made up of cash on hand belonging to the firm and of sums belonging to the firm as proceeds of its property, or as commissions due to it, or otherwise, the trustee in bankruptcy of the surviving partner was entitled to the fund. Though a deceased partner's interest in a partnership claim vests in the surviving partner, it does not pass to the latter's trustee in bankruptcy, so that the surviving partner can maintain an action thereon in his own name. McCandless v. Hadden (1848) 9 B. Mon. (Ky.) 186. A surviving partner, after the adjudication of the firm, has no power to consent to an allowance to the widow and heirs of the deceased partner out of the assets of the firm prior to the payment of the firm debts. In re F. Dobert & Son (D. C. 1908) 165 Fed. 749, 21 Am. Bankr. Rep. 634. The trustee in bankruptcy of the surviving partner is not entitled, as against judgment creditors of the latter suing on firm obligations, to a surplus arising on foreclosure against firm property. Moses v. Pond (1900) 32 Misc. Rep. 406, 66 N. Y. Supp. 600.

Where a partner carries on business with the consent of the personal representatives of the deceased partner, upon the surviving partner being adjudged bankrupt, there is no priority of payment between debts contracted before, and those contracted after, the death of the partner. In re Mills (D. C. 1875) 11 N. B. R. 74, Fed. Cas. No. 9,611.

10. Bankruptcy of firm without adjudication of any partner.—A partnership, as such, may be adjudged bankrupt without any adjudication being made against any one of the members of the firm. In re Hansley & Adams (D. C. 1916) 228 Fed. 564.

The adjudication in bankruptcy of a firm, when based on or involving its insolvency, draws to the court of bankruptcy for administration the individual estates of the partners, although they, personally and individually, are not adjudged bankrupts, and the court may compel any partner to transfer his individual property to the trustee. Francis v. McNeal (1913) 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, affirming (1911) 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555; Menke v. Sunderman (1911) 186 Fed. 486, 108 C. C. A. 464; In re Lattimer (D. C. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re Stokes (D. C. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262. CONTRA, In re Bertenshaw (1907) 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

A petition in bankruptcy following the official form for a partnership petition, and praying merely that the firm be adjudged a bankrupt, does not authorize the court to adjudge the partners bankrupt, and where an adjudication is desired of the petitioning partners as individuals, as well as the firm, the petition should so pray. Where petition in bankruptcy by two of three partners prayed that the firm be adjudged a bankrupt, but did not allege that nonjoining partner had committed any act of bankruptcy individually, there was no ground for adjudging him a bankrupt. In re Lenoir-Cross & Co. (D. C. 1915) 226 Fed. 227.

11. Voluntary petition by one or more partners.—The bankruptcy act contemplates a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court. In re Junck & Balthazard (D. C. 1909) 169 Fed. 481.

One partner may petition to have the partnership declared a voluntary bankrupt. In re Hansley & Adams (D. C. 1916) 228 Fed. 564.

When some of the members of a partnership file their petition in bankruptcy asking for an adjudication against the firm, the other partners not joining, the proceeding is, in its inception, a voluntary proceeding in bankruptcy, and it will remain so in its entirety unless the other partners, on due notice, dissent from the petition and contest the adjudication, in

which case the proceeding becomes, as to those partners, an involuntary one. In re Junck & Balthazard (D. C. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298; In re Carleton (D. C. 1904) 131 Fed. 146, 12 Am. Bankr. Rep. 475; In re Murray (D. C. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601. In consequence of the original voluntary nature of the proceeding, it is not necessary that the petitioning partner should allege acts of bankruptcy to have been committed by the firm, though the absence of such acts will be a defense to the partners who do not join. In re Junck & Balthazard (D. C. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298; In re Noonan (C. C. 1873) Fed. Cas. No. 10,292. But compare In re Forbes (D. C. 1904) 128 Fed. 137, 11 Am. Bankr. Rep. 787. The dissenting partner may show, if he can, that the firm is not insolvent. In re Fowler (D. C. 1867) Fed. Cas. No. 4,998. If the nonjoining partner afterwards comes in and confesses himself a bankrupt, and is so adjudged, it is a case of involuntary bankruptcy. Metsker v. Bonebrake (1883) 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654.

Where a petition in bankruptcy is filed by certain of the members of a partnership, praying an adjudication against the firm and averring that the partner who has not joined in the petition is not a resident of the district and that his residence is unknown to the petitioners, if the judge of the court of bankruptcy is absent from the district, or the division of the district in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee; but if partners who did not join in the petition shall, upon notice, enter their appearance and contest the adjudication of the firm, the referee cannot act upon the petition (it being then an involuntary case), but must certify the case to the judge, before whom the issue will be heard and determined. In re Murray (D. C. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601.

Questions presented by partner not joining copartners in petition for adjudication of bankruptcy of the firm, but insisting that he had paid to the creditors of the firm his part and had been released, will arise before referee under order of reference on adjudication of bankruptcy of firm. In re Lenoir, Cross & Co. (D. C. 1915) 226 Fed. 227.

Where one of the partners files his petition in bankruptcy, with the object of obtaining a discharge from debts of the firm as well as his individual debts, the petition should set forth the names of the partners and pray for a discharge from partnership debts, the schedules should list both the petitioner's individual property and debts and property and debts of the firm, notices to creditors should inform them that firm creditors are affected and that the bankrupt seeks a discharge from their debts, and notice of the filing of the petition and of creditors' meetings should be sent to the partners who have not joined. In re Laughlin (D. C. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; In re Hartman (D. C. 1899) 96 Fed 593, 3 Am. Bankr. Rep. 65.

Notice to the partners not joining in the petition is essential to any adjudication against the firm. No adjudication can be made until the nonjoining members of the firm have had due notice of the filing of the petition and a proper opportunity to defend against the same. If an adjudication has been made without such notice, it will be vacated and set aside on motion. In re Altman (D. C. 1899) 95 Fed. 263, 2 Am. Bankr. Rep. 407; In re Murray (D. C. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; In re Russel (D. C. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re Gorham (D. C. 1878) 18 N. B. R. 419, Fed. Cas. No. 5,624. Where certain of the members of a partnership file their voluntary petition in bankruptcy, asking for an adjudication of the firm, but the other partners do not join and are not notified of the proceedings, the defect is not cured by filing in court, after the adjudication, a paper purporting to embody the consent of the nonjoining partners, but which is unverified, qualified in its terms, and signed only by their attorneys. In re Altman (D. C. 1899) 95 Fed. 263, 2 Am. Bankr. Rep. 407.

If the partners who have not joined in the petition can be found, whether within the district or without it, personal service of such notice must be made upon them. But if personal service cannot be had, then, upon the filing of an affidavit showing the fact, the court will order publication of the notice in the same manner as in equity cases. In re Murray (D. C. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601.

A firm having failed more than eight years before a member thereof petitioned individually to be adjudged a bankrupt, and more than nine years before the other partner was cited, without any proof of bankruptcy, a rule on the latter to show cause why he and the partnership should not be adjudged bankrupt was held properly discharged. Royston v. Weis (1902) 112 Fed. 962, 50 C. C. A. 638, 7 Am. Bankr. Rep. 584.

Where one of the partners files his voluntary petition in bankruptcy as an individual, and does not seek an adjudication against the firm, nor a release from firm debts, the proceeding cannot be turned into a partnership proceeding by the voluntary joinder therein of the other partners. In re Boylan (D. C. 1867) Fed. Cas. No. 1,757. See In re Lewis (D. C. 1868) Fed. Cas. No.

8,311. If the bankrupt lists only his individual debts and assets, and does not seek an adjudication of the partnership, nor cause notice to be given to his copartners nor to the creditors of the firm, the discharge which he may receive will not release him from partnership debts. In re Little (D. C. 1868) Fed. Cas. No. 8,390; In re Noonan (C. C. 1873) Fed. Cas. No. 10,292; Hudgins v. Lane (D. C. 1874) Fed. Cas. No. 6,827; In re Plumb (D. C. 1878) Fed. Cas. No. 11,231.

A firm may be declared bankrupt although one of its members has already been adjudicated in involuntary proceedings against him by creditors. Hunt v. Pooke (D. C. 1872) 5 N. B. R. 161, Fed. Cas. No. 6,896. The fact that a partnership has been adjudicated bankrupt, and the partners have been denied a discharge in such proceedings, does not preclude one of the partners from filing an individual petition in bankruptcy, although he schedules the same debts and the same assets. In re Feigenbaum (D. C. 1902) 151 Fed. 508, 7 Am. Bankr. Rep. 339.

12. Individual bankruptcy of one or more partners.—Since, in the contemplation of the statute, a partnership is a distinct entity, its bankruptcy must be conditioned upon a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication against the partnership itself, irrespective of and in addition to any that may be made against the individual members, and even simultaneous proceedings against all the individual members of the firm do not necessarily bring the partnership itself into court so as to authorize an amendment calling for an adjudication against it. In re Mercur (D. C. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; affirmed (1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; In re Bertenshaw (1907) 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577. And see Lacey v. Cowan (1909) 162 Ala. 546, 50 South. 281. And upon a petition in involuntary bankruptcy against one person as an individual, no adjudication can be made against other persons who were in partnership with him, even though the latter voluntarily come in and consent to be adjudged bankrupts. If such persons desire to take the benefit of the act, they must file their individual petitions, deposit the fees required, and proceed strictly according to law. Mahoney v. Ward (D. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; Lacey v. Cowan (1909) 162 Ala. 546, 50 South. 281. And although a voluntary petitioner in bankruptcy may be a member of a firm, he may apply for adjudication simply in his private capacity, and without seeking to bring the partnership into bankruptcy. But it is his duty in such a case to include in his schedule not merely his individual assets, but also his interest in the partnership and its property, since even his private creditors may have an ultimate or reversionary right in the assets of the firm. In re Brick (D. C. 1880) 4 Fed. 804; Ex parte Norcross (D. C. 1842) Fed. Cas. No. 10,293.

If the bankrupt, being a member of a partnership which is not in bankruptcy, seeks a discharge from both individual and firm debts, the creditors of the firm may prove their debts against the bankrupt and cause his interest in the firm property to be subjected to the payment thereof; and if a proper foundation is laid in the pleadings and in the notices to creditors, the discharge granted to the bankrupt will release him from both classes of debts. In re Laughlin (D. C. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; In re McFaun (D. C. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; In re Hartman (D. C. 1899) 96 Fed. 593, 3 Am. Bankr. Rep. 65; In re Russel (D. C. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re Wilcox (D. C. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117. See also In re Frear (D. C. 1868) 1 N. B. R. 660, Fed. Cas. No. 5,074. But where one member of a firm thus files his separate petition, with the object of obtaining a discharge from the debts of the firm as well as from his private obligations, the petition should set forth the names of the partners and pray for a discharge from partnership debts, the schedules should list both the petitioner's individual property and debts and the assets and debts of the firm, notices to creditors should inform them that firm creditors are affected and that the bankrupt seeks a discharge from their debts, and notice of the filing of the petition and of creditors' meetings should be sent to the other partners. In re Hartman (D. C. 1899) 96 Fed. 593, 3 Am. Bankr. Rep. 65; In re Russel (D. C. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re McFaun (D. C. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66. Failing compliance with these requirements, the petitioner's responsibility for the firm debts will not be affected, although, on a seasonable application by the bankrupt, the adjudication may be set aside, and leave granted him to file an amended petition, and thereupon an adjudication may again be entered and the case proceeded with de novo. In re McFaun (D. C. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66.

Partners are not entitled to a discharge in bankruptcy affecting the debts of the firm, when the partnership, as such, is not in bankruptcy, but only the individual partners on their separate voluntary petitions, and when there is evidence of the existence of firm assets not brought into the bankruptcy, or circumstances justifying the inference that there has been a fraudulent concealment of partnership assets. In re

Meyers (D. C. 1899) 96 Fed. 408, 2 Am. Bankr. Rep. 707.

13. Effect of adjudication of one or more partners.—Where all the members of a firm are adjudged bankrupts, but there has been no adjudication against the firm as such, the trustee appointed in the individual cases has no authority to reclaim or interfere with the assets of the firm, notwithstanding that all the cases were instituted at the same time by the same creditors, and the same trustee was appointed for all the partners. In re Mercur (1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505, affirming (D. C. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; Ludowici Roofing Tile Co. v. Pennsylvania Inst. for Instruction of the Blind (C. C. 1902) 116 Fed. 661, 8 Am. Bankr. Rep. 739; Oldmixon v. Severance (1907) 119 App. Div. 821, 104 N. Y. Supp. 1042; American Steel & Wire Co. v. Coover (1910) 27 Okl. 131, 111 Pac. 217, 30 L. R. A. (N. S.) 787.

The provision of subdivision "h" of this section applies to the case (and only to the case) where the partnership as such is not in bankruptcy, and one or more of the partners have also escaped adjudication or have not been petitioned against, while another or others of the firm have been adjudged bankrupt in their individual capacities. Francis v. McNeal (1911) 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555, affirmed (1913) 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029; In re Junck & Balthazard (D. C. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

Where the total assets of the partners and of the firm are insufficient to pay the partnership debts, it is proper to render an adjudication of bankruptcy against both the firm and the individual partners, though one of them may be personally solvent. Yungbluth v. Slipper (1911) 185 Fed. 773, 108 C. C. A. 106, 26 Am. Bankr. Rep. 265.

The provision of subdivision "h" of this section does not apply where the infancy of the partner not adjudged bankrupt was the only ground for dismissing the petition in bankruptcy as to him. In such a case, the firm as such may be adjudged bankrupt, and its whole property administered in the bankruptcy proceedings, though there can be no adjudication against the infant partner. In re Dunnigan (D. C. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

Where the nonbankrupt partner elects to wind up the affairs of the firm, he cannot be interfered with by the trustee of the bankrupt partner. Such trustee has no right to sue for or take possession of any of the assets of the firm. Burke v. Rollinson (1901) 23 R. I. 177, 49 Atl. 694; Lane v. Tanner (1909) 156 Cal. 135, 103 Pac. 846. But the liquidating partner is bound to report to the court of bankruptcy the residuum of assets remaining to be distributed by that court among the partnership creditors, if not to report the details of his settlement of the firm's affairs. Dycus v. Brown (1909) 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190; In re Junck & Balthazard (D. C. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298. And when he has completed the settlement of the firm's affairs, he is bound to pay over the share of the bankrupt partner to the latter's trustee. Mills v. J. H. Fisher & Co. (1908) 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237.

14. Continuing or liquidating partner.—When a partnership is dissolved by mutual consent, and all its property is transferred to one of the partners, who proposes to continue the business and who assumes the payment of the firm debts, the assets of the partnership become the separate estate of the continuing partner, provided the transfer was made in good faith and for consideration, and will be so treated on his bankruptcy. In re Long (D. C. 1874) 9 N. B. R. 227, Fed. Cas. No. 8,476; In re Collier (D. C. 1874) 12 N. B. R. 266, Fed. Cas. No. 3,002; In re Montgomery (D. C. 1869) 3 N. B. R. 429, Fed. Cas. No. 9,727. But see In re Morse (D. C. 1876) 13 N. B. R. 376, Fed. Cas. No. 9,854. And since, under such an arrangement, he becomes individually responsible for the debts, the partnership creditors may, at their option, prove their claims as separate creditors of such partner and share pari passu with his individual creditors. In re Lloyd (D. C. 1884) 22 Fed. 88; In re Long (D. C. 1874) 9 N. B. R. 227, Fed. Cas. No. 8,476; In re Rice (D. C. 1874) 9 N. B. R. 373, Fed. Cas. No. 11,750. But they are not compelled to do so as against their own interest. And if the equities of the case require it, the law will still distinguish partnership assets and debts from the assets and debts of the individual bankrupt, and require the application of property belonging to the firm at the time of its dissolution to the satisfaction of debts existing against it at that time, and the application of the separate estate of the bankrupt partner to the payment of his individual debts, leaving only the surplus of either estate available to creditors of the other class. In re Denning (D. C. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; In re Filmar (1910) 177 Fed. 170, 100 C. C. A. 632, 24 Am. Bankr. Rep. 194; Oxley v. Willis (C. C. 1807) Fed. Cas. No. 10,639.

Where, as a part of an agreement for the dissolution of a partnership, it was stipulated that the continuing partner should furnish the outgoing partner with a release from liability from certain creditors of the firm, and that certain book accounts should be collected and the proceeds used to pay the other creditors, but the agreement as to the

appropriation of such accounts was not contained in the dissolution agreement, and the accounts were not so applied, the outgoing partner was not entitled to compel such application as against the creditors of the firm in bankruptcy. In re Wilson (D. C. 1912) 194 Fed. 564, 27 Am. Bankr. Rep. 867. Where an oral agreement between partners incident to dissolution provided that firm accounts should be collected and the proceeds applied to pay the debts of the firm, but there was no appropriation of the same pro tanto by transferring them, or otherwise, in such a manner as to take them out of the hands of the parties, or authorizing the holder to pay the amount directly to the creditor, without further intervention or concern on the part of the partnership, the provision of the contract was executory only, and unenforceable as against creditors in bankruptcy proceedings against the continuing partner. In re Wilson (D. C. 1912) 194 Fed. 564, 27 Am. Bankr. Rep. 867.

Where the continuing partner has assumed the joint debts, the firm creditors may, after petition filed, assent to the conveyance to him of the firm's assets, and they will then be entitled to come in with the individual creditors upon the separate estate of the bankrupt partner. In re Johnson (D. C. 1872) Fed. Cas. No. 7,369.

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, it is an act of bankruptcy upon which such partner, as an individual, may be adjudged bankrupt, being a conveyance or transfer of a portion of his property with intent to hinder or defraud his individual creditors. In re Meyer (1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

15. Status and rights of retiring partner.—The retiring partner will not ordinarily be adjudged bankrupt on the petition of the continuing partner, at least where the latter has assumed the joint debts and given bond for their payment, and the creditors do not desire such an adjudication. In re Bennett (D. C. 1875) Fed. Cas. No. 1,314.

The retiring partner in such cases cannot claim the right, when the other is adjudged bankrupt, to settle the firm's affairs, under the provision of subdivision "h" of this section, as that provision is not applicable to the case of the bankruptcy of a liquidating partner. In re Denning (D. C. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133.

The retiring partner occupies the position of a surety, and he cannot make proof for the difference between the amount of the firm debts and the dividend which the firm assets will pay, when he has not actually paid any part of such difference. In re Phelps (D. C. 1878) Fed. Cas. No. 11,070. But assets withdrawn by the retiring partner are subject to the payment of the firm debts, when the remaining assets are insufficient, and may be reached for the benefit of the creditors. In re Sauthoff (D. C. 1877) Fed. Cas. No. 12,380; In re Pease (D. C. 1876) 13 N. B. R. 168, Fed. Cas. No. 10,881.

II. PARTNERSHIP AND INDIVIDUAL ESTATES AND DEBTS

16. Election or appointment of trustee.—In the bankruptcy of a partnership, a person holding a claim against one of the individual partners is not a "creditor of the partnership," within the meaning of this section of the bankruptcy act, and therefore has no right to vote in the choice of a trustee in bankruptcy. In re Phelps (D. C. 1868) 1 N. B. R. 525, Fed. Cas. No. 11,071; In re Scheiffer (D. C. 1869) 2 N. B. R. 591, Fed. Cas. No. 12,445; In re South Boston Iron Co. (C. C. 1876) Fed. Cas. No. 13,183.

Where a separate adjudication is made against a bankrupt who is or has been a member of a firm, both the separate creditors and the firm creditors have a right to vote for the trustee. In re Beck, 110 Fed. 140, 6 Am. Bankr. Rep. 554; In re Falkner (D. C. 1877) 16 N. B. R. 503, Fed. Cas. No. 4,624; Wilkins v. Davis (D. C. 1876) Fed. Cas. No. 17,664; In re Webb (D. C. 1877) Fed. Cas. No. 17,-317.

The bankruptcy act contemplates that the trustee elected for a partnership shall also be the trustee of the individual partners, and there is no authority for the election of separate trustees for the partners. In re Coe (D. C. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715.

A court of bankruptcy has discretionary power to appoint separate trustees for the estates of a bankrupt partnership and of an individual partner, but such power should be exercised only in cases of special and peculiar necessity. In re Currie (D. C. 1910) 197 Fed. 1012, 28 Am. Bankr. Rep. 834.

17. Distribution of estate.—Under the rule of distribution prescribed by subdivision "f" of this section, partnership assets are for partnership creditors and individual property for separate creditors, and individual creditors cannot receive anything out of the firm assets until the partnership creditors have been paid in full, and conversely, creditors of the partnership cannot share in the assets of either of the partners until his individual creditors have received the full amount of their claims. In re Mills (D. C. 1899) 95 Fed. 269, 2 Am. Bankr. Rep. 667; Collins v. Hood (C. C. 1846) Fed. Cas. No. 3,015; In re Williams (C. C. 1842) Fed. Cas. No. 17,702; In re Warren (D. C. 1847) Fed. Cas. No. 17,191; In re Ingalls (C. C. 1842) Fed. Cas. No. 7,032; In

re Byrne (D. C. 1868) 1 N. B. R. 464, Fed. Cas. No. 2,270; In re Wiley (D. C. 1868) Fed. Cas. No. 17,656; In re Smith (D. C. 1876) 13 N. B. R. 500, Fed. Cas. No. 12,987; In re Estes (D. C. 1880) 3 Fed. 134; In re Hollister (D. C. 1880) 3 Fed. 452; In re Lloyd (D. C. 1884) 22 Fed. 90; In re Wilcox (D. C. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117; In re Jones (1900) 2 Nat. Bankr. News, 193; In re Bates (D. C. 1900) 100 Fed. 263; Murray v. Murray (1821) 5 Johns. Ch. (N. Y.) 60; New York Inst. for Instruction of Deaf and Dumb v. Crockett (1907) 117 App. Div. 269, 102 N. Y. Supp. 412; Gray v. Brunold (1903) 140 Cal. 615, 74 P. 303; Ex parte Cook (1728) 2 P. Wms. 500. And see Hiscock v. Varick Bank (1907) 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1.

The statutory rule for the distribution of assets as between individual and firm creditors—that partnership property goes to firm creditors, and separate property to individual creditors, and that only the surplus of either estate is available to creditors of the other class—applies not only to the case of the adjudication of the partnership as such, but also to the case where one member of the firm is adjudged bankrupt in his individual capacity; and creditors of the firm will not be entitled to receive dividends out of the bankrupt's separate estate until his individual creditors have been paid in full; and this rule prevails notwithstanding the fact that there are no partnership assets. In re Wilcox (D. C. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117; In re Morse (D. C. 1876) 13 N. B. R. 376, Fed. Cas. No. 9,854.

Where a partnership has been dissolved by decree of a state court, and its affairs wound up and all its assets distributed to its creditors, and no partner remains solvent, and afterwards one of the partners is adjudged bankrupt in his individual capacity, creditors of the firm who proved their claims and received the dividend in the state court, and who do not offer to surrender the same, are not entitled to participate in the distribution of the bankrupt's estate, as to the residue of their debts, until all his individual creditors have been paid in full. In re Mills (D. C. 1899) 95 Fed. 269, 2 Am. Bankr. Rep. 667. If one member of a firm is adjudged bankrupt, but not the other partners of the firm, a joint creditor may prove against the separate estate of the bankrupt. He cannot compete with the separate creditors in the distribution of separate assets, but he will receive dividends from any joint assets which the trustee may obtain, and from any surplus of the separate assets after the separate debts are paid. Wilkins v. Davis (D. C. 1876) 15 N. B. R. 60, Fed. Cas. No. 17,664.

The reduction of claims of creditors of a firm to judgment does not change the order of distribution of the proceeds of partnership and individual estates under the bankruptcy act. In re F. J. Hacker & Co. (D. C. 1915) 225 Fed. 869.

Partnership creditors have an equitable lien upon partnership property for the payment of the partnership debts. In re Abrams (D. C. 1912) 193 Fed. 271. Any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts is in violation of the act and will be frustrated by the court. In re Jones (D. C. 1900) 100 Fed. 781, 4 Am. Bankr. Rep. 141.

A partnership debt on which a bankrupt partner remains liable is none the less provable against his estate because there may be no surplus of his individual assets over his separate debts, since the provability of a debt depends upon the nature of the liability, not on the existence of assets for its satisfaction. In re Bates (D. C. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56.

In the primary distribution, partnership assets must be applied to partnership debts, without reference to any disproportion between the interests of the individual partners therein. In re Lowe (D. C. 1875) 11 N. B. R. 221, Fed. Cas. No. 8,564.

The United States is not bound by the rule for the division of an estate as between partnership and separate creditors, and though the claim of the government is against an individual partner, it is entitled to priority of payment out of the partnership funds, and vice versa. U. S. v. Lewis (C. C. 1875) Fed. Cas. No. 15,595, affirmed (1875) 92 U. S. 618, 23 L. Ed. 513; In re Strassburger (C. C. 1877) Fed. Cas. No. 13,526. CONTRA, In re Webb (D. C. 1869) 2 N. B. R. 614, Fed. Cas. No. 17,313.

Where the separate estate of one of the partners is more than sufficient to pay his individual debts, but the partnership assets are not sufficient for firm creditors, the separate creditors are not entitled, as against the firm creditors, to receive interest on their debts for the period subsequent to the adjudication. In re Chandler (C. C. A. 1911) 184 Fed. 887, 25 Am. Bankr. Rep. 865; In re Berrian (D. C. 1873) Fed. Cas. No. 1,351.

Where a bankrupt partner is a member of two firms, one of which is also in bankruptcy, the assets of that firm should be applied to the payment of the firm debts, and any surplus of the individual assets that may remain, after paying the individual debts in full, distributed pro rata among the creditors of both firms. In re Knowlton & Co. (1913) 202 Fed. 480, 120 C. C. A. 610; In re Dunkerson (D. C. 1869)

12 N. B. R. 391, Fed. Cas. No. 4,159. See In re Vetterlein (D. C. 1890) 44 Fed. 57.

18. —— Where no partnership assets exist.—Creditors of a partnership, as such, are not entitled to share ratably with the individual creditors of the bankrupt partners in the settlement of the individual estates in bankruptcy, although there are no partnership assets available for partnership creditors. Euclid Nat. Bank v. Union Trust & Deposit Co. (1906) 149 Fed. 975, 79 C. C. A. 485, 7 Am. Bankr. Rep. 834; In re Janes (1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341; In re Hull (D. C. 1915) 224 Fed. 796; In re Wilcox (D. C. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117; In re Henderson (D. C. 1906) 142 Fed. 588, 16 Am. Bankr. Rep. 91. CONTRA, In re Gray (D. C. 1913) 208 Fed. 959; In re Green (D. C. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553; In re Keller (D. C. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; Conrader v. Cohen (1903) 121 Fed. 801, 58 C. C. A. 249, 9 Am. Bankr. Rep. 619; In re Conrader (D. C. 1902) 118 Fed. 676, 9 Am. Bankr. Rep. 85; In re West (D. C. 1889) 39 Fed. 203; In re Lloyd (D. C. 1884) 22 Fed. 88; In re Litchfield (D. C. 1880) 5 Fed. 47; In re Slocum (C. C. 1879) Fed. Cas. No. 12,950; In re Jewett (D. C. 1868) 1 N. B. R. 491, Fed. Cas. No. 7,304; In re Knight (C. C. 1871) Fed. Cas. No. 7,880.

Where firm creditors claim the right to share with individual creditors in the individual estate, on the ground that there was no partnership property, the test of available assets of the firm is whether, at the time of the filing of the petition in bankruptcy, there was an available fund to pay firm creditors; and neglect by firm creditors to avail themselves of such fund then existing whereby it has been dissipated or lost to them, does not enlarge their equity against the individual estate, although in fact they have received nothing on their debts. In re Litchfield (D. C. 1880) 5 Fed. 47. If there is any joint fund, however small, and even though it was purposely created by separate creditors by purchasing worthless partnership assets, still firm creditors cannot prove against the separate estate in competition with separate creditors. In re Marwick (D. C. 1845) Fed. Cas. No. 9,181. But if the joint estate has all been expended in payment of costs, partnership creditors may share pari passu with individual creditors. In re McEwen (D. C. 1875) Fed. Cas. No. 8,783; In re Slocum (C. C. 1879) Fed. Cas. No. 12,950. But this does not apply where there were originally partnership assets, which would have been applicable to the payment of firm debts, but which have been totally expended by the trustee in a vain attempt to realize more. In re Blumer (D. C. 1882) 12 Fed. 489. Though there are no actual assets of the firm, a firm creditor cannot share in the separate property of a bankrupt partner, in competition with his individual creditors, if there remains a member of the firm who is solvent and not in bankruptcy. In re Dunham (D. C. 1873) Fed. Cas. No. 4,144. But if one member of a firm, though thrown into bankruptcy with the rest, owes no private debts, his individual assets are to be distributed among the partnership creditors. In re Leavitt (D. C. 1869) Fed. Cas. No. 8,169.

19. Marshaling assets.—Where there are both partnership creditors and individual creditors, a partnership creditor who has a lien on both the partnership and the individual assets will be required to exhaust the funds of the partnership estate before resorting to the individual fund. In re Lewis (D. C. 1873) Fed. Cas. No. 8,313; In re May (D. C. 1878) 17 N. B. R. 192, Fed. Cas. No. 9,327.

A creditor of the firm, holding security from one partner, may prove against the joint estate without surrendering or selling his security or applying its value on the claim. In re Holbrook (D. C. 1873) Fed. Cas. No. 6,588; In re Thomas (D. C. 1878) 17 N. B. R. 54, Fed. Cas. No. 13,886. But a note given by the firm as an accommodation to a partner, to enable him to raise his share of the firm's capital, may be proved against the firm, but securities pledged by the individual partner must first be applied to its payment. In re Norris (D. C. 1876) Fed. Cas. No. 10,302.

A lien acquired before bankruptcy, by execution, on the individual property of a member of the bankrupt firm, under a judgment against the firm, will not yield to the equities of the separate creditors of such partner. In re Sandusky (D. C. 1878) 17 N. B. R. 452, Fed. Cas. No. 12,308.

Where one of the members of a firm, who was indebted to a relative on his individual note, long overdue, caused the note to be indorsed in the name of the firm, no new consideration moving to the firm, and the partnership was then financially embarrassed, as the creditor knew, and within four months thereafter became bankrupt on its voluntary application, and the firm had assets but neither partner had any separate estate, held, that the transaction was a fraudulent attempt to prefer the holder of the note over other creditors, by converting the individual debt of the maker into a partnership obligation, and that the court of bankruptcy, under its power to marshal the assets of the bankrupts, should not allow the proof of the note as a claim against the joint estate. In re Jones (D. C. 1900) 100 Fed. 781, 4 Am. Bankr. Rep. 141.

Where the actions of partners, in

connection with the transfer by one of his interest in the firm to the other, are fraudulent and constitute acts of bankruptcy upon which both partners and the firm are adjudged bankrupt, the property will be marshaled, as between firm and individual creditors, as though no transfer had been made. In re Shapiro (D. C. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839.

Where the members of a bankrupt partnership were a natural person and another partnership, which was also insolvent, in the marshaling of assets in the bankruptcy proceedings the constituent partnership is to be treated as an individual partner, and its assets applied first to the payment of its own creditors. In re Knowlton & Co. (1913) 202 Fed. 480, 120 C. C. A. 610, 29 Am. Bankr. Rep. 729.

20. What constitute partnership assets.—Although all the capital of a partnership is in fact contributed by one partner, it constitutes assets of the firm, in bankruptcy, and not of the individual partner. Buckingham v. First Nat. Bank (1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465.

A seat on a stock exchange, contributed by the partner who owned it to the capital stock of the firm, for the purpose of carrying on its business, at an agreed valuation, on which sum he was to be paid interest by the firm, where the firm thereafter paid all dues chargeable against the seat, and charged the same on the firm's books as a firm expense, was part of the assets of the firm in bankruptcy, and not the individual property of the former owner. In re Hurlbutt, Hatch & Co. (1905) 135 Fed. 504, 68 C. C. A. 216.

Real estate purchased with partnership funds and used by the firm in its business, and constituting a part of its capital, though the legal title may stand in the name of one or more of the partners, is to be treated as personalty so far as to be charged with the debts of the firm in the first instance; it is assets in bankruptcy for the creditors of the firm, and not for the separate creditors. In re Groetzinger (1904) 127 Fed. 814, 62 C. C. A. 494, 11 Am. Bankr. Rep. 723; In re Farmer (D. C. 1878) 18 N. B. R. 207, Fed. Cas. No. 4,650; In re Lawrence (D. C. 1881) 5 Fed. 349. Real estate owned and held by a firm as partnership property and brought into the firm stock is not converted absolutely and for all purposes. It is to be treated as personalty in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively, but for every other purpose it remains real estate. Hence a judgment against the firm for a partnership debt is a lien on partnership real estate, and in the bankruptcy of the firm, if such judgment is valid and not voidable under the act, the judgment creditor is entitled to enforce his lien against such realty, and the trustee in bankruptcy, as representing the unsecured creditors of the firm, cannot claim the land on the theory of its conversion into personalty. In re Codding (D. C. 1881) 9 Fed. 849. The nature of the title to real estate held by partners cannot be changed to the prejudice of the rights of separate creditors by their classification thereof in their schedule. In re Zug (C. C. 1877) 16 N. B. R. 280, Fed. Cas. No. 18,222. Even where a creditor has obtained a judgment against those members of the firm in whose name the legal title to the firm's real estate stands, he will have no prior lien thereon. Marrett v. Murphy (D. C. 1874) 11 N. B. R. 131, Fed. Cas. No. 9,103.

If one of the partners has fraudulently converted to his own use property or money of the firm, or taken the funds of the firm for the purchase of property in his own name, it remains partnership assets and may, under the equitable powers of the court, be subjected to the payment of the debts of the firm. In re Hamilton (D. C. 1880) 1 Fed. 800; Patrick v. Central Bank (C. C. 1870) Fed. Cas. No. 10,803.

Where property of an insolvent firm is sold within a month of the commencement of the proceedings in bankruptcy, and the proceeds divided, and one partner, with his share, purchases property, it will be regarded as partnership assets. In re Melvin (D. C. 1878) 17 N. B. R. 543, Fed. Cas. No. 9,406.

Where the same partners, under different firm names, carry on the same business at two different places, the assets of both nominal firms are equally applicable to the payment of all the creditors of both. In re Williams (C. C. 1876) Fed. Cas. No. 17,707.

21. What constitute individual assets.—In bankruptcy of a partnership, "individual estate" is such property as belongs to one or more of the partners to the exclusion of the others. In re Lowe (D. C. 1875) 11 N. B. R. 221, Fed. Cas. No. 8,564.

Policies insuring the life of one member of a bankrupt partnership, and payable to himself or his legal representatives (or in one case, to his wife and children if they should outlive him), and which have been individually pledged by him, do not belong to the partnership estate, although the firm may have pledged the policies in connection with his separate individual pledge. Hiscock v. Varick Bank (1907) 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1.

Where property once belonging to a partnership has, by a bona fide contract, ceased to be partnership property and become the separate property of one of the partners, who afterwards becomes bankrupt, the partnership cred-

itors are not entitled to any preference over the bankrupt's individual creditors in relation to such property. In re Wiley (D. C. 1868) Fed. Cas. No. 17,656; Crane v. Morrison (D. C. 1876) Fed. Cas. No. 3,355.

Where a partner sues for the dissolution of the firm, and bankruptcy proceedings are begun against the firm, the amount claimed by such partner on dissolution is his individual property, which will pass to the trustee for the payment of his separate debts. In re Clark (D. C. 1870) Fed. Cas. No. 2,798.

On the bankruptcy of a person who is actually and in fact the sole owner of a business, although it was conducted in the name of himself and another as partners, the property and assets of such business will pass to his trustee as his individual property without regard to any liability of the ostensible partner to the creditors. In re Gibson (D. C. 1911) 191 Fed. 665, 27 Am. Bankr. Rep. 401.

22. Partnership debts and claims.—Joint debts of partners composing a bankrupt firm cannot be proved against the partnership estate, to share on an equality with firm creditors. In re L. B. Weisenberg & Co. (D. C. 1904) 131 Fed. 517, 12 Am. Bankr. Rep. 417.

A claim founded on a note or bond signed by the individual members of a firm, but not given for a firm debt, is not entitled, as against partnership creditors, to be paid out of the assets of the firm in bankruptcy, for though it is a joint debt, it is not a partnership debt. In re L. B. Weisenberg & Co. (D. C. 1904) 131 Fed. 517, 12 Am. Bankr. Rep. 417; In re Webb (D. C. 1869) Fed. Cas. No. 17,313; In re Nims (C. C. 1879) Fed. Cas. No. 10,269; In re Roddin (C. C. 1875) Fed. Cas. No. 11,989. But if notes are given for liabilities of the partnership, they constitute debts of the firm, though not signed by the firm name, but as the joint and several notes of the partners, and notwithstanding the individual liability of the partners thereon. In re Mosier (D. C. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268. A note made jointly by all the members of a firm, strictly in the course of the partnership business, and for a consideration passing to the firm, is to be treated as the debt of the firm, though not signed in the firm name. In re L. B. Weisenberg & Co. (D. C. 1904) 131 Fed. 517, 12 Am. Bankr. Rep. 417, citing In re Warren (D. C. 1847) Fed. Cas. No. 17,191; In re Thomas (D. C. 1878) 17 N. B. R. 54, Fed. Cas. No. 13,886; Davis v. Turner (1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704. CONTRA, In re Bucyrus Machine Co. (D. C. 1871) 5 N. B. R. 303, Fed. Cas. No. 2,100; In re Holbrook (D. C. 1873) Fed. Cas. No. 6,588; In re Herrick (D. C. 1876) 13 N. B. R. 312, Fed. Cas. No. 6,420; Strause v. Hooper (D. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225; In re Jones (D. C. 1902) 116 Fed. 431, 8 Am. Bankr. Rep. 626. A note signed by the members of the firm as individuals, with nothing on its face to indicate that it was given for a partnership debt, is presumptively the debt of the individuals, and cannot be proved as a claim against the estate of the partnership in bankruptcy to share with firm creditors. In re Jones (D. C. 1902) 116 Fed. 431, 8 Am. Bankr. Rep. 626. The real nature of the transaction relating to a note given by a bankrupt firm may be shown, to determine whether the debt is one provable against the firm or the individual partners, notwithstanding the failure to enter the transaction at large on the books of the creditor. In re Stevens (D. C. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9. A bank made a loan of money to each of the two members of a firm taking in each case a note signed by both partners. The proceeds were passed to the individual accounts of the partners respectively, but they thereupon, by their checks, transferred the money to the partnership account, and it was used in the firm's business. Held, that the notes did not constitute debts of the firm provable against its estate in bankruptcy, because it had received the money from the partners and not from the bank. In re L. B. Weisenberg & Co. (D. C. 1904) 131 Fed. 517, 12 Am. Bankr. Rep. 417.

A firm note separately indorsed by one of the partners is a firm obligation, whether the indorser's liability has become fixed or not, and cannot be made the basis of a claim against his estate in bankruptcy as an individual debt. Lamoille County Nat. Bank v. Stevens' Estate (D. C. 1901) 107 Fed. 245, 6 Am. Bankr. Rep. 164; In re Speer Bros. (D. C. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524. A bank holding a draft drawn by one firm and accepted by another, where both are adjudged bankrupts, cannot share with the individual creditors in the separate assets of one who was a partner in both firms. In re Dunkerson (D. C. 1869) Fed. Cas. No. 4,158.

Where property has been wrongfully converted by a partnership and inures to the benefit of the firm, and the owner, waiving the tort, seeks to recover the value of the property as on an implied contract, his claim is against the firm, and not against any individual partner. Reynolds v. New York Trust Co. (1911) 188 Fed. 611, 110 C. C. A. 409, 26 Am. Bankr. Rep. 698.

The mortgagee in a chattel mortgage of a stock of goods cannot prove his claim against a partnership formed after the making of the mortgage and before its maturity. In re Forbes (D. C. 1874) Fed. Cas. No. 4,922. And see In re Van Buren (D. C. 1880) 2 Fed. 643.

An agreement between two traders

to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before the bankruptcy of the firm to prove his claim as a joint creditor of the firm against the partnership estate. In re Isaacs (D. C. 1873) Fed. Cas. No. 7,093. But compare In re Sickman & Glenn (D. C. 1907) 155 Fed. 508, 19 Am. Bankr. Rep. 232.

Proof of a debt in the case of a bankrupt firm should show with reasonable certainty whether it was contracted by the firm or the individual partners, and proof against the partnership should not be joined with proof of a debt against an individual partner. In re Walton (D. C. 1868) Fed. Cas. No. 17,129.

23. **Separate debts of partners.**—Where a member of a firm gives his individual note, bond, or mortgage (not executed in the name of the firm nor by the other partner), to secure an existing creditor of the firm, or to secure the future payment of the price of goods purchased for the firm's stock in trade, it is his separate debt, and the creditor cannot come upon the partnership assets in competition with partnership creditors. In re Forse (D. C. 1910) 184 Fed. 85, 25 Am. Bankr. Rep. 843; In re Stevens (D. C. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9; In re Linforth (D. C. 1898) 87 Fed. 386.

Where a creditor of a firm, holding its promissory note for money loaned, surrendered the same and accepted in lieu thereof the individual note of a member of the firm, for the same amount, the assumption of the debt by that partner being part of the consideration for the purchase of an interest in the firm for her son-in-law, and the latter note was twice renewed and was finally reduced to a judgment against the maker, and within four months thereafter the partnership and its members became bankrupt, it was held that the debt was that of the individual partner, not of the firm, notwithstanding the fact that the interest on the new note had always been paid by the firm. In re Lehigh Lumber Co. (D. C. 1900) 101 Fed. 216, 4 Am. Bankr. Rep. 221.

An indebtedness contracted by a member of a partnership individually, before the partnership was formed, cannot be converted into a firm obligation by its entry as such on the books without the creditor's knowledge, or by making payments thereon by checks of the firm. Hibberd v. McGill (1904) 129 Fed. 590, 64 C. C. A. 158, 12 Am. Bankr. Rep. 101.

Where one member of a firm gives a note signed in the firm name, but in fraud of his copartners and for his private benefit, or even, as some of the cases hold, without the consent of the other partners, the firm being insolvent, and the transaction not being in any way for the benefit of the firm, it does not create a debt provable against the assets of the partnership. First Nat. Bank v. State Nat. Bank (1904) 131 Fed. 422, 65 C. C. A. 406, 12 Am. Bankr. Rep. 429; In re Forsyth (D. C. 1873) 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Golder (D. C. 1876) Fed. Cas. No. 5,510; In re Irving (D. C. 1877) 17 N. B. R. 22, Fed. Cas. No. 7,074. A partner cannot bind the firm by notes given in the firm name in renewal of his individual notes, and the burden rests upon the creditor seeking to prove the same against the partnership estate in bankruptcy to show that the other partner knew of the transaction and assented thereto. In re McIntire (D. C. 1903) 132 Fed. 295, 12 Am. Bankr. Rep. 787. But where a partner, acting for the firm, pledged as collateral security for a loan to the firm, for which he was indorser, individual notes made by himself to the firm for borrowed money, which were afterwards sold by the pledgee in accordance with the terms of the pledge, the purchaser took the same title and rights as though the notes had been those of a third party, unaffected by the fact that the maker was also indorser on the principal debt, and was entitled to prove the notes against the estate of the maker in bankruptcy. In re White (1910) 183 Fed. 310, 105 C. C. A. 522, 25 Am. Bankr. Rep. 541; Bush v. Crawford (C. C. 1872) Fed. Cas. No. 2,224; In re Dunkle (D. C. 1871) 7 N. B. R. 107, Fed. Cas. No. 4,161.

A mortgage given by one partner on partnership property, but to secure his individual debt, although with the consent of the other partner, cannot be enforced as against firm creditors in bankruptcy. In re Blanchard (D. C. 1907) 161 Fed. 793, 20 Am. Bankr. Rep. 417.

A note given by a bankrupt firm to a member for his contribution to the capital stock, and by him turned over to his wife, who furnished the money, is evidence only of the individual debt of such member and not provable against the firm. In re Frost (D. C. 1870) 3 N. B. R. 736, Fed. Cas. No. 5,135.

Where, after the failure of a firm, and while they are endeavoring to settle with their creditors, one partner, at the request of the holder of a firm obligation, guaranties its payment, such guaranty is without legal effect and does not entitle that creditor to prove against the separate estate of the guarantor upon a subsequent adjudication of bankruptcy. In re Blumer (D. C. 1882) 13 Fed. 622.

A judgment against partners and oth-

ers jointly is a several claim as against the bankrupt partners, and cannot receive a dividend from the joint estate. In re Herrick (D. C. 1876) 13 N. B. R. 312, Fed. Cas. No. 6,420. A debt founded on a judgment against the two members of a firm jointly, in a suit on a partnership note, does not entitle the creditor to dividends out of the separate estate of each member of the firm, on an equal footing with the separate creditors of each member. In re Berrian (D. C. 1873) Fed. Cas. No. 1,351.

Where a firm failing without assets resumed business under the name of one of its members as "agent," and again failed, the debts contracted under the former name were not entitled to share in the assets of the second failure. In re Nims (C. C. 1879) Fed. Cas. No. 10,269.

Where, by the local law of a state, taxes assessed against a firm are individual liabilities of the several partners, they may be proved against the separate estates in bankruptcy. In re Green (D. C. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553.

A creditor holding a claim against the partners jointly, which is not a firm debt, may file separate proofs of the same claim to its full amount against each of the members of the firm. In re Beers (D. C. 1870) 5 N. B. R. 211, Fed. Cas. No. 1,229.

24. Joint and several liability—Double proof.—A joint and several obligation given by a partnership is also provable as an individual obligation against the estate of either of the partners. Ex parte Miller (D. C. 1842) Fed. Cas. No. 9,550. A creditor who has proved a joint and several claim against the bankrupt members of a firm separately, and not against the firm, is entitled to dividends out of the several assets of the individual partners. In re Bigelow (D. C. 1869) Fed. Cas. No. 1,397.

A creditor who holds notes made by the bankrupt firm and indorsed by an individual member of the firm, also a bankrupt, may prove his debt against both estates and share in the dividends of each, having a right of action against each, though entitled to only one satisfaction. Buckingham v. First Nat. Bank (1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; In re McCoy (1906) 150 Fed. 106, 80 C. C. A. 60, 17 Am. Bankr. Rep. 760; In re Thomas (D. C. 1878) 17 N. B. R. 54, Fed. Cas. No. 13,886; Emery v. Canal Nat. Bank (C. C. 1872) 7 N. B. R. 217, Fed. Cas. No. 4,446; In re Bigelow (D. C. 1869) 2 N. B. R. 371, Fed. Cas. No. 1,397; In re Howard (D. C. 1871) 4 N. B. R. 571, Fed. Cas. No. 6,750; Stephenson v. Jackson, 9 N. B. R. 255, Fed. Cas. No. 13,374; In re Farnum (D. C. 1843) Fed. Cas. No. 4,674; In re Bradley (D. C. 1871) Fed. Cas. No. 1,772. Where a firm composed of three persons gave, in settlement of part of a debt due to one creditor, the note of the copartnership with the indorsement of one of the partners, and, for other parts of it, severally, three notes, each made by one of the partners and indorsed by the others, and the firm was adjudged bankrupt, and the creditor proved his debt against the makers alone of the four notes, it was held that he was entitled to dividends according to such proofs out of the several estates, joint or separate, against which the proofs were made. Mead v. Nat. Bank of Fayetteville (C. C. 1868) 2 N. B. R. 173, Fed. Cas. No. 9,366.

If a creditor having a firm note indorsed by one partner, and holding property of that partner as security, obtains payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note. In re Foot (D. C. 1875) 12 N. B. R. 337, Fed. Cas. No. 4,906.

A joint and several note, given for money borrowed by a firm and signed in the firm name, with other names following, may be proved against the joint assets of the firm, but not one which is signed individually by certain of the partners and by others as sureties. In re Holbrook (D. C. 1873) Fed. Cas. No. 6,588.

25. —— Liability for torts.—Where a firm converted certain property belonging to a bank, and the firm and the individual partners were then adjudged involuntary bankrupts, the bank could prove a claim against the partners jointly on their acceptances for the price of the goods and another against the partners jointly and severally on an implied contract to repay moneys, to wit, the proceeds of the goods wrongfully converted by them, the doctrine of election between inconsistent remedies on the same claim being without application. In re Coe (1910) 183 Fed. 745, 106 C. C. A. 181, 26 Am. Bankr. Rep. 352, affirming (D. C. 1909) 169 Fed. 1002, 22 Am. Bankr. Rep. 384. And see In re Jordan (D. C. 1880) 2 Fed. 319; In re Blackford (1898) 35 App. Div. 330, 54 N. Y. Supp. 972.

The rule which permits the owner of property converted to waive the tort and recover the value of the property as on an implied contract, is based on the ground that defendant's estate has been unjustly enriched by the conversion, and where the tort was committed by a partnership, and enured to the benefit of the firm's estate, whatever implied contract might arise would be that of the firm, and not of an individual partner; and hence the owner of the property, after having proved his claim against the partnership estate, as

a claim founded on contract, is not entitled to prove it against the individual estate of a partner, for this would have the effect of giving such creditor an advantage over creditors claiming against the firm under express contracts. Reynolds v. New York Trust Co. (1911) 188 Fed. 611, 110 C. C. A. 409, 26 Am. Bankr. Rep. 698.

Where one member of a firm, with the knowledge and assent of his copartners, misappropriates trust funds (as, the money of an estate of which he is executor, or the money of a corporation of which he is the treasurer or agent) and invests the same in the business of the firm, the obligation thus created is both joint and several; and proof of the claim may be made against the partnership as well as against the individual partner. In re Baxter (D. C. 1878) 18 N. B. R. 62, Fed. Cas. No. 1,119; In re Tesson (D. C. 1874) 9 N. B. R. 378, Fed. Cas. No. 13,844; In re Jordan (D. C. 1880) 2 Fed. 319.

Where a liability to the United States is incurred by a fraudulent undervaluation of goods entered at the custom house, the claim of the government against the firm for the tort is joint and several and may be proved against both estates. In re Vetterlein (D. C. 1884) 20 Fed. 109.

26. Claims of partners against each other and the firm.—Where a surviving partner converts the property of the deceased partner to his own use, and the administrators of the latter consent, they may prove a claim therefor against the estate of the former in bankruptcy. In re Mills (D. C. 1875) 11 N. B. R. 74, Fed. Cas. No. 9,611.

One partner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets. In re Gorham (D. C. 1878) Fed. Cas. No. 5,624.

While the trustee in bankruptcy of a partnership estate may prove a claim against the individual estate of one partner, such claim is not entitled to payment pro rata with the claims of individual creditors, but only from the surplus, if any, remaining after the individual claims have been paid. In re Telfer (1910) 184 Fed. 224, 106 C. C. A. 366.

Where a partnership existed between a bankrupt and another, which was terminated prior to the bankruptcy, the former partner cannot prove a claim against the estate, based on the debts of the partnership paid by him, without an accounting and settlement of the partnership affairs, but such accounting and settlement may be had in the bankruptcy court before a referee. In re Hirth (D. C. 1911) 189 Fed. 926, 26 Am. Bankr. Rep. 666. But the partner so proving on such a claim is not entitled to share in the distribution of the partnership estate until all the other creditors of the partnership have been paid. In re Effinger (D. C. 1911) 184 Fed. 728, 25 Am. Bankr. Rep. 930; In re Denning (D. C. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; In re Rice (D. C. 1908) 164 Fed. 509, 21 Am. Bankr. Rep. 205; Wallerstein v. Ervin (1901) 112 Fed. 124, 50 C. C. A. 129, 7 Am. Bankr. Rep. 256; In re Carmichael (D. C. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Ervin (D. C. 1901) 109 Fed. 135, 6 Am. Bankr. Rep. 356. See In re Lough (C. C. A. 1910) 182 Fed. 961, 25 Am. Bankr. Rep. 597. But this rule does not apply to a debt which was due from the firm to the particular partner before he entered into the partnership, and which was not brought into the firm's capital, but was overlooked and remained unpaid until after the bankruptcy. In re Ervin (D. C. 1902) 114 Fed. 596.

Where judgments against a firm, in favor of certain of its creditors, were bought up by one of the partners, who took assignments of the judgments to himself, it was held that he thereby became a creditor of each of his copartners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the copartners in bankruptcy. In re Carmichael (D. C. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815. So, where a partnership is dissolved by consent, one partner buying the assets and assuming all the debts and liabilities of the firm, from which he agrees to save the other harmless, the relation of the former partners becomes that of principal and surety, and if the retiring partner is compelled to pay a debt of the firm, after an adjudication in bankruptcy against the continuing partner, the former may prove the amount so paid as a claim against the latter's estate in bankruptcy, making such proof in the name of the creditor; or if the creditor has already proved the debt, the partner paying it may have himself subrogated to the rights of such creditor. In re Dillon (D. C. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63. And see In re Smith (D. C. 1877) 16 N. B. R. 113, Fed. Cas. No. 12,991.

Where, out of a firm consisting of four partners, two were insolvent, one was a bankrupt, and the fourth paid off and discharged all the firm debts out of his separate estate, held, that he was entitled to prove against the separate estate of the bankrupt one-half of the amount so paid by him. In re Dell (D. C. 1878) Fed. Cas. No. 3,774.

A partner who has taken notes on the sale of his interest to his copartner cannot receive a dividend from the estate of the latter in bankruptcy until all partnership debts have been paid. In re Jewett (D. C. 1869) 1 N. B. R. 495, Fed. Cas. No. 7,309.

Where a member of a bankrupt firm is also a member of another firm, his

partner, as the remaining member of the latter firm settling its affairs, may prove a debt against the bankrupt firm. In re Buckhause (D. C. 1874) Fed. Cas. No. 2,086.

The fact that two firms carrying on business under different names in different places are composed of identically the same persons will not operate to give the claims of one firm against another firm the character of individual demands, as distinguished from partnership demands. In re Stanton (C. C. 1845) Fed. Cas. No. 13,295. And see In re Vetterlein (D. C. 1871) Fed. Cas. No. 16,927.

§ 9590. (Act July 1, 1898, c. 541, § 6.) Exemptions of bankrupts.

Exemptions of Bankrupts.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. (30 Stat. 548.)

Notes of Decisions

1. Validity and construction of this section.
2. Determination of exemption with reference to time.
3. Exemptions under federal laws.
4. —— Pension money.
5. Construction and application of state exemption laws.
6. Exemption by value.
7. Exemption of specific property.
8. —— Wearing apparel, watches, and jewelry.
9. —— Tools and implements of trade.
10. —— Growing crops.
11. Policies of life insurance.
12. Homestead exemption.
13. Title to exempt property.
14. Forfeiture of exemptions.
15. Abandonment and waiver of exemptions.
16. —— Rights and remedies of creditors holding waivers.
17. Liens on and claims against exempt property.
18. —— Claims for unpaid purchase money.
19. Transfer and assignment of exempt property.
20. Jurisdiction of bankruptcy court.
21. Claim of exemptions.
22. Setting apart exempt property.
23. —— Valuation, selection, and delivery of property.
24. —— Report, exceptions, and confirmation.
25. Sale of property and allowance of exemptions out of proceeds.
26. Exemptions in partnership cases.

1. Validity and construction of this section.—This section, though it adopts the various state laws as the measure of exemptions to be allowed to bankrupts, is not repugnant to the requirement that laws on the subject of bankruptcy shall be "uniform" throughout the United States. Darling v. Berry (C. C. 1882) 13 Fed. 659.

This section is to be liberally construed, to accomplish the purpose of the exemption, in a manner comporting with the beneficent spirit which prompted it, and not defeated by technical rules. Smith v. Thompson (1914) 213 Fed. 335, 129 C. C. A. 637; In re Lenters (D. C. 1915) 225 Fed. 878; In re Tilden (D. C. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300.

This provision expressly confers on courts of bankruptcy jurisdiction to determine all claims of bankrupts to their exemptions. Lucius v. Cawthon-Coleman Co. (1905) 25 Sup. Ct. 214, 196 U. S. 149, 49 L. Ed. 425.

The bankruptcy act neither enlarges nor diminishes the exemption laws of the states, but takes the law of the particular state where the bankrupt is domiciled, as it exists at the time when the proceeding is begun, and adopts it as the measure of the exemption to be allowed. In re Bassett (D. C. 1911) 189 Fed. 410, 26 Am. Bankr. Rep. 800; In re Boyd (D. C. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337; In re Staunton (D. C. 1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; In re Wunder (D. C. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; In re Manning (D. C. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571; Steele v. Buel (1900) 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; In re Andrews & Simonds (D. C. 1911) 193 Fed. 776, 27 Am. Bankr. Rep. 116.

The extent and duration of a homestead allottment made in the court of bankruptcy will be the same as prescribed by the laws of the state. In re Woodard (D. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339; Windley v. Tankard (1883) 88 N. C. 223. But where the exemption law of the state has been amended by a new statute allotting additional exemptions, but such later act is void for want of conformity to the constitutional requirements as to amending statutes, a bankrupt who has had set apart to him all the exemptions allowed by the original act cannot claim anything further under the amending statute. In re Buelow (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389.

The nature and extent of the state exemption must be ascertained in the mode designated by the state law. In re Feely (D. C. 1868) 3 N. B. R. 66, Fed. Cas. No. 4,714.

Section 47a (2), as amended by Act June 25, 1910 (post, § 9631), held not to affect this section. Brandt v. Mayhew (1914) 218 Fed. 422, 134 C. C. A. 210.

Where, in proceedings against a bankrupt firm, one of the partners pro-

cured his release on the ground of infancy, he was thereby precluded from successfully claiming a right to exemptions. Right of a debtor to exemptions, conferred by Const. Wis. art. 1, § 17, is a personal privilege to each debtor individually, so that, when the debtor's individual relation to the process or proceeding through or in which the property has been seized is terminated on the sole ground that he is not amenable to it, his exemption privilege also fails. In re Ellenbecker (D. C. 1913) 205 Fed. 396.

2. **Determination of exemption with reference to time.**—The right to claim exemptions must exist, if at all, at the date of the commencement of the proceedings in bankruptcy. In re Crum (D. C. 1913) 221 Fed. 729; In re Duerson (D. C. 1876) 13 N. B. R. 183, Fed. Cas. No. 4,117. But where the bankrupt is entitled to the exemption at that date, his subsequent removal from the state does not deprive him of the right, though the exemption is only given to residents by the state law. In re Donahey (D. C. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796.

A bankrupt who was engaged in farming until a short time before the adjudication is entitled to the exemptions given by the state law to farmers, though he afterwards engages, temporarily, in another pursuit. In re Fly (D. C. 1901) 110 Fed. 141, 6 Am. Bankr. Rep. 550.

Where a husband before bankruptcy transferred his homestead interest to his wife, the fact that on bankruptcy proceedings he claimed a homestead exemption does not, under Rev. St. Mo. 1909, § 8304, prevent the wife from asserting her homestead exemption in the same property. Morrow v. Zane (1914) 170 S. W. 918, 185 Mo. App. 111.

3. **Exemptions under federal laws.**—This section deals solely with exemptions claimable under the laws of the states, and does not repeal or affect R. S. § 2296, ante, § 4551, providing that a federal homestead shall not be liable for debts of the homesteader before the issuance of a patent, and hence such a homestead cannot be subjected, in the bankruptcy proceedings, to the payment of any debts contracted by the bankrupt before the issuance of a patent. In re Cohn (D. C. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761; In re Daubner (D. C. 1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

An act of congress providing for the allotment in severalty of the agricultural lands of an Indian reservation, declared that the United States would hold the lands for 25 years in trust for the sole use and benefit of the Indian allottees, who were not allowed to convey or incumber the lands during that time, and that at the expiration of that period the United States would convey the land to the allottees or their heirs discharged of the trust, and free from all charges and incumbrances. During the time named, an Indian, one of the allottees under the act, became a voluntary bankrupt. Held, that the lands allotted to him did not vest in his trustee in bankruptcy, not being property which he could have alienated or incumbered, but being exempt under a law which was not repealed or affected by the bankruptcy act. In re Russie (D. C. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6.

4. —— **Pension money.**—R. S. § 4747, ante, § 9080, provides that no money due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall "inure wholly to the benefit of such pensioner." Held, that the words quoted mean only that the pension funds shall be protected until they have come safely into the hands of the pensioner, after which they are liable for his debts; and hence pension money in the hands of a bankrupt at the time of the adjudication, neither invested nor mingled with other funds, is not exempt. In re Jones (D. C. 1909) 166 Fed. 337, 21 Am. Bankr. Rep. 536. CONTRA, In re Bean (D. C. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

A bankrupt pensioner cannot claim as exempt real property which was purchased in the first instance partly with pension money, but out of which he has withdrawn, by way of mortgage, more than the pension money originally put in, and used the money so withdrawn in other ventures. In re Ellithorpe (D. C. 1901) 111 Fed. 163, 7 Am. Bankr. Rep. 18.

5. **Construction and application of state exemption laws.**—A bankrupt's right to exemptions must be deduced from state law, though asserted as prescribed by the bankruptcy act. In re Lenters (D. C. 1915) 225 Fed. 878. And the state laws govern on the question of exemptions. People's Nat. Bank of Independence v. Maxson (Iowa, 1915) 150 N. W. 601.

In construing the state exemption laws, for the purposes of the bankruptcy act, the federal courts will follow the decisions of the highest court of the state, if any applicable rulings are to be found. In re Crook (D. C. 1915) 219 Fed. 979; In re Scheier (D. C. 1911) 188 Fed. 744, 26 Am. Bankr. Rep. 739; In re National Grocer Co. (C. C. A. 1910) 181 Fed. 33, 24 Am. Bankr. Rep. 360; In re Cochran (D. C. 1911) 185 Fed. 913, 26 Am. Bankr. Rep. 459; In re Meriwether (D. C. 1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; In re McCrary Bros. (D. C. 1909) 169 Fed. 485, 22 Am. Bankr.

Rep. 161; In re Stone (D. C. 1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416; In re Owings (D. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; In re Downing (D. C. 1905) 148 Fed. 120, 15 Am. Bankr. Rep. 423; In re Stevenson (D. C. 1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; In re Camp (D. C. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Beauchamp (D. C. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; In re Wyllie (D. C. 1872) Fed. Cas. No. 18,112; Southern Irr. Co. v. Wharton Nat. Bank (Tex. Civ. App. 1912) 144 S. W. 701. But they are not bound to follow a mere obiter dictum. In re Sullivan (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578.

In setting out the exemption to the bankrupt, it is the law of his domicile which governs. Duncan v. Ferguson-McKinney Dry Goods Co. (1907) 150 Fed. 269, 80 C. C. A. 157, 18 Am. Bankr. Rep. 155. And property which is exempt by the laws of the state where the debtor resides and where the petition is filed will be protected wherever it may actually be situated, and if it is situated in another state, the court will not inquire into the laws of that state to see if it would be there exempt, that question being immaterial. In re Stevens (D. C. 1870) Fed. Cas. No. 13,392. Compare Gibbs v. Logan (1883) 22 W. Va. 208.

Collateral provisions in state laws, particularly in relation to the method of allotting or setting apart the exempt property, are not made a part of the bankruptcy act by this section. In re Lynch (D. C. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 262; Farmer v. Taylor (1876) 56 Ga. 559. See In re Culwell (D. C. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

Where the state law grants the exemption to "residents of the state," the bankrupt must answer this condition or he cannot claim the exemption. In re Dinglehoef (D. C. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; In re O'Hara (D. C. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714. And one who is not a citizen of the United States or of the particular state is not entitled to exemptions. In re Kaplan (D. C. 1910) 186 Fed. 242, 24 Am. Bankr. Rep. 376. Nor can the bankrupt claim the exemption if he does not answer the requirement of the state statute that exemptions shall be allowed only to one who is "the head of a family." In re Finklea (D. C. 1907) 153 Fed. 492, 18 Am. Bankr. Rep. 738; In re Youngstrom (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; In re Glisson (D. C. 1910) 182 Fed. 287, 25 Am. Bankr. Rep. 911; In re McGowan (D. C. 1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469. Or to a "citizen householder having a family." In re Rainwater (D. C. 1911) 191 Fed. 738, 25 Am. Bankr. Rep. 419.

The reference in this section to "the state laws" means the statutory law of the state only. Hence an item of property having an actual market value (such as a seat in a stock exchange) which, if exempted from liability to satisfy the debts of the owner, is so exempted by decisions of the state courts, not resting on any exemption by reason of a state statute, but purely on definitions of property, will not be deemed exempt under the bankruptcy act. Page v. Edmunds (1903) 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277.

6. Exemption by value.—Where the state statute, as is often the case, does not specify the items of property which may be claimed as exempt, but grants to the debtor an exemption of personal property generally (or of property either real or personal) to a value not exceeding a certain sum, it is held that the exemption is in property and not in money, so that a bankrupt must select the items of property which he wishes set apart to him, not exceeding the designated value, and cannot simply claim an exemption of that much money out of the proceeds of his estate in bankruptcy. In re Ansley Bros. (D. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457; In re Baughman (D. C. 1910) 183 Fed. 668, 25 Am. Bankr. Rep. 167; In re Pfeiffer (D. C. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230; In re Staunton (D. C. 1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675. Under Gen. Code Ohio, §§ 11730, 11733, 11735, 11738, it is proper to allow a bankrupt $500 in money from the proceeds of a sale of the homestead having a value of more than $1,000. In re Crum (D. C. 1913) 221 Fed. 729.

An exemption by value may be taken out of cash remaining in the hands of the bankrupt at the time of the adjudication. In re Wilson (D. C. 1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287. Or in a vested expectant interest of the bankrupt in a sum of money payable at his death or at the death of another person. In re Bennett (D. C. 1868) Fed. Cas. No. 1,315. Or in real estate if the statute so provides. In re Edwards (D. C. 1868) 2 N. B. R. 349, Fed. Cas. No. 4,293.

Where the state statute is intended primarily for the benefit of the family rather than of the individual debtor, and grants an exemption to either the husband or wife, but with a proviso that the amount allowed to them jointly shall not exceed a certain sum, the rights of a married bankrupt will be determined by the same rule which would govern them in the state courts, and

may thus depend on the financial condition of his wife. In re McCutchen (D. C. 1900) 100 Fed. 779, 4 Am. Bankr. Rep. 81. But in the absence of a provision of this kind, the bankrupt is entitled to claim the full amount of the exemption specified in the statute, irrespective of the fact that his wife may own unincumbered property. In re Tonne (D. C. 1875) 13 N. B. R. 170, Fed. Cas. No. 14,095.

The court of bankruptcy will give to a bankrupt the benefit of a state statute exempting his wages earned within a limited time or to a limited amount. In re Holden (D. C. 1904) 127 Fed. 980, 12 Am. Bankr. Rep. 96. Balance of a trustee's interests in certain profits of a business, after deducting his salary of $100 a week for a year prior to bankruptcy, held not "wages or salary," which he could claim exempt as such, under Act Pa. April 15, 1845 (P. L. 460) § 5. In re Pears (1913) 205 Fed. 255, 123 C. C. A. 459.

7. Exemption of specific property.—Under Rem. & Bal. Code, Wash. § 563, par. 3, exempting to a householder a bed and bedding for each member of the family, and "other furniture" not exceeding $500 in value, a bankrupt, having selected beds and bedding for each member of the family, could not select other beds and bedding to make up the additional $500 exemption. In re Robison (D. C. 1914) 215 Fed. 662.

An automobile belonging to a bankrupt, who had no other carriage, was a "carriage," within Sess. Laws Okl. 1905, c. 18, § 1, subd. 10, exempting to a debtor one carriage or buggy. Patten v. Sturgeon (1914) 214 Fed. 65, 130 C. C. A. 505.

As to a specific exemption of a lot in a cemetery, see Burdette v. Jackson (1910) 179 Fed. 229, 102 C. C. A. 481, 24 Am. Bankr. Rep. 127. As to claiming an exemption out of a stock of goods in trade, see In re Wilson (D. C. 1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287. Concerning the effect of a state insolvency law, granting to the debtor an allowance for the support of his family, see In re Anderson (D. C. 1901) 110 Fed. 141, 6 Am. Bankr. Rep. 555. As to a state law exempting "wages or salary," see In re Pears (C. C. A. 1913) 205 Fed. 255, 30 Am. Bankr. Rep. 563. On the construction of a statute exempting the "best swine or meat of a swine," see In re Libby (D. C. 1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615; Bank of Nez Perce v. Pindel (1912) 193 Fed. 917, 113 C. C. A. 545, 28 Am. Bankr. Rep. 69. On the exemption of earnings necessary for the support of a debtor's family, see In re Condon (D. C. 1912) 198 Fed. 947, 29 Am. Bankr. Rep. 907. On the question of exempting a membership in a stock exchange or chamber of commerce, having a market value, by reason of certain benefit or insurance features in its charter or rules, see In re Neimann (D. C. 1903) 124 Fed. 738, 10 Am. Bankr. Rep. 739. As to whether a liquor license can be claimed as a part of the exemption, see In re Olewine (D. C. 1903) 125 Fed. 840, 11 Am. Bankr. Rep. 40; In re Myers (D. C. 1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536.

The burden of proving that an article alleged to be exempt is within the provisions of the statute rests upon the bankrupt. In re Turnbull (D. C. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549. And he must select his exemption in kind, and cannot ordinarily wait until the property has been sold and then claim the maximum value of his exemption in money from the proceeds. In re Blanchard (D. C. 1907) 161 Fed. 793, 20 Am. Bankr. Rep. 417; In re Grady (D. C. 1905) 138 Fed. 935, 14 Am. Bankr. Rep. 738. A bankrupt who does not happen to own any articles of the kind or class mentioned in the statute (tools, domestic animals, or the like) will not be entitled to receive out of his estate a commutation of their value in money. In re Harrington, 1 Nat. Bankr. News, 513. And see In re Buelow (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389. But if articles strictly within the exemption law have been wrongfully taken by creditors, before the bankruptcy proceedings, on attachment, execution, or distress, and sold, the bankrupt will still be entitled to claim and receive the allowance of his exemptions, the sale being declared void or the money ordered refunded by the creditors or by the sheriff if still in the latter's hands. In re Martin (D. C. 1877) Fed. Cas. No. 9,152; In re Ellis (D. C. 1868) 1 N. B. R. 555, Fed. Cas. No. 4,400; Williams v. Miller (1844) 16 Conn. 144. And a judgment recovered by a debtor against one who has unlawfully levied upon and sold his exempt property stands in place of the exemption and cannot be reached by creditors. Tillotson v. Wolcott (1872) 48 N. Y. 188. And it appears that the same doctrine applies to money due to the bankrupt from an insurance company as indemnity for the loss of his exempt property by fire. Sands v. Roberts (1859) 8 Abb. Prac. (N. Y.) 343.

8. —— Wearing apparel, watches, and jewelry.—A gold watch and chain, habitually carried upon the person in the ordinary mode of use, is exempt as wearing apparel, if the value of the watch is not so great as to make it primarily an article of ornament rather than of mere use. In re H. L. Evans & Co. (D. C. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752; In re Jones (D. C. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; In re Freeman (D. C. 1900) 2 Nat. Bankr. News, 569; In re Steele (D. C. 1879) Fed. Cas. No. 13,346; Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; Stewart v. McClung (1885) 12 Or. 431,

8 Pac. 447, 53 Am. Rep. 374; Brown v. Edmonds (1894) 5 S. D. 508, 59 N. W. 731. CONTRA, In re Everleth (D. C. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236. But if the statute only exempts "necessary wearing apparel," a watch is not exempt. In re Turnbull (D. C. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549. If a bankrupt who is a mechanic can show that it is necessary for him to have a watch in order to carry on his trade, he may claim as exempt, under the designation of a tool or implement of his trade, such a watch as would be proper and sufficient for that purpose, but if the watch which he owns is more valuable than it need be for use in his trade, he must account to his creditors for the difference. In re Coller (D. C. 1901) 111 Fed. 503, 7 Am. Bankr. Rep. 131; In re Turnbull (D. C. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549. And see In re Everleth (D. C. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

Articles of jewelry which are only carried as ornaments are not exempt under the description of wearing apparel. In re Gemmell (D. C. 1907) 155 Fed. 551; In re Kasson (D. C. 1842) Fed. Cas. No. 7,616. Where the state statute exempts "wearing apparel," a bankrupt is entitled to claim as exempt a diamond stud, worth $250, habitually worn by him during several years past in the front of his shirt, and for the purpose of fastening the shirt together, when there are no circumstances connected with its acquisition or use tending to show fraud or bad faith towards his creditors. In re Smith (D. C. 1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140. And see In re H. L. Evans & Co. (D. C. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752, where the court allowed as exempt, under the statutory description of "wearing apparel," a gold watch and chain, and rings and scarf pins set with diamonds, sapphires, rubies, and pearls, aggregating over $400 in value.

The term "wearing apparel" may also include the uniform or regalia of a fraternal order to which the bankrupt belongs, although he does not wear it as an ordinary and usual dress, but only on special occasions. In re Jones (D. C. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259. But compare In re Everleth (D. C. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

9. —— Tools and implements of trade. —Within the meaning of a statute exempting the tools or implements of a mechanic or artisan necessary to the carrying on of his trade, a baker is a mechanic. In re Osborn (D. C. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; In re Petersen (D. C. 1899) 95 Fed. 417, 2 Am. Bankr. Rep. 630. And so is an undertaker and embalmer. Steiner v. Marshall (1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486. A farmer may claim as exempt a mechanical cream separator. In re Hemstreet (D. C. 1903) 139 Fed. 958, 14 Am. Bankr. Rep. 823. A professional guide in the Maine woods is entitled to the exemption of a canoe as a tool of his trade, but not his rifle. In re Mullen (D. C. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275. A horse and wagon may be so strictly necessary to the conduct of the bankrupt's business as to be exempt under the designation of implements of his trade. In re Conley (D. C. 1907) 162 Fed. 806, 19 Am. Bankr. Rep. 200; In re Hindman (1900) 104 Fed. 331, 43 C. C. A. 558, 5 Am. Bankr. Rep. 20. But where the statute exempts "two horses kept and used for team work," a bankrupt is not entitled to claim as exempt a horse kept and used only as a racer. In re Libby (D. C. 1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615.

Where the bankrupt is a "polyartist," or pursues several different mechanical trades at the same time, he is not required to limit his claim for exemption of tools and implements to those appropriate for the pursuit of any one of his trades, but may select those suitable for all his trades, provided he does not exceed the total amount of the exemption in value. In re Robinson (D. C. 1913) 206 Fed. 176, 30 Am. Bankr. Rep. 686.

10. —— Growing crops. — As to whether unmatured crops growing on a homestead claimable by the bankrupt under the law of the state constitute a part of it and so belong to the bankrupt, or are not included in it and therefore vest in the trustee, the question depends entirely on the terms of the state statute, which will be applied in the bankruptcy proceedings. In re Sullivan (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578; In re T. C. Burnett & Co. (D. C. 1912) 201 Fed. 162, 29 Am. Bankr. Rep. 872; In re Friedrich (D. C. 1912) 199 Fed. 193, 28 Am. Bankr. Rep. 656; In re Daubner (D. C. 1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368; In re Coffman (D. C. 1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530; In re Hoag (D. C. 1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290; In re Hussey (D. C. 1878) Fed. Cas. No. 6,945.

Shannon's Code Tenn. § 4764, held not to render a bankrupt's interest in a growing crop exempt property, so that he was entitled to have it set off to him as exempt under the state laws. In re T. C. Burnett & Co. (D. C. 1912) 201 Fed. 162.

Crops growing upon a homestead on the public lands of the United States, at the time when the homestead entryman becomes bankrupt, do not pass to the trustee in bankruptcy, but are exempt. In re Miller (D. C. 1915) 221 Fed. 690.

11. Policies of life insurance.—A policy of insurance on the life of a bankrupt, which is exempt from liability for the bankrupt's debts under the state

law, is also exempt under the bankruptcy act, and the bankrupt is not obliged to pay or secure its surrender value in order to retain it as his own. Holden v. Stratton (1905) 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, 14 Am. Bankr. Rep. 94; In re Johnson (D. C. 1910) 176 Fed. 591, 24 Am. Bankr. Rep. 277; In re Holden (1902) 114 Fed. 650, 52 C. C. A. 346; Steele v. Buel (1900) 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; Pulsifer v. Hussey (1903) 97 Me. 434, 54 Atl. 1076; Dreyfus v. Barton (1911) 98 Miss. 758, 54 South. 254; Chandler v. Traub (1909) 159 Ala. 519, 49 South. 240; In re Sawyer (D. C. 1877) Fed. Cas. No. 12,393; Young v. Thomason (Ala. 1912) 60 South. 272. CONTRA, In re Scheld (1900) 104 Fed. 870, 44 C. C. A. 233, 52 L. R. A. 188, 5 Am. Bankr. Rep. 102; In re Lange (D. C. 1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189; In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549.

Gen. St. Kan. 1901, § 3463, held to exempt the proceeds of a policy on the life of a debtor from liability for debts, and hence the surrender value of the policy was not a part of the insured's estate in bankruptcy. In re Morse (D. C. 1912) 206 Fed. 350.

Where the state law provides that a policy of insurance expressed to be for the benefit of or payable to the wife of the assured shall inure to her benefit as against the claims of his creditors, a policy on the life of a bankrupt but payable to his wife is exempt in the bankruptcy proceedings and does not vest in his trustee. In re Whelpley (D. C. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433; In re Carlon (D. C. 1911) 189 Fed. 815, 27 Am. Bankr. Rep. 18; Allen v. Central Wisconsin Trust Co. (1910) 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107. See In re Morse (D. C. 1912) 206 Fed. 350.

Where a life policy was payable to insured's wife in case he died prior to the end of 20 years, and if he survived that period he was entitled to certain specified benefits, he was without right on his becoming a bankrupt within the period to deprive his wife of the life insurance provision or to obtain any benefits of the policy to which she did not expressly assent. A wife's interest as beneficiary under a policy insuring the life of her husband is exempt both under the general law and under St. Wis. 1898, § 2347. In re Churchill (1913) 209 Fed. 766, 126 C. C. A. 490, reversing order (D. C. 1912) 198 Fed. 711.

But though the law may provide that insurance effected by a husband on his own life shall inure to the benefit of his widow free from the claims of his creditors, this does not exempt in favor of the husband, during his lifetime, insurance payable either to himself or to his estate. In re Moore (D. C. 1909) 173 Fed. 679, 23 Am. Bankr. Rep. 109. Exemption cannot be claimed in respect to a policy which is made payable to the assured at the end of twenty years if living, and in case of his prior death to his wife if living, and otherwise to his legal representatives or assigns. In re Loveland (D. C. 1912) 192 Fed. 1005, 27 Am. Bankr. Rep. 765; In re Churchill (D. C. 1912) 198 Fed. 711, 29 Am. Bankr. Rep. 153. CONTRA, In re Booss (D. C. 1907) 154 Fed. 494, 18 Am. Bankr. Rep. 658.

Under St. Mass. 1907, c. 576, § 73, and this section, insured in an endowment policy may, before his adjudication as a bankrupt, assign the policy to his wife, subject to his right to surrender it, and the wife remains the owner, unless he or his trustee in bankruptcy exercises the power to surrender. Where insured in an endowment policy assigned it to his wife, reserving the right to surrender it, and then became a bankrupt, and died before the power to surrender was exercised, the wife's right to the proceeds was absolute, notwithstanding Bankr. Act, § 70a (post, § 9654). Eldredge v. Mutual Life Ins. Co. of New York (1914) 105 N. E. 361, 217 Mass. 444.

Where a policy is made payable on the death of the insured to his wife by name, it is one expressed to be for her benefit, within the meaning of the statute, notwithstanding the fact that by its terms, as in most modern policies, the insured is given the right to change the beneficiary or to enjoy certain collateral rights in his lifetime in the way of obtaining loans thereon or its surrender value, and such a policy, which was so payable at the time of the bankruptcy of the insured, whether it be regarded as the property of the wife, or as exempt property of the husband, does not pass to his trustee and the latter cannot recover the same, even though the right of the wife may be subsequently extinguished, or though she does not set up any claim thereto. In re Orear (1911) 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521.

12. Homestead exemption. — Where the law of the state in which the bankruptcy proceeding is pending allows a homestead exemption to the debtor, the same exemption may be claimed and set apart to him in the bankruptcy proceeding; and all questions in regard to the acquisition of the homestead, the steps necessary to make it effective, its measure and duration, the kinds of debts enforceable against it, and its retention or abandonment, will be determined in accordance with the laws of the state, the court of bankruptcy following the decisions of its highest courts where they are applicable. Grattan v. Trego (C. C. A. 1915) 225 Fed. 705; In re Burnham (D. C. 1913) 202 Fed. 762; In re Rippa (D. C. 1909) 180 Fed. 603; In re Marquette (1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; In re Baker (C. C. A. 1910) 182 Fed.

392, 24 Am. Bankr. Rep. 411; In re Stone (D. C. 1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416; In re Reinhart (D. C. 1902) 129 Fed. 510, 12 Am. Bankr. Rep. 78; In re Buelow (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; In re Dawley (D. C. 1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; In re Harrington (D. C. 1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; In re Pope (D. C. 1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; In re Pratt (D. C. 1874) Fed. Cas. No. 11,-370; Daughters v. Christy (1906) 223 Ill. 612, 79 N. E. 292; Rushin v. Gause (1870) 41 Ga. 180; Murray v. Hazell (1888) 99 N. C. 168, 5 S. E. 428; Martin v. Lile (1879) 63 Ala. 406. Compare Darling v. Berry (C. C. 1882) 13 Fed. 659.

Where the right of a bankrupt to a homestead exemption has been adjudicated by a state court in proceedings under a general assignment made in accordance with a state law, after a contest by creditors, and before the court of bankruptcy acquired jurisdiction by the filing of the petition in bankruptcy, such adjudication cannot be reviewed or set aside in the bankruptcy proceedings. In re Rhodes (D. C. 1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173.

Since the rights of the parties are fixed at the date of the adjudication in bankruptcy, if no homestead was allowed by the law of the state at that time, none can be set apart to the bankrupt afterwards. In re Kerr (D. C. 1873) 9 N. B. R. 566, Fed. Cas. No. 7,729. See In re Vogler (D. C. 1873) Fed. Cas. No. 16,986; In re Smith (C. C. 1876) Fed. Cas. No. 12,996. But a homestead claim will not be denied in the bankruptcy proceeding, though the claim originally filed with the county recorder under the state law was defective, and an amended claim was filed after the filing of the bankrupt's schedules. In re Irving (D. C. 1915) 220 Fed. 969.

The statute of the state provided that to entitle any person to the benefit of a homestead exemption, he should cause the word "homestead" to be entered in the margin of his record title to the same, the entry to be signed and attested by the clerk and recorder of the county. Held, that where the alleged homestead of a bankrupt had not been so designated on the record when the petition in bankruptcy was filed, at the time of the adjudication, or when the trustee was appointed, the premises were not exempt under the state law and could not be made so under the bankruptcy law. In re Youngstrom (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572.

If the bankrupt has merely expressed an intention to claim as a homestead a certain tract of land belonging to him, but has taken no steps to make the intention effective, he cannot have the land set apart to him as exempt under the bankruptcy law. In re Duerson (D. C. 1876) 13 N. B. R. 183, Fed. Cas. No. 4,117.

Under Const. Kan. art. 15, § 9, and Gen. St. Kan. 1909, § 3646, no specified time is necessary for the occupancy of a farm by owner's family to entitle him to exemption therein on bankruptcy. Grattan v. Trego (C. C. A. 1915) 225 Fed. 705.

Where a bankrupt claims property as a homestead, and proceedings are taken before the referee to subject it to the payment of a prior debt, the bankrupt should be allowed an opportunity to set up the statute of limitations against such debt. In re Bean (D. C. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

The trustee in bankruptcy should include the homestead in his report of exempt property. In re Sinnett (D. C. 1877) Fed. Cas. No. 12,907.

Where the state statute grants a homestead only to one who is a "householder" or the "head of a family," the bankrupt must show that he answers this description. See Richardson v. Woodward (1900) 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94; In re Morrison (D. C. 1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488; In re Mussey (D. C. 1910) 179 Fed. 1007, 25 Am. Bankr. Rep. 91; In re Eash (D. C. 1907) 157 Fed. 996, 19 Am. Bankr. Rep. 738.

A bankrupt cannot claim a homestead, under a statute allowing such exemptions to a "householder having a family," by virtue of a marriage contracted after his adjudication. In re Rainwater (D. C. 1911) 191 Fed. 738, 25 Am. Bankr. Rep. 419. A wife cannot have a homestead on the land of her bankrupt husband, as against the trustee, nor against those claiming title thereto under a sale made by the trustee. Lumpkin v. Eason (1871) 44 Ga. 339.

Under Gen. Code Ohio, §§ 11730, 11733, 11735, 11738, wife, who filed petition in bankruptcy while family was still occupying homestead, but after improper allowance to the bankrupt husbank in lieu of a homestead, held not entitled to a homestead exemption. In re Crum (D. C. 1913) 221 Fed. 729.

Whether a divorced person comes within the description of those entitled to claim a homestead under the law of the state will be decided according to the laws and judicial decisions of the state. See In re Le Claire (D. C. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; In re Pope (D. C. 1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; In re Giles (1908) 158 Fed. 596, 85 C. C. A. 418, 19 Am. Bankr. Rep. 306; In re Rhodes (D. C. 1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173.

It is necessary that the debtor should own the property claimed as a homestead, at the time of the adjudication in bankruptcy, and have a present legal right to the occupancy of it. In re Sale (1906) 143 Fed. 310, 74 C. C. A. 448,

16 Am. Bankr. Rep. 235. A claim of homestead cannot be set up in respect to given property where he has divested himself of the title to it, in any way or for any purpose, before the bankruptcy proceedings. Hill v. Oxendine (1878) 79 N. C. 331; In re Everitt (D. C. 1873) 9 N. B. R. 90, Fed. Cas. No. 4,579. One who, about two months before filing a petition in bankruptcy, divested himself of title to realty, to protect it against the children of his first marriage in the interest of children of the present marriage, cannot claim the property as his homestead. Kinder v. Trotti (1912) 130 La. 360, 57 South. 1005. But this rule does not apply where the bankrupt has merely contracted to sell the property without parting with the title. In re Carmichael (D. C. 1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551. Or where he has leased the property to a third person, provided he has not abandoned it as a home, but has always intended to resume his occupancy of it. In re Pope (D. C. 1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525.

Under Const. Kan. art. 15, § 9, and Gen. St. Kan. 1909, § 3646, bankrupt owner of fee in remainder in farm, being tenant from year to year of owner of life estate, held not precluded from the exemption, because life tenant had present right of occupancy. Grattan v. Trego (C. C. A. 1915) 225 Fed. 705.

Where the state law requires that the premises claimed as a homestead shall be actually occupied by the debtor and his family as their residence, this point may be contested in the bankruptcy proceedings, and the bankrupt's claim of exemption determined in accordance with its solution. In re Malloy (1911) 188 Fed. 788, 110 C. C. A. 494, 26 Am. Bankr. Rep. 31; Cowan v. Burchfield (D. C. 1910) 180 Fed. 614, 25 Am. Bankr. Rep. 293; In re Irvin (1903) 120 Fed. 733, 57 C. C. A. 147, 9 Am. Bankr. Rep. 689; In re Dawley (D. C. 1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; In re Downing (D. C. 1905) 148 Fed. 120, 15 Am. Bankr. Rep. 423; Martin v. Lile (1879) 63 Ala. 406.

A bankrupt who resides in a city cannot claim a homestead in a tract of rural land on which he has not actually lived for several years. In re Buelow (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389.

A debtor may change his homestead by removing from one residence and taking up another, and may claim the new homestead as against his trustee in bankruptcy, though the change was made within the four months preceding his bankruptcy, if done in good faith and without fraud. Huenergardt v. J. S. Brittain Dry Goods Co. (1902) 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341; In re Carlon (D. C. 1911) 189 Fed. 815, 27 Am. Bankr. Rep. 18; In re Carmichael (D. C. 1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551; In re Johnson (D. C. 1902) 118 Fed. 312, 9 Am. Bankr. Rep. 257.

If the debtor abandons his homestead without taking up a new one, the right to claim it as exempt in bankruptcy is lost, and whether this has been done is a question determinable in each case by reference to the particular circumstances. In re Mayer (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; In re Thompson (D. C. 1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283; In re Harrington (D. C. 1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; In re Schulz (D. C. 1905) 135 Fed. 228, 14 Am. Bankr. Rep. 317; In re O'Brien (D. C. 1913) 203 Fed. 1012, 30 Am. Bankr. Rep. 151.

A homestead right will be protected for the benefit of the debtor's family, as against his trustee in bankruptcy, if they continue to reside on the premises, notwithstanding that the bankrupt has absconded. In re Pratt (D. C. 1874) Fed. Cas. No. 11,370; In re Luby (D. C. 1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801. In the absence of a local rule on the subject, the bankrupt's right to claim a homestead exemption in given property is not defeated by the fact that he moved his family into the premises after he became insolvent and in contemplation of bankruptcy. In re Stone (D. C. 1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416. Or even that he bought the property claimed as a homestead with funds or assets which would not be exempt in bankruptcy and when he was insolvent. In re Letson (1907) 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506; In re Wood (D. C. 1906) 147 Fed. 877, 17 Am. Bankr. Rep. 93; Rushin v. Gause (1870) 41 Ga. 180. Compare McGahan v. Anderson (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

If the state law prescribes any particular manner of claiming or designating the homestead claimed, it must be at least substantially complied with in the bankruptcy proceedings. In re Tobias (D. C. 1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555.

If the law of the state permits, a homestead may be claimed and allowed, in bankruptcy proceedings, out of a stock of merchandise. In re Tobias (D. C. 1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555. Compare Laderburg v. Miller (C. C. A. 1913) 210 Fed. 614.

Where the state law grants a homestead of a certain value, "to be valued at the time it is set apart," improvements or accretions made by the owner after the homestead is set apart become a part of it, and are not subject to the claims of creditors in bankruptcy, though they may so enhance the value of the property as to make it worth much more than it was originally. In re Wardlaw (D. C. 1912) 192 Fed. 449.

A bankrupt held entitled, under Code Iowa 1897, § 2972 et seq., to exemp-

tion as a homestead of an entire building, one room of which was rented for business purposes. In re Coles (D. C. 1915) 224 Fed. 170.

A bankrupt owning property used for hotel purposes, on which he and his family resided as a homestead, held entitled to have $2,000 of the value thereof exempt to him as homestead, under Rem. & Bal. Code Wash. § 552. In re Robison (D. C. 1914) 215 Fed. 662.

Under Act Okl. March 15, 1905 (Sess. Laws 1905, c. 18, § 1), and Const. Okl. art. 12, § 1, a bankrupt held entitled to claim a country homestead, not greater than 160 acres in area, as exempt, without reference to its value. Patten v. Sturgeon (1914) 214 Fed. 65, 130 C. C. A. 505.

A court of bankruptcy has no jurisdiction to allot to a bankrupt, domiciled within its district, a homestead in lands situated in another district or state. In re Owings (D. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472.

If the state law gives a homestead in real property, but not to exceed a certain designated value, and the trustee finds that the property occupied and claimed by the bankrupt as a homestead is worth more in the market than the specified sum, he will not be entitled to take possession of the premises. In re Nye (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142. But he may call upon the bankrupt to pay the excess value of the property over the limit of exemption, and if this is done, the bankrupt may retain the land. In re Manning (D. C. 1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498. See Hatfield v. Cline (1911) 143 Ky. 565, 137 S. W. 212. But if it is refused, and the property is not susceptible of division for the purposes of a sale without a loss, the trustee should apply to the court for an order for its sale, the bankrupt being then entitled to receive out of the proceeds a sum equal to the statutory amount of the homestead exemption. In re Nye (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; In re Oderkirk (D. C. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Under Gen. Code Ohio, §§ 11730, 11733, 11735, 11738, if sale of homestead yields more than $500 above liens, bankrupt held not entitled to allowance from personal property in lieu of homestead. In re Crum (D. C. 1913) 221 Fed. 729.

The value of personal property exemptions allowed to a bankrupt cannot be set off against a homestead exemption to which he is entitled for the purpose of diminishing the latter. In re Strauch (D. C. 1913) 208 Fed. 842.

Where the state law provides that the homestead shall continue exempt from the payment of any debt, after the death of the owner and during the widowhood of his wife and the majority of any of his children, the reversionary interest or title in land set apart to a bankrupt as his homestead, to accrue upon the termination of the homestead estate, is assets of his estate in bankruptcy vesting in the trustee. In re Woodard (D. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339; Williams v. Scott (1898) 122 N. C. 545, 29 S. E. 877. CONTRA, In re Wardlaw (D. C. 1912) 192 Fed. 449; McAllister v. Bodkin (1882) 76 Va. 809.

13. Title to exempt property.—Property which the bankrupt is entitled to claim as exempt does not pass to or vest in his trustee, but the title thereto remains in the bankrupt and is not affected by the bankruptcy proceedings. Lockwood v. Exchange Bank (1903) 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Ingram v. Wilson (1903) 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192; In re Nye (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; Bank of Nez Perce v. Pindel (C. C. A. 1912) 193 Fed. 917, 28 Am. Bankr. Rep. 69; In re Cale (1911) 191 Fed. 31, 111 C. C. A. 89, 26 Am. Bankr. Rep. 938; In re Orear (1911) 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521; In re Bass (C. C. 1877) 15 N. B. R. 453, Fed. Cas. No. 1,091; In re Hester (D. C. 1871) 5 N. B. R. 285, Fed. Cas. No. 6,437; In re Griffin (D. C. 1868) 2 N. B. R. 254, Fed. Cas. No. 5,813; McKenney v. Cheney (1903) 118 Ga. 387, 45 S. E. 433; Bush v. Lester (1876) 55 Ga. 579, 15 N. B. R. 36; Felker v. Crane (1883) 70 Ga. 484; Morgenstein v. Commercial Nat. Bank (1906) 125 Ill. App. 397; Fellows v. Dow (1876) 58 N. H. 21; Pollard v. Noyes (1880) 60 N. H. 184; Finnin v. Malloy (1871) 1 Jones & S. (N. Y.) 382; Wilkinson v. Wait (1872) 44 Vt. 508, 8 Am. Rep. 391; Robinson v. Wilson (1875) 15 Kan. 595, 22 Am. Rep. 272. 14 N. B. R. 565; Walker v. Carroll (1880) 65 Ala. 61; Morris v. Covey (Ark. 1912) 148 S. W. 257. Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy. In re Oleson (D. C. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22.

The trustee in bankruptcy has no authority to make deductions from the exemptions allowed the bankrupt by the state law. In re Humphreys (D. C. 1915) 221 Fed. 997.

The bankrupt may maintain an action of replevin for the recovery of exempt property in specie, or trespass for wrongs done in respect to it, independently of the trustee in bankruptcy. Winn v. Morse (1879) 59 N. H. 210; Henly v. Lanier (1876) 75 N. C. 72; Scott v. Wilkie (1871) 65 N. C. 376; Seiling v. Gunderman (1872) 35 Tex. 545.

Where a husband in fraud of his creditors conveyed exempt property to his wife, his trustee in bankruptcy cannot

reach the property. Jackson v. Jetter (Iowa, 1913) 142 N. W. 431.

If the bankrupt transfers his exempt property to one creditor with intent to give him an advantage over others, it is not a "preference" within the meaning of the bankruptcy act nor a fraud upon the statute. In re Scott (D. C. 1880) 11 Fed. 133; Schlitz v. Schatz (D. C. 1870) Fed. Cas. No. 12,459; Anderson v. Brown (1884) 72 Ga. 713; Jackson v. Jetter (Iowa, 1913) 142 N. W. 431. But it is held that, in Pennsylvania, according to the law of that state, a bankrupt's exemption is personal to himself and not assignable, and hence an assignment of his exempt property will operate as an abandonment of his right to it. In re Sloan (D. C. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

A trustee cannot maintain a bill to set aside a prior mortgage on the bankrupt's homestead, otherwise valid, as giving a preference contrary to the act, nor to restrain the foreclosure of such mortgage in the state courts. Rix v. Capitol Bank (C. C. 1873) Fed. Cas. No. 11,869.

The trustee in bankruptcy, though without title to the exempt property of the bankrupt, has the temporary dominion and control over it, until it can be selected and set apart to the bankrupt. In re Grimes (D. C. 1899) 96 Fed. 529; In re Seabolt (D. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; Pincus v. S. H. Meinhard & Bro. (1913) 139 Ga. 365, 77 S. E. 82; Sheldon v. Rounds (1879) 40 Mich. 425.

14. Forfeiture of exemptions. — A bankrupt cannot claim any exemption in property which, prior to the commencement of the proceedings in bankruptcy, he had conveyed away in fraud of his creditors, or transferred to a particular creditor by way of preference, and which is afterwards recovered for the estate. In re Wishnefsky (D. C. 1910) 181 Fed. 896, 24 Am. Bankr. Rep. 798; In re Yost (D. C. 1902) 117 Fed. 792, 9 Am. Bankr. Rep. 153; In re Coddington (D. C. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122; In re Long (D. C. 1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; In re Evans (D. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; In re White (D. C. 1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; In re Tollett (D. C. 1900) 105 Fed. 425, 5 Am. Bankr. Rep. 305; In re Graham (D. C. 1871) Fed. Cas. No. 5,660; Gibbs v. Logan (1883) 22 W. Va. 208. And see In re Denson (D. C. 1912) 195 Fed. 857, 28 Am. Bankr. Rep. 162; Kinder v. Trotti (1912) 130 La. 360, 57 South. 1005. CONTRA, In re Harrell (D. C. 1915) 222 Fed. 160; In re Cotton & Preston (D. C. 1910) 183 Fed. 190, 25 Am. Bankr. Rep. 532; In re Soper (D. C. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868; In re Thompson (D. C. 1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283; In re Falconer (1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; In re Park (D. C. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432; In re Noee (D. C. 1900) 2 Nat. Bankr. News, 789; Bartholomew v. West (C. C. 1872) 8 N. B. R. 12, Fed. Cas. No. 1,071; McFarland v. Goodman (C. C. 1874) 11 N. B. R. 134, Fed. Cas. No. 8,789; In re Detert (D. C. 1875) 11 N. B. R. 293, Fed. Cas. No. 3,829; Smith v. Kehr (C. C. 1872) 7 N. B. R. 97, Fed. Cas. No. 13,071; Fisher v. Henderson (D. C. 1873) 8 N. B. R. 175, Fed. Cas. No. 4,820; Penny v. Taylor (D. C. 1874) 10 N. B. R. 200, Fed. Cas. No. 10,957; In re Peterson, 1 Nat. Bankr. News, 215; Hatcher v. Crew (1887) 83 Va. 371, 5 S. E. 221; Vogler v. Montgomery (1874) 54 Mo. 577. And see In re Denson (D. C. 1912) 195 Fed. 857, 28 Am. Bankr. Rep. 162.

The court of bankruptcy will not uphold a bankrupt's claim of homestead exemption, where that would merely enable him to prefer one of several creditors for whose benefit he had waived the exemption. In re Anderson (D. C. 1915) 224 Fed. 790.

The allegations of fraud relied on to defeat the bankrupt's claim to exemptions must be specific, and the evidence complete and convincing. In re Tobias (D. C. 1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555. A bankrupt cannot be charged with a fraudulent disposition of his property, where he has sold it for a fair consideration and with an honest motive, though it has the effect of leaving nothing for creditors. In re Duffy (D. C. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358. Nor merely because he has sold goods from his stock without keeping track of all such sales and the proceeds thereof. In re McUlta (D. C. 1911) 189 Fed. 250, 26 Am. Bankr. Rep. 480. There is no actual fraud in a general assignment for the benefit of creditors, and the bankrupt may claim his exemptions out of property so assigned after it has been surrendered to the trustee or recovered by him. Bashinski v. Talbott (1902) 119 Fed. 337, 56 C. C. A. 241, 9 Am. Bankr. Rep. 513; In re Talbott (D. C. 1902) 116 Fed. 417, 8 Am. Bankr. Rep. 427. Where the local law expressly forbids the claim of a homestead exemption in any property the conveyance of which by the claimant has been set aside on the ground of fraud or a want of consideration, where there has been a conveyance by the head of a family, a reconveyance and claim of homestead in the property, before the rendition of any decree setting aside the conveyance as fraudulent, makes the claim a valid one, although a creditor's suit to set aside the conveyance for fraud was instituted before the reconveyance and was then pending. In re W. C. Allen & Co. (D. C. 1904) 134 Fed. 620, 13

Am. Bankr. Rep. 518; In re Tollett (1901) 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, 5 Am. Bankr. Rep. 404.

Where a debtor who is insolvent and contemplates bankruptcy makes an exchange of property, giving articles which would not be exempt for specific property which is exempt under the laws of the state, the transaction will be held void, and the trustee will take title to the property so attempted to be alienated. In re Parker (D. C. 1878) Fed. Cas. No. 10,724; Pratt v. Burr (C. C. 1857) Fed. Cas. No. 11,372. And so also where the debtor, under similar conditions as to insolvency and approaching bankruptcy, converts property into cash and invests it in a homestead. In re Gerber (1911) 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608. So where a partner takes notes belonging to the firm, and with these purchases a homestead, immediately before the bankruptcy of the firm and with knowledge of its insolvent condition, he will not be entitled to retain the homestead as exempt. In re Boothroyd (D. C. 1876) 14 N. B. R. 223, Fed. Cas. No. 1,652.

Where the exemption law of the state provides that a debtor shall forfeit his right to the exemption ordinarily allowed if he is guilty of willful fraud in concealing from his creditors any part of the property of which he is possessed at the time he seeks the benefit of the exemption, a bankrupt who does not make a full and fair disclosure of all the property owned by him at the time of filing his petition in bankruptcy, is not entitled to have any exemption set apart to him by the trustee. In re Rice (D. C. 1908) 164 Fed. 589, 21 Am. Bankr. Rep. 202; In re Dobbs (D. C. 1909) 172 Fed. 682, 22 Am. Bankr. Rep. 801; In re Schafer (D. C. 1907) 151 Fed. 505, 18 Am. Bankr. Rep. 361; In re Alex (D. C. 1905) 141 Fed. 483, 15 Am. Bankr. Rep. 450; In re Cochran (D. C. 1911) 185 Fed. 913, 26 Am. Bankr. Rep. 459; In re Leverton (D. C. 1907) 155 Fed. 925, 19 Am. Bankr. Rep. 426; In re Sussman (D. C. 1910) 183 Fed. 331, 24 Am. Bankr. Rep. 909; In re Boorstin (D. C. 1902) 114 Fed. 696, 8 Am. Bankr. Rep. 89; In re Stephens (D. C. 1902) 114 Fed. 192, 8 Am. Bankr. Rep. 53; In re Williamson (D. C. 1901) 114 Fed. 190, 8 Am. Bankr. Rep. 42; In re West (D. C. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; In re Waxelbaum (D. C. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; In re Morris (D. C. 1900) 2 Nat. Bankr. News, 260; In re Magota (D. C. 1900) 2 Nat. Bankr. News, 456. And see In re Woollcott (D. C. 1905) 140 Fed. 460, 15 Am. Bankr. Rep. 386; In re Simon & Sternberg (D. C. 1907) 151 Fed. 507, 18 Am. Bankr. Rep. 204. Where the amount of assets which the bankrupt has concealed cannot be ascertained, the trustee should not allow his personal property exemption until all of the personal property has been accounted for. In re Ansley Bros. (D. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457. It is only for gross fraud on the part of the bankrupt that a claim for exemptions should be denied. In re Irwin (D. C. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165.

The provision of Code Ga. § 2830, that "it shall be the duty of each and every person who claims the benefit of the exemption allowed in this article to act in perfect good faith," and that the exemption shall not be allowed to a claimant who is guilty of fraud, has reference to the $1,600 homestead exemption, and not to the $300 exemption. In re West (D. C. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564. And the good faith required of a debtor by this statute consists in making a full and fair disclosure of his property, and a court of bankruptcy would not be justified in denying his exemption because of his fraud in other respects. In re Castleberry (D. C. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159. The fact that the bankrupt has squandered money in gambling and other wasteful practices does not establish such fraud as will deprive him of his exemptions. In re Berman (D. C. 1908) 165 Fed. 383, 21 Am. Bankr. Rep. 139. Nor can he be denied the right to his homestead exemption because he once conveyed the land claimed to his wife in a vain attempt to evade a debt, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him as his property. In re Thompson (D. C. 1902) 115 Fed. 924, 8 Am. Bankr. Rep. 283.

Where, under the law of the bankrupt's domicile, fraud does not deprive a debtor of his exemptions, the making of a false financial statement to mercantile agencies by the bankrupt does not prevent him from claiming and holding his exemptions. In re Ziff (D. C. 1915) 225 Fed. 323.

A bankrupt who made a grossly false statement of his financial condition to a mercantile agency held not entitled to exemption from property not paid for, and which was presumably obtained on credit by reason of such statement. In re Peacock (D. C. 1913) 203 Fed. 191.

A bankrupt who is a fugitive from justice, and who has failed to account to his trustee for a large amount of property in his hands, has no right, after years of acquiescence, to claim an exemption out of cash in the hands of the trustee, the proceeds of property sold by him. In re Moyer (D. C. 1883) 15 Fed. 598. And a bankrupt who has made way with the greater part of his assets and gotten them out of the jurisdiction, cannot ask to have an exemption set apart to him out of such property as is in the court's pos-

session. In re Taylor (D. C. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410.

Under Code Ga. 1910, § 3380, a bankrupt who conceals personal property, omitting it from his schedule, is not entitled to the exemption provided by the statute. In re Anderson (D. C. 1915) 224 Fed. 790.

Since, under the laws of Pennsylvania, a debtor's exemption is a personal privilege, which he may waive or lose, failure of a Pennsylvania bankrupt to surrender all his property to his trustee deprived him of the right to exemptions out of that which he did surrender. In re Liby (D. C. 1914) 218 Fed. 90.

Since title to a bankrupt's exempt property does not vest in the trustee, except sub modo, the trustee cannot deprive the bankrupt of his exemptions because he has withheld assets. In re Elkin (D. C. 1914) 218 Fed. 971. Without denying the claim of exemptions in toto, it is proper to deduct from the sum allowed by the state law any cash which the bankrupt has converted to his own use after the filing of the petition and before the property is taken into the custody of the court. In re Ansley Bros. (D. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

A bankrupt may lose his exemptions by abandoning his claim thereto or abandoning the premises occupied as a homestead. In re Mayer (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; In re Baughman (D. C. 1910) 183 Fed. 668, 25 Am. Bankr. Rep. 167.

Where an owner of a business homestead assigned it for the benefit of creditors, and the assignee conducted the business and the owner for nearly two years, until adjudged a bankrupt, did not engage in any business in which the premises would have been useful to him, he could not claim the property as a business homestead. In re Martin (D. C. 1914) 214 Fed. 1012.

15. Abandonment and waiver of exemptions.—A bankrupt may be deemed to have abandoned or waived his right to exemptions when he fails to assert it and make claim for what the state law allows him in due and proper time, but not where the omission results from mere oversight, misunderstanding, or inattention, or in consequence of the trustee's unjustifiable demand for a bond of indemnity. In re Brown (D. C. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; In re Osborn (D. C. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; Harrelson v. Webb (1909) 124 La. 1007, 50 South. 833, 134 Am. St. Rep. 529; In re Eash (D. C. 1907) 157 Fed. 996, 19 Am. Bankr. Rep. 738; In re Maxson (D. C. 1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424. And see Meyer v. Perkins (Cal. App. 1913) 130 Pac. 206.

A bankrupt is not precluded from claiming a homestead as exempt because prior to adjudication he had failed to designate the same under the state laws, if he perfects his claim thereunder within a reasonable time after claiming the homestead. Brandt v. Mayhew (1914) 218 Fed. 422, 134 C. C. A. 210. That a bankrupt fails to claim his exemption in the probate court as provided by Code Ala. 1907, § 4168, does not disentitle him to such exemptions, where his entire personal property is of less value than the exemptions. In re Ziff (D. C. 1915) 225 Fed. 323. Bankrupt held entitled to exemption, notwithstanding failure to claim it in deed of trust for benefit of creditors, which under the state law deprived him of such exemption. In re Gorman (D. C. 1915) 226 Fed. 361.

The claim of a bankrupt to exemption, being a personal right, is waived unless asserted in due time. In re Exum (1913) 209 Fed. 716; In re Webb (D. C. 1915) 219 Fed. 349; In re Harrington (D. C. 1912) 200 Fed. 1010.

Where the exemption to which a bankrupt is entitled under the law of the state is in specific property, the property claimed must be particularly described in his schedule, and, if not, he cannot subsequently claim an exemption out of the proceeds of property sold by his trustee. In re Exum (D. C. 1913) 209 Fed. 716.

Bankrupt's right to an exemption in lieu of homestead, conferred by Gen. Code Ohio, § 11,738, held lost by his failure to select the property out of which he would claim his exemption before sale of his assets by his trustee. In re Stern (D. C. 1913) 208 Fed. 488.

A bankrupt's wife, having been made a party to the bankruptcy proceedings, was bound to exercise as great diligence as the bankrupt in making any claims to homestead or other exemptions under the state law. In re Burnham (D. C. 1913) 202 Fed. 762.

Where a homestead, perfected and identified under the state law, has not been claimed in the bankrupt's schedules through inadvertence, the bankruptcy courts will not be strict in determining the question of diligence in claiming the homestead in bankruptcy. In re Burnham (D. C. 1913) 202 Fed. 762.

That a bankrupt failed to schedule a life insurance policy is not ground for disallowing his exemptions, where the omission was without fraudulent intent, but through mistake, and there was no concealment. In re Strauch (D. C. 1913) 208 Fed. 842.

That a bankrupt has failed to itemize the articles claimed by him as exempt in his claim filed in the bankrupt court does not, under Code Ala. 1907, § 4164, disentitle him to such exemptions, where his entire personal property is of less value than the exemptions. In re Ziff (D. C. 1915) 225 Fed. 323.

Under Civ. Code Cal. § 3440, providing that transfers of personal prop-

erty, not accompanied by delivery and change of possession, shall be presumed fraudulent, except as to property exempt from execution, held, that an insolvent person, transferring property without such delivery or possession, did not waive the exemption by failure to claim it at the time of sale, or in his bankruptcy schedule. Meyer v. Perkins (Cal. App. 1913) 130 P. 206, rehearing denied by Supreme Court Id. 208.

Where the law of the state permits a debtor to waive the benefit of the exemption law with respect to any particular debt, such a waiver will be recognized in the bankruptcy proceedings, and will affect particular property in the hands of the trustee before setting it apart to the bankrupt, or in the hands of the latter after allotment. In re Hoover (D. C. 1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330; Sharp v. Woolslare (1904) 25 Pa. Super. Ct. 251; First Nat. Bank v. Bartlett (1908) 35 Pa. Super. Ct. 593; In re Pfeiffer (D. C. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230; Citizens' Bank v. Hargraves (C. C. A. 1908) 164 Fed. 613, 21 Am. Bankr. Rep. 323; Jackson v. Edwards (1911) 136 Ga. 888, 72 S. E. 341; In re Harber (D. C. 1900) 2 Nat. Bankr. News, 449. But see In re Garner (D. C. 1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263. Under a statute which, in case of a sale in bulk of a stock of merchandise, makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller by making such sale must be deemed to have assented to such application, and on his adjudication as a bankrupt he cannot claim his statutory exemptions out of the money due from the purchaser. In re Connor (D. C. 1906) 146 Fed. 998, 16 Am. Bankr. Rep. 784.

A mortgage on the bankrupt's homestead will be respected and enforced in the bankruptcy proceedings, if otherwise valid, and the mortgagee will be required to exhaust the mortgage security before coming upon the general estate of the bankrupt. In re Sauthoff (D. C. 1876) Fed. Cas. No. 12,379.

A discharge in bankruptcy does not release the lien of a judgment obtained within four months prior to the adjudication upon a note waiving the homestead exemption allowed by the state law. McKenney v. Cheney (1903) 118 Ga. 387, 45 S. E. 433; Smith v. Zachry (1904) 121 Ga. 467, 49 S. E. 286.

A bankrupt, who wrote his creditors after a fire, promising to pay to them the insurance money when collected held to them created an equitable lien on the fund, and not entitled to hold as a homestead property bought with the money. Parlin & Orendorff Implement Co. v. Moulden (C. C. A. 1915) 228 Fed. 111.

General assignment of all of a bankrupt's property, including property on which he and his wife lived, for the benefit of all of their creditors, held not to preclude him from claiming the property on which they lived as an exempt homestead. Brandt v. Mayhew (C. C. A. 1914) 218 Fed. 422, 134 C. C. A. 210.

Where, though bankrupt in purchasing jewelry signed memorandum in the form of a conditional bill of sale, the seller did not rely thereon, but relied on the bankrupt's employment and the possibility of protecting himself from the bankrupt's salary, the pawning of the jewelry held not to defeat the granting of an order enabling the bankrupt to collect his salary against which a garnishee execution was filed. In re Collins (D. C. 1914) 213 Fed. 543.

Where a creditor's attempt to collect a note containing a waiver of exemptions results in giving him an unlawful preference, which is frustrated by the proceedings in bankruptcy, the waiver will fall with the preference. In re Bolinger (D. C. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

A creditor holding a judgment note against the bankrupt, but who has not reduced his note to judgment, is not entitled to take advantage of a waiver of exemptions provided in such note. In re Brown, 1 Nat. Bankr. News, 230.

A waiver of the debtor's statutory exemption in favor of a particular creditor does not inure to the benefit of the trustee in bankruptcy, nor confer any special rights upon the other creditors, nor operate in their favor so as to throw the whole property, exempt and unexempt, open to the satisfaction of their claims, nor will it prevent the bankrupt from claiming any balance of the exemption which may remain after the discharge of the particular debt as to which the waiver of exemption was made. In re Nye (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; Hallman v. Hallman (1889) 124 Pa. 347, 16 Atl. 871; Hall v. Fulgham (1888) 86 Tenn. 451, 7 S. W. 121; In re Poleman (D. C. 1874) 9 N. B. R. 376, Fed. Cas. No. 11,247; In re Becker (D. C. 1900) 2 Nat. Bankr. News, 202.

16. —— Rights and remedies of creditors holding waivers.—The fact that the obligation evidencing the debt due to a particular creditor contains a waiver of the benefit of the exemption laws does not create any such lien on specific property as will be preserved by the bankruptcy act. In re Moran (D. C. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472; Coffey v. Mitchell (1913) 139 Ga. 430, 77 S. E. 561. Nor does it make that creditor a "secured" creditor within the meaning of the law. First Nat. Bank v. Hollinsworth (1889) 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92. It merely gives the creditor an

individual right of recourse against the property which is or will be set apart to the bankrupt as his exemption. Scott v. Cheatham (1883) 78 Va. 82.

Before the exempt property of a bankrupt is ascertained and set apart to him, a creditor having recourse against it by virtue of a waiver will not be allowed to attach it or levy an execution on it. Byrd v. Harrold (D. C. 1878) 18 N. B. R. 433, Fed. Cas. No. 2,269; In re Sorg (D. C. 1907) 155 Fed. 550. See In re McKissic (D. C. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817. Although, where he holds a mortgage waiving exemptions and coupled with a delegation of authority to him to select the exempt property, which is permitted under the law of the particular state, the mortgagee will be entitled to select and hold the property which the bankrupt might otherwise have chosen as his exemption. In re National Grocer Co. (1910) 181 Fed. 33, 104 C. C. A. 47, 24 Am. Bankr. Rep. 360.

Where the bankrupt's exemption is to be set apart to him, not in the form of specific articles of property, but as so much out of a fund in court realized from the sale of his assets, the court of bankruptcy has jurisdiction to determine the claims of creditors holding waivers and to order their payment out of the sum which otherwise would have been turned over to the bankrupt. In re MacKissic (D. C. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; In re Highfield (D. C. 1908) 163 Fed. 924, 21 Am. Bankr. Rep. 92; In re Renda (D. C. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re Sloan (D. C. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435. Compare In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

When the bankrupt has no other property except such as is exempt under the state law, or when the property which he is entitled to hold as exempt has been set apart to him, or is definitely ascertained and ready for relinquishment to him, then the court of bankruptcy has no jurisdiction or authority to retain the possession or control of such property for the purpose of administering it for the benefit of creditors holding waivers, or of adjudicating and enforcing their claims against it. Lockwood v. Exchange Bank (1903) 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; In re Remmerde (D. C. 1913) 206 Fed. 822, 30 Am. Bankr. Rep. 701; In re Batten (D. C. 1909) 170 Fed. 688; Bell v. Dawson Grocery Co. (1904) 120 Ga. 628, 48 S. E. 150; In re Black (D. C. 1900) 104 Fed. 289, 4 Am. Bankr. Rep. 776; Woodruff v. Cheeves (1901) 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; In re Moore (D. C. 1901) 112 Fed. 289, 7 Am. Bankr. Rep. 285; In re Swords (D. C. 1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; In re Hill (D. C. 1899) 96 Fed. 185, 2 Am. Bankr. Rep. 798; In re Camp (D. C. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Bass (C. C. 1877) 15 N. B. R. 453, Fed. Cas. No. 1,091; In re Webb (D. C. 1915) 219 Fed. 349.

Where no rent was due when petition in bankruptcy was filed, but under the lease it immediately became due and the lessor entered judgment, bankruptcy court held to have no jurisdiction to determine a claim of the lessor against exempt property under a waiver of exemptions in the lease, notwithstanding a sale of the property by a receiver prior to the adjudication. In re Haas (D. C. 1914) 213 Fed. 694.

To enable such creditors to obtain redress in the state courts, the court of bankruptcy may stay the proceedings in bankruptcy until their rights shall have been determined in the proper court. In re W. C. Allen & Co. (D. C. 1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518. Or it may withhold the bankrupt's discharge until the waiver creditors have opportunity to resort to such remedies as may be granted by the state courts. Lockwood v. Exchange Bank (1903) 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Bell v. Dawson Grocery Co. (1904) 120 Ga. 628, 48 S. E. 150; H. S. Meinhard & Bro. v. Pincus (C. C. A. 1912) 200 Fed. 736, 29 Am. Bankr. Rep. 619. And the bankruptcy court will not enjoin such a creditor from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, or at any rate, not longer than until the property shall have been set apart as exempt by the trustee. B. F. Roden Grocery Co. v. Bacon (1904) 133 Fed. 515, 66 C. C. A. 497, 13 Am. Bankr. Rep. 251.

According to the law and decisions in Georgia, the creditor holding a waiver has no remedy at law, not being allowed to sue the debtor while the proceedings in bankruptcy are pending. But he has a remedy in equity, by means of a bill praying a special decree (in the nature of a judgment in rem) against the exempt property, together with the appointment of a receiver to take charge of the property if it is perishable or in danger of being wasted, and also an injunction to forbid the debtor from demanding and receiving it from the hands of his trustee in bankruptcy. Fidelity Produce Co. v. Perdue (1910) 134 Ga. 778, 68 S. E. 503; Arnwine v. Beaver (1910) 134 Ga. 377, 67 S. E. 937; Perry v. Britt-Carson Shoe Co. (1907) 129 Ga. 560, 59 S. E. 216, 121 Am. St. Rep. 232; Bell v. Dawson Grocery Co. (1904) 120 Ga. 628, 48 S. E. 150; Hudson v. Lamar, Taylor & Riley Drug Co. (1905) 121 Ga. 835, 49 S. E. 735; Wright v. Horne (1905) 123 Ga. 86, 51 S. E. 30. And the creditor is not precluded from taking this course by the fact that he filed his claim in the

court of bankruptcy and had notice of the setting apart of the exemption and did not object thereto. Jackson v. Edwards (1911) 136 Ga. 888, 72 S. E. 341.

In Pennsylvania, a judgment creditor holding a waiver may have the sheriff levy upon and sell the exempt property at any time before the final discharge of the bankrupt. First Nat. Bank v. Bartlett (1908) 35 Pa. Super. Ct. 593; Greenfield v. Golder (1910) 42 Pa. Super. Ct. 462. But he must first file his claim in the bankruptcy proceedings. Claster v. Soble (1903) 22 Pa. Super. Ct. 631.

Where a debtor has waived his right of exemption as to one of his creditors, but not as to others, the equitable principle of marshalling assets will require the creditor having a right to resort to the exempt property to exhaust his remedies against that fund before coming upon the general estate of the debtor in competition with the creditors who have no such rights against the exempt estate. Hallman v. Hallman (1889) 124 Pa. 347, 16 Atl. 871; Shelley's Appeal, 36 Pa. St. 373; In re Sauthoff (D. C. 1876) 14 N. B. R. 364, Fed. Cas. No. 12,379.

17. Liens on and claims against exempt property.—Proceedings in bankruptcy do not destroy existing liens on the bankrupt's exempt property. On the contrary, such liens, attaching before the commencement of the proceedings, and whether created by legal proceedings or by the act of the debtor, follow the property into the bankruptcy and are not obliterated or extinguished by the setting apart to him of such property as exempt. In re J. E. Maynard & Co. (D. C. 1910) 183 Fed. 823, 25 Am. Bankr. Rep. 732; Northern Shoe Co. v. Cecka (1912) 22 N. D. 631, 135 N. W. 177; Powers Dry Goods Co. v. Nelson (1901) 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Dozier v. McWhorter (1901) 113 Ga. 584, 39 S. E. 106; Currier v. King (1908) 81 Vt. 285, 69 Atl. 873; Gregory Co. v. Cale (1911) 115 Minn. 508, 133 N. W. 75, 37 L. R. A. (N. S.) 156; Newberry Shoe Co. v. Collier (1910) 111 Va. 288, 68 S. E. 974; Thole v. Watson (1879) 6 Mo. App. 592; Dixon v. Lawson (1880) 65 Ga. 661; Hiley v. Bridges (1878) 60 Ga. 375; Bush v. Lester (1876) 55 Ga. 579, 15 N. B. R. 36; Robinson v. Wilson (1875) 15 Kan. 595, 22 Am. Rep. 272, 14 N. B. R. 565; Bank of Mendon v. Mell (1915) 185 Mo. App. 510, 172 S. W. 484. In granting an exemption to a bankrupt, the court will order that it shall not affect or prejudice the wife's rights to alimony chargeable upon real estate claimed as a homestead. In re Garrett (D. C. 1875) 11 N. B. R. 493, Fed. Cas. No. 5,252. But a lien by attachment, garnishment, etc., which is avoided by the adjudication of the debtor as a bankrupt within four months after its creation, is none the less avoided because it concerns or attaches to exempt property. Chicago, B. & Q. R. Co. v. Hall (1913) 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, 30 Am. Bankr. Rep. 619.

Under section 67f (post. § 9651), declaring liens obtained against an insolvent within four months of his adjudication in bankruptcy void, held, that a state district court had no power to condemn the wages of an insolvent in the hands of a garnishee, against his claim of exemption, within four months of the filing of his petition in bankruptcy. Southern Pac. Co. v. I. X. L. Furniture & Carpet Installment House (Utah, 1914) 140 P. 665. A judgment on three notes, one usurious, and all waiving homestead, the waiver being invalid in the usurious note, held enforceable against property set aside as exempt in bankruptcy for the amount of the two notes. Floyd v. Johnson (1914) 83 S. E. 943, 142 Ga. 833.

Real property was not exempt from lien of a judgment by adoption of Const. Ga. 1868, with provisions as to homestead exemptions, nor by Act March 3, 1873, amendatory of Bankr. Act March 2, 1867, preserving exemptions under state laws. Kener v. La Grange Mills (1913) 34 Sup. Ct. 83, 231 U. S. 215, 58 L. Ed. 189, affirming judgment Keener v. Same (1911) 70 S. E. 245, 135 Ga. 730.

Liens lawfully attaching to exempt property of a bankrupt are not extinguished by his discharge in bankruptcy. Long v. Bullard (1886) 117 U. S. 617, 6 Sup. Ct. 917, 29 L. Ed. 1004; In re Weaver (D. C. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265; Fowler v. Wood (1887) 26 S. C. 169, 1 S. E. 597; F. Mayer Boot & Shoe Co. v. Ferguson (1910) 19 N. D. 496, 126 N. W. 110. Compare Groves v. Osburn (1905) 46 Or. 173, 79 Pac. 500.

The mortgaging of exempt property to a creditor is not against public policy, and a mortgage of such property, good against the debtor under the laws of the state, will be good as against his trustee in bankruptcy. In re National Grocer Co. (1910) 181 Fed. 33, 104 C. C. A. 47, 24 Am. Bankr. Rep. 360. It is no defense to an action to foreclose a mortgage that the mortgaged premises were allotted to the mortgagor as a homestead by proceedings in the court of bankruptcy. Brady v. Brady (1883) 71 Ga. 71; Brown v. Hoover (1877) 77 N. C. 40. But if a mortgage covers an aggregate of property, only a part of which is exempt from execution, and its lien is avoided by the subsequent institution of proceedings in bankruptcy, and the bankrupt waives his right of exemption, the lien is divested as to all the property, for the mortgagee cannot claim for the debtor a benefit which he waives for himself. In re Schuller (D. C. 1901) 108 Fed. 591, 6 Am. Bankr. Rep. 278. And see In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285. And one taking a mortgage on a parcel of

land claimed as a homestead, after a decree declaring that it is not exempt as such, may be summarily ordered to release his security, and without the formality of a plenary proceeding at law or in equity. In re Boothroyd (D. C. 1877) 15 N. B. R. 368, Fed. Cas. No. 1,653.

The fact that homestead or other exempt property has been mortgaged to certain creditors does not make it assets to be administered in bankruptcy. In re Bailey (D. C. 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201. In re Sinnett (D. C. 1877) Fed. Cas. No. 12,907. And a court of bankruptcy has no authority to allot the bankrupt's exemption in specie, or order the payment of the amount of his exemption in money, to a mortgagee or to any one but the bankrupt himself. In re Blanchard & Howard (D. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422; In re Paramore & Ricks (D. C. 1907) 156 Fed. 211, 19 Am. Bankr. Rep. 130. But the court may, in a proper case, adjudicate the question whether or not a legal or equitable lien claimed by a creditor upon exempt property is valid. In re Lucius (D. C. 1903) 124 Fed. 455, 10 Am. Bankr. Rep. 653; Smalley v. Laugenour (1902) 30 Wash. 307, 70 Pac. 786. Compare In re Little (D. C. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681.

Where it is necessary to send the creditor to the state court for relief, the court of bankruptcy may so far aid him as to withhold the granting of a discharge to the bankrupt until the creditor shall have been afforded a reasonable opportunity to test his rights. In re Brumbaugh (D. C. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204. Or direct the trustee in bankruptcy to hold the fund out of which the exemption is claimed until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction. In re Castleberry (D. C. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

Where no materialman's lien was secured for materials used by a debtor in repair of his homestead, but, judgment having been recovered thereon, the debtor duly scheduled the same as a part of his indebtedness in bankruptcy, he was entitled to a stay of execution on the judgment until one year after adjudication, notwithstanding Const. Minn. art. 1, § 12, provides that a homestead shall not be exempt from liability for such debts. In re Hassler (D. C. 1913) 204 Fed. 139.

The court of bankruptcy has no authority to hold in custody the exempt property of a bankrupt to await the determination of an action in tort against him in a state court, since his discharge would not be a bar to a recovery therein. In re Hartsell & Son (D. C. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177. Neither will it entertain the bankrupt's petition for an injunction to restrain a creditor from selling the exempt property on an execution issued before the bankruptcy, the remedy, if any, being in the state court. In re Hunt (D. C. 1871) 5 N. B. R. 493, Fed. Cas. No. 6,883.

Where a homestead exemption is claimed out of property of larger value than the limit of the exemption as fixed by the state law, or where the lien of a creditor covers both exempt and nonexempt property, the circumstances of the case may make it proper for the bankruptcy court to partition the property, incidentally adjudging the creditor's lien to attach to the specific parcel set apart as exempt, or to order its sale as a whole and satisfy the lien creditor out of the proceeds. In re Gordon (D. C. 1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; In re Thomas (D. C. 1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99; In re Betts (C. C. 1877) 15 N. B. R. 536, Fed. Cas. No. 1,371; Blood v. Munn (1909) 155 Cal. 228, 100 Pac. 694; In re Stout (D. C. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505. But compare Ingram v. Wilson (1903) 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192. Or, if the homestead has been sold under foreclosure of a mortgage upon it, and it is thought that the property is more valuable than the amount allowed by the state law as exempt, the court may authorize the trustee in bankruptcy to redeem from the foreclosure, and in that case the bankrupt will have the same right to redeem from the trustee that he would have had to redeem from the foreclosure purchaser. Swenson v. Halberg (C. C. 1880) 1 Fed. 444.

A mortgage covering both exempt and nonexempt property, and which constitutes an unlawful preference, is voidable by the mortgagor's trustee in bankruptcy only as to the nonexempt property. In re Bailey (D. C. 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; Morris v. Covey (Ark. 1912) 148 S. W. 257.

Where it appeared that the debtor, shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, had sold property which was not exempt from execution and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, it was held that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the rights of the mortgagee to the extent of the money so paid. In re Boston (D. C. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388. But compare In re Henkel (D. C. 1872) Fed. Cas. No. 6,362. And see In re Jackson (D. C. 1902) 116 Fed. 46, 8 Am. Bankr. Rep. 594. But generally, when the trustee has set apart property to the bankrupt as exempt, and his action has been approved, and the bankrupt has taken possession, such property passes out of the jurisdiction of the

court of bankruptcy, and that court cannot thereafter entertain proceedings either to defend the property against adverse claims or liens or to subject it to liens or adjudicate the rights of claimants thereto. In re Little (D. C. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Hatch (D. C. 1900) 102 Fed. 280. But see In re Hassler (D. C. 1913) 204 Fed. 139, 29 Am. Bankr. Rep. 502.

State courts have jurisdiction to enforce any specific lien upon exempt property of a bankrupt. Robinson v. Wilson (1875) 15 Kan. 595, 22 Am. Rep. 272. And proceedings for the foreclosure of a mortgage on property which the bankrupt claims as a homestead should be brought against the bankrupt himself, and not against his trustee. Dendel v. Sutton (C. C. 1884) 20 Fed. 787. On the other hand, the action of a federal court in bankruptcy in setting apart to a bankrupt the exemption which the state law allows him has exactly the same effect as if it had been granted and allowed by the proper state court in a proceeding before it, and the property is not any more subject to levy and sale on the part of subsequent creditors in the one case than in the other. Smith v. Zachry (1902) 115 Ga. 722, 42 S. E. 102; Evans v. Rounsaville (1902) 115 Ga. 684, 42 S. E. 100; Collier v. Simpson (1885) 74 Ga. 697.

The state courts have jurisdiction to enforce a chattel mortgage given prior to bankruptcy on property set apart to the mortgagor as exempt under the state law. Bank of Mendon v. Mell (1915) 172 S. W. 484, 185 Mo. App. 510. A homestead exemption, set apart by a court of bankruptcy, cannot be levied on. Murphey v. Smith (Ga. App. 1915) 85 S. E. 791.

18. —— Claims for unpaid purchase money.—Where the law of the state provides that the grant of an exemption of property to a debtor shall not prevail as against a claim for the unpaid purchase money of the property in question, a bankrupt cannot claim to have property set apart to him as exempt when he has not paid for it. Mullinix v. Simon (1912) 196 Fed. 775, 116 C. C. A. 399, 28 Am. Bankr. Rep. 1; Cannon v. Dexter Broom & Mattress Co. (1903) 120 Fed. 657, 57 C. C. A. 119, 9 Am. Bankr. Rep. 724; McGahan v. Anderson (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; In re Wells (D. C. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308; In re Perdue (D. C. 1868) 2 N. B. R. 183, Fed. Cas. No. 10,975; In re Whitehead (D. C. 1869) 2 N. B. R. 599, Fed. Cas. No. 17,-562; In re Brown (D. C. 1869) 3 N. B. R. 250, Fed. Cas. No. 1,980; Camp v. Young (1904) 119 Ga. 981, 47 S. E. 560; In re Peacock (D. C. 1913) 203 Fed. 191, 30 Am. Bankr. Rep. 179. See In re Hammonds (D. C. 1912) 198 Fed. 574, 28 Am. Bankr. Rep. 811; In re Nunemaker (D. C. 1913) 208 Fed. 491; In re Phillips (D. C. 1913) 209 Fed. 490.

An indebtedness for borrowed money which was used in the purchase of the property claimed as exempt is not an "obligation contracted for its purchase," within the meaning of the state law. In re Bailes (D. C. 1909) 176 Fed. 460, 23 Am. Bankr. Rep. 789. Under Gen. Code Ohio, § 11,738, and section 47, as amended by Act June 25, 1910, § 8 (post, § 9631), where a bankrupt purchased a stock of goods with money borrowed, and also incurred debts for goods purchased to renew the stock, he was not entitled to exemptions as against creditors for the goods so purchased, but only as against the claimants for money borrowed. In re Stern (D. C. 1913) 208 Fed. 488. A bankrupt is entitled to goods exempted by the state statute, although they were paid for out of the proceeds of goods which were not paid for. In re Tobias (D. C. 1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555.

A creditor opposing the bankrupt's claim to exempt property on the ground that it has not been paid for must have taken the steps required by the state law, such as reducing his claim to a judgment. In re Butler (D. C. 1902) 120 Fed. 100, 9 Am. Bankr. Rep. 539. And the unpaid creditor is the only proper person to raise the objection, not the trustee in bankruptcy. In re Boyd (D. C. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337. But see In re Campbell (D. C. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

An allowance of exemptions in bankruptcy out of a stock of goods cannot be defeated on the theory that the stock, being made up by commingling goods paid for with goods not paid for, must be treated as a unit, and that since it is not all paid for no part of it can be exempted, or that, since the assets are less than the liabilities, presumably nothing has been paid for, but in this case it is for the creditor to point out the items not paid for. In re Rippa (D. C. 1909) 180 Fed. 603. But compare In re Tobias (D. C. 1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555.

The fact that a claim of exemptions is opposed by the claim that the property has not been paid for does not bring such property within the jurisdiction of the court of bankruptcy, nor entitle the creditor to have the trustee take possession of it and administer it for his benefit. In re Seydel (D. C. 1902) 118 Fed. 207, 9 Am. Bankr. Rep. 255. See In re Boyd (D. C. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337. Nor has the creditor a right to enforce his vendor's lien in the court of bankruptcy. In re Wells (D. C. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308. But the trustee will be directed to surrender the property to the bankrupt in order that

it may be taken on attachment or other process from the state court. In re Durham (D. C. 1900) 104 Fed. 231, 4 Am. Bankr. Rep. 760. And the fact that the goods in question have been set apart to the bankrupt as exempt is no ground for quashing an attachment in an action for their price. Northern Shoe Co. v. Cecka (1912) 22 N. D. 631, 135 N. W. 177. But in some states it is held that the remedy of the creditor in this situation is in equity. Brooks v. Britt-Carson Shoe Co. (1909) 133 Ga. 191, 65 S. E. 411.

19. Transfer and assignment of exempt property.—One who purchases from a bankrupt before the goods are set apart, as exempt under the state law, by the ordinary, gets a good title, unless the sale was made to delay or defraud creditors, who had the right to subject the exemption, and this intention was known to the purchasers. Pincus v. S. H. Meinhard & Bro. (1913) 77 S. E. 82, 139 Ga. 365.

Where a bankrupt assigns a fund in the hands of his trustee in bankruptcy which had been set apart to him under his exemption claim, and notice of such assignment is given to the trustee and to the attorney of a debtor of the bankrupt who subsequently issued an attachment against the fund under a judgment waiving exemption, the assignee has priority in the distribution of the fund over the attaching creditor, and the attachment will be dissolved. La Barre v. Doney (1913) 53 Pa. Super. Ct. 435.

The homestead exemption claimed by a bankrupt cannot be transferred until approved by the referee or 20 days have elapsed without objections by creditors being filed. In re Anderson (D. C. 1915) 224 Fed. 790.

20. Jurisdiction of bankruptcy court.—It is the duty of a bankruptcy court to determine claims of a bankrupt to exemption, and to sever the exempt property from the bankrupt's estate, but not to grant exemptions. In re Elkin (D. C. 1914) 218 Fed. 971.

Exempt property is never really in the bankruptcy court, as the bankruptcy court has no jurisdiction of it except to set it aside as exempt property, and as the rights of the lien creditors with reference to it must be determined in the state courts. Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App. 1916) 182 S. W. 678.

The jurisdiction of a court of bankruptcy to "determine all claims of bankrupts to their exemptions," and to set apart to them the property which they are entitled to claim as exempt, includes the consideration of preliminary questions as to the right of the bankrupt to claim the property and as to whether he has taken the steps required by the state law to make his claim effective. In re Highfield (D. C. 1908) 163 Fed. 924, 21 Am. Bankr. Rep. 92. And the action of the trustee in setting apart property to the bankrupt as exempt is not final, but is subject to the determination of the court on the application of the bankrupt or any party in interest. In re White (D. C. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613. Jurisdiction to make such determination will be exercised originally by the referee, but subject to review by the judge if desired by the bankrupt or the creditors. In re Dobbs (D. C. 1909) 175 Fed. 319, 23 Am. Bankr. Rep. 569. This jurisdiction to determine claims to exemptions is exclusive, and in the performance of this duty the court of bankruptcy will not be interfered with by any other court, nor can any independent proceedings in a state court for the same purpose be lawfully taken. McGahan v. Anderson (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; In re Gibbs (D. C. 1900) 103 Fed. 782, 4 Am. Bankr. Rep. 619; Smalley v. Laugenour (1902) 30 Wash. 307, 70 Pac. 786; In re Overstreet, 1 Nat. Bankr. News, 408; In re Askew (D. C. 1870) 3 N. B. R. 575, Fed. Cas. No. 585; Woolfolk v. Murray (1871) 44 Ga. 133, 10 N. B. R. 540. A wrongful allowance by the bankruptcy court of the property claimed as exempt by the bankrupt cannot be remedied in the state courts. Brengle v. Richardson (1884) 78 Va. 406. Nor can the order of the court of bankruptcy in that behalf be collaterally questioned. Where the trustee sells property to which the bankrupt had title at the time of the adjudication, no state court can entertain any inquiry as to whether such property was exempt to the bankrupt. Steele v. Moody (1875) 53 Ala. 418, 16 N. B. R. 558.

The action of the court of bankruptcy has the same effect, in removing specific property from the reach of ordinary judicial process, that would attend the judgment of a state court setting apart such property as exempt, under the course of procedure prescribed by the state statute. Evans v. Rounsaville (1902) 115 Ga. 684, 42 S. E. 100; Smith v. Zachry (1902) 115 Ga. 722, 42 S. E. 102; Collier v. Simpson (1885) 74 Ga. 697; Ross v. Worsham (1880) 65 Ga. 624; Brady v. Brady (1883) 71 Ga. 71. Compare Felker v. Crane (1883) 70 Ga. 484; Adams v. Dickson (1884) 72 Ga. 846; Youngblood v. Lathen (1884) 20 S. C. 370.

When the bankrupt's exempt property has been designated and set apart to him by the trustee in bankruptcy, with the approval of the court, it has been administered, so far as the proceedings in bankruptcy are concerned, and passes out of the control of the bankruptcy court, and thereafter such court has no jurisdiction either to defend such property from adverse claims or liens or to enforce liens or claims against it. Sullivan v. Mussey (C. C. A. 1910) 184 Fed. 60, 25 Am. Bankr. Rep. 781; In re Yeager (D. C. 1910) 182 Fed. 951,

25 Am. Bankr. Rep. 51; In re MacKissic (D. C. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; In re Culwell (D. C. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614; In re Sorg (D. C. 1907) 155 Fed. 550; In re Reese (D. C. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; Jeffries v. Bartlett (C. C. 1884) 20 Fed. 496; In re Fetherston (D. C. 1872) Fed. Cas. No. 4,-753; King v. Neill (C. C. 1885) 26 Fed. 721; Phillips v. Bass (1880) 65 Ga. 427; Lathrop v. Pate (1911) 136 Ga. 36, 70 S. E. 569; McKenney v. Cheney (1903) 118 Ga. 387, 45 S. E. 433; Brooks v. Eblen (1908) 106 S. W. 308, 32 Ky. Law Rep. 543; Powers Dry Goods Co. v. Nelson (1901) 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Newberry Shoe Co. v. Collier (1910) 111 Va. 288, 68 S. E. 974.

A bankruptcy court, having determined the property that is exempt generally to the bankrupt and set it apart to him, has exhausted its jurisdiction over such property; and creditors claiming that for any reason, as waiver, it is not exempt from their claims, must resort to a state court for enforcement of payment therefrom. In re Remmerde (D. C. 1913) 206 Fed. 822. A court of bankruptcy is without jurisdiction to order the sale for any purpose of property which it has set apart to a bankrupt as his homestead exemption. In re Yungbluth (C. C. A. 1915) 220 Fed. 110.

If exempt property is under an attachment at the time of the adjudication in bankruptcy, the lien of which is dissolved by the adjudication, the attaching creditor cannot hold the property on the theory that, being exempt, it is not subject to be administered in the bankruptcy proceedings, but the court should require the officer having possession under the attachment to surrender the property to the trustee, in order that he may set it apart to the bankrupt. In re Stevens (D. C. 1870) Fed. Cas. No. 13,392.

21. Claim of exemptions.—It is the duty of a bankrupt desiring to claim exemptions, to insert in his schedule a particular statement of the property claimed as exempt, giving each item of property and its value, and, if any portion of it is real estate, its location, description, and present use. In re Duffy (D. C. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; In re J. E. Maynard & Co. (D. C. 1910) 183 Fed. 823, 25 Am. Bankr. Rep. 732; In re Irwin (1909) 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487; In re Kelly (D. C. 1912) 199 Fed. 984, 28 Am. Bankr. Rep. 730; In re Diamond (D. C. 1908) 158 Fed. 370, 19 Am. Bankr. Rep. 811. But it has been held that it is not necessary for the bankrupt to specify the articles specially claimed to be exempt, as the official form is not intended to be mandatory, but to be altered to suit the circumstances of the particular case. Burke v. Guarantee Title & Trust Co. (1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31. But a claim by a bankrupt of an exemption out of a stock of goods, claiming the stock in bulk, is not a sufficient compliance. In re Wilson (D. C. 1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287. So, where a bankrupt is possessed of property capable of being divided, from which he could make his selection, he must do so in his schedule, and a claim to the exemption from "proceeds of personal property" to the amount limited is not sufficient. In re Donahey (D. C. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796. So if a bankrupt includes in his schedule all his lands, claiming, as a homestead exemption therein, "real estate to the value of $500," but without designating any particular portion, it is a defect, but one which is amendable, and of which advantage cannot be taken in a subsequent collateral proceeding. Walker v. Carroll (1880) 65 Ala. 61.

While the bankrupt's right to exemptions must be deduced from the state law, his claim must be made at the time and in the manner pointed out by the bankruptcy law, which is exclusive and controlling on these points. In re Crum (D. C. 1913) 221 Fed. 729; Lipman v. Stein (1905) 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; In re Andrews & Simonds (D. C. 1911) 193 Fed. 776, 27 Am. Bankr. Rep. 116; In re Le Vay (D. C. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Kane (1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; In re W. S. Jennings & Co. (D. C. 1909) 166 Fed. 639, 22 Am. Bankr. Rep. 160; In re Burnham (D. C. 1913) 202 Fed. 762, 30 Am. Bankr. Rep. 270. But compare in re Fisher (D. C. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; In re Garner (D. C. 1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263; Northern Alabama Ry. Co. v. Feldman (1911) 1 Ala. App. 334, 56 South. 16. The only question to be determined on a bankrupt's application for his exemptions under the state law is whether he is entitled to the same against general creditors. In re Brumbaugh (D. C. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204. Ordinarily it is sufficient if he makes his claim to exemptions in his schedule, and an extension of time for filing the schedule will also extend the time for making such claim. In re O'Hara (D. C. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714. It is the ordinary method, and the one sanctioned by the rules and forms in bankruptcy, for a bankrupt to claim her homestead exemption in the schedule attached to her voluntary petition. Sheridan State Bank v. Rowell (D. C. 1914) 212 Fed. 529. Where a bankrupt claimed a homestead exemp-

tion at the time of filing his schedules and as a part thereof, as he was authorized to do, the schedules having been filed in time, his claim of exemption was in time. Brandt v. Mayhew (1914) 218 Fed. 422, 134 C. C. A. 210.

If the bankrupt makes an erroneous claim to property mentioned in the schedule as being exempt, it is the duty of the trustee to correct or disregard it. In re Whetmore (D. C. 1869) Fed. Cas. No. 17,508. But a mere claim made by a bankrupt to his trustee, asserting a right to a homestead exemption, but not incorporated in the schedule nor allowed by the trustee or the court, will not be available against a purchaser of the property at the trustee's sale. Steele v. Moody (1875) 53 Ala. 418.

It is in the power of the bankrupt to waive the exemption, and he will generally be taken to have done so if he omits to set up the claim in his schedule, either originally or by seasonable amendment. In re Gerber (1911) 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608; In re Moran (D. C. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472; In re Von Kerm (D. C. 1905) 135 Fed. 447, 14 Am. Bankr. Rep. 403; In re Harrington (D. C. 1912) 200 Fed. 1010, 29 Am. Bankr. Rep. 666.

A mortgagee of the bankrupt cannot set up the latter's rights of exemption in the mortgaged property, in order to validate his mortgage against the charge that it constituted a preference or a fraudulent conveyance. Mitchell v. Mitchell (D. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; Edmondson v. Hyde (C. C. 1872) Fed. Cas. No. 4,285. A bankrupt's wife, after his adjudication, having filed a declaration of homestead on real property on which they had been living, as she was authorized to do by the state law, held entitled to enforce her claim in the bankruptcy proceedings. Brandt v. Mayhew (1914) 218 Fed. 422, 134 C. C. A. 210.

The failure of the bankrupt to claim his exemptions in his original petition will not be taken as a waiver of his right afterwards to claim the property which is exempt, by an amendment properly filed, provided, that the amendment can be allowed without causing any loss or injury to persons who have acquired rights in the property in question in consequence of the bankrupt's neglect seasonably to assert his claims. In re Fisher (D. C. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; In re Berman (D. C. 1905) 140 Fed. 761, 15 Am. Bankr. Rep. 463; In re Moran (D. C. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472; In re Kaufmann (D. C. 1906) 142 Fed. 898, 16 Am. Bankr. Rep. 118; In re White (D. C. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556; Goodman v. Curtis (1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504; In re Lenters (D. C. 1915) 225 Fed. 878; In re Crum (D. C. 1913) 221 Fed. 729. An amendment will be refused where it is avowedly sought for the purpose of preferring certain creditors to whom the bankrupt had given notes containing a waiver of the exemption law. Moran v. King (1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; In re Merry (D. C. 1913) 201 Fed. 369, 29 Am. Bankr. Rep. 829. The bankruptcy court does not favor the extension by amendment of exemptions of the bankrupt where such extension will work solely for the benefit of a creditor, though the court as a rule exercises great liberality in permitting amendments. In re Merry (D. C. 1913) 201 Fed. 369, 29 Am. Bankr. Rep. 829.

If a bankrupt, instead of incorporating a claim for his exemptions in his schedule, goes into a state court and there sets up a claim and has the exemption allowed, he will not be entitled to have the exemption set off to him by the trustee in bankruptcy on his filing a record of the proceedings in the state court. Gayle v. Randall (1882) 71 Ala. 469; In re Nunn, 1 Nat. Bankr. News, 427. But where a homestead exemption is seasonably claimed in a bankruptcy proceeding, it may thereafter be perfected under the state law, if the claimant proceeds expeditiously. In re Burnham (D. C. 1913) 202 Fed. 762.

If the bankrupt omits to claim his exemptions in the proceedings in bankruptcy, as required by the law, but allows the trustee to sell the property, he cannot afterwards assert his right to it as exempt in a proceeding to set aside the sale or in a suit against the purchaser. In re Oderkirk (D. C. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; In re Wunder (D. C. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; Steele v. Moody (1875) 53 Ala. 418, 16 N. B. R. 558. But the right of the bankrupt to the property exempted by the law of the state is a fixed and determinate right, not dependent upon the discretion of the trustee, and where it is claimed and illegally refused before the trustee's sale of the property, it may be asserted against the proceeds of the property while in the hands of the court for distribution. In re Jones (C. C. 1871) Fed. Cas. No. 7,445. And see In re Rodenhagen (D. C. 1900) 2 Nat. Bankr. News, 674.

Since the statute expressly grants to an involuntary bankrupt a period of ten days after the adjudication in which to claim his exemptions, if such claim is made before the expiration of the ten days, it is in time, and the bankrupt cannot be deprived of his exemptions by the fact that, in the meantime, the property has been sold and converted

into money by a receiver in bankruptcy appointed at the time of filing the petition. Lipman v. Stein (1905) 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; In re Coddington (D. C. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122.

While the bankrupt must claim his exemption as prescribed by the statute, a severance of the exempted articles or property is not to be made by the debtor before adjudication, but by the trustee when appointed; and the valuation of exempt property is to be made in the first instance by the trustee. The bankruptcy act, while allowing to debtors the exemptions provided by the state law, itself regulates the manner in which such exemptions are to be claimed, set apart, and awarded. In re Friedrich (1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; Burke v. Guarantee Title & Trust Co. (1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; Cowan v. Burchfield (D. C. 1910) 180 Fed. 614.

22. Setting apart exempt property.—The provision of the statute that the trustee shall set apart the bankrupt's exemptions and report the items and estimated value thereof is mandatory and these duties cannot be performed by any one else. An agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final and not subject to exception, is void, and an order made by the referee, by consent of parties, in the terms of such agreement, will be set aside. In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

Where a claim has been duly and properly made for the exemption allowed by the law of the state, the trustee has no right to refuse to set the property apart. If he sells it, the court has jurisdiction to award the proceeds to the bankrupt. In re Finkelstein (D. C. 1912) 192 Fed. 738, 27 Am. Bankr. Rep. 229. The bankruptcy court has no control over a bankrupt's exemption for the purpose of distributing it among creditors holding notes waiving the exemption, and will pay over the fund claimed as exempt to the bankrupt or some one duly appointed to receive it. In re Anderson (D. C. 1915) 224 Fed. 790.

The determination of a bankrupt's claim to a homestead exemption by the referee before the appointment of a trustee, though informal and not in accordance with the regular course of procedure, may be sanctioned by the court in the exercise of its equity powers, where it appears that the bankrupt has no property except that claimed as exempt, so that, if the exemption should be allowed, there would be no occasion for the appointment of a trustee. In re W. C. Allen & Co. (D. C. 1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518; Snalley v. Laugenour (1902) 30 Wash. 307, 70 Pac. 786. When a trustee has been appointed and qualified, the referee has no authority to set apart the bankrupt's exemptions, nor to direct the trustee in the matter. In re Peabody (D. C. 1877) 16 N. B. R. 243, Fed. Cas. No. 10,866.

The trustee has no right to demand from the bankrupt, as a condition upon his delivering to him the property claimed as exempt and appraised for that purpose, a bond of indemnity, and where, upon demand and refusal of such a bond, the trustee sells the property in question, the bankrupt may claim the amount of his exemptions from the proceeds. In re Brown (D. C. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

The setting apart of exempt property to the bankrupt, and the sale of real estate in which a homestead is claimed, if indivisible, should always be done promptly, and the referee should see that this is done. In re Brown (D. C. 1915) 228 Fed. 533.

If exemptions have recently been claimed and allowed to the bankrupt in proceedings under the state law, it is permissible for the trustee to adopt and sanction the allotment, if no circumstances of fraud or mistake appear. In re Vogler (D. C. 1873) Fed. Cas. No. 16,986. See In re Wilson (D. C. 1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260. But it is not the duty of the trustee to wait until exemptions have been allowed and set apart by state officers according to the procedure prescribed by the laws of the state. In re Camp (D. C. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165. If the state law withholds the exemption from the bankrupt until he shall have complied with certain requirements as to the mode of claiming and securing its allowance, he must pursue the same course before he can make good his claim to the exemptions in the bankruptcy proceeding. In re Farish (D. C. 1868) 2 N. B. R. 168, Fed. Cas. No. 4,647; In re Jackson (D. C. 1869) 2 N. B. R. 508, Fed. Cas. No. 7,127.

Property exempted in the bankruptcy court, but which bankrupt did not have set aside by state court as exempt, held subject to a fi. fa. levied on it more than three years after the adjudication in bankruptcy, where no discharge had been granted to the bankrupt. Baltimore Bargain House v. Busby (1915) 85 S. E. 875, 143 Ga. 734. A bankrupt, to whom personalty claimed as exempt has been set apart, may thereafter execute and file for record a declaration of homestead, as required by state law, and have the same set apart as exempt. In re Lehfeldt (D. C. 1915) 225 Fed. 681.

23. —— Valuation, selection, and delivery of property.—The trustee in bankruptcy, in valuing and setting apart the exemptions of the bankrupt, should

conform as nearly as may be to the method provided by the state law for that purpose. In re McCutchen (D. C. 1900) 100 Fed. 779, 4 Am. Bankr. Rep. 81; In re Woodard (D. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692. But compare In re Lynch (D. C. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 262. Where the state statute provides that the homestead shall be appraised by three persons, chosen respectively by the debtor, the creditor, and the officer holding the writ, a trustee in bankruptcy, when a claim of homestead is made by the bankrupt, should cause the property to be appraised by three persons, one named by himself, one by the bankrupt, and one by the creditors, and an appraisement made by three persons all chosen by the trustee, the bankrupt not being represented in their selection, will be set aside on objections by the latter, and a new appraisement ordered. In re McCutchen (D. C. 1900) 100 Fed. 779, 4 Am. Bankr. Rep. 81. But it has been ruled that there is no provision of the bankruptcy law authorizing the valuation by appraisers of the property claimed by the bankrupt as exempt, and that, where the appraisers value the entire estate of the bankrupt, as provided by law, their inventory is not binding on the trustee as respects the exempt property nor can he adopt it as his own. In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730. And see In re Andrews & Simonds (D. C. 1911) 193 Fed. 776, 27 Am. Bankr. Rep. 116; Bank of Nez Perce v. Pindel (1912) 193 Fed. 917, 113 C. C. A. 545, 28 Am. Bankr. Rep. 69, holding that the time and manner of setting apart the bankrupt's exemptions must be determined by and in accordance with the bankruptcy act.

Where the state law exempts to a debtor personal property to a certain value, "to be selected by him," the debtor, on being adjudged bankrupt, has the right to select specific personal property, to that value, from the estate in the hands of his trustee, even though the property is not divisible without loss nor salable except as a whole. In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730. On the other hand, where the state law provides that the exempt property shall be selected by the debtor, it is not permissible to allow the bankrupt to select a trifling amount of personal property and receive the entire difference in cash from the trustee. In re Woodard (D. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692. But when property claimed by the bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale. In re Park (D. C. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432.

A mistake made by the trustee in valuing or setting off the property may be corrected by amendment, or by a revaluation of the property, where that is the proper course. Brady v. Brady (1883) 71 Ga. 71. Where a trustee in bankruptcy, in setting off to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers fifteen years before, when it was allotted to the bankrupt as a homestead under process of a state court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the state, the court of bankruptcy will direct the trustee to re-value the property and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed. In re McBryde (D. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

When the trustee has set apart the property to be allowed as exempt and made report of his doings, and his action is either approved by the court or passes without exceptions being taken, it is then his further duty to deliver the possession to the bankrupt. In re Soper (D. C. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868. But he is not authorized to dispense with the requirements of the statute and simply pay the bankrupt a sum of money equivalent to the value of the exemptions, where no proper steps have been taken to select and set apart the exempt property, and especially where it does not appear that the money was placed in a designated depository and drawn out according to the rules in bankruptcy. In re Hoyt (D. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

The bankrupt is entitled to receive the full amount of his exemption, and it cannot be diminished by deducting from it any costs and expenses made in the proceedings, even the necessary cost of selling perishable property. In re Le Vay (D. C. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Hopkins (D. C. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 619. But storage charges on the specific property, pending its delivery to the bankrupt, may be deducted. In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

24. —— Report, exceptions, and confirmation.—General Order in Bankruptcy No. 17 (post, § 9614), providing that "the trustee shall make report to the court within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, with the estimated value of each article," requires a specification of items and a separate appraisal of the property set apart to the bankrupt. And under the laws of Pennsylvania, a trustee in bankruptcy, in setting aside as exempt household goods and book accounts, must itemize them and value each item separately. In re Manning (D. C. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571. The time thus limited may be extended by the court for good cause shown, and leave given to the trustee to make a later or further

report. In re Shields (D. C. 1868) 1 N. B. R. 603, Fed. Cas. No. 12,785.

The mere setting apart by the trustee in bankruptcy of exempt property to the bankrupt, as required by section 47, par. 11 (post, § 9631), is not an adjudication. Seedig v. First Nat. Bank of Clifton (Tex. Civ. App. 1914) 168 S. W. 445. The decision of the court of bankruptcy on the allowance of exemptions to the bankrupt and exceptions thereto will be accepted as conclusive by the state courts. Morton v. Jones (1910) 136 Ky. 797, 125 S. W. 247; McKinley v. Morgan (1905) 36 Wash. 561, 79 Pac. 45. The action of the court of bankruptcy on the trustee's report cannot be impeached collaterally, and if it wrongfully allows and sets apart to the bankrupt property which he claims as exempt, the remedy is not in the state courts. Brengle v. Richardson's Adm'r (1884) 78 Va. 406; Brady v. Brady (1883) 71 Ga. 71.

A judgment of the bankruptcy court, setting apart mortgaged property as a homestead, held conclusive on the parties to an action to foreclose the mortgage, where the debt secured was duly scheduled, and plaintiff appeared and objected to its being set apart. McCurry v. Sledge (Okl. 1915) 149 P. 1124. A creditor not a party to the debtor's bankruptcy proceedings was not bound by the decree of the federal court setting aside to the bankrupt and his wife certain lands as a homestead. Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App. 1916) 182 S. W. 678.

The action of the trustee in bankruptcy, in allotting to the bankrupt the property exempt under the state law, may be excepted to and the propriety of his action, either as to whether the exemption was lawful or whether too much or too little was set apart, may be finally determined by the bankruptcy courts. In re Cheatham (D. C. 1914) 210 Fed. 370. If the bankrupt is dissatisfied with the allowance made by the trustee, he may except to the latter's decision and have the question heard by the referee, and if necessary certified to the court. In re Sloan (D. C. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; Richardson v. Trubey (1911) 250 Ill. 577, 95 N. E. 971; In re Pryor (D. C. 1868) Fed. Cas. No. 11,457; In re Thiell (D. C. 1868) Fed. Cas. No. 13,882; In re Smith (D. C. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190. Any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. McGahan v. Anderson (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; E. B. Taylor Co. v. Williams (Ga. 1913) 77 S. E. 386. To be entitled to take exceptions, it is not necessary that the creditor should be armed with any process. In re Campbell (D. C. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723. The trustee, on behalf of all the creditors, may object to the bankrupt's claim of exemptions, or take exceptions to the decision of the referee thereon. In re Rice (D. C. 1908) 164 Fed. 589, 21 Am. Bankr. Rep. 202.

Where a bankrupt, before confirmation of a homestead exemption allowance, required by general order No. 17 (post, § 9614), assigned the same to a creditor, and after objections filed by other creditors moved to amend his schedules so as to withdraw his application for a homestead exemption, the application was properly allowed. In re Herrin & West (D. C. 1914) 215 Fed. 250. Creditors of bankrupt husband and wife, who failed to object to improper allowance in lieu of homestead to the husband, held not precluded from objecting to a similar allowance to the wife. In re Crum (D. C. 1913) 221 Fed. 729.

Though exceptions should be taken within the limited time of 20 days, it is in the discretion of the court to consider objections presented by creditors after the expiration of that time, in cases of fraud or mistake or for other good cause. In re Perdue (D. C. 1868) 2 N. B. R. 183, Fed. Cas. No. 10,975. But compare In re Cotton & Preston (D. C. 1910) 183 Fed. 190, 25 Am. Bankr. Rep. 532. And see In re Gainey (D. C. 1869) 2 N. B. R. 525, Fed. Cas. No. 5,181. Where the trustee has not filed his report within the time limited for that purpose, creditors are not bound to except to the same within twenty days after its filing. In re Peabody (D. C. 1877) 16 N. B. R. 243, Fed. Cas. No. 10,866. A creditor seeking to present objections after the time limited must excuse his delay and clear himself of the imputation of laches. In re Reese (D. C. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411.

Where an insolvent is adjudged a bankrupt on his voluntary petition, and a trustee sets aside property as exempt and files his report, to which no exception is taken, the bankrupt may assign the property, in good faith, for pre-existing debts, though made within the 20 days allowed, under general order in bankruptcy No. 17 (post, § 9614), in which to file exceptions. E. B. Taylor Co. v. Williams (1913) 77 S. E. 386, 139 Ga. 581.

An exception to the allowance of exemptions to a bankrupt is not strictly speaking a pleading, and the want of a verification is not a jurisdictional defect. In re Campbell (D. C. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

Where the bankrupt makes out a prima facie case in support of his claim of exemptions, the burden is on the objecting creditors to show that he is not entitled to what he demands. In re Rippa (D. C. 1909) 180 Fed. 603; In re Grimes (D. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160. CONTRA, that the burden is on the bankrupt to prove his right to the exemptions claimed, by conclusive evidence, see In

re Rainwater (D. C. 1911) 191 Fed. 738, 25 Am. Bankr. Rep. 419; In re Campbell (D. C. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

On hearing exceptions to the allowance of exemptions to a bankrupt, the court will not enter upon an inquiry as to whether he has made a fraudulent conveyance such as would bar his right to a discharge. In re W. C. Allen & Co. (D. C. 1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518. Rulings of the referee on questions of fact in allowing exemptions will not be reversed unless clearly erroneous. In re Rutland Grocery Co. (D. C. 1911) 189 Fed. 765, 26 Am. Bankr. Rep. 942.

25. Sale of property and allowance of exemptions out of proceeds.—Where the law of the state exempts to the debtor personal property to a certain value, "to be selected by him," the debtor, on being adjudged bankrupt has the right to select specific personal property to that value from the estate in the hands of his trustee, and although his personal estate consists of a stock of goods not divisible without loss, nor salable except as a whole, yet the court cannot order the trustee to sell the whole stock and pay the bankrupt the value of his exemptions out of the proceeds. In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Shrimer (D. C. 1916) 228 Fed. 794; In re Crum (D. C. 1913) 221 Fed. 729. Where the exemption law of the state does not exempt money, or any sum in money, but only property to a certain value, the trustee has no right, where the bankrupt's property has been seized and sold under execution and distress for rent, leaving him no property to claim as exempt, to allow money, the proceeds of debts due to the bankrupt, for the purpose of making good the property which would have been exempted if it had not been sold. In re Lawson (D. C. 1868) 2 N. B. R. 54, Fed. Cas. No. 8,149.

Though the statute requires a debtor to select the specific personal property which he claims as exempt, a court of bankruptcy is not bound to require such selection, and where it is to the best interest of all concerned, or where, by reason of its being mortgaged, specific property cannot be selected and set apart as exempt, it may properly permit such property to be sold as an entirety by the trustee, and award the bankrupt his exemption from the proceeds. In re Kane (1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533.

If the trustee takes the goods selected by the bankrupt and mixes them with others and sells the whole indiscriminately, the bankrupt will not be entitled to claim out of the proceeds the maximum value allowed by the exemption law, but only the price brought by the specific goods which he had selected. In re Arnold (D. C. 1909) 169 Fed. 1000, 22 Am. Bankr. Rep. 392; In re Friend (C. C. 1877) Fed. Cas. No. 5,120. If the bankrupt, after making the selection, allows the selected articles to be sold with the rest, by an agreement to that effect with his trustee, that course being for the benefit of the estate, in that it makes the stock as a whole more salable, the trustee should allow to the bankrupt, as his exemption, out of the proceeds of the sale, a sum of money equal to the value of the goods originally selected. In re Richard (D. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Hutchinson (D. C. 1912) 197 Fed. 1021, 28 Am. Bankr. Rep. 405; In re Hargraves (D. C. 1907) 160 Fed. 758, 20 Am. Bankr. Rep. 186; In re Renda (D. C. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. Where personal property which the bankrupt was entitled to claim as exempt was sold, on his request that cash should be allowed him instead of the property, he should be charged with his percentage of the difference between the proceeds of the property and its appraised value as against the amount of his exemptions. In re Ansley Bros. (D. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457. But under the laws of Pennsylvania, the trustee cannot set apart as exempt cash out of the proceeds of a future sale of the bankrupt's personal property. In re Manning (D. C. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571.

If, before the appointment of a trustee, the property has come into the hands of a receiver in bankruptcy, who proposes to sell the same, the proper course is for the court to direct the receiver to set aside the specific property which the bankrupt claims as exempt, to await the determination of his claim. In re N. Shaffer & Son (D. C. 1904) 128 Fed. 986, 11 Am. Bankr. Rep. 717; In re Joyce (D. C. 1904) 128 Fed. 985, 11 Am. Bankr. Rep. 716. But if the receiver has sold the property (as being perishable or for other good reasons) before the appointment of a trustee, and the bankrupt has duly made his claim for his exemptions, it will be his right to receive the proper amount out of the proceeds of the sale. In re Zack (D. C. 1912) 196 Fed. 909, 28 Am. Bankr. Rep. 138; In re Le Vay (D. C. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Haskin (D. C. 1901) 109 Fed. 789, 6 Am. Bankr. Rep. 485; In re Bolinger (D. C. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171; In re Sloan (D. C. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

Where the state law does not give the debtor the right to select specific property as exempt, but fixes the value in money of the exemption to be allowed, if the property in the hands of the trustee is not capable of division into parts without injury to the whole, or if it is of such a nature that it cannot advantageously be sold except as a whole, the court may order a sale of

the whole and an allowance to the bankrupt of the value of his statutory exemption to be paid to him out of the proceeds. In re Yeager (D. C. 1910) 182 Fed. 951, 25 Am. Bankr. Rep. 51; In re Diller (D. C. 1900) 100 Fed. 931, 4 Am. Bankr. Rep. 45; In re Beede (D. C. 1879) 19 N. B. R. 68, Fed. Cas. No. 1,226; In re Poleman (D. C. 1874) Fed. Cas. No. 11,247.

Where a bankrupt's exemption allowed by the state law for the benefit of his family will be defeated unless its allowance be made in cash out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds. In re Luby (D. C. 1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801.

Where a bankrupt claims the property on which he resides as a homestead, but it is alleged that it exceeds in value the limit fixed by the homestead law of the state, and the evidence on the subject of value is conflicting, or responsible parties offer to bid a larger sum for the property, the proper course is to order the property sold by the trustee at public sale after due advertisement. At such sale, the bankrupt will be considered as bidding the amount fixed by the statute as the maximum value of a homestead exemption, and it will be knocked down to him at that price if no better offer is made. But if the property brings more than that amount, the bankrupt will be allotted a sum of money, out of the proceeds, equal to the value of a homestead exemption under the statute, and this will be considered as his exemption. In re Lynch (D. C. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 262; In re Watson (D. C. 1869) 2 N. B. R. 570, Fed. Cas. No. 17,271; Bank of Nez Perce v. Pindel (C. C. A. 1912) 193 Fed. 917, 28 Am. Bankr. Rep. 69; In re Paramore & Ricks (D. C. 1907) 156 Fed. 208, 19 Am. Bankr. Rep. 126. And see Dunlap Hardware Co. v. Huddleston (C. C. A. 1909) 167 Fed. 433, 21 Am. Bankr. Rep. 731; Smith v. Thompson (1914) 213 Fed. 335, 129 C. C. A. 637; In re Crum (D. C. 1913) 221 Fed. 729.

Where a mortgage, recognized as valid in the bankruptcy proceedings, covers an undivided fractional part of the real estate out of which the bankrupt claims his homestead exemption, the court will not order the trustee to partition the land as between the bankrupt and the mortgagee, and set apart to the former a designated portion to be held by him as his homestead in severalty and free from the mortgage, as this would change, and might impair, the security of the mortgagee. But the bankrupt may apply for an order to sell portions of the land not actually occupied as a homestead, and apply the proceeds in payment of the mortgage. In re Thomas (D. C. 1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99. Upon the sale of a homestead set apart to a bankrupt to satisfy a purchase-money lien, any surplus should be paid to the bankrupt. Sheridan State Bank v. Rowell (D. C. 1914) 212 Fed. 529.

26. Exemptions in partnership cases.—A partnership cannot be a "head of a family" or a "housekeeper," within the meaning of these and similar terms used in the state exemption laws, and therefore cannot, as such, claim exemptions out of the firm assets. In re Lentz (D. C. 1899) 97 Fed. 486; In re Smith (C. C. & D. C. 1874) Fed. Cas. No. 12,979.

Where the individual members of a bankrupt partnership claim the right to receive, each for himself, the statutory exemption out of the assets of the firm, there being no individual estates sufficient to yield the amount allowed as exempt, the court of bankruptcy will follow the rule established by the decisions of the highest court of the state, if any have been rendered. In re Beauchamp (D. C. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; In re Camp (D. C. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Stevenson (D. C. 1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230. If no rule has been thus established in the particular state, the individual partners are not entitled to exemptions out of the partnership property, unless there should be a surplus after paying all firm debts. Jennings v. Stannus (1911) 191 Fed. 347, 112 C. C. A. 91, 27 Am. Bankr. Rep. 384; In re Scheier (D. C. 1911) 188 Fed. 744, 26 Am. Bankr. Rep. 739; In re Beauchamp (D. C. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151.

In case of the bankruptcy of a partnership, where the individual partners have no separate estates, but there are assets of the firm in bankruptcy, each partner is held entitled to receive, out of the partnership assets, the exemption allowed by law, under the statutes of the following states, as construed and applied by the courts of bankruptcy: North Carolina. In re Gartner Hancock Lumber Co. (C. C. 1909) 173 Fed. 153, 22 Am. Bankr. Rep. 898; In re Seabolt (D. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; In re Stevenson (D. C. 1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; In re Grimes (D. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Wilson (D. C. 1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260. Georgia. In re Rutland Grocery Co. (D. C. 1911) 189 Fed. 765, 26 Am. Bankr. Rep. 942; In re Camp (D. C. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165. Wisconsin. In re Zimmerman (D. C. 1913) 202 Fed. 812; In re Friedrich (1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; In re Friederick (D. C. 1899) 95 Fed. 282; Ex parte Robinson (C. C. 1876) Fed. Cas. No. 11,933. Missouri. In re Young (D. C. 1869) 3 N. B. R. 440, Fed. Cas. No.

18,148; In re Richardson (D. C. 1874) 11 N. B. R. 114, Fed. Cas. No. 11,776. New York. Stewart v. Brown (1867) 37 N. Y. 350, 93 Am. Dec. 578. Michigan. In re Andrews & Simonds (D. C. 1911) 193 Fed. 776, 27 Am. Bankr. Rep. 116; In re Parks (D. C. 1874) 9 N. B. R. 270, Fed. Cas. No. 10,765.

In the following states, the individual members of a bankrupt partnership are not entitled to claim any separate exemption out of the partnership assets: Ohio. In re Tonne (D. C. 1875) 13 N. B. R. 170, Fed. Cas. No. 14,095; In re Rosenbaum, 1 Nat. Bankr. News, 541. South Dakota. In re Abrams (D. C. 1912) 193 Fed. 271; In re Novak (D. C. 1907) 150 Fed. 602, 18 Am. Bankr. Rep. 236; In re Lentz (D. C. 1899) 97 Fed. 486; In re I. S. Vickerman & Co. (D. C. 1912) 199 Fed. 589, 29 Am. Bankr. Rep. 298. Compare In re McKercher, 8 N. B. R. 409. Pennsylvania. In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Hafer (D. C. 1868) 1 N. B. R. 547, Fed. Cas. No. 5,896. Arkansas. In re Head (D. C. 1902) 114 Fed. 489, 7 Am. Bankr. Rep. 556; In re Meriwether (D. C. 1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; In re Handlin (C. C. 1875) Fed. Cas. No. 6,018. Alabama. In re McCrary Bros. (D. C. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161. New Jersey. In re Demarest (D. C. 1901) 110 Fed. 638, 6 Am. Bankr. Rep. 232. Vermont. In re Mosier (D. C. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268. Washington. Jennings v. Staunus (1911) 191 Fed. 347, 112 C. C. A. 91, 27 Am. Bankr. Rep. 384. Mississippi. In re H. W. Bundy & Co. (D. C. 1914) 218 Fed. 711.

A partner having an equal interest with his copartner in the firm property is entitled to claim his statutory exemption therefrom, in case of the bankruptcy of the firm, although the amount contributed by him to the capital of the firm was less than the amount of such exemption. In re Grimes (D. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160. But compare In re Rutland Grocery Co. (D. C. 1911) 189 Fed. 765, 26 Am. Bankr. Rep. 942.

A surviving partner may have his personal exemption set apart to him out of the partnership effects with the consent of the administrator of deceased partner. In re Seabolt (D. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; In re Dinglehoef (D. C. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242.

Where a firm consists of several partners, all must consent to the allowance of exemptions out of the firm property, and if any object, it cannot be done. In re J. M. Monroe & Co. (D. C. 1907) 156 Fed. 216, 19 Am. Bankr. Rep. 255.

A partner cannot be allowed an exemption out of the firm's property unless it appears that he has no individual estate out of which to claim and receive the exemption. In re Steed (D. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.

To be entitled to claim his individual exemption out of assets of a firm in bankruptcy, the claimant must establish his status as a member of the firm. In re E. M. Fowler & Co. (D. C. 1906) 145 Fed. 270, 16 Am. Bankr. Rep. 580; In re Wilson (D. C. 1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260; In re W. J. Floyd & Co. (D. C. 1907) 154 Fed. 757, 18 Am. Bankr. Rep. 827. An alleged partner who escapes adjudication on the ground of his being an infant cannot claim exemptions as a partner. In re Ellenbecker (D. C. 1913) 205 Fed. 396, 30 Am. Bankr. Rep. 537.

One is not deprived of his right to exemptions by the mere fact that he has conducted his business under a name indicating that it was owned by a firm or a corporation, if in fact he was the sole owner of it. In re Carpenter (1901) 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

Where, by agreement between the partners, the partnership property is turned over to one of the partners, to become his individual property, he is entitled to claim his exemption out or such property in bankruptcy proceedings subsequently brought against him. In re Kolber (D. C. 1912) 193 Fed. 281, 27 Am. Bankr. Rep. 414, citing Sargent v. Blake (1908) 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115, 17 L. R. A. (N. S.) 1040. And see In re Bjornstad (D. C. 1878) 18 N. B. R. 382, Fed. Cas. No. 1,453.

Where members of partnership the day preceding the adjudication in bankruptcy took $200 each from the partnership assets, held, that the money became their separate property and subject to claims of exemption, under Kirby's Dig. Ark. § 3903. Crawford v. Sternberg (1915) 220 Fed. 73, 135 C. C. A. 641.

Where a firm which is insolvent dissolves, but there is no transfer of the property by the retiring partner to the liquidating partner, but the former simply abandons his interest in the firm, the liquidating partner will not be allowed to claim an individual exemption out of the assets of the firm, on the theory that he is now the sole owner. In re Abrams (D. C. 1912) 193 Fed. 271.

§ 9591. (Act July 1, 1898, c. 541, § 7.) Duties of bankrupts.

Duties of Bankrupts.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if

filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. (30 Stat. 548.)

Notes of Decisions

I. Status and duties of bankrupt

1. Status of bankrupt during proceedings.
2. Duties of bankrupt with relation to estate.
3. —— Assistance to trustee.

II. Schedule of assets and list of creditors

4. Schedule of assets—Preparation and filing.
5. —— Privilege against self-crimination.
6. Form and contents of schedule.
7. Mistakes and omissions in schedule.
8. List of creditors.
9. —— Addresses of creditors.
10. Statement and description of debts.
11. Amendment of schedule and list.
12. —— Time of allowing amendments.

III. Surrender of money or assets to trustee

13. Jurisdiction and power to order.
14. Petition, order, and proceedings thereon.
15. Evidence to sustain order.
16. Excuses, defenses, and allowances.
17. Commitment for contempt.

IV. After-acquired property and surplus of estate

18. After-acquired property.
19. Right to surplus of estate.

I. STATUS AND DUTIES OF BANKRUPT

1. Status of bankrupt during proceedings.—During the pendency of the proceedings, the bankrupt is regarded as "civiliter mortuus" so far as concerns all his property and estate which is subject to administration in bankruptcy. From the date of the adjudication in bankruptcy, he loses all power of disposing of any portion of such property, and any subsequent deed, conveyance, incumbrance, transfer, or agreement which he may make is a nullity and absolutely void as against his trustee in bankruptcy. In re Anderson (D. C. 1885) 23 Fed. 482; In re Gregg (D. C. 1868) 3 N. B. R. 529, Fed. Cas. No. 5,796; Johnson v. Geisriter (1870) 26 Ark. 44; Hamilton v. Smith (1907) 36 Mont. 1, 92 Pac. 32, 122 Am. St. Rep. 330; Redman v. Gould (1845) 7 Blackf. (Ind.) 361. He can make no binding agreement with creditors or others as to the distribution of his estate. In re Anderson (C. C. 1876) Fed. Cas. No. 351. If he executes a mortgage on his property, pending the proceedings, the trustee may have it set

aside summarily on petition, and need not resort to a bill in equity. In re Sims (D. C. 1878) 16 N. B. R. 251, Fed. Cas. No. 12,888. If the bankrupt undertakes to make an assignment of a judgment standing in his name, it passes no right or title available against the trustee. Harris v. England (1880) 1 Ky. Law Rep. 271. Even a transfer of promissory notes by the payee, pending bankruptcy proceedings against him which result in an adjudication and an injunction against disposing of his property, vests no title in the purchaser, though he had no actual notice of the proceedings. In re Lake (D. C. 1872) 6 N. B. R. 542, Fed. Cas. No. 7,992.

All persons are so far affected with constructive notice of a proceeding in bankruptcy that they cannot deal with the bankrupt or his estate to the prejudice of the proceedings or in derogation of the title of the trustee. Page v. Waring (1879) 76 N. Y. 463.

Payment of a debt made to a bankrupt after the commencement of proceedings against him, though made in good faith and in the usual course of business, and without any knowledge or actual notice of the bankruptcy proceedings, is not effectual to discharge the debt, but the debtor may be required to pay the money again to the trustee in bankruptcy, unless, indeed, the bankrupt should surrender the amount of it. Howard v. Crompton (C. C. 1877) Fed. Cas. No. 6,758; In re Hayden (D. C. 1872) 7 N. B. R. 192, Fed. Cas. No. 6,257; Mays v. Manufacturers' Nat. Bank (1870) 64 Pa. 74, 3 Am. Rep. 573. See Babbitt v. Burgess (C. C. 1873) 7 N. B. R. 561, Fed. Cas. No. 693; Ex parte Goodwin, 1 Atk. Ch. 100.

The bankrupt has the right to deal as he sees fit with property which is of such a character that it is not affected by the bankruptcy proceedings and does not pass to the trustee. Tallman v. Tallman (1850) 5 Cush. (Mass.) 325. Such is the rule in regard to a right of action for a purely personal tort against the bankrupt, such as libel or slander or malicious prosecution and false arrest. In re Haensell (D. C. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286; Stanly v. Duhurst (1793) 2 Root (Conn.) 52; Noonan v. Orton (1874) 34 Wis. 259, 17 Am. Rep. 441, 12 N. B. R. 405; In re Crockett (D. C. 1868) 2 N. B. R. 208, Fed. Cas. No. 3,402; Dillard v. Collins (1874) 25 Grat. (Va.) 343.

The individual bankruptcy of a person who is a stockholder and director and officer of a corporation (which is not in bankruptcy) does not prevent him from voting on stock still standing in his name, nor incapacitate him from exercising his functions as such officer of the corporation, nor render void as to third persons the acts and conveyances of the corporation done and executed through him as its representative. Atlas Nat. Bank v. Gardner (C. C. 1879) Fed. Cas. No. 635; State v. Ferris (1875) 42 Conn. 560.

2. Duties of bankrupt with relation to estate.—Prior to the appointment of a trustee, the bankrupt has sufficient title to the personal property included in his schedule of assets to enable him to bring, and in case the trustee neither sues nor intervenes, to prosecute to judgment, a suit for damages occasioned by the alleged unlawful judicial sale of such property after he had filed a claim of exemption. Johnson v. Collier (1912) 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306; Hickcock v. Bell (1877) 46 Tex. 610.

A corporation in bankruptcy must deliver to its trustee its corporate records and stock books, and the court of bankruptcy has power to compel it to do so, there being no adverse holding, on petition and rule to show cause. Babbitt v. Dutcher (1910) 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402. A bankrupt refusing to turn over his books of account to his trustee may be punished as for contempt. In re Wilson (D. C. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612.

The court of bankruptcy has jurisdiction to require the bankrupt to do whatever is necessary to make valid and effectual the legal transfer of his property to the trustee. In re Lattimer (D. C. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re Hudson River Water Power Co. (D. C. 1906) 148 Fed. 877, 17 Am. Bankr. Rep. 778. The bankrupt may be compelled to join in an application for the transfer of a liquor license formerly belonging to him and sold by the trustee. In re Wiesel (D. C. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59. Or in such proceedings as are necessary to transfer a seat on the stock exchange. In re Hurlbutt, Hatch & Co. (1905) 135 Fed. 504, 68 C. C. A. 216, 13 Am. Bankr. Rep. 50. Where a devise has been made to a bankrupt and accepted by him, it is a fraud upon his creditors for him to disclaim or renounce it, and the court of bankruptcy will compel him to do all acts necessary to perfect his title to the devised estate. Ex parte Fuller (C. C. 1842) Fed. Cas. No. 5,147.

The fact that no trustee has yet been appointed will not relieve the bankrupt from the duty, or deprive him of the right, of objecting to the allowance of any false or unjust claim against his estate, or of moving for its expunction. In re Ankeny (D. C. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72.

3. —— Assistance to trustee.—A claim by a bankrupt for compensation for rendering extraordinary services and assistance to his trustee, beyond what was required to make the property, rights, credits, and effects available,

cannot be allowed by the court, though it may be allowed by the creditors as an act of grace on their part. In re Barnes (D. C. 1874) Fed. Cas. No. 1,-013.

A bankrupt is under no obligation to render services, in his capacity as an attorney at law, in proceedings to realize his estate for the benefit of his creditors, and if he does so, he will be entitled to the payment of a fair compensation therefor out of the funds so secured. Blythe v. Thomas (1893) 55 Fed. 961, 5 C. C. A. 356.

II. SCHEDULE OF ASSETS AND LIST OF CREDITORS

4. Schedule of assets—Preparation and filing.—Under General Order in Bankruptcy No. 8, where a partnership and one member of it are adjudged bankrupt, and the other member is not so adjudged, the latter must file a schedule and inventory within ten days. Armstrong v. Fisher (1915) 224 Fed. 97, 139 C. C. A. 653.

Where proceedings in bankruptcy against a corporation are pending in the federal court in one state, and the treasurer of the corporation, who alone is competent to prepare its schedules, resides in another state, ancillary proceedings may be instituted in the latter state to compel him to prepare and file such schedules. In re Brockton Ideal Shoe Co. (1912) 200 Fed. 745, 119 C. C. A. 189.

The court may compel the bankrupt to file satisfactory schedules by withholding his discharge until this is done. In re Walther (D. C. 1899) 95 Fed. 941, 2 Am. Bankr. Rep. 702; In re Schulman & Goldstein (D. C. 1908) 164 Fed. 440, 20 Am. Bankr. Rep. 76.

5. —— Privilege against self-crimination.—A bankrupt is not relieved from the duty of filing a schedule on the ground that its contents would tend to incriminate him, or could be used in evidence against him in a criminal prosecution; but even though he is under indictment at the time, he is required in good faith to make an effort to file a schedule which will comply with the requirements of the bankruptcy act, up to the point where the court can see that further obedience would violate his constitutional privilege. But he will be excused from making any statement in his schedule with reference to a transaction between himself and a third person, where it is apparent that there is immediate danger of a criminal prosecution against the bankrupt arising out of such transaction. In re Podolin (D. C. 1913) 202 Fed. 1014, 29 Am. Bankr. Rep. 406.

Where bankrupts sent through the mail in June, 1911, a false financial statement, and, after proceedings in bankruptcy were instituted, they were indicted for misuse of the mails in sending out such statement, there was no such connection between their condition in June and that in October, when they were adjudged bankrupt, as would entitle them to refuse to file schedules in bankruptcy, on the theory that to do so would tend to incriminate them. Where a bankrupt claims that to furnish information will tend to incriminate him, it must appear from the character of the information sought that his claim is justified, or he must produce facts on which he bases such claim, that the court may judge of their sufficiency. Podolin v. Lesher Warner Dry Goods Co. (1914) 210 Fed. 97, 126 C. C. A. 611, affirming judgment In re Podolin (D. C. 1913) 205 Fed. 563.

6. Form and contents of schedule.—Corporate stock standing in the name of a bankrupt should be included in his schedule, although hypothecated for its full value. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715. Growing crops unmatured must be entered on the schedule. In re Schumpert (D. C. 1873) 8 N. B. R. 415, Fed. Cas. No. 12,491. So also must a claim of the bankrupt for damages on a contract for the sale of goods. In re Orne (C. C. 1867) 1 N. B. R. 57, Fed. Cas. No. 10,581. If the bankrupt has property in his possession and has the actual use of it as his own, although his title to it may be defeasible, he must set it out in his schedule and turn it over to his trustee. In re Beal (D. C. 1869) 2 N. B. R. 587, Fed. Cas. No. 1,156. The bankrupt's willful omission from his schedule of his interest in a vested estate in remainder to take effect in possession after the termination of a precedent life estate, is such a fraud as will vitiate his discharge. Edwards v. Gibbs (1860) 39 Miss. 166. A grantor in an unrecorded deed, who becomes bankrupt, properly includes in his schedule the property conveyed thereby. Davis v. Pursel (Colo. 1913) 134 Pac. 107.

Where the bankrupt has no property except what he claims as exempt, and his creditors are all of one class, he is required, in making up his schedule, to use only such forms as are appropriate to and descriptive of the debts and property he is required to list. Anonymous (D. C. 1867) 1 N. B. R. 122, Fed. Cas. No. 457.

Property or rights of action which are of such a character that they will not vest in the trustee are not to be included in the schedule of the bankrupt. In re Brick (D. C. 1880) 4 Fed. 804.

As the schedule speaks from the date of the filing of the petition, the bankrupt is bound to set forth in it only such property as he has a right or interest in at the commencement of the proceedings. Ex parte Robertson (C. C. 1873) Fed. Cas. No. 11,921. The proceedings in bankruptcy are not constructive notice to any one of facts not necessary to appear therein, and this is true of a statement in the bankrupt's

as to property formerly, but , owned by him. Page v. War- 9) 76 N. Y. 463.

ty which the bankrupt has ed, assigned, or conveyed away fraudulent design to hinder or his creditors is not to be in- his schedule, since, as to the t himself, such a transfer or nt is valid and binding. In re w (D. C. 1899) 95 Fed. 632, 2 kr. Rep. 623; In re Schreck, 1 nkr. News, 334; In re Warne 882) 12 Fed. 431; In re Free- C. 1870) 4 N. B. R. 64, Fed. 5,082; Ex parte Robertson (C.) Fed. Cas. No. 11,921. But In re Skinner (D. C. 1899) 97 , 3 Am. Bankr. Rep. 163.

a proposed voluntary bank- o has no property except such empt, borrows $50 wherewith he fees and costs of his attor- before filing his petition, he is ired to list the sum so bor- his schedule of assets, and his to do so is no ground of op- to his discharge. Sellers v. C. A. 1899) 94 Fed. 801, 2 kr. Rep. 529. An interest in profits of a business as addi- mpensation for the services of upt need not be scheduled by re Brown (D. C. 1842) Fed. 1,978.

received from the United s a pension, and remaining in sioner's hands at the time of petition in bankruptcy, should in his schedule of assets un- heading of "cash on hand," with nent that he claims it as ex- If omitted without fraudulent e may be permitted to insert endment. In re Bean (D. C. 0 Fed. 262, 4 Am. Bankr. Rep.

ct that property of the bank- hen previously sold at judicial s bought by members of his ea not afford presumptive evi- an ownership remaining in the which will require him to ac- r the property in his schedule. iley (D. C. 1842) 18 Fed. Cas. In re Pomeroy (D. C. 1868) R. 14, Fed. Cas. No. 11,258; mmitsch (D. C. 1868) 2 N. B. ed. Cas. No. 6,866.

chedule should set forth the items of household furniture ring apparel, but a defect in ticular may be remedied by nt. In re Hill (D. C. 1867) R. 16, Fed. Cas. No. 6,481. ers v. Bell (C. C. A. 1899) 94 1, 2 Am. Bankr. Rep. 529. ts in favor of the bankrupt e entered under the heading l property" in the schedule, under the head of "unliquidat- s." In re Sallee (D. C. 1868) R. 228, Fed. Cas. No. 12,256. ing forth interests in real es- tate, it is not necessary that the schedule should describe the property with all the particularity of a deed or mortgage, but there must be a sufficient description to fix the location of the property and enable the trustee to identify it with certainty. See In re Shenberger (D. C. 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; Woods v. Little (1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742; In re Gailey (1904) 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539; In re Frisbee (D. C. 1842) Fed. Cas. No. 5,130; In re Dodge (D. C. 1842) Fed. Cas. No. 3,946a.

7. Mistakes and omissions in schedule.—If an omission or other error in the bankrupt's schedule was the result of mere mistake, accident, or inadvertence on his part or of the attorney who prepared the schedule, without fraudulent design, it will not sustain a prosecution against him nor be a reason for refusing his discharge. In re Crenshaw (D. C. 1899) 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; Sellers v. Bell (C. C. A. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; In re Bushnell, 1 Nat. Bankr. News, 528; In re Winsor (D. C. 1877) 16 N. B. R. 152, Fed. Cas. No. 17,885. Nor can a criminal prosecution or the refusal of a discharge be based on the omission of property from the schedule, when the bankrupt's reason for not including it was his honest, though mistaken, belief that he had no title to it or interest in it, or that it was worthless, or that the incumbrances upon it were so great as to leave no margin of value for the general creditors. In re Barrow (D. C. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Winsor (D. C. 1877) 16 N. B. R. 152, Fed. Cas. No. 17,885; In re Cushman (D. C. 1874) Fed. Cas. No. 3,512. But if the bankrupt describes a claim as worthless when he knows it to be of considerable value, or has reason to believe it valuable, a purchase made by him, or for his benefit, of his assets for a nominal sum, even after his discharge, at a sale by the trustee, would be considered fraudulent and void. Phelps v. McDonald (1876) 2 MacArthur (9 D. C.) 375. An erroneous claim of certain articles mentioned as exempt does not affect the truth of the affidavit to the schedule which states that it contains a statement of all the bankrupt's estate. In re Whetmore (D. C. 1869) Fed. Cas. No. 17,508.

Neither the adjudication of bankruptcy nor the decree of the court upon the bankrupt's application for discharge can be impeached collaterally by reason of anything contained in the schedule or anything omitted from it, as the jurisdiction of the court is not founded upon it. Fuller v. Pease (1887) 144

Mass. 390, 11 N. E. 694; Graves v. Wright (1884) 53 Mich. 425, 19 N. W. 129.

8. **List of creditors.**—If the names and addresses of creditors are so illegibly written that the referee cannot determine with certainty who are the persons entitled to notice of the first meeting and where they are to be served, it is his duty to refuse to take any action until he has been furnished with a fair and legible copy of the list. In re Hall (D. C. 1868) 2 N. B. R. 192, Fed. Cas. No. 5,922.

A debt of a bankrupt due William J. Davidson is not discharged by scheduling it in the name of William F. Davison. Collins v. Davidson (1908) 34 Ohio Cir. Ct. R. 668.

The listing of a creditor by an initial instead of by his Christian name is not such an insufficient compliance with the requirements of the bankruptcy act as to deprive the bankrupt of the benefit of the order discharging provable debts. Kreitlein v. Ferger (1915) 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184.

The list is to be deemed sufficient if the exercise of reasonable intelligence and common sense, brought to bear upon it, will prevent mistake as to the persons of the creditors or their addresses. Gatliff v. Mackey (1907) 31 Ky. Law Rep. 947, 104 S. W. 379; In re Orne (D. C. 1867) Fed. Cas. No. 10,582.

A creditor objecting that the bankrupt does not set forth a full list of his creditors, with their residences and the amounts due, must point out the omission. In re Plimpton (D. C. 1842) Fed. Cas. No. 11,227.

Under section 17 (post, § 9601), relating to the effect of discharge, held, that notice to mortgage creditor, who was not included in the bankrupt's schedule, by a third person, was not such as to discharge the debt. Wheeler v. Newton (1915) 154 N. Y. S. 431, 168 App. Div. 782.

A bankrupt is not estopped from alleging the invalidity of a judgment because he has placed it on his schedule in the list of claims against him. King v. Pickett (1880) 32 La. Ann. 1006.

9. **—— Addresses of creditors.**—The statements of the residences of creditors in the bankrupt's list should be such as will insure due delivery of notices to them by mail or service in person. In re Pulver (D. C. 1867) Fed. Cas. No. 11,466.

A schedule listing a creditor's residence as "Indianapolis, Ind.," without giving a street and house number, is prima facie at least a sufficient compliance with the requirement of the act in regard to showing the residences of creditors in the list, and such omission does not, as a matter of law, render the bankrupt's discharge inoperative. Kreitlein v. Ferger (1915) 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184.

A question of diligence in ascertaining the correct residence of a creditor of a bankrupt enters into the question as to whether the debt has been properly scheduled only so far as it affects the good faith of the debtor's statement in the schedule that such residence is unknown. Lutz v. Kalmus (Sup. 1909) 115 N. Y. Supp. 230.

Where a creditor's address is erroneously given in the list filed, and notice is sent to that address, and his true address might easily have been ascertained from the city directory, no proper notice has been given. In re Quackenbush (1907) 122 App. Div. 456, 106 N. Y. Supp. 773.

Where a schedule in voluntary bankruptcy stated the present residences of certain creditors to be unknown, but gave their former residences, it was held that the statement as to the present residences was sufficient, and that the statement as to their former residences was surplusage, but the bankrupt could show, either in the list or by separate affidavit, what efforts he had made to ascertain the residences of such creditors. In re Pulver (D. C. 1867) Fed. Cas. No. 11,466.

10. **Statement and description of debts.**—The statement of the amount due to each creditor is sufficient if the sum and the date of the debt or judgment is given. In re Hill (D. C. 1867) Fed. Cas. No. 6,481.

A judgment due to a firm should be listed in the firm's name, without setting forth the names of its members, but giving their individual names will not vitiate the list. Anonymous (D. C. 1867) 1 N. B. R. 122, Fed. Cas. No. 457. And see New York Institution for Instruction of Deaf and Dumb v. Crockett (1907) 117 App. Div. 269, 102 N. Y. Supp. 412.

In listing a debt due to a newspaper, the name of its proprietor should be given, and not merely the name of the newspaper. Anonymous (D. C. 1843) 2 N. B. R. 141, Fed. Cas. No. 462.

Where a bankrupt in his schedule sets forth a debt represented by a promissory note to be due to one who is the equitable owner thereof though not the legal payee, it is sufficient. Ross-Lewin v. Goold (1904) 113 Ill. App. 499.

Where a judgment previously recovered against the bankrupt still appears of record as an unsatisfied obligation against him in favor of the judgment creditor, it is rightly included in his schedule as a debt due to that creditor, although it has actually been sold to another creditor, and the bankrupt is chargeable with knowledge of the sale. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

The bankrupt must state whether or not any note has been given, or any judgment rendered, for each of the debts listed, and whether or not any person is liable with him as a partner or joint contractor. In re Orne (D. C. 1867) Fed. Cas. No. 10,582.

ngent liability need not be list- it does not appear that the rimarily liable will not pay in re Greenebaum (D. C. 1878) No. 5,769.

endment of schedule and list.— reditors are omitted from the ebts, or property omitted from lule of assets, or either wrong- but as the result of accident, or inadvertence, or where lack of form or of compliance statutory requisites, General o. 11 authorizes corrections to in the manner prescribed. In ell (D. C. 1915) 222 Fed. 160; erry (D. C. 1868) 1 N. B. R. l. Cas. No. 10,998; In re Hill 1867) Fed. Cas. No. 6,481; In ee (D. C. 1842) Fed. Cas. No.

bankrupt, without any fraud- ent, has omitted from his sched- erty which he means to claim pt, he will be allowed to insert nendment. In re Bean (D. C. 0 Fed. 262, 4 Am. Bankr. Rep. rrelson v. Webb (1909) 124 7, 50 South. 833, 134 Am. St. 9.

editor who has proved his claim right to ask that the bankrupt ired to amend defects in his . In re Jones (D. C. 1868) R. 59, Fed. Cas. No. 7,447.

eferee in bankruptcy has au- to allow amendments to the and list. In re Morford (D.) Fed. Cas. No. 9,796; In re D. C. 1867) Fed. Cas. No. 10,-

der authorizing or requiring an ent in the bankrupt's schedule specify particularly the respects h it is to be amended. In re D. C. 1867) 1 N. B. R. 79, Fed. o. 10,582.

the former bankruptcy law it ld that an application by the t for leave to amend and cor- list of creditors, by inserting ne of a creditor inadvertently , was ex parte and grantable of and required no notice to cred- nd that creditors had no right ct to such amendment, and no f fact or law could be raised or ed in regard to it. In re Hill 1881) 5 Fed. 448; In re Watts 1869) Fed. Cas. No. 17,293; In er (D. C. 1871) 5 N. B. R. 46, Cas. No. 6,339. The right of nent may be conditioned on such as will prevent any injustice or ity. In re Ratcliffe (D. C. 1867) as. No. 11,578.

e the names of creditors are y amendment of the bankrupt's es after the election of a trus- nose votes would have changed ction, a new meeting of cred- ould be held and a new election tee held, and if this results in oice of a different trustee from first chosen, he may be remov- ed. In re Perry (D. C. 1873) 1 N. B. R. 220, Fed. Cas. No. 10,998; In re Ratcliffe (D. C. 1867) 1 N. B. R. 400, Fed. Cas. No. 11,578; In re Morgenthal (D. C. 1868) 1 N. B. R. 402, Fed. Cas. No. 9,813; In re Carson (D. C. 1868) 5 N. B. R. 290, Fed. Cas. No. 2,460.

12. —— Time of allowing amendments.—As to the time or stage of the proceedings at which amendments may be allowed, it is held that they do not come too late if made after the filing of specifications of opposition to the discharge of the bankrupt (based on errors or omissions in the schedules), and even though a hearing may have been had on such specifications, yet if it can be shown to the court that the bankrupt was guilty of no greater fault than inadvertence or mistake, and that there is no ground for withholding the discharge by reason of any fraud or perjury, proper amendments may be ordered and the case continued, with leave to renew the application for discharge at a future time. In re Preston (D. C. 1869) 3 N. B. R. 103, Fed. Cas. No. 11,392; In re Heller (D. C. 1875) 5 N. B. R. 46, Fed. Cas. No. 6,339; In re Townsend (D. C. 1880) 2 Fed. 559. But see In re Kittler (D. C. 1910) 176 Fed. 655, 23 Am. Bankr. Rep. 585. It is said that the allowance of an amendment to the schedule, by adding property omitted, does not preclude a creditor from availing himself of any ground of opposition to the bankrupt's application for discharge arising out of such omission. In re Watts (D. C. 1869) 2 N. B. R. 447, Fed. Cas. No. 17,293.

Where, after the bankrupts and their trustees were discharged, the bankrupts, acting in good faith, assisted by their counsel, found additional assets of which they had hitherto been ignorant, resulting in a credit to the estate of each of about $2,000, the bankrupts, not having received the full amount of their exemptions under the state statute, were each entitled within a reasonable time to leave to amend his schedule of exempt property, and to an allowance out of the fund so obtained of an amount necessary to complete the exemption. In re Irwin (D. C. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165.

Where a considerable time has elapsed since the granting of a discharge, the bankrupt will not be permitted to reopen the proceedings and amend the schedule for the purpose of including an omitted creditor who had not been made a party to the proceedings, and had no notice or knowledge of them. In re Spicer (D. C. 1906) 145 Fed. 431, 16 Am. Bankr. Rep. 802.

III. SURRENDER OF MONEY OR ASSETS TO TRUSTEE

13. Jurisdiction and power to order. —When the court of bankruptcy is sat-

isfied, either from the examination of the bankrupt himself or from other evidence, that he has in his possession and control money or other property which belongs to his estate in bankruptcy and should be administered by the trustee, and if the bankrupt has neglected or refused to surrender such money or property to his trustee, or fails or refuses to give any account of his disposition of it, or attempts to account for its loss by a story which is incredible in itself or is contradicted by trustworthy evidence, then it is within the power and jurisdiction of the court of bankruptcy summarily to order the bankrupt to pay the money or surrender the property to the trustee, and his obedience to this order may be enforced by committing him to prison, as for a contempt of court, where he may be held until he will comply with the command of the court, or until it becomes evident that it is impossible for him to yield such obedience. In re Kalmanowitz (D. C. 1914) 211 Fed. 167; Schweer v. Brown (C. C. A. 1904) 130 Fed. 328, 12 Am. Bankr. Rep. 178; In re Rosser (1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; In re Schlesinger (1900) 102 Fed. 117, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; In re Purvine (1899) 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; In re Shachter (D. C. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; In re Gerstel (D. C. 1903) 123 Fed. 166, 10 Am. Bankr. Rep. 411; Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Mayer (D. C. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Logan (D. C. 1912) 196 Fed. 678, 28 Am. Bankr. Rep. 543; Wayne Knitting Mills v. Nugent (D. C. 1900) 2 Nat. Bankr. News, 714; In re Schlesinger (D. C. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342; In re Wilson (D. C. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; In re Shaffer & Stern (D. C. 1911) 185 Fed. 549, 26 Am. Bankr. Rep. 54; Cummings v. Synnott (C. C. A. 1911) 184 Fed. 718, 25 Am. Bankr. Rep. 859; In re De Gottardi (D. C. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Greenberg (D. C. 1901) 106 Fed. 496, 5 Am. Bankr. Rep. 840; In re Felson (D. C. 1903) 124 Fed. 288, 10 Am. Bankr. Rep. 716; In re Tudor (D. C.) 96 Fed. 942, 2 Am. Bankr. Rep. 808; In re Pevear (D. C. 1884) 21 Fed. 121; In re Salkey (D. C. 1875) 11 N. B. R. 423, Fed. Cas. No. 12,253, affirmed (C. C. 1875) 11 N. B. R. 516, Fed. Cas. No. 12,254; In re Peltasohn (C. C. 1877) 16 N. B. R. 265, Fed. Cas. No. 10,912; In re Kempner (D. C. 1873) 6 N. B. R. 521, Fed. Cas. No. 7,689; In re Speyer (D. C. 1871) 6 N. B. R. 255, Fed. Cas. No. 13,239; In re How (D. C. 1879) 18 N. B. R. 565, Fed. Cas. No. 6,747; In re Dresser (D. C. 1870) 3 N. B. R. 557, Fed. Cas. No. 4,077.

The fact that a bankrupt who knowingly and fraudulently conceals from his trustee any property belonging to his estate in bankruptcy thereby commits a crime, for which he is liable to be prosecuted and punished by imprisonment, does not deprive the court of jurisdiction to order him to surrender the property and to deal with him as for contempt if he does not obey. Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299. And since such an order is not an order for the payment of a debt, it cannot be said that a commitment of the bankrupt to jail to enforce his obedience to it is in any sense imprisonment for debt. In re Rosser (1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153.

Two essential facts condition the lawful exercise of this power by the court; first, that the money or property directed to be delivered to the trustee shall be a part of the bankrupt's estate, and second, that the bankrupt has it in his possession or under his control at the time the order for delivery is made. In re Rosser (1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153.

In speaking of the "court," in this connection, it is to be understood that the referee is included. That officer has jurisdiction of an application for an order requiring such a surrender of property, and to make an order in accordance with his findings on such application. In re Mayer (D. C. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Oliver (D. C. 1899) 96 Fed. 85, 2 Am. Bankr. Rep. 783.

Where the bankrupts absconded from the state where original bankruptcy proceedings were instituted, and carried large sums of money into Louisiana, the federal court of that state, sitting in bankruptcy, had ancillary jurisdiction to assist the domiciliary receiver to recover the money. Musica v. Prentice (C. C. A. 1914) 211 Fed. 326, affirming decree In re A. Musica & Son (D. C. 1913) 205 Fed. 413. Appeal dismissed Lazarus, Michael & Lazarus v. Prentice (1914) 34 S. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305.

Where a bankrupt, within a few days before the filing of the petition in bankruptcy, sold property and handed the proceeds over to his wife, she will be regarded as holding the same as his agent, and the facts will warrant an order requiring him to pay the money over to his trustee. In re Eddleman (D. C. 1907) 154 Fed. 160, 19 Am. Bankr. Rep. 45. So where the owner of patents for inventions has assigned them to a corporation in exchange for its stock, he holds them thereafter merely as an agent or officer of the company, and must surrender them to its trustee. In re Cantelo Mfg. Co. (D. C. 1912) 201 Fed. 158, 29 Am. Bankr. Rep. 704.

It is the duty of the bankrupt to surrender to the trustee any money which

have collected from his debtors
e commencement of the bank-
roceedings, and he may be or-
d required to do so. Howard
pton (C. C. 1877) Fed. Cas.
8; In re Ettinger (D. C. 1878)
R. 222, Fed. Cas. No. 4,543.
, after commencement of bank-
roceedings, but before receiver
ointed, the bankrupt transfer-
rance policies to a state court
the court should require the
to be transferred to the bank-
receiver. Davis v. Williams
16) 87 S. E. 1050.
there was evidence that par-
er than bankrupts were inter-
alleged dummy corporation,
t trustee should have proceed-
st corporation for surrender of
erty in order that such parties
e protected. Cohen v. Bach-
C. C. A. 1916) 229 Fed. 385.

tition, order, and proceedings
—In order to obtain a surren-
property or money by a bank-
is not necessary to resort to a
suit, but the matter may be de-
l summarily, that is, on a pe-
the trustee and a rule on the
t to show cause why he should
ordered as prayed. In re Adler
1904) 129 Fed. 502, 12 Am.
Rep. 19; In re Pevear (D. C.
1 Fed. 121; In re McKenna (D.
) 9 Fed. 27; In re Thompson
876) 13 N. B. R. 300, Fed. Cas.
938.
al Order 37 (post, § 9614), pro-
hat the rules of equity proceed-
all be followed, does not ap-
summary proceeding to compel
t to turn over property to his
In re Cunney (D. C. 1904)
l. 426. The application can be
ly by the trustee in bankrupt-
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large; a motion will not be
ned if made by a creditor inde-
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D. C. 1906) 148 Fed. 510, 17
nkr. Rep. 419.
money or property in ques-
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third person, holding as an
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ecifically traced into his hands.
ogelman (D. C. 1911) 188 Fed.
Am. Bankr. Rep. 742. It is
before applying to the court,
demand upon the bankrupt
property in question, but he
complain of the omission of
demand if the order for its de-
served on him in ample time
of his compliance before steps
en to punish him. In re D.
Co. (1905) 142 Fed. 442, 73
C. C. A. 558, 15 Am. Bankr. Rep. 166.

The trustee's petition for such an order should contain definite averments and state specifically what sum of money or what particular property the bankrupt is alleged to be concealing or withholding. In re Ruos (D. C. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; In re Greer (D. C. 1911)189 Fed. 511, 26 Am. Bankr. Rep. 811; Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299. But the petition need not allege affirmatively that the bankrupt is able to comply with an order requiring its surrender. In re Stavrahn (1909) 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168.

In a petition by the trustee of a bankrupt corporation for an order requiring an officer to turn over property of the corporation, it is sufficient to allege that it is in his possession, leaving him to set up any adverse claim he may have thereto. In re Brockton Ideal Shoe Co. (1913) 202 Fed. 199, 120 C. C. A. 447.

Where, in a proceeding by a trustee to require a bankrupt to pay over to him certain sums of money which were found to be no longer under his control, the evidence disclosed a failure to account for a larger amount, and all the proceedings were thereafter conducted as if the bankrupt was charged with the secretion of the entire amount, and the issues were contested with reference to the entire balance unaccounted for, rather than any particular items, an order requiring the bankrupt to pay to the trustee money unaccounted for, other than the items sought to be recovered when the proceeding was instituted, was not unauthorized. In re Vyse (D. C. 1915) 220 Fed. 727.

The bankrupt must have notice of the application and an opportunity to be heard in his own behalf, to make his defense, produce evidence, and cross-examine witnesses, and an order made without such notice and opportunity being given is unlawful and void. In re Atwater (D. C. 1915) 227 Fed. 511; In re Rosser (1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; In re Frank (C. C. A. 1910) 182 Fed. 794, 25 Am. Bankr. Rep. 486; Boyd v. Glucklich (1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; In re Cole (C. C. A. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; In re Baum (1909) 169 Fed. 410, 94 C. C. A. 632, 22 Am. Bankr. Rep. 295.

The bankrupt may either answer or demur to the trustee's petition. In re Koplin (D. C. 1910) 179 Fed. 1013, 24 Am. Bankr. Rep. 534. But his answer, although under oath, is not conclusive on the court, but it may proceed to inquire into all the facts and circumstances. In re Gerstel (D. C. 1903)

123 Fed. 166, 10 Am. Bankr. Rep. 411.

Proceedings on the petition are usually had before the referee, but the court may refer the matter to a special master for hearing and an examination of the bankrupt. In re Herskovitz (D. C. 1907) 152 Fed. 316, 18 Am. Bankr. Rep. 247.

The referee in bankruptcy in a proceeding by the trustee to compel a bankrupt to turn over money in his possession or under his control should in the first instance have merely found that such money was in his possession or under his control at the date of bankruptcy, leaving its subsequent disposition for inquiry under such further proceedings as might be taken. In re Pennell (1914) 214 Fed. 337, 130 C. C. A. 645.

A referee's finding that the bankrupt had in his possession money which he unlawfully withheld from his trustee deduced merely from a statement of account held not conclusive on the court which was authorized to review the evidence and make an independent finding as to whether the bankrupt had in his possession money or property which he willfully or intentionally withheld. In re Holden (1913) 203 Fed. 229, 121 C. C. A. 435, affirming order In re Haring (D. C. 1912) 193 Fed. 168.

If money is found to be withheld by the bankrupt, the order should require it to be paid over to the trustee, and not into the registry of the court. In re Baum (1909) 169 Fed. 410, 94 C. C. A. 632, 22 Am. Bankr. Rep. 295. If property other than money is involved, the order should describe it with reasonable certainty and as particularly as practicable, though in such a case as a stock of merchandise a general description will be sufficient, and should require its surrender in specie. Samel v. Dodd (1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re Lesaius (D. C. 1908) 163 Fed. 614, 21 Am. Bankr. Rep. 23.

Where an order of a referee requiring a bankrupt thus to surrender or turn over property to his trustee was based on a mistake of fact, the referee has power, on the petition of the bankrupt, filed within the time limited for a review of his decision, and the mistake being shown, to reconsider and set aside such order. In re Brenner (D. C. 1911) 190 Fed. 209, 26 Am. Bankr. Rep. 646.

15. Evidence to sustain order.—In a a proceeding to compel a bankrupt to surrender money or property alleged to be withheld or concealed by him, it is first of all necessary for the trustee to make out a prima facie case by showing that the bankrupt had such money or property in his possession or under his control at or about the time of his bankruptcy, and that it was not included in his schedule and has not since been turned over to the trustee. In re Cunney (D. C. 1904) 225 Fed. 426; In re Reynolds (D. C. 1911) 190 Fed. 967, 27 Am. Bankr. Rep. 200; In re Barton Bros. (D. C. 1907) 149 Fed. 620, 18 Am. Bankr. Rep. 98. In proceedings to recover withheld assets from a bankrupt, the creditors must clearly prove at least a minimum value of the property. In re Kalmanowitz (D. C. 1914) 211 Fed. 167. When this fact is established either by evidence or by the admission of the bankrupt or his failure to deny it, the burden is then shifted to the bankrupt, and it is incumbent on him to give a satisfactory reason for his failure to produce the property, by explaining in a clear, explicit, and credible manner what became of it, what disposition he made of it, or how it passed out of his possession or control. Power v. Fuhrman (1915) 220 Fed. 787, 136 C. C. A. 393; In re Ricciardelli (D. C. 1915) 224 Fed. 638; Good v. Kane (C. C. A. 1914) 211 Fed. 956; In re Graning (C. C. A. 1916) 229 Fed. 370; In re Stavrahn (1909) 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168; In re Deuell (D. C. 1900) 100 Fed. 633, 4 Am. Bankr. Rep. 60; In re Nisenson (D. C. 1910) 182 Fed. 912, 24 Am. Bankr. Rep. 915; In re Lesaius (D. C. 1908) 163 Fed. 614, 21 Am. Bankr. Rep. 23; In re Schlesinger (D. C. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342; In re Averick (D. C. 1909) 170 Fed. 521, 22 Am. Bankr. Rep. 518; In re De Gottardi (D. C. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Rosenthal (D. C. 1912) 200 Fed. 190, 29 Am. Bankr. Rep. 515.

Recent possession of property by a bankrupt, failing to account for it, justifies an order for its delivery to his trustee. In re Dixon (D. C. 1915) 224 Fed. 624. If he fails to appear before the referee when cited for this purpose, or if, when under examination, he refuses to give any account of the money or property in question, there is sufficient ground for an order requiring him to surrender it to the trustee in bankruptcy. In re Smith (D. C. 1911) 185 Fed. 983, 26 Am. Bankr. Rep. 399; In re D. Levy & Co. (1905) 142 Fed. 442, 73 C. C. A. 558, 15 Am. Bankr. Rep. 166; In re Rosser (D. C. 1899) 96 Fed. 308, 2 Am. Bankr. Rep. 746.

The bankrupt's mere denial under oath that he has the money or property is not conclusive, and does not prevent the court from proceeding to a further investigation and making the order for surrender if sufficient contrary evidence is adduced. Kirsner v. Taliaferro (1912) 202 Fed. 51, 120 C. C. A. 305, 29 Am. Bankr. Rep. 832; In re Stanny (D. C. 1915) 226 Fed. 517; In re Kramer (D. C. 1914) 210 Fed. 977; Good v. Kane (C. C. A. 1914) 211 Fed. 956; In re Cunney

1904) 225 Fed. 426; In re Stern 1914) 215 Fed. 979; Moody v. . C. 1906) 148 Fed. 295, 17 Am. Rep. 818; Schweer v. Brown 130 Fed. 328, 64 C. C. A. 574, Bankr. Rep. 178.

the only reasonable conclusion rawn from the evidence before ree is that the bankrupt has ossession or under his control which belongs to the estate, and destroyed the books which how the facts, his mere denial ntitled to weight. In re Good- C. 1912) 196 Fed. 566, 27 Am. Rep. 697. Or where his testi- is entirely uncorroborated, he was given ample opportuni- btain corroborating testimony t this could easily have been his own testimony were true. enderson (D. C. 1904) 130 Fed. Am. Bankr. Rep. 351; In re er (D. C. 1904) 128 Fed. 641, Bankr. Rep. 175.

nscript of the testimony of the t when under examination at a of his creditors is admissible him at the hearing on an ap- for an order requiring him ender assets to the trustee. Kane (C. C. A. 1914) 211 Fed. re Cunney (D. C. 1904) 225 6; In re Wiesen Bros. (D. C. 35 Fed. 442, 14 Am. Bankr. 7.

h trustee, in proceeding to pun- krupt for contempt for refusal over assets has burden of prov- cealment of assets, held, that roof is usually established by tions drawn from the facts, itive proof is not required. In ing (C. C. A. 1916) 229 Fed.

nstances showing a general dis- on the part of the bankrupt to etive and unfair towards his s, or to entertain a fraudulent of overreaching them or con- assets from them, may be ad- as tending to discredit his ry of the loss or disappearance property in question. In re De (D. C. 1902) 114 Fed. 328, Bankr. Rep. 723.

an inventory taken by a bank- rchant prior to his bankruptcy made the basis of an order re- him to turn over property, it e used with caution on account very probable unreliability. v. Taliaferro (1912) 202 Fed. C. C. A. 305.

oceedings to punish bankrupts empt in failing to comply with r requiring them to pay over funds to the trustee, they hav- fied that they did not have pos- or control of the money, the as authorized to examine the y taken by the referee to de- whether such testimony was false. In re Kramer (D. C. 1914) 210 Fed. 977.

A petition by the trustee to compel the bankrupt to surrender assets to him will be granted where, by a fair preponderance of the evidence, it appears that the bankrupt has the assets. In re Dixon (D. C. 1915) 224 Fed. 624; In re Cramer (D. C. 1909) 175 Fed. 879, 23 Am. Bankr. Rep. 637.

A court of bankruptcy is without authority to make an order adjudging a bankrupt guilty of contempt for failure to obey an order of a referee requiring him to turn over property or money of the estate to his trustee, except on clear and convincing proof that he has present possession or control of the property or money and the ability to comply with the order. Stuart v. Reynolds (1913) 204 Fed. 709, 123 C. C. A. 13, affirming order In re Reynolds (D. C. 1911) 190 Fed. 967.

It is held by the great majority of the decisions that the court must be satisfied beyond a reasonable doubt that the bankrupt has the present possession or control of the money or property in question and the present ability to comply with an order for its surrender. In re Krueger (D. C. 1912) 197 Fed. 124, 28 Am. Bankr. Rep. 890; In re Krall (D. C. 1910) 182 Fed. 191, 24 Am. Bankr. Rep. 941; In re Berman (D. C. 1908) 165 Fed. 383, 21 Am. Bankr. Rep. 139; In re Sax (D. C. 1905) 141 Fed. 223, 15 Am. Bankr. Rep. 455; In re Adler (D. C. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19; Moody v. Cole (D. C. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818; Boyd v. Glucklich (1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; In re Walder (D. C. 1906) 142 Fed. 784, 16 Am. Bankr. Rep. 41; Samel v. Dodd (1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re De Gottardi (D. C. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Anderson (D. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Mayer (D. C. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re McCormick (D. C. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; In re Thiessen (D. C. 1900) 2 Nat. Bankr. News, 625; Kirsner v. Taliaferro (C. C. A. 1912) 202 Fed. 51, 29 Am. Bankr. Rep. 832; In re Holden (C. C. A. 1913) 203 Fed. 229, 29 Am. Bankr. Rep. 387; Shea v. Lewis (C. C. A. 1913) 206 Fed. 877, 30 Am. Bankr. Rep. 436; Stuart v. Reynolds (C. C. A. 1913) 204 Fed. 709, 29 Am. Bankr. Rep. 412; In re Mitchell (D. C. 1913) 202 Fed. 806.

Such an order will not be justified when based on circumstances which merely create a strong suspicion that he is concealing assets. In re Switzer (D. C. 1905) 140 Fed. 976, 15 Am. Bankr. Rep. 468; In re Adler (D. C. 1908) 170

Fed. 634, 21 Am. Bankr. Rep. 371. Or even a strong probability to that effect. In re Goldfarb Bros. (D. C. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386. Where the issue turns upon comparative estimates of the value of a stock of goods at different times, an order of surrender will not be made unless the discrepancy is great and such as cannot be explained except on the theory that the bankrupt is keeping back a part. In re Reese (D. C. 1909) 170 Fed. 986, 22 Am. Bankr. Rep. 521.

Although the bankrupt's explanation of the loss or disappearance of his property is entirely uncontradicted by any testimony, yet the court is not bound to believe him, but may refuse to accept the explanation and make its order for the surrender of the property, when the story told by the bankrupt is so evidently manufactured for the occasion or so incredible that it would not deceive any person of reasonable sagacity. In re Stokes (D. C. 1910) 185 Fed. 994, 26 Am. Bankr. Rep. 255; In re Lippman (D. C. 1910) 184 Fed. 551, 25 Am. Bankr. Rep. 874; In re Robert Greenberg & Bro. (D. C. 1910) 179 Fed. 413, 24 Am. Bankr. Rep. 943; In re Weinreb (1906) 146 Fed. 243, 76 C. C. A. 609, 16 Am. Bankr. Rep. 702; In re Kane (D. C. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; In re Frankfort (D. C. 1905) 144 Fed. 721, 15 Am. Bankr. Rep. 210; In re Chamelin (D. C. 1911) 184 Fed. 553, 25 Am. Bankr. Rep. 570; In re De Gottardi (D. C. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Levin (D. C. 1901) 113 Fed. 498, 6 Am. Bankr. Rep. 743; Schweer v. Brown (1904) 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178.

Where the bankrupt attempts to explain the loss of the money or property in question by a story which, though difficult to believe, is not impossible nor an obvious fabrication, he may be ordered before the judge or referee for further examination as to whether or not he has made a full disclosure of the facts. In re McCormick (D. C. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340.

Evidence in particular cases held sufficient to sustain an order requiring the bankrupt to surrender money or property. Shea v. Lewis (1913) 206 Fed. 877, 124 C. C. A. 537; In re Pennell (1914) 214 Fed. 337, 130 C. C. A. 645; In re Katz (D. C. 1914) 216 Fed. 949; In re Greenblatt (D. C. 1914) 216 Fed. 985; In re Dixon (D. C. 1915) 224 Fed. 624; In re Mitchell (D. C. 1913) 202 Fed. 806.

An application to compel bankrupts to turn over concealed property was not maintainable, where neither the report of the commissioner nor the proof accurately showed just what or how much property had been concealed. In re Kalmanowitz (D. C. 1914) 211 Fed. 167.

16. Excuses, defenses, and allowances.—An order requiring a bankrupt to deliver property alleged to have been withheld from his trustee should not be granted unless it appears that the bankrupt is physically able to deliver the property. Epstein v. Steinfeld (1914) 210 Fed. 236, 127 C. C. A. 54; In re Stern (D. C. 1914) 215 Fed. 979; In re Cummings (D. C. 1911) 186 Fed. 1020, 26 Am. Bankr. Rep. 130; In re Richards (D. C. 1910) 183 Fed. 501, 25 Am. Bankr. Rep. 176; In re Davison (D. C. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 337.

The bankrupt may show that, since the time the money in question is shown to have been in his hands, it has passed into the possession of others and is no longer under his control. American Trust Co. v. Wallis (1903) 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 360. That members of bankrupt partnership had paid out money withdrawn from the firm assets, and had no other money with which to repay it, held a sufficient defense to an application for its repayment. Crawford v. Sternberg (1915) 220 Fed. 73, 135 C. C. A. 641.

Member of bankrupt firm, who was in fact a mere clerk, held not to be ordered to pay to trustee money which he had turned over to his partner. Trustee held not entitled to proceed directly against bankrupt to require payment of money which he had delivered to his sister, even though claim that it was delivered in payment of a debt was preposterous. In re Vyse (D. C. 1915) 220 Fed. 727.

This method of proceeding cannot be employed to reach property which is in the hands of third persons, claiming title thereto by conveyance or transfer from the bankrupt prior to the bankruptcy, though such transfer was manifestly fraudulent. In re Mayer (D. C. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

Money of a married woman received by her husband, but which by the law of the state is her separate property and subject to her absolute control, is presumably held by him as her agent, and the fact of his possession furnishes no excuse for her failure to deliver it to her trustee in bankruptcy, unless she shows as a matter of fact that she is unable to obtain the actual possession of it. In re Cole (1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302.

The bankrupt cannot escape the duty of turning over to his trustee money which he has invested in his business on the pretense that he holds it as a trustee. In re Smith Longbottom & Sons (D. C. 1905) 142 Fed. 291, 15 Am. Bankr. Rep. 437.

In a proceeding to compel the bankrupt to surrender money alleged to be withheld, it is a good defense that he has paid it away to his creditors, al-

uch payments were not justified ulted in giving preferences. In ıey (D. C. 1904) 225 Fed. 426; yse (D. C. 1915) 220 Fed. 727; aplume Condensed Milk Co. (D.) 145 Fed. 1013, 16 Am. Bankr. 9; In re Smith Longbottom & D. C. 1905) 142 Fed. 291, 15 nkr. Rep. 437; In re Kane (D.) 125 Fed. 984, 10 Am. Bankr. 8; In re Anderson (D. C. 1900) l. 854, 4 Am. Bankr. Rep. 640. upt's admission that he gambled rything upon which he could lay l held not a sufficient account- several thousand dollars, to pre- order for its delivery to the In re Vyse (D. C. 1915) 220 .

termining what sum of money krupt should be ordered to pay his trustee, he may be allowed or so much as he has spent in onable cost of his living, if he lucted himself economically and , but not for sums spent in a nor in journeying to a remote search of employment. In re D. C. 1900) 100 Fed. 796, 4 Am. Rep. 78.

the bankrupt had an interest ing crops, but omitted to list his schedule under the honest at they would not vest in the and he completed their cul- and harvesting after his adjudi- nd was then ordered to surren- crops, or the proceeds of their the trustee, it was held that d be allowed a reasonable com- n for his work and care be- on them from the date of the tion. In re Barrow (D. C. 8 Fed. 582, 3 Am. Bankr. Rep.

, in proceedings against two in- owners of a bankrupt corpora- refusing to turn over the pro- a certain note, one of the de- took up and relieved the other payment thereof and furnished of the existence and where- of the note, the other was not le. In re Jamaica Slate Roof- pply Co. (D. C. 1913) 202 Fed.

ors of a bankrupt corporation, een ordered to return $822.94 o have been wrongfully receiv- the bankrupt's assets, could not claim of another corporation d by them against the trustee.

mmitment for contempt.— bankrupt fails or refuses to vith a lawful order of the court uptcy, requiring him to surren- signated sum of money or cer- cified property to his trustee, contempt of the court, and his e to the order may be enforced nitting him to prison until he e his contempt by obedience to r. In re Cole (C. C. A. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; Clay v. Waters (1910) 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; In re Gerstel (D. C. 1903) 123 Fed. 166, 10 Am. Bankr. Rep. 411; In re Rosser (D. C. 1899) 96 Fed. 308, 2 Am. Bankr. Rep. 746; In re Salkey (D. C. 1875) 11 N. B. R. 423, Fed. Cas. No. 12,253; In re Speyer (D. C. 1873) 6 N. B. R. 255, Fed. Cas. No. 13,239. See Mallory Mfg. Co. v. Fox (C. C. 1884) 20 Fed. 409; In re Fogelman (D. C. 1913) 204 Fed. 351, 30 Am. Bankr. Rep. 348; In re Star Spring Bed Co. (C. C. A. 1913) 203 Fed. 640, 30 Am. Bankr. Rep. 208; Power v. Fuhrman (1915) 220 Fed. 787, 136 C. C. A. 393; In re Heyman (D. C. 1915) 225 Fed. 1000; In re Stanny (D. C. 1915) 226 Fed. 517; In re Stern (D. C. 1914) 215 Fed. 979. Such an order is not a judgment for the payment of a debt, and therefore the commitment of the bankrupt for failure of compliance with it is not "imprisonment for debt" within the meaning of the state and federal laws abolishing that method of collecting debts. Samel v. Dodd (1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; Schweer v. Brown (1904) 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178; Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Schlesinger (C. C. A. 1900) 102 Fed. 117, 4 Am. Bankr. Rep. 361; In re Anderson (D. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640.

When the bankrupt is brought before the court to be dealt with for his disobedience, the proceedings need not be formal, but may be based on a petition of the trustee setting forth the facts and informing the bankrupt of the charge he is to meet. In re Cole (C. C. A. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761. The bankrupt is not entitled to a trial by jury. Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299. The purpose of a contempt proceeding of this kind is to reach and compel the surrender of money or property in the bankrupt's possession or control, and not to punish him for concealing his assets. In re Kane (D. C. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478. A motion to commit the treasurer of a bankrupt corporation for contempt for failure to obey an order of the referee requiring him to turn over money to the trustee will not be considered where he is under bail to appear and answer to indictments in the state court for the embezzlement of such money from the corporation, until after the indictments are disposed of. In re Hooks Smelting Co. (D. C. 1906) 146 Fed. 336, 17 Am. Bankr. Rep. 141.

Punishment for failure to satisfactorily account for assets, except where prosecution is under criminal statutes, can only be imposed as a result of con-

tempt proceedings for violating an order for delivery of specified described assets. In re Kalmanowitz (D. C. 1914) 211 Fed. 167. A proceeding to compel a bankrupt to turn over assets to his trustee and a contempt proceeding to enforce such an order are distinct. In re Ricciardelli (D. C. 1915) 224 Fed. 638.

The order requiring the bankrupt to surrender the property will be conclusive of the fact that, at the time it was made, the bankrupt had in his possession or control money or property which he was then able to surrender to the trustee, and this question will not be reviewed or re-examined. In re Frankel (D. C. 1911) 184 Fed. 539, 25 Am. Bankr. Rep. 920; In re Marks (D. C. 1910) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Richards (D. C. 1910) 183 Fed. 501, 25 Am. Bankr. Rep. 176. But it is not conclusive that he still is able to make the payment or surrender, because he may in the meantime have paid away the money or lost the property; and on this question the bankrupt is entitled to a hearing and cannot be committed until he has had an opportunity to present this defense. In re Hausman (1903) 121 Fed. 984, 58 C. C. A. 260, 10 Am. Bankr. Rep. 64; In re Davison (D. C. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Cole (1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302.

Whatever may have been the state of the case when the order for surrender was made, the court will not send the bankrupt to jail unless it is shown that he still continues in a position of present and continuous ability to make the surrender. In re Dickens (D. C. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660; In re Davison (D. C. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Marks (D. C. 1910) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Richards (D. C. 1910) 183 Fed. 501, 25 Am. Bankr. Rep. 176; In re Mize (D. C. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577; In re Reynolds (D. C. 1911) 190 Fed. 967, 27 Am. Bankr. Rep. 200; In re Ruos (D. C. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; In re Holden (C. C. A. 1913) 203 Fed. 229, 29 Am. Bankr. Rep. 387; In re Heyman (D. C. 1915) 225 Fed. 1000; In re McNaught (D. C. 1903) 225 Fed. 511; Freed v. Central Trust Co. of Illinois (C. C. A. 1914) 215 Fed. 873.

Of the bankrupt's present ability to make the surrender the court must be satisfied by clear and convincing proof, or beyond a reasonable doubt. In re Heyman (D. C. 1915) 225 Fed. 1000; In re Stanny (D. C. 1915) 226 Fed. 517; In re Dixon (D. C. 1915) 224 Fed. 624; In re Dickens (D. C. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660; McNeil v. McCormack (C. C. A. 1910) 182 Fed. 808; In re Davison (D. C. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Mize (D. C. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577. If the contempt proceeding follows close on the heels of the order for surrender, it may be presumed that the ability to pay or surrender continues, and then the bankrupt must overcome this presumption by proof. In re Banzai Mfg. Co. (C. C. A. 1910) 183 Fed. 298, 25 Am. Bankr. Rep. 497; First Nat. Bank v. Cole (1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302; In re Stavrahn (1909) 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168; In re Marks (D. C. 1910) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Haring (D. C. 1912) 193 Fed. 168, 174, 175, 27 Am. Bankr. Rep. 285; In re Reynolds (D. C. 1911) 190 Fed. 967, 27 Am. Bankr. Rep. 200.

In such cases, the bankrupt's contempt is a continuing contempt, and therefore the court is not confined to committing him for a definite and limited time, as it would be in the case of a specific act, complete in itself, constituting a contempt. And if he is released on bail, he may be recommitted by order of the court, on the trustee's showing that his contumacy still continues, and if he leaves the district, he may be pursued and arrested on warrant and again recommitted until the further order of the court or until he complies. United States v. Sowles (D. C. 1883) 16 Fed. 536; In re Krichevsky (D. C. 1915) 219 Fed. 347. But as the object is not punishment, but only to enforce obedience, the imprisonment should not be continued indefinitely, and the bankrupt should be discharged after a reasonable time when it appears that he is really unable to comply with the order. In re Karp (D. C. 1912) 196 Fed. 998, 28 Am. Bankr. Rep. 559; In re Taylor (D. C. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410; In re Cummings (D. C. 1911) 188 Fed. 767, 26 Am. Bankr. Rep. 477.

IV. AFTER-ACQUIRED PROPERTY AND SURPLUS OF ESTATE

18. After-acquired property.—Property acquired in any way by the bankrupt after the commencement of the proceedings in bankruptcy, though before the discharge, belongs to him personally, and is not within the jurisdiction of the court in bankruptcy nor liable to be administered in the proceedings, nor can it be subjected to the claims of creditors holding provable debts, except in case the bankrupt fails to obtain his discharge (or as to debts not released by the discharge), and then only by the ordinary processes of law, and without relation to the bankruptcy proceedings. Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; Traer v. Clews (1885) 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467; Clay v. Waters (C. C. A. 1908) 161 Fed. 815, 20 Am. Bankr. Rep. 561; In re Harper (1907) 155 Fed. 105, 83 C. C. A. 565, 18 Am. Bankr. Rep. 741;

Rennie, 1 Nat. Bankr. News, 335; Grant (C. C. 1842) Fed. Cas. 93; In re Levy (D. C. 1867) 1 R. 136, Fed. Cas. No. 8,296; In terson (D. C. 1867) 1 N. B. R. ed. Cas. No. 10,815; Day v. Su-Court (1882) 61 Cal. 489; Bond lwin (1850) 9 Ga. 91; Mays v. acturers'. Nat. Bank (1870) 64 3 Am. Rep. 573; Sosnowski v. (1882) 69 Ga. 548; Bank of ri v. Franciscus (1846) 10 Mo. urner v. Gatewood (1848) 8 B. Ky.) 613; McLendon v. Turner 65 Ga. 577.

title of the trustee in bankruptcy limited to such property as the pt possessed at the time of the f the petition, any property ac-by the bankrupt after that date, before the adjudication of bank-is made, is after-acquired prop-nd does not vest in the trustee. Judson (1912) 192 Fed. 834, 113 A. 158, 27 Am. Bankr. Rep. 704; Burka (D. C. 1900) 104 Fed. 326, Bankr. Rep. 12; Sibley v. Nason 196 Mass. 125, 81 N. E. 887, R. A. (N. S.) 1173, 124 Am. St. 20, 12 Ann. Cas. 938.

bankrupt may maintain trover recovery of his after-acquired y. Webb v. Fox, 7 Durn. & E. If his creditors seize upon it his application for discharge is , a court of equity will interfere nction to protect his rights, and train proceedings until the ques-his discharge has been decided. v. Steele (1845) 7 Ala. 299.

bankrupt may become a pur-at the trustee's sale of his own y and assets, and is not dis-d from buying back as much of e can pay for out of his exempt r-acquired property. Sparhawk kes (1891) 142 U. S. 1, 12 Sup. 1, 35 L. Ed. 915; Traer v. Clews 115 U. S. 528, 6 Sup. Ct. 155, Ed. 467; Phelps v. McDonald 2 MacArthur (9 D. C.) 375, 16 R. 217; Gates v. Fraser (1882) pp. 624. A bankrupt who, after charge, becomes the bona fide of a note payable to himself, had been returned in his sched-l sold by the assignee, is remit-his original title, and may trans-y indorsement so as to vest the f action in his indorsee. Birch tson (1849) 16 Ala. 387.

e value of property claimed by nkrupt as after-acquired is so s to make it improbable that it rned since the commencement of roceedings in bankruptcy, the pt must show how he acquired n his discharge is impeached for ent and willful concealment of Hargroves v. Cloud (1845) 8 3; Mays v. Manufacturers' Nat. 1870) 64 Pa. 74.

e an estate was conveyed to a d and wife to be held in en-and the husband went into bankruptcy, and, between the adjudication and his discharge, he obtained a divorce from his wife, it was held that, when the adjudication was made, he had no interest in the real estate which could pass to the trustee, and if he gained an alienable interest by the divorce, it was a new acquisition which could not be claimed by the trustee. In re Benson (D. C. 1877) Fed. Cas. No. 1,328. Where a wife, being possessed of a separate estate, procured a policy of insurance on her own life, payable on her death to her husband, and paid the premiums out of her own estate for a year, before the end of which time he was adjudicated a bankrupt, and she paid out of her own estate the premiums for the two following years and then died, it was held that the husband was entitled to the proceeds of the policy, and not his trustee in bankruptcy. In re Murrin (C. C. 1873) Fed. Cas. No. 9,968. Where a devise or bequest, vesting by the death of the testator after the filing of a petition in bankruptcy against the heir, is coupled with a provision for the deduction of any indebtedness then existing from the heir to the testator, this does not prevent the bankrupt from being entitled to the benefit of the bequest in full so far as concerns his general creditors, subject only to the contingency of his not obtaining a discharge. In re Woods (D. C. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

Crops planted by a bankrupt after the filing of the petition in bankruptcy do not pass to the trustee as assets for the use of creditors. Conley v. Nelin (Tex. Civ. App. 1910) 128 S. W. 424; In re Barnett (D. C. 1868) Fed. Cas. No. 1,024; Jackson v. Jetter (Iowa, 1913) 142 N. W. 431. A liquor license granted to one after he has been adjudicated a bankrupt belongs to him personally, and not to his receiver or trustee in bankruptcy. In re Whitlock's License (1909) 39 Pa. Super. Ct. 34.

Income or profits accruing to the bankrupt after the adjudication, but from property in which he had a fixed and vested interest before the bankruptcy, is not to be regarded as after-acquired property. In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; In re Wright (D. C. 1910) 177 Fed. 578, 24 Am. Bankr. Rep. 437. The share of a bankrupt in a trust estate is not after-acquired property, though it was decreed to him after the filing of the petition in bankruptcy, the rights of the parties in the trust estate being adjudicated by such decree as of a date prior to the filing of such petition. McNaboe v. Marks (1906) 51 Misc. Rep. 207, 99 N. Y. Supp. 960. But where the conditions upon which the bankrupt was to become entitled to a trust fund were not performed until after his adjudication, his trustee had no title thereto for the use of the creditors. Hull v. Palmer

(1913) 155 App. Div. 636, 140 N. Y. Supp. 811. Where one held land by an unrecorded deed prior to his bankruptcy, and his grantor thereafter sold the land to another, his right of action against the grantor for the proceeds of such sale is not property acquired after the bankruptcy so as to entitle him to sue therefor in his own name. Simpson v. Miller (1908) 7 Cal. App. 248, 94 Pac. 252.

19. Right to surplus of estate.— Where all the claims duly proved against the bankrupt's estate have been paid in full, together with the costs and expenses of the proceedings and the fees and commissions of the officers, if there remains any surplus in money, or any property not disposed of by the trustee, it belongs to the bankrupt, and upon the closing of the estate and the discharge of the trustee, such surplus will be ordered turned over to the bankrupt. In re Hoyt (D. C. 1873) 3 N. B. R. 55, Fed. Cas. No. 6,806; Colie v. Jamison (1875) 4 Hun (N. Y.) 284, 13 N. B. R. 1; Dewey v. Moyer (1877) 9 Hun (N. Y.) 473, 16 N. B. R. 1; Jones v. Pyron (1882) 57 Tex. 43; Herndon v. Davenport (1889) 75 Tex. 462, 12 S. W. 1111; Steevens v. Earles (1872) 25 Mich. 40; Boyd v. Olvey (1882) 82 Ind. 294; Page v. Waring (1879) 76 N. Y. 463; Hunter v. Hodgson (Tex. Civ. App. 1906) 95 S. W. 637; Wade v. Goza (1906) 78 Ark. 7, 96 S. W. 388; Robertson v. Schard (1909) 142 Iowa, 500. 119 N. W. 529, 134 Am. St. Rep. 430; Robertson v. Howard (1910) 82 Kan. 588, 109 Pac. 696; Bracklee Co. v. O'Connor (1910) 67 Misc. Rep. 599, 122 N. Y. Supp. 710; Johnson v. Norris (1911) 190 Fed. 459, 111 C. C. A. 291, 27 Am. Bankr. Rep. 107. A conveyance by the bankrupt alleged to be fraudulent as to creditors will not be set aside at the suit of the trustee, when there are no provable debts, as the estate, after satisfying the claims against it, belongs to the bankrupt. Nicholas v. Murray (C. C. 1878) 18 N. B. R. 469, Fed. Cas. No. 10,223.

If necessary, the trustee should execute a formal conveyance or assignment of such surplus property to the bankrupt. Scruby v. Norman (1902) 91 Mo. App. 517; Kempner v. Bauer (1907) 53 Misc. Rep. 109, 104 N. Y. Supp. 76; Kruegel v. Murphy & Bolanz (Tex. Civ. App. 1910) 126 S. W. 680. But see Frazier v. Desha's Adm'r (1897) 40 S. W. 678, 19 Ky. Law Rep. 407.

Where no trustee was appointed, a chose in action belonging to the bankrupt will revert to him after his creditors have been satisfied out of his other property. Griffin v. Mutual Life Ins. Co. (1904) 119 Ga. 664, 46 S. E. 870. Where a bankrupt filed his petition in bankruptcy, but no trustee was ever appointed and the estate was administered, and the bankrupt discharged without disposition of his land, the title of the bankrupt to the land was never divested. Roberts v. Martin (1914) 164 S. W. 369, 158 Ky. 124.

After the trustee in bankruptcy has paid in full the debts proved against the estate, the surplus, instead of being returned to the bankrupt, should be applied in payment of debts which, though not proved, were listed by the bankrupt in his schedule. In re Haynes (D. C. 1867) 2 N. B. R. 227, Fed. Cas. No. 6,269; In re James (D. C. 1868) 2 N. B. R. 227, Fed. Cas. No. 7,175. CONTRA, In re Hoyt (D. C. 1870) 3 N. B. R. 55, Fed. Cas. No. 6,806.

Where a preference, voidable under the act, has been wrested from the creditor at the suit of the trustee, and the creditor then makes proof of his debt, and the assets are enough to pay all the other creditors in full and leave a surplus, in this case the preferred creditor's proof may be allowed to stand, and he may be paid out of such surplus; for, as between the bankrupt and himself, he is entitled to the money. In re McGuire (D. C. 1876) Fed. Cas. No. 8,813.

The surplus remaining after the payment of all proved claims, with interest thereon to the date of adjudication, should not be returned to the bankrupt until there has been further paid out of it interest on the proved claims from the date of adjudication to the day of payment. In re Town (D. C. 1873) 8 N. B. R. 40, Fed. Cas. No. 14,112; In re Hagan (D. C. 1873) 10 N. B. R. 383, Fed. Cas. No. 5,898; In re Bank of North Carolina (D. C. 1879) 12 N. B. R. 130, Fed. Cas. No. 895.

The discharge of the bankrupt and the closing of the estate in bankruptcy do not transfer to the bankrupt the title to any unadministered assets, the title to which had vested in the trustee. In re Lighthall (D. C. 1915) 221 Fed. 791.

Plaintiff, after discharge of defendants in bankruptcy held not entitled to subject land, of which the trustee declined to take possession as an asset, to the lien of a judgment, scheduled as a liability by the bankrupts. People's Nat. Bank of Independence v. Maxson (Iowa, 1915) 150 N. W. 601.

After the estate has been closed, the trustee discharged, and the bankrupt himself discharged, property which comes to light, not having been discovered in time to be administered in the bankruptcy proceedings, belongs to the bankrupt as a surplus of his estate, and if there are no representations of fraud or concealment on his part, or of such mistake as would vitiate the discharge, the court has no authority to appoint a new trustee to take possession of such surplus. Hanson v. First Nat. Bank (Tex. Civ. App. 1910) 128 S. W. 1147; Lasater v. First Nat. Bank (1903) 96 Tex. 345, 72 S. W. 1057; Mayer v. Gourden (D. C. 1885) 26 Fed. 742; Burton v. Perry (1893) 146

34 N. E. 60; In re Pintard 359) Fed. Cas. No. 11,170.
arged bankrupt can assert no can he maintain any action, t to property which he will- ealed from his trustee or fail- hedule or surrender for the of the creditors. Jones v. (Miss. 1914) 66 South. 212; First Nat. Bank v. Lasater (1905) 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408, 13 Am. Bankr. Rep. 698; Laing v. Fish (1905) 119 Ill. App. 645; Hunt v. Doyal (1907) 128 Ga. 416, 57 S. E. 489. See Rand v. Iowa Cent. Ry. Co. (1904) 96 App. Div. 413, 89 N. Y. Supp. 212; Rand v. Sage (1905) 94 Minn. 344, 102 N. W. 864.

(Act July 1, 1898, c. 541, § 8.) Death or insanity of bankts.

n or Insanity of Bankrupts.—a The death or insanity of a ot shall not abate the proceedings, but the same shall be ed and concluded in the same manner, so far as possible, gh he had not died or become insane: Provided, That in death the widow and children shall be entitled to all rights of nd allowance fixed by the laws of the State of the bankrupt's ce. (30 Stat. 549.)

Notes of Decisions

h or Insanity of bankrupt be- dication.—When a petition in cy has been duly filed, the gs are saved from discontin- on the subsequent death of the , even though that occurs be- service of process, or, after at any time before adjudica- re Spalding (1905) 139 Fed. C. C. A. 370, 14 Am. Bankr. ; In re Hicks (D. C. 1901) 910, 6 Am. Bankr. Rep. 182; Patterson (1906) 147 Fed. C. C. A. 75, 17 Am. Bankr. In re Agnew (D. C. 1915) 650.

he death of an alleged bank- r the filing of the petition, his nd personal representatives e brought in and made parties n adjudication. Shute v. Pat- 1906) 147 Fed. 709, 78 C. C. Am. Bankr. Rep. 99.

he death of the bankrupt, his rator may file an application charge. In re Agnew (D. C. 5 Fed. 650.

Death of partner.—After a nas been filed against partners, of one of them prior to any ion upon the question of bank- no legal cause for dismissing ion. Hunt v. Pooke (D. C. N. B. R. 161, Fed. Cas. No.

Distribution of estate.—Sub- he proviso of this section as to s of the widow and children, e of a deceased bankrupt is to buted according to the bank- aw, and not according to the which otherwise would be ap- In re Devlin (D. C. 1910) 170, 24 Am. Bankr. Rep. 863.

Insanity of bankrupt.—Where d bankrupt commits an act of cy while sane, and by reason tion founded on such act, the bankruptcy obtains jurisdiction of a proceeding against him, it will continue the proceedings notwithstanding his supervening insanity; but if the bankrupt was insane when the alleged act of bankruptcy was committed, no adjudication of bankruptcy can be made against him. In re Kehler (1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513; In re Ward (D. C. 1911) 194 Fed. 174, 28 Am. Bankr Rep. 29.

5. Dower and allowances to widow and children.—The provision of this section with reference to rights of dower and allowance to the widow and children of the bankrupt does not create or extend any right of dower or allowance, but makes the right of a bankrupt's widow, and its nature and extent, depend upon the local law. In re McKenzie (D. C. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 227. And see Kelly v. Strange (D. C. 1869) 3 N. B. R. 8, Fed. Cas. No. 7,676; In re Hester (D. C. 1871) 5 N. B. R. 285, Fed. Cas. No. 6,437. Compare Hurley v. Devlin (D. C. 1907) 151 Fed. 919, 18 Am. Bankr. Rep. 627. The widow will have the same right of dower and the same allowances as are granted by the laws of the state of the bankrupt's domicile under similar circumstances. In re McKenzie (1905) 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679. See In re Dicks (D. C. 1912) 198 Fed. 293, 28 Am. Bankr. Rep. 845.

If the bankrupt dies seised of realty in various states, the court of bankruptcy of the bankrupt's residence will have exclusive jurisdiction after his death to determine the right of the widow to dower in such lands. Hurley v. Devlin (D. C. 1907) 151 Fed. 919, 18 Am. Bankr. Rep. 627.

The right of the widow and children of a deceased bankrupt to the dower and allowances they are entitled to from his estate under the state law is not lost or defeated by the vesting of title in the bankrupt's trustee before the death of the bankrupt. Hull v. Dicks

(1915) 235 U. S. 584, 35 Sup. Ct. 152; Thomas v. Woods (1909) 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132; In re Slack (D. C. 1901) 111 Fed. 523, 7 Am. Bankr. Rep. 121; Cravens v. Shippen (1904) 25 Ky. Law Rep. 1322, 77 S. W. 929; Warford v. Noble (C. C. 1880) 2 Fed. 202. The right of the widow of a deceased bankrupt, under this section, to allowance from his estate under state law, was not affected by his assignment for the benefit of creditors within four months of his adjudication. In re Scott (C. C. A. 1915) 226 Fed. 201.

The trustee in bankruptcy may not sell the real estate free from the widow's rights, after the death of the bankrupt, nor divest her of her dower right without her consent. Porter v. Lazear (1883) 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; In re McKenzie (1905) 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; Smith v. Smith (1800) 5 Ves. 189; In re Angier (D. C. 1871) 4 N. B. R. 619, Fed. Cas. No. 388; In re Bartenbach (D. C. 1875) 11 N. B. R. 61, Fed. Cas. No. 1,068.

After personal property has been delivered into the possession of a duly qualified trustee, the bankrupt ceases to be "seised or possessed" of it, so that his subsequent death will not entitle the widow to claim a third of it, as she might have done if he had not been adjudged bankrupt. In re McKenzie (1905) 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; In re McKenzie (D. C. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 227; In re Slack (D. C. 1901) 111 Fed. 523, 7 Am. Bankr. Rep. 121. But it is not the duty of a trustee in bankruptcy to protect the dower rights of the bankrupt's wife against the consequences of her own acts prior to the bankruptcy. Dudley v. Easton (1881) 104 U. S. 99, 26 L. Ed. 668.

In Connecticut, the judge of the court of bankruptcy may make a reasonable allowance to the bankrupt's widow, from his estate in bankruptcy, for her support during the settlement of the estate. In re Newton (D. C. 1903) 122 Fed. 103, 10 Am. Bankr. Rep. 345. Compare In re Seabolt (D. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57.

In Ohio, the widow of a bankrupt having his domicile in that state is entitled to reside for a year in the mansion house of her deceased husband, if dower is not sooner assigned, and also to the allowance of a year's support for herself and children, these grants being in lieu of the exemptions which the husband would have been entitled to claim from the estate in bankruptcy if he had lived. In re Parschen (C. C. 1902) 119 Fed. 976, 9 Am. Bankr. Rep. 389.

The widow must assert her claims in some proper way before the court of bankruptcy. To entitle her to dower it is not sufficient for her merely to intervene in a suit by the trustee in bankruptcy to set aside an alleged fraudulent conveyance, and file a suggestion of her husband's death without any further action. Gray v. Chase (1903) 184 Mass. 444, 68 N. E. 676. And where a state statute provides that a wife who is granted a divorce shall be entitled to one-third of the husband's personal property absolutely, a wife who has begun an action for divorce has no such claim upon the husband's personalty, before decree, as will entitle her to enjoin the distribution of the proceeds of the property in the hands of his trustee in bankruptcy. Hawk v. Hawk (D. C. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463.

§ 9593. (Act July 1, 1898, c. 541, § 9.) Protection and detention of bankrupts.

Protection and Detention of Bankrupts.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not

ng ten days, but not imprison him, until he shall be examined
eased or give bail conditioned for his appearance for examina-
om time to time, not exceeding in all ten days, as required by
rt, and for his obedience to all lawful orders made in reference
. (30 Stat. 549.)

Notes of Decisions

ntion of bankrupt.—The pro- this section, relating to the nd detention of the bankrupt, require the warrant to state bankrupt is to be brought before for examination, and the writ e vacated for failure to include tatement, if it was issued upon petition setting forth the facts, and the bankrupt, be- with brought before the judge, emand an examination or make ction, but immediately offered ch was accepted. In re Lipke 00) 98 Fed. 970, 3 Am. Bankr. .

wer of a court of bankruptcy the detention of a bankrupt bout to abscond from the ju- with his assets is not limit- e particular circumstances and purposes covered by this sec- under other provisions of the court has authority to issue an the nature of a ne exeat, when st of the bankrupt is shown to ssary for the enforcement of as applied to his case. In re . C. 1900) 98 Fed. 970, 3 Am. Rep. 569; In re Berkowitz (D. 173 Fed. 1012.

ourt has no authority to issue t for the arrest of a bankrupt not within the district. In re usch (1901) 108 Fed. 35, 47 177, 5 Am. Bankr. Rep. 532.

Privilege from arrest on civil —This section and General Or- 30 are in pari materia and e construed as a whole. U. S. s (D. C. 1909) 166 Fed. 613, Bankr. Rep. 177. But whereas ute exempts the bankrupt from cases where the debt or claim h the process is founded is of nature that it will be released discharge in bankruptcy, while eral order exempts him from cases where the debt or claim able in bankruptcy, it is held this conflict, the order must y to the statute, the latter be- iperior authority. In re Baker 899) 96 Fed. 954, 3 Am. Bankr. 1.

section exempts the bankrupt rest only during the pendency e bankruptcy proceedings. nan v. Bolster (1915) 220 Mass. N. E. 543.

laws of the state so provide, krupt may be arrested in an ac- a claim from which his dis- would not release him, and the bankruptcy court will not interfere to prevent the enforcement, by arrest and imprisonment, of a judgment founded on such a claim, unless such action is necessary to enable the bankruptcy court to exercise its proper authority and jurisdiction in the case. In re Pettis (D. C. 1868) 2 N. B. R. 44, Fed. Cas. No. 11,046; In re Baker (D. C. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101. On this principle it is held that, if the laws of the state authorize the arrest and detention of a defaulting taxpayer, a bankrupt in that plight will not be released on habeas corpus, since taxes due to a state or municipality are not affected by a discharge in bankruptcy. Aldrich v. Aldrich (Mass. 1844) 8 Metc. 102. The same is true of claims sounding in tort, when the torts are of the nature excepted by the statute from the effects of a discharge. In re Devoe (D. C. 1868) 2 N. B. R. 27, Fed. Cas. No. 3,843; In re Simpson (D. C. 1868) 2 N. B. R. 47, Fed. Cas. No. 12,879; In re Whitehouse (D. C. 1870) 4 N. B. R. 63, Fed. Cas. No. 17,564. And if the debtor is held under arrest in a civil action in a state court founded on a debt contracted by his defalcation while acting in a fiduciary capacity, that is a claim from which his discharge in bankruptcy would not release him, and therefore he is not entitled to be released on habeas corpus from the court of bankruptcy. In re Seymour (D. C. 1867) 1 N. B. R. 29, Fed. Cas. No. 12,684; Kavanaugh v. McIntyre (1908) 128 App. Div. 722, 112 N. Y. Supp. 987. But a bankrupt arrested and held on a capias in an action to recover from him the value of property which he is alleged to have embezzled and fraudulently converted to his own use, is entitled to release on habeas corpus, where no facts are pleaded which show such embezzlement to have been committed while he was acting in a fiduciary capacity. Barrett v. Prince (1906) 143 Fed. 302, 74 C. C. A. 440, 16 Am. Bankr. Rep. 64. A judgment in a bastardy proceeding, brought against the putative father in the name of the state and by the public prosecutor, according to the state law, adjudging him to pay a certain sum monthly to the mother of the child for the period of ten years, and to secure such payment by a bond with sureties, is not such a debt as will be released by his discharge in bankruptcy, and hence, if he is arrested, during the bankruptcy proceedings, for failure to furnish the bond required, and commit-

ted, the court of bankruptcy will not set him at liberty on habeas corpus. In re Baker (D. C. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101.

A state court cannot lawfully cause the bankrupt to be arrested and imprisoned for a contempt of its authority in omitting to pay instalments of alimony due under a decree of such court. In re Houston (D. C. 1899) 94 Fed. 119, 2 Am. Bankr. Rep. 107. See In re Van Orden (D. C. 1899) 96 Fed. 86, 2 Am. Bankr. Rep. 801; In re Smith, 1 Nat. Bankr. News, 471; In re Lachemeyer (D. C. 1878) 18 N. B. R. 270, Fed. Cas. No. 7,966; In re Foye (D. C. 1875) Fed. Cas. No. 5,021. The arrest of the bankrupt under a capias on a judgment recovered against him in a suit for breach of promise of marriage is unlawful in view of this provision of the bankruptcy act. In re Fife (D. C. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258. A bankrupt cannot be held in the custody of a sheriff of the county on account of a judgment obtained against him for costs in an action in a state court. In re Borst (D. C. 1868) 2 N. B. R. 171, Fed. Cas. No. 1,665. Except in cases where the judgment for costs was not rendered until after the adjudication in bankruptcy. In re Marcus (1901) 105 Fed. 907, 45 C. C. A. 115, 5 Am. Bankr. Rep. 365.

Where a bankrupt, who resided in another state, on being required to appear and testify before a referee, was given an order of protection prohibiting any person from arresting him on civil process while in the state in attendance on the hearing and for a stated time thereafter, an arrest on such a process before the expiration of the time is a violation of such order, and he will be discharged by the court of bankruptcy on writ of habeas corpus, regardless of whether or not the claim on which he was arrested is dischargeable in bankruptcy. U. S. v. Flynn (D. C. 1909) 179 Fed. 316, 23 Am. Bankr. Rep. 270; In re Kimball (D. C. 1867) Fed. Cas. No. 7,767. The provision of this section that the bankrupt shall be exempt from arrest "while in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act" is to be construed liberally, and the bankrupt's exemption is not restricted to particular occasions when his physical attendance in court is required or when he is actually engaged in performing some required duty. In re Dresser (D. C. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270.

The bankrupt's exemption from arrest begins at the time of the filing of the petition in bankruptcy. State v. Rollins (1850) 13 Mo. 179; In re Winthrop (D. C. 1842) Fed. Cas. No. 17,900. See Robb v. Powers (1845) 7 Ala. 658; Gibson v. Holmes (1905) 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451; Turgeon v. Bean (1912) 109 Me. 189, 83 Atl. 557. The exemption continues until the final decision on the bankrupt's application for discharge. U. S. v. Peters (D. C. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177.

Where a state statute authorizes a judgment creditor, upon alleging that his debtor has fraudulently disposed of his property, to institute proceedings which begin with the arrest and imprisonment of the debtor, but such arrest is not intended as a punishment of the debtor, but as a means of obtaining a full disclosure as to his property, the proceeding is not criminal but civil, and its primary object is the collection of the creditor's judgment. Such proceedings are therefore in direct conflict with the bankruptcy law, as respects any property which has passed to a trustee in bankruptcy, and a bankrupt cannot be arrested in proceedings founded on such statute. Goodwin v. Sharkey (N. Y. 1868) 5 Abb. Prac. N. S. 64.

The bankruptcy law does not prevent a state court from committing the bankrupt to prison for a contempt, where such commitment is intended as a punishment and not as a means of collecting a debt. In re Fritz (D. C. 1907) 152 Fed. 562. 18 Am. Bankr. Rep. 244; In re Collins (1903) 39 Misc. Rep. 753, 80 N. Y. Supp. 1119; In re Meggett (1900) 105 Wis. 291, 81 N. W. 419.

The court of bankruptcy, in granting the bankrupt a protection against a arrest, may impose terms, and may, in a proper case, require him to furnish a bond with sureties, conditioned that during its continuance he will obey all orders of the court and not meanwhile depart from its jurisdiction. In re Lewensohn (D. C. 1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594.

3. —— Release from Imprisonment.— A court of bankruptcy has jurisdiction to enforce the protection against arrest on civil process accorded to bankrupts by the statute, and for this purpose may issue the writ of habeas corpus, requiring the production of the bankrupt before it in order that it may inquire and determine whether or not the case is one within the statute, and in the former alternative, discharge the bankrupt. In re Glaser (D. C. 1868) Fed. Cas. No. 5,474; U. S. v. Dobbins (D. C. 1871) Fed. Cas. No. 14,971. The authority thus given to the bankruptcy courts can be exercised only by that court in which the particular bankruptcy proceedings are pending. In re Seymour (D. C. 1867) Fed. Cas. No. 12,684.

Where a bankrupt is under arrest under process from a state court, he should first apply to that court, before coming into the court of bankruptcy to obtain his release. In re O'Mara (D.

Fed. Cas. No. 10,509. Where was arrested on process is- m a state court on a charge violated a penal statute of against fraudulent insolvency, wards, on petition of his cred- he proper federal court, was bankrupt, and the state court, ng, then committed him for he thereupon applied to the urt for his release on habeas n the ground that the state as superseded by the bank- w, held, that the state courts petent to decide the federal thus raised, and that, no cir- es of special urgency being e federal courts should not s determination until the pris- exhausted his remedy in the ts. U. S. v. McAleese (1899) 56, 35 C. C. A. 529.

state court, being applied to ankrupt's release from arrest, he application, the court of y is not bound by its deci- may order his release if sat- t his detention is in violation hts under the bankruptcy law. Putnam (D. C. 1901) 107 Fed. n. Bankr. Rep. 80; In re Wig- C. 1868) Fed. Cas. No. 17,623.

e purpose of releasing the from a detention which is in of the provisions of the bank- w, it is immaterial whether the n which the arrest was effect- from a state court or a fed- . In re Wenham (D. C. 1906) 910, 16 Am. Bankr. Rep. 690.

lease of the bankrupt may be y means of an order to show y he should not be released tody. This being an order in y, the court may compel to it by the process of at- as for contempt. In re Glas- . 1868) Fed. Cas. No. 5,474; oby (D. C. 1867) 1 N. B. R. Cas. No. 7,165.

urt of bankruptcy has power t the bankrupt from imprison- a case where the law exempts arrest, not only by releasing actual custody, by means of of habeas corpus, but also by aying further proceedings in court, or staying the issue of s or attachment against the or by enjoining the creditor g out such a writ, or forbid- to execute a writ already out. Putnam (D. C. 1901) 107 Fed. n. Bankr. Rep. 80; In re Pet- C. 1868) 2 N. B. R. 44, Fed. 11,046; In re Jacoby (D. C. N. B. R. 118, Fed. Cas. No. n re Migel (D. C. 1869) 2 N. 1, Fed. Cas. No. 9,538; In re (D. C. 1877) Fed. Cas. No.

application for the release of pt who is held under arrest cess from a state court, if a has been rendered in the state court and the record shows that the debt was one contracted by the fraud of the bankrupt, or in a fiduciary capacity, or otherwise was of such a nature as not to be affected by his discharge in bankruptcy, the federal court will accept the record as importing absolute verity and will not inquire further into the question, and will refuse the application. In re Robinson (D. C. 1876) Fed. Cas. No. 11,939; In re Patterson (D. C. 1868) Fed. Cas. No. 10,-817. If the case has not proceeded to judgment, and the record contains only the declaration, complaint, or affidavit on which process for the arrest of the bankrupt was issued, the court of bankruptcy has only to decide the question of law whether the debt, assuming it to be of the nature shown by such papers, is dischargeable in bankruptcy, and should not enter upon an inquiry as to the truth of the facts alleged. In re Kimball (D. C. 1868) 2 N. B. R. 204, Fed. Cas. No. 7,768, affirmed (C. C. 1869) 2 N. B. R. 354, Fed. Cas. No. 7,769; In re Valk (D. C. 1869) 3 N. B. R. 278, Fed. Cas. No. 16,814; In re Devoe (D. C. 1868) 2 N. B. R. 27, Fed. Cas. No. 3,843. Evidence cannot be received to contradict the declaration in the action in which the order of arrest was granted and to show that no such cause of action really exists as is therein set forth, for the bankruptcy court cannot undertake to decide whether the plaintiff's claim is well or ill founded; that must be left to the determination of the court where the suit is pending. In re Devoe (D. C. 1868) Fed. Cas. No. 3,843. But certain cases maintain that the bankruptcy court is not bound by the case made by the pleadings or affidavits in the proceedings in the state court, nor obliged to accept the plaintiff's allegations as conclusive on the question of fact, but may inquire whether or not the debt is one liable to be released by the discharge of the bankrupt, and to this end may consider all legal evidence brought before it. In re Alsberg (D. C. 1877) 16 N. B. R. 116, Fed. Cas. No. 261; In re Glaser (D. C. 1868) 1 N. B. R. 336, Fed. Cas. No. 5,474; In re Williams (C. C. 1874) 11 N. B. R. 145, Fed. Cas. No. 17,700; In re Jacoby (D. C. 1867) 1 N. B. R. 118, Fed. Cas. No. 7,165.

4. Arrest prior to bankruptcy proceedings.—A bankrupt who was arrested under process from a state court, civil or criminal, before the filing of the petition in bankruptcy, and is held in custody under such arrest, cannot obtain his release from such imprisonment by application to the federal court, on petition for the writ of habeas corpus; and in this case it makes no difference whether the debt or claim for which he was arrested is of such a character as to be provable in bankruptcy or released by the discharge, for irrespective of any such question, the

pending arrest will not be superseded by the bankruptcy proceedings. In re Claiborne (D. C. 1901) 109 Fed. 74, 5 Am. Bankr. Rep. 812; Ex parte Ziegenfuss (1842) 24 N. C. 463; Ex parte Rank (D. C. 1842) Fed. Cas. No. 11,566; In re Walker (D. C. 1868) 1 N. B. R. 318, Fed. Cas. No. 17,060; Hazleton v. Valentine (C. C. 1868) 2 N. B. R. 31, Fed. Cas. No. 6,287; Minon v. Van Nostrand (D. C. 1870) 4 N. B. R. 108, Fed. Cas. No. 9,642, affirmed (C. C. 1873) Fed. Cas. No. 9,641; Brandon Nat. Bank v. Hatch (1876) 57 N. H. 460, 16 N. B. R. 468. CONTRA, see Turgeon v. Emery (D. C. 1910) 182 Fed. 1016, 25 Am. Bankr. Rep. 694; People v. Erlanger (D. C. 1904) 132 Fed. 883, 13 Am. Bankr. Rep. 197. If the claim sought to be enforced by the arrest is one which is affected by the discharge in bankruptcy, the defendant will be entitled to regain his liberty after the discharge is granted and on application to the proper state court. Brandon Nat. Bank v. Hatch (1876) 57 N. H. 460.

§ 9594. (Act July 1, 1898, c. 541, § 10.) Extradition of bankrupts.

Extradition of Bankrupts.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another. (30 Stat. 549.)

Compare § 2, cl. 14, ante, § 9586, providing that the courts of bankruptcy shall have authority to "extradite bankrupts from their respective districts to other districts." See also R. S. § 1029, ante, § 1695, providing that "only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed."

§ 9595. (Act July 1, 1898, c. 541, § 11.) Suits by and against bankrupts.

Suits by and against Bankrupts.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. (30 Stat. 549.)

Notes of Decisions

1. Effect of bankruptcy on pending suits.
2. Stay of pending suits by state court.
3. Stay by injunction or order of court of bankruptcy.
4. —— Courts in which proceedings may be stayed.
5. —— Application for injunction or stay.
6. —— Dissolution of injunction.
7. Leave to continue suit in state court.
8. What actions may be stayed.
9. —— Proceedings to collect alimony.
10. —— Proceedings subsequent to judgment.
11. —— Proceedings supplementary to execution.
12. —— Proceedings on appeal.
13. —— Contempt proceedings.
14. Effect of the stay.
15. Effect of grant or denial of discharge.
16. Pending actions by bankrupt as plaintiff.
17. Intervention of trustee in pending suits.
18. —— Effect of trustee declining to intervene.
19. —— Right dependent on nature of action.
20. —— Time to intervene.
21. —— Form of application and pleadings.
22. Suits begun after adjudication.

1. Effect of bankruptcy on pending suits.—A state court is not deprived, by the mere force of an adjudication in bankruptcy, of jurisdiction over suits

at the time against the bank-
, unless the action is stayed or
by the court of bankruptcy,
court is not required to dis-
ending action, but may proceed
r a valid judgment therein.
Farmers' & Mechanics' Nat.
913) 121 C. C. A. 262, 202
4, 30 Am. Bankr. Rep. 200;
avis (D. C. 1820) 4 N. B. R.
l. Cas. No. 3,620; Hewett v.
(C. C. 1870) 13 N. B. R. 276,
. No. 6,441; First Nat. Bank
(1874) 1 MacArthur (8 D. C.)
re Davis (D. C. 1870) 8 N.
7, Fed. Cas. No. 3,619; Cutter
(1874) 115 Mass. 27, 11 N.
8; Munson v. Boston, H. & E.
(1876) 120 Mass. 81, 21 Am.
; Seymour v. Browning (1848)
362; Serra é Hijo v. Hoffman
9 La. Ann. 17; Brown v. New-
80) 66 Ala. 275; Sutherland
(1873) 42 Ind. 26, 10 N. B.
Brandon Mfg. Co. v. Frazer
7 Vt. 88, 19 Am. Rep. 118, 13
362; U. S. v. Mackoy (C. C.
d. Cas. No. 15,696; Friedman
er (1911) 74 Misc Rep. 448,
Y. Supp. 320; Hardesty v.
(1885) 7 Ky. Law Rep. 447;
v. Dayton (1885) 34 Minn.
N. W. 348; Lewis v. Higgins
2 Md. 616; Hobart v. Haskell
4 N. H. 127; McCormick v.
(1882) 13 Neb. 306, 14 N. W.
erbrook Steel Pen Mfg. Co. v.
879) 31 N. J. Eq. 3; Bowman
er (1910) 144 Mo. App. 100,
. 848; Sively v. Campbell (Va.
Grat. 893; Williams v. Lane
158 Cal. 39, 109 Pac. 873;
v. Bishop (C. C. 1868) Fed.
7,373; Irving Nat. Bank v.
1882) 90 N. Y. 682; Nonotuck
v. Pritzker (1908) 143 Ill.
4. Compare Fellows v. Hall
844) Fed. Cas. No. 4,723.

udication in bankruptcy under
ruptcy act of 1898, as amended,
put the creditor under a "legal
," within the meaning of Rev.
l. 1910, § 4658, as to an ac-
a state court on a provable
Simpson v. Tootle, Wheeler &
Mercantile Co. (1914) 141 P.
kl. 275. Where, pending appeal
decree restraining defendants
osecuting actions on certain
e of them became a bankrupt,
l interest in the notes, though
duled, and the appeal as to
be dismissed. Jones v. Barnes
914) 66 So. 212.

nkruptcy of some or all of the
ts is no cause for dismissing
equity prior to the hearing,
he complainant admits the
cy and concedes that it bars all
prayed for. Ballin v. Ferst
5 Ga. 546.

ion of a decree for partition in
court is not arrested because
e parties to the suit becomes
, for his share of the property
vests in his trustee. Baum v. Stern (1870) 1 S. C. 415.

A judgment entered after the adjudication in bankruptcy, on a default entered before the petition was filed, without fraud, mistake, or surprise, where the bankrupt had no defense, will not be set aside. Fiske v. Hunt (C. C. 1843) Fed. Cas. No. 4,831. See American Wood Working Machinery Co. v. Furbush (1907) 193 Mass. 455, 79 N. E. 770. Where, after judgment on a note for plaintiff, it is discovered that he had been adjudged bankrupt, and that the note had not been scheduled, such facts constitute ground for a new trial. Juden v. Nebham (Miss. 1912) 60 South. 45.

Bankruptcy of the defendant in an action is not a bar to a motion to amend the minutes of the court, by entering nunc pro tunc a verdict rendered against him some years before. Woolfolk v. Gunn (1872) 45 Ga. 117.

In the case of several joint defendants in a pending suit in a state court, one or more of whom are in bankruptcy, but not all, the suit will not be stayed on the application of those not affected by the bankruptcy proceedings. Johnson v. Waxelbaum Co. (1907) 1 Ga. App. 511, 58 S. E. 56; Ex parte Canada (1910) 151 Mo. App. 704, 132 S. W. 754.

Though the trustee in bankruptcy is the proper person to assume and carry on litigation in which the bankrupt is concerned, yet a bankrupt who is defendant in a pending suit may defend it, if the trustee refuses to do so. Lane v. Moore (1879) 59 N. H. 80.

While a valid judgment may be rendered against the bankrupt if the proceedings are not enjoined or stayed, it cannot, if rendered after the filing of the petition in bankruptcy, create any lien upon his estate. McLean v. Rockey (C. C. 1843) Fed. Cas. No. 8,-891.

If an attaching creditor, who knows that proceedings in bankruptcy have been instituted, proceeds in his suit against the bankrupt to judgment before a trustee is appointed, it is a fraud on the law and he will not be allowed to retain the fruits of his writ. Acme Harvester Co. v. Beckman Lumber Co. (1911) 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Ex parte Foster (C. C. 1842) Fed. Cas. No. 4,960; Everett v. Stone (C. C. 1844) Fed. Cas. No. 4,-577. Partnership creditors may attach partnership assets, though one member of the firm is a bankrupt. Pelzer Mfg. Co. v. Pitts & Hartzog (1907) 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665.

2. Stay of pending suits by state court.—It is the duty of the state court to grant a stay of proceedings when the suit pending against the bankrupt is founded on a debt or claim from which his discharge would release him, and when application therefor is duly made.

In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; Maas v. Kuhn (1909) 130 App. Div. 68, 114 N. Y. Supp. 444; First Nat. Bank v. Flynn (1902) 117 Iowa, 493, 91 N. W. 784; McIntyre v. Malone (1902) 3 Neb. (Unof.) 159, 91 N. W. 246; Stone v. Brookville Nat. Bank (1872) 39 Ind. 284; Turner v. Gatewood (Ky. 1848) 8 B. Mon. 613; Dickens v. Dickens (1911) 174 Ala. 305, 56 South. 806. But some courts, particularly in Massachusetts, do not admit this rule to the fullest extent, but hold that it is entirely within their discretion whether or not to stay the suit. See Rosenthal v. Nove (1900) 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512; Feigenspan v. McDonnell (1909) 201 Mass. 341. 87 N. E. 624; St. Louis World Pub. Co. v. Rialto Grain & Securities Co. (1904) 108 Mo. App. 479, 83 S. W. 781. Although the court of bankruptcy has the power to order a stay of such proceedings, and may, if necessary, enjoin the plaintiff from further prosecution of his suit, it has been ruled that the application for a stay should not be made to the federal court in the first instance. but to the state court. In re Geister (D. C. 1899) 97 Fed. 322, 3 Am. Bankr. Rep. 228; McIntyre v. Malone (1902) 3 Neb. (Unof.) 159, 91 N. W. 246; Delavergue v. Farrand (1869) 1 Mich. N. P. 90; Stone v. Brookville Nat. Bank (1872) 39 Ind. 284; Smith v. Soldiers' Business Messenger & Dispatch Co. (1871) 35 N. J. Law, 60. CONTRA, see Garrett v. Carrow (Del. 1868) 3 Houst. 652.

To warrant the state court in taking this action it is necessary that the fact of the bankruptcy should be brought to its judicial attention in some proper manner, generally by a formal answer or plea. Holden v. Sherwood (1876) 84 Ill. 92; Red River Nat. Bank v. Bray (Tex. Civ. App. 1910) 132 S. W. 968; State v. Broaddus (1911) 234 Mo. 358, 137 S. W. 268. See Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 89 Pac. 610. A defendant who desires to plead his subsequent discharge in bankruptcy as a bar, should move for a continuance to see if he shall obtain it, and if he does, he should then plead it. Rogers v. Abbot (1910) 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394. A petition by trustees to vacate an attachment of the bankrupt's realty, after the adjudication, is the appropriate method of procedure. Ward v. Hargett (1909) 151 N. C. 365, 66 S. E. 340. A mere statement of defendant's counsel at the trial that his client is in bankruptcy will not be sufficient to operate as a stay of proceedings. McGowan v. Bowman (1906) 79 Vt. 295, 64 Atl. 1121. And evidence of the fact of the defendant's bankruptcy cannot be introduced under the plea of the general issue. Styles v. Fuller (1886) 101 N. Y. 622, 4 N. E. 348.

The mere filing of a petition in bankruptcy, without any adjudication thereon, does not bar the prosecution of a suit against the debtor in a state court; and is no ground for staying the proceedings. Rennebaum v. Atkinson (1899) 21 Ky. Law Rep. 587, 52 S. W. 828; Givens v. Robbins (1843) 5 Ala. 676; Stewart v. Sonneborn (1874) 51 Ala. 126; Murphy v. Young, 6 Wkly. Notes Cas. (Pa. 1878) 317.

A state court need not grant a stay of an action brought therein against the bankrupt jointly with others; it will order that proceedings on any judgment which may be obtained against him shall be stayed until the further order of the court. Friedman v. Zweifler (1911) 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Hoyt v. Freel (N. Y. 1869) 8 Abb. Prac. N. S. 220.

Where, after the verdict but before the entry of a judgment thereon, in a cause pending in a state court, the defendant files his petition in bankruptcy, the court, on the filing of a certificate of his having been adjudged bankrupt, and on motion of the defendant, should stay further proceedings until the bankruptcy court passes upon his application for discharge; and on a showing that the discharge was granted, the state court will render judgment on the verdict against the defendant, but with a perpetual stay of execution. Hill v. Harding (1886) 116 Ill. 92, 4 N. E. 361. See Rosenthal v. Nove (1900) 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

A defendant who is adjudged bankrupt pending a suit against him in a state court may allow the action to proceed to judgment without pleading his bankruptcy, and if a judgment is entered, he may apply to the court to vacate it, or set up the bankruptcy in defense to proceedings to enforce the judgment. Whyte v. McGovern (1888) 51 N. J. Law, 356, 17 Atl. 957. Compare Darnall v. Cline (1882) 4 Ky. Law Rep. 537. The levy of an execution issued after the defendant has made application for the benefit of the bankruptcy law, will be quashed by the court out of which it issued, on motion. McDougald v. Reid (1843) 5 Ala. 810.

If the debt or claim in suit is one which would not be affected by the defendant's discharge, no stay is necessary or proper. But if there is doubt on this point, a continuance may be ordered. Thus, where the complaint states a cause of action for embezzlement, but the defendant asserts that his liability, if any, is on contract, it is proper for the state court to postpone the action, pending a determination against the defendant in the court of bankruptcy. Ex parte Butler-Keyser Mfg. Co. (1911) 174 Ala. 237, 56 South. 960.

an equitable petition was filed, to enjoin the enforcement of a t and have an equitable set-off it established, it was held that that defendant had been ad- l a bankrupt and no trustee had pointed, was not ground for a hearing on a demurrer to the Miller v. Smith (1911) 136 70 S. E. 887.

y by injunction or order of f bankruptcy. — When a suit in a state court against a de- who is adjudged bankrupt is upon a debt or claim which e released by his discharge in tcy, it is within the jurisdic- he court of bankruptcy to order l or enjoin its further prosecu- itchell Storebuilding Co. v. Car- 12) 193 Fed. 616, 113 C. C. A. Am. Bankr. Rep. 894; Moore (1906) 145 Fed. 472. 76 C. C. 16 Am. Bankr. Rep. 648; v. Dillon (D. C. 1875) 12 N. B. Fed. Cas. No. 5,000. But a f bankruptcy has no jurisdic- enjoin a sale of property on a t rendered in a state court en- a mortgage lien of date long four months preceding the ad- n of the mortgagor as a bank- Sample v. Beasley (1908) 158 7, 85 C. C. A. 429, 20 Am. Rep. 164. And see Pickens v. 901) 106 Fed. 653, 45 C. C. A. Am. Bankr. Rep. 644. This lies to cases of voluntary bank- as well as to involuntary pro- . In re Geister (D. C. 1899) 322, 3 Am. Bankr. Rep. 228. nmaterial that the state court viously denied a similar applica- a stay of proceedings on the round by the same petitioner. ver Coal Land Co. v. Ruffner 908) 165 Fed. 881. 91 C. C. A. Am. Bankr. Rep. 100.

this section the bankruptcy ay restrain the further prose- of actions pending against a t, provided the demand sued ne from which a discharge in tcy will be a release, or where secution of the action to judg- d the enforcement of the judg- ending bankruptcy proceedings erfere with the enforcement of In re Nuttall (D. C. 1912) 201 7.

h the pending action is not di- against the bankrupt himself, rt of bankruptcy has power to ts further prosecution, if the ngs in the state court, if al- continue, might interfere with ay the settlement of the bank- state, as, where the defendant action, though a solvent cor- and not in bankruptcy, is to be a mere department or of the business of the bank- nd therefore its assets are claimed by the trustee in bankruptcy. Mitchell Storebuilding Co. v. Carroll (C. C. A. 1912) 193 Fed. 616, 27 Am. Bankr. Rep. 894.

A judgment on a nondischargeable debt should not be stayed pending bankruptcy proceedings. In re Dowie (D. C. 1912) 202 Fed. 816.

A referee in bankruptcy has no jurisdiction to issue an injunction staying proceedings in a state court. In re Siebert (D. C. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348.

The granting of an order staying proceedings pending against the bankrupt in a state court is in the discretion of the court of bankruptcy, and its action in this matter will not be interfered with by the appellate court, on petition for review, unless such discretion has been abused. In re Guanacevi Tunnel Co. (1912) 201 Fed. 316, 119 C. C. A. 554, 29 Am. Bankr. Rep. 229; In re Lesser (C. C. A. 1900) 99 Fed. 913, 3 Am. Bankr. Rep. 758. The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discretion of the trial court, and that a review by an appellate court is limited to the question whether there has been an abuse of discretion in granting the writ, does not apply to an appeal from an order dissolving a preliminary injunction, in which case the appellate court is not limited to the question of abuse of discretion, but may inquire into all the circumstances connected with the proceedings as they appear of record and the effect the dissolution may have on the rights of the parties. Bothwell v. Fitzgerald (1915) 219 Fed. 408, 135 C. C. A. 212.

The courts of bankruptcy should incline against any unnecessary interference with the normal action of the state courts, and their power in this behalf should be sparingly exercised. In re United Wireless Telegraph Co. (D. C. 1912) 196 Fed. 153, 28 Am. Bankr. Rep. 394; In re Guanacevi Tunnel Co. (1912) 201 Fed. 316, 119 C. C. A. 554, 29 Am. Bankr. Rep. 229. It should be exercised only upon due and careful consideration of all the equities of the case. Henry v. Harris (D. C. 1912) 191 Fed. 868. And it should not be exercised where there is legitimate scope for the judgment of the state court without interfering with the jurisdiction of the bankruptcy court. In re United Wireless Telegraph Co. (D. C. 1912) 196 Fed. 153, 28 Am. Bankr. Rep. 394.

Under R. S. § 720, ante, § 1242, and this section, the bankruptcy court could not enjoin a suit in a state court on a claim from which a discharge would be a release for more than 12 months after the adjudication, where the bankrupt did not within that time apply for a discharge. In re Federal Biscuit Co. (C. C. A. 1914) 214 Fed. 221.

The fact that the bankrupt has already received his discharge is no ob-

stacle to an injunction from the court of bankruptcy directed against the enforcement of a collusive or fraudulent judgment or transfer of property. Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9.

4. —— **Courts in which proceedings may be stayed.**—A court of bankruptcy has no power to issue an injunction ex parte, and without notice or service of process, to restrain a creditor from suing the bankrupt in a state outside the jurisdiction of the bankruptcy court; but such a proceeding can only have binding force upon the creditor if jurisdiction is obtained over him by ancillary proceedings in a court having jurisdiction, and upon service of process upon him. Acme Harvester Co. v. Beekman Lumber Co. (1911) 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262.

Where a resident of the western district of Virginia was not a party to bankruptcy proceedings pending in the eastern district, the bankruptcy court of the eastern district had no jurisdiction to enjoin such nonresident from enforcing an assignment of the bankrupt's wages. Progressive Building & Loan Co. v. Hall (1914) 220 Fed. 45, 135 C. C. A. 613.

The court of bankruptcy cannot stay or enjoin foreign creditors proceeding against the bankrupt in a foreign court; but if they seek the aid of the court of bankruptcy for the enforcement of their demands, they will not be allowed any advantage over other creditors. In re Bugbee (D. C. 1874) 9 N. B. R. 258, Fed. Cas. No. 2,115. Where the resident partners of a firm, having a partner residing abroad, prove a debt in bankruptcy, the firm becomes a party to the proceedings, and the resident partners may be restrained from prosecuting suits abroad to collect the claim. In re Schepeler (D. C. 1870) Fed. Cas. No. 12,453.

Where proceedings in bankruptcy are pending against the owner of a vessel, the court of bankruptcy has jurisdiction to enjoin or stay the prosecution of a libel against such vessel filed on the admiralty side of the same court. In re People's Mail S. S. Co. (D. C. 1869) Fed. Cas. No. 10,970.

A federal district court cannot enjoin proceedings in a state court on the ground that proceedings in bankruptcy against the defendant are pending in some other federal district court. In re Richardson (D. C. 1868) Fed. Cas. No. 11,774; Markson v. Heaney (C. C. 1871) Fed. Cas. No. 9,098. And while the bankruptcy court has power to stay pending suits against the bankrupt, and also to empower the trustee to take the place of the bankrupt therein, it has no authority to withdraw from the state court a suit pending therein and compel its trial in the district court. Samson v. Burton (D. C. 1870) Fed. Cas. No. 12,285.

5. —— **Application for injunction or stay.**—Application for an order staying a suit or enjoining further proceedings therein may be made by the trustee in bankruptcy, or by the bankrupt himself if no trustee has yet been appointed. Brock v. Terrell (D. C. 1869) 2 N. B. R. 643, Fed. Cas. No. 1,914; In re Tifft (D. C. 1878) 18 N. B. R. 78, Fed. Cas. No. 14,031.

6. —— **Dissolution of injunction.**—Any person who desires to obtain the dissolution of an injunction restraining the prosecution of proceedings against the bankrupt in a state court may apply therefor by motion. In re Wallace (D. C. 1868) Fed. Cas. No. 17,094.

Since the bankruptcy act and the jurisdiction of the federal courts in bankruptcy, when properly invoked, is paramount in the administration of the affairs of bankrupts, and is essentially exclusive, bankruptcy proceedings having been instituted against an irrigation company, it was error for the federal court to dissolve a preliminary injunction restraining proceedings by creditors of the bankrupt in the state court, for the appointment of a receiver, to reconstruct a portion of the irrigation company's works with money to be collected from contract holders, which was claimed by the trustee to constitute assets of the bankrupt's estate. Bothwell v. Fitzgerald (1915) 219 Fed. 408, 135 C. C. A. 212.

7. **Leave to continue suit in state court.**—It is not necessary to obtain leave of the court of bankruptcy to continue to judgment a suit founded in tort, pending at the time of the filing of the petition in bankruptcy against the defendant, since the claim would not be provable until the judgment was obtained. In re Hennocksburgh (D. C. 1872) Fed. Cas. No. 6,367; Louisville Dry Goods Co. v. Lanman (1909) 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451.

A pending suit on a dischargeable debt, in which the bankrupts had been arrested and given bail more than four months prior to their bankruptcy, may be permitted to proceed to judgment to enable the plaintiff to enforce his demand against the surety in the undertaking, in case it is in form a security for the payment of the judgment. In re Ennis & Stoppani (D. C. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679. See In re Martin (D. C. 1900) 105 Fed. 753, 5 Am. Bankr. Rep. 423.

Where several attachments were levied so far before the commencement of the bankruptcy proceedings as not to be affected by them, a state court may proceed to determine the question of priority of liens as between the several creditors. Davis v. Friedlander (1881) 104 U. S. 570, 26 L. Ed. 818.

Bankruptcy court's action in allow-

ecution of suits in state courts
er income of trust under Real
Law N. Y. § 98, beyond sum
for support held not improp-
rosecution thereof beyond judg-
to be allowed. In re Buchan-
4) 219 Fed. 492, 135 C. C. A.

of proceedings against the
in a state court may be va-
o as to permit creditors to
e state court to punish the
for contempt committed prior
iling of the bankruptcy peti-
re Sims (D. C. 1910) 176
, 23 Am. Bankr. Rep. 899.
case whatever will the court
ruptcy permit property which
custody and possession of a
n bankruptcy to be seized on
or other final process from
court based on a judgment
the bankrupt, or against the
as his successor in interest.
Montgomery (1873) 48 Miss.

t actions may be stayed.—To
an order staying pending pro-
against a bankrupt, it is nec-
at the claim in suit should be
h is provable in the bankrupt-
edings (as otherwise it would
ffected by the discharge), and
it should not be within the
claims which are expressly ex-
rom the operation of a dis-
In re Camelo (D. C. 1912) 195
, 28 Am. Bankr. Rep. 353.
imposed on a bankrupt by a
urt for a civil contempt under
Law N. Y. §§ 753, 773, for
nce of an order of that court
an action against him prohib-
from transferring his prop-
disposing of it and shortly aft-
the petition in voluntary bank-
s not a provable debt, and a
bankruptcy is without juris-
o interfere with its enforce-
eople v. Sheriff of Kings Coun-
. 1913) 206 Fed. 566.
an order was granted staying
for the bankrupt from enter-
ment and further prosecuting
in the state court to recover
der the bond against the bank-
fraudulent representations in
the bond, and it was doubtful
the surety's claim was dis-
le in bankruptcy, a motion to
he stay would be denied, to
e bankrupt to move to vacate
ult and try the question of
the state court, with leave to
otion on termination of such
gs. In re Dunfee (D. C.
6 Fed. 745.
ithin the exclusive jurisdiction
urt of bankruptcy to determine
or not the claim in a pending
nst the bankrupt is of such a
that its further prosecution
e stayed, annd its decision on
t is final and conclusive, unless

reversed on appeal. In re Mustin (D. C. 1908) 165 Fed. 506, 21 Am. Bankr. Rep. 147; American Graphophone Co. v. Leeds & Catlin Co. (C. C. 1909) 174 Fed. 158, 23 Am. Bankr. Rep. 337; Wagner v. U. S. (1900) 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596. The court of bankruptcy is not bound or concluded by any decision of the state courts on the same question. Knott v. Putnam (D. C. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80. The court of bankruptcy is not required to enter into an investigation outside of the pleadings in the action to determine the character of the claim. In re Adler (1907) 152 Fed. 422, 81 C. C. A. 564, 18 Am. Bankr. Rep. 240.

An unliquidated claim, which might have been liquidated and proved against the bankrupt, should be treated as a provable debt, with reference to the question of staying an action upon it. In re Hilton (D. C. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774. But compare In re New York Tunnel Co. (1908) 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25. And see Imbriani v. Anderson (1912) 76 N. H. 491, 84 Atl. 974. Where the debt is clearly provable in bankruptcy, an action based upon it should be stayed, although its object is not to enforce collection of the claim, but to remove the bankrupt from his position as a member of a municipal fire department because of his failure to pay the debt in question. In re Hicks (D. C. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654. Generally speaking, suits which contemplate some other relief than the collection of a debt are not to be stayed, as their prosecution would not ordinarily interfere with the bankruptcy proceedings. In re United Wireless Telegraph Co. (D. C. 1911) 192 Fed. 238, 27 Am. Bankr. Rep. 1.

Proceedings for an accounting before a master in a patent infringement suit, where an interlocutory judgment had been rendered before the adjudication in bankruptcy, are not of such a character that they should be stayed. In re Leeds & Catlin Co. (D. C. 1909) 175 Fed. 309, 23 Am. Bankr. Rep. 679. Nor is an action of forcible entry and detainer by a landlord under the state statute to recover possession of the leased premises. In re Van Da Grift Motor Car Co. (D. C. 1912) 192 Fed. 1015, 27 Am. Bankr. Rep. 474.

The prosecution of a pending action in a state court against the bankrupt should not be stayed or enjoined when the debt on which it is founded is one which will not be released by his discharge in bankruptcy. In re Camelo (D. C. 1912) 195 Fed. 632, 28 Am. Bankr. Rep. 353; A. Klipstein & Co. v. Allen-Miles Co. (1905) 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; Continental Nat. Bank v. Katz (Ill.) 1 Nat. Bankr. News, 165; Black v. McClelland (C. C. 1875) 12

N. B. R. 481, Fed. Cas. No. 1,462; In re Dowie (D. C. 1912) 202 Fed. 816, 29 Am. Bankr. Rep. 338. Except in cases where the temporary suspension of the action is necessary to enable the court of bankruptcy fully to carry out the provisions of the law and to exercise without hindrance its plenary jurisdiction over the estate of the bankrupt. In re Nuttall (D. C. 1912) 201 Fed. 557, 29 Am. Bankr. Rep. 800.

Where the plaintiff is proceeding against the bankrupt for a debt "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," the claim is one which will not be affected by a discharge, if granted, and therefore the action should not be stayed. In re Cole (D. C. 1901) 106 Fed. 837, 5 Am. Bankr. Rep. 780; In re Thaw (D. C. 1910) 180 Fed. 419, 24 Am. Bankr. Rep. 759; In re Lawrence (D. C. 1908) 163 Fed. 131, 20 Am. Bankr. Rep. 698; In re Gulick (D. C. 1911) 186 Fed. 350, 26 Am. Bankr. Rep. 362; In re Wollock (D. C. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; Mackel v. Rochester (D. C. 1905) 135 Fed. 904; In re Adler (1906) 144 Fed. 659, 75 C. C. A. 461, 16 Am. Bankr. Rep. 414; In re Ennis & Stoppani (D. C. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; Horter v. Harlan, 7 N. B. R. 238. See Gleason v. O'Mara (1909) 180 Fed. 417, 103 C. C. A. 563, 24 Am. Bankr. Rep. 832. Since a suit to require a defendant corporation to issue a certificate of stock, and for damages for refusing to issue it, involves a claim from which a discharge in bankruptcy would not be a release, the suit cannot be stayed. In re Clipper Mfg. Co. (1910) 179 Fed. 843, 103 C. C. A. 260, 24 Am. Bankr. 683. And wages earned by a bankrupt after his adjudication belong to him and not to his estate in bankruptcy, and the court has no jurisdiction to take action against a creditor who has wrongfully collected such wages on an assignment made prior to the bankruptcy. In re Karns (D. C. 1905) 148 Fed. 143, 16 Am. Bankr. Rep. 841.

A judgment in a bastardy proceeding, requiring the putative father to provide for the maintenance of the child is not a "debt" from which he will be released by his discharge in bankruptcy, and hence proceedings for its enforcement should not be stayed. In re Baker (D. C. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; In re Cotton (D. C. 1843) Fed. Cas. No. 3,269.

An action for breach of promise of marriage is an action on contract and not in tort, although seduction is also alleged, and a general verdict for the plaintiff, not specifically awarding any damages for the seduction, creates a debt provable and dischargeable in bankruptcy, so that a suit for its enforcement may be stayed. In re Warth (D. C. 1912) 196 Fed. 571, 28 Am. Bankr. Rep. 41; In re McCauley (D. C. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122.

Where the bankrupt is a corporation, and a creditor has an action pending against it, but it appears that his ultimate object is to enforce a statutory liability against the directors and stockholders, and to do this he must first have recovered a judgment against the corporation, the bankruptcy court will refuse to enjoin him and will allow him to proceed to judgment against the bankrupt. In re Marshall Paper Co. (D. C. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653; In re Remington Automobile & Motor Co. (D. C. 1902) 119 Fed. 441, 6 Am. Bankr. Rep. 285. So where the creditor's object is not to collect anything from the bankrupt, but to enforce the liability of the surety on a bail bond. In re Franklin (D. C. 1901) 106 Fed. 666, 6 Am. Bankr. Rep. 285.

The statute does not prevent the court of bankruptcy from restraining attaching creditors of the bankrupt from the further prosecution of their attachment suits in a state court, when the preference created by the levy of such attachments was the act of bankruptcy on which the adjudication was based, and the petition was filed within four months after the levy, even though the creditors' causes of action were such as would not be affected by a discharge of the debtor in bankruptcy. Bear v. Chase (1900) 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746.

The court of bankruptcy may interfere where proceedings between the bankrupt and another in a state court are collusive and intended to give such other an advantage over other creditors. Samson v. Burton (D. C. 1871) Fed. Cas. No. 12,286; In re Clark (C. C. 1872) Fed. Cas. No. 2,801.

The jurisdiction acquired before the proceedings in bankruptcy by a state court in proceedings for the partition of an estate in which the bankrupt is interested will not be interfered with by the bankruptcy court. In re Caldwell (D. C. 1874) Fed. Cas. No. 2,300.

9. —— Proceedings to collect alimony.—Alimony awarded to a divorced wife by the judgment of a court of competent jurisdiction, to be paid in fixed periodical installments, and overdue at the time the husband is adjudged bankrupt, is not provable as a "debt" against his estate, and is not such a claim as will be released by his discharge; and therefore the wife will not be stayed or enjoined, pending the bankruptcy proceedings, from pursuing appropriate remedies for its collection. Audubon v. Shufeldt (1901) 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Hubbard (D. C. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528; Turner v. Turner (D. C. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Shepard (D. C. 1899) 97

; In re Anderson (D. C. 1899) 321, 5 Am. Bankr. Rep. 858; ith, 1 Nat. Bankr. News, 471; owell (D. C. 1900) 99 Fed. Am. Bankr. Rep. 837; In re (D. C. 1900) 2 Nat. Bankr. ; In re Garrett (D. C. 1875) R. 493, Fed. Cas. No. 5,252; chemeyer (D. C. 1878) 18 N. 0, Fed. Cas. No. 7,966; Bar- Barclay (1900) 184 Ill. 375, 56 6, 51 L. R. A. 351; Welty v. 901) 96 Ill. App. 141; Mais- Maisner (1901) 62 App. Div. N. Y. Supp. 1107; Young v. 901) 35 Misc. Rep. 335, 71 N. . 944; Lemert v. Lemert 25 Ohio Cir. Ct. Rep. 253. A, Wagner v. U. S. (1900) 104 43 C. C. A. 445, 4 Am. Bankr. ; In re Houston (D. C. 1899) 119, 2 Am. Bankr. Rep. 107; an Orden (D. C. 1899) 96 2 Am. Bankr. Rep. 801; In ner (D. C. 1899) 98 Fed. 82, 3 nkr. Rep. 442; Arrington v. n (1902) 131 N. C. 143, 42 S. 92 Am. St. Rep. 769; In re Estate (1909) 118 N. Y. 32. Installments of alimony due and payable under the decree after the date of the ion in bankruptcy are not debts against the bankrupt's nd therefore not affected by his e. In re Nowell (D. C. 1900) 931, 3 Am. Bankr. Rep. 837; alloner (D. C. 1899) 98 Fed. m. Bankr. Rep. 442; In re (D. C. 1875) Fed. Cas. No. n re Lachemeyer (D. C. 1878) R. 270, Fed. Cas. No. 7,966.

— Proceedings subsequent to t.—Where a creditor has re- judgment and caused final pro- be issued and levied on prop- the debtor, before the latter's tion in bankruptcy, if no stay eedings is ordered, nor other s taken, in the court of bank- o arrest the action, the offi- ing the writ may proceed to sale of the property, and his ll give the purchaser a title annot be impeached collateral- e trustee in bankruptcy. Doe ress (1874) 21 Wall. 642, 22 549; In re Hufnagel (D. C. 2 N. B. R. 554, Fed. Cas. No. Thames v. Miller (C. C. 1873) s. No. 13,860; Elston v. Cas- 4) 101 Ind. 426, 51 Am. Rep. unter v. Porch (1883) 4 Ky. . 826; Fisher v. Lewis (1879) 629; Thompson v. Moses 43 Ga. 383; Wheeler v. Red- 75) 55 Ga. 87. But if the writ ued and levied within four before the institution of the ngs in bankruptcy, its lien is ex- ed by the adjudication in bank- and consequently the officer holds the property as a mere temporary custodian, and the trustee is entitled to recover possession of it, and the court of bankruptcy has jurisdiction to order the surrender of the property, on a summary petition by the trustee. In re Francis-Valentine Co. (C. C. A. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co. (D. C. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Schnepf (D. C. 1867) 1 N. B. R. 190, Fed. Cas. No. 12,471.

The court of bankruptcy has jurisdiction, by injunction, to forbid an execution creditor of the bankrupt from proceeding to sell property on which a levy has been made at the date of the adjudication, where the execution constitutes the act of bankruptcy found against the defendant, or is an unlawful preference and contrary to the provisions of the bankruptcy law. In re Lesser (D. C. 1900) 100 Fed. 433. 3 Am. Bankr. Rep. 815; In re Kimball (D. C. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; In re Lady Bryan Min. Co. (D. C. 1870) 6 N. B. R. 252, Fed. Cas. No. 7,980; Beattie v. Gardner (D. C. 1871) 4 N. B. R. 323, Fed. Cas. No. 1,195; In re Mallory (D. C. 1871) 6 N. B. R. 22, Fed. Cas. No. 8,991; Blake v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; Irving v. Hughes (C. C. 1867) 2 N. B. R. 61, Fed. Cas. No. 7,076; In re Metzler (D. C. 1867) 1 N. B. R. 38, Fed. Cas. No. 9,512; Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9. And though the judgment is not thus impeachable, the court of bankruptcy may enjoin the sale by the sheriff, until the trustee in bankruptcy can intervene, when this appears necessary for the protection of the general creditors. In re Lady Bryan Min. Co. (D. C. 1870) 6 N. B. R. 252, Fed. Cas. No. 7,980; In re Globe Cycle Works, 1 Nat. Bankr. News, 421; Eastburn v. Yardley (C. C. 1873) Fed. Cas. No. 4,252. An injunction restraining proceedings on execution under a judgment against the bankrupt will be dissolved where the trustee has taken no measures to recover the property levied on, and the bankrupt declares that the property does not belong to him. In re Olcott (D. C. 1868) Fed. Cas. No. 10,478.

That property is perishable is no ground for dissolving an injunction which restrained a sale thereof on execution prior to the adjudication. In re Metzler (D. C. 1867) 1 N. B. R. 38, Fed. Cas. No. 9,512.

When a sheriff holding a writ against the bankrupt is allowed to proceed with the sale, the sheriff will be directed to bring the entire proceeds, less costs, into the court of bankruptcy;

or he may be directed to satisfy the execution creditor (if the latter's claim is valid and not affected by the adjudication), and to pay over the remainder to the trustee in bankruptcy. In re Bernstein (D. C. 1867) Fed. Cas. No. 1,350; O'Brien v. Weld (1875) 92 U. S. 81, 23 L. Ed. 675.

If a sheriff, acting under a writ the lien of which was dissolved by the adjudication in bankruptcy of the debtor, because levied within four months before the commencement of the proceedings in bankruptcy, had already made a sale before the adjudication, and has the proceeds in his hands, he may be enjoined from disposing of such proceeds, and ordered to surrender the same to the trustee in bankruptcy, and this may be done in summary proceedings, without a plenary suit. Clark v. Larremore (1903) 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, 9 Am. Bankr. Rep. 476; In re Kenney (1900) 105 Fed. 897, 45 C. C. A. 113, 5 Am. Bankr. Rep. 355; In re English (1904) 127 Fed. 940, 62 C. C. A. 572, 11 Am. Bankr. Rep. 674; In re Franks (D. C. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; Schmilovitz v. Bernstein (1901) 22 R. I. 330, 47 Atl. 884; In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; Bear v. Chase (1900) 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; Miller v. O'Brien (C. C. 1871) 9 N. B. R. 26, Fed. Cas. No. 9,586; In re Grinnell (D. C. 1873) 9 N. B. R. 29, Fed. Cas. No. 5,830; Pennington v. Lowenstein (D. C. 1868) 1 N. B. R. 570, Fed. Cas. No. 10,938; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Francis-Valentine Co. (C. C. A. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522; Mills v. Davis (N. Y. Super. Ct. 1873) 10 N. B. R. 340; Kosches v. Libowitz (Tex. Civ. App. 1900) 56 S. W. 613; Davis v. Jewett (1903) 17 S. Dak. 410, 97 N. W. 16. Compare In re Easley (D. C. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715; In re Campbell (D. C. 1867) 1 N. B. R. 165, Fed. Cas. No. 2,349.

If the sheriff has paid over the proceeds of the execution to the creditor, after the adjudication of the debtor as a bankrupt, the trustee will still have a remedy by action against the creditor to recover the fund, if the levy was dissolved by the bankruptcy proceedings or was voidable as a preference. Bradley v. Frost (C. C. 1875) Fed. Cas. No. 1,780. But otherwise where the sale was made and the proceeds paid over to the creditor before the filing of the petition in bankruptcy, though less than four months prior thereto, since the statute applies only to liens existing and unsatisfied at the commencement of the proceedings in bankruptcy. Davis v. Jewett (1903) 17 S. Dak. 410, 97 N. W. 16; Levor v Seiter (1902) 69 App. Div. 33, 74 N. Y Supp. 499; Greene v. Montana Brewing Co. (1903) 28 Mont. 380, 72 Pac 751; Farrell v. W. B. Lockett & Co (1905) 115 Tenn. 494, 91 S. W. 209.

An adjudication in bankruptcy bring the entire estate of the bankrupt within the custody and control of the cour of bankruptcy; and if a sheriff there after levies on goods of the bankrupt he may be enjoined from making a sale under his levy. The title to the goods vests in the trustee in bankruptcy, and he alone must make the sale the proceeds being subject to any valid liens or claims upon them. Leonard v Yohnk (1887) 68 Wis. 587, 32 N. W 702, 60 Am. Rep. 884; Pennington v Sale (D. C. 1868) 1 N. B. R. 572, Fed Cas. No. 10,939.

In a suit to revive a judgment against a bankrupt, his trustee is the proper person on whom to serve the citation if he is still in office. Grayson's Ex'r v. Norton (1881) 33 La. Ann. 1018.

11. —— Proceedings supplementary to execution.—Where proceedings supplementary to execution are pending in a state court at the time of the adjudication of the judgment debtor as a bankrupt, the judgment being a debt provable in bankruptcy, the court of bankruptcy, on the application of the bankrupt or his trustee, may order a stay of all proceedings in the state court to await the determination of the court of bankruptcy on the question of the bankrupt's discharge. In re Lesser (1900) 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758; In re Kletchka (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Reed (D. C. 1867) 1 N. B. R. 1, Fed. Cas. No. 11,637.

When a judgment in a state court has been recovered against two defendants on their joint and several obligations, and one of them is afterwards adjudged bankrupt but not the other, proceedings in the state court supplementary to execution on such judgment may be stayed and enjoined as to the bankrupt, but not as to the other judgment debtor. In re Burke (D. C. 1907) 155 Fed. 703, 19 Am. Bankr. Rep. 51.

A bankrupt who has omitted to apply for a stay of proceedings in an action against him, pending the question of his discharge, may nevertheless apply to the state court after judgment to have supplementary proceedings against him thereon stayed, on the ground that he has been discharged, if the plaintiff's demand is of such a nature as to be released by the discharge. World Co. v. Brooks (N. Y. 1869) 3 N. B. R. 588.

The adjudication in bankruptcy will not affect the state court's jurisdiction of the supplementary proceedings, nor authorize the debtor to refuse to comply with its order directing his examination, in the absence of an application

ederal court for a stay of such ngs. In re William E. De Lan-. (D. C. 1903) 124 Fed. 280, Bankr. Rep. 634.

plaintiff has procured the ap-nt of a receiver in his supple-proceedings, and the latter has tual possession of the proper-ill not, under any ordinary cir-ces, be interfered with by the tcy court, but leave will be giv-e trustee to intervene in the s action, for the purpose of g his claim, if there is any o do so, and for the protection nterests of the general cred-n re Whipple (D. C. 1876) . No. 17,512.

— Proceedings on appeal.—The cy of a party does not prevent ng and determination of an ap-n a judgment of a state court ppellate court of the state, and t of bankruptcy will not order f the proceedings on appeal. Meisenheimer (1898) 104 Ky. 3. W. 1087; Flanagan v. Pear-5) 42 Tex. 1, 19 Am. Rep. 40; . Glidden (1870) 39 Cal. 559, tep. 479; Alston v. Wingfield 3 Ga. 18; Booker v. Adkins 48 Ala. 529; In re Hirsch 868) 2 N. B. R. 3, Fed. Cas.); Booker v. Blythe (1909) 90 , 118 S. W. 401; Bennett v. (1901) 65 S. W. 12, 23 Ky. . 1281. Compare In re Met-C. 1867) 1 N. B. R. 201, Fed. 9,494; In re Leszynsky (D. C. d. Cas. No. 8,278. See United Telegraph Co. v. National Signaling Co. (1912) 198 Fed. C. C. A. 261, 28 Am. Bankr.

nt against defendant and his on appeal from justice court , rendered prior to bankrupt-not void though pending ap-ndant was adjudged a bank-bankruptcy court having au-plaintiff to proceed to judg-ohn, Weil & Co. v. Weinberg 15) 70 So. 353.

the bankrupt was the appel-rustee, on producing the prop-ce of his official character, motion, be substituted as ap-the case. Herndon v. How-) 9 Wall. 664, 19 L. Ed. 809; Exchange Bank (1870) 12 , 20 L. Ed. 287. See Sigler (1846) 15 Ohio, 471.

rustee does not intervene and e substituted, still the bank-r to his discharge, has suffi-rest in preventing the estab-of a claim against him to en-to maintain an appeal from nt thereon. Sanford v. San-4) 58 N. Y. 67, 17 Am. Rep. Weil v. Dougherty (1873) 46 Hughes v. Thweatt (1879) 376.

the judgment was not render-fter the adjudication in bank-ruptcy, yet the bankrupt may prosecute an appeal or writ of error thereon in his own name. Hill v. Harding (1880) 131 U. S. (Appendix) cc, 26 L. Ed. 310; O'Neil v. Dougherty (1873) 46 Cal. 575. But compare Parks v. Doty (1878) 13 Bush (Ky.) 727; Daugherty v. Ringo (1880) 1 Ky. Law Rep. 282. And see Jenkins v. International Bank (1881) 97 Ill. 568. Provided he obtains the written consent of the trustee in bankruptcy. Christy v. Des Moines City Ry. Co. (1905) 126 Iowa, 428, 102 N. W. 194.

After the bankrupt has received his discharge, he has no further interest in any action pending against him, and cannot prosecute an appeal from a judgment rendered against him before the discharge was granted, though his trustee may do so. Knox v. Exchange Bank (1870) 12 Wall. 379, 20 L. Ed. 287; Wilson v. McMullen (1883) 4 Ky. Law Rep. 895.

13. —— Contempt proceedings. — A fine imposed by a state court for a contempt, committed by willfully presenting to the court false affidavits, is not a debt which is released by a discharge in bankruptcy, and a court of bankruptcy will not stay proceedings against the bankrupt for its enforcement. In re Koronsky (1909) 170 Fed. 719, 96 C. C. A. 39, 21 Am. Bankr. Rep. 851. A fine imposed on a bankrupt, although after the filing of the petition in bankruptcy, by a state court for a criminal contempt is not a dischargeable debt in bankruptcy, and proceedings for its enforcement will not be stayed by the court of bankruptcy, if the contempt itself was committed before the filing of the petition. In re Hall (D. C. 1909) 170 Fed. 721, 22 Am. Bankr. Rep. 498.

It is the duty of a court of bankruptcy to stay contempt proceedings against a bankrupt, in a civil suit against him in a state court on a debt or claim from which his discharge would be a release, for twelve months or until his right to a discharge has been determined. In re Adler (1906) 144 Fed. 659, 75 C. C. A. 461, 16 Am. Bankr. Rep. 414.

14. Effect of the stay.—When the court of bankruptcy has exercised its power to order a stay of proceedings in a pending suit against the bankrupt, founded on a debt from which his discharge would be a release, this does not divest the state court of jurisdiction over the case, and the stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon

establishing his claim, may obtain a general judgment. Hill v. Harding (1882) 107 U. S. 633, 2 Sup. Ct. 404, 27 L. Ed. 493; Byers v. First Nat. Bank (1877) 85 Ill. 423; Tinkum v. O'Neale (1869) 5 Nev. 93.

A creditor enforcing an execution on a judgment recovered in the state court, in defiance of an injunction of the court of bankruptcy, in which the debtor has filed a voluntary petition, is guilty of contempt. In re Atkinson (D. C. 1872) 7 N. B. R. 143, Fed. Cas. No. 606. Where a bankrupt obtained an injunctive order from the bankruptcy court staying all suits and proceedings against him on the part of certain creditors, their agents and attorneys, to collect certain specified debts, and thereupon a suit by one of the creditors was discontinued, and afterwards a new suit was brought through the same attorney in the same court for the recovery of the same debt, with allegations of fraud, it was held that the last named suit was a violation of the injunction. In re Schwarz (D. C. 1882) 14 Fed. 787. The jurisdiction of the court of bankruptcy to issue an injunction of this kind may be inquired into by the state court, and if the latter finds that the federal court has acted without authority, the injunction may be disregarded, or the parties may be enjoined from attempting to enforce it. Kittredge v. Emerson (1844) 15 N. H. 227.

A sale of property of the bankrupt on execution, after notice of an injunction granted by the court of bankruptcy staying further proceedings in the action, will render the officer liable. Stinson v. McMurray (1845) 6 Humph. (Tenn.) 339.

Where the suit is against the bankrupt and another jointly, and proceedings are stayed as to the bankrupt, judgment may be rendered against both defendants, and an order made staying execution as to the bankrupt until the question of his discharge is determined. Byers v. First Nat. Bank (1877) 85 Ill. 423.

Where a creditor has already recovered judgment against the bankrupt and a third person, though he is enjoined from enforcing execution as against the bankrupt, this does not affect his right to proceed against the other defendant. Penny v. Taylor (D. C. 1874) 10 N. B. R. 200, Fed. Cas. No. 10,957.

15. Effect of grant or denial of discharge.—An injunction issued by the court of bankruptcy, staying proceedings against the bankrupt in a state court until the question of his discharge shall have been determined, if not ipso facto dissolved by the granting of the discharge, should ordinarily be vacated as a matter of course on the application of the creditor who was stayed or enjoined. In re Rosenthal (D. C. 1901) 108 Fed. 368, 5 Am. Bankr. Rep. 799; In re Flanders (D. C. 1903) 121 Fed. 936, 10 Am. Bankr. Rep. 379; In r Thomas (D. C. 1869) 3 N. B. R. 3 Fed. Cas. No. 13,890; Kittredge v. Em erson (1844) 15 N. H. 227. The sam action should be taken by a state cour when the stay of proceedings wa granted by it. Wakeman v. Throckmo ton (1902) 74 Conn. 616, 51 Atl. 55

An injunction obtained ex parte i the bankruptcy court, after the dis charge has been granted, continuing th previous injunction, was held to hav been improvidently granted and was va cated. In re Herzberg (D. C. 1885) 2 Fed. 699.

If the defendant fails to obtain hi discharge, an action pending agains him in a state court at the time of th adjudication survives. American Wool en Co. v. Maaget (1912) 86 Conn. 234 85 Atl. 583.

16. Pending actions by bankrupt a plaintiff.—A pending action will no abate merely by reason of the bank ruptcy of the plaintiff. Thatcher v Rockwell (1881) 105 U. S. 467, 26 L Ed. 949; King v. Morrison (1844) Ark. 519; Pittsburgh, C. & St. L. R Co. v. Nuzum (1878) 60 Ind. 533 Springer v. Vanderpool (1844) 4 Edw Ch. (N. Y.) 362; Griffin v. Mutual Lif Ins. Co. (1904) 119 Ga. 664, 46 S. E 870.

The transfer of the right of action i a pending suit to a trustee in bankrupt cy is a matter of defense to be set u by the defendant, and the failure of th plaintiff to disclose the fact of his bank ruptcy is not a fraud nor ground for a new trial. Coulson v. Ferree (1904 26 Ky. Law Rep. 959, 82 S. W. 1000 Where no trustee has been appointed the bankrupt still retains title to hi property, and may maintain a suit on a chose in action. Rand v. Iowa Cent R. Co. (1906) 186 N. Y. 58, 78 N. E 574, 116 Am. St. Rep. 530, 9 Ann. Cas 452.

If the trustee in bankruptcy declines to prosecute an action begun by the bankrupt, or expressly or impliedly re nounces his claim to do so, the suit may be continued by the bankrupt in his own name and for his own benefit. Greenall v. Hersum (1915) 220 Mass 278, 107 N. E. 941; Hubbard v. Gould (1906) 74 N. H. 25, 64 Atl. 668; Grif fin v. Mutual Life Ins. Co. (1904) 119 Ga. 664, 46 S. E. 870; Towle v. Rowe (1878) 58 N. H. 394; Ramsey v. Fel lows (1879) 58 N. H. 607; Conner v. Southern Expr. Co. (1871) 42 Ga. 37, 5 Am. Rep. 543, 9 N. B. R. 138. But see Peters v. Wallace (1887) 4 S. W. 914 9 Ky. Law Rep. 215. Before a bank rupt can maintain an action on a claim which, under the adjudication in bank ruptcy, passed to his trustee, on the ground that the trustee elected not to take such claim, it devolves upon the bankrupt to show that the trustee was informed of the nature of the claim and that he elected not to take it.

m v. Buckingham (1880) 36
38. The trustee may consent
bankrupt shall continue to
the action in his own name,
osing his right to whatever
ecovered in the action, or di-
mself of the title passed to
e adjudication in bankruptcy.
v. Rockwell (1881) 105 U.
L. Ed. 949; Gilmore v. Bangs
5 Ga. 403; Peck v. U. S.
Ct. Cl. 364; Mayhew v. Pen-
80) 129 Mass. 332; Williams
1882) 132 Mass. 385; Thatch-
ckwell (1878) 4 Colo. 375;
Paul (1881) 131 Mass. 129.
of the trustee to receive the
the judgment, and of the de-
be protected in paying the
the proper party, may be
proper steps taken for that
Stone v. Jenkins (1900) 176
, 57 N. E. 1002, 79 Am. St.
Griffin v. Mutual Life Ins.
) 119 Ga. 664, 46 S. E. 870;
Exp. Co. v. Connor (1873)
5, 12 N. B. R. 53.
rustee in bankruptcy has yet
inted, the defendant may, in
recovery, protect himself
ability to another suit by a
hen appointed, by an appli-
the court of bankruptcy.
owa Cent. R. Co. (1906) 186
78 N. E. 574, 116 Am. St.
9 Ann. Cas. 542.
been held that the court in
action is tried may direct the
hey find for the plaintiff, to
he recover for the use of his
bankruptcy. Woddail v. Hol-
71) 44 Ga. 18. Or the court
ptcy may make its order re-
he defendant to pay the
the judgment to the trustee.
Jones (D. C. 1848) 23 Vt.
Cas. No. 9,768.
e discharge of the trustee, or
payment of all creditors and
rge of the bankrupt, the lat-
ake up and continue the pros-
any actions which were pend-
time of his bankruptcy and
ain unsettled. Bacon v. Ab-
4) 137 Mass. 397; Peery v.
885) 86 Mo. 652.
ause of action, in a suit pend-
e name of the bankrupt as
the time of the adjudication,
ch does not pass to the trus-
kruptcy, the bankrupt himself
nue to prosecute the action
y reference to his trustee or
proceedings in bankruptcy.
Davenport (1876) 57 N. H.
ere the bankrupt before his
on had begun an action in a
t to recover damages for a
prosecution and arrest, the
ankruptcy has no jurisdiction
him in the further conduct
it, the right of action therein
g in the trustee, and the
needs no permission from the
court of bankruptcy to prosecute such suit to judgment. In re Haensell (D. C. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286.

Pending proceedings in bankruptcy and after the appointment of a trustee, the bankrupt has no standing to commence and prosecute an action in his own name, in relation to any of his property, unless it be exempt property. Pickens v. Dent (1901) 106 Fed. 653, 45 C. C. A. 522, 5 Am. Bankr. Rep. 644; Scheidt v. Goldsmith (1902) 103 Ill. App. 623; Simpson v. Miller (1907) 7 Cal. App. 248, 94 Pac. 252; Buckingham v. Buckingham (1880) 36 Ohio St. 68; Rand v. Sage (1905) 94 Minn. 344, 102 N. W. 864; Remmers v. Remmers (1909) 217 Mo. 541, 117 S. W. 1117. But the assignee of a chose in action may maintain a suit thereon in the name of his assignor, notwithstanding the fact that the latter has been adjudged a bankrupt. Hayes v. Pike (1845) 17 N. H. 564. And so, the purchaser of a chose in action from the trustee of a bankrupt's estate may maintain an action upon it in the name of such trustee. Rogers v. Union Stone Co. (1883) 134 Mass. 31.

17. Intervention of trustee in pending suits.—The trustee is entitled to be made a party to suits pending in state courts by or against the bankrupt, and to assume the control of them and be substituted in place of the bankrupt, and the latter, if necessary, will be enjoined from interfering with the litigation. Gates v. Goodloe (1879) 101 U. S. 612, 25 L. Ed. 895; Samson v. Burton (D. C. 1870) 4 N. B. R. 1, Fed. Cas. No. 12,285; New Orleans Acid & Fertilizer Co. v. Guillory (1906) 117 La. 821, 42 South. 329; Williams v. Lane (1910) 158 Cal. 39, 109 Pac. 873; Neill v. Barbaree (1911) 135 Ga. 771, 70 S. E. 638; Lee v. Pfeffer (1881) 25 Hun (N. Y.) 97. But see Jewett Bros. v. Huffman (1905) 14 N. D. 110, 103 N. W. 408. But some of the state courts maintain that, while the trustee is hereby authorized to apply to the court in which an action is pending to be made a party, yet it rests in the discretion of the state court to grant or refuse such an application, and that its authority is not abridged by the fact that the court of bankruptcy has directed or ordered the trustee to enter his appearance or intervene, and that, in deciding such an application, the state court will be governed by state laws and judicial policy. National Distilling Co. v. Seidel (1899) 103 Wis. 489, 79 N. W. 744; Bank of Commerce v. Elliott (1901) 109 Wis. 648, 85 N. W. 417. The right of a trustee in bankruptcy to intervene in a cause pending in a state court must be determined in and under the practice and rules of the state court. Drew v. Fort Payne Co. (Ala. 1914) 65 So. 71.

If leave of court is necessary to the trustee's intervention in a pending suit,

the objection that it was not obtained comes too late after verdict. Jones v. Meyer Bros. Drug Co. (1901) 25 Tex. Civ. App. 234, 61 S. W. 553.

If a trustee, after intervening in a pending suit has been inadvertently or improperly discharged, and is afterwards reinstated by the referee in bankruptcy, the suit may be revived in his name. Bunch v. Smith (1906) 116 Tenn. 201, 93 S. W. 80.

When the trustee intervenes and takes part in the prosecution or defense of the action, he submits himself to the jurisdiction of the state court, and becomes a party in the ordinary sense and with the ordinary consequences, and a judgment may be taken against him by default. Kingsbury v. Waco State Bank (1902) 30 Tex. Civ. App. 387, 70 S. W. 551. He may become liable for costs accruing after his entrance into the case. Kessler v. Herklotz (1909) 132 App. Div. 278, 117 N. Y. Supp. 45. And he will be bound by the judgment rendered, and if that judgment is unfavorable to the claims of the bankrupt, the court of bankruptcy will not, at the instance of the trustee, enjoin the state court's officers from executing the judgment, or from distributing its proceeds according to the orders of the state court. In re Van Alstyne (D. C. 1900) 100 Fed. 929, 4 Am. Bankr. Rep. 42; In re Neely (1902) 113 Fed. 210, 51 C. C. A. 167, 7 Am. Bankr. Rep. 312. The trustee may be authorized to compromise and settle a suit pending in a state court, in which the bankrupt is plaintiff, but not without consent of the latter's attorney, as he has a lien on any judgment recovered for his services. In re Adamo (D. C. 1907) 151 Fed. 716, 18 Am. Bankr. Rep. 180.

If the bankrupt was one of two joint plaintiffs on the record, the suit must be continued in the name of the trustee in bankruptcy and the other plaintiff, or, if a trustee has not yet been appointed, the action may be supported in the names of the bankrupt and the other plaintiff until a trustee comes in. Stinson v. Fernald (1885) 77 Me. 576, 1 Atl. 742. And see Toulmin v. Hamilton (1845) 7 Ala. 362.

18. —— Effect of trustee declining to intervene.—The trustee is not bound to intervene in a pending suit if satisfied that nothing is to be gained for the estate, and neither the parties to the action nor any court can compel him to intervene. In re Leeds & Catlin Co. (D. C. 1909) 175 Fed. 309, 23 Am. Bankr. Rep. 679; Griffin v. Mutual Life Ins. Co. (1904) 119 Ga. 664, 46 S. E. 870; Heckscher v. Blanton (1911) 111 Va. 648, 69 S. E. 1045, 37 L. R. A. (N. S.) 923; Serra-é Hijo v. Hoffman (1877) 29 La. Ann. 17. See Norton v. Switzer (1876) 93 U. S. 355, 23 L. Ed. 903. He may allow the action to proceed in the name of the bankrupt and claim for the estate the fruits o the litigation if it is successful. Kes ler v. Herklotz (1909) 132 App. Div 278, 117 N. Y. Supp. 45. Where patent infringement suit is pendin against the bankrupt, the court o bankruptcy may grant leave to th plaintiff to file a supplemental bill mak ing the trustee a party defendant, i order that he may be bound by the de cree; but this does not oblige him t make any defense or take anythin more than a nominal part in the pro ceedings; whether or not he shall inter fere actively is a matter to be deter mined by him and by the bankruptc court. Victor Talking Mach. Co. v Hawthorne & Sheble Mfg. Co. (C. C 1909) 173 Fed. 617, 23 Am. Bankr Rep. 234.

If the trustee declines to take up litigation begun by the bankrupt, th suit may proceed in the name of th bankrupt himself, or the bankrupt' surety may be allowed to continue it i the name of the bankrupt but for hi own protection. Bluegrass Canning Co. v. Steward (C. C. A. 1909) 175 Fed 537, 23 Am. Bankr. Rep. 726. But th trustee, by taking this course, will no lose his right to claim whatever ma be recovered. Peck v. U. S. (1879) 15 Ct. Cl. 364. But as the trustee oc cupies substantially the position of purchaser pendente lite, he will be con cluded by the judgment. Eyster v. Gaf (1875) 91 U. S. 521, 23 L. Ed. 403 Heckscher v. Blanton (1911) 111 Va 648, 69 S. E. 1045, 37 L. R. A. (N. S.) 923; Chickering v. Failes (1861) 2 Ill. 507; Mount v. Manhattan Co. (1887) 43 N. J. Eq. 25, 9 Atl. 114 Cleveland v. Boerum (1862) 24 N. Y 613.

Where plaintiff sued for an account ing and a decree that title to land wa in him and that defendant should exe cute title on payment of the amoun due, and pending action plaintiff becam bankrupt, a final decree should declar the amount to be due by the bankrup and authorize its payment, and that o making of such payment his truste should have title executed to him, o on termination of bankruptcy to per son succeeding to plaintiff's right t the land. Scott v. Lunsford (Ga. 1913 80 S. E. 316.

Where a pending action is against th bankrupt as defendant, and the trus tee declines to intervene, a judgmen recovered by the creditor may be prov ed in the bankruptcy proceedings as liquidation or judicial ascertainment of the amount due the creditor, an as a basis of dividends, but it is ef fective for that purpose only. Norto v. Switzer (1876) 93 U. S. 355, 23 L Ed. 903.

19. —— Right dependent on natur of action.—To entitle the trustee to in tervene in a pending action, it must b

ich the estate of the bankrupt
terest, and which may there-
rosecuted or defended by the
or the benefit of the general
In re Haensell (D. C. 1899)
355, 1 Am. Bankr. Rep. 286.
nkrupt has an action pending
he claims damages for a per-
, the trustee cannot claim to
uted as plaintiff. Epstein v.
er (1911) 29 Okl. 337, 116
If the bankrupt has dis-
itle to the property in suit,
e cannot come in and assert
nmons v. Richards (1902) 28
App. 112, 66 S. W. 687. But
appears on the face of the
at the bankrupt, plaintiff in an
s a prima facie right to sue
roperty in question, his trus-
lication to be substituted as
cannot be defeated by the
alleging that his wife is the
in interest. Person v. U. S.
Ct. Cl. 543.

stee has the right to intervene
brought by a judgment credi-
bankrupt to set aside a fraud-
veyance and reach concealed
Slick v. Nimmo (1913) 121 Md.
Atl. 116; In re Riker (D. C.
Fed. 96, 5 Am. Bankr. Rep.
vis v. Vandiver (1905) 143
38 South. 850; Kinmouth
igam (N. J. Eq. 1904) 57 Atl.
nch v. Smith (1906) 116 Tenn.
S. W. 80; Tharp v. Tharp's
(Ky. 1909) 119 S. W. 814;
Globe Bank & Trust Co. (Ky.
S. W. 879. And in such an
recovery by the trustee is for
t of all the creditors, and not
r the original plaintiff, and the
entitled to have turned over
e entire proceeds of a sale of
erty. Bunch v. Smith (1906)
201, 93 S. W. 80. The trus-
be admitted to prosecute to
ment a suit begun by a credi-
void an unlawful preference.
New Orleans Acid & Fertili-
1909) 211 U. S. 496, 29 Sup.
53 L. Ed. 300. Or a suit to
n equitable lien on property of
upt. Snyder v. Smith (1904)
58, 69 N. E. 1089. Or a suit
se a mortgage, in order that
ee may be enabled to claim
us proceeds of the sale after
the mortgage. In re Gerdes
1900) 102 Fed. 318, 4 Am.
ep. 346.

ction by a creditor of an in-
corporation on unpaid stock
ons, the court had power, un-
Code Ohio, § 11,363, to sub-
e trustee in bankruptcy of the
on as plaintiff, with leave to
nended petition and bring in
ubscriber as defendant. Van
McCulley (Ohio, 1913) 104 N.

stee in bankruptcy has a legal status to attack a judgment illegally entered against the bankrupt. Garrison v. Seckendorf (1909) 79 N. J. Law, 203, 74 Atl. 311; Weil v. Simmons (1877) 66 Mo. 617. Or to move to set aside a judgment entered against the bankrupt by default. First Nat. Bank v. Flynn (1902) 117 Iowa, 493, 91 N. W. 784. Or to take the bankrupt's place in an action begun by him to obtain an injunction against the collection of a judgment on the ground that it had been paid. Brandon v. Cabiness (1846) 10 Ala. 155. A defendant's trustee in bankruptcy is entitled to move in the state court for vacation of an attachment on a bankrupt's property. C. Tennant Sons & Co. v. New Jersey Oil & Meal Co. (1912) 139 N. Y. S. 1023, 78 Misc. Rep. 497. CONTRA, Gray v. Arnot (N. D. 1915) 154 N. W. 268.

20. —— Time to intervene.—A trustee in bankruptcy, who assumes to proceed as a party in a cause in a state court before the court has either affirmatively or tacitly allowed him to intervene acts prematurely, and papers filed by him in the cause may be on motion stricken out. Drew v. Fort Payne Co. (Ala. 1914) 65 So. 71.

If the trustee wishes to intervene in a pending suit, he must act promptly, and an unreasonable delay, operating to the prejudice of others in interest, will justify a denial of his application. Freehold Const. Co. v. Bernstein (1908) 60 Misc. Rep. 363, 113 N. Y. Supp. 368. If he allows the suit to go to judgment in the court of first instance, he cannot intervene after it has been taken up on appeal. Weaver Mercantile Co. v. Thurmond (1911) 68 W. Va. 530, 70 S. E. 126, 33 L. R. A. (N. S.) 1061.

21. —— Form of application and pleadings.—The proper method for the trustee to intervene in a suit pending by or against the bankrupt is by his own petition or motion in the court where the suit in pending. Kent v. Downing (1871) 44 Ga. 116. A motion by the bankrupt himself, without any application on the part of the trustee, is not sufficient. Oscar Bonner Oil Co. v. Pennsylvania Oil Co. (1907) 150 Cal. 658, 89 Pac. 613.

The trustee's petition should contain allegations showing the fact and date of the adjudication in bankruptcy. Jones v. Meyer Bros. Drug Co. (1901) 25 Tex. Civ. App. 234, 61 S. W. 553; A. Lehmann & Co. v. Rivers (1903) 110 La. 1079, 35 South. 296. And his own appointment as trustee. Jones v. Meyer Bros. Drug Co. (1901) 25 Tex. Civ. App. 234, 61 S. W. 553. And such facts as show that he has an interest in the litigation as the representative of the creditors at large. Hackett's Ex'rs v. Hackett's Trustee (Ky. 1909) 118 S. W. 377; Kohout v. Chaloupka (1903) 69 Neb. 677, 96 N. W.

173. But he need not prove his appointment and qualification unless his right to recover in the capacity of a trustee in bankruptcy is challenged in such form as the state law requires. Jones v. Meyer Bros. Drug Co. (1901) 25 Tex. Civ. App. 234, 61 S. W. 553.

The bankruptcy act does not undertake to regulate the practice in the state courts, but places on the trustee the official duty of appearing according to the rules and practice of such courts, so as to protect the interests of the general creditors. Bacon v. George (1910) 206 Mass. 566, 92 N. E. 721. The trustee is not exempt from the necessity of proper pleadings and evidence. Wikle v. Jones (1909) 133 Ga. 266, 65 S. E. 577. But he cannot set up either the bankrupt's adjudication or his discharge as a ground for staying the proceedings or in bar of the action, as that is a right personal to the bankrupt. Serra é Hijo v. Hoffman (1877) 29 La. Ann. 17.

Where the trustee is brought in as a defendant, it is not necessary that the plaintiff's pleadings, alleging the trustee's representative capacity, and the transfer to him of the title to the defendant's property, should also state a cause of action against him. Latimer v. McKinnon (1903) 85 App. Div. 224, 83 N. Y. Supp. 315. If the defendant in an action in a state court wishes to object to the substitution of the plaintiff's trustee in bankruptcy in place of the plaintiff himself, he must do so by objection or exception taken at the time; if he goes to trial, it will then be too late to object to any irregularity. Chicago Legal News Co. v. Browne (1882) 103 Ill. 317; Brandon v. Cabiness (1846) 10 Ala. 155.

A bankrupt's trustee, substituted as complainant in a pending suit by the bankrupt to recover personal property, held to occupy the same position that the bankrupt would have occupied in the absence of adjudication. Earl v. Jacobs (Mich. 1913) 142 N. W. 1079.

22. Suits begun after adjudication.—As a general rule, no suit can lawfully be commenced against a bankrupt, in any court, after the adjudication of bankruptcy and until the question of his discharge is determined. Greenwald v. Appell (C. C. 1883) 17 Fed. 140; In re Williams (C. C. 1874) 11 N. B. R. 145, Fed. Cas. No. 17,700; In re Archenbrown (D. C. 1875) 11 N. B. R. 149, Fed. Cas. No. 504; Woolfolk v. Murray (1871) 44 Ga. 133, 10 N. B. R. 540; Wilson v. Capuro (1871) 41 Cal. 545, 4 N. B. R. 714; Rogers v. Wentworth (1878) 58 N. H. 318; Collins v. Scheeline (1877) 52 Cal. 450. Compare Hackett v. Supreme Council A. L. H. (1910) 206 Mass. 139, 92 N. E. 133; Davidson v. Fisher (1889) 41 Minn. 363, 43 N. W. 79; Thompson v. Massie (1884) 41 Ohio St. 307. The court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a de from which his discharge would be release, pending the determination the question of his discharge, althou the action was not begun until after t filing of the petition in bankruptcy. re Basch (D. C. 1899) 97 Fed. 761, Am. Bankr. Rep. 235; In re Cohen (C. 1879) 19 N. B. R. 133, Fed. Cas. N 2,961. But on the application of creditor the court of bankruptcy m grant him leave to begin a suit again the bankrupt in a state court, whe there are special circumstances re dering such a proceeding necessar But when the creditor has brought b suit, pursuant to such leave, and sav his rights thereby, the court of ban ruptcy will then order a stay of furth proceedings to await the determinati of the question of discharge. In Ghirardelli (D. C. 1870) Fed. Cas. N 5,376; Brooks v. Bates (1884) 7 Col 576, 4 Pac. 1069; In re Whiting (C. 1874) Fed. Cas. No. 17,574; In Scott (D. C. 1874) Fed. Cas. No. 12 520.

A creditor holding a promissory not valid and enforceable against the mak at the date of the latter's adjudicati in bankruptcy, but against which t statute of limitations has nearly ru may reduce the same to judgment b suit brought in a state court after su adjudication, and such judgment will e tablish the claim and stop the runni of the statute, though it will not gi the creditor any lien or priority nor e title him to levy on the bankrupt's pro erty. In re McBryde (D. C. 1899) Fed. 686, 3 Am. Bankr. Rep. 729. Th same principle applies where it is ne essary to begin a suit in order to pr serve a mechanic's lien. Clifton v. Fo ter (1869) 103 Mass. 233.

Creditors permitted to recover jud ments against the bankrupt after b adjudication can acquire no lien on a of the property in the custody or co trol of the trustee in bankruptcy b such judgments nor by executions ther on. In re Franklin Lumber Co. (D. 1906) 147 Fed. 852, 17 Am. Bank Rep. 443; McLean v. Rockey (C. 1843) Fed. Cas. No. 8,891; In re D (D. C. 1869) 3 N. B. R. 305, Fed. Ca No. 3,870; In re Tifft (D. C. 1879) N. B. R. 201, Fed. Cas. No. 14,03 Sicard v. Buffalo, N. Y. & P. R. C (C. C. 1879) Fed. Cas. No. 12,831; St art v. Hines (1871) 33 Iowa, 61, 6 B. R. 416; Manwarring v. Kouns (187 35 Tex. 171; Clifton v. Foster (186 103 Mass. 233, 4 Am. Rep. 539; Wi liams v. Merritt (1869) 103 Mass. 18 4 Am. Rep. 521, 4 N. B. R. 706. N can they interfere with the possessi of the trustee in bankruptcy by attac ments. In re Renda (D. C. 1906) 14 Fed. 614, 17 Am. Bankr. Rep. 521; In John L. Nelson & Bro. Co. (D. C. 1907 149 Fed. 590, 18 Am. Bankr. Rep. 6 Williams v. Merritt (1869) 103 Mas 184, 4 Am. Rep. 521, 4 N. B. R. 70

arnishment. In re Cunning-
C. 1879) 19 N. B. R. 276, Fed.
3,478; McAfee v. Arnold
55 Ala. 561, 46 South. 870.
replevin. White v. Schloerb
8 U. S. 542, 20 Sup. Ct. 1007,
1183, 4 Am. Bankr. Rep. 178;
atteville Foundry & Machine
C. 1906) 147 Fed. 828, 17 Am.
ep. 291. But the proceedings
uptcy do not bar an action
he bankrupt by one who was
editor at the time of the ad-
, though of course his judgment will not entitle him to levy execution upon any property except such as the bankrupt may have acquired since the adjudication. Miller v. Warden (1886) 111 Pa. 300, 2 Atl. 90.

Where a promissory note due to a bankrupt, or a judgment recovered thereon, is set apart to him by the trustee in bankruptcy as a part of his exemption, the bankrupt can sue thereon in a state court in his own name. Robinson v. Hall (1858) 11 Gray (Mass.) 483.

(Act July 1, 1898, c. 541, § 12, as amended, Act June 25, 0, c. 412, § 5.) Compositions, when confirmed.

ositions, when confirmed.—a A bankrupt may offer, either r after adjudication, terms of composition to his creditors ut not before, he has been examined in open court or at a of his creditors, and has filed in court the schedule of his and the list of his creditors required to be filed by bankrupts. ositions before adjudication the bankrupt shall file the re-chedules, and thereupon the court shall call a meeting of cred- the allowance of claims, examination of the bankrupt, and tion or conduct of estates, at which meeting the judge or shall preside; and action upon the petition for adjudication delayed until it shall be determined whether such composition confirmed.

application for the confirmation of a composition may be the court of bankruptcy after, but not before, it has been ac-in writing by a majority in number of all creditors whose ave been allowed, which number must represent a majority nt of such claims, and the consideration to be paid by the t to his creditors, and the money necessary to pay all debts ave priority and the cost of the proceedings, have been de-in such place as shall be designated by and subject to the order udge.

late and place, with reference to the convenience of the par-nterest, shall be fixed for the hearing upon each application confirmation of a composition, and such objections as may be its confirmation.

judge shall confirm a composition if satisfied that (1) it is best interests of the creditors; (2) the bankrupt has not been f any of the acts or failed to perform any of the duties which e a bar to his discharge; and (3) the offer and its acceptance good faith and have not been made or procured except as rovided, or by any means, promises, or acts herein forbidden. on the confirmation of a composition, the consideration shall ibuted as the judge shall direct, and the case dismissed. er a composition is not confirmed, the estate shall be admin-in bankruptcy as herein provided. (30 Stat. 549. 36 Stat.

this section, as originally enacted, subdivision a was as follows:
A bankrupt may offer terms of composition to his creditors after, but not e, he has been examined in open court or at a meeting of his creditors and n court the schedule of his property and list of his creditors, required to ed by bankrupts."
was amended by Act June 25, 1910, c. 412, § 5, cited above, to read as rth here.
tion 14 of said amendatory Act June 25, 1910, c. 412, 36 Stat. 842, pro-

vided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Notes of Decisions

1. Nature of composition in bankruptcy.
2. Right to offer composition.
3. Examination of bankrupt.
4. Offer of terms.
5. Acceptance by creditors.
6. —— Creditors entitled to vote.
7. —— Secured creditors.
8. —— Fraudulent inducement to consent.
9. Deposit for payment.
10. Application for confirmation.
11. Notice to creditors.
12. Objections and hearing thereon.
13. Confirmation and proceedings thereon.
14. —— Grounds for refusing confirmation.
15. Performance and distribution.
16. Effect of failure of performance.
17. Operation and effect of composition.
18. —— What debts released.
19. —— Effect on rights of secured creditors.
20. —— Joint liability of others with bankrupt.
21. New promise to pay debt.

1. Nature of composition in bankruptcy.—A composition of a bankrupt with his creditors is at once a settlement and a discharge. In re Ullman (D. C. 1910) 180 Fed. 944, 24 Am. Bankr. Rep. 755. It is in the nature of an accord and satisfaction. Harrison v. Gamble (1888) 69 Mich. 96, 36 N. W. 682. The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective claims. In re Lissburger (D. C. 1880) 2 Fed. 153. In the absence of any expressed restrictions in the law, it should not be held that any act or omission of a bankrupt can operate to prejudice the creditors from entering into a composition whenever they deem it best to do so. In re Joseph (C. C. 1885) 24 Fed. 137. But see In re Rider (D. C. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178, where it is said that the provisions of the bankruptcy act prescribing the requisites of a composition are to be strictly construed as against those who seek by this means to deprive non-assenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings.

The court of bankruptcy may enjoin creditors from harassing the debtor by proceedings at law, while his composition proceeding is pending, except as to proceedings to enforce a valid security. In re Hinsdale (D. C. 1877) Fed. Cas. No. 6,526.

2. Right to offer composition.—A corporation, as well as a natural person, may avail itself of the right to offer a composition to creditors. In re Weber Furniture Co. (D. C. 1876) 13 N. B. R. 529, Fed. Cas. No. 17,330. One member of a firm which has been adjudged bankrupt may submit an offer of composition to the firm creditors and his individual creditors. Pool v. McDonald (C. C. 1877) 15 N. B. R. 560, Fed. Cas. No. 11,268. The refusal or neglect of one of the partners in a bankrupt firm to sign a proposition for composition, unless fraudulent, will not render the proceedings invalid as against the other partners, though he will be deprived of all benefit of it. In re Henry (D. C. 1878) Fed. Cas. No. 6,370.

To authorize any step to be taken for the offer and acceptance of a composition, there must first be a pending case in bankruptcy. In re Reiman (D. C. 1874) Fed. Cas. No. 11,673. Until the amendment of the bankruptcy act in 1910, a debtor was not entitled to offer a composition to his creditors until after there had been an adjudication of bankruptcy entered in his case. In re Back Bay Automobile Co. (D. C. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

The proceeding for a composition will not be vitiated by a statement in the bankrupt's schedule that the value of his real estate is unknown. In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17,377. Nor by an innocent mistake in stating the amount due to a particular creditor. Ex parte Trafton (D. C. 1876) Fed. Cas. No. 14,133.

A bankrupt will not be permitted to trade with his creditors by increasing an offer of composition after he finds his first offer was rejected as insufficient. But a bankrupt who in good faith made an insufficient offer of composition, because of lack of opportunity to examine the property, may be permitted to amend his offer. In re Cockshaw (D. C. 1915) 220 Fed. 239.

Where there is a fatal defect in the proceedings relating to an offer of composition, and a majority of the creditors are apparently willing to accept the offer made, the court will reject such offer, but may permit the bankrupt to make a new offer, if he desires so to do. In re Kinnane Co. (D. C. 1914) 217 Fed. 488, confirmation denied (D. C. 1915) 221 Fed. 762.

If a trustee in bankruptcy has not been appointed before the offer of a composition, none will be appointed after its acceptance by the creditors since his services are not needed. But in that case, the bankrupt himself stands in the place of a trustee, so far as regards such matters as the set-off of mutual debts. Ex parte Howard Nat. Bank (D. C. 1876) Fed. Cas. No. 6,764.

3. Examination of bankrupt.—In the provision of this section that the bankrupt cannot offer terms of composition until after "he has been examined in

: or at a meeting of his cred- phrase "in open court" re- oceedings before the referee. odworth-Stembridge Co. (D. .78 Fed. 372, 24 Am. Bankr.

nination here contemplated is amination of the bankrupt as on the issues of insolvency ommission of acts of bank- rged, but the examination to bankrupt is required to sub- present at the first meeting editors, and hence should be an examination into his re- d liabilities. In re Back Bay e Co. (D. C. 1907) 158 Fed. m. Bankr. Rep. 835; In re C. 1878) 17 N. B. R. 175, No. 11,439. And the referee thority to require any other an the bankrupt to testify. oins (D. C. 1878) 18 N. B. R. Cas. No. 3,943.

tor may be required to attend at an adjourned meeting of ors, but he may be excused oing if he presents a satis- ason therefor, and it is ac- a sufficient vote of the cred- re Tifft (D. C. 1878) 17 N. Fed. Cas. No. 14,029.

ority creditors may insist up- amination of the bankrupt, al- e majority are willing to take the proposition offered with- xamination. In re Little (D. .9 N. B. R. 234, Fed. Cas. No. here creditors conducting the on of the bankrupt in an ap- arnest opposition to the com- uddenly cease, without dis- ause, it is proper for the ref- low another creditor to take ontinue the examination. In hoef (D. C. 1878) Fed. Cas.).

isal of the referee to proceed examination until his fees are ecured is not ground of op- the recording of a resolution the composition. In re Tifft 878) 18 N. B. R. 227, Fed. 14,033.

of terms.—The consideration l to creditors on a composi- ankruptcy is not necessarily may be something equivalent or convertible into money easonable time, including any safe securities or indorsed re Hurst (C. C. 1876) Fed. 6,925; In re Reiman (D. C. d. Cas. No. 11,673. But the notes of the bankrupt, not in- secured in any way, will not a consideration which the feel bound to approve. In re (D. C. 1875) Fed. Cas. No. re Langdon (D. C. 1875) No. 8,058. And if a creditor nd objects, the court will not composition where the alleg- ration is preferred stock in a corporation which the bankrupt has organized for the purpose of continuing his business, and it does not appear that the stock represents any value except the supposed good will of the business, and the effect would be to leave the bankrupt in control of the business and the creditors, in the capacity of stockholders, liable for the corporate debts. In re Woodend (D. C. 1904) 133 Fed. 593, 12 Am. Bankr. Rep. 768.

It is not necessary that the consideration of the composition should be immediately payable; the question as to the time for its payment is one for the creditors to settle, and their judgment will not be reversed except for valid reasons. In re Wilson (D. C. 1878) 18 N. B. R. 300, Fed. Cas. No. 17,785. Ordinarily it is not a sufficient objection to the confirmation of a composition that it is payable in instalments secured by notes. In re Wilson (C. C. 1879) Fed. Cas. No. 17,781; In re McNab & H. Mfg. Co. (D. C. 1878) 18 N. B. R. 388, Fed. Cas No. 8,906; In re Wronkow (C. C. 1878) 18 N. B. R. 81, Fed. Cas. No. 18,105.

A composition agreement to pay more than the estate is able to pay, where the balance is made up by the relatives or friends of the bankrupt, is not evidence of fraud. In re Snelling (D. C. 1878) 19 N. B. R. 120, Fed. Cas. No. 13,140. But a contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal. McCormick v. Solinsky (1907) 152 Fed. 984, 82 C. C. A. 134, 18 Am. Bankr. Rep. 540.

A composition may take the form of ratifying an assignment for the benefit of creditors made by the bankrupt under the state statute. In re Dumahaut (C. C. 1878) Fed. Cas. No. 4,124. Or it may include the adjustment of controversies which a trustee in bankruptcy would have been authorized to compromise. In re Doyle (C. C. A. 1915) 220 Fed. 434; In re Linderman (D. C. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131. Or it may be conditioned upon the surrender of all the bankrupt's property to him and the discontinuance of all pending suits. In re Cavan (D. C. 1879) 19 N. B. R. 303, Fed. Cas. No. 2,528.

The bankruptcy law does not provide or imply that compositions, though informal or even preferential, shall be void as between the parties. In re Black Diamond Copper Min. Co. (1908) 11 Ariz. 415, 95 Pac. 117.

Since the aim of the bankrupt law is equality between creditors, a composition must be for the best interest of all of the creditors, and not of certain ones of a certain class. An offer of composition by a bankrupt corporation held not entitled to confirmation because it gave an unfair preference to certain creditors, gave the individual

creditors no evidence of the deferred payments, and required them to be governed by the vote of the majority of the creditors in enforcing their security. In re Kinnane Co. (D. C. 1915) 221 Fed. 762.

5. Acceptance by creditors.—All of the creditors must have notice of the proposed composition, whether or not they have proved their claims at the time of the offer, and the proposition must be offered and explained to all, and they must have a reasonable opportunity to consider it. In re Rider (D. C. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178. These conditions being fulfilled, the decision of the majority will be binding upon all, where their judgment is exercised in good faith, and there is no evidence of fraud, accident or mistake. In re Weber Furniture Co. (C. C. 1876) 13 N. B. R. 559, Fed. Cas. No. 17,331.

Creditors who have signed an acceptance of the composition will not be permitted afterwards to defeat it by withdrawing their signatures, where it is not alleged that they were procured by fraud or misrepresentations. In re Levy (D. C. 1901) 110 Fed. 744, 6 Am. Bankr. Rep. 299. But the fact that a former offer of composition, confirmation of which was refused because of irregularity in proceedings, was accepted by a creditor, does not preclude him from objecting to a subsequent offer in substantially the same terms. In re Kinnane Co. (D. C. 1915) 221 Fed. 762.

Mere delay, without laches, in obtaining the requisite number of signatures, will not be sufficient ground for refusing to confirm the composition. In re Cavan (D. C. 1879) 19 N. B. R. 303, Fed. Cas. No. 2,528.

Under this section, a proposed composition between a bankrupt and his creditors must be accepted in writing by a majority of the creditors, both in number and amount, before the court can order confirmation. And where a proposed composition between a bankrupt and his creditors has not been assented to by a majority, both in number and amount, of the bankrupt's creditors, the court cannot compel those who have not consented to accept the proposition. In re Goldstein (D. C. 1914) 213 Fed. 115.

Those creditors signing the acceptance must constitute a majority in number and amount of the claims at the time of the hearing on the application to confirm the composition; it is not enough that they constituted a majority at the time the composition was offered or accepted. In re Rider (D. C. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

An assignee holding a large number of claims should be counted as only one creditor in making up this majority, and he is not entitled to as many votes as the creditors whom he represents, nor are his assignors to be counted in d termining the number necessary make a majority. In re Messengill (1 C. 1902) 113 Fed. 366, 7 Am. Bank Rep. 669.

A partnership being a creditor, ar one of the partners may bind the fir by accepting the terms of compositio Bruen v. Marquand (1819) 17 John (N. Y.) 58. But in the case of th bankruptcy of a firm and its member a partner who desires to make a con position with his individual creditor must obtain the acceptance of a ma jority of those creditors; it is no enough that he obtains the acceptanc of a majority of the firm creditor even though the consenting creditor may be more than a majority of a the creditors, both firm and individua In re Ullman (D. C. 1910) 180 Fe 944, 24 Am. Bankr. Rep. 755; In r Spades (D. C. 1875) Fed. Cas. No. 13, 196.

6. —— Creditors entitled to vote.—Only those creditors are entitled t vote on a composition agreement, o be counted in ascertaining the neces sary majority, who have claims tech nically provable in bankruptcy. E parte Trafton (D. C. 1876) Fed. Ca No. 14,133. This does not include th holder of a merely uncertain or con tingent claim. In re Kahn (D. C. 1902 121 Fed. 412, 9 Am. Bankr. Rep. 107 Nor the accommodation maker of note for the bankrupt's benefit. Liebk v. Thomas (1886) 116 U. S. 605, Sup. Ct. 496, 29 L. Ed. 744. Nor on whose claim is for damages for a tort not assessed or liquidated in any way In re Bailey (C. C. 1868) Fed. Cas. No 729. But for this purpose the cour may allow the ascertainment of a unliquidated claim by permitting th prosecution of a pending suit in a stat court, or by ordering an inquiry befor itself. Ex parte Trafton (D. C. 1876) 14 N. B. R. 507, Fed. Cas. No. 14.133 But where, in composition proceedings the amount of the claim of one of the creditors is disputed by the debtor, and an estimate is made to be used merely as showing on what sum the creditor is entitled to vote, such estimate does not estop the debtor from questioning the amount of the claim on which the percentage of the composition shall be calculated in paying the composition. In re Holmes (C. C. 1878) 18 N. B. R. 230, Fed. Cas. No. 6,632a.

To give a valid consent to the acceptance of a composition, it is necessary that the creditor should have proved his claim and secured its allowance. In re Ennis (D. C. 1910) 183 Fed. 859, 25 Am. Bankr. Rep. 383; American Woolen Co. v. Cohen (1911) 142 App. Div. 880, 127 N. Y. Supp. 787; In re Keller (D. C. 1878) 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Bryce (D. C. 1879) 19 N. B. R. 287, Fed. Cas. No. 2,069.

tor whose claims are more t by the claims of the bank- ıst him cannot be counted in urpose of a composition. In l (D. C. 1878) 18 N. B. R. Cas. No. 11,470.

ction to a creditor's vote on f composition, on the ground claim is invalid, cannot be the first time on an appli- confirm the composition. In (D. C. 1878) 18 N. B. R. 328, No. 1,551. The vote or con- person who is not lawfully to ted a creditor will not nulli- ceedings, if the elimination of would not change the result. lshe (C. C. 1878) Fed. Cas. 3.

tor who has bought a claim, intention of preventing the of a pending offer of com- may refuse his acceptance unted in determining the nec- ajority, if he had no fraudu- erely oppressive motive in the n. Ex parte Jewett (D. C. d. Cas. No. 7,303.

n acting under a power of at- voting on a proposed com- must keep strictly within its cannot vary his instructions. xander (D. C. 1875) Fed. Cas.

a married woman votes her against the bankrupt's estate nposition proceedings, an af- her husband that he has giv- uthority to vote in favor of osition validates the wife's e principle of ratification and In re Bailey (C. C. 1876) No. 729.

Secured creditors.—A secur- r, who is fully protected by ty and willing to rest upon to be counted in. In re Van . C. 1876) 14 N. B. R. 425, No. 16.828; In re Snelling 78) 19 N. B. R. 120, Fed. Cas. 0.

tor whose lien or other secu- not fully cover his claim may security valued or foreclosed, e allowed to prove a claim for ce or deficiency, and to this may participate in the com- roceedings. Flower v. Greene- C. 1880) 50 Fed. 190; In re D. C. 1876) Fed. Cas. No. 12,- et v. Ticknor (C. C. 1877) 16 315, Fed. Cas. No. 10,711.

f a bankrupt which are se- by the personal indorsement r may be included as unse- ts in a composition with cred- d the confirmation of such on will discharge the bankrupt of the notes without affecting ty of the indorser. Stauffer- Co. v. Abington Hardware & Co. (1912) 131 La. 715, 60 2.

8. —— **Fraudulent inducement to consent.**—A payment of money to a creditor of a bankrupt, to induce him to consent to a pending offer of composition, or to induce him to forbear an active or threatened opposition, will invalidate the entire composition arrangement; and this rule applies although the required number of creditors accepted the offer of composition, without counting the one to whom payment was made, and even though it does not appear that their action was in any way influenced by the transaction. In re Bennett (D. C. 1876) Fed. Cas. No. 1,312; Fairbanks v. Amoskeag Nat. Bank (C. C. 1889) 38 Fed. 630; In re Sawyer (D. C. 1876) 14 N. B. R. 241, Fed. Cas. No. 12,395; Bullene v. Blain (C. C. 1874) Fed. Cas. No. 2,124; Brownsville Mfg. Co. v. Lockwood (C. C. 1882) 11 Fed. 705. And money so paid may be recovered back by the trustee in bankruptcy, or by the bankrupt himself or by injured creditors. Fairbanks v. Amoskeag Nat. Bank (C. C. 1889) 38 Fed. 630; Bean v. Brookmire (C. C. 1871) Fed. Cas. No. 1,169. Except in cases where the payment was made out of property which was not included in the bankrupt's schedule and was not available as assets in the bankruptcy. National Park Bank v. People's Bank (C. C. 1879) Fed. Cas. No. 10,049.

A composition is vitiated where the consent of a creditor is obtained by the bankrupt's secret promise to pay him a larger share of his debt than the other creditors will receive under the composition. Citizens' Nat. Bank v. Kerney (Ind. App. 1915) 108 N. E. 139; Carey v. Hess (1887) 112 Ind. 398, 14 N. E. 235. And see Claflin v. Torlina (1874) 11 N. B. R. 521, 56 Mo. 369; Bean v. Amsinck (C. C. 1873) 8 N. B. R. 228, Fed. Cas. No. 1,167; In re Keller (D. C. 1878) 18 N. B. R. 331, Fed. Cas. No. 7,654; Woodman v. Stow (1882) 11 Ill. App. 613; Russell v. Rogers (1833) 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; Bullene v. Blain (C. C. 1874) Fed. Cas. No. 2,124; Cullingworth v. Loyd (1840) 2 Beav. 385. See Jacobs v. Siff (1911) 74 Misc. Rep. 58, 131 N. Y. Supp. 656.

A composition will be vitiated where the inducement offered to a creditor to procure his consent is that the bankrupt will give him security for the remainder of his debt, or additional security or better security than he now holds. Chuck v. Mesritz (C. C. 1817) Fed. Cas. No. 2,710; Bean v. Brookmire (C. C. 1873) 7 N. B. R. 568, Fed. Cas. No. 1,170; Howell v. Todd (C. C. 1876) Fed. Cas. No. 6,783; Way v. Langley (1864) 15 Ohio St. 392; Mallouck v. American Exchange Nat. Bank (1912) 75 Misc. Rep. 285, 135 N. Y. Supp. 78. Where an insolvent debtor, desiring to obtain his release in bankruptcy by a composition with his creditors, agrees to execute

his notes to one of the creditors for the balance of his debt, the notes so given are void. Tinker v. Hurst (1888) 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.

A composition may be set aside on account of a fraudulent or secret advantage given to one creditor, though it does not appear that the bankrupt himself procured it or was a party to it. In re Sawyer (D. C. 1876) Fed. Cas. No. 12,395. Where an offer of money was made to two creditors, by the bankrupt's bookkeeper, to induce them to consent to a composition, and the bankrupt had no actual knowledge of the offer, but the bookkeeper was employed generally to see the creditors and procure their consent, held, that the bankrupt was chargeable with what his representative did in the matter, and the proceeding was vitiated and the composition must fail. In re Bennett (D. C. 1876) Fed. Cas. No. 1,312. Where a creditor was induced to consent to the composition by an undefined expectation of advantage held out to him by the indorser of the note which the creditor held, the composition was properly set aside, though it did not appear that the bankrupt had anything to do with it. In re Sawyer (D. C. 1876) Fed. Cas. No. 12,395. The signature of a creditor to the composition agreement, obtained upon the promise of another creditor to give him the promisor's trade in the future will invalidate the composition. In re Shine (D. C. 1877) Fed. Cas. No. 12,788.

That creditors holding notes of a bankrupt corporation, indorsed by individuals connected with the bankrupt, before accepting a composition, obtained an agreement by such indorsers that they should not thereby be discharged, does not invalidate the composition, since that would be the legal result of it without any promise. In re B. Jacobson & Son Co. (C. C. A. 1912) 196 Fed. 949, 28 Am. Bankr. Rep. 492.

A bankrupt may use his credit to acquire the money required for the purposes of a composition offered conformably to the bankruptcy act to his creditors, and what inducement he gives to the person loaning him the money is a matter which does not concern the existing creditors, and hence does not affect the validity of the composition. And extortion or attempted extortion as a consideration for acting or forbearing to act in bankruptcy proceedings (which is expressly forbidden by the statute) cannot be inferred from a promise by the bankrupt, after adjudication, that if certain creditors would loan him a specified sum to be used in paying the consideration of an offered composition, he would pay them the balance of their claim when such composition was confirmed, after deducting their share of the consideration of the composition, which promise they accepted, making the loan for the said purpose. Zavelo v. Reeves (1913) 227 U. S. 625, 33 Sup. Ct. 365, L. Ed. 676, 29 Am. Bankr. Rep. 49 And see Hickman v. Galveston D Goods Co. (1906) 42 Tex. Civ. Ap 582, 94 S. W. 157.

When a bankrupt has proposed ter of composition and the same have be approved by a majority of the creditor such creditors and their attorneys ha an interest in common in securing acceptance of the composition offere and thereafter may properly participa in securing the necessary consent And it is not improper for the attorn for the receiver, having secured po ers of attorney to that end, to repr sent and vote for creditors in favor the composition, so long as no fal statements are made, and there is trickery or collusion between creditor and the bankrupt, and no fraud pra ticed. In re McLellan (D. C. 191 204 Fed. 482, 30 Am. Bankr. Rep. 32

9. Deposit for payment.—The r quirement of this section as to the d posit of money on a composition agre ment is imperative, and if it is n complied with, the composition wi not be confirmed, although the applic tion is not opposed by any creditor. I re Frear (D. C. 1903) 120 Fed. 97 10 Am. Bankr. Rep. 199. Confirmatio of the composition will be withhe where the money deposited to cov the cost of the proceedings is not su ficient in amount. In re Rider (D. 1899) 96 Fed. 808, 3 Am. Bankr. Re 178. The "cost of the proceedings" i cludes any fees which may be payab under the statute in disbursing t money. In re Mayer (D. C. 1900) Nat. Bankr. News, 527.

Where a bankrupt obtained from third person and deposited funds carry out a composition which was su sequently withdrawn, expenses incu red pending the composition, whic would not have been incurred if t proceedings had gone forward as ori inally contemplated, were payable o of the deposit. In re Wiener (D. 1914) 215 Fed. 278. Where a thi person advances money to a bankrup to be deposited to perform an offer composition, such deposit is liable f expenses incurred by reason of the st secured by the bankrupt by the comp sition proceedings, if they fail, thoug not for delay occasioned by the opp sition of a creditor to the offer of co position. In re Wiener (D. C. 191 217 Fed. 173.

On petition to the court of bankrup cy, the bankrupt may be relieved fro the necessity of depositing the sum ne essary to pay the costs and fees of t proceedings, on filing a stipulation, a ceptable to the court, that it will p all such costs and fees as if the mon were actually in court. In re J. White & Co. (D. C. 1915) 225 Fe 796.

The "debts which have priority," f the purposes of this section, include a

from the bankrupt or on his In re Flynn (D. C. 1905) 145, 13 Am. Bankr. Rep. 720. he consideration to be paid to tors, it is held that the bank- required to deposit the per- offered, not only on all claims re confirmation, but also on claims listed by him in his but he is not required to ufficient to cover such per- n secured claims, nor for any deficiency thereon, if it has een ascertained and filed. In y (D. C. 1906) 144 Fed. 901, Bankr. Rep. 345; In re Atlan- . Co. (D. C. 1915) 228 Fed.

lication for confirmation.—An composition may be presented eeting of creditors and exam- f bankrupt provided that no- the offer will be made is given rs. In re Fox (D. C. 1915) 135, petition to revise denied 23 Fed. 1022, 138 C. C. A.

after a composition has been creditors, a new or amend- is made, the court is without to confirm it until it has been omitted in the same manner iginal offer and all creditors an opportunity to accept or In re Kinnane Co. (D. C. 7 Fed. 488, confirmation de- C. 1915) 221 Fed. 762.

nfirmation or rejection of a on must be passed upon and y the judge of the court of cy; it is not within the ju- of the referee. In re Blood- embridge Co. (D. C. 1910) 178 , 24 Am. Bankr. Rep. 156. referee may appoint a day for the composition before the hearing, and may issue the notices to creditors. In re (D. C. 1900) 104 Fed. 866, 4 kr. Rep. 741. And it is proper issible for the judge to send to the referee to ascertain and e facts, when objections are the approval of the composi- h depend on disputed matters r even in an unopposed case, judge has not sufficient facts m to form a clear judgment as opriety of confirming the com- Adler v. Jones (1901) 109 48 C. C. A. 761, 6 Am. Bankr. ; In re Levy (D. C. 1908) 780, 22 Am. Bankr. Rep. 769; alshe (C. C. 1876) Fed. Cas. 8; In re Scott (D. C. 1876) R. 73, Fed. Cas. No. 12,519.

ice to creditors.—All creditors notified of a proposed compo- ether or not they have proved ims and honestly advised of condition of the debtor's af- re Kinnane Co. (D. C. 1914) 488, confirmation denied (D. 221 Fed. 762; In re Cadenas & Coe (D. C. 1910) 178 Fed. 158, 24 Am. Bankr. Rep. 135; In re Hilborn (D. C. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741.

12. Objections and hearing thereon.—Objecting creditors, irrespective of number or amount, may successfully oppose confirmation of a composition, by alleging and proving one or more of the provisions of the bankruptcy act made a sufficient ground for denial of confirmation. In re Rivkin (D. C. 1914) 216 Fed. 218.

Only those creditors who have proved their claims are entitled to object to the confirmation of a composition. In re Scott (D. C. 1876) 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Keller (D. C. 1878) 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Mathers (D. C. 1878) 17 N. B. R. 225, Fed. Cas. No. 9,274; In re Bryce (D. C. 1879) 19 N. B. R. 287, Fed. Cas. No. 2,069.

It is immaterial that the opposing creditor bought up a claim against the bankrupt for the very purpose of using it in opposition to the proposed composition, if he had no motive in so doing that was fraudulent or oppressive, but only a desire to realize as much as possible from the estate. Ex parte Morris (D. C. 1875) 12 N. B. R. 170, Fed. Cas. No. 7,303; In re Comstock (D. C. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65.

Objections may be based on the commission of acts by the bankrupt which would bar his application for a discharge. In re Cohen (D. C. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84. And on matters peculiar to the composition, such as irregularities in the offer or its acceptance, the genuineness of signatures purporting to accept, fraudulent practices in inducing creditors to accept, or the acceptance by a sufficient proportion of the creditors. In re Rivkin (D. C. 1914) 216 Fed. 218; In re Scott (D. C. 1876) 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Asten (D. C. 1876) Fed. Cas. No. 594. But a general objection, to the effect that the estate could pay more than the percentage offered by the bankrupt, will not avail unless the disparity is great and evident. In re Welles (D. C. 1878) 18 N. B. R. 525, Fed. Cas. No. 17,377.

Facts known to creditors when they accepted the offer of composition, or when the composition was confirmed, cannot afterwards be used to vitiate or destroy it. In re South Boston Iron Co. (C. C. 1876) Fed. Cas. No. 13,183.

Creditors desiring to oppose the application for confirmation should be required to enter their appearance and to file written specifications of the grounds of their opposition. Adler v. Jones (1901) 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; City Nat. Bank v. Doolittle (1901) 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

The burden of sustaining specifica-

tions of objection to the confirmation of an offer of composition rests on the objecting creditors. Bolles v. Kelley (1915) 222 Fed. 63, 137 C. C. A. 601; In re Rivkin (D. C. 1914) 216 Fed. 218; In re H. J. Arrington Co. (D. C. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64; City Nat. Bank v. Doolittle (1901) 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 735.

The court will not permit objections to an offer in composition which had been heard and sustained to be withdrawn. In re Levenson (D. C. 1914) 223 Fed. 874.

The bankrupt has the right and capacity to appear and controvert the objections offered by creditors. In re French (D. C. 1909) 181 Fed. 583, 25 Am. Bankr. Rep. 77.

13. Confirmation and proceedings thereon.—It is the duty of the court to confirm a composition if it is for the interest of creditors, and the bankrupt has not done or omitted to do anything to prevent a discharge, and the offer and acceptance are in good faith, and have not been procured by improper means. In re McLellan (D. C. 1913) 204 Fed. 482, 30 Am. Bankr. Rep. 325; In re Silberstein (D. C. 1915) 225 Fed. 665.

As this section contemplates that dissenting creditors may be compelled to accept the percentage which is satisfactory to the majority, and may be deprived of their remedies on the balance of their claims, it should be strictly construed. Broadway Trust Co. v. Manheim (1905) 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

The court can inquire whether a composition offered by a bankrupt conforms to the requirements of subdivision "d" of this section though it has been approved by a majority of the creditors and there is no objection made thereto. In re Kinnane Co. (D. C. 1915) 221 Fed. 762. Denying confirmation (D. C. 1914) 217 Fed. 488.

Refusal to confirm composition offered by bankrupt and recommended by referee, and remand of matter to referee, in order that claimant, denied a hearing because of delay in filing and serving specifications, might have its day in court, held within the discretion of the trial judge. In re Soloway & Katz (C. C. A. 1914) 211 Fed. 333.

To justify the confirmation of a composition, it must appear to the court to be for the best interest of all the creditors, not merely for the advantage of certain creditors or of a certain class. In re Hannahs (D. C. 1876) Fed. Cas. No. 6,033; In re Purcell (D. C. 1878) 18 N. B. R. 447, Fed. Cas. No. 11,470. Though it is opposed by only a small minority of the creditors, yet the court has power to reject it if satisfied that a settlement of the estate through the agency of a trustee in bankruptcy would be more for their interest. In re Whipple (C. C. 1858) Fed. Cas. No. 17,513.

The approval of a majority of th creditors is prima facie evidence th the acceptance of the offer will be fo the best interest of all concerned, an the burden of proof will rest upo those who oppose the confirmation o this ground. In re Goldstein (D. C 1914) 213 Fed. 115; In re Barde (D C. 1913) 207 Fed. 654; In re Hoxi (D. C. 1910) 180 Fed. 508, 25 An Bankr. Rep. 32; In re Waynesbor Drug Co. (D. C. 1907) 157 Fed. 10 19 Am. Bankr. Rep. 487; In re Josep (C. C. 1885) 24 Fed. 137.

If objection is interposed by a minor ity, it becomes the duty of the court t make an independent investigation an determination. In re Waynesboro Dru Co. (D. C. 1907) 157 Fed. 101, 19 An Bankr. Rep. 487; In re Keiler (D. C 1878) 18 N. B. R. 36, Fed. Cas. No 7,648.

In determining this question, the of fer of composition should be compare with what the creditors would probabl receive upon a settlement of the estat by a trustee in bankruptcy, and no with what the debtor might possibly b able to pay them. In re Whipple (D C. 1875) Fed. Cas. No. 17,513. Onl those assets should be considere which have been surrendered or can b recovered and made available for dis tribution. In re Linderman (D. C 1909) 166 Fed. 593, 22 Am. Bankr Rep. 131.

14. —— Grounds for refusing confir mation.—As to the objection that th bankrupt has been guilty of acts o omissions which would bar his dis charge, if it is clearly made out thi objection must prevail, and the com position must be rejected, however ad vantageous to creditors it might hav been, and though it will result in thei securing a smaller percentage of thei debts than they would have receive under the composition. In re Griffi (D. C. 1910) 180 Fed. 792, 25 Am Bankr. Rep. 206; In re Comstock (D C. 1907) 154 Fed. 747, 19 Am. Bankr Rep. 65; In re Godwin (D. C. 1903) 122 Fed. 111, 10 Am. Bankr. Rep. 252

An objection of this kind will not b sustained unless it appears that th conduct of the bankrupt to which ex ception is taken was willfully and inten tionally false, fraudulent, or deceitful This applies to the objection that h failed to keep proper books of accoun or concealed or destroyed his books o accounts. In re Barde (D. C. 1913) 207 Fed. 654; In re Silberstein (D. C 1915) 225 Fed. 665; In re Rivkin (D C. 1914) 216 Fed. 218; In re Sabse vitz (D. C. 1912) 197 Fed. 109, 28 Am Bankr. Rep. 623; In re Olman (D. C 1902) 134 Fed. 681, 13 Am. Bankr Rep. 395; In re Wilson (D. C. 1901) 107 Fed. 83, 5 Am. Bankr. Rep. 849; In re Barde (D. C. 1913) 207 Fed. 654 Or that he omitted to include in his schedule property which belonged to his estate. In re B. Jacobson & Son

12) 196 Fed. 949, 116 C. C. A. Am. Bankr. Rep. 492; In re (C. C. 1875) 13 N. B. R. 128, s. No. 11,675. Or that he obnoney or property on credit s of a materially false financial nt. In re Witman (D. C. 1914) . 286; In re Levenson (D. C. 23 Fed. 874; In re Sabsevitz 1912) 197 Fed. 109, 28 Am. Rep. 623; In re O'Callaghan 1912) 199 Fed. 662, 29 Am. Rep. 304; In re Seligman (D.) 163 Fed. 549, 20 Am. Bankr. 4. Or that he concealed, reor misappropriated property or d it in fraud of creditors. In rstein (D. C. 1915) 225 Fed. re Burman (D. C. 1913) 210 2; In re Bloch (D. C. 1878) . R. 328, Fed. Cas. No. 1,551. he gave fraudulent preferences. Rivkin (D. C. 1914) 216 Fed. re McLellan (D. C. 1913) 204 2; In re Jacobs (D. C. 1879) . R. 48, Fed. Cas. No. 7,159. ing by a master that he was not that the bankrupt had not ilty of knowingly and fraduaking a false oath in proceed- the bankruptcy court held int to sustain objections to con-, on the ground that the bankad committed perjury in the ings. In re Rivkin (D. C. 1914) . 218.

lso proper for the court to con- y irregularities in the previous ings, and to refuse to confirm ular composition. In re Frear 1903) 120 Fed. 978, 10 Am. Rep. 199. But irregularities re the effect of mere mistake, of fraud, are not necessarily n re Henry (D. C. 1878) Fed. . 6,370.

proper to refuse to confirm a tion when there is evidence proceedings are collusive. In r (D. C. 1878) 18 N. B. R. 36, s. No. 7,658; In re Allen (D. 17 N. B. R. 157, Fed. Cas. No. ut though there are indicia of he court should not refuse to the composition without giving rupt and the majority creditors ortunity to be heard. In re Furniture Co. (C. C. 1876) 13 559, Fed. Cas. No. 17,331.

mation should be refused when rs that the creditors have not nestly and fully advised of the ndition of the debtor's affairs. eiler (D. C. 1878) 18 N. B. R. Cas. No. 7,648; In re Greene-D. C. 1878) Fed. Cas. No. 5,-

questions of policy and expedi- ve been fairly before the cred- nd disposed of by them, and tion has been approved by the court, it will not be interfered appeal. In re Wilson (C. C. Fed. Cas. No. 17,781.

appears that the creditors will receive under the composition less than may reasonably be expected by an administration of the assets of the bankrupt in due course, the composition should be denied, as not being for their best interest; otherwise it should be confirmed. Adler v. Jones (1901) 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Rider, 1 Nat. Bankr. News, 483; In re Keiler (D. C. 1878) 18 N. B. R. 36, Fed. Cas. No. 7,648; In re H. J. Arrington Co. (D. C. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64. And see In re Waynesboro Drug Co. (D. C. 1907) 157 Fed. 101, 19 Am. Bankr. Rep. 487; Riley v. Pope (D. C. 1911) 186 Fed. 857, 26 Am. Bankr. Rep. 618.

The court should refuse to confirm a composition when it clearly appears that there have been preferential payments, and there is reasonable cause to believe that they, or any substantial part of the same, may be recovered by the trustee, and it also appears that the estate in hand, with such preferences recovered and added, will net the creditors a greater percentage than is offered in the proposed composition. In re McLellan (D. C. 1913) 204 Fed. 482, 30 Am. Bankr. Rep. 325. And the court may also consider the relations of the creditors favoring the composition to the debtor, and the relative number of creditors whose individual opinions are expressed in person in the acceptance of the offer as compared with those who dissent. In re Weber Furniture Co. (D. C. 1876) 13 N. B. R. 529, Fed. Cas. No. 17,330.

15. Performance and distribution.—A summary order for the enforcement of a composition agreement will not be made where it does not appear that the creditors are willing and desirous to proceed with it. In re Remsen (D. C. 1877) Fed. Cas. No. 11,698.

Money payable to a creditor on a composition cannot be attached or its payment obstructed by proceedings in another court, and the court of bankruptcy will not suspend or deny the creditor's right to receive it, except in favor of one who claims a specific lien thereon, or who has procured the appointment of a receiver to take the creditor's title. In re Kohlsaat (D. C. 1878) 18 N. B. R. 570, Fed. Cas. No. 7,918.

The court has no power to require the bankrupt to pay the composition percentage to a creditor whose claim was not scheduled or filed, or proved within a year after the adjudication. In re Abrams & Rubins (D. C. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Lane (D. C. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 136.

Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares. Ex parte Hamlin (D. C. 1877) Fed. Cas. No. 5,993.

A fee cannot be allowed to the bank-

rupt's attorney for his services in securing the confirmation of the composition, when it was opposed by creditors in good faith and on reasonable grounds. In re Martin (D. C. 1907) 152 Fed. 582.

A composition proceeding will be regarded as pending until all notes become due which were given by the debtor to effect the same. In re Hinsdale (D. C. 1877) Fed. Cas. No. 6,526.

Even after the confirmation of a composition, the estate may be reopened for the purpose of recovering or receiving the surrender of a preference, though it will enure to the benefit of the bankrupt himself by reason of the composition. In re B. Feinberg & Sons (D. C. 1910) 187 Fed. 283, 26 Am. Bankr. Rep. 587.

Where money deposited by the bankrupt with the clerk pursuant to an offer in composition, during litigation by minority creditors, earned interest, on final confirmation of the composition the bankrupt is entitled to the return of such interest. In re Kelley (D. C. 1915) 223 Fed. 383.

16. Effect of failure of performance.—The acceptance of a composition and its confirmation by the court will not operate as a discharge or release of the debtor from any given debt, unless the distributive share of that creditor under the composition agreement is actually paid or unconditionally tendered to him. In re Hurst (C. C. 1876) 13 N. B. R. 455, Fed. Cas. No. 6,925; Harrison v. Gamble (1888) 69 Mich. 96, 36 N. W. 682; Whittemore v. Stephens (1882) 48 Mich. 573, 12 N. W. 858. And the question whether such payment or tender has been made is open to trial in any court in which the debt may be sued for. Whittemore v. Stephens (1882) 48 Mich. 573, 12 N. W. 858. Upon failure of performance of the condition of a composition, the creditor may pursue his appropriate remedies for the recovery of his original debt (not merely for the percentage offered under the composition) in any proper court. In re Maytag-Mason Motor Co. (D. C. 1915) 223 Fed. 684; Ransom v. Geer (C. C. 1882) 12 Fed. 607; Harrison v. Gamble (1888) 69 Mich. 96, 36 N. W. 682; Page v. Carton (1909) 64 Misc. Rep. 645, 120 N. Y. Supp. 277. Compare In re Bayly (C. C. 1879) 19 N. B. R. 73, Fed. Cas. No. 1,144.

If the debtor is subsequently adjudged bankrupt in a fresh proceeding on his own petition, having paid the cash part of a composition previously effected, but not the notes which were given for the remainder of the percentage offered, the creditors may prove their original claims, giving credit for the cash received. In re A. B. Carton & Co. (D. C. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; Brookmire v. Bean (C. C. 1875) 12 N. B. R. 217, Fed. Cas. No. 1,942.

Mere delay in paying composition notes, occasioned by legal or other difficulties, does not ipso facto avoid the composition, nor does failure to pay one creditor according to the composition forfeit the bankrupt's rights as to creditors punctually paid. In re Kohlsaat (D. C. 1878) 18 N. B. R. 570, Fed. Cas. No. 7,918.

Where a bankrupt executes composition notes with an agreement that if any note shall be in default all shall become due, and a creditor taking the notes assigns his claim to a third person, and takes the latter's notes in payment and retains the composition notes as security, he cannot proceed on the composition notes until after default on the other notes. Willey v. Browne (1903) 206 Pa. 322, 55 Atl. 1029.

One who has agreed to become a surety on a composition will not be summarily compelled to give security, where it appears that the bankrupt has abandoned the composition, and has not given the notes agreed upon as a part of it. In re Remsen (D. C. 1877) Fed. Cas. No. 11,698.

17. Operation and effect of composition.—The confirmation and performance of a composition operate as a discharge by operation of law, and release the bankrupt from all of his debts which would be barred by a discharge and in like manner terminate all remedies of creditors for the enforcement of their claims against either the bankrupt or his property. Herrington v. Davitt (Sup. 1914) 145 N. Y. Supp 452; In re Bjornstad (D. C. 1881) 5 Fed. 791; In re Becket (C. C. 1875) 12 N. B. R. 201, Fed. Cas. No. 1,210; Taylor v. Skiles (1904) 113 Tenn 288, 81 S. W. 1258; Broadway Trust Co. v. Manheim (1905) 47 Misc. Rep 415, 95 N. Y. Supp. 93; Mandell v Levy (1905) 47 Misc. Rep. 147, 93 N Y. Supp. 545; Harrison v. Gamble (1888) 69 Mich. 96, 36 N. W. 682 Denny v. Merrifield (1880) 128 Mass 228; Turner v. Hudson (1909) 105 Me 476, 75 Atl. 45, 18 Ann. Cas. 600 Where an offer of composition was accepted by creditors of a firm adjudged a bankrupt without a proviso that the partners individually should be discharged from partnership debts or without any agreement that they should remain liable, the mere fact that the referee and court and the parties had a mistaken view as to what the law was did not affect the legal liability of the partners. Abbott v. Anderson (1914) 106 N. E. 782, 265 Ill. 285, affirming judgment (1914) 184 Ill. App. 598.

The effect of the confirmation of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with title to his property free from the claims of creditors. Cumberland Glass Mfg. Co. v. De Witt (1915) 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042; Ligon v. Allen (1879) 56 Miss. 632; McDonald v. H. E. Taylor & Co. (1911) 144 App. Div. 329, 128

Supp. 1048. On confirmation of osition, money belonging to the t in the hands of a third per- ich had not been reduced to on by the trustee, at once re- in the bankrupt, free of any r right of the trustee. In re necht (1915) 223 Fed. 417, 139 . 11. After confirmation of a tion, the court of bankruptcy jurisdiction of a petition by the t for an order requiring the s of property claimed by him id over to him, when the prop- s not in the custody or control court of bankruptcy when the tion was confirmed. In re Hol- C. A. 1916) 229 Fed. 349.

a composition has been con- the bankrupt is at liberty to h his assets as he may please. haw (D. C. 1881) 9 Fed. 495. y prosecute suits in his own r may consent to the further tion of an action in the name rustee in bankruptcy, after the tion, and in that case the court h the suit is pending will not ed to dismiss it on account of ing of the estate in bankruptcy. Jenkins (1900) 176 Mass. 544, . 1002.

djudication setting off against ved claim of a creditor a claim it which was listed among the t's unliquidated assets was in- in bankruptcy proceedings ter- g in a decree in composition, such creditor, though objecting composition, made no attempt the set-off adjudicated in the tcy court, made no opposition confirmation of the composition, and holds its composition divi- the full amount of its claim in e manner as other creditors. land Glass Mfg. Co. v. De 915) 237 U. S. 447, 35 Sup. Ct. L. Ed. 1042.

bankrupt recovers his title in e condition in which it was be- bankruptcy, and a merely de- title to certain property is not by the confirmation of a com- agreement. Zavelo v. Cohen 1908) 156 Ala. 517, 47 South.

confirmation of a composition s the functions of the trustee dministering the estate. In re (D. C. 1879) 19 N. B. R. 161, as. No. 645. The requirement case shall be "dismissed" up- confirmation of a composition t forbid such further proceed- the case as are necessary to te it, and proceedings may be fore the referee to pass upon unts of the trustee, and to dis- him and close the estate. Unit- es v. Sondheim (D. C. 1910) d. 378. But no new claims the estate can be filed or al- In re Cooper Bros. (D. C. 1908) 166 Fed. 932, 20 Am. Bankr. Rep. 634. But a question as to what amount the trustee shall pay over to the bankrupt, as the balance in his hands, should be determined by the referee under a special order of the court. In re August (D. C. 1879) 19 N. B. R. 161, Fed. Cas. No. 645.

The trustee cannot be held personally liable to a creditor for the difference between the dividend received under the composition agreement and the greater dividend which the trustee assured the creditor he would receive, such assurance being merely an expression of opinion that the larger dividend could be realized. Bossak v. Siff (1911) 147 App. Div. 177, 132 N. Y. Supp. 109.

All creditors who have proved their claims will be regarded as parties to the bankruptcy proceeding so as to be bound and concluded by the composition. Clairmonte v. Napier Motor Co. (1909) 11 Cal. App. 265, 104 Pac. 712; In re Rodger (D. C. 1831) 18 N. B. R. 381, Fed. Cas. No. 11,992. After the confirmation of a composition it is too late for creditors to claim that a conveyance made by the debtor before the bankruptcy was fraudulent as against them. McMaster v. Campbell (1879) 41 Mich. 513, 2 N. W. 836.

A composition prevents creditors from maintaining any suit or action for the enforcement of a claim or the collection of a debt which would be released by a discharge in bankruptcy. Taylor v. Skiles (1904) 113 Tenn. 288, 81 S. W. 1258; Hem v. Allen (1913) 179 Ill. App. 223. A suit against the bankrupt in a state court by a creditor included in the composition may be enjoined pending the completion of the composition. In re Shafer (D. C. 1878) 17 N. B. R. 116, Fed. Cas. No. 12,695. But after the confirmation of the composition, the court of bankruptcy will not interfere by injunction, as the debtor has a complete defense by pleading the composition and his consequent discharge. In re Negley (D. C. 1884) 20 Fed. 499.

A creditor who receives a composition with full knowledge of the facts cannot afterwards require a set-off to be enforced against the debtor in a court of equity, which he had opportunity to assert at the time the composition was effected. Hunt v. Holmes (D. C. 1878) 16 N. B. R. 101, Fed. Cas. No. 6,890.

Where the assignee of a creditor, party to a composition agreement, sued on the debt, the burden was upon the debtor to prove tender to the plaintiff or its assignor of the proportion of the debt called for by the composition. Ocean Accident & Guarantee Corporation Limited of London, England, v. Beck (Sup. 1915) 153 N. Y. S. 932.

A composition in bankruptcy must be pleaded in order to be a bar to an action. Consolidated Rubber Tire Co. v.

Vehicle Equipment Co. (1907) 121 App. Div. 764, 106 N. Y. Supp. 599. If set up after the time for final performance of the terms of the composition, the plea must not only aver the proceedings leading up to the composition and its confirmation by the court, but also performance on the part of the debtor, or a sufficient excuse for failure to perform. Harrison v. Gamble (1888) 69 Mich. 96, 36 N. W. 682; Dobson v. Noyes (1888) 39 Kan. 471, 18 Pac. 697.

A composition confirmed by the court of bankruptcy cannot be impeached in any collateral proceeding in a state court. Loeffler v. Wright (1910) 13 Cal. App. 224, 109 Pac. 269; Farwell v. Raddin (1880) 129 Mass. 7.

18. —— What debts released.—A bankrupt, having effected a composition, is released from all his provable debts. Herschman v. Bolster (1915) 220 Mass. 137, 107 N. E. 543. All debts to which a bankrupt might plead in bar a discharge obtained in the ordinary course of administration will be equally released by the confirmation of a composition. In re Jersey Island Packing Co. (D. C. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417; Consolidated Rubber Tire Co. v. Vehicle Equipment Co. (1907) 121 App. Div. 764, 106 N. Y. Supp. 599. An action on a debt or claim will not be barred by composition proceedings if it would not be discharged by the debtor's discharge in bankruptcy. Wilmot v. Mudge (1880) 103 U. S. 217, 26 L. Ed. 536; Bayly v. Washington & Lee University (1882) 106 U. S. 11, 1 Sup. Ct. 88, 27 L. Ed. 97; Zavello v. J. S. Reeves & Co. (1911) 171 Ala. 401, 54 South. 654; Mudge v. Wilmot (1878) 124 Mass. 493. Compare Wells v. Lamprey (N. H.) 16 N. B. R. 205.

A composition will not affect the debtor's liability on a debt contracted by his fraud. In re Tooker (D. C. 1876) Fed. Cas. No. 14,096. Or a debt contracted while acting in a fiduciary capacity. In re Rodger (D. C. 1878) 18 N. B. R. 252, Fed. Cas. No. 11,991; In re Shafer (D. C. 1878) 17 N. B. R. 116, Fed. Cas. No. 12,695; Succession of Bayly (1878) 30 La. Ann. 75. Or a claim founded on one of the kinds of torts mentioned in the statute as not being released by a discharge. In re Coe (1910) 183 Fed. 745, 106 C. C. A. 181, 26 Am. Bankr. Rep. 352.

A creditor whose claim was shown on the bankrupt's schedule, and who was given due notice of the offer of composition, but paid no attention to it and made no proof of his claim, is chargeable with laches, and in the absence of fraud will not be allowed to come in and prove a larger claim, after the composition has been confirmed, and he has received his dividend on the amount shown by the schedule. In re Wilkens (D. C. 1911) 191 Fed. 94, 27 Am. Bankr. Rep. 235; In re Abrams & Rubins (D. C. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Sta (C. C. 1893) 56 Fed. 142; Troy Rudnick (1908) 198 Mass. 563, 85 E. 177; Glover Grocery Co. v. Dor (1902) 116 Ga. 216, 42 S. E. 347.

A judgment liquidating claim n proved and filed within the statuto time is barred, where there has bee confirmation of a composition, and t bankrupt is entitled to return of s curities deposited as part of an off of composition. In re Maytag-Mas Motor Co. (D. C. 1915) 223 Fed. 68

A creditor whose claim is not list by the bankrupt nor included in t composition arrangement, and who do not of his own motion come in a prove his claim, will not be affected bound by the composition, provided at all times lacked that notice or actu knowledge of the bankruptcy proceed ings which would have charged hi with the duty of intervening for t protection of his own interests. In Blackmore (D. C. 1882) 11 Fed. 41 Flower v. Greenbaum (C. C. 1880) Fed. 897; Broadway Trust Co. v. Ma heim (1905) 47 Misc. Rep. 415, 95 Y. Supp. 93; Robinson v. Soule (187 56 Miss. 549; Collins & Toole v. Cre (1907) 3 Ga. App. 238, 59 S. E. 72 Shulman v. Graves (1879) 63 A 402; Smith v. Rucker (1908) 88 A 615, 114 S. W. 1181; In re Black Di mond Copper Min. Co. (1906) 10 Ar 42, 85 Pac. 653.

Where a creditor's address was sta ed in the bankrupt's schedule as "u known," and he took no part in t composition proceedings, he is not a fected or bound thereby. Harrison Gamble (1888) 69 Mich. 96, 36 N. 682. Nor is a debt discharged by composition where it was stated in t schedule at less than its true amou and the creditor did not join in t composition, and objected to its co firmation, and refused to accept a money under it. Hewes v. Rand (188 129 Mass. 519.

Creditors whose claims are barred failure to file or present the same wit in the year allowed for that purpo have no standing before the bankrupt court in composition proceedings. In French (D. C. 1909) 181 Fed. 583, Am. Bankr. Rep. 77.

The fact that a corporation has bee adjudged bankrupt and has effected composition with its creditors will n prevent creditors from maintaining a action against its directors, to enfor a liability imposed on them personal by statute for failing to report t condition of the company, since such statutory liability is entirely indepen ent of the cause of action against t corporation. Wood & Selick v. Va derveer (1900) 55 App. Div. 549, 6 N. Y. Supp. 371.

19. —— Effect on rights of secur creditors.—Liens and other securiti which would be valid and unassailab in the ordinary course of bankrupt

ngs are equally protected in ion arrangements and are not ed or affected. In re Cyclopean C. A. 1909) 167 Fed. 971, 21 nkr. Rep. 679; In re Stowell 1885) 24 Fed. 468. If the wishes to bring the claims of creditors under the operation composition, it is his duty to securities valued as the law Flower v. Greenebaum (C. C. Fed. 190. But, the other con- xisting, a composition confirm- e court has the effect to con- cured creditor to his security, ischarge the debtor from per- bility for the debt. In re Ly- C. 1876) Fed. Cas. No. 8,650. Cavanna v. Bassett (C. C. Fed. 215. After the confirma- composition, a mortgage credi- ot recover a deficiency judg- the foreclosure of his mort- merican Woolen Co. v. Cohen 42 App. Div. 880, 127 N. Y. 7.

as concerns the property af- y a lien, the court of bank- oses all control over it when osition is confirmed, and can- after protect it, by injunction, izure under process from a rt. In re Lytle (D. C. 1876) . No. 8,650.

litor of a bankrupt corpora- ming a lien for part of his o refused to accept securities rganized corporation, tendered pursuant to a composition nt confirmed by the court, and ed a suit to establish and his lien, is not entitled to h securities impounded pend- uit, so that he may have them cessful, especially when the issuing the same is not a the suit. York Mfg. Co. v. ts' Refrigerating Co. (C. C. 8 Fed. 108.

of a bankrupt which are se- ly by the personal indorse- a third person may be included ured debts in a composition, confirmation of such composi- discharge the bankrupt as the notes. Stauffer-Eshleman Co. v. Abington Hardware & Furniture Co. (1912) 131 La. 715, 60 South. 202.

An attachment levied about a month before the adjudication in bankruptcy, on a debt included in and released by the composition, will be dissolved thereby. Miller v. Mackenzie (1876) 43 Md. 404, 20 Am. Rep. 111.

20. —— Joint liability of others with bankrupt.—While the release of one joint debtor usually discharges the other, this rule does not apply to a discharge by a composition in bankruptcy. Hem v. Allen (1913) 179 Ill. App. 223.

A composition in bankruptcy, while it discharges the bankrupt himself from any further liability for his debts, does not operate to exonerate or release any person who is jointly liable with him for the payment of the same debt, or who is collaterally liable therefor, in the character of a surety, guarantor, or otherwise. Easton Furniture Mfg. Co. v. Caminez (1911) 146 App. Div. 436, 131 N. Y. Supp. 157; Guild v. Butler (1877) 122 Mass. 498, 23 Am. Rep. 378; In re Burchell (D. C. 1880) 4 Fed. 406; Mason & Hamlin Organ Co. v. Bancroft (1876) 1 Abb. N. C. (N. Y.) 415; Moore v. Stanwood (1881) 98 Ill. 605.

21. New promise to pay debt.—A confirmation of a composition offered by a bankrupt operates as a discharge of the bankrupt, but it destroys the remedy only, not the indebtedness. In re Kinnane Co. (D. C. 1915) 221 Fed. 762, denying confirmation (D. C. 1914) 217 Fed. 488.

A new promise will not revive a debt included in and settled by a composition in bankruptcy, though it would in the case of a discharge for a composition is an accord and satisfaction and extinguishes the debt. Taylor v. Skiles (1904) 113 Tenn. 288, 81 S. W. 1258.

Since a dismissal of a bankrupt's debts by composition is by operation of law, there remains subsisting a moral obligation which may furnish the consideration of a new promise to pay. Herrington v. Davitt (Sup. 1914) 145 N. Y. S. 452.

(Act July 1, 1898, c. 541, § 13.) Compositions, when set de.

ositions, when Set Aside.—a The judge may, upon the ap- n of parties in interest filed at any time within six months composition has been confirmed, set the same aside and e the case if it shall be made to appear upon a trial that as practiced in the procuring of such composition, and that wledge thereof has come to the petitioners since the confirma- such composition. (30 Stat. 550.)

Notes of Decisions

sdiction. — A composition in cy can be set aside only by t of bankruptcy. No state n annul or disregard a discharge in bankruptcy, whether obtained in the ordinary way or as the result of a composition. Turner v. Hudson (1909) 105 Me. 476, 75 Atl. 45, 18

Ann. Cas. 600. But compare Mallouk v. American Exchange Nat. Bank (1912) 75 Misc. Rep. 285, 135 N. Y. Supp. 78.

Authority to set aside a composition is confided by this section only to the "judge" of the court of bankruptcy, which term, in this instance, does not include the referee. See, ante, § 9585, cl. 16, and post, § 9622.

2. Petition and notice.—Application to set aside a composition in bankruptcy should take the form of a petition, and leave to file such a petition should not be refused unless the petition shows on its face that, upon the facts stated, the petitioner could not in any circumstances be entitled to relief. In re Allen B. Wrisley Co. (1904) 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

The petition should show by proper averments sufficient grounds why the court should revoke the order confirming the composition or set it aside. City Nat. Bank v. Doolittle (1901) 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

The petition should allege that the fraud charged was not known to the petitioner until after the composition was confirmed, but need not allege the time or manner of acquiring such knowledge, and it is not demurrable for omitting to allege that the petitioner restored or offered to restore the consideration immediately on discovery of the fraud, nor for want of tender of the consideration into court. In re Roukous (D. C. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

The petition should be verified in the usual form for a bill in equity, but verification by an agent is not sufficient when the principal allegations are made on information and belief and the agent is not shown to have any personal knowledge of the facts. Id.

Notice of a petition to set aside a composition should be given to the bankrupt and to all the creditors. Ex parte Hamlin (D. C. 1877) 16 N. B. R. 320, Fed. Cas. No. 5,993.

3. Parties entitled to apply.—A creditor who has assigned his claim, receiving a consideration therefor, is no longer a "party in interest," though the assignment was procured by the fraud and misrepresentation of the trustee and the bankrupt. In re Allen B. Wrisley Co. (1904) 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

The fact that a creditor has commenced an action at law against the bankrupt will not prevent him from also maintaining a petition to set aside the composition. In re Roukous (D. C. 1904) 128 Fed. 648, 12 Am. Bankr. Rep. 169.

Evidence held to entitle a judgment creditor of a bankrupt, whose case was pending on appeal at the time of the bankruptcy and of a composition, to have such composition set aside on the ground of fraud, unless the bankrupt placed him on an equality with the other creditors. In re Ballance (D. C. 1913) 206 Fed. 505.

4. Limitation of time.—An application to set aside a composition cannot be considered by the court unless filed within the six months allowed by the statute. In re Ennis (D. C. 1910) 183 Fed. 859, 25 Am. Bankr. Rep. 383; In re Jersey Island Packing Co. (D. C. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417; In re Eisenberg (D. C. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776. And the time allowed is not enlarged by the provision found in another section of the act, that a discharge may be revoked within a year after it is granted, for this relates only to a discharge obtained in the ordinary way, not to a discharge resulting by operation of law from the confirmation of a composition. In re Jersey Island Packing Co. (D. C. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417.

5. Grounds for setting aside composition.—This section defines exclusively the ground upon which a composition may be set aside, and operates as a limitation upon the general grant of authority given to the courts of bankruptcy by section 2, cl. 9 (ante, § 9586), to "set aside compositions and reinstate the cases." In re Rudnick (D. C. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114; In re Cooper Bros. (D. C. 1908) 166 Fed. 932, 20 Am. Bankr. Rep. 634.

A composition cannot be set aside merely because the petitioning creditor's address was erroneously stated in the bankrupt's schedule, in consequence of which he had no notice of the proceedings, and did not prove his debt, and the same was not included in the composition. In re Rudnick (D. C. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114. Nor can a composition be set aside on account of inadequacy nor because the estate might have paid a larger dividend. In re Shaw (D. C. 1881) 9 Fed. 495. Nor because the bankrupt has failed to carry out his part of the composition agreement. In re Eisenberg (D. C. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776. Nor because some creditors fraudulently obtained notes for more than their pro rata share, where it appears that the applicant for the order also obtained a preference. In re Sacharoff & Kleiner (D. C. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814.

The fact that the bankrupt made a false schedule or a false oath to his schedule constitutes ground for setting aside a composition subsequently effected, as the schedule is supposed to inform the creditors of the extent and nature of his assets and to influence them in accepting terms of composition, and

raud in the schedule is fraud d in procuring the composition. oukous (D. C. 1904) 128 Fed. Am. Bankr. Rep. 128.

act that the trustee joins with krupt to effect a composition to riment of creditors by means of presentations as to the assets, is not only for his removal, but r vacating the composition. In n B. Wrisley Co. (1904) 133 88, 66 C. C. A. 450, 13 Am. Rep. 193.

nposition accepted by the requiember of creditors of a bankrupt be set aside on the ground that procured by fraud, where all the elied on to constitute the fraud sclosed at the examination which d the composition, and were nown to the creditors accepting. Furniture Co. v. Walker-Cooley ure Co. (D. C. 1913) 206 Fed.

emurrer to petition to set aside compositions in bankruptcy for fraud, court, having found fraud, held to have erred in dismissing the petition on condition that the bankrupt pay a specified part of the petitioner's claim. In re Ballance (1914) 219 Fed. 537, 135 C. C. A. 287, reversing order (D. C. 1913) 206 Fed. 505.

6. Effect of setting aside composition.—All acts regularly done in pursuance of the composition, the same having been partly performed, remain valid though the composition is afterwards set aside, and the rights and title of the trustee are subject thereto. Ex parte Hamlin (D. C. 1877) 16 N. B. R. 320, Fed. Cas. No. 5,993.

A workman, employed by the bankrupt during the period intervening between the confirmation of a composition and the order setting it aside, is entitled to payment in full of his wages earned during that period. In re Wells (D. C. 1880) 4 Fed. 68.

3. (Act July 1, 1898, c. 541, § 14, as amended, Act Feb. 5, 903, c. 487, § 4, and Act June 25, 1910, c. 412, § 6.) Discharg-, when granted.

charges, when Granted.—a Any person may, after the expira- f one month and within the next twelve months subsequent ng adjudged a bankrupt, file an application for a discharge court of bankruptcy in which the proceedings are pending; if ll be made to appear to the judge that the bankrupt was unbly prevented from filing it within such time, it may be filed but not after the expiration of the next six months.

he judge shall hear the application for a discharge and such and pleas as may be made in opposition thereto by the trustee er parties in interest, at such time as will give the trustee or in interest a reasonable opportunity to be fully heard, and igate the merits of the application and discharge the applicant he has (1) committed an offense punishable by imprisonment ein provided; or (2) with intent to conceal his financial condi- estroyed, concealed, or failed to keep books of account or rec- rom which such condition might be ascertained; or (3) obtained or property on credit upon a materially false statement in writ- ade by him to any person or his representative for the purpose aining credit from such person; or (4) at any time subsequent first day of the four months immediately preceding the filing petition transferred, removed, destroyed, or concealed, or per- to be removed, destroyed, or concealed, any of his property, ntent to hinder, delay, or defraud his creditors; or (5) in vol- proceedings been granted a discharge in bankruptcy within ars; or (6) in the course of the proceedings in bankruptcy re- to obey any lawful order of, or to answer any material ques- pproved by the court: Provided, That a trustee shall not inter- bjections to a bankrupt's discharge until he shall be authorized lo at a meeting of creditors called for that purpose.

he confirmation of a composition shall discharge the bank- rom his debts, other than those agreed to be paid by the terms e composition and those not affected by a discharge. (30 550. 32 Stat. 797. 36 Stat. 839.)

n this section, as originally enacted, subdivision b was as follows:

b The judge shall hear the application for a discharge, and such proofs and as as may be made in opposition thereto by parties in interest, at such time will give parties in interest a reasonable opportunity to be fully heard, and

investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

It was amended by Act Feb. 5, 1903, c. 487, § 4, cited above, by changing the first words of clause 2 of said subdivision, "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," to read, "with intent to conceal his financial condition," and by adding to said subdivision four further clauses, as follows:

"or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

Said subdivision b was further amended by Act June 25, 1910, c. 412, § 6, last cited above, to read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Notes of Decisions

I. Right to discharge

1. In general.
2. Responsibility for acts of partner, agent, or employé.
3. Effect of prior application or decision.

II. Persons entitled to oppose discharge

4. Creditors.
5. Estoppel of creditors.
6. Trustee in bankruptcy.

III. Grounds for refusal of discharge

7. Existence of statutory grounds.
8. Want of jurisdiction.
9. Transactions prior to enactment of bankruptcy law.
10. Purchasing consent of creditor.
11. Fraudulent or preferential transfers.
12. —— Conclusiveness of prior decision.
13. Creation of fiduciary, fraudulent, or tortious debts.
14. Concealment of property.
15. Omissions in schedule and list of creditors.
16. —— Knowledge and fraudulent purpose.
17. —— Omission by mistake or by advice of counsel.
18. —— Omission of property without value.
19. —— Omission of doubtful claims or assets.
20. —— Omission of debts or creditors.
21. False oath or testimony.
22. Refusal to testify.
23. Obtaining credit by false statements.
24. —— Intention or knowledge of falsity.
25. —— By whom false statements made.
26. —— To whom false statements made.
27. —— Falsity in substance of statements.
28. Failure to keep books of account.
29. Destruction, mutilation, or concealment of books.
30. —— Intent to conceal financial condition.
31. —— Contemplation of bankruptcy.
32. —— What are proper books of account.

IV. Application for discharge and proceedings thereon

33. Time of application.
34. —— Extension for unavoidable delay.
35. Petition for discharge.
36. Notice of application for discharge.
37. Proceedings in opposition to discharge.
38. Withdrawal of opposition.
39. —— Corrupt inducement to withdraw opposition.
40. Want or failure of opposition.
41. Time to file specifications in opposition.
42. Form and sufficiency of specifications.
43. —— Allegations as to concealment of property.
44. —— Allegations of knowledge, falsity, and fraudulent intent.
45. —— Allegations as to failure to keep books or destruction or concealment of books.
46. Signature and verification of specifications.
47. —— By attorney at law or in fact.
48. Amendment of specifications.
49. Exceptions to sufficiency of specifications.
50. Dismissal for want of prosecution.
51. Evidence on application for discharge.
52. —— Admissibility.
53. —— Burden of proof.
54. —— Weight and sufficiency of evidence.
55. Hearing and determination of application.
56. —— Powers and duties of judge and referee.
57. Staying or suspending discharge.
58. Order of discharge.

ɔclusiveness and effect of discharge
usiveness of discharge.
t of discharge.
As to property fraudulently transed or not scheduled.
teral impeachment of discharge.
ing discharge in bankruptcy.
Necessity of pleading.
Who may plead discharge.
Form and effect of plea.
ence as to discharge.
t of refusal of discharge or failto apply.

I. Discharge of partners
arge of partners separately.
arge of partnership as such.

Discharge of corporations
neral.

RIGHT TO DISCHARGE

general.—One seeking a disfrom his debts under the bankaw must comply strictly with sions of the statute. In re Lev- (D. C. 1910) 180 Fed. 957, 24 nkr. Rep. 822. And he must proper steps to expedite the ngs. In re Wollowitz (1911) l. 105, 112 C. C. A. 445, 27 nkr. Rep. 558.

ions to a bankrupt's discharge founded on statutory grounds, bankrupt cannot be punished, holding his discharge, for imt or reckless financial transwhich occurred long before the the petition. In re Boner (D. 169 Fed. 727, 22 Am. Bankr.

the referee, without the ge of the bankrupt, entered an scharging the trustee, there beassets and no claims proved, not such a final disposition of as to deprive the bankrupt of t to a discharge. In re For- C. 1880) 4 Fed. 629.

ponsibility for acts of partner, r employé.—Where one of the in a bankrupt firm has been an act or omission such as to the granting of a discharge to to the firm, this will not be for refusing a discharge to anrtner who did not participate rongful act and had no knowlit. Ragan, Malone & Co. v. & Preston (1912) 200 Fed. C. C. A. 640, 29 Am. Bankr. 7; Hardie v. Swafford Bros. ds Co. (1908) 165 Fed. 588, 91 426, 20 L. R. A. (N. S.) 785, Bankr. Rep. 457; Frank v. Paper Co. (1910) 179 Fed. C. C. A. 268, 24 Am. Bankr. 1; In re Cotton & Preston (D. 183 Fed. 181, 25 Am. Bankr. ; In re Schachter (D. C. 1909) 683, 22 Am. Bankr. Rep. 389. aking of a statement for credit partner, from facts stated to his copartner, who was to furnish the entire capital for the business, though in fact untrue, will not defeat the right of the partner making it to his discharge in bankruptcy, where the falsity of the material statements so made was unknown to him. W. S. Peck Co. v. Lowenbein (1910) 178 Fed. 178, 101 C. C. A. 498, 24 Am. Bankr. Rep. 138.

The fraud of a partner in so keeping the firm books, of which he had sole charge, as to conceal withdrawals of money by himself from his partner as well as from creditors cannot be imputed to the innocent partner, so as to bar his right to a discharge. In re Schultz (D. C. 1901) 109 Fed. 264, 6 Am. Bankr. Rep. 91.

Where a business belonging to a married woman is conducted wholly by her husband, to whom she confides its entire management, and he, without her knowledge or privity, conceals property from the creditors, and the wife becomes bankrupt, she is not to be deprived of her right to a discharge by reason of her husband's misconduct, being herself guiltless of any actual fraudulent intent, and her negligence in relation to the business not being equivalent to fraud, for the purposes of a penal statute, though her discharge may be made conditional upon her using all reasonable means within her power to discover to the bankruptcy court the assets so concealed. In re Hyman (D. C. 1899) 97 Fed. 195, 3 Am. Bankr. Rep. 169; In re Meyers (D. C. 1900) 105 Fed. 353, 5 Am. Bankr. Rep. 4.

One appointed by a duly executed writing as manager and attorney in fact for the owner in conducting a mercantile business has such authority that a materially false property statement made by him for the purpose of obtaining goods for sale in such business on credit is one made by the owner, so as to bar the latter's discharge. In re Reed (D. C. 1911) 191 Fed. 920, 26 Am. Bankr. Rep. 286.

Where the manager of a bankrupt firm (not himself a member of the firm), acting within the scope of his authority, signed a false statement of the firm's financial condition for the purpose of obtaining credit, this was held sufficient to prevent the discharge of either of the partners, though one of them was a woman advanced in years, who took no part in the business, but intrusted her interests to such manager, who was her son. In re Schwartz & Co. (D. C. 1912) 201 Fed. 166, 28 Am. Bankr. Rep. 670.

A merchant who has failed to keep proper books of account is not entitled to his discharge in bankruptcy, though the fault was wholly with his bookkeeper, as the law puts upon the merchant the duty of seeing that his books are properly kept. In re Hammond (D. C. 1869) Fed. Cas. No. 5,999.

A bankrupt was not entitled to a discharge where he signed a blank statement of his financial condition, which,

at his direction, his bookkeeper filled out and sent to a bank, which lent the bankrupt money on the faith thereof, though, relying on the bookkeeper's honesty and accuracy, the bankrupt did not actually know that the statement was materially false and did not consciously intend to deceive the bank. In re Gilpin (D. C. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

Where the bankrupt did business through the medium of a corporation, which was merely a form of business activity, a concealment of assets belonging to him will be sufficient to bar his discharge, though the assets would first be applicable to the creditors of the corporation. In re Berger (D. C. 1912) 200 Fed. 325, 29 Am. Bankr. Rep. 712.

3. Effect of prior application or decision.—An order refusing to grant a discharge to a bankrupt, if in the nature of a final determination on the merits of the controversy, is a bar to any second application for discharge in the same proceedings, and must be regarded as res judicata as to the matters involved. In re Brockway (C. C. 1882) 23 Fed. 583; In re Royal (D. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636. Otherwise if the refusal of a discharge was based merely on some irregularity in the proceedings. In re Connelly (C. C. 1823) Fed. Cas. No. 3,111.

A subsequent proceeding in bankruptcy for the sole purpose of obtaining a discharge, to which a prior proceeding has determined that the bankrupt is not entitled; presents no ground for relief, is vexatious, and cannot lawfully be maintained. Kuntz v. Young (1904) 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; In re Fiegenbaum (1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; In re Kuffler (1909) 168 Fed. 1021, 93 C. C. A. 671, 22 Am. Bankr. Rep. 289. But compare In re Claff (D. C. 1901) 111 Fed. 506, 7 Am. Bankr. Rep. 128. And see In re Farrell (D. C. 1871) 5 N. B. R. 125, Fed. Cas. No. 4,680, as to a new proceeding in bankruptcy where the discharge was formerly refused only on the ground that it was not applied for in due time. See, also, Bluthenthal v. Jones (1906) 51 Fla. 396, 41 South. 533, 13 L. R. A. (N. S.) 629, 120 Am. St. Rep. 181, as to the effect of failure on the part of creditors to raise any objection to the second application for discharge, though notified thereof. This rule applies where the bankrupt's application for a discharge in the earlier proceeding was dismissed for want of prosecution. Pollet v. Cosel (1910) 179 Fed. 488, 103 C. C. A. 68, 24 Am. Bankr. Rep. 678.

Although the question of a discharge was not tried or determined in the first proceeding, the bankrupt's failure to apply for it within the time limited is substantially equivalent to a judgment by default in favor of his creditors, and renders the question of his right to receive it res judicata, and so will constitute sufficient ground for refusing to discharge him in a subsequent proceeding in bankruptcy, at least so far as concerns the debts which were provable under the earlier petition, though he may be discharged in the later case as against new debts. Siebert v. Dahlberg (1914) 218 Fed. 793, 134 C. C. A. 460; In re Bacon (1912) 193 Fed. 34, 113 C. C. A. 358, 27 Am. Bankr. Rep. 736 (writ of error denied in Bacon v. Buffalo Cold Storage Co. [1912] 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264); Kuntz v. Young (1904) 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; In re Richter (D. C. 1911) 190 Fed. 905, 27 Am. Bankr. Rep. 215; In re Springer (D. C. 1912) 199 Fed. 294, 29 Am. Bankr. Rep. 96; In re Westbrook (D. C. 1911) 186 Fed. 414, 26 Am. Bankr. Rep. 181; In re Stone (D. C. 1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24; In re Von Borries (D. C. 1909) 168 Fed. 718, 21 Am. Bankr. Rep. 849; In re Weintraub (D. C. 1905) 133 Fed. 1000, 13 Am. Bankr. Rep. 711.

An order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge in a proceeding instituted under the act of 1898, on the same facts and as to the same debts. In re Herrman (1901) 106 Fed. 987, 46 C. C. A. 77; Id. (D. C. 1900) 134 Fed. 566.

A judgment denying a debtor a discharge from a debt under a state insolvency law is not an adjudication of his right to a discharge from such debt in bankruptcy, where it does not appear upon what grounds the judgment was based. In re Bybee (D. C. 1903) 124 Fed. 1011, 10 Am. Bankr. Rep. 761.

The provision of this section that a discharge may not be granted to a bankrupt if he has, "in voluntary proceedings, been granted a discharge in bankruptcy within six years," has no application to cases in which a discharge was applied for before its enactment, but it applies to all cases in which the application for discharge is made after its passage, and such application does not expose it to the objection of being retroactive legislation. In re Neely (D. C. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Seaholm (1905) 136 Fed. 144, 69 C. C. A. 142, 14 Am. Bankr. Rep. 292. The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought, so that it makes no difference in the application of the provision whether the second proceeding is based on a voluntary or an involuntary petition. In re Seaholm (1905)

l. 144, 69 C. C. A. 142, 14 Am. Rep. 292; In re Neely (D. C. 34 Fed. 667, 12 Am. Bankr. 7. The period of six years is easured backward from the time hearing on the application for ond discharge, and not from the the commencement of the sec- ceeding. In re Haase (C. C. A. 64 Fed. 1022, 21 Am. Bankr. 8; In re Jordan (D. C. 1905) l. 292, 15 Am. Bankr. Rep. 449; ittle (1905) 137 Fed. 521, 70 C. 105, 13 Am. Bankr. Rep. 640. re Dunphy (D. C. 1913) 206 0, 30 Am. Bankr. Rep. 760.

SONS ENTITLED TO OP- POSE DISCHARGE

ditors.—Any creditor of the t who has a provable claim is in interest and entitled to op- e application for discharge, al- he has not proved his claim red its allowance. In re Na- (D. C. 1907) 155 Fed. 645, 19 nkr. Rep. 56; In re Frice (D.) 96 Fed. 611, 2 Am. Bankr. 4; In re Groome (D. C. 1880) 464; In re Murdock (D. C. N. B. R. 146, Fed. Cas. No. In re Shepard (D. C. 1868) 1 R. 439, Fed. Cas. No. 12,753; ook (C. C. 1843) Fed. Cas. No. In re Smith (C. C. 1871) Fed. 12,977; In re Boutelle (D. C. ed. Cas. No. 1,705; Haxtun v. 1848) 2 Barb. Ch. (N. Y.) 506. e Talcott v. Friend (1910) 179 6, 103 C. C. A. 80, 24 Am. Rep. 708. But in that case he ove his claim or it must clearly y the evidence before the court is really a creditor. In re Bou- . C. 1868) 2 N. B. R. 129, Fed. . 1,705. Specifications of ob- iled by one not shown to be a should state facts showing how he is a party in interest. In y (D. C. 1904) 133 Fed. 572, Bankr. Rep. 312.

ion to allowance of claim bankrupts held not to estop g creditor from opposing dis- for omission of such liability financial statement on which as extended. In re Waite (D. 223 Fed. 853.

who has a suit pending against rupt for the recovery of a debt s contested, is entitled to op- e application for discharge, the claim has not been proved bankruptcy proceeding. In re (D. C. 1905) 134 Fed. 764, 14 nkr. Rep. 249.

ct that a person is named as a in the bankrupt's schedule is acie evidence that he has the appear in opposition to the e, though he may not have is claim. Haley v. Pope (1913) 206 Fed. 266, 124 C. C. A. 330; In re Barrager (D. C. 1911) 191 Fed. 247, 27 Am. Bankr. Rep. 366. But if the bankrupt, in pursuance of an arrangement with a creditor, omits the debt from his schedule, the creditor will not be permitted to object to the discharge, at least on the ground of such omission. In re Whetmore (D. C. 1869) Fed. Cas. No. 17,508.

The term "creditor," as descriptive of one having the right to oppose the discharge in the character of a party in interest, will include one having an equitable claim against the estate. In re Tebbetts (C. C. 1842) Fed. Cas. No. 13,817. Or a claim secured by a mortgage. In re Ely (D. C. 1843) Fed. Cas. No. 4,428. Or a contingent and unliquidated claim which for that reason, is not provable in the bankruptcy proceeding. Ex parte Traphagen (D. C. 1842) Fed. Cas. No. 14,140. Or a debt barred by the statute of limitations at the time when the creditor filed his specification of objections. In re Westbrook (D. C. 1911) 186 Fed. 414, 26 Am. Bankr. Rep. 181.

Opposition cannot be made by a creditor whose claim is not provable in the bankruptcy proceedings or is of such a character that it would not be affected by the discharge. In re Nathanson (D. C. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56. A claim which is illegal does not constitute the holder a creditor for this purpose, but if the bankrupt has allowed it to be filed and proved, without objection, he will be estopped to deny the standing of the creditor when the question of his discharge comes up. In re A. B. Carton & Co. (D. C. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343.

Where the creditor is a corporation, its stockholders are not parties in interest in such sense as to be entitled individually to oppose the bankrupt's discharge. In re Tallmadge (D. C. 1842) Fed. Cas. No. 13,738. Where a partnership which had proved a claim against the estate is afterwards dissolved, without any disposition being made of the claim as between the partners, neither of them can maintain opposition to the bankrupt's discharge without showing affirmatively that all consent. In re Hendrick (D. C. 1906) 143 Fed. 647, 16 Am. Bankr. Rep. 218.

Where the ground of opposition is fraud on the part of the bankrupt, or concealing property, or obtaining credit on false statements, the right to oppose the discharge is not confined to the person defrauded, but objection may be made by any other creditor or party in interest. In re Kretz (D. C. 1914) 212 Fed. 784; In re A. B. Carton & Co. (D. C. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; In re Harr (D. C. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213.

The right of creditors to oppose the

bankrupt's discharge on the ground of alleged fraudulent transactions does not depend on their having taken any legal proceedings, through the trustee or otherwise, to recover the property affected. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

5. Estoppel of creditors.—A creditor will be estopped from setting up in opposition to the bankrupt's application for discharge matters which have already been litigated between them to final decree in a state court, the decision therein having been adverse to the contention of the creditor. In re Antisdel (D. C. 1878) 18 N. B. R. 289, Fed. Cas. No. 490. And a similar estoppel is raised against a creditor who participated in a previous general assignment by the bankrupt, to the extent of ratifying it and taking measures under it to secure his claim, or accepting a preference which it gave him. In re Jones (D. C. 1875) 12 N. B. R. 48, Fed. Cas. No. 7,452; In re Schuyler (D. C. 1869) Fed. Cas. No. 12.494. But the mere acceptance of a dividend under such an assignment will not estop the creditor if he had no power to dissent from the assignment or to repudiate or avoid it. In re Kraft (D. C. 1880) 3 Fed. 892.

A creditor may be estopped from setting up in opposition to the discharge a false financial statement made by the bankrupt, and on which he obtained credit from such creditor, where the creditor has expressly waived the fraud, by admitting in writing that any inaccuracies in the statement were inadvertent and without wrongful intent. In re Russell (1910) 176 Fed. 253, 100 C. C. A. 77, 23 Am. Bankr. Rep. 850.

6. Trustee in bankruptcy.—The trustee in bankruptcy derives his right to contest a bankrupt's application for discharge from the creditors, and has no authority to object unless authorized by them. In re Hockman (D. C. 1912) 205 Fed. 330, 30 Am. Bankr. Rep. 921.

When the trustee has obtained authority from the creditors, neither the referee nor the court has power to withhold from him the right to file objections. or to prescribe as conditions to its exercise that no expense shall be imposed on the estate or that it shall not delay settlement beyond a stated time. In re Churchill (D. C. 1912) 197 Fed. 114, 28 Am. Bankr. Rep. 603.

The requirement of the statute that authority to the trustee to file objections must be given at a meeting of the creditors called for that purpose is satisfied if the authority is given at a meeting called by the referee: it is not necessary that the judge should issue the call and hold the meeting, or that he should specially authorize such call and meeting. In re Reiff (D. C. 1913) 205 Fed. 399, 29 Am. Bankr. Rep. 753.

III. GROUNDS FOR REFUSAL OF DISCHARGE

7. Existence of statutory grounds.—The precedent conditions having been complied with, the grant or refusal of a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed acts or omissions. In re Marshall Paper Co. (1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468.

The court is without jurisdiction unless there are dischargeable debts, and where the only claims listed by a bankrupt, or filed, are stated in his schedule to be disputed, and are in fact in litigation, the court has no power to grant him a discharge. In re Gulick (D. C. 1911) 190 Fed. 52, 26 Am. Bankr. Rep. 632.

A discharge can be refused only on one or more of the specific grounds mentioned in the statute, not on account of any acts or conduct on the part of the bankrupt, however reprehensible, which do not clearly come within the words of the law. Woodruff v. Cheeves (1901) 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; Strause v. Hooper (D. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225; In re Clark (D. C. 1868) 3 N. B. R. 16, Fed. Cas. No. 2,800; In re Elliott (D. C. 1868) 2 N. B. R. 110, Fed. Cas. No. 4,391. But in a case where the bankrupt's financial transactions showed that his financial difficulties were the result of suspicious and fraudulent dealings, and he had been guilty of gross misrepresentations as to his solvency, and his assets in bankruptcy were purchased by a pawnbroker, who at once installed the bankrupt as manager of the business, with the same apparent control thereof as before, the court held, with severe animadversions, that the bankrupt was not entitled to a discharge. In re Miller (D. C. 1905) 135 Fed. 591, 14 Am. Bankr. Rep. 329.

The specified grounds for denying a discharge are not in the nature of offenses or forfeitures of the right to a discharge, but are rather in the nature of violations of conditions precedent. In re Seeley (D. C. 1879) 19 N. B. R. 1, Fed. Cas. No. 12,628.

It is not sufficient ground for refusing to discharge the bankrupt that he misused and wasted his estate before the filing of the petition. In re Rogers (D. C. 1870) Fed. Cas. No. 12,001. Or that his petition was filed merely for the purpose of defeating the claims of the judgment creditor who objects. In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143. But the court is not obliged to grant a discharge to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it

ted. In re Luftig (D. C. 2 Fed. 322, 15 Am. Bankr.

ication for discharge is an in- proceeding, in which juris- nd the validity of the prior gs are not involved. In re (D. C. 1910) 175 Fed. 243, 24 r. Rep. 541. And a discharge denied on account of an ir- in the former proceedings, n error in the name of the in giving notices to creditors. ind (C. C. A. 1909) 175 Fed. . Bankr. Rep. 166.

arge cannot be denied to a because he has violated a statute of the state not de- the particular offenses made by the bankruptcy act. In lan (D. C. 1913) 204 Fed. m. Bankr. Rep. 325. Nor be- the alleged offense of larceny, as bailee, committed by the against the objecting creditor a year before the petition is re Wolf (D. C. 1908) 159 20 Am. Bankr. Rep. 304.

ive a bankrupt of his right to ge, it is not necessary that he been convicted of one of the numerated in the act, but it if it is shown by clear and evidence that he has been such offense. In re Shear (D. 201 Fed. 460, 29 Am. Bankr. In re George (D. C. 1869) No. 5,325.

ctions making the offense of and fraudulently making a by the bankrupt in the bank- oceedings, in respect to his a ground for denying him a do not extend to previous transactions which are mere- lent as to creditors and not inal. Fellows v. Freudenthal 1900) 102 Fed. 731, 4 Am. ep. 490. And see In re Warne 82) 10 Fed. 377.

anity of a bankrupt, though it nted his examination by the and still continues, is not a s discharge, as it is not one ounds specified for refusing a and especially in view of the the statute provides that the f a bankrupt shall not abate edings, but the same shall be and concluded in the same o far as possible, as if in- l not supervened. In re Mil- 1904) 133 Fed. 1017, 13 Am. ep. 345.

of jurisdiction.—Where an on in bankruptcy has been e, upon a petition sufficient face, and without any chal- he jurisdiction of the court, it d conclusive, not only in col- oceedings, but also in the fur- eedings in the same case, and not been appealed from, re- r set aside, creditors cannot oppose the bankrupt's application for discharge on the ground of an original want of jurisdiction over him. In re Clisdel (D. C. 1900) 101 Fed. 246, 4 Am. Bankr. Rep. 95; In re Goodale (D. C. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Walrath (D. C. 1910) 175 Fed. 243, 24 Am. Bankr. Rep. 541; In re Ives (C. C. 1879) 19 N. B. R. 97, Fed. Cas. No. 7,115. And see In re Tinker (D. C. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580.

Objections on the ground of a want of jurisdiction cannot be made by a creditor who has recognized the validity of the adjudication by filing and proving his claim, participating in the election of a trustee, and sharing in the distribution of the estate. In re Mason (D. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599.

9. Transactions prior to enactment of bankruptcy law.—A discharge in bankruptcy cannot be refused on account of acts or omissions occurring, or transactions completed, before the enactment of the bankruptcy law, although the same things would have constituted good grounds of opposition to the discharge if done after the statute came into force, for the contrary construction would give the act an ex post facto operation, or at least make it objectionably retrospective. In re Goodale (D. C. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Webb (D. C. 1899) 98 Fed. 404, 3 Am. Bankr. Rep. 386; Paxton v. Scott (1902) 66 Neb. 385, 92 N. W. 611; Schreck v. Hanlon (1905) 74 Neb. 264, 104 N. W. 193; In re Webb (D. C. 1899) 2 Nat. Bankr. News, 11; In re Moore (D. C. 1868) Fed. Cas. No. 9,751; In re Keefer (D. C. 1870) 4 N. B. R. 389, Fed. Cas. No. 7,636.

The failure of the bankrupt to keep proper books of account or records from which his financial condition could be known, or his wrongful acts in concealing, destroying, or mutilating such books or records, will not warrant the court in refusing to grant him a discharge, unless such omission or offense occurred since the date of the enactment of the bankruptcy law. In re Marx (D. C. 1900) 102 Fed. 676, 4 Am. Bankr. Rep. 521; In re Phillips (D. C. 1900) 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Dews (D. C. 1899) 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Carmichael (D. C. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Holman (D. C. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Shorer (D. C. 1899) 96 Fed. 90, 2 Am. Bankr. Rep. 165; In re Stark (D. C. 1899) 96 Fed. 88, 2 Am. Bankr. Rep. 785; In re Lieber (D. C. 1899) 2 Nat. Bankr. News, 21; In re Friedberg (D. C. 1879) 19 N. B. R. 302, Fed. Cas. No. 5,116.

As to the offense of concealing property from his trustee "while a bank-

rupt," it is held that the act of concealment may be continuous, and that if a concealment of goods or money is begun before the enactment of the bankruptcy law, with intent to defraud creditors, and is continued after the adjudication of bankruptcy, by failure to list it in the schedule or to disclose it to the trustee, it is a concealment from the trustee "while a bankrupt," within the meaning of the statute, and ground for refusing a discharge. In re Jacobs & Verstandig (D. C. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Quackenbush (D. C. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274.

10. Purchasing consent of creditor.—Although a creditor whose assent to the discharge of the bankrupt has been corruptly procured is estopped from afterwards setting up the fraud as a ground of opposition to the discharge, yet other creditors, on learning of the fraud, may object on that ground. In re Bright (D. C. 1881) 9 Fed. 491. The fact of bribery being established, it is no defense to say that the assent of that creditor was not necessary. In re Dougless (D. C. 1882) 11 Fed. 403.

A promise by a debtor to pay his creditor "all he ever owed him when he got able," on condition that he would assent to his discharge in bankruptcy, constitutes a pecuniary consideration or obligation sufficient to defeat the right of the bankrupt to be discharged. In re Ekings (D. C. 1881) 6 Fed. 170. But this rule does not apply to a payment by the bankrupt of the fees of an attorney and of a notary and the register in making proofs of claims against his estate, though his only motive in so doing was to obtain the consent of the creditors to his discharge. In re Svenson (C. C. 1879) Fed. Cas. No. 13,659.

If the bankrupt pays money to a creditor to induce him to forbear opposition to the discharge, or procures the buying up of the creditor's claim for the like purpose, and the creditor knows whence the money comes and its purpose, not only is the creditor guilty of the offense denounced by the statute, but the bankrupt also is guilty as a participant therein, and this is ground for refusing to grant the discharge. In re Luftig (D. C. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773. And see In re Sanborn (D. C. 1904) 131 Fed. 397, 12 Am. Bankr. Rep. 428.

11. Fraudulent or preferential transfers.—The provision of this section requiring the refusal of a discharge to a bankrupt who has transferred, etc., any of his property, with intent to defraud creditors, is to be strictly construed, and a fraudulent conveyance of property will not affect his right to a discharge unless strictly within the statute. Ashley v. Robinson (1856) 29 Ala. 112, 65 Am. Dec. 387.

The making of such fraudulent conveyance is immaterial with respect to the bankrupt's discharge unless it was made within the four months before the filing of the petition in bankruptcy. In re Schickerling (C. C. A. 1913) 204 Fed. 592, 30 Am. Bankr. Rep. 312; In re Jacobs (D. C. 1906) 144 Fed. 868, 16 Am. Bankr. Rep. 482; In re Brumbaugh (D. C. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Wakefield (D. C. 1913) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Hennebry (D. C. 1913) 207 Fed. 882. Otherwise in the case of an instrument which must be recorded to be effective, and which was recorded within the four months, though executed some time before. In re McKane (D. C. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 621.

To bar the discharge on this ground, there must have been a fraudulent intent on the part of the bankrupt. Pirvitz v. Pithan (C. C. A. 1912) 194 Fed. 403, 27 Am. Bankr. Rep. 621. An intention to dispose of his property in such a way as to keep it beyond the reach of his creditors is an intention to hinder, delay, and defraud them, and will bar the discharge. In re Nelson (D. C. 1909) 179 Fed. 320, 23 Am. Bankr. Rep. 37.

Where a bankrupt, within four months prior to the filing of a bankruptcy petition, sold his stock of merchandise, which was within the Rhode Island bulk sales act, and to avoid giving a list of creditors made oath that he had no creditors connected with his business, which was false, in an objection to his discharge on the ground that he had transferred his property with intent to defraud his creditors will be sustained. In re De Nomme (D. C. 1914) 214 Fed. 671.

A preferential payment or transfer of property, as distinguished from a fraudulent transfer, though it may be voidable in the bankruptcy proceedings, will not constitute ground for refusing the bankrupt's discharge. In re Friedrich (D. C. 1912) 199 Fed. 193, 28 Am. Bankr. Rep. 656; In re Bouck (D. C. 1912) 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Battle (D. C. 1907) 154 Fed. 741, 19 Am. Bankr. Rep. 40; In re Maher (D. C. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340. And see In re Steed (D. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.

The provision of Bankr. Act § 14b (4), making a transfer of property by a debtor, within four months prior to bankruptcy, with intent to hinder, delay, or defraud his creditors, ground for denying a discharge, includes two classes of transfers: First, those made with actual fraudulent intent; and, second, those where from the terms of the agreement, or the nature of the transaction itself, the fraudulent intent is presumed as an inference of law. But a bona fide transfer of property for a valuable consideration is not within the provision, although it may in fact hinder and delay creditors, or result in a preference; the statute recognizing the distinction between an in-

defraud and an intent to pre-
:h latter is not made ground
l of a discharge. In re Julius
914) 217 Fed. 3, 133 C. C. A.
R. A. 1915C, 89, reversing de-
C. 1913) 209 Fed. 371.

le and transfer by the mem-
an insolvent mercantile part-
within four months prior to
cy proceedings against them,
eir property for its full value
poration organized by friends,
e not creditors, for the pur-
making the purchase, and the
of the proceeds in the hands
:orney to be used in discharg-
indebtedness as far as pos-
thout preference, by payment
o rata share to each creditor
ld accept the same in com-
of his claim, was not a trans-
intent to hinder, delay, or de-
editors, which barred the right
rtners to a discharge. Id.

a broker pledges stock which
hands, but which belongs to a
, as security for a loan to
it is not a transfer of "his"
with intent to defraud cred-
ch as to bar his discharge in
cy. In re Jacob Berry & Co.
1906) 146 Fed. 623, 15 Am.
Rep. 360.

reement between a bankrupt
vife, by which he undertook to
certain property to her as a
e, but which was void under
of the state for want of power
arties to contract with each
d which was not accompanied
actual transfer or removal of
erty, which in fact passed into
s of the trustee in bankruptcy,
defeat the bankrupt's right to
ge. In re Brown (D. C. 1905)
383, 15 Am. Bankr. Rep. 350.
re Hedley (D. C. 1907) 156
, 19 Am. Bankr. Rep. 409.

ts made to a creditor from
ime, to enable the bankrupt to
in business, and to induce the
to continue supplying material
usiness, and which do not re-
assets available to creditors,
raudulent in this sense. In re
D. C. 1906) 144 Fed. 503, 15
kr. Rep. 786.

t of $4,500 by a bankrupt to
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hinder, delay, or defraud cred-
as to bar a discharge on that
In re Marcus (1913) 203
121 C. C. A. 393, affirming or-
C. 1911) 192 Fed. 743.

y a bankrupt to his wife and
previous to the bankruptcy,
they may be voidable by the
do not necessarily warrant
sal of a discharge. In re
C. C. 1882) 12 Fed. 431. But
insolvent debtor, just before
ruptcy, so manipulates his
property as to get it into the possession and apparent ownership of his wife or children, it is generally such a fraudulent transfer or concealment as will prevent him from obtaining a discharge. In re Schenck (D. C. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727; In re Skinner (D. C. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; In re Kamsler (D. C. 1899) 97 Fed. 194; In re Eldred (D. C. 1869) 3 N. B. R. 256, Fed. Cas. No. 4,328.

12. —— Conclusiveness of prior decision.—If the validity of a transfer of property by a bankrupt has previously been tried and determined in the bankruptcy proceeding, the decision will be conclusive on that question on subsequent opposition to his discharge. In re Miller (D. C. 1905) 135 Fed. 591, 14 Am. Bankr. Rep. 329.

If the rights of third persons as adverse claimants are involved, it is not proper to attempt their determination in such a collateral proceeding as the statutory hearing on the bankrupt's application for discharge. Fellows v. Freudenthal (1900) 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

The judgment of a state court, in a suit brought by the bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, is conclusive on the creditors, and they cannot thereafter set up the same transfer as a ground of opposition to the discharge of the bankrupt. In re Tiffany (D. C. 1906) 147 Fed. 314, 17 Am. Bankr. Rep. 296; In re McGurn (D. C. 1900) 102 Fed. 743, 4 Am. Bankr. Rep. 459.

13. Creation of fiduciary, fraudulent, or tortious debts.—It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for willful and malicious injury to property, or a claim founded upon the fraud of the bankrupt, or for obtaining property by false pretenses, or for the embezzlement or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity. Such debts will not be released by the discharge when granted, but they do not defeat the bankrupt's right to be discharged, as they are not among the enumerated grounds for refusing a discharge. In re Carmichael (D. C. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Peacock (D. C. 1900) 101 Fed. 560, 4 Am. Bankr. Rep. 136; In re Gara (D. C. 1911) 190 Fed. 112, 26 Am. Bankr. Rep. 573; In re Rhutassel (D. C. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Mussey (D. C. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592; In re Black (D. C. 1899) 97 Fed. 493; In re Thomas (D. C. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Lieber (D. C. 1899) 2 Nat. Bankr. News, 21; In re Rosenfield (D. C. 1868) 1 N. B. R. 575, Fed. Cas. No. 12,058; In re Rathbone (D. C. 1868)

Fed. Cas. No. 11,580; In re Tallman (D. C. 1868) Fed. Cas. No. 13,739; In re Elliot (D. C. 1868) 2 N. B. R. 110, Fed. Cas. No. 4,391; In re Tracy (D. C. 1868) 2 N. B. R. 298, Fed. Cas. No. 14,124.

If there are any other claims, though they may be inconsiderable in comparison with the nondischargeable debts, the discharge cannot be withheld. In re Brumbaugh (D. C. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204.

In a case where the only debt scheduled against the bankrupt was a judgment of a state court, and, as the law then stood, it was doubtful whether or not it would be affected by the discharge, the court held that it had jurisdiction of the bankrupt's application, and would grant him a discharge if he was otherwise entitled to it, leaving the question as to its effect on the judgment to be determined elsewhere and in a more appropriate proceeding. In re Tinker (D. C. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580.

14. Concealment of property.— Though there may have been an actual concealment of property by the bankrupt, it is not ground for refusing his discharge if it was not willful, but the result of mere accident or mistake. In re Conn (D. C. 1901) 108 Fed. 525, 6 Am. Bankr. Rep. 217; In re De Leeuw (D. C. 1899) 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Pierce (D. C. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Boynton (D. C. 1882) 10 Fed. 277; In re Smith (C. C. 1871) 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott (D. C. 1880) 11 Fed. 133. Failure of bankrupt to account for $385 received four years before bankruptcy, he having been working on a salary in the meantime and out of employment a part of the time, held not to justify the denial of a discharge. In re Miller (1914) 212 Fed. 920, 129 C. C. A. 440, reversing decree (D. C. 1913) 203 Fed. 170. Refusal of bankrupt to assign income of trust fund liable to creditors under Real Property Law N. Y. § 98, held not ground for denying a discharge. In re Buchanan (1914) 219 Fed. 492, 135 C. C. A. 204.

A fraudulent intent to conceal property is not alone sufficient ground for refusing a discharge, but there must be an actual concealment or withholding of assets of the estate. Vehon v. Ullman (1906) 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435. There is no concealment where the claim is openly made that the property in question does not belong to the bankrupt, but to another. In re Marsh (D. C. 1901) 109 Fed. 602, 6 Am. Bankr. Rep. 537. The concealment of title to the property may be urged in bar of the bankrupt's discharge, as well as the hiding from view of the property itself. In re Hussman (D. C. 1869) 2 N. B. R. 437, Fed. Cas. No. 6,951. Though the trustee may have actual knowledge that the bankrupt owns cer tain property which he has not liste in his schedule, it is none the less con cealed from the trustee if he does no know where the property is or how t find it. In re Beal (D. C. 1869). Fe Cas. No. 1,156.

The act of concealment may be con tinuous, and a bankrupt who hid prop erty from his creditors while insolven though more than four months befor the filing of the petition, is not entitle to his discharge if he kept the sam concealed until after his adjudicatio Kaufman v. United States (1914) 21 Fed. 613, 129 C. C. A. 149; In r James (C. C. A. 1910) 181 Fed. 47 24 Am. Bankr. Rep. 288.

To constitute the offense of concea ing property in violation of section 2 (post, § 9613), the concealment mu have been made after the filing of a p tition, and must have been knowing and fraudulently made. In re Agne (D. C. 1915) 225 Fed. 650.

It is necessary that the property co cealed should have been property "b longing to his estate in bankruptcy and creditors objecting to the discharg must show that the property in que tion was of such a character that would constitute assets of the estate bankruptcy, that the bankrupt own it at the time of the adjudication, a that it was then in his possession, or least that it was then in such a situ tion that he could have claimed it f himself. Vehon v. Ullman (1906) 1 Fed. 694, 78 C. C. A. 82, 17 Am. Bank Rep. 435; In re Isaac Prager & S (D. C. 1905) 134 Fed. 1006, 13 A Bankr. Rep. 527; In re Fritchard (1 C. 1900) 103 Fed. 742, 4 Am. Bank Rep. 609; In re Locks (D. C. 190 104 Fed. 783, 5 Am. Bankr. Rep. 13 In re Hirsch (D. C. 1899) 96 Fed. 46 2 Am. Bankr. Rep. 715. See In Fleishman (D. C. 1902) 120 Fed. 96 9 Am. Bankr. Rep. 557. Property a quired after the adjudication belon to the bankrupt and not to the estat and therefore he is not bound to di close it. In re Parish (D. C. 1903) 1 Fed. 553, 10 Am. Bankr. Rep. 54 And the concealment of a claim again his wife on account of a gift made her several years before his bankrup cy, and which was valid as to him a all his creditors except one, who mig have maintained a suit to set it asid is not enough to forfeit the right to discharge. In re House (D. C. 190 103 Fed. 616, 4 Am. Bankr. Rep. 60

Where the bankrupt has property his possession and has the use of it his own, and willfully omits it from h schedule and keeps it from his truste it is no answer to a charge of concea ment thereof that the property belong of right to his assignee under a prev ous assignment under the state inso vency law. In re Beal (D. C. 186 Fed. Cas. No. 1,156.

If the bankrupt was a member of firm (not in bankruptcy) and has t

possession of joint estate and
s of the firm, he must disclose
his individual trustee in bank-
In re Beal (D. C. 1869) Fed.
. 1,156. So if he has mingled
money with funds of an estate
he is administrator, he must
bankruptcy court a correct and
le account of his affairs, so
can be determined what prop-
ngs to the estate in bankrupt-
until he does this his discharge
vithheld. In re Walther (D. C.
5 Fed. 941, 2 Am. Bankr. Rep.

title to the property in question
upon the validity of a certain
mortgage and its foreclosure,
stion will not be determined
ly on the application for dis-
but the discharge will not be
until it shall have been deter-
a proper proceeding. In re
(D. C. 1908) 163 Fed. 428,
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bankrupt knowingly and fraud-
onceals assets from his trustee
fense within section 29b (post,
though he has disposed of it
n order requiring payment to
tee. In re Stern (D. C. 1914)
. 979.

ankrupt cannot obviate objec-
the granting of his discharge,
round of his having concealed
, by the fact that he listed
perty on his schedule after it
discovered by the trustee or
itors. In re Sussman (D. C.
90 Fed. 111, 26 Am. Bankr.

nkrupt's interest in a business,
s under a will or a trust, his
in an insurance policy, or other
n action, may constitute assets
state, and he "conceals" such
he keeps silence in relation to
mits them from his schedule,
lse evidence concerning them,
es that they do not exist or do
ng to him. In re Bacon (D. C.
05 Fed. 545, 30 Am. Bankr.
4; In re Cohen (D. C. 1912)
. 188, 29 Am. Bankr. Rep. 698;
wne (D. C. 1903) 122 Fed. 313,
Bankr. Rep. 284; In re Otto
1902) 115 Fed. 860, 8 Am.
Bankr. Rep. 305; In re Wood (D. C. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Hammond (D. C. 1869) 3 N. B. R. 273, Fed. Cas. No. 5,999.

It is not technically a concealment of an asset if the bankrupt lists or discloses it, although he attempts to divert attention from it by pretending that it has only a nominal value, or assigns it a value much below its actual worth in the market. In re McBryde (D. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Semmel (D. C. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351.

It is a concealment of assets if the bankrupt conducts a business, of which he is the real owner, in the name of his wife or a relative, pretending himself to act only as agent or manager. In re Miller (1914) 212 Fed. 920, 129 C. C. A. 440; In re Freund (D. C. 1899) 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Welch (D. C. 1899) 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Rathbone (D. C. 1868) 1 N. B. R. 536, Fed. Cas. No. 11,583; In re Hill (D. C. 1868) 1 N. B. R. 431, Fed. Cas. No. 6,483; In re Rathbone (D. C. 1868) 2 N. B. R. 260, Fed. Cas. No. 11,581.

In order to establish a concealment of assets such as will defeat the bankrupt's right to a discharge, it must be shown that the property in fact belonged to him at the time of the bankruptcy. And if it had previously been transferred to another, the transfer being actual and not merely colorable and such as to place the property beyond the reach of the bankrupt, the bankrupt's omission of it from his schedule or his denial that he owns it is not a concealment of assets, although the transfer would be voidable at the suit of creditors or of the trustee. In re Hammerstein (1911) 189 Fed. 37, 110 C. C. A. 472, 26 Am. Bankr. Rep. 757; In re Dauchy (1904) 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511, affirming (D. C. 1903) 122 Fed. 688, 10 Am. Bankr. Rep. 527; Fields v. Karter (1902) 115 Fed. 950, 53 C. C. A. 432, 8 Am. Bankr. Rep. 351; In re Wermuth (D. C. 1910) 179 Fed. 1009, 24 Am. Bankr. Rep. 785.

If a pretended transfer was colorable only and not real, and the property continues to be held for the benefit of the bankrupt and subject to his control, or under a secret trust for him, or he retains a secret interest in it or use of it, it continues to be his property in such sense that his failure to disclose it or surrender it to the trustee will constitute a concealment of assets. In re Hagy (C. C. A. 1915) 220 Fed. 665; In re Graves (D. C. 1911) 189 Fed. 847, 26 Am. Bankr. Rep. 633; Hudson v. Mercantile Nat. Bank (1902) 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; In re Wilcox (1900) 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362; In re Welch (D. C. 1899) 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Holstein (D. C. 1902) 114 Fed. 794, 8 Am.

Bankr. Rep. 147; In re Berner (D. C. 1900) 2 Nat. Bankr. News, 268; In re Wakefield (D. C. 1913) 207 Fed. 180, 31 Am. Bankr. Rep. 42.

Where a voluntary bankrupt claimed to have no assets, but it appeared that he had been in business and had successfully disposed of three different concerns using his sister to hold the proceeds, he was not entitled to a discharge. In re Miller (D. C. 1913) 203 Fed. 170.

Where a bankrupt received $2,000 from his brokers shortly before bankruptcy, which amount he concealed and used for his own purposes and in the name of his wife, such concealment constituted ground for the denial of a discharge, whether the money was his or was borrowed from his brokers. In re De Mauriac (D. C. 1913) 206 Fed. 358.

The concealment by a bankrupt, during the four months preceding the filing of the petition, of the fact that a deed previously executed by him was a mortgage, is a concealment of property, which may defeat his discharge, under Bankr. Act, § 14b(4). In re White (D. C. 1915) 222 Fed. 688.

Facts and circumstances showing a fraudulent concealment of assets by a bankrupt, which will defeat his right to a discharge, must be proved and will not be deduced, as a matter of doubtful inference, from other facts and circumstances. In re Conn (D. C. 1901) 108 Fed. 525, 6 Am. Bankr. Rep. 217.

Where the established facts show a very large shrinkage or disappearance of assets within a short period, such assets being definitely shown to have existed, and the discrepancy being too great to be accounted for by the ordinary vicissitudes of business, it is a fair presumption that the bankrupt is concealing some or all of such assets, and this presumption he must overcome by giving a credible account of the loss or shrinkage, and if he fails to do so, it will be just cause for refusing to discharge him. In re Coppleman (D. C. 1913) 30 Am. Bankr. Rep. 414; In re Schwartz (D. C. 1912) 201 Fed. 166, 28 Am. Bankr. Rep. 670; In re Simon & Sternberg (D. C. 1907) 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Jacobs & Verstandig (D. C. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Boyden (D. C. 1904) 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Becker (1901) 112 Fed. 1020, 50 C. C. A. 666; In re Leslie (D. C. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Cashman (D. C. 1900) 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Hoffman (D. C. 1900) 102 Fed. 979, 4 Am. Bankr. Rep. 331; In re Morgan (D. C. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re O'Gara (D. C. 1899) 97 Fed. 932, 3 Am. Bankr. Rep. 349; In re Grossman (D. C. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510. Compare In re Lesser (1902) 114 Fed. 83, 52 C. C. A. 31, 8 Am. Bankr. Rep. 15. And see In re Allendorf (D. C. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320.

15. Omissions in schedule and list of creditors.—If a bankrupt knowingly, intentionally, and dishonestly omits from his schedule of assets property which should have been listed therein and turned over to his trustee, and swears to the schedule thus fraudulently incomplete, he is guilty both of concealing property from his trustee and of making a false oath in a proceeding in bankruptcy, and on both grounds forfeits his right to a discharge. Osborne v. Perkins (1901) 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; In re McCann (D. C. 1910) 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Guilbert (D. C. 1909) 169 Fed. 149, 22 Am. Bankr. Rep. 221; In re Breiner (D. C. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684; In re Bullwinkle (D. C. 1901) 111 Fed. 364, 6 Am. Bankr. Rep. 756; In re Semmel (D. C. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; In re Lowenstein (D. C. 1899) 106 Fed. 51; In re Lewin (D. C. 1900) 103 Fed. 852, 4 Am. Bankr. Rep. 636; In re Gammon (D. C. 1901) 109 Fed. 312, 6 Am. Bankr. Rep. 482; In re Wood (D. C. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Roy (D. C. 1899) 96 Fed. 400, 3 Am. Bankr. Rep. 37. This is the case where he makes a willfully false statement in his schedule that all his property has gone into the possession of a receiver appointed by a state court, when in fact he has property which he did not turn over to the receiver nor list in his schedule. In re Lesser (D. C. 1901) 108 Fed. 205, 5 Am. Bankr. Rep. 330.

The fact that the bankrupt amends his schedule and lists the omitted property, after the discovery of the fact that he has concealed assets and made a false oath, will not relieve him from the consequences of his original fault nor entitle him to a discharge. In re Breiner (D. C. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684.

The rule applies only to the omission of property in which the creditors can claim an interest or which could be made available for the satisfaction of their claims through the bankruptcy proceedings. In re Winchester (D. C. 1907) 155 Fed. 505, 19 Am. Bankr. Rep. 227. And hence it is not ground for denying the discharge that the bankrupt failed to place any valuation on the property which he listed and claimed as exempt. In re Reed (D. C. 1911) 191 Fed. 920, 26 Am. Bankr. Rep. 286. Or did not specify a valuable gold watch as included in the "personal wearing apparel" which he claimed to be exempt. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. Or omitted a portion of his monthly salary as a public state officer which was earned but not

at the time of filing the peti-
re Doherty (D. C. 1904) 135
, 13 Am. Bankr. Rep. 549. Or
previously transferred by a
ce which was valid as against
ugh voidable at the suit of
. In re Hennebry (D. C. 1913)
882; In re Crenshaw (D. C.
Fed. 632, 2 Am. Bankr. Rep.
re Wakefield (D. C. 1913) 207
, 31 Am. Bankr. Rep. 42. Or
hich he gave to his wife nine
fore. In re Howell (D. C.
5 Fed. 594. Or property which
reviously transferred to a cred-
hom it had been pledged as se-
r a debt of equal or greater
In re Webb (D. C. 1899) 98
, 3 Am. Bankr. Rep. 386.
the bankrupt omits from his
a contract under which he was
o receive money, though it was
assigned to another, and was
ssigned to the amount he owed
nee, it being otherwise treated
ankrupt, the assignee, and the
rty thereto, as the bankrupt's
this amounts to a false oath
his discharge. In re Semmel
1902) 118 Fed. 487, 9 Am.
ep. 351.
subdivision b (4) of this sec-
conveyance by the bankrupt
rty was not absolute, but a
ust existed, or if the convey-
in fact a mortgage, the fail-
port this interest by the bank-
is schedule would be a fraud-
cealment under the act, which
revent a discharge. In re
(D. C. 1913) 207 Fed. 180.
pt having purchased and paid
tock of a corporation largely
ng checks on funds on deposit
in his own name and not hav-
ded the same in his schedules
uptcy, it was no answer to an
to his discharge for alleged
ent of assets and because of
d false oath to his schedule
corporation was purchased
funds of his wife. In re Dia-
C. 1913) 204 Fed. 137.

Knowledge and fraudulent
—The mere fact that the bank-
tted from his schedule of as-
erty which he ought to have
rein is not alone sufficient to
ischarge. To constitute such
e against the bankruptcy law
arrant the court in refusing
privilege of a discharge, it
ther be made to appear that
ssion was made with a clear
ite knowledge on his part of
ence of the property in ques-
of the nature of his right to it
t in it, and for the fraudulent
f keeping it from the knowl-
is trustee and the creditors
enting its administration as a
s estate in bankruptcy. Smith
(1901) 111 Fed. 157, 49 C.
, 7 Am. Bankr. Rep. 4; In re Eaton (D. C. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; In re Slingluff (D. C. 1900) 105 Fed. 502; Fellows v. Freudenthal (1900) 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re De Leeuw (D. C. 1899) 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Marsh (D. C. 1900) 2 Nat. Bankr. News, 593; In re Parker (D. C. 1868) Fed. Cas. No. 10,720; In re Burk (D. C. 1868) 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Wyatt (D. C. 1868) 2 N. B. R. 288, Fed. Cas. No. 18,106; In re Tebbetts (C. C. 1842) Fed. Cas. No. 13,817; Allen v. Hickling (1882) 11 Ill. App. 549.

17. —— **Omission by mistake or by advice of counsel.**—The omission of a bankrupt to include particular property in his schedule of assets will not be ground for refusing his application for discharge, where such omission was not caused by a fraudulent intent to conceal the property from his trustee, but was the result of a mistake of law or fact, or of an honest though erroneous belief that he had no available interest in the property. In re Morrow (D. C. 1899) 97 Fed. 574, 3 Am. Bankr. Rep. 263; In re Crenshaw (D. C. 1899) 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Freund (D. C. 1899) 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Huber, 1 Nat. Bankr. News, 431; In re Finan (D. C. 1900) 2 Nat. Bankr. News, 872; In re Boynton (D. C. 1882) 10 Fed. 277; In re Smith (C. C. 1871) 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott (D. C. 1880) 11 Fed. 133; In re Woodward (D. C. 1875) Fed. Cas. No. 18,001.

A discharge should not be refused because the schedule states that the bankrupt owns a half interest in certain property, when the truth is that he has a life interest in the whole of it, where he testifies that he did not know exactly what his interest was. In re Blalock (D. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

Bad faith will not be inferred because of slight understatements and overstatements of debts, which practically counteract each other. In re Miner (D. C. 1902) 114 Fed. 998, 8 Am. Bankr. Rep. 248.

The defense or excuse of mistake must be clearly made out, and cannot be accepted in the face of plain facts, where it is incredible that the omission could have been due to inadvertence. In re Royal (D. C. 1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106.

It is permissible for the bankrupt to show, as negativing any fraudulent purpose on his part, that he acted under the advice of his counsel in omitting to list any particular item of property in his schedule. In re Stafford (D. C. 1915) 226 Fed. 127; Klein v. Powell (1909) 174 Fed. 640, 98 C. C. A. 394, 23 Am. Bankr. Rep. 494; In re Schofield (D. C. 1905) 147 Fed. 862, 15 Am.

Bankr. Rep. 824; In re Neely (D. C. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Shenberger (D. C. 1900) 102 Fed. 978, 2 Nat. Bankr. News, 783. But to excuse the omission on this ground, it is necessary to show that the counsel's advice related to matter of law only, that there was at least some substantial reason in law to question the necessity of including the property in the schedule, that the bankrupt stated all the facts to his attorney fully and fairly, and that the advice was given and accepted in good faith. Remmers v. Merchants' Laclede Nat. Bank (1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; In re Breitling (1904) 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; In re Alleman (D. C. 1908) 162 Fed. 693, 20 Am. Bankr. Rep. 745; In re Stoddart (D. C. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762; In re Berner (D. C. 1900) 2 Nat. Bankr. News, 268; In re Headley (D. C. 1900) 2 Nat. Bankr. News, 684.

18. —— Omission of property without value.—The bankrupt should not be denied a discharge on account of the omission from his schedule of items of property which have no value, or could not be made to realize anything for the creditors, or which he honestly believes to be worthless. In re Le Claire (D. C. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; In re Dews (D. C. 1899) 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Bryant (D. C. 1900) 104 Fed. 789, 5 Am. Bankr. Rep. 114; Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

A fraudulent concealment of property or the making of a false oath cannot be predicated on the omission from the schedule of stocks or bonds of an insolvent or dissolved corporation. In re McCrea (C. C. A. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; In re Eaton (D. C. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531. Or of debts due to the bankrupt from persons who cannot be made to pay. In re Pearce (D. C. 1843) Fed. Cas. No. 10,873. Or a leasehold interest in realty under a yearly lease, where there is nothing to show that the use of the property is worth more than the rent. In re Hirsch (D. C. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344. Or an option to purchase leased premises under a lease which the bankrupt had surrendered. In re Kolster (D. C. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52. Or a contract to purchase land, on which a payment equal only to the accrued interest had been made, and which the vendor had a right to cancel for nonperformance. In re Miner (D. C. 1902) 114 Fed. 998, 8 Am. Bankr. Rep. 248. Or a small amount of furniture, which eventually sold for $15, there being no fraudulent intent to conceal it, and the key to the room containing it having been turned over to the trustee. Baker v. Bishop-Babcock-Becker Co. (C. C. A. 1915) 220 Fed. 657.

It is no ground for refusing a discharge to a bankrupt that he failed to list property which was hypothecated or pledged for its full value, if he acted under the honest belief that, being so pledged, it was no longer his, or was not worth including. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Hamilton (D. C. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; In re Adams (D. C. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696.

The bankrupt may be excused for failing to list a small sum of money on deposit with a person who has a claim against him of equal or greater amount. In re Miner (D. C. 1902) 114 Fed. 998, 8 Am. Bankr. Rep. 248.

19. —— Omission of doubtful claims or assets.—If the right of the bankrupt to a particular item of property, or his interest in it, depends on the solution of doubtful questions of law, that is, if there is substantial reason in law to doubt whether the property should constitute an asset of his estate in bankruptcy or could be made available for creditors through the medium of the bankruptcy proceedings, and if, for this reason, the bankrupt omits to list it in his schedule, it cannot be said that his purpose in so doing was fraudulent, and therefore he should not be refused his discharge. In re McCrea (C. C. A. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; In re Brumbaugh (D. C. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Countryman (D. C. 1903) 119 Fed. 639, 9 Am. Bankr. Rep. 572; In re Todd (D. C. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770; In re McAdam (D. C. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 417; In re Freund (D. C. 1899) 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Webb (D. C. 1899) 98 Fed. 404, 3 Am. Bankr. Rep. 386; In re Dews (D. C. 1899) 96 Fed. 181, 2 Am. Bankr. Rep. 483.

Where the question whether the bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in such estate on which he could raise money, his failure to schedule such interest as a part of his estate in bankruptcy should not preclude his right to a discharge. Woods v. Little (1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

In another case, it appeared that a testator bequeathed a sum of money to trustees, in trust to pay the income to his wife during her life, and with power to her to dispose of the principal by will, and added that, in default of such disposition by her, "I give the said trust fund, upon her decease, to my own then surviving next of kin." After the death of the testator, his son was

l bankrupt, and thereafter the
's wife died, having exercised
er of appointment by bequeath-
fund to the bankrupt uncondi-
The bankrupt did not list this
in his schedule of assets, nor
surrender it to his trustee. It
l that, in view of the doubtful
s of law, whether the bank-
nterest in the trust fund at the
the adjudication was a vested
such as would pass to his trus-
whether his title thereto, after
ner's decease, was derived from
or from the prior will of his
t could not be said that he had
gly and fraudulently" conceal-
erty from his trustee, so as to
his right to a discharge. In re
e (D. C. 1900) 99 Fed. 703, 3
nkr. Rep. 700.

e of bankrupt to schedule in-
f trust fund liable to creditors
Real Property Law N. Y. § 98,
ground for denying discharge,
of the doubt as to the trustee's
such income. In re Buchanan
219 Fed. 492, 135 C. C. A. 204.

e a bankrupt has received a
rporting to convey an interest
and has acted upon it by ob-
a loan secured by a mortgage
interest, which is outstanding
ime of the adjudication in bank-
he has no right to omit the
or the debt from his schedules
theory that in fact the convey-
sted no interest in him, that be-
atter to be determined by the
and his entire omission of any
of the property is ground for
to grant him a discharge. In
y (1904) 127 Fed. 538, 62 C. C.
11 Am. Bankr. Rep. 539.

— **Omission of debts or cred-**
The omission of creditors from
edule of a bankrupt is not
for refusing his discharge. In
ck (D. C. 1902) 118 Fed. 679,
Bankr. Rep. 266.

e a bankrupt at the time of his
tion owed certain debts to his
s, which were not scheduled
erred to in a written statement
obtain credit, the existence of
ebts would not prejudice the
t's right to discharge, provid-
creditors would release the
t from the debts or consent
ey be scheduled nunc pro tunc.
Josephs (D. C. 1913) 205 Fed.

e a proposed voluntary bank-
ho has no property except such
xempt, borrows a small sum of
to pay the fees and costs of his
y, just before filing his peti-
e is not required to list the
so borrowed in his schedule of
and his omission to do so is no
of opposition to his application
charge. Sellers v. Bell (1899)
94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

21. **False oath or testimony.**—It is statutory ground for refusing to discharge a bankrupt if he shall have "made a false oath in, or in relation to, any proceeding in bankruptcy." This offense may be committed by his making a material and intentionally false statement in his voluntary petition for adjudication, or in the poverty affidavit accompanying it. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. Or by swearing to a schedule of assets which is false, and known to be so, in respect to particular items of property, or which intentionally omits to mention property which should have been included. In re Herrman (1904) 136 Fed. 767, 69 C. C. A. 413, 13 Am. Bankr. Rep. 778; In re Goodman (D. C. 1909) 171 Fed. 287, 22 Am. Bankr. Rep. 570; In re Kamsler (D. C. 1899) 97 Fed. 194; In re Roy (D. C. 1899) 96 Fed. 400, 3 Am. Bankr. Rep. 37. Or by giving willful false testimony in the course of his examination before the referee, provided the evidence is material and relates to a subject which is a legitimate matter of inquiry on such examination. In re Luftig (D. C. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773; In re Conroy (D. C. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; In re Kamsler (D. C. 1899) 97 Fed. 194.

Where a bankrupt, on examination before a special commissioner, falsely testified that he had never made a financial statement to any one, when in fact he had made a false financial statement to a commercial agency, he was guilty of making a false oath which was punishable by imprisonment under Bankr. Act 1898, § 29b2, which was ground for denial of a discharge under section 14b(1). In re Zoffer (C. C. A. 1914) 211 Fed. 936.

It is not enough to justify the refusal of a discharge that the bankrupt's testimony was evasive, misleading, or unsatisfactory, or that his behavior was disrespectful and contumacious. In re Cohen (D. C. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Fanning (D. C. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55.

That a bankrupt in the course of an extended examination made a misstatement concerning his want of knowledge of his insolvency at a particular time was insufficient to warrant a denial of a discharge on the ground that he made a false oath. In re Marcus (C. C. A. 1913) 203 Fed. 29.

Any pleading, verified and filed in the bankruptcy proceeding, may contain such a "false oath" as to forfeit the right to a discharge. But the verification of an answer by the bankrupt containing a false statement of fact, does not constitute the making of a false oath in this sense, where the answer

was filed too late and was not in fact considered. In re Young (D. C. 1905) 140 Fed. 728, 15 Am. Bankr. Rep. 477.

While the perjury of a bankrupt in his testimony on proceedings for his discharge will not prevent the granting of the discharge, where the other evidence shows him to be entitled to it, such perjury is a contempt of court for which he may be punished. In re Kretsch (D. C. 1909) 172 Fed. 523, 22 Am. Bankr. Rep. 284. Compare In re Dews (D. C. 1900) 101 Fed. 549.

Where a petition in involuntary bankruptcy was filed against a corporation, and one who was an officer of it and a stockholder in it gave testimony on the hearing of the petition, which was false, and afterwards he was himself adjudged bankrupt, it was held that his right to a discharge was not prejudiced by such false testimony. In re Blalock (D. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

Testimony given by the bankrupt in prior proceedings under the state insolvency law, even if materially false, cannot prejudice his right to a discharge, and this holds true even where such testimony is read into the record on the bankrupt's examination in the bankruptcy proceedings, where this is done by agreement of counsel, without the concurrence of the bankrupt and without his making any oath in respect to the truth of it. In re Goldsmith (D. C. 1900) 101 Fed. 570, 4 Am. Bankr. Rep. 234.

The falsity of an oath taken by the bankrupt does not affect his right to a discharge where it was not made in connection with the administration of his estate or in any way affecting such estate. Bauman v. Feist (1901) 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 708. Or where the statement was not material to any issue in the bankruptcy proceedings. In re Chamberlain (D. C. 1910) 180 Fed. 304, 25 Am. Bankr. Rep. 37. False and evasive testimony concerning statement to mercantile agency held not immaterial, but to justify denial of discharge, though no creditor relied on the statement. In re Sheinberg (D. C. 1915) 223 Fed. 218.

The statute cannot be extended so as to embrace previous conduct or transactions which are merely fraudulent as to creditors, but not made criminal. Fellows v. Freudenthal (1900) 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

A false statement made by the bankrupt upon his examination, touching the existence of certain books of account, will not prevent his discharge if it appears that such statement was against his own interest, and apparently without motive, and the circumstances indicate that it was innocently and not willfully made. In re Warne (C. C. 1882) 12 Fed. 431.

To bar his right to a discharge, the oath or testimony of the bankrupt must have been knowingly and fraudulently false. Kentucky Nat. Bank v. Carle (1904) 127 Fed. 686, 62 C. C. A. 41 12 Am. Bankr. Rep. 119; In re Hal (D. C. 1913) 206 Fed. 856, 31 An Bankr. Rep. 88.

The false oath or testimony whic will deprive a bankrupt of his right t a discharge must be such as would sus tain an indictment for perjury. In r Strouse (D. C. 1899) 2 Nat. Bank News, 64. But if this condition is ful filled, it is immaterial that the bank rupt could not be convicted of perjur on account of the protection given t him by another provision of the statut In re Gaylord (1901) 112 Fed. 668, 5 C. C. A. 415, 7 Am. Bankr. Rep. 1 In re Dow's Estate (D. C. 1900) 10 Fed. 889, 5 Am. Bankr. Rep. 400; I re Leslie (D. C. 1903) 119 Fed. 406, Am. Bankr. Rep. 561. But compar In re Marx (D. C. 1900) 102 Fed. 67 4 Am. Bankr. Rep. 521; In re Loga (D. C. 1900) 102 Fed. 876, 4 An Bankr. Rep. 525.

The objecting creditors must sustai the burden of proving that the oath statement was not only false, but wa knowingly and intentionally so. Ba man v. Feist (1901) 107 Fed. 83, 4 C. C. A. 157, 5 Am. Bankr. Rep. 70 In re Gaylord (1901) 112 Fed. 668, 5 C. C. A. 415, 7 Am. Bankr. Rep. 1; I re Slingluff (D. C. 1900) 105 Fed. 50 In re Marcus (C. C. A. 1913) 203 Fe 29, 30 Am. Bankr. Rep. 176.

A bankrupt's discharge should not b denied because of an alleged false oat where he corrected his testimony b fore the close of his examination. I re Doyle (D. C. 1912) 199 Fed. 24 29 Am. Bankr. Rep. 102. CONTR In re Marcus (D. C. 1911) 192 Fe 743, 27 Am. Bankr. Rep. 164.

22. Refusal to testify.—The bank rupt's refusal to answer material que tions approved by the court will b ground for refusing his discharge, a though his refusal was based on claim of his constitutional privile against incriminating himself. In Dresser (1906) 146 Fed. 383, 76 C. A. 655, 16 Am. Bankr. Rep. 561; In Schwartz & Co. (D. C. 1912) 201 Fe 166, 28 Am. Bankr. Rep. 670.

Refusal of a bankrupt to answer m terial questions on his examination b fore creditors will bar his discharg although he subsequently offers to a swer the particular questions or a swers the same or similar questions the hearing of specifications of obje tion to his discharge. In re Weinr (1907) 153 Fed. 363, 82 C. C. A. 43 18 Am. Bankr. Rep. 387; In Schwartz & Co. (D. C. 1912) 201 Fe 166, 28 Am. Bankr. Rep. 670.

23. Obtaining credit by false stat ments.—A transfer of corporate sto to a bankrupt for which he gave h notes secured by a pledge of the stoc and a further agreement by the sell to extend the time for payment of

the corporation then due, with
ional security except the bank-
romise to pay the debt, consti-
obtaining of property on cred-
e bankrupt, and, where it was
by a materially false statement
g made by the bankrupt as to
cial ability, is a bar to his dis-
In re Wylly (D. C. 1913) 210
4.

otaining of a surety or indemni-
by means of false financial
ats is not the obtaining of
y" on credit, within the mean-
his section. In re Tanner (D.
192 Fed. 572, 27 Am. Bankr.
5.

n statements made by a bank-
procure credit will not bar a
e, unless there is substantial
that money or property has
ained on the faith thereof, and
wn that the statements were in
e when made. In re McLellan
1913) 204 Fed. 482.

not necessary that a statement
a bankrupt to obtain goods on
hould have been made or the
elivered within four months pri-
e bankruptcy, in order to bar
charge. In re Simon (D. C.
01 Fed. 1004, 29 Am. Bankr.
8. A false financial statement
ghteen months before a sale of
the bankrupt cannot be con-
a proximate cause of the sale,
entitle the seller to object to
nkrupt's application for dis-
on account of it. In re Braver-
. C. 1912) 199 Fed. 863, 28 Am.
Rep. 513; In re Allendorf (D.
) 129 Fed. 981, 12 Am. Bankr.
0. An objecting creditor could
up the claim that it relied on
atements as to the bankrupt's
l condition made by the bank-
a commercial agency three
after goods have been sold and
dit extended. In re Main (D.
) 205 Fed. 421.

charge will not be refused where
own that the creditor first re-
make the loan to the bankrupt
the latter asked for, and for
e submitted the alleged false
nt, and afterwards made the
security given at the time and
e then deemed sufficient. In re
(D. C. 1905) 141 Fed. 463, 15
nkr. Rep. 534.

e a bank loaned money to the
t on certain warehouse receipts
teral, but only after a false
statement had been presented,
ppears that the loan would not
een made without such state-
e loan was a credit within the
of this provision. In re Sav-
1913) 209 Fed. 830, 126 C. C.

— Intention or knowledge of
-To bar a bankrupt's discharge,
statement made to obtain prop-
credit must have been false to
his knowledge and made with an intention to deceive. Gilpin v. Merchants' Nat. Bank (1908) 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, 21 Am. Bankr. Rep. 429; In re Josephson (D. C. 1916) 229 Fed. 272; In re Cloutier Bros. (D. C. 1915) 228 Fed. 569; In re Simon (D. C. 1913) 201 Fed. 1004; Hamlin v. J. M. Radford Grocery Co. (Tex. Civ. App. 1915) 182 S. W. 716. Or it must have been either knowingly false or made so recklessly as to warrant a finding that the bankrupt acted fraudulently in making it. In re Collins (D. C. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688.

Where a bankrupt made a full disclosure of his financial condition to an objecting creditor's agent, and depended on him to enter the facts according to the disclosure, and signed the statement so made without reading it, it was not "false," so as to bar the bankrupt's discharge, though it was inaccurate. International Harvester Co. of America v. Carlson (1914) 217 Fed. 736, 133 C. C. A. 430.

If the statement was made for the purpose of obtaining credit and brought about that result, and was false in fact, it is none the less a bar to the bankrupt's discharge because the inaccuracy was due to a mistake made in good faith. In re Aldridge (D. C. 1909) 168 Fed. 93; In re Shaffer (D. C. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147. Or because it was made and given as a mere matter of form and with no actual intention to defraud. In re Arenson (D. C. 1912) 195 Fed. 609, 28 Am. Bankr. Rep. 113; In re Terens (D. C. 1909) 172 Fed. 938, 22 Am. Bankr. Rep. 895.

Intent to deceive being included in "false," within this section, barring right to discharge of bankrupt obtaining credit on false statements, his signing as president statements of financial condition of a corporation, wholly relying on advice of his financial adviser, will not have the effect. In re Stafford (D. C. 1915) 226 Fed. 127.

The word "false," as used, in this section, means false, coupled with an intention to deceive, "intentionally untrue," and was not satisfied by a financial statement made by the bankrupt while away from home, omitting $4,300 of his debts and also assets of an equal or greater amount. Franklin v. Monning Dry Goods Co. (1914) 217 Fed. 929, 133 C. C. A. 601.

25. **—— By whom false statements made.**—A false statement in writing of the assets and liabilities of a bankrupt firm, made by the firm's managing agent, to obtain credit for the firm, held available to bar a discharge in bankruptcy of the members of the firm. In re Schwartz & Co. (D. C. 1912) 201 Fed. 166; In re Cloutier Bros. (D. C. 1915) 228 Fed. 569.

Statement of firm to mercantile agen-

cy held the statement of the firm, though made by the bookkeeper and not on the personal investigation of either copartner. In re Cloutier Bros. (D. C. 1915) 228 Fed. 569.

Where a bankrupt knew that a financial statement was being prepared by his bookkeeper to be used as the basis of credit from a bank, as he was authorized to do, and copies of the statement, which was materially false with reference to matters concerning which the bankrupt was entirely familiar were called to his attention, though he testified that he left such work to the bookkeeper and other office clerks and relied implicitly on them, and thought the statement was correct such testimony was untrue or he was recklessly negligent; and he being bound by the acts of the bookkeeper in preparing and submitting such statement was therefore not entitled to a discharge under the provision that a bankrupt shall not be entitled to a discharge if he has obtained money on credit on a materially false statement in writing to the person from whom such credit is obtained. In re Savarese (1913) 209 Fed. 830, 126 C. C. A. 554.

A false financial statement will bar the bankrupt's discharge though it was filled out by a representative of the creditor from figures given by the bankrupt. In re Puschkin (D. C. 1911) 183 Fed. 882, 25 Am. Bankr. Rep. 742.

Where one member of a firm makes a false statement of its assets and liabilities, for the purpose of obtaining credit, this will prevent the discharge of that partner and also of the firm, but not of a partner who did not know of it and took no part in the fraud. Ragan, Malone & Co. v. Cotton & Preston (1912) 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597; In re Neyland & McKeithen (D. C. 1910) 184 Fed. 144, 24 Am. Bankr. Rep. 879; In re Josephson (D. C. 1916) 229 Fed. 272.

The effect of false statements made by a bankrupt to obtain credit, as barring his right to a discharge, is not different because the credit was obtained by a corporation of which the bankrupt owned a majority of the stock. In re Dresser & Co. (D. C. 1905) 144 Fed. 318, affirmed (1906) 145 Fed. 1021, 74 C. C. A. 680.

A materially false financial statement made by a bankrupt as to the solvency of a corporation of which he was president, on the faith of which he obtained $15,000 from a bank on notes of the corporation indorsed by him, the proceeds of which he largely used himself, held a sufficient basis for the denial of his discharge. In re Bleyer (C. C. A. 1914) 215 Fed. 896, affirming order In re Bleyer (D. C. 1913) 210 Fed. 391.

26. —— **To whom false statemen made.**—For the purpose of barring bankrupt's right to discharge, a fal financial statement is made to the pe son furnishing property on credit in r liance on such statement, when it w given to an agent for the purpose using it in obtaining property for t bankrupt, and if its contents were co municated by the agent to such pe son. In re Dresser (1906) 146 Fe 383, 76 C. C. A. 655, 16 Am. Ban Rep. 561.

A financial statement made by t bankrupt to a mercantile or comme cial agency, in response to its reque therefor or in answer to its inquiri though materially false, is not a bar his discharge, where creditors mere relied on his rating thus obtained a furnished him goods on credit, b without direct communication with t bankrupt himself. In re Russ (1910) 176 Fed. 253, 100 C. C. A. 7 23 Am. Bankr. Rep. 850; Novick v. P. Reed & Co. (1911) 192 Fed. 20, Am. Bankr. Rep. 521; In re Fost (D. C. 1910) 186 Fed. 254, 24 A Bankr. Rep. 368; In re Steed (D. 1901) 107 Fed. 682, 6 Am. Bankr. Re 73; In re Zoffer (C. C. A. 1914) 2 Fed. 936; In re Kretz (D. C. 191 212 Fed. 784. False statement of a sets and liabilities by a merchant a commercial agency merely to conti ue a business rating will not bar discharge in bankruptcy. In re Sim (D. C. 1913) 201 Fed. 1004, 29 A Bankr. Rep. 805. But such a stat ment, made to a commercial agency, r citing that it is made as a basis f credit with the associate members such agency, and which is communica ed to members, who extend credit the faith of it, is equivalent to o made directly to them. In re Pinc (D. C. 1906) 147 Fed. 621, 17 A Bankr. Rep. 331. And the result the same where the bankrupt, havi made such a statement to a merca tile agency, refers to it in his applic tion for credit with a particular cre itor, and is granted credit in relian on it. In re Cloutier Bros. (D. 1915) 228 Fed. 569; In re Kyte (1 C. 1909) 174 Fed. 867, 23 Am. Bank Rep. 414.

27. —— **Falsity in substance of stat ments.**—A "materially false statemen made by a bankrupt, which is grou for the denial of a discharge, is a d rect statement, either negative or po itive, which is false, and is not sati fied by blanks left under a schedule liabilities in a statement made by t bankrupt. International Harvester C of America v. Carlson (1914) 217 Fe 736, 133 C. C. A. 430.

The falsity of a statement which wi bar a bankrupt's right to discharge ms consist in a claim of assets which d not exist, or which, though real, a

roperty of the bankrupt. In le (D. C. 1904) 130 Fed. 782, ankr. Rep. 380. Or in a gross ate of the value of land or perty. In re Ellerbee (D. C. 8 Fed. 952, 29 Am. Bankr.

rupt not having objected to a a special commissioner that emoved goods had not been be goods of the bankrupt, he resist an objection to his dis- r obtaining credit on a mate- se statement on the ground he value of such goods were his other assets, it would t the statement was not ma- false. In re Nadel (D. C. 1 Fed. 767.

rially false statement, made to operty on credit, will bar a s right to discharge, where ty consists in the omission, ent, or understatement of his n re Waite (D. C. 1915) 223 ; In re Josephson (D. C. 9 Fed. 272; In re Miller (D. 192 Fed. 730, 27 Am. Bankr. ; In re Augspurger (D. C. 1 Fed. 174, 25 Am. Bankr. In re Brener (D. C. 1907) 930, 20 Am. Bankr. Rep.

o, to obtain credit, made false s as to his financial condition, by concealed the fact that he lessly insolvent, was guilty a false statement, barring his in bankruptcy, though sub- the concealed debts were paid ed, and though he believed debtors would not press him ent. Josephs v. Powell & (1914) 213 Fed. 627, 130 C. , reversing order In re Jos- C. 1913) 205 Fed. 548.

two bankers in the same in the habit of "clearing" or their accounts against each the close of each day's busi- debtor bank for the day giv- t on a third bank, and num- uch drafts drawn by one of rs (the bankrupt in this case) provided for, although he had in the hands of the drawee e of making the drafts, the the last two drafts, so drawn vas insolvent, are dishonored, make them "materially false s in writing" given for the obtaining property on credit. v. Harvey (1909) 174 Fed. . C. A. 420, 23 Am. Bankr.

clearly shown that any one of in the bankrupt's financial was materially false, though y be open to dispute or ques- may be successfully defend- he plain duty of the court to ischarge. In re Darevski (D. C. 1909) 171 Fed. 288, 22 Am. Bankr. Rep. 571.

28. Failure to keep books of account. —To bar a bankrupt's discharge, it is necessary that his omission to keep books or accounts should have been due to a wish to conceal his financial condition from his creditors and in pursuance of an intent to do so. In re Brockman (D. C. 1908) 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Keefer (D. C. 1905) 135 Fed. 885.

The fact that the bankrupt kept no books of account will not warrant a refusal of his discharge where the business in which he was engaged was such that ordinarily books of account would not be kept. In re Corn (D. C. 1901) 106 Fed. 143, 5 Am. Bankr. Rep. 478. Or where the bankrupt was an employé and not engaged in any business of his own. In re McCrea (C. C. A. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412. Or where, for several years before, he had not been engaged in any business in which the keeping of books would be necessary or appropriate. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. Or where he was a farmer and not a business man, and showed entire willingness to give evidence as to facts and transactions alleged to constitute a concealment of assets. In re Marsh (D. C. 1900) 2 Nat. Bankr. News, 593. Or where the bankrupt was a building contractor in a small way and had never kept any books while engaged in that business. In re Tanner (D. C. 1911) 192 Fed. 572, 27 Am. Bankr. Rep. 615; In re Arnold (D. C. 1915) 228 Fed. 75.

The failure to keep proper books of account in a business which had been entirely closed out before the bankruptcy, there being no debts or assets arising out of such business, will not prevent a discharge. In re Friedberg (D. C. 1879) 19 N. B. R. 302, Fed. Cas. No. 5,116; In re Keach (D. C. 1869) Fed. Cas. No. 7,629. But in this situation, the bankrupt must show that everything in relation to the discontinued business had been so fully ended that no account therein can in any way affect the interests of his creditors at the time of his bankruptcy. Tyler v. Angevine (C. C. 1879) Fed. Cas. No. 14,306.

The sale of firm assets to a new firm composed of the same members and one other, without any entry of the transaction on the books of the old firm, is a failure to keep books within the meaning of the bankruptcy act. In re Colcord (D. C. 1880) Fed. Cas. No. 2,970a.

A bankrupt, who sold for cash lumber not paid for shortly before the bankruptcy, and failed to keep any record of the disposition of the pro-

ceeds, held to be denied a discharge. In re Sims (D. C. 1914) 213 Fed. 992.

Where the bankrupt fails to enter on his books a transfer of property made about the time when his affairs became embarrassed, it is cause for refusing a discharge. In re Grieves (D. C. 1877) Fed. Cas. No. 5,809. Or a transfer of his business to his wife, which is thereafter supposed to be continued by her, but with no visible difference in the conduct of it. In re Bemis (D. C. 1900) 104 Fed. 672, 5 Am. Bankr. Rep. 36. Or a sale of his stock of goods in bulk for about half its cost, and under circumstances indicating haste and secrecy. In re Morgan (D. C. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402.

A discharge must be denied where the bankrupt mingled his wife's money and his own and deposited it all in a bank in his wife's name and kept no account or record to show how much of it was his. Bragassa v. St. Louis Cycle (1901) 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700. And where there was a very great shrinkage of the bankrupt's assets, and his books entirely failed to show what had become of his property. In re Brod (D. C. 1909) 166 Fed. 1011, 21 Am. Bankr. Rep. 426, affirmed (1909) 173 Fed. 1019, 97 C. C. A. 667.

The mere fact that the partners in the bankrupt firm sometimes drew out for personal use equal sums, without entering the same on the books, is not enough to show an intention to conceal their financial condition. In re Mackenzie (D. C. 1904) 132 Fed. 114, 12 Am. Bankr. Rep. 605.

A merely temporary and accidental omission in good faith and for a reasonable time to make the proper entries would not be a failure to keep the books, although a cessation to keep them, on purpose, or for an unreasonable length of time, would be. In re Hammond (D. C. 1869) Fed. Cas. No. 5,999; In re Burgess (C. C. 1855) 3 N. B. R. 196, Fed. Cas. No. 2,153.

That a bankrupt kept no books except a cash book and a check book in which the entries had been made by a young woman who acted as his clerk, and who, after the bankruptcy, could not be located as a witness, was not sufficient to sustain an objection to his discharge on the ground of a failure to keep books. In re Mintzer (D. C. 1912) 197 Fed. 647, 28 Am. Bankr. Rep. 743.

Where the books of a firm were kept by a competent bookkeeper, who was not interfered with by either member of the firm, and were not so kept as to conceal the bankrupt's financial condition, the fact that they were inaccurate on account of misunderstanding, inadvertence, or mistake was insufficient to bar a discharge. In re Marcus (C. C. A. 1913) 203 Fed. 29.

A bankrupt residing in New York, and being a member of a firm doing business in Michigan, is not prevented from obtaining his discharge either by the failure of the firm to keep proper books of account or by his neglect to see that proper books were kept. In re Garrison (1906) 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831.

A bankrupt, who had intrusted the entire conduct of his business to an agent, may be denied a discharge for the agent's failure to keep books with intent, in which the bankrupt did not participate, to conceal the condition of the business. In re Janavitz (1915) 219 Fed. 876, 135 C. C. A. 546.

Where the bankrupt did business through a corporation which he owned and controlled, his failure to keep books, either individually or through the corporation, so as to show his business transactions, will constitute a good objection to his discharge. In re Berger (D. C. 1912) 200 Fed. 325, 29 Am. Bankr. Rep. 712.

29. Destruction, mutilation, or concealment of books.—Destruction or concealment of books of account, to constitute ground of objection to a bankrupt's discharge, must appear to have been done by the bankrupt himself, or at least with his knowledge and connivance. In re Brice (D. C. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355.

A bankrupt's discharge will not be barred by the fact that the account books of a corporation for which he was bookkeeper, and in which he had no interest, had been mutilated before they came into the possession of the corporation. Bauman v. Feist (1901) 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703.

Where a debtor has kept books of account or records of his business carried on before the enactment of the bankruptcy law, their destruction or concealment, after the passage of the act, will be ground for refusing his discharge, if done with the fraudulent intent denounced by the statute. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

The mutilation of books of account, either by tearing out leaves or by changing the entries, may constitute a "destruction" or a "concealment" of them, according to the circumstances. In re Mendelsohn (D. C. 1900) 102 Fed. 119, 4 Am. Bankr. Rep. 103. Such a mutilation may be explained, and condoned if done without any fraudulent intent. In re Nooman (D. C. 1869) 3 N. B. R. 267, Fed. Cas. No. 10,291.

Where it appears that erasures in the bankrupt's books arose from errors in the original entries, which were corrected by erasing the figures and substituting the correct ones therefor, and there was no suggestion of a fraudulent intent, a discharge will not be refused because of such erasures. In

lel (D. C. 1878) 18 N. B. R. Cas. No. 490.

bankrupt testifies that he does where his books of account n they are in fact in the cus- ne of his creditors, where he em to be and where he has them, he is guilty of conceal- In re Kamsler (D. C. 1899) 194. As also where he first ving kept any books, and then, estigation has shown their ex- produces only one, and that most important. In re Mc- (D. C. 1902) 116 Fed. 783, ankr. Rep. 732.

harge was granted where the of the bankrupt was that, ne of his failure, thinking the re of no further value to him, ng no place to keep them, he lying in the store and sup- y had been lost or mislaid in y unknown to him. In re D. C. 1899) 96 Fed. 468, 2 kr. Rep. 715. And in a case e books were in a safe in the en the sheriff levied, and the said he had never seen the nce and did not know what ne of them. In re Stark (D. 96 Fed. 88, 2 Am. Bankr. And in another case, where s had been turned over to a n-law when the latter bought ness, and no effort was made m as a witness or require the n of the books. In re Shorer 99) 96 Fed. 90, 2 Am. Bankr.

harge was refused in a case e books were needed to ex- arge shrinkage of assets, and rupts had turned them over litor along with the stock in on a bill of sale, but never for the books nor made any recover them. In re Ablo- C. 1900) 99 Fed. 81, 3 Am. ep. 586. And in a case where rupt testified that his wife the books, but that they could be found. In re Wiedmann 911) 188 Fed. 684, 26 Am. ep. 697.

struction by a bankrupt, who books of account, of his can- cks and stubs shortly before ruptcy and when insolvent, er the evidence a destruction ds" with intent to conceal his condition which debarred him right to a discharge under n b (2), as amended by Act 03. In re Hodge (D. C. 1913) 824, 30 Am. Bankr. Rep. 522. arge should be refused where rupt kept no accounts at all in loose memoranda of sales, estroyed these. In re Hirsch- . C. 1912) 194 Fed. 562, 27 kr. Rep. 701.

- Intent to conceal financial —If a bankrupt's failure to keep books, or their destruction or concealment, was with an intent to conceal his financial condition, it is not necessary to show, in order to bar his discharge, that such intent was also fraudulent. In re Newbury & Dunham (1913) 209 Fed. 195, 126 C. C. A. 207; In re Hodge (D. C. 1913) 205 Fed. 824, 30 Am. Bankr. Rep. 522; In re Hanna (C. C. A. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843.

To justify the denial of a discharge to a bankrupt, it is necessary to show that his failure to keep books, or his destruction or concealment of them, was with intent to conceal his financial condition. The mere failure of the bankrupt to keep any books is not enough. In re Brown (D. C. 1912) 199 Fed. 356, 29 Am. Bankr. Rep. 73. Nor is it enough to show that the books have disappeared. In re Phillipps (D. C. 1900) 98 Fed. 844, 3 Am. Bankr. Rep. 542. Or that they were kept in a negligent or careless manner. In re Haskell (D. C. 1908) 164 Fed. 301, 20 Am. Bankr. Rep. 914. Or that the true state of the bankrupt's affairs or his real financial condition cannot be ascertained from the books as kept. In re Brice (D. C. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355; In re Lafleche (D. C. 1901) 109 Fed. 307, 6 Am. Bankr. Rep. 483.

It is necessary to show that the failure to keep books, or their destruction or concealment, or the manner of keeping them resulted from the bankrupt's intention to use this means of concealing his financial condition. Van Ingen v. Schophofen (1904) 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24; In re Allendorf (D. C. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320; In re Idzall (D. C. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741; In re Carmichael (D. C. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Spear (D. C. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; In re Boasberg, 1 Nat. Bankr. News, 133.

Where a transaction alleged to have been fraudulent was fully entered on the books, although the entries were made to deceive the general creditors, yet if they were not made with an intent to falsify the books, the particular intention denounced by the statute is not present. In re Hamilton (D. C. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

If the bankrupt meant to conceal his financial condition, and for that reason kept no books, it is immaterial what the actual effect on creditors may have been. In re Schachter (D. C. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

Objecting creditors must assume the burden of proving an intent on the part of the bankrupt to conceal his financial condition by failing to keep books of account or by destroying or concealing them. In re Forth (D. C. 1907) 151 Fed. 951, 18 Am. Bankr. Rep. 185; In

re Shertzer (D. C. 1900) 99 Fed. 706, 3 Am. Bankr. Rep. 699.

Such intent may be proved by the bankrupt's own admissions. In re Feldstein (1902) 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

Proof of various circumstances supporting the theory that the bankrupt intended to conceal his financial condition, or all pointing to such an intent as the only explanation of his conduct, will raise a presumption that such an intent existed, and this will justify the refusal of a discharge unless the facts are satisfactorily explained by the bankrupt. In re Weston (1913) 206 Fed. 281, 124 C. C. A. 345; In re Janavitz (1915) 219 Fed. 876, 135 C. C. A. 546; In re Shrimer (D. C. 1916) 228 Fed. 794; In re Linker (D. C. 1914) 222 Fed. 173; McKibbon, Driscoll & Dorsey v. Haskell (1912) 198 Fed. 639, 117 C. C. A. 343, 28 Am. Bankr. Rep. 588; In re Alvord (D. C. 1905) 135 Fed. 236, 14 Am. Bankr. Rep. 264; In re Feldstein (D. C. 1901) 108 Fed. 794, 6 Am. Bankr. Rep. 458; In re Studebaker (D. C. 1903) 124 Fed. 945, 10 Am. Bankr. Rep. 205; In re Kenyon (D. C. 1902) 112 Fed. 658, 7 Am. Bankr. Rep. 527; In re Cashman (D. C. 1900) 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Morgan (D. C. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402.

Where the bankrupt was a dealer in pianos, and his books showed all receipts from customers who had taken pianos on lease or conditional sale or time sales, but not receipts for pianos sold for cash, and his explanation was that he did not want his salesmen to know that he was selling pianos at cost for cash, held, that no "intent to conceal his financial condition" had been established, for concealment can exist only when it obtains with reference to persons entitled to know the facts. In re Barthier (D. C. 1910) 188 Fed. 394.

It was held a reasonable excuse for failure to enter certain loans on the bankrupt's books that he was afraid that, if the objecting creditor knew that he got money outside, he would close him up, whereas the bankrupt hoped that he could work along from season to season and eventually pay his debts. Van Ingen v. Schophofen (1904) 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24.

A discharge should not be refused where it appeared that the bankrupt had not kept such books or records as would be sufficient to disclose his true financial condition, but that his system or method of keeping his accounts, incomplete and insufficient as it was, had been persisted in by him during the whole time he had been in business (about nine years) and had not been in any respect changed after the passage of the present bankruptcy act. In re Idzall (D. C. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741.

A bankrupt is not entitled to a discharge where he admittedly destroy his books of account with intent to c ceal the record of his business, thou he testified that his motive was to stroy evidence that might have be used in a criminal prosecution agai him for violating a state statute. In Wolf (D. C. 1907) 156 Fed. 543, Am. Bankr. Rep. 70.

It is proper to refuse a dischar where the bankrupt concealed or stroyed his books in order to thwart investigation into his financial con tion. Ablowich v. Stursberg (190 105 Fed. 751, 45 C. C. A. 31, 5 A Bankr. Rep. 403. Or where he stroyed them when he was preparing file a petition in bankruptcy, and books were material to a proper und standing of the state of his affairs. re Conley (D. C. 1902) 120 Fed. 9 Am. Bankr. Rep. 496.

A bankrupt's omission to make pr er entries in his books is not excu by his saying that he thought it unn essary for his creditors to know t he was getting money from his wi In re Koelle (D. C. 1909) 171 F 257, 22 Am. Bankr. Rep. 515.

31. —— Contemplation of bankru cy.—Under the provision of the Ba ruptcy Act for the discharge of a ba rupt unless he has, with intent to c ceal his financial condition, destroy concealed, or failed to keep books account or records from which s condition might be ascertained, the f ure to keep such books of account w intent to conceal his financial conditi prevents a discharge, though the ba rupt's intent was not fraudulent, a though his acts were not done in c templation of bankruptcy. In re L ker (D. C. 1914) 222 Fed. 173.

32. —— What are proper books account.—The question, whether or the bankrupt has kept proper books account, is in every case a question evidence, and it depends largely up the nature and extent of the busine which he has carried on. In re Ne man (D. C. 1868) 2 N. B. R. 302, F Cas. No. 10,175.

If a competent accountant can, fr an examination of the books produc and in the possession of the trust determine the true financial conditi of the debtor, they are sufficient justify granting him a discharge. In Gay (D. C. 1868) Fed. Cas. No. 5,27 In re Bellis (D. C. 1870) Fed. Cas. N 1,275; In re Schumpert (D. C. 187 Fed. Cas. No. 12,491; In re Bartenba (D. C. 1875) Fed. Cas. No. 1,068; re Vernia (D. C. 1880) 5 Fed. 723; re Frey (D. C. 1881) 9 Fed. 376; re Graves (D. C. 1885) 24 Fed. 55 In re Simon (D. C. 1913) 201 F 1004, 29 Am. Bankr. Rep. 808.

The law does not require that t bankrupt shall have kept any particul kind of books, or that his books sh have been kept according to any speci mode or system of bookkeeping, or

scientific and approved man-
nly that they shall disclose
l condition. In re Simon (D.
01 Fed. 1004, 29 Am. Bankr.
In re Frey (D. C. 1881) 9
In re Idzall (D. C. 1899)
14, 2 Am. Bankr. Rep. 741;
mberlain (D. C. 1903) 125
11 Am. Bankr. Rep. 95; In
hy (D. C. 1877) Fed. Cas.

bankrupt stockbrokers kept
dividual accounts of custom-
ir general ledger by number,
by the name of the customer,
kept other records, such as
instruction or powers of at-
m which such accounts might
identified, it cannot be said
had failed to keep books of
om which their financial con-
ld be ascertained. In re A.
& Co. (1913) 204 Fed. 63,
A. 377, 30 Am. Bankr. Rep.

bankrupt's stock consisted
a stock of goods which he had
ver from a former business,
artners in the new business
ble to agree on the discount
de from the cost price, the
nch stock were valued at cost
wn in lead pencil in the in-
o that by making a proper
rom the items so entered, the
s of the firm at any particu-
ould be determined, held, that
to take stock and inventory
of all the assets at the end
ear did not show that the
ks were improperly kept for
se of concealing its financial
In re Marcus (C. C. A.
Fed. 29, 30 Am. Bankr. Rep.

nistakes in the books of a
will not prevent the granting
arge. In re Winsor (D. C.
N. B. R. 152, Fed. Cas. No.
or the fact that the books,
n in charge of a competent
r, were inaccurate on account
erstanding, inadvertence, or
In re Marcus (C. C. A.
Fed. 29, 30 Am. Bankr. Rep.
on account of obscurities
l explanation, when they are
plained. In re Townsend (D.
Fed. 559. But if the books
lligible, and the intent to con-
de out, a discharge cannot be
the bankrupt. In re Mackay
70) 4 N. B. R. 66, Fed. Cas.

fy the requirements of the
law, a tradesman must gen-
p an invoice or stock book.
ite (D. C. 1868) 2 N. B. R.
Cas. No. 17,532. But the
n invoice book will not pre-
discharge where he has so
his invoice bills that a com-
unt of all goods received by
e made out from them. In
D. C. 1875) 12 N. B. R. 390,

Fed. Cas. No. 11,639. See In re Josephson (D. C. 1916) 229 Fed. 272. The failure to keep a cash book may be a bar to the bankrupt's discharge, if the consequence is that it is impossible to determine the state of his affairs. In re Bellis (D. C. 1870) Fed. Cas. No. 1,275. But not where cash receipts and payments may be shown from other books. In re Hannahs (D. C. 1876) Fed. Cas. No. 6,032. As from a bank book and an account book of receipts and expenditures. In re Marsh (D. C. 1879) 19 N. B. R. 297, Fed. Cas. No. 9,109.

Books showing only the aggregate monthly purchases and sales are not proper books of account. In re Anketell (D. C. 1879) 19 N. B. R. 268, Fed. Cas. No. 394. And so, where the books of a firm doing an extensive business do not show the state of accounts between the partners, they are not entitled to a discharge. In re Jorey (D. C. 1870) Fed. Cas. No. 7,530.

A custom of keeping no proper books, but making entries of various transactions on as many slips of paper, which are not elsewhere recorded or otherwise co-ordinated, has generally been regarded as not enough to satisfy the statute. In re Hammond (D. C. 1869) Fed. Cas. No. 5,999; In re Perry (D. C. 1873) Fed. Cas. No. 10,999; In re Hunt (D. C. 1886) 26 Fed. 739. But a mere pocket memorandum book may be a sufficient "record" to disclose the bankrupt's financial condition. In re Howard (1910) 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841. Though not if it is so loosely kept that he himself cannot tell from it the amount of his business or the particulars of his debts. In re Newman (D. C. 1868) Fed. Cas. No. 10,175; In re Garrison (D. C. 1872) Fed. Cas. No. 5,254. And the practice of entering transactions of a particular kind only in a private memorandum book, always carried by the bankrupt himself and shown to no one, is evidence of an intent to conceal his financial condition. In re Pomerantz & Hopkins (1909) 168 Fed. 444, 21 Am. Bankr. Rep. 857; In re Feldstein (1902) 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

IV. APPLICATION FOR DISCHARGE AND PROCEEDINGS THEREON

33. Time of application.—An objection by a creditor that the petition for discharge was prematurely filed cannot be waived by him, since the court is bound, for the protection of all the creditors, to see that all the statutory conditions of granting the discharge are fulfilled. In re Wheeler (D. C. 1881) 5 Fed. 299.

Under the provision of this section that a bankrupt may file his application for discharge "after the expiration of one month and within the next twelve months subsequent to being ad-

judged a bankrupt," the twelve months' period begins to run, not from the date of the adjudication, but from the expiration of the one month. In re Walters (D. C. 1913) 209 Fed. 133; In re Daly (D. C. 1915) 224 Fed. 263. CONTRA, In re Holmes (D. C. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339. One additional day may be added where the last day of the twelve months is a public holiday. In re Lang (D. C. 1869) 2 N. B. R. 480, Fed. Cas. No. 8,056.

The court has no power to open an adjudication entered on default in involuntary proceedings, and make a new one, to permit the bankrupt to file an application for discharge, which he neglected to do within the time prescribed. In re Morse (D. C. 1909) 168 Fed. 157, 21 Am. Bankr. Rep. 709.

It is no part of the referee's duty to notify the bankrupt or his attorney of the time when the application may be filed or of the expiration of the year for filing it; the bankrupt himself must take notice of these matters. In re Knauer (D. C. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503.

If the twelve months have expired without the filing of an application (saving the case where the bankrupt was "unavoidably prevented" from acting in time), it is not within the discretion or authority of the court to entertain the application or to grant a discharge, but its jurisdiction and authority in this particular are at an end. In re Knauer (D. C. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503; In re Sloan (C. C. 1875) 12 N. B. R. 59, Fed. Cas. No. 12,945; In re Wilmott (D. C. 1868) 2 N. B. R. 214, Fed. Cas. No. 17,778; In re Greenfield (D. C. 1868) 2 N. B. R. 298, Fed. Cas. No. 5,774; In re Martin (D. C. 1869) 2 N. B. R. 548, Fed. Cas. No. 9,153; In re Schenck (D. C. 1872) 5 N. B. R. 93, Fed. Cas. No. 12,447; In re Barrett (D. C. 1874) 11 N. B. R. 527, Fed. Cas. No. 1,044. See In re Canady (D. C. 1868) 3 N. B. R. 11, Fed. Cas. No. 2,377; In re Daly (D. C. 1915) 224 Fed. 263. And a bankrupt who has failed to apply for his discharge within the time limited cannot thereafter file a second petition in bankruptcy, and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy. In re Loughran (1914) 218 Fed. 619, 134 C. C. A. 377; In re Silverman (C. C. A. 1907) 157 Fed. 675, 19 Am. Bankr. Rep. 460.

Where the bankrupt filed his application sixteen months after the adjudication, but without obtaining leave to do so and without showing cause excusing his delay, and afterwards, but more than eighteen months after the adjudication, he presented a verified petition setting forth the reasons for his delay, and praying for leave to file his application, and that the order granting such leave might be entered nunc pro tunc as of the date when the application was originally presented, his petition wa denied, on the ground that the failur seasonably to obtain leave to file th application was attributable to the lach es of the party and not to the act of th court. In re Wolff (D. C. 1900) 10 Fed. 430, 4 Am. Bankr. Rep. 74.

A court of bankruptcy cannot on nunc pro tunc order, extend the statu tory period for filing an application fo discharge. In re Taunton (D. C. 1914 216 Fed. 987.

The court, for cause shown, may ex tend the time in which an applicatio for a discharge may be filed by the ad ministrator of the bankrupt, dyin pending the bankruptcy proceedings. I re Agnew (D. C. 1915) 225 Fed. 650.

34. —— Extension for unavoidabl delay.—After the expiration of th twelve months, the bankrupt has n absolute right to apply for a discharge but he may be allowed to do so withi the next six months, by an order o court, based on a petition to the judg for leave to file such application, ac companied by satisfactory evidence tha the bankrupt was unavoidably prevent ed from making his application withi the year. In re Wolff (D. C. 1900) 10 Fed. 430, 4 Am. Bankr. Rep. 74. Se In re Donaldson (C. C. 1873) 11 N. B R. 460, Fed. Cas. No. 3,982; In r Lowenstein (C. C. 1876) 13 N. B. R 479, Fed. Cas. No. 8,573. But this pe tition must absolutely be presented be fore the end of the additional si months; if not, the court has no juris diction to act upon it. In re Levenstei (D. C. 1910) 180 Fed. 957, 24 Am Bankr. Rep. 822; In re Wagner (D C. 1905) 139 Fed. 87, 15 Am. Bankr Rep. 100; In re Fahy (D. C. 1902) 11 Fed. 239, 8 Am. Bankr. Rep. 354.

An application for leave to file a pe tition for discharge after the time lim ited by law, on the ground that th bankrupt was "unavoidably prevented' from applying in due time, is addresse to the discretion of the judge and ma be made without notice to creditors o formalities of practice or procedure except such as the judge may at th time direct, and in the exercise of hi discretion the judge may give a libera construction to the term "unavoidabl prevented," so as to make it include ex cusable neglect, reasonable grounds fo delay, mistake, and possibly inadver tence. In re Churchill (D. C. 1912) 197 Fed. 111, 28 Am. Bankr. Rep. 607 In re Chase (D. C. 1910) 186 Fed 408, 26 Am. Bankr. Rep. 456; In r Fritz (D. C. 1909) 173 Fed. 560, 2 Am. Bankr. Rep. 84.

Where delay in applying for leave to file petition for discharge is due to fault of attorney's clerk or employé, or postal employés, nunc pro tunc order allowing filing held to be made. In re Daly (D. C. 1915) 224 Fed. 263.

Nothing can be considered sufficient cause for delay which could have been avoided by ordinary diligence and at-

n the part of the bankrupt, was informed by his attorney me when he must file his ap- and had plenty of time to pre- re Daly (D. C. 1913) 205 2, 30 Am. Bankr. Rep. 475. e bankrupt or members of his ere sick and he had no money r preparing his application for , this may be an acceptable or delay beyond the year al- n re Casey (D. C. 1912) 195 , 28 Am. Bankr. Rep. 359. where it appears that there ing to prevent his attorney paring the petition for his sig- nd verification within the ap- time. In re Lewin (D. C. 5 Fed. 252, 14 Am. Bankr. . And merely to say that the of filing the petition was over- ing to press of business is no t all. In re Anderson (D. C. 4 Fed. 319, 14 Am. Bankr. .

the fact is such that, if the had applied for his discharge he twelve months, it would ly have been refused, because scharge in voluntary proceed- in six years previously, this s not "unavoidably prevent" n taking action within the onths, and therefore does not extension of time until after ear period shall have expired. ne (D. C. 1911) 186 Fed. 535; ase (D. C. 1910) 186 Fed. 408, Bankr. Rep. 456.

court grants an extension of an insufficient showing, cred- y move to vacate the order. ynes & Sons (D. C. 1903) 122 , 10 Am. Bankr. Rep. 13.

eave to file the application out has been granted, and the or- not been vacated or with- ts propriety is judicially set- when the application comes on ng, creditors can oppose the only on the statutory grounds.

ition for discharge.—If the 's petition for discharge is de- ither in respect to the allega- fact or the prayer for relief, may permit its amendment. ufman (D. C. 1905) 136 Fed. m. Bankr. Rep. 393.

one member of a bankrupt es to apply separately for his , the petition therefor should adjudication of the firm and titioner as a member of it, and ay for a discharge from both ndividual debts. In re Meyers 99) 97 Fed. 757, 3 Am. Bankr. . But if it is faulty in these s, it may be amended. In re (D. C. 1904) 127 Fed. 186, Bankr. Rep. 498; In re Bid- C. 1868) 2 N. B. R. 229, Fed. 1,392.

tition for discharge should be considered as a pleading, within the meaning of the bankruptcy law and therefore should be verified under oath, but if no objection to a want of verification is made until after the evidence on the application has been heard before the referee, it will then be too late. In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143.

As the petition is addressed to the judge, and is a matter for his personal consideration, it must be filed with the clerk of the court, and not with the referee. In re Hockman (D. C. 1912) 205 Fed. 330, 30 Am. Bankr. Rep. 921; In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143. But see In re Pincus (D. C. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331. But in a case where the application, although erroneously filed with the referee in the first place, instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after the adjudication, and no objection had been taken by creditors to the improper original filing with the referee, it was held that the petition would be regarded as properly filed. In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143.

36. Notice of application for discharge.—The prescribed notice to creditors of the bankrupt's application for discharge is jurisdictional, and no petition for discharge will be considered without proof that the prescribed notice has been given. In re Sykes (D. C. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264; Lathrop v. Stuart (C. C. 1850) Fed. Cas. No. 8,113.

Notice to creditors of a hearing on application for a bankrupt's discharge and fixing the date should be on order of the judge of the bankruptcy court in accordance with Supreme Court form 57. In re Hockman (D. C. 1912) 205 Fed. 330, 30 Am. Bankr. Rep. 921.

For the purpose of mailing the notice to creditors, a notice printed on the back of a postal card and duly mailed is sufficient. In re Downing (D. C. 1912) 199 Fed. 329, 28 Am. Bankr. Rep. 778.

It is not improper to add to the notice of the bankrupt's application for discharge, a notice of a meeting of creditors for the purpose of examining the bankrupt. In re Price (D. C. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419.

Notice by mail should be given to all creditors who have proved their debts, or whose names are included by the bankrupt in his list of creditors. In re McIntire (D. C. 1867) Fed. Cas. No. 8,822. If no proofs of claims have been filed, and no assets have come into the hands of the trustee, notice may be given by publication only. Anonymous (D. C. 1867) 1 N. B. R. 122, Fed. Cas. No. 457. But this course is not proper where there are known creditors, unless the bankrupt shows that the addresses of such creditors are

unknown to him and cannot be ascertained after diligent search and inquiry. In re Dvorak (D. C. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66.

Notice sent by mail to a judgment creditor, directed to his address as known at the beginning of the bankruptcy proceedings, will be sufficient, although the creditor has died in the meantime, at least if the will has not been admitted to probate and no steps have been taken to substitute the executor as a creditor in the bankruptcy. Lent v. Farnsworth (1904) 180 N. Y. 503, 72 N. E. 1144.

37. Proceedings in opposition to discharge.—Objections to the bankrupt's application for discharge call for action by the judge, and must be filed with the clerk of the court of bankruptcy, and not with the referee. In re C. H. Kendrick & Co. (D. C. 1915) 226 Fed. 980.

The judge may, in his discretion, extend the time for entering an appearance, as well as the time for filing specifications, and may grant leave to do so after the time has expired as well as before; but the creditor has no right to enter an appearance after the return day, and generally should not be allowed to do so except for good cause shown excusing his delay. In re Levin (1910) 176 Fed. 177, 99 C. C. A. 531, 23 Am. Bankr. Rep. 845; In re Ginsburg (D. C. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Chase (D. C. 1910) 186 Fed. 408, 26 Am. Bankr. Rep. 456; In re Grant (D. C. 1905) 135 Fed. 889, 14 Am. Bankr. Rep. 398.

Creditors who appear and file objections on the merits to the granting of a discharge thereby waive objections to any error or irregularity in the granting of an extension of time for filing the petition for discharge. In re Churchill (D. C. 1912) 197 Fed. 111, 28 Am. Bankr. Rep. 607.

A creditor who does not enter his appearance at the time specified (or within a further time granted to him by the court) has no standing in court on the hearing of the petition for discharge, and cannot be heard in opposition to it, but, on the contrary, will be understood as assenting to it. In re Sutherland (D. C. 1869) Fed. Cas. No. 13,640; In re Smith (D. C. 1871) 5 N. B. R. 20, Fed. Cas. No. 12,935; In re Seabury (D. C. 1874) 10 N. B. R. 90, Fed. Cas. No. 12,573; In re Schuyler (D. C. 1869) 2 N. B. R. 549, Fed. Cas. No. 12,494.

The entry of an appearance by one or more creditors for the purpose of opposing the application for discharge suspends all further proceedings until the filing of the specifications; but if the specifications are not filed within the ten days (or within an extension of the time specially granted by the court), then the case proceeds as if no opposition had been entered. In re McVey (D. C. 1868) 2 N. B. R. 257, Fed. Cas. No. 8,932; In re Frizelle (D. C 1871) 5 N. B. R. 119, Fed. Cas. No 5,132.

One creditor may adopt and prosecute the objections filed by another creditor, when the latter has declared his intention to abandon the same. In re Guilbert (D. C. 1907) 154 Fed. 676 18 Am. Bankr. Rep. 830. But not after the claim of the creditor originally objecting has been stricken out. In re McDonald (D. C. 1876) 14 N. B. R 477, Fed. Cas. No. 8,753.

The fact that creditors who proposed to contest the granting of a discharge on the ground that the bankrupt had defrauded them have abandoned their opposition is entitled to consideration by the court. In re Hammerstein (1911) 189 Fed. 37, 110 C. C. A. 472 26 Am. Bankr. Rep. 757.

Creditor, whose partnership with bankrupt was terminated prior to pretended sales of interest in another firm held not estopped from objecting to the bankrupt's discharge because of the concealment of such interest. In re Hagy (C. C. A. 1915) 220 Fed. 665.

The provision of the bankruptcy act (added by the amendment of 1910) that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized to do so at a meeting of creditors called for that purpose, is satisfied if the authority be given at a meeting called by the referee In re Reiff (D. C. 1913) 205 Fed. 399

38. Withdrawal of opposition.—A creditor who has entered opposition to a bankrupt's application for discharge may withdraw the same without the consent of the other creditors. Brangan v. His Creditors (1883) 64 Cal. 394 1 Pac. 477. But this cannot be done without notice to other creditors who have adopted the specifications as representing their own objections and propose to prosecute them. In re Dietz (D. C. 1899) 97 Fed. 563, 3 Am Bankr. Rep. 316. When a creditor who has filed specifications of objection is about to withdraw them, other creditors may be substituted and carry on the opposition. In re Houghton (D. C 1874) Fed. Cas. No. 6,730.

39. —— Corrupt inducement to withdraw opposition.—Any agreement or arrangement by which a creditor is to be paid in full, on consideration of his withdrawing opposition to the discharge, or is to receive a larger share of his debt than other creditors, or to receive other property or a bonus or present, is corrupt, illegal, and contrary to public policy, and cannot be enforced in any form of proceeding Blasdel v. Fowle (1876) 120 Mass. 447 21 Am. Rep. 533. See Fox v. Paine (1846) 10 Ala. 523. If a promissory note is given to the creditor in pursuance of such an agreement, it is invalid and cannot be collected by law. Bell v. Leggett (1852) 7 N. Y. 176; Marble

v. Grant (1882) 73 Me. 423; Rice v. Maxwell (1850) 13 Smedes & M. (Miss.) 289, 53 Am. Dec. 85. If the consideration is the bankrupt's promise to pay him in full, no action can be maintained on such promise. Austin v. Markham (1871) 44 Ga. 161.

Where the bankrupt's wife executes a mortgage on her separate property, at his request, in pursuance of an agreement by which he was to pay the debt of his creditor in full if the latter would assent to his discharge, the mortgage is without consideration and tainted with the illegality of the transaction, notwithstanding it was executed after the discharge and though the wife did not know of the agreement. Blasdel v. Fowle (1876) 120 Mass. 447, 21 Am. Rep. 533.

A corrupt bargain with a creditor to withdraw opposition to the bankrupt's discharge will invalidate the discharge if granted, or constitute sufficient ground for revoking and annulling it. Coates v. Blush (1848) 1 Cush. (Mass.) 564.

It is ground for vacating a discharge in bankruptcy that a creditor's withdrawal from opposition was purchased, though it was done by a friend of the bankrupt, without the procurement or participation of the bankrupt, where the latter was privy to the arrangement and consented to it. In re Dietz (D. C. 1899) 97 Fed. 563, 3 Am. Bankr. Rep. 316.

Where a surety of the bankrupt paid the debt of a creditor who was opposing the discharge, merely for his own purposes, and because the granting of the discharge would put him (the surety) in a better position, and this was done without consulting with the bankrupt or informing him of the transaction until long afterwards, and the latter had no part in it nor made any promise to repay the amount, it was held that this would not vitiate the discharge. Ex parte Briggs (D. C. 1875) Fed. Cas. No. 1,868.

40. Want or failure of opposition.—If no specifications of objection to the bankrupt's application for discharge are filed, or if those filed are withdrawn, ruled out, or found in favor of the bankrupt, the court will not, of its own motion, refuse a discharge, although it may appear that the bankrupt has committed some act which would deprive him of the right to a discharge if properly specified and proved. In re McDuff (1900) 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Hixon (D. C. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Thomas (D. C. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Holman (D. C. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Antisdel (D. C. 1878) 18 N. B. R. 289, Fed. Cas. No. 490; In re Clark (D. C. 1879) 19 N. B. R. 301, Fed. Cas. No. 2,812; In re Fowler (D. C. 1872) Fed. Cas. No. 4,999. CONTRA, In re Sohoo (D. C. 1869) 3 N. B. R. 215, Fed. Cas. No. 13,162; In re Wilkinson (D. C. 1869) 3 N. B. R. 286, Fed. Cas. No. 17,667.

Where there is no opposing party to the discharge, the proceeding may be continued from time to time to suit the convenience of the bankrupt. In re Sutherland (D. C. 1869) Fed. Cas. No. 13,640.

41. Time to file specifications in opposition.—Creditors desiring to oppose the bankrupt's application for discharge are required (by General Order No. 32) to enter their appearance on the day when creditors are required to show cause, and to file their specifications within ten days thereafter. But though the notice to show cause usually designates not only the return day, but a particular hour of that day, creditors are not restricted to the hour so appointed, but have the entire day in which to enter their appearance and ten days thereafter for filing the specifications. In re Barrager (D. C. 1911) 191 Fed. 247, 27 Am. Bankr. Rep. 366. The general order does not operate as a statute of limitations, so as to cut off absolutely the right of creditors to file opposition if not exercised within the ten days, or prevent the court from granting an extension of time for good reasons shown. In re Nathanson (D. C. 1907) 152 Fed. 585, 18 Am. Bankr. Rep. 252.

Specifications of opposition filed after the expiration of the prescribed time, without leave of court first obtained or valid excuse for the delay, will be disregarded, or may be dismissed on motion of the bankrupt. In re Albrecht (D. C. 1900) 104 Fed. 974, 5 Am. Bankr. Rep. 223; In re Buxbaum (D. C.) 13 N. B. R. 477, Fed. Cas. No. 2,259.

After the expiration of the ten days, no creditor can claim any absolute right to file specifications. Whether he shall be allowed to do so rests entirely in the discretion of the court. It may be granted as a privilege by the judge, but not without good cause shown, and not unless the creditor clears himself of the imputation of laches. In re Young (D. C. 1908) 162 Fed. 912, 20 Am. Bankr. Rep. 697; In re Frice (D. C. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Morgan (D. C. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re Marsh (D. C. 1900) 2 Nat. Bankr. News 649; In re Levin (C. C. 1876) 14 N. B. R. 385, Fed. Cas. No. 8,291; In re Jacobs (D. C. 1879) Fed. Cas. No. 7,160; In re Grefe (D. C. 1868) 2 N. B. R. 329, Fed. Cas. No. 5,794.

42. Form and sufficiency of specifications.—Specifications must present adequate statements of issuable facts, and mere statements of conclusions of

law are not sufficient. In re Holman (D. C. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; Stewart v. Hargrove (1853) 23 Ala. 429.

The allegations of the specifications must be clear, distinct, specific, and circumstantial, and they must be so precise and full as to inform the bankrupt of the exact charge which he is called upon to refute, and to inform the court of the exact issue to be tried. In re Wittenberg (D. C. 1908) 160 Fed. 991, 20 Am. Bankr. Rep. 398; In re Servis (D. C. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Frice (D. C. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Parish (D. C. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re Waggoner (D. C. 1867) Fed. Cas. No. 17,037; In re White (D. C. 1878) 18 N. B. R. 107, Fed. Cas. No. 17,533; In re Rathbone (D. C. 1868) 1 N. B. R. 294, Fed. Cas. No. 11,580; In re Burk (D. C. 1868) 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Eidom (D. C. 1869) 3 N. B. R. 106, Fed Cas. No. 4,314; In re Freeman (D. C. 1870) 4 N. B. R. 64, Fed. Cas. No. 5,082; In re Hill (D. C. 1868) 1 N. B. R. 275, Fed. Cas. No. 6,482; In re Tyrrel (D. C. 1868) 2 N. B. R. 200, Fed. Cas. No. 14,314; In re Hansen (D. C. 1869) 2 N. B. R. 211, Fed. Cas. No. 6,039.

A specification is insufficient which alleges that the bankrupt made "various contradictory statements" in the course of the proceedings. In re Blalock (D. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

Specifications in opposition to a bankrupt's application for discharge must be in writing. In re Shoemaker (D. C. 1868) Fed. Cas. No. 12,799. They must disclose the name of the objecting party, and must allege that he is a party in interest, and, if he is a creditor, that he has a debt provable in bankruptcy, or that it has been proved and allowed if such is the case, and further that his claim is one which will be affected by the discharge if granted. In re Main (D. C. 1913) 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re Chandler (1905) 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; In re Servis (D. C. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Palmer (D. C. 1869) 3 N. B. R. 301, Fed. Cas. No. 10,682.

Specifications must distinctly allege at least one of the statutory grounds for refusing the discharge, objections not specified in the act being unavailable. In re Griffin Bros. (D. C. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; In re McGurn (D. C. 1900) 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Rhutassel (D. C. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697. Where specifications of opposition to a discharge wholly fail to state any statutory ground for refusal, their insufficiency is not waived by failing to except thereto, and they may be disregarded. In re McCarthy (D. C. 1909) 170 Fed. 859, 22 Am. Bankr. Rep. 499.

A specification which merely follows the general language of the statute, without attempting to set forth particular facts, transactions, or details, is not sufficient. In re Main (D. C. 1913) 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re Mintzer (D. C. 1912) 197 Fed. 647, 28 Am. Bankr. 743; In re Lewis (D. C. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; In re Bromley (D. C. 1907) 152 Fed. 493, 18 Am. Bankr. Rep. 227; In re Ginsburg (D. C. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Peck (D. C. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Graves (D. C. 1885) 24 Fed. 550; In re Son (D. C. 1868) 1 N. B. R. 310, Fed. Cas. No. 13,174. An exception exists in the case of alleging the failure to keep books of account, or the destruction or concealment of books, where, from the nature of the case, it may be impossible for the objecting creditor to particularize. Here an allegation in the language of the statute may suffice. See In re Magen Bros. Co. (1912) 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729.

The specifications should be of such a character that their sufficiency may be tested by demurrer or by exceptions analogous to those allowed in equity. Troeder v. Lorsch (1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

The specifications must set forth the facts with the same particularity and exactness that are required in an indictment or a criminal information. In re Levey (D. C. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Butterfield (D. C. 1870) Fed. Cas. No. 2,247.

Specifications in opposition to a discharge, especially where attempting to charge some criminal act, should be pleaded with greater particularity than ordinary civil actions, though the strict rules as to indictments do not apply. In re White (D. C. 1915) 222 Fed. 688.

A specification which states the facts only on information and belief is insufficient. Id.

A specification, in opposition to the discharge of a bankrupt, that he knowingly made a false oath, for the purpose of deceiving the trustee and concealing his assets, sufficiently states the materiality of the oath. Id.

Where the specifications filed are too vague and indefinite to be triable, the case stands as if there were no opposition and no specifications filed, and the bankrupt must receive his discharge if otherwise entitled to it. In re Son (D. C. 1868) Fed. Cas. No. 13,174.

Where time is an essential part of the act charged in opposition to the

bankrupt's discharge, it must be alleged particularly, and an allegation that the act was done "a short time" prior to the filing of the petition is not sufficient. In re Steed (D. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Peacock (D. C. 1900) 101 Fed. 560, 4 Am. Bankr. Rep. 136.

A specification in opposition to the bankrupt's application for discharge, on the ground that he obtained money or property on credit by means of a false statement, must allege that it was made in writing. In re Lewis (D. C. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711. And it must state the substance of the false statement and the name of the person defrauded by it. E. H. Godshalk Co. v. Sterling (1904) 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302; In re Levey (D. C. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312. See In re Main (D. C. 1913) 205 Fed. 421, 30 Am. Bankr. Rep. 547.

43. —— **Allegations as to concealment of property.**—A specification which states the facts only on information and belief is insufficient. In re White (D. C. 1915) 222 Fed. 688. An allegation which merely states the creditor's belief that the bankrupt owns property which he is concealing and has not listed in his schedule is insufficient. In re Thomas (D. C. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515.

Where fraudulent payments are charged, it is not necessary to state that the persons receiving such payments were creditors. In re Smith (D. C. 1871) 5 N. B. R. 20, Fed. Cas. No. 12,985.

The specification must distinctly allege a concealment of property or that the trustee has been prevented from taking possession of it. In re Taplin (D. C. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360. It must be alleged that the property has been concealed from the trustee, a charge that it has been concealed "from his estate in bankruptcy" being insufficient. In re Adams (D. C. 1909) 171 Fed. 599, 22 Am. Bankr. Rep. 613. A statement that the bankrupt has placed his property in the hands of his wife is insufficient. In re Hill (D. C. 1868) Fed. Cas. No. 6,482.

The objection must specify and describe the particular property alleged to have been concealed, with as much certainty as the nature of the case admits, it being insufficient to allege that the bankrupt has "concealed a part of his effects," "concealed his estate and effects," or "concealed certain papers." In re Agnew (D. C. 1915) 225 Fed. 650; In re White (D. C. 1915) 222 Fed. 688; In re Parish (D. C. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re Mawson (D. C. 1868) 1 N. B. R. 437, Fed. Cas. No. 9,318; In re Hixon (D. C. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Condict (D. C. 1879) 19 N. B. R. 142, Fed. Cas. No. 3,094; In re Carrier (D. C. 1891) 47 Fed. 438; In re Dreyer (D. C. 1868) 2 N. B. R. 212, Fed. Cas. No. 4,082. But see In re Milgraum & Ost (D. C. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306, as to an allegation that bankrupts had concealed "large quantities of merchandise" in a certain house.

44. —— **Allegations of knowledge, falsity, and fraudulent intent.**—A specification in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee, is fatally defective if it fails to allege that the offense was committed "knowingly and fraudulently," these words being included in the statute as a necessary part of the crime or ground for refusing a discharge. In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Pierce (D. C. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Griffin Bros. (D. C. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78. An allegation that he has "not offered to surrender all of his property for the benefit of his creditors" and that he is "withholding property from his creditors" is not sufficient. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715. Nor is an allegation that the bankrupt, "with a fraudulent intent, has failed to include in his schedules property belonging to him." In re Adams (D. C. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696. Nor a charge that, at the time of filing the petition, he owned and possessed property which he has fraudulently concealed and fraudulently failed to inventory. In re Taplin (D. C. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360. Nor an allegation that he fraudulently disposed of a part of his property and in his petition concealed the fact, and has converted the proceeds of the property to his own use. In re Patterson (D. C. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371.

The making of a false oath in a proceeding in bankruptcy, considered as a ground for refusing a discharge, must have been done knowingly and fraudulently," and if this is not distinctly alleged, the specifications will be insufficient. In re Patterson (D. C. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Beebe (D. C. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; In re Blalock (D. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Mayer (D. C. 1912) 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Smith (D. C. 1871) 5 N. B. R. 20, Fed. Cas. No. 12,985.

A charge that the bankrupt has concealed his books of account or destroyed them is defective if it fails to allege that this was done with intent to conceal his financial condition. In re Griffin Bros. (D. C. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

Where the ground of opposition is that the bankrupt omitted the name and claim of the objecting creditor from his

schedule, it must be alleged that it was willfully and fraudulently done. Symonds v. Barnes (1871) 59 Me. 81, 8 Am. Rep. 418.

If the act of the bankrupt objected to is a transfer of his property made within four months before the filing of the petition in bankruptcy, it must be alleged to have been made with intent to hinder, delay, or defraud his creditors, though in this case the words "knowingly and fraudulently" need not be used. In re Gift (D. C. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

Where it is specified that the bankrupt has committed perjury in his testimony before the referee, the objection must set out the testimony alleged to be false, together with the facts relied on to prove its falsity, so as to present a specific issue. In re Goodale (D. C. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493.

A specification stating that the bankrupt procured the assent of certain creditors to the granting of the discharge, without alleging that he did so by means of a pecuniary consideration or otherwise corruptly, is not sufficient. In re Mawson (D. C. 1868) Fed. Cas. No. 9,318.

A specification that the bankrupt has falsely set forth in his petition and schedule that he had no property is defective and insufficient; it must specify what property he had. In re Beardsley (D. C. 1868) 1 N. B. R. 304, Fed. Cas. No. 1,183; In re Rathbone (D. C. 1868) 1 N. B. R. 324, Fed. Cas. No. 11,582.

45. —— Allegations as to failure to keep books or destruction or concealment of books.—Where the ground of objection to the bankrupt's discharge is that he has failed to keep books of account from which his financial condition could be ascertained, or that he has destroyed or concealed his books, the specifications of objection may state the charge generally, following the language of the statute, and without giving particulars, since these matters are peculiarly within the bankrupt's own knowledge and cannot ordinarily be specified in detail. In re Magen Bros. Co. (1912) 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729; In re Ginsburg (D. C. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Randall (D. C. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Nathanson (D. C. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Patterson (D. C. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Bellis (D. C. 1870) 3 N. B. R. 496, Fed. Cas. No. 1,275. Compare In re Milgraum & Ost (D. C. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Dreyer (D. C. 1868) 2 N. B. R. 212, Fed. Cas. No. 4,082.

A specification of objection on this ground is not defective for uncertainty because it alleges, in the disjunctive, that the bankrupt, with intent to conceal his financial condition, either de stroyed or failed to keep books of ac count. In re Magen Bros. Co. (1912 192 Fed. 883, 113 C. C. A. 207, 2 Am. Bankr. Rep. 729; In re Brod (D C. 1909) 166 Fed. 1011, 21 Am. Bankr Rep. 426, affirmed Brod v. J. K. Or Shoe Co. (1909) 173 Fed. 1019, 97 C C. A. 667.

It is not sufficient to allege that th bankrupt failed to keep books of ac count "and hence the true status of hi affairs cannot be ascertained." It mus be specifically charged that his failur to keep books, or his destruction o concealment of them, was in pursuanc of an intent to conceal his financial sit uation. In re Blalock (D. C. 1902 118 Fed. 679, 9 Am. Bankr. Rep. 266 In re Bradin (D. C. 1910) 179 Fed 768, 24 Am. Bankr. Rep. 793; In r Marston (D. C. 1871) Fed. Cas. No 9,142.

If the ground of objection is that th bankrupt gave false testimony befor the referee in regard to the book which he kept or did not keep, or i regard to the disposition which he ha made of them, the specifications mus be definite and certain and must se forth such particulars as will raise distinct issue. In re Nathanson (D. C 1907) 155 Fed. 645, 19 Am. Bankr Rep. 56.

If the specification charges that h failed to keep books of account or rec ords from which his financial conditio could have been ascertained, it is no necessary to proceed further and enu merate or describe the books or rec ords which the bankrupt ought to hav kept in order to disclose the state o his affairs. E. H. Godshalk Co. v Sterling (1904) 129 Fed. 580, 64 C C. A. 148, 12 Am. Bankr. Rep. 302 Or if the particular charge is that th bankrupt, intending to conceal hi financial condition, destroyed his can- celed checks and their stubs, it is no necessary more definitely to describe the checks and stubs alleged to hav been destroyed. E. H. Godshalk Co. v Sterling (1904) 129 Fed. 580, 64 C. C A. 148, 12 Am. Bankr. Rep. 302.

A specification of objection against bankrupt's discharge that he failed t keep books, with full and complet knowledge of the importance and ne- cessity thereof, in the brokerage busi- ness, and with intent to defraud an deceive the undersigned objecting cred- itors and others, while inapt, was suf- ficient to sustain an amendment, so a to conform it to the statute. In r Weston (1913) 206 Fed. 281, 124 C C. A. 345.

46. Signature and verification o specifications.—If the objecting creditor is a partnership, its signature may b affixed to the specifications by one o the partners having authority to sig the firm name. If the creditor is a corporation, the specification may b signed by a duly authorized officer who will also affix the corporate seal

In re Glass (D. C. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391.

If several creditors desire to urge the same objections to the bankrupt's application for discharge, they may join in one specification. In re Milgraum & Ost (D. C. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306. But each of them must sign and swear to the specification. In re Glass (D. C. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391.

Specifications of objection to the bankrupt's application for discharge must be verified under oath by the objecting creditor. In re Brown (1901) 112 Fed. 49, 50 C. C. A. 118, 7 Am. Bankr. Rep. 252; In re Baerncopf (D. C. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Gift (D. C. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Servis (D. C. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271. Compare In re Jamieson (D. C. 1903) 120 Fed. 697, 9 Am. Bankr. Rep. 681. The want of a verification is an irregularity which will be considered waived if the bankrupt does not object to the specification on this ground. In re Main (D. C. 1913) 205 Fed. 421, 30 Am. Bankr. Rep. 547. The want of a verification may be supplied by amendment. In re Meurer (D. C. 1906) 144 Fed. 445, 15 Am. Bankr. Rep. 823; In re Gift (D. C. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

Where, on taking of testimony before special master, it was agreed to submit objection to verification of objections to discharge to the judge, verification on the last day on which briefs were filed held in time, and hence it was immaterial whether the original verification was sufficient. In re Kretz (D. C. 1914) 212 Fed. 784.

The proper form for the verification of specifications is that by which the objecting creditor "does hereby make solemn oath that the statements of fact contained" in the specification "are true according to the best of [his] knowledge, information, and belief." In re Nathanson (D. C. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Glass (D. C. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Milgraum & Ost (D. C. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Peck (D. C. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747.

47. **—— By attorney at law or in fact.**—Specifications of objection should not ordinarily be signed and verified by attorneys at law or in fact for objecting creditors, instead of by the creditors themselves, but may be so signed under exceptional circumstances. In re Milgraum & Ost (D. C. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306. In this case, the reason why the verification is made by counsel instead of by the creditor in person should be explicitly stated in the affidavit. In re Randall (D. C. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Baerncopf (D. C. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133.

Attorneys, solicitors, or other agents should not be allowed to verify the specifications, unless in pursuance of a previous order of court allowing them so to do, and in that event both the order and the oath must state the reasons. In re Glass (D. C. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391.

48. **Amendment of specifications.**—It is within the authority and discretion of the court to permit the amendment of specifications in opposition to the bankrupt's discharge, as, for the purpose of supplying a necessary allegation which was originally omitted. In re Miller (D. C. 1912) 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Knaszak (D. C. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Glass (D. C. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Holman (D. C. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Bellis (D. C. 1870) 3 N. B. R. 496, Fed. Cas. No. 1,275; In re Jacobs (D. C. 1879) Fed. Cas. No. 7,160; Ashley's Adm'r v. Robinson (1856) 29 Ala. 112, 65 Am. Dec. 387. This may be done if the specification, as first drawn, contains enough of substance to warrant an amendment according to the usual rules in such cases. In re Weston (C. C. A. 1913) 206 Fed. 281, 30 Am. Bankr. Rep. 647; In re Nathanson (D. C. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56.

The courts should be liberal in allowing amendments in these cases, where no laches or unfairness on the part of the creditor appears, and no injustice to the bankrupt will result nor any unreasonable delay in the progress of the case. In re Carley (1902) 117 Fed. 130, 55 C. C. A. 146, 8 Am. Bankr. Rep. 720.

Creditors who desire to oppose the bankrupt's discharge must act with reasonable promptness and will not be allowed to amend their specifications if chargeable with laches. Kentucky Nat. Bank v. Carley (1903) 121 Fed. 822, 58 C. C. A. 158, 10 Am. Bankr. Rep. 375; In re Mudd (D. C. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 242.

Leave to amend can only be granted by the judge of the bankruptcy court, and application for such leave should be made to him and not to the referee. In re Peck (D. C. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767.

After the expiration of the ten days allowed for filing specifications of opposition, they can be amended only upon application to the court; and amended specifications filed without leave of court first obtained will be stricken from the files, if the bankrupt so moves. In re Clothier (D. C. 1901) 108 Fed.

199, 6 Am. Bankr. Rep. 203. But it is in the power of the judge, on application duly made, to allow amendments after the end of the ten days, provided the amendments are merely enlargements of the specifications already on file, in the way of supplying details, or improving allegations already made, and do not change the substantial nature of the objections urged. In re Osborne (1902) 115 Fed. 1, 52 C. C. A. 595, 8 Am. Bankr. Rep. 165; In re Gift (D. C. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Hendrick (D. C. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795. But when the time has run, it is too late to permit an amendment setting out an entirely new and separate ground of objection. In re Johnson (D. C. 1911) 192 Fed. 356, 27 Am. Bankr. Rep. 644.

Specifications of objections to a bankrupt's discharge, on the ground of his having procured credit by false representations, may be amended when, during a hearing on the specifications, another instance of the same general character as those charged came to the knowledge of the objecting creditors, and where an application for leave to amend was promptly made. In re Pechin (D. C. 1915) 225 Fed. 798.

An amendment may be allowed for the purpose of inserting a necessary allegation after the evidence has been taken. In re Pierce (D. C. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554. But not for the purpose of introducing an entirely new ground of objection and presenting a separate and distinct issue for the consideration of the court. In re Graves (D. C. 1885) 24 Fed. 550; In re Pierce (D. C. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554.

The bankrupt's failure to demur to such specifications is not an admission of their legal sufficiency. In re Crist (D. C. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1.

49. Exceptions to sufficiency of specifications.—Where a bankrupt presents his application for discharge in due form, and specifications in opposition thereto are filed by creditors, no further pleading on the part of the bankrupt is necessary, and that the allegations of the specifications cannot be taken as confessed for want of an answer by the bankrupt. In re Logan (D. C. 1900) 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Hendrick (D. C. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795.

The bankrupt is entitled to raise the question of the sufficiency of specifications filed in opposition to his discharge, by demurrer, or by exceptions analogous to those allowed in equity. In re Walker (D. C. 1913) 209 Fed. 144; In re Burk (D. C. 1868) Fed. Cas. No. 2,156; In re Duncan (D. C. 1878) 18 N. B. R. 42, Fed. Cas. No. 4,-133.

Defects or irregularities in the execution of the specifications will deemed waived if not seasonably o jected to by the bankrupt. In re Baer copf (D. C. 1902) 117 Fed. 975, 9 A Bankr. Rep. 133; In re Robinson (C. 1903) 123 Fed. 844, 10 Am. Bank Rep. 477; In re Wakefield (D. C. 191 207 Fed. 180, 31 Am. Bankr. Rep. 4 Even the objection of the lack of essential averment will be deemed wai ed, and will not be considered on a peal, if an exception was not proper taken in the court below. In re O borne (1902) 115 Fed. 1, 52 C. C. 595, 8 Am. Bankr. Rep. 165.

Under the court rule that, when demurrer or motion attacking the sufficiency is interposed to specific tions of objection to a discharge, un the hearing or reference to the maste they will be deemed to present eve question fairly suggestive, specificatio of objection to discharge of a bankru held to sufficiently present the questi of fraudulent concealment of propert In re Wakefield (D. C. 1913) 207 Fe 180.

50. Dismissal for want of prosecution.—Delay by a bankrupt in bringi on for a hearing his application f discharge, which was filed in due tim is not a legal ground for refusing hi a discharge, where no objections we filed. In re Glasberg (1912) 197 Fe 896, 117 C. C. A. 235, 28 Am. Bank Rep. 826; In re Wolff (D. C. 190 132 Fed. 396, 13 Am. Bankr. Rep. 9

Any creditor may apply to the cou to require the bankrupt to have th question of his discharge determine or may move to set the case down fo hearing. In re Fowler (D. C. 1872 Fed. Cas. No. 4,999; In re Sutherlan (D. C. 1869) Fed. Cas. No. 13,64 The court may order that creditors an all others who have proved their debt shall have leave to prosecute any an all suits, as if there had been no adjudi cation of bankruptcy. In re Kelly (D C. 1880) 3 Fed. 219.

A bankrupt who delays unreasonabl to press his application for discharge i guilty of abusing the proceedings for th sake of hindering creditors, and a mo tion to dismiss for want of prosecutio is proper in such cases and should b granted. Lindeke v. Converse (1912 198 Fed. 618, 117 C. C. A. 322, 28 Am Bankr. Rep. 596; In re Lederer (D C. 1903) 125 Fed. 96, 10 Am. Bankr Rep. 492; In re Kuffler (D. C. 1906 144 Fed. 445, 16 Am. Bankr. Rep. 305 The case last cited was reversed on ap peal, but on other grounds, the review ing court agreeing with the court belo as respects the point to which the deci sion is here cited. In re Kuffler (1907 151 Fed. 12, 80 C. C. A. 508, 18 Am Bankr. Rep. 16.

The court has authority to allow th bankrupt to withdraw his petition fo discharge, no adjudication having pass ed upon it, and to file a new one at

later day. In re Svenson (C. C. 1879) Fed. Cas. No. 13,659.

51. **Evidence on application for discharge.**—On the trial of a bankrupt's application for discharge, to which creditors have filed specifications of opposition, the testimony must be strictly confined to the issues raised by the specifications, and evidence will not be received which relates to grounds of objection not set forth in the specifications, or which relates to transactions outside the scope of the matters alleged. In re Felts (D. C. 1909) 205 Fed. 983; In re Bouck (D. C. 1912) 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Rosenfeld (D. C. 1868) 2 N. B. R. 116, Fed. Cas. No. 12,057; Tenny v. Collins, 4 N. B. R. 477, Fed Cas. No. 13,833.

Where the ground of opposition specified is that the bankrupt had conveyed his property with intent to defraud creditors, evidence that he concealed his property is immaterial and must be excluded. In re Bouck (D. C. 1912) 199 Fed. 453, 28 Am. Bankr. Rep. 378.

Where the specifications allege the making of a false oath by the bankrupt during his examination before the referee, it is not a question of his general truthfulness, but a question as to some specific matter which can be framed into an issue material to the bankruptcy proceedings. Troeder v. Lorsch (1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

It is necessary, not only that the opposing creditors should specify some one or more of the statutory grounds for refusing a discharge, but that the particular charge should be sustained by the evidence, that is, each of the constituent elements of the offense or wrongful act alleged against the bankrupt must be supported by proper evidence and satisfactorily proved. In re Brockman (D. C. 1908) 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Holman (D. C. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Thomas (D. C. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Rhutassel (D. C. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re McGurn (D. C. 1900) 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Cornell (D. C. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172; In re Phillips (D. C. 1900) 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Royal (D. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636.

An application to examine a witness who is a resident of another state, in support of the creditors' specifications, should be made to the federal district court of the district wherein the witness resides. In re Robinson (D. C. 1910) 179 Fed. 724, 24 Am. Bankr. Rep. 617.

52. —— **Admissibility.**—The schedule of property prepared and filed by the bankrupt is evidence against him in proceedings in opposition to his discharge, but not an inventory or return by the trustee of the property which came into his hands. Stevens v. Thompson (1845) 17 N. H. 103. The bankrupt's sworn answer in a chancery case is admissible against him. Anonymous (D. C. 1843) Fed. Cas. No. 463. So is his deposition made in a suit by the trustee against him and others, and the decree in such suit. In re Leland (D. C. 1875) Fed. Cas. No. 8,232. But not a statement filed in a state court by a creditor. In re Williams (C. C. 1874) Fed. Cas. No. 17,700. Nor the record of proceedings by the trustee in a suit against a third person. In re Leland (D. C. 1875) Fed. Cas. No. 8,232.

Declarations made by a debtor, at the time of his failure, that he had means to pay all his debts, may be admissible as tending to show a fraudulent concealment of assets, though not alone sufficient for that purpose. In re Delavan (D. C. 1842) Fed. Cas. No. 3,758.

The allegations contained in the creditors' petition in involuntary bankruptcy, on which the adjudication was made, are not evidence against the bankrupt on his subsequent application for discharge, even though he suffered the adjudication to go by default. In re Lathrop (D. C. 1869) 3 N. B. R. 46, Fed. Cas. No. 8,105.

The testimony given by the bankrupt on his examination by creditors before the referee is admissible against him on the hearing of his application for discharge, if the correctness of the record produced is properly established. Shaffer v. Koblegard Co. (1910) 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898; In re Goodhile (D. C. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Bard (D. C. 1901) 108 Fed. 208, 5 Am. Bankr. Rep. 810; In re Logan (D. C. 1900) 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Malschick (D. C. 1914) 217 Fed. 492.

Where a partnership was dissolved by bankruptcy proceedings, evidence on the examination of the bankrupts in the general administration of the estate was only admissible against the partner testifying, when offered in a subsequent proceeding by the bankrupts for discharge. In re Malschick (D. C. 1914) 217 Fed. 492.

Where specifications of objections against a bankrupt's discharge did not allege prior fraudulent conveyances of property by the bankrupt through a third person to his wife within four months prior to bankruptcy, questions to the bankrupt's wife as to the consideration paid by her for certain conveyances made by her husband to her through a third person some 10 years before bankruptcy were irrelevant. In re Felts (D. C. 1909) 205 Fed. 983.

The testimony of third persons, taken on examinations before the referee, is not admissible. In re Goodhile (D. C.

1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Wilcox (1900) 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362. Compare In re Cooke (D. C. 1901) 109 Fed. 631, 5 Am. Bankr. Rep. 434. But where the bankrupt's first or original petition for discharge was denied (not on the merits), and he made another application, it was held that the testimony of a witness taken on the hearing under the first petition was competent evidence on the hearing on the second application, the witness having died in the meantime. In re Brockway (D. C. 1882) 12 Fed. 69.

A creditor of a voluntary bankrupt is a competent witness for other creditors opposing the bankrupt's discharge. In re Day (D. C.) Fed. Cas. No. 3,-671a. One who appeared as counsel in an equity suit brought by the trustee against the bankrupt and others may be compelled to testify as a witness for the creditors. In re Leland (D. C. 1875) Fed. Cas. No. 8,232.

Where the charge is the obtaining of goods on credit by means of a materially false statement in writing, the fact that the creditor parted with his property in reliance on such statement may be shown circumstantially. In re Reed (D. C. 1911) 191 Fed. 920, 26 Am. Bankr. Rep. 286.

The intent with which the bankrupt failed to keep books of account is provable by the same methods of proof as any other fact, and inferences from conceded or established facts may be resorted to. In re Shrimer (D. C. 1916) 228 Fed. 794; In re Josephson (D. C. 1916) 229 Fed. 272.

Evidence of concealment of assets claimed by the bankrupt to be exempt, though irrelevant as evidence in support of the specifications, may be competent on the question of knowledge, to show methods of concealment by the bankrupt with a view to bankruptcy. In re Isaacson (D. C. 1909) 175 Fed. 292, 23 Am. Bankr. Rep. 665.

53. —— **Burden of proof.**—Creditors objecting to the bankrupt's application for discharge have the burden of proof, and must sustain the allegations of their specifications by satisfactory and convincing evidence, so as to show clearly the existence of one or more of the statutory grounds for refusing a discharge. Poff v. Adams, Payne & Gleaves (1915) 226 Fed. 187, 141 C. C. A. 185; In re Miller (1914) 212 Fed. 920, 129 C. C. A. 440; In re Shrimer (D. C. 1916) 228 Fed. 794; In re Johnson (D. C. 1914) 215 Fed. 748; In re Cohen (C. C. A. 1913) 206 Fed. 457, 30 Am. Bankr. Rep. 653; In re Main (D. C. 1913) 205 Fed. 421, 30 Am. Bankr. Rep. 547; Hardie v. Swafford Bros. Dry Goods Co. (1908) 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, 21 Am. Bankr. Rep. 457; In re Eades (1905) 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30; In re Garrison (1906) 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831; re Walder (D. C. 1907) 152 Fed. 48 18 Am. Bankr. Rep. 419; In re Kolst (D. C. 1906) 146 Fed. 138, 17 A Bankr. Rep. 52; In re Keefer (D. 1905) 135 Fed. 885, 14 Am. Bank Rep. 290; In re Hamilton (D. C. 190 133 Fed. 823, 13 Am. Bankr. Rep. 33 In re McGurn (D. C. 1900) 102 Fe 743, 4 Am. Bankr. Rep. 459; In Chamberlain (D. C. 1903) 125 Fe 629, 11 Am. Bankr. Rep. 95; In Fitchard (D. C. 1900) 103 Fed. 74 4 Am. Bankr. Rep. 609; In re Wetmo (D. C. 1900) 99 Fed. 703, 3 Am. Bank Rep. 700; In re Phillips (D. C. 190 98 Fed. 844, 3 Am. Bankr. Rep. 54 In re Shertzer (D. C. 1900) 99 Fe 706, 3 Am. Bankr. Rep. 699; In Hixon (D. C. 1899) 93 Fed. 440, 1 A Bankr. Rep. 610; In re Idzall (D. 1899) 96 Fed. 314, 2 Am. Bankr. Re 741; In re Finan (D. C. 1900) 2 N Bankr. News, 872; In re Boasberg, Nat. Bankr. News, 133; In re Her (D. C. 1880) 1 Fed. 242; In re Ban (D. C. 1843) Fed. Cas. No. 958; In Nooman (D. C. 1869) 3 N. B. R. 2 Fed. Cas. No. 10,291; In re Maws (D. C. 1868) 1 N. B. R. 548, Fed. C No. 9,319; In re Doyle (D. C. 187 3 N. B. R. 782, Fed. Cas. No. 4,05 In re Orcutt (D. C. 1871) 4 N. B. 538, Fed. Cas. No. 10,550; Larsen Hyman, 126 N. Y. Supp. 100.

If objecting creditors fail to susta the burden of proof, the specificatio of objection will be overruled and d missed and the discharge will be gra ed. In re Corn (D. C. 1901) 106 Fe 143, 5 Am. Bankr. Rep. 478; In Hirsch (D. C. 1899) 97 Fed. 571, Am. Bankr. Rep. 344; In re O'K (D. C. 1868) 2 N. B. R. 105, Fed. C No. 10,475; In re Harris (D. C. 186 2 N. B. R. 105, Fed. Cas. No. 6,11 In re May (D. C. 1899) 2 Nat. Ban News, 93.

Where the ground of opposition the concealment of property from t trustee, and the creditors have sho the recent existence of assets whi have not been scheduled or surrender and their disappearance or large shrin age within a short time prior to t bankruptcy, the burden is on the ban rupt to account for the disappearan or diminution of his estate, and if fails to give a reasonable and credil explanation, the court will be justifi in inferring a fraudulent concealme of assets, such as to forfeit his rig to a discharge. In re Diamond (D. 1913) 204 Fed. 137, 30 Am. Ban Rep. 363; In re Miller (D. C. 191 203 Fed. 170, 30 Am. Bankr. Rep. 11 In re McCann (D. C. 1910) 179 Fe 575, 24 Am. Bankr. Rep. 789; Sei v. Cartel (C. C. A. 1908) 164 Fed. 6 21 Am. Bankr. Rep. 140; In re Les (D. C. 1903) 119 Fed. 406, 9 A Bankr. Rep. 561; In re Finkelstein (C. 1900) 101 Fed. 418, 3 Am. Ban Rep. 800; In re Meyers (D. C. 189 96 Fed. 408, 2 Am. Bankr. Rep. 70

In re Wood (D. C. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572.

An objecting creditor has the burden of showing that a materially false statement made by the bankrupt as a basis for credit was known by him to be untrue when made; but when that fact is proved, the burden shifts to the bankrupt to show that it was not made with intent to deceive. In re Arenson (D. C. 1912) 195 Fed. 609, 28 Am. Bankr. Rep. 113.

The presumption that the failure of a bankrupt to keep books was with intent to conceal his financial condition may be rebutted, either by direct evidence or by the circumstances of the case. In re Arnold (D. C. 1915) 228 Fed. 75. Testimony that there was no intent to conceal the condition of the business by the failure to keep books is admissible to refute the presumption of such an intent. In re Janavitz (1915) 219 Fed. 876, 135 C. C. A. 546. To entitle a partner to a discharge notwithstanding the fact that the firm failed to keep proper books of account, with intent on the part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of any participation therein. In re Schachter (D. C. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

The rule does not apply in cases where there can be no burden of proof one way or the other, as where the question presented is one of law and not of fact, as, for example, upon the construction of the statute. In re Gilpin (D. C. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

54. —— **Weight and sufficiency of evidence.**—Creditors objecting to the bankrupt's application for a discharge are only required to prove their allegations by a preponderance of evidence, not necessarily to prove them beyond a reasonable doubt, even though the ground of objection may be a criminal offense. In re Atlas (D. C. 1914) 219 Fed. 783; Troeder v. Lorsch (1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Delmour (D. C. 1908) 161 Fed. 589, 20 Am. Bankr. Rep. 405; In re Greenberg (D. C. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; In re Polakoff, 1 Nat. Bankr. News, 232; In re Berner (D. C. 1900) 2 Nat. Bankr. News, 268. But see In re Moore (D. C. 1868) Fed. Cas. No. 9,751. And compare In re Hennebry (D. C. 1913) 207 Fed. 882.

Where it is charged that the bankrupt swore falsely in verifying his schedule or in the proceedings in bankruptcy, the evidence must be sufficiently clear and convincing to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury. Remmers v. Merchants'-Laclede Nat. Bank (1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78.

It is only necessary that there should be a fair preponderance of the credible evidence supporting the case of the objecting creditors. In re Bacon (D. C. 1913) 205 Fed. 545, 30 Am. Bankr. Rep. 584; In re Doyle (D. C. 1912) 199 Fed. 247, 29 Am. Bankr. Rep. 102; In re Dauchy (1904) 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511; In re Leslie (D. C. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561. But this preponderance must exist, for an evenly balanced condition of the proof will warrant a decision in favor of the bankrupt. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

The objecting creditors are required to produce clear and convincing proof. In re Agnew (D. C. 1915) 225 Fed. 650; In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re Salsbury (D. C. 1902) 113 Fed. 833, 7 Am. Bankr. Rep. 771; In re Howden (D. C. 1901) 111 Fed. 723, 7 Am. Bankr. Rep. 191. Or strict and convincing evidence. Garry v. Jefferson Bank (1911) 186 Fed. 461, 108 C. C. A. 439, 26 Am. Bankr. Rep. 511. Or satisfactory and sufficient evidence. In re Hirsch (D. C. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344. Or clear and satisfying evidence. In re Berner (D. C. 1900) 2 Nat. Bankr. News, 268. Or indisputable proof. In re Banks (D. C. 1843) Fed. Cas. No. 958. A bankrupt's intent to conceal his financial condition by failing to keep books of account can only be inferred from facts proved clearly and almost irresistibly leading to such conclusion, notwithstanding the amendment of 1903 to the Bankruptcy Act. In re Hindin (D. C. 1914) 219 Fed. 605.

In regard to questions of fraud, motive, and intent, it is not sufficient to prove merely suspicious circumstances or conduct which wears a sinister aspect. In re Howard (1910) 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841.

A fraudulent conveyance of property must be shown affirmatively, and it is not sufficient that the bankrupt's evidence on his examination tends indirectly to support the contention of the creditors. In re Ferris (D. C. 1900) 105 Fed. 356, 5 Am. Bankr. Rep. 246.

While evasive and disingenuous testimony is not a ground for refusing his discharge, it is a material consideration in determining his credibility when testifying as to what became of certain money or property. In re Leslie (D. C. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561.

The case may be such that the bankrupt's testimony alone will be sufficient to rebut the case of the creditors, where it is clear and positive and is not discredited by any fact proved. In re Eades (1905) 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30.

For decisions upon the weight and sufficiency of the evidence on a contest of the bankrupt's application for dis-

charge in particular cases, see Poff v. Adams, Payne & Gleaves (1915) 226 Fed. 187, 141 C. C. A. 185; In re Cohen (1913) 206 Fed. 457, 124 C. C. A. 363; In re Atlas (D. C. 1914) 219 Fed. 783; In re Hindin (D. C. 1914) 219 Fed. 605; In re Magen (D. C. 1914) 218 Fed. 692; Bloomfield v. Lehman (C. C. A. 1914) 215 Fed. 97; In re Wakefield (D. C. 1913) 207 Fed. 180; In re Simon (D. C. 1913) 201 Fed. 1004; Troeder v. Lorsch (1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Taylor (D. C. 1910) 182 Fed. 187, 24 Am. Bankr. Rep. 945; In re Margolis (D. C. 1909) 181 Fed. 591, 24 Am. Bankr. Rep. 934; In re Chamberlain (D. C. 1910) 180 Fed. 304, 25 Am. Bankr. Rep. 37; In re Tillyer (D. C. 1905) 147 Fed. 860, 17 Am. Bankr. Rep. 125; In re Burstein (D. C. 1908) 160 Fed. 765, 20 Am. Bankr. Rep. 399; In re Goldich (D. C. 1908) 164 Fed. 882, 21 Am. Bankr. Rep. 249; In re Guilbert (D. C. 1909) 169 Fed. 149, 22 Am. Bankr. Rep. 221; Barton Bros. v. Texas Produce Co. (1905) 136 Fed. 355, 69 C. C. A. 181, 14 Am. Bankr. Rep. 502; In re Doherty (D. C. 1904) 135 Fed. 432, 13 Am. Bankr. Rep. 549; In re Harr (D. C. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; In re Jacobs (D. C. 1906) 144 Fed. 868, 16 Am. Bankr. Rep. 482; In re Leslie (D. C. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Young (D. C. 1905) 140 Fed. 728, 15 Am. Bankr. Rep. 477; In re Miner (D. C. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; In re Baerncopf (D. C. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Boyden (D. C. 1904) 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Blalock (D. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Murray (D. C. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Hedley (D. C. 1907) 156 Fed. 314, 19 Am. Bankr. Rep. 409; In re Lewin (D. C. 1907) 155 Fed. 501, 18 Am. Bankr. Rep. 72; In re Moore (D. C. 1868) Fed. Cas. No. 9,751.

55. **Hearing and determination of application.**—Objections to a bankrupt's discharge constitute the beginning of a new suit or action, the hearing of which is in effect a trial in equity. In re Malschick (D. C. 1914) 217 Fed. 492.

The order of court designating the time and place for hearing the bankrupt's application for discharge, and directing that creditors and other parties in interest may then and there appear and show cause against the same, must be signed by the clerk and bear the seal of the court. In re Bellamy (D. C. 1867) Fed. Cas. No. 1,268.

The proceedings may be continued from day to day if necessary, but an adjournment without day will put an end to them, unless a new order is issued. In re Seckendorf (D. C. 1868) Fed. Cas. No. 12,600.

Where the record of an order extending the time in which to file excep tions to the report of a special mas ter on objections to a bankrupt's dis charge had never been entered of rec ord, and had been lost or destroye the court at a subsequent term ha power to supply the record. Interna tional Harvester Co. of America Carlson (1914) 217 Fed. 736, 133 C. C A. 430.

Creditors opposing the bankrupt' application for discharge have the a firmative of the issue, and consequent ly the right to begin. Anonymous (D C. 1845) Fed. Cas. No. 464.

The bankrupt must attend the hea ing upon his application for discharg although he may have removed fro the district pending the proceeding In re Curle (D. C. 1914) 217 Fed. 68 His presence cannot be dispensed wit by the referee if it is demanded by th creditors. In re Shanker (D. C. 1905 138 Fed. 862, 15 Am. Bankr. Re 109.

The creditors have the right to ex amine the bankrupt, when so in at tendance at the hearing, for the pur pose of eliciting evidence which wi support their objections, and the fac that he has already been examined a an earlier stage of the proceedings wi not excuse him from this duty. In r Mellen (D. C. 1899) 97 Fed. 326, Am. Bankr. Rep. 226. On this hearin only such grounds of objection to th bankrupt's discharge may be heard an considered as have been set forth i the specifications of the opposing cred itors, and the evidence will be confine to the material facts alleged in th specifications. In re Taplin (D. C 1905) 135 Fed. 861, 14 Am. Bank Rep. 360; In re Adams (D. C. 190 104 Fed. 72, 4 Am. Bankr. Rep. 69 In re Kaiser (D. C. 1899) 99 Fed. 689, Am. Bankr. Rep. 767; In re Baldwi (D. C. 1903) 119 Fed. 796, 9 An Bankr. Rep. 591. See In re Marsha Paper Co. (D. C. 1899) 95 Fed. 41 2 Am. Bankr. Rep. 653. The que tion whether or not the debt of a par ticular creditor is such as to be ex cepted from the operation of a dis charge in bankruptcy cannot proper be raised or tried on the bankrupt application for discharge. In re Rhu tassel (D. C. 1899) 96 Fed. 597, 2 An Bankr. Rep. 697. And the propriet or validity of an order extending th time for filing the application for dis charge cannot be reviewed on the hea ing of the application itself. In r Casey (D. C. 1912) 195 Fed. 322, 2 Am. Bankr. Rep. 359.

A creditor cannot object to the actio of the court in granting the discharg on the ground that the issue fou in favor of the bankrupt, and on whic the case turned, was inconclusiv where that issue was distinctly raise by the creditor's own allegations. Ke tucky Nat. Bank v. Carley (1904) 12

Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119.

In determining on the application, the court must be governed solely and entirely by the admissible evidence produced on the hearing of the application and objections. In re Murray (D. C. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Walder (D. C. 1907) 152 Fed. 489, 18 Am. Bankr. Rep. 419; In re Halsell (D. C. 1904) 132 Fed. 562, 13 Am. Bankr. Rep. 106. The referee has no legal right to consider evidence which has been previously offered before him as referee, if it is not repeated at the present hearing or made a part of the record. In re Walder (D. C. 1907) 152 Fed. 489. 18 Am. Bankr. Rep. 419.

The specifications in opposition may be rejected for insufficiency, or they may be overruled and dismissed if not sustained by the evidence, but in some way they must be disposed of, and a motion to grant the discharge cannot be granted by the court until this has been done. In re Randall (D. C. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

When final action has been taken on the case, it may perhaps be reopened for good cause shown, but not for the purpose of letting in additional evidence when the original hearing was full and complete and the proofs were then formally closed. Kentucky Nat. Bank v. Carley (1904) 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119; In re Royal (D. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636.

Costs are not usually awarded to the prevailing party, unless the objections filed were found to be frivolous or vexatious, or, on the other hand, the bankrupt is shown to have the means of paying costs. In re George (D. C. 1870) Fed. Cas. No. 5,326.

56. —— **Powers and duties of judge and referee.**—Under the explicit language of the bankruptcy act, the bankrupt's application for discharge must be heard and determined by the judge of the court of bankruptcy, not by the referee. The latter officer has no jurisdiction either to grant or to refuse a discharge, but this duty is cast upon the judge, who must either hear the case originally or upon the report and recommendations of the referee or a special master, and render the decision. In re Taylor (D. C. 1911) 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re Randall (D. C. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Johnson (D. C. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814; In re McDuff (1900) 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Mawson (D. C. 1868) 1 N. B. R. 265, Fed. Cas. No. 9,317. All questions on application for discharge are originally for the court and not the referee. In re Hockman (D. C. 1912) 205 Fed. 330. While this duty cannot be delegated, yet, when specifications in opposition to the bankrupt's application are filed, it is in the power of the judge to refer the issues raised thereby to the referee, in the character of a special master, with instructions to ascertain and report the facts. Fellows v. Freudenthal (1900) 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re McDuff (1900) 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Daugherty (D. C. 1911) 189 Fed. 239, 26 Am. Bankr. Rep. 550; In re Eldred (D. C. 1907) 152 Fed. 491, 18 Am. Bankr. Rep. 243.

While it is customary to select and appoint the referee who has acted in the proceedings as special master to hear the application for discharge, yet any other person may be appointed in the discretion of the judge, and, when so appointed, is entitled to a reasonable compensation. In re Gillardon (D. C. 1911) 187 Fed. 289, 26 Am. Bankr. Rep. 103. The proceeding on an application for discharge is a separate proceeding, jurisdiction of which is not conferred on the referee by the original reference. In re C. H. Kendrick & Co. (D. C. 1915) 226 Fed. 980.

The referee has authority to pass upon objections to the sufficiency of specifications filed in opposition to the discharge, and should refuse to receive evidence on specifications which are clearly insufficient. In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Mudd (D. C. 1900) 2 Nat. Bankr. News, 710; In re Hendrick (D. C. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795. Compare In re Brockman (D. C. 1908) 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Puffer (D. C. 1868) 2 N. B. R. 43, Fed. Cas. No. 11,459. The proper course in such a case is to report back to the court that nothing has been filed with him in the way of objections which would require the taking of testimony. In re Hendrick (D. C. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795.

When questions arise as to the admissibility of evidence, the referee has no power to exclude it, but must require and receive an answer to the question objected to, and incorporate in his report to the court the question challenged, the objections made thereto, his ruling on its admissibility, and the answer given. In re Isaacson (D. C. 1909) 175 Fed. 292, 23 Am. Bankr. Rep. 665; In re Knaszak (D. C. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

A master to whom specifications of objection to a bankrupt's discharge are referred cannot properly make a finding of fact concerning an instrument which is not before him and as to which there is no secondary evidence. In re Rubin & Lipman (D. C. 1914) 215 Fed. 669.

Where specifications of objection to a

bankrupt's discharge were referred to a master who died before being able to make his report and a second master was appointed, it was improper for him to make a report on the evidence taken before the first master without again hearing the witnesses. Id.

The functions of the referee are not limited to taking and reporting the evidence adduced on the hearing, but he should also find and report the facts as he deduces them from the evidence and state his conclusions of law and his recommendation as to whether the discharge should be granted or refused. In re Kaiser (D. C. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Steed (D. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Hughes (D. C. 1868) 1 N. B. R. 226, Fed. Cas. No. 6,841. And in so doing, he should exercise an independent judgment on the facts brought out before him. In re Mayer (D. C. 1912) 195 Fed. 571, 28 Am. Bankr. Rep. 342. If his report is incomplete or defective, it will be sent back to him with directions to proceed according to the statute. Mahoney v. Ward (D. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770.

Under General Bankruptcy Orders, Nos. 12, 37 (post, § 9614), and equity rule 66, (ante, § 1536), where an application for a discharge is referred to the master to take testimony and report, exceptions to his report must be filed within 20 days, if at all, after the filing of the report. In re Pierce (D. C. 1914) 210 Fed. 389. Delay of several months in certifying to the judge contested application for discharge held unreasonable. In re Shrimer (D. C. 1916) 228 Fed. 794.

The referee's findings of fact are entitled to the very highest consideration, and while the judge is not technically concluded thereby, but must bring his own mind to bear on the evidence, yet the report of the referee will be accepted as correct, unless very plainly shown to be wrong. International Harvester Co. of America v. Carlson (1914) 133 C. C. A. 430, 217 Fed. 736; Baker v. Bishop-Babcock-Becker Co. (C. C. A. 1915) 220 Fed. 657; In re McCann (D. C. 1910) 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Wheeler (C. C. A. 1908) 165 Fed. 188, 21 Am. Bankr. Rep. 262; In re Knaszak (D. C. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Shriver (D. C. 1903) 125 Fed. 511, 10 Am. Bankr. Rep. 746; In re Lafleche (D. C. 1901) 109 Fed. 307, 6 Am. Bankr. Rep. 483; In re McKane (D. C. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; In re Covington (D. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373.

The district judge held bound to pass an independent judgment on an application for a bankrupt's discharge, regardless of the report of a referee. International Harvester Co. of America v. Carlson (1914) 217 Fed. 736, 133 C. C. A. 430.

Where the evidence as to whether a bankrupt obtained property on credit on a false statement in writing was conflicting, it was the province of the master to determine the credibility of the witnesses. In re Hindin (D. C. 1914) 219 Fed. 605.

The referee's recommendations will also be considered as entitled to great weight. But a recommendation that the discharge should be granted, when the referee has found that one of the specifications of objection was supported by the evidence, is erroneous and will be disregarded. In re Cohen (D. C. 1911) 192 Fed. 751, 26 Am. Bankr. Rep. 544.

57. Staying or suspending discharge—It is within the authority of the court of bankruptcy to adjourn the hearing on a bankrupt's application for discharge or temporarily to stay proceedings thereon, if it appears that the decision thereon may be affected by the result of pending and uncompleted proceedings, or by the intervention of new parties who desire to come in. In re Ketchum (D. C. 1880) 1 Fed. 838; In re Mawson (D. C. 1868) 1 N. B. R. 271, Fed. Cas. No. 9,320; In re Thompson (D. C. 1868) 1 N. B. R. 323, Fed. Cas. No. 13,935. And see In re Steed (D. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.

A creditor may be entitled to a reasonable postponement of the bankrupt's discharge to enable him to enforce rights in a state court. In re J. L. Philips & Co. (D. C. 1915) 22[illegible] Fed. 628.

An application for discharge may be stayed until there has been a definite settlement of the rights of creditors who claim the privilege of enforcing their demands against property which has been set apart to the bankrupt as exempt. In re Woodruff (D. C. 1899) 96 Fed. 317, 2 Am. Bankr. Rep. 678; In re McBryde (D. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Mitchell (D. C. 1910) 175 Fed. 877, 2[illegible] Am. Bankr. Rep. 707.

A claimant holding a lien against garnishees indebted to the bankrupt is entitled to a stay of the discharge for a reasonable time, to enable him to enforce his rights against the garnishees and the sureties on a bond to dissolve the garnishment. In re Maher (D. C. 1909) 169 Fed. 997, 22 Am. Bankr. Rep. 290.

The court of bankruptcy will not stay its decision on the discharge to await the result of a pending action in a state court wherein creditors of the bankrupt seek to set aside a transfer of property made by him before the adjudication of bankruptcy, and which they allege to have been fraudulent as to creditors, the same plaintiffs opposing the

bankrupt's discharge on the ground of the same alleged fraud; for the issues are not identical, nor would the decree of the state court determine the right of the bankrupt to be discharged. In re Cornell (D. C. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172.

Under the 1910 amendment to the bankruptcy act, arming the trustee with the rights of a judgment creditor, he is qualified to sue under a state statute to reach surplus revenue to which the bankrupt will be entitled under a testamentary trust, and his recovery will be for the benefit of all the creditors; and since such right will not be affected by the bankrupt's discharge, a judgment creditor is not entitled to have the granting of the discharge postponed to enable him to prosecute such a suit for the benefit of judgment creditors only. In re Morris (1913) 204 Fed. 770, 123 C. C. A. 220, 30 Am. Bankr. Rep. 319.

58. **Order of discharge.**—The court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed, provided such amendment will not affect vested rights. In re Diamond (1906) 149 Fed. 407, 79 C. C. A. 227, 17 Am. Bankr. Rep. 563.

An order granting or refusing a discharge may be entered nunc pro tunc, where the parties have acted on the theory that such an order was in force, and the rights of third persons will not be prejudiced. In re Drisko (D. C. 1875) Fed. Cas. No. 4,090.

A discharge in bankruptcy is not void because granted after the death of the bankrupt. Robinson v. Butler (1882) 4 Ky. Law Rep. 449. In such a case it should be entered as of a date prior to his death. Young v. Ridenbaugh (C. C. 1875) Fed. Cas. No. 18,173.

Where specifications in opposition to the discharge have been overruled, and the discharge ordered, the bankrupt's certificate of discharge will not issue until the expiration of ten days after the order, or until the expiration of any extension of the time allowed to creditors to appeal from such order. In re Hirsch (D. C. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

The court will order a discharge of a bankrupt on conditions which will protect a creditor procuring by garnishment funds of the bankrupt more than four months before bankruptcy. In re J. L. Philips & Co. (D. C. 1915) 224 Fed. 628.

On the application for discharge, the character of any particular debt is not in issue, nor will the court undertake to decide whether or not it will be released by the discharge. Hence creditors having claims which they allege to be within the excepted classes cannot ask the court to frame its order of discharge in such a way as to make specific exceptions in favor of their debts. The court will grant a discharge in the usual form, leaving its scope for future determination when the question shall properly arise. In re Mussey (D. C. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592.

V. CONCLUSIVENESS AND EFFECT OF DISCHARGE

59. **Conclusiveness of discharge.**—A state court is bound to take notice of a discharge in bankruptcy under the federal law when it is properly pleaded. Wood v. Carr (1903) 115 Ky. 303, 73 S. W. 762. Where a trustee of a bankrupt opposes his discharge on the ground that he has failed to turn over the property standing in his wife's name, and the United States court holds that the property is not that of the bankrupt, the trustee is concluded thereby. Andrus v. Cornwell (1914) 64 So. 221, 134 La. 403.

An order of discharge is a judgment and is supported by the same presumptions which attach to any other; and therefore it is conclusive evidence of all facts appearing on the record or deducible therefrom by necessary inference, and of the fact that the bankrupt has been lawfully discharged from all of his provable debts save those specifically excepted by the statute. Palmer v. Hussey (1886) 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362; Crouse v. Whittlesey (1893) 66 Hun, 629, 20 N. Y. Supp. 965; Ruckman v. Cowell (1848) 1 N. Y. 505; Blake v. Bigelow (1848) 5 Ga. 437; Boas v. Hetzel (1846) 3 Pa. 298; Belknap v. Davis (1849) 21 Vt. 409; Tichenor v. Allen (Va. 1855) 13 Grat. 15; Jones v. Knox (1874) 51 Ala. 367; Norris v. Goss (S. C. 1843) 2 Speer 80. See In re Krall (D. C. 1912) 196 Fed. 402, 28 Am. Bankr. Rep. 452.

The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied on by the debtor as a defense to the enforcement of a particular claim, and that issue cannot properly arise or be considered in determining the right to a discharge, and therefore the discharge is not evidence on the question whether or not a particular claim is within the excepted classes. In re Marshall Paper Co. (1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; In re McCarty (D. C. 1901) 111 Fed. 151, 7 Am. Bankr. Rep. 40; U. S. v. Peters (D. C. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177.

60. **Effect of discharge.**—A discharge in bankruptcy operates only as a bar to an action for the recovery of the debt, and not as a payment of the debt or as a release or extinguishment of it. Herrington v. Davitt (1914) 145 N. Y. Supp. 452; Lanier v. Tolleson (1883) 20 S. C. 57; Craig v. Seitz (1886) 63 Mich. 727, 30 N. W. 347; Citizens' Loan Ass'n v. Boston & M. R. Co. (1907) 196 Mass. 528, 82 N. E. 696,

14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365. Compare J. B. Ellis & Co. v. Mobile, J. & K. C. R. Co. (1910) 166 Ala. 187, 51 South. 860; Needham v. Matthewson (1909) 81 Kan. 340, 105 Pac. 436, 26 L. R. A. (N. S.) 274, 135 Am. St. Rep. 374, 19 Ann. Cas. 146.

The discharge of a bankrupt has no necessary effect on the right or duty of the trustee in bankruptcy to continue the prosecution of an action already begun by him. In re Penn (D. C. 1872) Fed. Cas. No. 10,928. A discharge in bankruptcy has no effect on the right of the trustee to recover property, unless all debts and expenses have been paid. Guernsey v. Douglas (Cal. 1915) 153 P. 227.

A discharge in bankruptcy will revoke a power of attorney to confess judgment. Dye v. Bartram (1877) 5 Ohio Dec. 508. And excuse the debtor from complying with the condition of a bond, before given, to take the benefit of the state insolvency law. Nesbit v. Graves (Pa. 1837) 6 Watts & S. 120; Hubert v. Horter (1870) 81 Pa. 39. And release him from liability on a note given before the adjudication, though it was expressly stated to have been given for cash advanced to enable him to file his petition in bankruptcy. Nelson v. Stewart (1875) 54 Ala. 115, 25 Am. Rep. 660.

A discharge in bankruptcy does not extinguish any valid lien. Reed v. Bullington (1873) 49 Miss. 223; Boone v. Revis (1876) 44 Tex. 384. Nor will it be a defense to an action for the breach of the bankrupt's bond as a public officer, occurring after the discharge. White v. Blake (1887) 79 Me. 114, 8 Atl. 457. A discharge in bankruptcy will not terminate a lease in which the bankrupt is the tenant, unless the landlord re-enters or the trustee has assumed the lease. Witthaus v. Zimmermann (1904) 91 App. Div. 202, 86 N. Y. Supp. 315.

In a suit to recover damages for personal injuries, plaintiff is not precluded from recovering reasonable charges incurred for the services of a physician and other like charges, necessarily resulting from his injury, because he included such claims in his schedule in bankruptcy and had been discharged from legal liability for the same. Sibley v. Nason (1907) 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938.

In an action of trover, neither the defendant nor his surety in the bail bond therein can set up as a defense the discharge of the defendant in bankruptcy pending the trial, the petition in trover being one of title and not of debt. Berry v. Jackson (1902) 115 Ga. 196, 41 S. E. 698, 90 Am. St. Rep. 102; Birmingham Fertilizer Co. v. John A. Cox & Son (1912) 10 Ga. App. 699, 73 S. E. 1090.

A discharge of a husband in bankruptcy will discharge his wife's li bility on a contract executed by hi and his wife to sell community pro erty. Bimrose v. Matthews (Wash 1914) 138 Pac. 319.

An adjudication and discharge i bankruptcy, pending an action again the bankrupt on a note which is du scheduled in the bankruptcy proceed ings, abates the action. Fort-Mims Haynes Co. v. Branan-Akers Co. (191 78 S. E. 721, 140 Ga. 131.

61. —— As to property fraudulent transferred or not scheduled.—A di charge in bankruptcy does not preclud the trustee from recovering propert previously transferred by the bankru in fraud of his creditors. In re Pierc (D. C. 1900) 103 Fed. 64, 4 Am. Bank Rep. 554; Nye v. Hart (1901) 2 Ohio Cir. Ct. R. 427; Stephenson Bird (1910) 168 Ala. 363, 53 South 92, Ann. Cas. 1912B, 249; McLeod Trustee v. McLeod (1905) 89 S. W 199, 28 Ky. Law Rep. 284; Blick Nimmo (1913) 121 Md. 139, 88 At 116.

After the discharge, creditors ma proceed in any proper form of actio or suit to subject to their claims an property of the bankrupt which h omitted to list in his schedule of assets whether such omission was fraudulent ly planned or was the result of mer oversight. Horn v. Bates (Ky. 1908 114 S. W. 763; Card v. Walbridg (1849) 18 Ohio, 411. See Rand Iowa Cent. Ry. Co. (1906) 186 N. Y 58, 78 N. E. 574, 116 Am. St. Rep 530, 9 Ann. Cas. 542. Compare Boy v. Olvey (1882) 82 Ind. 294.

Since the bankruptcy law expressl confers on a trustee in bankruptcy th right to avoid any transfer by th bankrupt of his property which an creditor might have avoided, and to re cover the property so transferred o its value, a judgment creditor of th bankrupt, after the latter's discharge cannot levy on and sell the bankrupt' property because of fraud in securin the discharge, but the rights of cred itors must be worked out through th trustee. Hibbard v. Henderson (1904 44 Or. 318, 75 Pac. 889.

62. Collateral impeachment of dis charge.—A state court can neither an nul nor disregard a discharge dul granted by a court of bankruptcy hav ing jurisdiction, nor allow it to be im peached in any collateral proceedin for any cause which would have pre vented the granting of the discharge o which would have been sufficient groun for revoking the discharge in the bank ruptcy court. U. S. v. Griswold (C C. 1881) 8 Fed. 556; Lathrop v. Stuar (C. C. 1850) Fed. Cas. No. 8,113 Custard v. Wigderson (1907) 130 Wi 412, 110 N. W. 263, 10 Ann. Cas. 740 Young v. Stevenson (1905) 73 Ark 480, 84 S. W. 623; Lutz v. Kalmu (1909) 115 N. Y. Supp. 230; Delt County Bank v. McGranahan (1905

37 Wash. 307, 79 Pac. 796; First Nat. Bank v. Masterson (1911) 29 Okl. 76, 116 Pac. 162; Parker v. Atwood (1872) 52 N. H. 181; Corey v. Ripley (1869) 57 Me. 69, 2 Am. Rep. 19, 4 N. B. R. 503; Alston v. Robinett (1873) 37 Tex. 56, 9 N. B. R. 74; Howland v. Carson (1876) 28 Ohio St. 625, 16 N. B. R. 372; Milhous v. Aicardi (1874) 51 Ala. 594; Fuller v. Pease (1887) 144 Mass. 390, 11 N. E. 694; Talbott v. Suit (1888) 68 Md. 443, 13 Atl. 356; Way v. Howe (1871) 108 Mass. 502, 11 Am. Rep. 386, 4 N. B. R. 677; Blair v. Hanna (1882) 87 Ind. 298; Brown v. Covenant Mut. Life Ins. Co. (1885) 86 Mo. 51; Brady v. Brady (1883) 71 Ga. 71; Begein v. Brehm (1890) 123 Ind. 160, 23 N. E. 496; Lawver v. Gladden (Pa. 1885) 1 Atl. 659; Thurmond v. Andrews (Ky. 1873) 10 Bush, 400; Stetson v. Bangor (1868) 56 Me. 286; Smith v. Ramsey (1875) 27 Ohio St. 339; Seymour v. Street (1876) 5 Neb. 85; Oates v. Parish (1872) 47 Ala. 157; Sheets v. Hawk (Pa. 1826) 14 Serg. & R. 173; Thomas v. Jones (1875) 39 Wis. 124.

Where a United States district court has discharged a bankrupt, an action to set aside the discharge must be brought in the court that granted it, unless the discharge is an absolute nullity. Andrus v. Cornwell (1914) 64 So. 221, 134 La. 403.

All legal presumptions must be indulged in favor of the order of discharge, and it cannot be held void in a collateral proceeding unless want of jurisdiction in the court which granted it appears affirmatively on the face of the record. Ross-Lewin v. Goold (1904) 211 Ill. 384, 71 N. E. 1028; Williams v. Scott (1898) 122 N. C. 545, 29 S. E. 877. If the bankruptcy court had jurisdiction of the subject-matter, by reason of the filing of a petition which (aided by every presumption and inference) can be held sufficient to confer jurisdiction, then the discharge must be conclusively presumed valid. Ross-Lewin v. Goold (1904) 211 Ill. 384, 71 N. E. 1028; Jones v. Knox (1874) 51 Ala. 367.

A discharge granted by a court having jurisdiction of the estate cannot be treated by any other court as void as to any particular creditor, on the theory that the court never acquired jurisdiction of his person because he was not served with notice of the proceedings, and this, although his name was purposely omitted from the list of creditors, or although the omission to serve him with notice was fraudulent and intentional. Allen v. Thompson (D. C. 1882) 10 Fed. 116; Benedict v. Smith (1886) 48 Mich. 593, 12 N. W. 866; Thornton v. Hogan (1876) 63 Mo. 143; Williams v. Butcher, 12 N. B. R. 143; Sawyer v. Rector (1888) 5 Dak. 110, 37 N. W. 741; Brown v. Kroh (1877) 31 Ohio St. 492; Bailey v. Corruthers (1880) 71 Me. 172; Black v. Blazo (1875) 117 Mass. 17, 18 N. B. R. 195. CONTRA, see Batchelder v. Low (1871) 43 Vt. 662, 5 Am. Rep. 311, 8 N. B. R. 571; Jones v. Knox (1874) 51 Ala. 367.

It is not permissible, in any collateral proceeding, to impeach a discharge in bankruptcy on the ground of fraud practised by the bankrupt in obtaining it (though directed against the particular creditor who complains) or on the ground of a fraudulent concealment of assets or other fraudulent conduct of the bankrupt, since the remedy for these matters is to be sought in the court of bankruptcy and there alone. Ocean Nat. Bank v. Olcott (1871) 46 N. Y. 12; Smith v. Ramsey (1875) 27 Ohio St. 339, 15 N. B. R. 447; Rayl v. Lapham (1875) 27 Ohio St. 452, 15 N. B. R. 508; Oates v. Parish (1872) 47 Ala. 157; Ewell v. Pitman (Ky. 1894) 27 S. W. 870; Farr v. Evans (Pa.) 26 Pittsb. Leg. J. 141; Morris v. Creed (Tenn. 1872) 11 Heisk. 155; Brown v. Causey (1882) 56 Tex. 340; Seymour v. Street (1851) 5 Neb. 85; Wiley v. Pavey (1878) 61 Ind. 457, 28 Am. Rep. 677; Wales v. Lyon (1876) 2 Mich. 276. CONTRA, see Gupton v. Connor (Tenn. 1850) 11 Humph. 287; Bond v. Baldwin (1850) 9 Ga. 9; Shelton v. Pease (1847) 10 Mo. 473.

A creditor who has unsuccessfully opposed the bankrupt's application for discharge is thereby estopped, in a suit which he afterwards brings to recover his debt, and to which the defendant pleads his discharge, from showing that the discharge was fraudulently obtained. Wales v. Lyon (1851) 2 Mich. 276.

No mere irregularities of practice or errors of law alleged to have been committed by the court of bankruptcy can be set up to avoid the effect of the discharge. It cannot be questioned in any other court for any lack of conformity to the provisions of the bankruptcy law, or as having been wrongly, improperly, or irregularly allowed. Grover v. Fox (1877) 36 Mich. 463; Marshall v. Sumner (1879) 59 N. H. 218, 47 Am. Rep. 194; Hudson v. Bigham (Tenn. 1873) 12 Heisk. 58, 8 N. B. R. 494; Dusenbury v. Hoyt (N. Y. 1873) 45 How. Prac. 147; Sinclair v. Smyth (S. C. 1804) 1 Brev. 402. If the plea setting up the discharge shows the court to have had jurisdiction of the petition, and to have proceeded, on the petition, to grant the discharge, all the intermediate steps will be presumed to have been duly and regularly taken. Morrison v. Woolson (1854) 29 N. H. 510; Hubbell v. Cramp (N. Y. 1844) 11 Paige, 310.

An action brought by a creditor on his debt against a discharged bankrupt is not a collateral attack upon the discharge in bankruptcy. Collins v. Davidson (1908) 34 Ohio Cir. Ct. R. 668. It is permissible for a creditor, in such a suit, to show that his debt is one of the kind excepted from the operation of a discharge, as, where it was creat-

ed by the bankrupt by fraud or while acting in a fiduciary capacity. Sutherland v. Lasher (1903) 41 Misc. Rep. 249, 84 N. Y. Supp. 56; Santa Rosa Bank v. White (1903) 139 Cal. 703, 73 Pac. 577; Stevens v. Brown (1873) 49 Miss. 597, 11 N. B. R. 568; Linn v. Hamilton (1870) 34 N. J. Law, 305; Broadnax v. Bradford (1874) 50 Ala. 270. Or the creditor may show that he had no knowledge of the proceedings in time to file his claim for proof and allowance. Fields v. Rust (1904) 36 Tex. Civ. App. 350, 82 S. W. 331.

Where, in proceedings in a court of competent jurisdiction for the discharge of a debtor on a composition, the decree is based on a finding that the bankrupt has not been guilty of any of the acts which would bar his discharge, nor of a failure to perform any of the duties necessary to secure it, which finding was essential to the exercise of the court's jurisdiction, the decree will be binding as to such matters on all parties to the proceeding until properly set aside, and cannot be collaterally impeached. Hoskins v. Velasco Nat. Bank (1908) 48 Tex. Civ. App. 246, 107 S. W. 598.

63. Pleading discharge in bankruptcy.—A discharge in bankruptcy is a plea in bar. House v. Schnadig (1908) 138 Ill. App. 498. It is a perfect defense to a suit on a debt barred thereby. Craig v. Seitz (1886) 63 Mich. 727, 30 N. W. 347. The plea of a discharge in bankruptcy is a legitimate and meritorious defense, which is not regarded with any disfavor by the courts. Citizens' Nat. Bank v. Branden (1910) 19 N. D. 489. 126 N. W. 102, 27 L. R. A. (N. S.) 858.

The plea of a discharge in bankruptcy may be interposed in a suit begun before the bankruptcy and still pending after the discharge, as, in a creditor's suit, where it may be set up in a supplemental answer. Stewart v. Isador (N. Y. 1868) 5 Abb. Prac. N. S. 68.

On a rule to set aside a writ of fieri facias, the defendant cannot allege that he was discharged as a bankrupt prior to the date when the judgment was entered. Such a defense was available only at the trial. People's Trust Co. v. Ehrhart (1914) 56 Pa. Super. Ct. 101.

The plaintiff in any pending suit may anticipate the plea of a discharge in bankruptcy, and may, by leave of court and before defendant has pleaded his discharge, discontinue the action, without costs; or if the defendant pleads his discharge, no terms being imposed, and recovers judgment, he will be entitled to his costs the same as in other cases; for the principle that, where a cause of action is extinguished, the action cannot proceed for the mere purpose of recovering costs does not apply to the status of an action to recover a debt after it has been discharged in bankruptcy, the action having been commenced before the discharge. Bank of Commerce v. Elliott (1901) 1 Wis. 648, 85 N. W. 417.

64. —— Necessity of pleading.—T bankrupt, if he wishes to avail himse of the benefit of his discharge in a particular suit, must plead it proper and seasonably, and if he omits to so, it constitutes no bar to the rend tion of a valid judgment against hi In re Nuttall (D. C. 1912) 201 Fe 557, 29 Am. Bankr. Rep. 800; Fow v. Park (C. C. 1892) 48 Fed. 78 Doggett v. Emerson (C. C. 1846) Fe Cas. No. 3,962; Fellows v. Hall (C. 1843) Fed. Cas. No. 4,722; City Newark v. Stout (1889) 52 N. J. La 35, 18 Atl. 943; Schreiber v. Sch macker Piano Forte Mfg. Co. (1912) 1 App. Div. 817, 137 N. Y. Supp. 74 Griffith v. Adams (1902) 95 Md. 17 52 Atl. 66; McDougald v. Chattanoog Medicine Co. (1912) 10 Ga. App. 65 73 S. E. 1089; Friedman v. Zweifl (1911) 74 Misc. Rep. 448, 132 N. Y Supp. 320; Broadway Trust Co. Manheim (1905) 47 Misc. Rep. 415, 9 N. Y. Supp. 93; Bank of Commerce Elliott (1901) 109 Wis. 648, 85 N. W 417; Lovell v. Sneed (1906) 79 Ar 204, 95 S. W. 157; Lane v. Holcom (1903) 182 Mass. 360, 65 N. E. 79 Collins v. McWalters (1901) 35 Mis Rep. 648, 72 N. Y. Supp. 203; Bailey Kraus (1903) 39 Misc. Rep. 845, 81 N Y. Supp. 492; Collins v. Hammoc (1877) 59 Ala. 448; Brown v. J. & P Stevens Co. (1884) 52 Conn. 110; Smit v. Cook (1883) 71 Ga. 705; Horner Spelman (1875) 78 Ill. 206; Jenks Opp (1873) 43 Ind. 108; Palmer Moore (1848) 3 La. Ann. 208; Ludelin v. Felton (1877) 29 La. Ann. 710 Jones v. Coker (1876) 53 Miss. 195 Bank of Missouri v. Franciscus (1851) 15 Mo. 303; Cronell v. Dakin (1868) 38 N. Y. 253; Gardner v. Hengehol (1880) 6 Ohio Dec. 997; Park v. Case (1872) 35 Tex. 536; Bellamy v. Wood son (1848) 4 Ga. 175, 48 Am. Dec 221; Finney v. Mayer (1878) 61 Ga 500; Gallaher v. Michel (1874) 26 La Ann. 41; Hollister v. Abbot (1855) 31 N. H. 442, 64 Am. Dec. 342; Steward v. Green (N. Y. 1845) 11 Paige, 535; Paschall v. Bullock (1879) 80 N. C. 329; Bell v. Cunningham (1879) 81 N. C. 83; First Nat. Bank of Broadway, Va., v. Cootes (W. Va. 1914) 81 S. E. 844.

If the defendant in an action fails to plead his discharge in bankruptcy and permits a judgment to go against him, he cannot afterwards, on the ground of the discharge, have relief in equity against any proceedings founded on the judgment, as, by enjoining the levy of execution thereunder. Goodrich v. Hunton (C. C. 1875) Fed. Cas. No. 5,544; Stone v. Schneider-Davis Co. (1908) 51 Tex. Civ. App. 517, 112 S. W. 133; Marsh v. Mandeville (1854) 28 Miss. 122; Rahm v. Minis (1870) 40 Cal. 421; White v. Powell (1905) 38 Tex. Civ. App. 38, 84 S. W. 836.

Nor can he have the judgment set aside, in order to enable him to plead his discharge. Mack Mfg. Co. v. Van Duerson (C. C. 1905) 138 Fed. 953.

A discharge in bankruptcy must be pleaded affirmatively in a proceeding by scire facias to revive a judgment, as well as in an original suit. In re Wesson (D. C. 1881) 88 Fed. 855; Spring Run Coal Co. v. Tozier (1883) 102 Pa. 342; Stewart v. Colwell (1854) 24 Pa. 67; Duncan v. Hargrove (1853) 22 Ala. 150.

Where a suit is pending against several defendants, and one of them obtains his discharge in bankruptcy, but does not plead it, and judgment is rendered against them all and the amount is paid by one of the other defendants, the latter is entitled to enforce contribution from the bankrupt. Brown v. J. & E. Stevens Co. (1882) 52 Conn. 110.

The court of bankruptcy cannot and will not do anything to relieve a defendant who, failing to plead his discharge in a suit in another court on a dischargeable debt, suffers a judgment. In re Ferguson (D. C. 1875) Fed. Cas. No. 4,738.

Laches in making an application for leave to plead a discharge in bankruptcy is a sufficient ground for denying such application. Medbury v. Swan (1871) 46 N. Y. 200. Where the defendant in a suit filed an answer which made no reference to the fact that he had been discharged in bankruptcy, and first brought that fact to the attention of the court by a motion in arrest of judgment, three weeks after a verdict had been returned against him, and did not attempt to plead his discharge in bar until nearly seven months after the verdict, it was held that he had waived his right to do so. Lane v. Holcomb (1903) 182 Mass. 360, 65 N. E. 794.

Where the bankrupt has had no opportunity to plead his discharge before judgment goes against him, he does not lose its protection by the rendition of a judgment on a dischargeable debt. Ewing v. Peck (1850) 17 Ala. 339; Brown v. Branch Bank of Montgomery (1852) 20 Ala. 420; Milhous v. Aicardi (1874) 51 Ala. 594.

Where the failure to plead the discharge was due to the fact that the attorney representing the defendant in that litigation was unaware of it, it was held that leave might be granted to vacate the judgment given against him and for him to plead the discharge, but only on terms including the payment of costs and disbursements. De Marco v. Mass (1900) 31 Misc. Rep. 827, 64 N. Y. Supp. 768.

65. —— Who may plead discharge.— A plea of discharge in bankruptcy is personal to the debtor, and he may waive the benefit of his discharge by failing to plead it, and no one can plead it for him. Taber v. Donovan (1909) 156 Mich. 652, 121 N. W. 481; Ludeling v. Felton (1877) 29 La. Ann. 719; Manwarring v. Kouns (1872) 35 Tex. 171; Horner v. Spelman (1875) 78 Ill. 206; Goodrich v. Hunton (C. C. 1875) Fed. Cas. No. 5,544; Bush v. Stanley (1887) 122 Ill. 406, 13 N. E. 249; Bank of Commerce v. Elliott (1901) 109 Wis. 648, 85 N. W. 417; First International Bank v. Lee (N. D. 1913) 141 N. W. 716.

The plea of a discharge in bankruptcy of one defendant in an action cannot be set up by a codefendant. George Bohon Co. v. Moren & Sipple (1913) 151 Ky. 811, 152 S. W. 944. Nor by one who is in possession of property of the debtor, transferred with an intent to defraud creditors, in an action to set aside such transfer. Dewey v. Moyer (N. Y. 1877) 9 Hun, 473.

The plea of a discharge in bankruptcy may be made by the personal representatives of the bankrupt, and his administrator cannot waive the benefit of the discharge by failing to plead it. Parker v. Grant (1884) 91 N. C. 338. A discharge may be pleaded by the heirs of the bankrupt, or by his widow in an action to recover land formerly belonging to the bankrupt and transferred to her through the agency of a third person. Upshur v. Briscoe (1891) 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

A surety of the bankrupt may plead the latter's discharge in bankruptcy, in respect to the transaction out of which the surety's liability is supposed to grow. McDonald v. State (1881) 77 Ind. 26; Bouie v. Pucket (Tenn. 1846) 7 Humph. 169.

Where the question respects the discharge in bankruptcy as affecting a lien on property, it may be pleaded by any one claiming an interest in the property adverse to the lien asserted. Fleitas v. Mellen (C. C. 1889) 39 Fed. 129.

Where the object of the plea is not to show the bankrupt's immunity from liability for his past debts, but to show (as a fact relevant to the issue on trial) that the claim of a particular creditor was released or extinguished by the discharge, it may be alleged as matter of fact by any party who finds it a necessary part of his claim or defense. Fleitas v. Richardson (1893) 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

66. —— Form and effect of plea.— The mode of pleading a discharge in bankruptcy is to be determined by the mode of pleading in the state courts. Landly & Co. v. Cummins (1883) 5 Ky. Law Rep. 511.

A state court has the right to proceed with any case pending before it until the discharge in bankruptcy is brought to its notice by a proper and sufficient plea. Bennett v. Lewis (1902) 66 S. W. 523, 23 Ky. Law Rep. 2037. Whether a judgment against one who is thereafter adjudged a bankrupt is thereby discharged is a question properly raised by pleading the discharge in a proceeding to enforce the

judgment, and not by a petition in the bankruptcy court to enjoin the judgment creditor from enforcing it. Hellman v. Goldstone (1908) 161 Fed. 913, 88 C. C. A. 604, 20 Am. Bankr. Rep. 539.

A plea of a discharge in bankruptcy is not sufficient unless it sets forth the facts on which jurisdiction both of the subject-matter and of the person depend. Bailey v. Kraus (1903) 39 Misc. Rep. 845, 81 N. Y. Supp. 492; Ruckman v. Cowell (1848) 1 N. Y. 505; Sackett v. Andross (N. Y. 1843) 5 Hill, 327; Stephens v. Ely (N. Y. 1844) 6 Hill, 607; Stow v. Parks (Wis. 1849) 1 Chand. 60; Wiggins v. Shapleigh (1846) 20 N. H. 444; Morse v. Presby (1852) 25 N. H. 299; Landly v. Cummins (1883) 5 Ky. Law Rep. 511. CONTRA, Rowan v. Holcomb (1847) 16 Ohio, 463; Mount v. Manhattan Co. (1886) 41 N. J. Eq. 211, 3 Atl. 726; Bryant v. Kinyon (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; Hays v. Ford (1876) 55 Ind. 52; Cromwell v. Burr (N. Y. 1880) 59 How. Prac. 93.

Where the state law provides that a judgment may be pleaded by stating that it was duly given or made, a plea alleging that the defendant was "duly adjudged" a bankrupt in a designated federal court sufficiently alleges the jurisdiction of that court. Broadway Trust Co. v. Manheim (1905) 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

The plea of a discharge in bankruptcy should name the court in which the discharge was granted. Morrison v. Woolson (1854) 29 N. H. 510; Bailey v. Kraus (1903) 39 Misc. Rep. 845, 81 N. Y. Supp. 492. And it should aver the filing of the petition in bankruptcy, that being a fundamental jurisdictional fact. Cutter v. Folsom (1845) 17 N. H. 139; Wiggins v. Shapleigh (1846) 20 N. H. 444; Price v. Bray (1848) 21 N. J. Law, 13; McCormick v. Pickering (1850) 4 N. Y. 276. It should state the date of the filing of such petition, if it has any bearing on the availability of the discharge as a defense to the claim in suit. House v. Johnson (1904) 19 Colo. App. 524, 76 Pac. 743; Stephenson v. Bird (1910) 168 Ala. 363, 53 South. 93. And it should allege the residence or domicile of the bankrupt within the territorial jurisdiction of the bankruptcy court for the requisite length of time. Cutter v. Folsom (1845) 17 N. H. 139; Wiggins v. Shapleigh (1850) 20 N. H. 444; McCormick v. Pickering (1850) 4 N. Y. 276; Price v. Bray (1847) 21 N. J. Law, 13.

A defect in a plea of a discharge in bankruptcy, in failing to set forth such facts as will show the jurisdiction of the court, may be waived by pleading over. Price v. Bray (1847) 21 N. J. Law, 13.

It is necessary to show the jurisdiction of the court, and to allege that the defendant has been discharged by the judgment of the proper court, and h received his certificate of dischar Hayes v. Flowers (1852) 25 Miss. 16 City of Newark v. Stout (1889) 52 J. Law, 35, 18 Atl. 943. But not allege all the different proceedings ta en to entitle him to his dischar White v. How (C. C. 1843) Fed. Ca No. 17,549; Lathrop v. Stuart (C. 1850) Fed. Cas. No. 8,113; Johnson Ball (1844) 15 N. H. 407; Wiggins Shapleigh (1846) 20 N. H. 444; M Cormick v. Pickering (1850) 4 N. 276; Preston v. Simons (S. C. 184 1 Rich. L. 262; Downer v. Chamberl (1849) 21 Vt. 414. It is not necessa to allege that the requisite notices h been given to the creditors and othe before the discharge was grante Weld v. Locke (1836) 8 N. H. 14 Wiggins v. Shapleigh (1846) 20 N. 444; State v. Gaston (1890) 52 N. Law, 321, 19 Atl. 608; McCormi v. Pickering (1850) 4 N. Y. 276. T plea will be good if it sets out the o der of discharge after a "talliter pr cessum est" or other equivalent for of allegation. Price v. Bray (184 21 N. J. Law, 13. In passing on a d murrer to a plea or answer setting a discharge in bankruptcy, the cou will assume that every step in t bankruptcy proceedings prior to and the time of the discharge was in respects regular and complied with e ery requirement of the statute. Jarec Mfg. Co. v. McElwaine (C. C. 190 107 Fed. 249, 5 Am. Bankr. Rep. 75

It is necessary for the plea of a di charge in bankruptcy to show that t claim or debt in suit, and to which it interposed as a defense, was a provab debt in the bankruptcy proceeding and this should be done by alleging th it was listed in the bankrupt's schedul or, if not so listed, that the credit had notice or knowledge of the ban ruptcy proceedings in time to prove h claim and have it allowed. Currier King (1908) 81 Vt. 285, 69 Atl. 87 Balk v. Harris (1902) 130 N. C. 38 41 S. E. 940; Johnson v. Waxelbau Co. (1907) 1 Ga. App. 511, 58 S. 56; Bennett v. Lewis (1902) 66 S. 523, 23 Ky. Law Rep. 2037; Biela Urbanczyk (1905) 38 Tex. Civ. Ap 213, 85 S. W. 451. But compare B. Roden Grocery Co. v. Leslie (1910) 1 Ala. 579, 53 South. 815; Morrison Woolson (1851) 23 N. H. 11; Ha rington v. McNaughton (1848) 20 293. And the plea should show th the demand in suit was not contract after the defendant was adjudicated bankrupt. Fowler v. Michael (Te Civ. App. 1904) 81 S. W. 321. But is not necessary for the defendant allege or show that the debt in questi is not one of those excepted from t operation of the bankruptcy act. the plaintiff contends that the debt w of a fiduciary character, contracted fraud, for willful injury to the perso etc., it is for him to allege this fact

reply, but not for the defendant to negative it in advance. Rowan v. Holcomb (1847) 16 Ohio, 463; State v. Beck (1911) 175 Ind. 312, 93 N. E. 664; McNeil v. Knott (1852) 11 Ga. 142; Donald v. Kell (1887) 111 Ind. 1, 11 N. E. 782; Wiggins v. Shapleigh (1846) 20 N. H. 444; McCabe v. Cooney (N. Y. 1849) 2 Sandf. Ch. 314; Stow v. Parks (Wis. 1849) 1 Chand. 60. CONTRA, see Jordan v. Gatewood (Ind. 1848) Smith, 82; Bivens v. Newcomb (1850) 2 Ind. 98; Frost v. Tibbetts (1849) 30 Me. 188; Hayes v. Flowers (1852) 25 Miss. 169; Sackett v. Andross (N. Y. 1843) 5 Hill 327; Maples v. Burnside (N. Y. 1845) 1 Denio, 332.

A plea of the defendant's bankruptcy should conclude with a verification. Kirby v. Garrison (1847) 21 N. J. Law, 179; Stoll v. Wilson (1875) 38 N. J. Law, 198; Patrick v. Brown (Pa. 1870) 7 Phila. 133; Mayer v. Gimbel (Pa. 1873) 9 Phila. 90; Downer v. Chamberlin (1849) 21 Vt. 414. And a certificate of the discharge should be filed with the plea. Stoll v. Wilson (1875) 38 N. J. Law, 198. But the court cannot dismiss the action merely on the filing of such a plea, but must submit the issue to the jury. Austin v. Markham (1871) 44 Ga. 161; Cooper v. Cooper (1853) 9 N. J. Eq. 566. And a debtor will be estopped from pleading in bar, in a suit in a state court, a discharge in bankruptcy obtained pendente lite, where he fraudulently concealed from his creditor the pendency of the proceedings in bankruptcy until after the discharge was granted, and the creditor had no actual notice of the pendency of such proceedings. Batchelder v. Low (1871) 43 Vt. 662, 5 Am. Rep. 311. A defective plea of discharge in bankruptcy is amendable on terms. McNeil v. Knott (1852) 11 Ga. 142; Stoll v. Wilson (1875) 38 N. J. Law, 198; Bailey v. Kraus (1902) 39 Misc. Rep. 845, 81 N. Y. Supp. 494.

In an action at law, if the suit was begun before the discharge in bankruptcy and is pending, the discharge should be pleaded in bar by a plea "puis darrein continuance," or by such form of answer as is equivalent thereto. Reeves v. McCracken (1905) 69 N. J. Eq. 203, 60 Atl. 332; Platt v. Cole (C. C. 1880) 5 Fed. 260; Penn v. Edwards (1873) 50 Ala. 63; Keene v. Mould (1847) 16 Ohio, 12; Humble v. Carson, 6 N. B. R. 84. If the proceeding is in equity, the discharge, granted since the commencement of the suit, may be set up by a supplemental answer. Kahn v. Casper (1900) 51 App. Div. 540, 64 N. Y. Supp. 838; Holyoke v. Adams (N. Y. 1874) 1 Hun, 223. Or by a cross-bill. Banque Franco-Egyptienne v. Brown (C. C. 1885) 24 Fed. 106. Where a defendant, before judgment against him, has suggested his bankruptcy, and filed a written motion for a continuance, he may, on subsequently obtaining a review, plead his discharge in bankruptcy in bar of the action. Todd v. Barton (1875) 117 Mass. 291.

In a proper case, the court may impose terms on granting an application for leave to plead a discharge in bankruptcy obtained pending the suit, as a waiver of any costs up to the time of setting up the defense. Bank of Commerce v. Elliott (1901) 109 Wis. 648, 85 N. W. 417.

If the defendant in an action pleads his discharge in bankruptcy, and the plaintiff means to contend that the discharge does not release his claim, because it belongs to one of the classes of debts expressly excepted by the statute, he should set up this matter by a replication. Kellogg v. Kimball (1885) 138 Mass. 441; Cooper Grocery Co. v. Blume (Tex. Civ. App. 1913) 156 S. W. 1157; Cogburn v. Spence (1849) 15 Ala. 549, 50 Am. Dec. 140; Stewart v. Hargrove (1853) 23 Ala. 429; Brereton v. Hull (N. Y. 1845) 1 Denio, 75. Compare Shelton v. Pease (1847) 10 Mo. 473. And the same course is proper where he means to avoid the effect of the discharge by showing a new promise on the part of the defendant to pay the debt in suit. Young v. Denslinger (1878) 2 Ill. App. 22. But where, in a suit on a note, the answer sets up a discharge in bankruptcy before suit, it does not justify a reply that the money for which it was given was obtained on false pretenses. Strauch v. Flynn (1909) 108 Minn. 313, 122 N. W. 320.

67. **Evidence as to discharge.**—When a discharge in bankruptcy is pleaded in defense to an action, and the plaintiff contends that the discharge is not operative as to his debt, or that, for any reason, he is not bound by it, the burden is on him to establish this fact. Broadway Trust Co. v. Manheim (1905) 47 Misc. Rep. 415, 95 N. Y. Supp. 93. It is not incumbent on the bankrupt, in the first instance, to show that the claim sued on was provable in the bankruptcy proceedings, where it appears on its face to be so provable. Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537. But see Baker v. Hughes (1909) 5 Ga. App. 586, 63 S. E. 587.

A bankrupt pleading his discharge as a defense to an action, or as a basis for affirmative relief, must assume the burden of showing either that the debt was duly listed in his schedule, or that the creditor had notice or actual knowledge of the bankruptcy proceedings in time to have filed his claim and procured its allowance. Weidenfeld v. Tillinghast (1907) 54 Misc. Rep. 90, 104 N. Y. Supp. 712; Graber v. Gault (1905) 103 App. Div. 511, 93 N. Y. Supp. 76; Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537; Fields v. Rust (1904) 36 Tex. Civ. App. 350, 82 S. W. 331. CONTRA, See Alling v. Straka (1905) 118 Ill. App. 184; Laffoon v. Kerner (1905) 138 N. C. 281, 50 S. E. 654. The bankrupt's evidence must

identify the claim in suit with the one listed in the schedule. Kreitlein v. Ferger (Ind. App. 1912) 97 N. E. 819; B. F. Roden Grocery Co. v. Leslie (1910) 169 Ala. 579, 53 South. 815; Anthony v. Sturdivant (1911) 174 Ala. 521, 56 South. 571.

If the debt was scheduled and is identified, it is not incumbent on the bankrupt to show that the creditor had notice or knowledge of the proceedings in bankruptcy, as that will be presumed. New York Institution for Instruction of Deaf and Dumb v. Crockett (1907) 117 App. Div. 269, 102 N. Y. Supp. 412; Stevens v. King (1897) 16 App. Div. 377, 44 N. Y. Supp. 893; Claflin v. Wolff (N. J. 1915) 96 Atl. 73.

While a debt or claim omitted from the schedule may still be barred by the discharge, yet the burden in this case is on the bankrupt to show that the creditor had such timely notice or actual knowledge of the bankruptcy proceedings as is necessary under the statute to bring about this result. George F. Sloan & Bro. v. Grollman (1910) 113 Md. 192, 77 Atl. 577; Wineman v. Fisher (1904) 135 Mich. 604, 98 N. W. 404.

The presumption is that all scheduled debts are released by the discharge, and hence if a creditor, suing after the discharge, contends that his particular claim is not affected, because within one of the classes specially excepted by the statute, as having been created by fraud, embezzlement, defalcation of a trustee, etc., then he must assume the burden of proving this contention. Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537; In re Peterson (1910) 137 App. Div. 435, 121 N. Y. Supp. 738; Tompkins v. Williams (1910) 137 App. Div. 521, 122 N. Y. Supp. 152; Culver v. Torrey (1901) 34 Misc. Rep. 793, 69 N. Y. Supp. 919; In re Peterson's Estate (1909) 64 Misc. Rep. 217, 118 N. Y. Supp. 1077; Van Norman v. Young (1907) 228 Ill. 425, 81 N. E. 1060; Gatliff v. Mackey (1907) 104 S. W. 379, 31 Ky. Law Rep. 947; Hallagan v. Dowell (Iowa, 1913) 139 N. W. 883; Gregory v. Edgerly (1885) 17 Neb. 374, 22 N. W. 703; Sherwood v. Mitchell (N. Y. 1847) 4 Denio, 435.

A certified copy of an order granting a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. Bankruptcy Act 1898, § 21f. And see Nation v. Jones (1907) 3 Ga. App. 83, 59 S. E. 330; United Society of Shakers v. Underwood (1875) 74 Ky. (11 Bush) 265, 21 Am. Rep. 214; Hays v. Ford (1876) 55 Ind. 52, 15 N. B. R. 569.

Where the claim in suit, and against which the discharge is pleaded, consists of a judgment, and it is contended that the judgment is excepted from the operation of the discharge because rendered in an action for fraud, this qu tion must be determined by an insp tion of the record of the action which the judgment was rendered, a the showing made by such record conclusive. Louisville & N. R. Co. Bryant (1912) 149 Ky. 359, 149 S. 830; Forsyth v. Vehmeyer (1898) 1 Ill. 359, 52 N. E. 55. If it is claim that the judgment in question was "willful and malicious injury to person or property," the fact of being based on such a cause of acti may be shown by record eviden Flanders v. Mullin (1907) 80 Vt. 1 66 Atl. 789, 12 Ann. Cas. 1010.

It is for a jury to determine, up competent and sufficient eviden whether or not the plaintiff's cla against the bankrupt, not having be reduced to judgment, was created the fraud of the bankrupt. Culver Torrey (1901) 34 Misc. Rep. 793, N. Y. Supp. 919. Or by his false rep sentations or false pretenses. Atla Skirt Mfg. Co. v. Jacobs (1910) 8 App. 299, 68 S. E. 1077. And wheth or not the creditor had notice or kno edge of the proceedings in bankrupt Troy v. Rudnick (1908) 198 Mass. 5 85 N. E. 177; Bergmann v. Ma (1910) 141 App. Div. 102, 125 N. Supp. 973; Fields v. Rust (1904) Tex. Civ. App. 350, 82 S. W. 3 Armstrong v. Sweeney (1905) 73 N 775, 103 N. W. 436. And it is a qu tion of fact for a jury when the ba rupt's contention is that a certain p son was acting as the creditor's age so that his knowledge of the proce ings should be imputed to the credit Atkinson v. Elmore (1903) 103 M App. 403, 77 S. W. 492.

68. Effect of refusal of discharge failure to apply.—If the bankrupt d not obtain his discharge, none of t proceedings in the bankruptcy case w in any way affect the demands of creditors against him. Whitney Crafts (1813) 10 Mass. 23; Chandler Windship (1810) 6 Mass. 310; Lu mus v. Fairfield (1809) 5 Mass. 2 And a creditor who has proved claim and accepted and received dividend thereon is not estopped fr collecting the remainder of his debt any proper way, if the bankrupt is discharged, but the dividend will me ly reduce his cause of action pro tan Hamlin v. Hamlin (1857) 56 N. 191; American Woolen Co. v. Maa (1912) 86 Conn. 234, 85 Atl. 583.

If the bankrupt fails to apply for discharge, the order of the court proving the record and closing the c without granting a discharge is equiv lent to a judgment by default in fav of the bankrupt's then existing cre tors, and is res judicata in any sub quent bankruptcy proceeding, precl ing him from obtaining a dischar therein from any debts previou scheduled. In re Bramlett (D.

1908) 161 Fed. 588, 20 Am. Bankr. Rep. 402; In re Elby (D. C. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734. And the fact that a claim so scheduled is afterwards reduced to judgment does not create a new debt which could form the basis for a subsequent bankruptcy proceeding and discharge therein. In re Schnabel (D. C. 1909) 166 Fed. 383, 23 Am. Bankr. Rep. 22; In re Kuffler (D. C. 1907) 155 Fed. 1018, 19 Am. Bankr. Rep. 181.

When the bankrupt's application for a discharge is denied, the right to sue him upon any existing claim revives. Storrs v. Plumb (N. Y. 1883) 30 Hun, 319. And the refusal of a discharge renders the issue of his right to a discharge from any debts provable in that proceeding res judicata, so that he is not entitled to retry it in a second proceeding. In re Kuffler (D. C. 1907) 155 Fed. 1018, 19 Am. Bankr. Rep. 181.

A creditor who desires to rely upon the order refusing a discharge, as res judicata in a second proceeding instituted some years later, must prove it or otherwise call it to the attention of the court of bankruptcy, and if he fails to do so, and a general discharge is granted in the second proceeding, a state court must give effect to it in any proceedings thereafter brought to enforce the creditor's claim. Youngman v. Salvage (1911) 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913C, 1181.

VI. DISCHARGE OF PARTNERS

69. Discharge of partners separately.—Where a firm and its members have been adjudged bankrupt on the voluntary petition of the partners composing it, either partner, without reference to the others, may present his individual petition for a separate discharge; and the petition should recite the adjudication of the firm and of the petitioner as a member of it, and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts. In re Meyers (D. C. 1899) 97 Fed. 757, 3 Am. Bankr. Rep. 260. Where a member of a firm filed a petition individually to be adjudged a bankrupt, and the petition was silent as to any partnership assets or liabilities, though the schedule disclosed individual and partnership debts, and the creditors of the firm were not notified, the bankrupt was not entitled to a discharge from firm debts, though the firm had been dissolved and was without assets, and the firm debts were barred by limitation. In re Morrison (D. C. 1904) 127 Fed. 186, 11 Am. Bankr. Rep. 498.

When the partnership as such is not in bankruptcy, but only the individual partners on their separate voluntary petitions, they are not entitled to a discharge which will release them from the debts of the firm. In re Meyers (D. C. 1899) 96 Fed. 408, 2 Am. Bankr. Rep. 707.

A discharge purporting on its face to release one member of a firm from his individual debts will not discharge him from the firm liabilities. Honegger v. Wettstein (1881) 47 N. Y. Super. Ct. 125.

A discharge in bankruptcy granted to a member of a firm in proceedings based on a voluntary petition in which both the firm and the individual partners joined, and on which the petitioners were adjudged bankrupt as prayed, should be made to cover his liability on the debts of the firm and also his individual debts. In re Gay (D. C. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529.

The discharge of one partner cannot be made operative in favor of the other, and it will not release such other from the indebtedness of the firm. Payne v. Able (1870) 7 Bush (Ky.) 344, 3 Am. Rep. 316.

A discharge in bankruptcy of two general partners cannot be set up in favor of a special partner in an action against the three as general partners, on the ground that the special partner had made himself liable as a general partner. Abendroth v. Van Dolsen (1889) 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57.

The failure to keep proper books of account may prevent the discharge of both partners, though the fault was wholly that of one of them. In re George (D. C. 1869) Fed. Cas. No. 5,325.

While the trial of objections to the discharge of partners may be joint, the decrees thereon must be several. Id.

70. Discharge of partnership as such.—When the proceeding in bankruptcy is against the firm as a legal entity, but does not include adjudications against the partners separately, it is only the firm which is entitled to a discharge, and the court cannot grant discharges to the partners as individuals. In re Neyland (D. C. 1910) 184 Fed. 144, 24 Am. Bankr. Rep. 879; In re Hale (D. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35.

VII. DISCHARGE OF CORPORATIONS

71. In general.—A corporation is entitled to a discharge in bankruptcy in the same circumstances as a natural person, but such discharge will not prevent creditors from subsequently taking a judgment against the corporation in a state court, in such limited form as may enable them to enforce the secondary liability of the directors under the state statute, to which, by the terms of the statute, a judgment against the corporation is a prerequisite. In re Marshall Paper Co. (1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468.

§ 9599. (Act July 1, 1898, c. 541, § 15.) Discharges, when revoke

Discharges, when Revoked.—a The judge may, upon the applic tion of parties in interest who have not been guilty of undue lache filed at any time within one year after a discharge shall have be granted, revoke it upon a trial if it shall be made to appear th it was obtained through the fraud of the bankrupt, and that t knowledge of the fraud has come to the petitioners since the grantin of the discharge, and that the actual facts did not warrant the di charge. (30 Stat. 550.)

Notes of Decisions

1. Revocation of discharge.—A petition for the revocation of a discharge may be referred to the referee as special commissioner, to ascertain and report upon the matters of fact alleged in the petition. In re Meyers (D. C. 1900) 100 Fed. 775.

The jurisdiction to revoke or cancel a discharge is vested exclusively in the court of bankruptcy which granted it, and a federal court of equity in a district other than that in which the discharge was granted, has no jurisdiction to set it aside for fraud. Atlantic Dynamite Co. v. Reger (D. C. 1912) 200 Fed. 1002, 29 Am. Bankr. Rep. 659; Nicholas v. Murray (C. C. 1878) Fed. Cas. No. 10,223.

The court of bankruptcy has power, on motion of a proper party, or even on its own motion, to set aside or recall an order of discharge for such causes (aside from the charge of fraud in obtaining it) as would justify that action in any other case, as, for instance, mistake, surprise, or unavoidable accident. In re Louisville Nat. Banking Co. (1908) 158 Fed. 403, 85 C. C. A. 513; In re Bimberg (D. C. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601; In re Dupee (D. C. 1871) Fed. Cas. No. 4,183. But this power cannot be exercised after the expiration of a year from the time of granting the discharge. In re Cuthbertson (D. C. 1912) 202 Fed. 266, 29 Am. Bankr. Rep. 923.

A petition for the revocation of a discharge which merely alleges that the petitioner is a "creditor" does not sufficiently show that he is a "party in interest," but it must allege that he had a provable debt which would be affected by a discharge. In re Chandler (1905) 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512. A creditor whose claim is entirely wiped out by the bankrupt's discharge is a party in interest and may attack the discharge for fraud. The cash surrender value of the life policies assigned in good faith by bankrupt being only $17, in which the objecting creditor could not participate, the discharge will not be revoked, as for fraud. In re Levy (D. C. 1915) 227 Fed. 1011.

A creditor's right to apply to vacate a bankrupt's discharge is not affected by the creditor's failure to file proof of its scheduled claim. In re Walsh (D. C. 1914) 213 Fed. 643; In re Bimberg (D. C. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601. But see Arringt v. Arrington (D. C. 1904) 132 F 200, 13 Am. Bankr. Rep. 89.

A creditor who neglects to file o jections to the bankrupt's discharge due time, and afterwards discove fraud, may require the bankrupt take his discharge and then apply revoke it. In re Fowler (D. C. 187 Fed. Cas. No. 4,999.

The bankrupt himself is a party interest, and may move to have t discharge set aside, for the purpose amending his schedules by includi debts which were originally omitt through mistake or inadvertence. re McKee (D. C. 1908) 165 Fed. 2 21 Am. Bankr. Rep. 309.

A petition to vacate a discharge the statutory ground of fraud must forth distinctly each one of the fa necessary to sustain it and to just the action asked for. In re Cuthbe son (D. C. 1912) 202 Fed. 266, 29 A Bankr. Rep. 823; Vary v. Jacks (1908) 164 Fed. 840, 90 C. C. A. 6 21 Am. Bankr. Rep. 334; In re Ba (D. C. 1886) 27 Fed. 604. Moving p pers on an application to set aside bankrupt's discharge should set o facts which, if proved, would require denial of the discharge and show th the creditor has reasonable pro prima facie sufficient to require a d nial of an application for dischar In re Walsh (D. C. 1914) 213 Fed. 6

The law does not authorize a rehe ing or new trial on specifications ready filed in opposition to the d charge, and which were heard and d termined before the discharge, even the opposing creditor can adduce n facts, happening since the dischar which would be competent evidence a new trial were authorized by t statute. In re Corwin (D. C. 1880) Fed. 847.

The burden of proof is on a petitio er seeking to have the discharge vac ed, and he must prove, by sufficient e dence, every fact essential to the j risdiction of the court and to its e ercise in the particular case. In Cuthbertson (D. C. 1912) 202 Fed. 2 29 Am. Bankr. Rep. 823; In re St son (D. C. 1870) Fed. Cas. No. 13,3

2. —— Time for application—Lach —The period of one year within whi an application to revoke a bankrup discharge must be filed begins to r from the date of the order granting t

discharge, and not from the discovery of the fraud on which the application is based. Mall v. Ulrich (D. C. 1888) 37 Fed. 653; Pickett v. McGavick (D. C. 1876) Fed. Cas. No. 11,126; In re Brown (D. C. 1879) Fed. Cas. No. 1,-983; In re Herzig (N. Y. 1884) 16 Abb. New Cas. 179.

An action to set aside the discharge of a bankrupt must be brought within a year from the discharge, and a state court, if it had jurisdiction, could not set it aside where more than a year had elapsed. Andrus v. Cornwell (1914) 64 So. 221, 134 La. 403.

The requirement that the application shall be presented within the year is a limitation directly on the power or jurisdiction of the court, as distinguished from a limitation on the cause of action, so that, if this provision of the law is not complied with, it is beyond the power of the court to revoke the discharge. In re Howard (D. C. 1913) 201 Fed. 577; In re Cuthbertson (D. C. 1912) 202 Fed. 266, 29 Am. Bankr. Rep. 823.

Application for leave to amend a petition for the revocation of a bankrupt's discharge will be refused when the year has fully run, when the petition as originally presented was insufficient, though filed in due time. In re Howard (D. C. 1913) 201 Fed. 577; In re Sims (D. C. 1881) 9 Fed. 440.

A creditor who had ample opportunity during the pendency of the proceedings to examine the bankrupt fully as to all matters regarded as fraudulent or suspicious, and who appeared in opposition to his discharge, and was given time to file specifications of opposition, but failed to do so, and permitted the discharge to be granted without further objection, is not entitled to be heard on a subsequent application to revoke the discharge, being guilty of laches. In re Upson (D. C. 1903) 124 Fed. 980; In re Mauzy (D. C. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59. The case may be otherwise where the petitioner had no opportunity either to discover the fraud in question before the discharge was granted or to allege it in opposition to the discharge. In re Griffin Bros. (D. C. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78. But one in this position must show very clearly how and when he acquired information of the fraud, and that he failed to receive notice of the application for discharge or was otherwise prevented from setting it up at that time. In re Howard (D. C. 1913) 201 Fed. 577.

An unexplained delay of eight months will be ground for refusing to entertain a petition for the revocation of a discharge. In re Downing (D. C. 1912) 199 Fed. 329, 28 Am. Bankr. Rep. 778.

Where the interest of the creditors who petitioned for a review of the discharge was small in comparison with the aggregate of the debts, and the bankrupt had resumed his business on the faith of his discharge, and had entered into extensive contracts, held, that five months was too unreasonable a delay on the part of the creditors, no sufficient excuse being offered and the petition must be dismissed. In re Murray (C. C. 1876) Fed. Cas. No. 9,953.

Where a bankrupt was discharged October 20, 1904, and an application filed by a creditor January 5, 1905, to revoke the discharge, was not brought on for hearing for over seven years, during which time the bankrupt died, the creditor's right to prosecute his application was barred by laches as against heirs and legal representatives of the bankrupt. Drees v. Waldron (1914) 212 Fed. 93, 128 C. C. A. 609.

A creditor is not barred by laches from attacking the discharge, having acted in a month after ascertaining the facts. In re Levy (D. C. 1915) 227 Fed. 1011.

3. —— **Grounds for revoking.**—Fraud practiced in obtaining a discharge in bankruptcy, as a ground for revoking it, means bad faith, involving moral turpitude or intentional wrong, as distinguished from fraud in law. In re Cuthbertson (D. C. 1912) 202 Fed. 266, 29 Am. Bankr. Rep. 823; In re Griffin Bros. (D. C. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78. It must be actual fraud knowingly practiced by the bankrupt. In re Wright (D. C. 1910) 177 Fed. 578, 24 Am. Bankr. Rep. 437. And it must have been practiced in obtaining the discharge, and fraud committed by the bankrupt at any earlier stage of the proceedings should be set up in opposition to his application for discharge, but cannot be presented as a ground for revoking it. In re Hoover (D. C. 1900) 105 Fed. 354, 5 Am. Bankr. Rep. 247; In re Adams (D. C. 1887) 29 Fed. 843.

The willful and fraudulent concealment of property, practiced by the bankrupt throughout the whole proceedings, and continued up to and through the proceedings on his application for discharge, constitutes the suppression of a fact which, if it had been known, would have barred his right to a discharge, and therefore may be considered as fraud in the obtaining of the discharge, so that, if it comes to the knowledge of parties in interest only after the discharge has been granted, and they act promptly, it will furnish ground for revoking the discharge. In re Meyers (D. C. 1900) 100 Fed. 775; In re Paine (D. C. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Augenstein (D. C. 1875) 2 MacArthur, 322, 16 N. B. R. 252; In re Rainsford (D. C. 1871) 5 N. B. R. 381, Fed. Cas. No. 11,537. See, also, In re Hansen (D. C. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; Throop v. Griffin (1897) 180 Pa. 452, 36 Atl. 865. Failure of a bankrupt to schedule an interest in certain real property which had been conveyed to a trustee held not fraud in fact, sufficient to justify a vacation of the dis-

charge. In re Cuthbertson (D. C. 1912) 202 Fed. 266, 29 Am. Bankr. Rep. 823.

The willful and intentional omission of a creditor's name or address from the bankrupt's schedule may be ground for annulling the discharge, when done with the purpose of keeping the proceeding secret from that creditor and preventing him from opposing the discharge. In re Herrick (D. C. 1873) 7 N. B. R. 341, Fed. Cas. No. 6,419. But the omission by a bankrupt of a debt from the schedule annexed to his petition is not ground for setting aside the discharge, where there was no fraudulent purpose, although the omitted creditor had no notice of the bankruptcy proceedings in time to have proved his claim, since in this case the creditor is not prejudiced by the discharge. In re Monroe (D. C. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706.

It is fraud practiced in obtaining a discharge if the bankrupt, though knowing the correct address of a creditor, causes the notice of his application for discharge to be sent to a wrong address, so that the creditor has no knowledge of the application for discharge in time to oppose it. In re Roosa (D. C. 1902) 119 Fed. 542, 9 Am. Bankr. Rep. 531. But see In re Fritz (D. C. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84. A bankruptcy court has no jurisdiction to set aside a discharge on the ground that the objecting creditor did not receive his notice of the application for discharge, which was duly mailed. In re Walsh (D. C. 1914) 213 Fed. 643.

It is a fraud upon the law and ground for revoking a discharge where a creditor who has filed specifications of opposition thereto is induced, by a pecuniary consideration, to withdraw hi opposition and permit the discharge t be granted as unopposed, and thi though the payment was not made b the bankrupt but by a third person, i the bankrupt knew of and consented t the arrangement. In re Dietz (D. C 1899) 97 Fed. 563, 3 Am. Bankr. Rep 316. Compare Heim v. Chapman (1898 171 Mass. 347, 50 N. E. 529. Wher certain of the objecting creditors with drew their opposition without any cor rupt motive, but without notifying othe creditors who had relied on the specifi cations filed as representing their ow objections and instructed their attor neys to co-operate with the attorney of the objecting creditors, it was fraud on the law and a ground for re voking the discharge. In re Dietz (D C. 1899) 97 Fed. 563, 3 Am. Bankr Rep. 316.

Knowledge of the fraud alleged mus have come to the objecting creditor "since the discharge was granted," since, if they knew of it in time to se it up in opposition to the applicatio for discharge, they are estopped fron alleging it as a ground of revocation In re Fowler (D. C. 1872) Fed. Cas No. 4,999. A discharge will not be se aside when the fraudulent acts relie on by the creditors were suspected an believed to exist, though not positivel known, before the discharge was grant ed. Marrionneaux's Case (C. C. 1870 Fed. Cas. No. 9,088. Nor where th facts in question, though not within th creditor's personal knowledge, wer well known to the trustee in bankrupt cy before the discharge, since the trus tee is the representative of the credi tors and his knowledge is imputable t them. In re Hansen (D. C. 1901) 10 Fed. 252, 5 Am. Bankr. Rep. 747.

§ 9600. (Act July 1, 1898, c. 541, § 16.) Co-debtors of bankrupts.

Co-Debtors of Bankrupts.—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. (30 Stat. 550.)

Notes of Decisions

1. Effect of discharge as to codebtors and persons jointly liable.—Under this section, the liability of a person who is jointly liable with the bankrupt for a debt, or liable as a guarantor or surety of the bankrupt, is not in any way canceled, released, or impaired by the discharge of the bankrupt. Polk v. Stephens (Ark. 1915) 176 S. W. 689; Daniel v. Browder-Manget Co. (Ga. App. 1913) 79 S. E. 237; Elder v. Prussing (1902) 101 Ill. App. 655; Ward v. Johnson (1816) 13 Mass. 148; Edwards v. Coleman (Ky. 1820) 2 A. K. Marsh. 249; Hill v. Trainer (1880) 49 Wis. 537, 5 N. W. 926. It is the intention of the statute to make a discharge personal to the debtor, and not to release any other parties liable with him or liens not declared to be releas ed. Holland v. Cunliff (1902) 96 Mo App. 67, 69 S. W. 737. As to this, i is immaterial whether or not the credi tor proves his claim in the bankruptcy proceedings. Gurley v. Robertson (Ala. 1912) 59 South. 643. It is immaterial that the creditor participated in a composition and consented to the discharge of the bankrupt thereby. Hill v. Trainer (1880) 49 Wis. 537, 5 N. W. 926.

Bankruptcy proceedings do not deprive a creditor of any right of action against third persons. Mattone v. Illinois Surety Co. (1910) 123 N. Y. Supp. 236. And the effect of the discharge in bankruptcy of one of the defendants in a pending suit is substan-

tially the same as if he had died. Seymour v. O. S. Richardson Fueling Co. (1902) 103 Ill. App. 625.

In a suit brought after the discharge, on a joint obligation of the bankrupt with others, the bankrupt is a necessary party to the action, because his discharge is a personal privilege which may be waived, and which must be pleaded if he means to take advantage of it. Jenks v. Opp (1873) 43 Ind. 108.

Where several persons jointly execute an undertaking in the name of a corporation, the fact that the creditor proved his claim in bankruptcy against the corporation does not estop him to sue on the individual liability of the persons executing the instrument. Ridenour v. Mayo (1876) 29 Ohio St. 138.

If one of two joint judgment debtors is discharged in bankruptcy, this does not affect the liability of the other. Love v. McGill (1906) 41 Tex. Civ. App. 471, 91 S. W. 246. Nor does it affect the right of the creditor to revive the judgment by scire facias against the defendant not discharged. Simpson v. Minnix (1908) 30 App. D. C. 582. But where a contractor, to whom material has been furnished, is discharged in bankruptcy prior to a judgment creating a lien for such material, the lien cannot thereafter be foreclosed against the property of the owner and a judgment rendered against him. Philip Carey Mfg. Co. v. Viaduct Place (1907) 1 Ga. App. 707, 58 S. E. 274.

Where a discharged bankrupt applies for the cancellation of record of a judgment standing against him on a discharged debt, the court has no power to discharge the judgment as against the other defendants in the action. In re Quackenbush (1907) 122 App. Div. 456, 106 N. Y. Supp. 773.

Where one mortgages his land to secure the debt of another, the latter's discharge in bankruptcy does not affect the mortgage or release the mortgagor. Post v. Losey (1887) 111 Ind. 74, 12 N. E. 121; Security Sav. Bank v. Scott (1906) 3 Cal. App. 687, 86 Pac. 903.

The discharge in bankruptcy of the maker of a note does not release an indorser or co-maker, and vice versa. Buchholz v. Feustel (1913) 179 Ill. App. 396; Commercial Bank of Boonville v. Varnum (1914) 176 Mo. App. 78, 162 S. W. 1080; Guild v. Butler (1877) 122 Mass. 498, 23 Am. Rep. 378; King v. Central Nat. Bank (1849) 6 Ga. 257; Pratt v. Chase (1877) 122 Mass. 262; Harwell v. Steel (1850) 17 Ala. 372.

Under Rem. & Bal. Code Wash. § 5918, and section 47 (post, § 9631), an adjudication of bankruptcy against a married man constitutes also an adjudication against the community, and his discharge discharges the community. Gibbons v. Dexter Horton Trust & Savings Bank (D. C. 1915) 225 Fed. 424.

A discharge obtained by a joint debtor is a bar to an action by his codebtor for contribution. Dean v. Speakman (Ind. 1844) 7 Blackf. 317; Frentress v. Markle (Iowa, 1850) 2 G. Greene, 553.

2. Sureties and guarantors.—Under this section, the liability of a guarantor or surety for a bankrupt is not in any way released, changed, or diminished by the discharge of the principal debtor. Leader v. Mattingly (1904) 140 Ala. 444, 37 South. 270; Boyd v. eral Union Surety Co. (1911) 156 Mo. Agricultural Ins. Co. (1904) 20 Colo. App. 28, 76 Pac. 986; State v. Fed- App. 603, 137 S. W. 613; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. (1907) 123 Mo. App. 249, 100 S. W. 680. This rule also prevailed under the bankruptcy act of 1867. See Cochrane v. Cushing (1878) 124 Mass. 219; Lewis v. Brown (1856) 41 Me. 448; Bowery Sav. Bank v. Clinton (1848) 4 N. Y. Super. Ct. 113; Jones v. Hagler (1859) 51 N. C. 542; Commercial Nat. Bank v. Simpson (1884) 90 N. C. 467; Garnett v. Roper (1846) 10 Ala. 842.

The surety on an appeal bond is not released by the discharge in bankruptcy of the principal debtor, though the judgment was upon a debt provable and dischargeable in bankruptcy, and that, in such a case, a judgment may be rendered against the bankrupt, but with a perpetual stay of execution, which will preserve the liability of the surety. Brown & Brown Coal Co. v. Antezak (1910) 164 Mich. 110, 128 N. W. 774, 130 N. W. 305, Ann. Cas. 1912B, 778; Oberreich v. Foster (1910) 152 Ill. App. 302; Sandusky v. Exchange Bank (1876) 81 Ill. 353; Fisse v. Einstein (1878) 5 Mo. App. 78; Hall v. Fowler (N. Y. 1844) 6 Hill, 630; Knapp v. Anderson (1877) 71 N. Y. 466; James v. Harry Kitzinger & Co. (Ala. App. 1915) 68 South. 582. Where the liability of the surety has become fixed before the discharge is granted to the principal, by the affirmance of the judgment appealed from or by the rendition of a judgment on the bond, then the liability of the surety is not released or affected, even though the judgment becomes inoperative as against the principal debtor. Slusher v. Hopkins (1906) 97 S. W. 1128, 30 Ky. Law Rep. 257; St. Louis World Pub. Co. v. Rialto Grain & Securities Co. (1904) 108 Mo. App. 479, 83 S. W. 781; Williams & Freeman v. Bosworth (Miss. 1912) 59 South. 6; Bailey v. Reeves (Miss. 1912) 59 South. 802. But where the appeal bond is conditioned on the affirmance of the judgment or the dismissal of the appeal, and no final judgment is rendered in the action because it is terminated by the prin-

cipal's discharge in bankruptcy (as, where the appeal is taken from the judgment of a justice of the peace and the bankrupt pleads his discharge in the higher court), then the liability of the surety is extinguished along with that of the principal, or rather, there is no breach of the condition of the bond on which the surety could be held liable. James v. Harry Kitzinger & Co. (Ala. App. 1915) 68 South. 582; Lafoon v. Kerner (1905) 138 N. C. 281, 50 S. E. 654; Goyer Co. v. Jones (1901) 79 Miss. 253, 30 South. 651; Otto Young & Co. v. Howe (1907) 150 Ala. 157, 43 South. 488; House v. Schnadig (1908) 235 Ill. 301, 85 N. E. 395; Odell v. Wootten (1868) 38 Ga. 224, 4 N. B. R. 183; Payne v. Able (Ky. 1870) 7 Bush, 344, 3 Am. Rep. 316, 4 N. B. R. 220. The remedy of the surety on supersedeas bond of appellants becoming bankrupt after judgment must be sought in the bankruptcy court. Vandiver v. American Can Co. (Ala. 1914) 67 So. 299.

A surety on an attachment bond is released where the defendant is adjudicated a bankrupt within four months after the attachment and subsequently discharged. Simon Casady & Co. v. Hartzell (Iowa, 1915) 151 N. W. 97. Where the proceeding in bankruptcy is not begun until more than four months after the laying of the attachment, the court may render a special judgment against the defendant, to enable the plaintiff to enforce the surety's liability on the bond, such judgment containing a stipulation for a perpetual stay of execution against the defendant. Schunack v. Art Metal Novelty Co. (1911) 84 Conn. 331, 80 Atl. 290; Crook Horner Co. v. Gilpin (1910) 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376; United States Wind Engine & Pump Co. v. North Penn Iron Co. (1910) 227 Pa. 262, 75 Atl. 1094; Butterick Pub. Co. v. E. F. Bowen Co. (1911) 33 R. I. 40, 80 Atl. 277; Rice v. Nirdlinger (1909) 41 Pa. Super. Ct. 238; Wolf v. Stix (1878) 99 U. S. 1, 25 L. Ed. 309.

The statute does not apply to the liability of the bankrupt's surety on a bond to dissolve on a garnishment given in a suit against the bankrupt on a provable debt, pending at the time the bankruptcy proceedings were instituted. A. Klipstein & Co. v. Allen-Miles Co. (1905) 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15. But see National Surety Co. v. Medlock (1907) 2 Ga. App. 665, 58 S. E. 1131.

A surety on an injunction bond given in a suit to restrain the enforcement of a judgment is not released from liability by the discharge of his principal in bankruptcy. Stull v. Beddeo (1907) 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507. Nor the surety on a claimant's bond given for goods taken on execution. Pinkard v. Willis (19 24 Tex. Civ. App. 69, 57 S. W. 8 The liability of a surety on a p debtor's recognizance cannot be red ed to nominal damages by reason of subsequent adjudication of the deb as a bankrupt. Carpenter v. Godd (1906) 191 Mass. 54, 76 N. E. 9 The discharge in bankruptcy of principal in a bail bond given by in a civil action, before the liability the bail became fixed, is a discharge the bond. Keyes v. Bennett (1905) Ill. 625, 75 N. E. 1075, affirming (19 122 Ill. App. 60. And see Almon Fogg Co. v. Bartlett (1909) 106 122, 75 Atl. 380, 138 Am. St. Rep. 3 Jones v. State (1873) 28 Ark. 119.

The provision of this section app so as to prevent the release of a su ty on a note by the discharge of principal debtor. Mace v. Wells (18 7 How. 272, 12 L. Ed. 698; Hardy Carter (Tenn. 1847) 8 Humph. 1 Wolfboro Loan & Banking Co. v. B lins (1907) 195 Mass. 323, 81 N. 204; Cilley v. Colby (1881) 61 N. 63. One who has guaranteed the p ment of rent reserved in a lease m to the bankrupt is not released by latter's discharge. Witthaus v. Z mermann (1904) 91 App. Div. 202, N. Y. Supp. 315; Dersch v. Wal (1905) 28 Ky. Law Rep. 325, 89 S. 233. The surety on a bond given b contractor for the erection of a nicipal bridge is not released by contractor's discharge. Empire St Surety Co. v. City of Des Moi (1911) 152 Iowa, 531, 131 N. W. 87

Where a partnership is dissolved, one of the partners assumes the de of the firm, he becomes the princi debtor and the other partner a su ty, and if the principal debtor is charged in bankruptcy, this will release the other partner. Schmitt Greenberg (1908) 58 Misc. Rep. 5 109 N. Y. Supp. 881.

Where a wife executes a mortgage her own real estate for the purp of securing the individual debt of husband, she is his surety to the tent of the property which she mo gages, and the mortgage is not relea by the husband's discharge in ba ruptcy from the debt secured. Bu v. Wait (1885) 33 Kan. 478, 6 P 783.

3. Contribution between sureties. discharge in bankruptcy cannot pleaded in defense to an action brou by one cosurety against another contribution, when the entire debt the principal, for which the part were jointly bound as sureties, was p by the plaintiff, thus founding his ri to contribution, after the discharge the defendant. Dunn v. Sparks (18 1 Ind. 397, 50 Am. Dec. 473; (1856) 7 Ind. 490; Dole v. War (1850) 32 Me. 94, 52 Am. Dec. 6 Wyckoff v. Gardner (N. J. 1886) 5

801; Goss v. Gibson (Tenn. 1847) 8 Humph. 197; Liddell v. Wiswell (1887) 59 Vt. 365, 8 Atl. 680; Byers v. Alcorn (1880) 6 Ill. App. 39; Smith v. Hodson (1880) 50 Wis. 279, 6 N. W. 812.

§ 9601. (Act July 1, 1898, c. 541, § 17, as amended, Act Feb. 5, 1903, c. 487, § 5.) Debts not affected by a discharge.

Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. (30 Stat. 550. 32 Stat. 798.)

In this section, as originally enacted, clause 2 was as follows:

"(2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person of another."

The section was amended by Act Feb. 5, 1903, c. 487, § 5, cited above, by changing said clause 2 to read as set forth here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Notes of Decisions

I. Debts affected by discharge

1. Debts and liabilities discharged.
2. Stockholders' and directors' liabilities.
3. Claims of sureties for bankrupt.
4. Claims against bankrupt as surety.
5. Claims for alimony.
6. Claims for support of wife or children.
7. Claims of alien creditors.
8. Liabilities to state or United States.
9. Claims for taxes.
10. Debts and claims not provable.
11. Debts not duly scheduled.
12. —— Creditor's notice or knowledge of proceedings.
13. Debts contracted in fiduciary capacity.
14. —— Trustees.
15. —— Executors, administrators, and guardians.
16. —— Agents.
17. —— Attorneys.
18. —— Bailees.
19. —— Bankers and brokers.
20. —— Factors and commission merchants.
21. —— Auctioneers.
22. —— Partners and joint adventurers.
23. —— Public and other officers.
24. —— Sureties on bonds of fiduciary debtors.
25. Liabilities for willful and malicious injuries.
26. Liabilities for seduction and criminal conversation.
27. Debts contracted by fraud.
28. —— Deceit and false representations.
29. —— Conversion of property.
30. Effect of proving debt and receiving dividend.
31. Partnership and individual debts.
32. Effect of discharge of corporation on liabilities of officers and stockholders.
33. Effect of discharge as to securities and liens.
34. —— Attachment and garnishment.
35. —— Lien by creditor's suit.
36. —— Mortgages.
37. Effect of discharge on rights as to judgment and execution.
38. —— Cancellation of judgment of record.

II. Revival of debts barred by discharge

39. Validity and consideration of new promise.
40. To whom promise may be made.
41. Time of making promise.
42. Sufficiency of new promise.
43. —— Part payment.
44. —— Written or oral promise.
45. Conditional promise.
46. Promise to pay when able.
47. Remedies of creditor.
48. Burden of proof and evidence.

I. DEBTS AFFECTED BY DISCHARGE

1. Debts and liabilities discharged.—Subject only to the exceptions specified in this section, a discharge in bankruptcy releases the debtor and his after-acquired property from all debts and liabilities which were provable in bankruptcy and which existed at the commencement of the proceedings. A. Klipstein & Co. v. Allen-Miles Co. (1905) 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; In re American Vacuum Cleaner Co. (D. C. 1911) 192 Fed. 939, 26 Am. Bankr. Rep. 621; Ruhl-Koblegard Co. v. Gillespie (1907)

61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929; Meyer v. Bartels (1907) 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Nelson v. Petterson (1907) 229 Ill. 240, 82 N. E. 229, 13 L. R. A. (N. S.) 912, 11 Ann. Cas. 178; Alling v. Straka (1905) 118 Ill. App. 184; Drake v. Vernon (1910) 26 S. D. 354, 128 N. W. 317; Thornburgh v. Madren (1872) 33 Iowa, 380; Fleming v. Lullman (1881) 11 Mo. App. 104; Lefler v. Hunt (Ind. 1846) 8 Blackf. 195; Magoon v. Warfield (Iowa, 1851) 3 G. Greene, 293; Talbott v. Suit (1888) 68 Md. 443, 13 Atl. 356; Withers v. Stinson (1878) 79 N. C. 341; Glasco v. Cooper (Ga. App. 1916) 87 S. E. 1095.

If a creditor, having a provable claim, had an opportunity to prove it, his omission to do so will not withdraw it from the operation of the discharge. In re Kuffler (D. C. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587.

A provable debt is none the less barred by a discharge granted without opposition because the bankrupt had been refused a discharge in a prior proceeding, on the objection of the same creditor, in respect of the same indebtedness, where the ground of the refusal does not appear. Bluthenthal v. Jones (1908) 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390, 19 Am. Bankr. Rep. 288. And the refusal of a discharge in an insolvency proceeding does not necessarily withdraw a debt proved therein from the operation of a discharge in a later bankruptcy proceeding, though the debt is not proved. Dean v. Justices of Municipal Court (1899) 173 Mass. 453, 53 N. E. 893. Debts existing under the bankruptcy act of 1867, and kept alive by subsequent judgments, are not excepted from the operation of the present bankruptcy law. In re Herrman (1901) 106 Fed. 987, 46 C. C. A. 77.

The claim or liability must be a provable debt at the time of the filing of the petition in bankruptcy. Hence if it does not accrue or mature until after that date, it is not affected by the discharge. Rice v. Murphy (1912) 109 Me. 101, 82 Atl. 842; Wight v. Gottschalk (Tenn. Ch. App. 1897) 48 S. W. 140.

The discharge does not release the bankrupt from a claim which was not provable because not a "fixed liability absolutely owing." Phœnix Nat. Bank v. Waterbury (1910) 197 N. Y. 161, 90 N. E. 435. Or because it was uncertain or contingent. Leader v. Mattingly (1904) 140 Ala. 444, 37 South. 270. Or because it was a claim for damages not liquidated in time for proof and allowance. Jim Pearce & Co. v. Fisher (1911) 170 Ala. 456, 54 South. 164.

The exemptions from the operation of a discharge in bankruptcy, made by this section, do not rest upon any theory of the exclusion of the creditor from the bankruptcy act, or of deprivation of the right to participate in th distribution, but solely on the groun that, although such rights are enjoy ed, an exemption from the effect of th discharge is superadded. Friend v Talcott (1913) 228 U. S. 27, 33 Sup Ct. 505, 57 L. Ed. 718.

A discharge in bankruptcy does no operate to prevent the prosecution o an appeal. Stockwell v. Sillowa (1870) 105 Mass. 517.

A discharge will release the bank rupt from liability for breach of a cove nant of warranty in his deed, th breach occurring before the bankrupt cy. Sweaney v. Baugher (1906) 16 Ind. 557, 77 N. E. 1083; Mackenzie v Miller (1886) 7 Ky. Law Rep. 831 Bradford v. Russell (1881) 79 Ind. 6 And from his liability as the maker o a note. Blackwell v. Farmers' & Mer chants' Nat. Bank (Tex. Civ. App 1903) 76 S. W. 454. And from all per sonal liability on a judgment recovere against him. J. B. Ellis & Co. v. Mo bile, J. & K. C. R. Co. (1910) 16 Ala. 187, 51 South. 860; Otto Youn & Co. v. Howe (1907) 150 Ala. 15 43 South. 488; Branes Cycle Co. v Haines (1905) 69 N. J. Eq. 651, 6 Atl. 515. It is the nature of the trans action, and not the form of actio which is looked to in order to deter mine whether a cause of action is re leased by a discharge in bankruptc Nelson v. Petterson (1907) 131 Il App. 443. And a court will look be hind a judgment in order to ascertai whether the claim on which it wa founded was of a nature to be provabl in bankruptcy and therefore discharge able. Bever v. Swecker (1908) 13 Iowa, 721, 116 N. W. 704. A judg ment creditor has the burden of show ing that the judgment is such a liabi ity as is not released by the discharg in bankruptcy. In re Levitan (D. C 1915) 224 Fed. 241.

The court of bankruptcy, in grantin a discharge, will not undertake to lim it it to any particular debts nor under take to decide upon what claims it sha operate and what shall be excepte from it. Hanan v. Long (1912) 15 App. Div. 327, 134 N. Y. Supp. 78 But where a bankrupt was not entitle to a discharge as to certain debt scheduled in a former proceeding, th court has power to limit a subsequen discharge so as to exclude such claim In re Westbrook (D. C. 1911) 186 Fe 414, 26 Am. Bankr. Rep. 181.

2. Stockholders' and directors' li bilities.—The liability of one who ha subscribed for stock in a corporatio or to whom stock not fully paid ha been issued, to make good the unpa balance of his subscription is a del provable against him in bankruptc and therefore will be released by h discharge, even though the call o which the action is based is not mad until after the discharge. Carey Mayer (1897) 79 Fed. 926, 25 C. C. A

239; Burke v. Maze (1909) 10 Cal. App. 206, 101 Pac. 438, 440. Compare Glenn v. Howard (1886) 65 Md. 40, 3 Atl. 895. But it is otherwise in regard to the liability imposed by some state statutes on the stockholders or directors of insolvent corporations to be answerable for the debts of the company, or for debts contracted under certain circumstances or within a particular time. A liability of this kind is statutory and not contractual, and therefore is not released by the discharge of the stockholder or director in bankruptcy. Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co. (1903) 183 Mass. 557, 67 N. E. 870; First Nat. Bank v. Hingham Mfg. Co. (1879) 127 Mass. 563. Unless it has been reduced to judgment before the granting of the discharge, or the extent of the liability of the bankrupt, as a stockholder or director, has been fixed by a decree against the company and its stockholders, in which case it appears that it becomes a provable debt in the bankruptcy proceedings, and therefore will be extinguished by the discharge. Dight v. Chapman (1904) 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793. And see Philadelphia & R. Coal & Iron Co. v. Hotchkiss (1880) 82 N. Y. 471.

3. Claims of sureties for bankrupt.—A person who is responsible for the bankrupt's debt or undertaking, in the character of a surety, guarantor, or indorser, has no provable claim against the bankrupt's estate until he has paid or in some way discharged the obligation on which he is liable, and hence if there is no breach of the obligation and no payment by the surety or indorser before the bankrupt's discharge, he may, notwithstanding the discharge, have recourse against the bankrupt for any sum which he is thereafter compelled to pay. Goding v. Roscenthal (1901) 180 Mass. 43, 61 N. E. 222.

Discharge in bankruptcy acquits obligation of bankrupts to indemnify surety on their building contract bond, though surety did not pay damage until after bankruptcy proceedings, it being a provable debt, released by discharge. Williams v. United States Fidelity & Guaranty Co. (1915) 35 Sup. Ct. 289, 236 U. S. 549, 59 L. Ed. 713, reversing judgment R. P. Williams & Co. v. Same (1912) 75 S. E. 1067, 11 Ga. App. 635.

Under section 57i (post, § 9641), a surety or indorser, not having yet paid the debt, has a provable claim in bankruptcy in the event that the principal creditor omits to prove the claim, and if his demand or claim thus becomes provable, it will also be released by the discharge granted to the bankrupt. Hayer v. Comstock (1901) 115 Iowa, 187, 88 N. W. 351; Smith v. Wheeler (1900) 55 App. Div. 170, 66 N. Y. Supp. 780.

4. Claims against bankrupt as surety.—Where the surety on an appeal bond becomes bankrupt and receives his discharge, after the rendition of a judgment on such appeal bond, the discharge is a defense to the enforcement of the judgment, and likewise to any debt or claim for the costs incurred by the judgment creditor in obtaining the judgment and defending the appeal. Coe v. Waters (1901) 16 Colo. App. 311, 64 Pac. 1054.

5. Claims for alimony.—Even before the amendment of 1903, expressly excepting from the operation of a discharge in bankruptcy "liabilities for alimony due or to become due," it was decided that a claim for alimony due to a divorced wife was not a debt within the meaning of the bankruptcy law, and, not being provable as a debt, was not released by the bankrupt's discharge. Audubon v. Shufeldt (1901) 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; Turner v. Turner (D. C. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Anderson (D. C. 1899) 97 Fed. 321, 5 Am. Bankr. Rep. 858; Lemert v. Lemert (1905) 72 Ohio St. 364, 74 N. E. 194, 106 Am. St. Rep. 621, 2 Ann. Cas. 914; Barclay v. Barclay (1900) 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Dunbar v. Dunbar (1901) 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623; In re Williams (1913) 208 N. Y. 32, 101 N. E. 853.

A discharge in bankruptcy is no bar to a claim based on a contract or agreement of the bankrupt to pay an annuity or fixed periodical sum to his divorced wife during her lifetime or until her remarriage. Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; Schlessinger v. Schlessinger (1907) 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863.

6. Claims for support of wife or children.—The discharge cannot be pleaded as a defense to a claim upon the bankrupt based on his liability to make an allowance or pay a fixed sum for the support of his minor children, where such liability is imposed upon him by an order or decree of court. Wetmore v. Markoe (1904) 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 13 Am. Bankr. Rep. 1; In re Hubbard (D. C. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528; Rush v. Flood (1902) 105 Ill. App. 182; In re Baker (D. C. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101. Nor where it is based upon his voluntary agreement to contribute to the support of his children remaining in the custody of his divorced wife. Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

The obligation of a man to recompense his former wife for expenditures made, after she had remarried, for the benefit of their child, is like his obligation to recompense any other person

who had contributed to the support of the child; it is merely a civil debt and is extinguished by the father's discharge in bankruptcy. Rush v. Flood (1902) 105 Ill. App. 182.

The expression in the statute, "liabilities for maintenance or support of wife and child," does not refer to debts for goods purchased by the husband or parent, and used by the wife or child. Schellenberg v. Mullaney (1906) 112 App. Div. 384, 98 N. Y. Supp. 432. Nor to a debt for medical attendance furnished to the wife or child of the bankrupt at his request, and while the normal family relations subsist between him and the recipient of the services. In re Ostrander (D. C. 1905) 139 Fed. 592, 15 Am. Bankr. Rep. 96.

Where the father of a bastard child has been ordered by the court to pay a monthly stipend for its support, and, on his refusal, a final money judgment has been rendered for the total amount due, the rights of the person entitled to recover under the order of filiation are merged in the judgment, and the judgment, being a provable debt in bankruptcy and not expressly excepted from the operation of the discharge, will be released by it. McKittrick v. Cahoon (1903) 89 Minn. 383, 95 N. W. 223, 99 Am. St. Rep. 606.

7. Claims of alien creditors.—A discharge in bankruptcy under the act of congress will constitute a bar to the claim of an alien creditor suing in any court within the United States, in the same manner and to the same extent as though he were a citizen of the United States. Ruiz v. Eickerman (C. C. 1881) 5 Fed. 790; Pattison v. Wilbur (1873) 10 R. I. 448, 12 N. B. R. 193; In re Zarega's Case (D. C. 1842) Fed. Cas. No. 18,204; Murray v. De Rottenham (N. Y. 1822) 6 Johns. Ch. 52. Compare Moore v. Horton (N. Y. 1884) 32 Hun, 393.

8. Liabilities to state or United States.—Claims or debts due to a state are not extinguished or released by the debtor's discharge in bankruptcy. State v. Shelton (1879) 47 Conn. 400; Commonwealth v. Hutchinson (1849) 10 Pa. 466; Saunders v. Commonwealth (Va. 1853) 10 Grat. 494; Commonwealth v. McMillen (1880) 1 Ky. Law Rep. 270.

A debt due to the United States is not barred by the debtor's discharge in bankruptcy, although the government may prove its debt and may have priority of payment over other creditors. U. S. v. Herron (1873) 20 Wall. 251, 22 L. Ed. 275; U. S. v. Rob Roy (C. C. 1870) 13 N. B. R. 235, Fed. Cas. No. 16,179; U. S. v. King (C. C. 1801) Fed. Cas. No. 15,536; Hamilton v. Reynolds (1882) 88 Ind. 191; Smith v. Hodson (1880) 50 Wis. 279, 6 N. W. 812. CONTRA, see U. S. v. Davis (C. C. 1844) Fed. Cas. No. 14,929; U. S. v. Throckmorton (C. C. 1872) 8 N. B. R. 309, Fed. Cas. No. 16,516; U. S. v. Zerega (D. C. 1856) Fed. Cas. 1 16,786.

A claim against a bankrupt on bond as a contractor with the gove ment, if a "fixed liability absolut owing," is a provable debt and d chargeable in bankruptcy. U. S. v. linois Surety Co. (C. C. A. 1915) 2 Fed. 653.

9. Claims for taxes.—A judgment costs in a criminal prosecution is a debt "due as taxes" levied by t state, and therefore it is released the discharge of the judgment debtor bankruptcy. Olds v. Forrester (190 126 Iowa, 456, 102 N. W. 419.

10. Debts and claims not provable If a debt or claim was not proval in bankruptcy, it is not affected by t discharge of the bankrupt, whether not it was properly scheduled. Smi v. McQuillin (1906) 193 Mass. 289, N. E. 401; National Mt. Wollast Bank v. Porter (1877) 122 Mass. 30 Pierce v. Wilcox (1872) 40 Ind. 70.

If a particular debt did not matu or a particular liability did not atta until after the filing of the petition, is not provable and not dischargeal though it grows out of a contract obligation antedating the petition bankruptcy and which continues in fect. Colman Co. v. Withoft (C. C. 1912) 195 Fed. 250, 28 Am. Banl Rep. 328; In re Burka (D. C. 190 104 Fed. 326, 5 Am. Bankr. Rep. 1 Holbrook v. Foss (1847) 27 Me. 44 Robinson v. Pesant (1873) 53 N. 419, 8 N. B. R. 426; Cohen v. Pecha sky (1910) 67 Misc. Rep. 72, 121 N. Supp. 602; Stern v. Nussbaum (N. 1874) 47 How. Prac. 489; Jersey Ci Ins. Co. v. Archer (1887) 7 N. Y. S Rep. 326.

Where the bankrupt is surety on bond, and no breach of the condition the bond has occurred until after b adjudication and discharge in ban ruptcy, his liability on a subseque breach is not affected by the discharg Paddleford v. State (1879) 57 Mis 118; Eastman v. Hibbard (1874) N. H. 504, 20 Am. Rep. 157.

Where he has given a deed with cov nants of warranty, his liability on breach occurring before the commenc ment of the bankruptcy proceedings w constitute a provable debt, and so released by the discharge. Merrill Schwartz (1878) 68 Me. 514; Dow Davis (1882) 73 Me. 288. But t mere probability, existing at the tin of the bankruptcy, that a breach m occur does not make a provable deb Baker v. Hooks (1909) 6 Ga. App. 12 64 S. E. 573. And a breach actual occurring after the filing of the pet tion in bankruptcy creates a liabili which is not affected by the discharg Bush v. Cooper (1855) 18 How. 82, L. Ed. 273; Abercrombie v. Conn (1846) 10 Ala. 293; French v. Mor (Mass. 1854) 2 Gray, 111; Murray De Rottenham (N. Y. 1822) 6 John

Ch. 52. Compare Bates v. West (1857) 19 Ill. 134.

A promissory note given by a debtor after he has been adjudged a bankrupt, although before he is discharged, and although given for a debt which existed before the filing of the petition, is not released by his discharge. Jersey City Ins. Co. v. Archer (1890) 122 N. Y. 376, 25 N. E. 338; Donnell v. Swain (Pa. 1844) 2 Clark, 134.

A discharge in bankruptcy does not release a grantor or mortgagor from the estoppel created by the covenants in his conveyance. Kezer v. Clifford (1879) 59 N. H. 208. Nor will it release a defendant in replevin, who has given a forthcoming bond, from a judgment requiring him to restore the property. Robinson v. Soule (1879) 56 Miss. 549. An action on the case for deceit is not barred by a discharge in bankruptcy, although the measure of damages is ascertainable by reference to a contract. Hughes v. Oliver (1848) 8 Pa. 426. A discharge in bankruptcy is no defense to an action for unliquidated damages arising solely from a tort. Hun v. Cary (N. Y. 1880) 59 How. Prac. 426, affirmed (1880) 82 N. Y. 65. But where a claim is founded on an open account or on a contract express or implied, and may be proved, if the creditor waives any tort and files his claim, the claim is barred by the discharge. In re Nuttall (D. C. 1912) 201 Fed. 557.

A discharge is no bar to a claim which, at the time of the bankruptcy, was too uncertain or contingent to constitute a provable debt. Clemmons v. Brinn (1901) 36 Misc. Rep. 157, 72 N. Y. Supp. 1066; Lesser v. Gray (1911) 8 Ga. App. 605, 70 S. E. 104; Johnson v. Worden (1874) 47 Vt. 457. The discharge is no bar to a claim for subsequently accruing rent under a lease held by the bankrupt as tenant, and which is not terminated by the adjudication in bankruptcy. Bernhardt v. Curtis (1902) 109 La. 171, 33 South. 125, 94 Am. St. Rep. 445; Scott v. Demarest (1912) 75 Misc. Rep. 289, 135 N. Y. Supp. 264; Shapiro v. Thompson (1909) 160 Ala. 363, 49 South. 391; Hamilton v. McCroskey (1901) 112 Ga. 651, 37 S. E. 859.

A discharge in bankruptcy will not release the bankrupt from the payment of a fine imposed upon him by a court as part of the punishment for an offense of which he has been convicted. Ex parte O'Donnell, 1 Nat. Bankr. News, 59. Nor from a fine imposed as punishment for violation of an injunction or other contempt of court. Spalding v. New York (1846) 4 How. 21, 11 L. Ed. 858; People v. Spalding (N. Y. 1843) 10 Paige, 284.

An obligation on a forfeited bail bond is not provable in bankruptcy, and therefore is not released by the bankrupt's discharge. In re Weber (1914) 212 N. Y. 290, 106 N. E. 58.

Where the claim of a creditor was inherently of such a nature as to be provable in the bankruptcy proceedings, the mere fact that it was subject to objection on the ground of the statute of limitations having run against it, and that it was disallowed on that ground, does not take it out of the class of provable claims so as to prevent the pleading of the discharge in bar of any subsequent proceeding to collect it. Hargadine-McKittrick Dry Goods Co. v. Hudson (1903) 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225.

II. Debts not duly scheduled.—A discharge in bankruptcy will not release the bankrupt from any debt which was omitted from his schedule, or which was so incorrectly set forth as not to be "duly" scheduled, unless it is shown that the creditor, notwithstanding the omission or error, had notice or actual knowledge of the bankruptcy proceedings in time to have proved his claim. Hilton v. White (Sup. 1915) 156 N. Y. Supp. 9; Lown v. Casselman (N. D. 1913) 141 N. W. 73; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App. 1916) 182 S. W. 678; In re Monroe (D. C. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706; Karter v. Fields (1904) 140 Ala. 352, 37 South. 204; Hughes v. Clark (1902) 109 Ill. App. 107; Reynolds v. Whittemore (1904) 99 Me. 108, 58 Atl. 415; Tyrrel v. Hammerstein (1900) 33 Misc. Rep. 505, 67 N. Y. Supp. 717; Lutz v. Kalmus (1909) 115 N. Y. Supp. 230; Bernheim v. Bloch (1904) 45 Misc. Rep. 581, 91 N. Y. Supp. 40; Kreitlein v. Ferger (Ind. App. 1912) 97 N. E. 819; Gilmore v. Farmer (1910) 156 Ill. App. 70; Custard v. Wigderson (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Wineman v. Fisher (1904) 135 Mich. 604, 98 N. W. 404.

Under the provision of this section that a bankrupt will not be released from debts not duly scheduled in time for proof and allowance, unless the creditors had actual knowledge of the proceedings in bankruptcy, a discharge in bankruptcy will not release a grantee of land from liability for payment of vendor's lien notes which he assumed when acquiring the land where he concealed his assumption of the debt and scheduled neither the debt nor the land. Raley v. D. Sullivan & Co. (Tex. Civ. App. 1913) 159 S. W. 99.

A discharge will not release a bankrupt from a claim omitted from his schedule, although the reason of its omission was that he was ignorant of its existence at the time the schedule was made up. Santa Rosa Bank v. White (1903) 139 Cal. 703, 73 Pac. 577. Or because he failed to remember it. Jones v. Walter (1903) 115 Ky. 556, 74 S. W. 249. Or where he omitted it at the request of the creditor himself. Davis v. Barwick (1911) 88 S. C. 355, 70 S. E. 1007. Or where he omitted it in pursuance of an understanding with the claimant's attor-

ney, subsequently employed by the bankrupt himself. Webster City Steel Radiator Co. v. Chamberlin (1908) 137 Iowa, 717, 115 N. W. 504.

If a mortgage was executed by the bankrupt and his wife together, it cannot be said to be "duly" scheduled when it is described as having been given by the wife alone. Fifth Ave. Building & Loan Ass'n v. Goldberg (1903) 22 Pa. Super. Ct. 197.

The operation of the discharge will not be defeated by the fact that an obligation represented by a note was scheduled as upon an open account. Matteson v. Dewar (1909) 146 Ill. App. 523.

Small variations in the bankrupt's own name, comparing that signed to the note or other evidence of the debt with that signed to the petition in bankruptcy, do not make the scheduling of the debt insufficient so as to exempt it from the operation of the discharge. Northern Commercial Co. v. Hartke (1910) 110 Minn. 338, 125 N. W. 508; Finnell v. Armoura (1911) 39 Utah, 316, 117 Pac. 49.

The name of the creditor must be correctly stated in the schedule, and a misnomer will be ground for holding that the debt was not "duly" scheduled, though the variance is comparatively unimportant. Custard v. Wigderson (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Marshall v. English-American Loan & Trust Co. (1907) 127 Ga. 376, 56 S. E. 449; Wright-Dalton-Bell-Anchor Store Co. v. Sanders (1910) 142 Mo. App. 50, 125 S. W. 517; Cohen v. Pinkus (1908) 126 App. Div. 792, 111 N. Y. Supp. 82; Haack v. Theise (1906) 51 Misc. Rep. 3, 99 N. Y. Supp. 905; Liesum v. Kraus (1901) 35 Misc. Rep. 376, 71 N. Y. Supp. 1022.

The listing of a creditor by an initial, instead of by his Christian name, is not such an insufficient compliance with the requirements of the bankruptcy act as to the listing of creditors, as to deprive the bankrupt of the benefit of the order discharging provable debts. Kreitlein v. Ferger (1915) 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184.

Where a bankrupt, after filing his schedules and before discharge, ascertains the transfer of a debt, he is required by amendment to include the transferee as a creditor in his schedules and give notice to him, unless the creditor is shown to have notice of the bankruptcy proceedings, and otherwise the debt will not be barred by the discharge. Hein v. Liberman (1913) 141 N. Y. S. 314.

A note is not duly scheduled in the name of the payee, if the bankrupt knows at the time that it has been discounted by a bank. Columbia Bank v. Birkett (1903) 174 N. Y. 112, 66 N. E. 652, 102 Am. St. Rep. 478. CONTRA, Broadway Trust Co. v. Manheim (1905) 47 Misc. Rep. 415, 95 N. Y. Supp. 93. A claim is not correctly listed in the name of the original creditor, if the bankrupt knows that the creditor dead and that the claim has been d tributed among his heirs. Fible Crabb (1908) 129 Ky. 461, 112 S. 576. But if the bankrupt has no know edge that a mortgage given by him h been assigned, he does not forfeit t benefit of his discharge by listing it the name of the original mortgag Mueller v. Goerlitz (1907) 53 Mi Rep. 53, 103 N. Y. Supp. 1037.

The surviving partner of a credit firm is correctly named as the credit in the schedule. Kaufman v. Schre (1905) 108 App. Div. 298, 95 N. Supp. 729. If the original creditc are named in the schedule, it is imm terial that their interests have be committed to a receiver. Longfield Minnesota Sav. Bank (1905) 95 Mi 54, 103 N. W. 706. If a debt due to bank is correctly listed in the name the bank, the schedule is not vitiat by the fact that it does not mention t cashier of the bank, who is the nomi holder of the note by which the debt secured. Ross-Lewin v. Goold (190 211 Ill. 384, 71 N. E. 1028.

It is also essential to the due listi of a debt that the address of the cre itor should be given, if known to t bankrupt. The address required is th of the creditor's residence, and it is n proper to state his business or offi address, if the residence address known or can be ascertained. A mi take of this kind will prevent the di charge from releasing the particul debt. McKee v. Preble (1912) 1 App. Div. 156, 138 N. Y. Supp. 91 Weidenfeld v. Tillinghast (1907) Misc. Rep. 90, 104 N. Y. Supp. 712.

If the creditor's address is not know it may be so stated in the schedu and, in the absence of fraud, this w be a sufficient compliance with the st ute to bring the debt within the oper tion of the discharge. Steele v. Th heimer (1905) 74 Ark. 516, 86 S. 305; In re Mollner (1902) 75 A Div. 441, 78 N. Y. Supp. 281.

It is a fraud to state a creditor's a dress as unknown, when in fact it known to the bankrupt, and in this ca the claim will not be affected by t discharge. Miller v. Guasti (1912) 2 U. S. 170, 33 Sup. Ct. 49, 57 L. E 173, 29 Am. Bankr. Rep. 201. And t same is true where the bankrupt i serts a certain street number as t residence of the creditor, when in fa he does not know where the credit resides. Sutherland v. Lasher (190 41 Misc. Rep. 249, 84 N. Y. Supp. 5 And the bankrupt cannot state t creditor's residence as "unknown," a so bar the creditor's claim by his di charge, until he has made at least re sonably diligent efforts to discover by proper inquiries. Feldmark Weinstein (1904) 45 Misc. Rep. 329, N. Y. Supp. 478; Schiller v. Weinste (1905) 47 Misc. Rep. 622, 94 N. Supp. 763; In re Boom (1905) 48 Mi

Rep. 632, 96 N. Y. Supp. 204; Cagliostro v. Indelli (1907) 53 Misc. Rep. 44, 102 N. Y. Supp. 918. If the name and address of the creditor are correctly given in the city directory, but are not stated in the bankrupt's schedule, the debt is not released. In re Quackenbush (1907) 122 App. Div. 456, 106 N. Y. Supp. 773; Murphy v. Blumenreich (1908) 123 App. Div. 645, 108 N. Y. Supp. 175. The debtor is not allowed to state the creditor's address as unknown, when he could learn it from a draft drawn on him by the creditor which contained the latter's post office address. Guasti v. Miller (1911) 203 N. Y. 259, 96 N. E. 416. Or from a writ served on him at the suit of the creditor. Parker v. Murphy (1913) 215 Mass. 72, 102 N. E. 85.

The bankrupt is justified in relying on information given to him by the creditor's attorney, as, where the attorney states that notice sent to a given address will reach the creditor. Vaughn v. Irwin (1905) 49 Misc. Rep. 611, 96 N. Y. Supp. 742. Or where the attorney states that all communications in the matter should be addressed to the attorney's office. In re David (1904) 44 Misc. Rep. 516, 90 N. Y. Supp. 85.

12. —— **Creditor's notice or knowledge of proceedings.**—The claim of a given creditor will be released by the discharge (being otherwise dischargeable) if the creditor had notice or actual knowledge of the bankruptcy proceedings, although his debt was altogether omitted from the bankrupt's schedule, or was incorrectly described therein, or the creditor's name or address was wrongly stated. First Nat. Bank of Enosberg Falls v. Bamforth (Vt. 1916) 96 Atl. 600; Kaufman v. Schreier (1905) 108 App. Div. 298, 95 N. Y. Supp. 729; Morrison v. Vaughan (1907) 119 App. Div. 184, 104 N. Y. Supp. 169; Thomson v. Caverley (1909) 148 Ill. App. 295; Alling v. Straka (1905) 118 Ill. App. 184; Zimmerman v. Ketchum (1903) 66 Kan. 98, 71 Pac. 264; Fider v. Mannheim (1899) 78 Minn. 309, 81 N. W. 2; Armstrong v. Sweeney (1905) 73 Neb. 775, 103 N. W. 436; Perry Naval Stores Co. v. Caswell (1912) 63 Fla. 552, 57 South. 660; Delta County Bank v. McGranaham (1905) 37 Wash. 307, 79 Pac. 796; Briggs v. Angus (1889) 52 Hun, 613, 5 N. Y. Supp. 313.

The notice here intended is actual notice, and not such constructive notice as might be implied from the publication of the orders and proceedings in the bankruptcy case. Santa Rosa Bank v. White (1903) 139 Cal. 703, 73 Pac. 577.

Actual notice or knowledge possessed by the creditor's authorized agent may be imputed to the creditor. Atkinson v. Elmore (1903) 103 Mo. App. 403, 77 S. W. 492. The knowledge of a receiver may be imputed to the creditors whom he represents. Dight v. Chapman (1904) 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793. Where notice of bankruptcy proceedings was given to an attorney of a judgment creditor employed to collect the judgment, and the same was duly scheduled, the notice was sufficient, though no notice was given to the creditor's attorneys of record. Keefauver v. Hevenor (1914) 148 N. Y. S. 434, 163 App. Div. 531. But an attorney employed to represent the creditor in an appeal from a judgment of a state court against the bankrupt, but not in any way employed in the bankruptcy proceedings, is not the creditor's agent in this sense or for this purpose. Strickland v. Capital City Mills (1906) 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

An unscheduled debt cannot be brought within the operation of the discharge, on the ground that the creditor had actual notice of the proceedings, where his knowledge was not acquired until after the discharge had been granted, though he acquired it within the year allowed for proving claims and in time to have moved for the revocation of the discharge. Birkett v. Columbia Bank (1904) 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231, 12 Am. Bankr. Rep. 691.

The question of notice or want of it is one to be tried when the discharge in bankruptcy is set up in defense to a suit by the creditor. When this is done, the creditor is entitled to show that he did not receive any notice, and had no actual knowledge of the bankruptcy proceedings. Westheimer v. Howard (1905) 47 Misc. Rep. 145, 93 N. Y. Supp. 518. And all facts, whether occurring before or after the commencement of the proceedings, tending to establish notice or the want of it, are competent evidence in determining the question. Knapp v. Harold (1903) 25 Ohio Cir. Ct. R. 213.

The burden of proving that a creditor's debt was duly scheduled in the debtor's bankruptcy proceeding, and that the creditor had either statutory or other actual notice of the proceeding, rested upon the bankrupt. Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App. 1916) 182 S. W. 678.

13. **Debts contracted in fiduciary capacity.**—Debts created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting in a fiduciary capacity are not released by his discharge. Forbes v. Keyes (1906) 193 Mass. 38, 78 N. E. 733; Treadwell v. Holloway (1873) 46 Cal. 547; Herman v. Lynch (1881) 26 Kan. 435, 40 Am. Rep. 320; Ruff v. Milner (1901) 92 Mo. App. 620; Gerner v. Yates (1900) 61 Neb. 100, 84 N. W. 596.

The words "fiduciary capacity," as here used, are to be limited to cases of technical trusts expressly created, not merely such as the law implies from

the contract or the relation of the parties, but actually and expressly constituted; and hence the phrase cannot be extended so as to apply to cases where the law regards the relation of the parties simply as that of debtor and creditor, though the nature of the transaction between them is such that more or less confidence is necessarily reposed in the debtor. Lewis v. Shaw (1907) 122 App. Div. 96, 106 N. Y. Supp. 1012; American Surety Co. v. Spice (1912) 119 Md. 1, 85 Atl. 1031; Palmer v. Hussey (1882) 87 N. Y. 303; Keime v. Graff (C. C. 1878) Fed. Cas. No. 7,650; Gibson v. Gorman (1882) 44 N. J. Law, 325; Goddin v. Neal (1884) 99 Ind. 334; First Nat. Bank of Enosburg Falls v. Bamforth (Vt. 1916) 96 Atl. 600; Martin v. Starrett (1915) 97 Neb. 653, 151 N. W. 154.

To bring a debt within this exception in the statute, the fiduciary relation must have existed previously to or independently to the transaction from which the debt arises. First Nat. Bank of Enosburg Falls v. Bamforth (Vt. 1916) 96 A. 600.

The position of one who owes money, including accounts collected for the creditor, is not one of trust within the meaning of this clause of the statute. Hanan v. Long (1912) 150 App. Div. 327, 134 N. Y. Supp. 786. A mere conversion of money or property does not put the bankrupt in the position of a fiduciary debtor. Watertown Carriage Co. v. Hall (1901) 66 App. Div. 84, 72 N. Y. Supp. 466; Glasco v. Cooper (Ga. App. 1916) 87 S. E. 1095.

A contract consigning goods for sale, with a stipulation that the consignee will "hold in trust" for the consignor all goods remaining unsold and the proceeds of his sales, does not create a technical trust nor make the debtor a fiduciary in respect to the proceeds of sales. In re Butts (D. C. 1903) 120 Fed. 966, 10 Am. Bankr. Rep. 16.

There is no fiduciary relation between a buyer and seller of merchandise, in respect to the unpaid price of the goods, although the sale was induced by the fraudulent representations of the buyer. Harrington & Goodman v. Herman (1903) 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885.

The liability of a subscriber for corporate stock for an amount due on his subscription is not a fiduciary debt. Morrison v. Savage (1881) 56 Md. 143. Although a conveyance of property by the bankrupt was intended to delay and defraud his creditors, the grantee therein does not hold the property in a fiduciary capacity. Reeves v. McCracken (1905) 69 N. J. Eq. 203, 60 Atl. 332.

Courts will look behind a note, a mortgage, or even a judgment, to ascertain the nature of the debt; and if it is discovered to be one which is not released by a discharge in bankruptcy, it will be so adjudged. Donald v. Kell (1887) 111 Ind. 1, 11 N. E. 782. If the debt was created by the bankrupt while acting in a fiduciary capacity, it is immaterial that it has been reduced to judgment; the judgment will not be barred or affected by the discharge in bankruptcy any more than the original debt would be. Wade v. Clark (1879) 52 Iowa, 158, 2 N. W. 1039; Brooks v. Yocum (1890) 42 Mo. App. 516; Simpson v. Simpson (1879) 80 N. C. 332. And a discharge in bankruptcy is no more a defense to a petition for a personal decree for a deficiency after mortgage sale, where the mortgage was given to secure the loan of trust funds misappropriated by the defendant, than it would be in a proceeding brought against him in his fiduciary capacity. Field v. Howry (1903) 132 Mich. 687, 94 N. W. 213. But in the case of a judgment, the courts will not go back of the record to inquire into the nature of the debt. Thus, if the record shows on its face that the judgment was obtained in a suit on a promissory note, it shows that there was no fiduciary relation between the parties, and the discharge in bankruptcy will be a good defense. Donald v. Kell (1887) 111 Ind. 1, 11 N. E. 782.

There may be a novation of the debt such as to extinguish its fiduciary character, as where a debt due from a guardian is formally released on his giving his individual note for the amount due. Coleman v. Davies (1872) 45 Ga. 489.

Embezzlement is an act which can be committed only by a person who holds funds in a fiduciary character, so that an allegation that the defendant "wrongfully embezzled" the plaintiff's money necessarily implies that he became possessed of it in a fiduciary capacity, and therefore his answer setting up a discharge in bankruptcy as a defense is demurrable as insufficient. Watertown Carriage Co. v. Hall (1903) 176 N. Y. 313, 68 N. E. 629.

14. —— **Trustees.**—A trustee under an express trust (whether created by deed, will, or otherwise) acts in a fiduciary capacity, and his discharge in bankruptcy will not release him from liability for any claims against him on account of his loss, misappropriation, or conversion of the trust funds. Warren v. Robinson (1900) 21 Utah, 429, 61 Pac. 28; Crisfield v. State (1880) 55 Md. 192.

A receiver acts in a fiduciary capacity, within the meaning of this section. Field v. Howry (1903) 132 Mich. 687, 94 N. W. 213. And an assignee under a deed of assignment for the benefit of creditors. Pinkston v. Brewster (1848) 14 Ala. 315. And a husband's liability as trustee under an antenuptial contract to account to the deceased wife's personal representative for trust moneys is a fiduciary debt. Donovan v. Haynie (1880) 67 Ala. 51.

Where a sum of money to which a wife was entitled, on the sale of cer-

tain land in partition proceedings, was decreed to be paid to her husband, he to apply the interest to his own use and to give bonds for the payment of the principal sum at his death, or whenever so required by the court, it was held that the liability of the husband to pay over the principal sum was incurred in a fiduciary capacity. Mock v. Howell (1888) 101 N. C. 443, 8 S. E. 167.

Where one of two parties who contemplated the formation of a partnership paid over to the other a sum of money for the benefit of the firm, and shortly afterwards died, and during his sickness, the recipient of the money deposited it in a bank in his own name, and after the death of his intended partner, he converted the money to his personal use, held, that the partnership was dissolved by the death of one of the parties to it, and that the other thereafter became a trustee of the money for the benefit of the decedent's estate, so that his liability to account for it was contracted in a "fiduciary capacity" and was not released by his discharge in bankruptcy. Haggerty v. Badkin (1907) 72 N. J. Eq. 473, 66 Atl. 420.

This provision of the statute applies only to cases of technical trust, not to implied trusts. Johnson's Adm'r v. Parmenter (1901) 74 Vt. 58, 52 Atl. 73; Ehrhart v. Rork (1904) 114 Ill. App. 509; Williamson v. Dickens (1844) 5 Ired. (27 N. C.) 259.

A bankrupt was not released from a debt created by the collection of certain notes for defendant under an agreement reciting their receipt as trustee for collection. Williams v. Virginia-Carolina Chemical Co. (Ala. 1913) 62 So. 755.

This provision does not include the obligation of one to whom, as a creditor, the debtor has delivered property with directions to sell it and apply so much of the proceeds as may be necessary to pay the debt, and pay over the balance to the debtor; the liability of the creditor to account for such balance involves no breach of trust, but only of contract. Cronan v. Cotting (1870) 104 Mass. 245; Bissell v. Couchaine (1846) 15 Ohio, 58. And so, a debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed from A. to B. of certain parts of A.'s real estate, no trust being expressly declared, is not excepted from the operation of a discharge in bankruptcy. Reeves v. McCracken (1905) 69 N. J. Eq. 203, 60 Atl. 332.

Where A. directed B. to pay to the plaintiff $700 a year during her natural life, or during her good behavior, and to that end he delivered to B. the sum of $10,000, declaring that such annual payments should be considered as interest thereon, and he directed that, in certain contingencies, the principal sum should be paid to the plaintiff, but that, if the plaintiff died without issue, it should revert to A. and his heirs, and the plaintiff and B. each executed a written acceptance of these directions, held that, although, in the instruments embodying it, the transaction was called a "trust" and B. a "trustee" for the plaintiff, yet the obligation assumed by him was not a debt created in a fiduciary capacity, within the meaning of the bankruptcy law. Upshur v. Briscoe (1891) 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

15. —— **Executors, administrators, and guardians.**—An executor or administrator is a technical trustee, and holds the funds of the estate in a fiduciary capacity, and debts and liabilities growing out of his administration of the estate are not affected by his discharge in bankruptcy. If he mingles the funds of the estate with his own money, he is guilty of a wrongful misappropriation thereof within the meaning of the bankruptcy law. Johnson's Adm'r v. Parmenter (1901) 74 Vt. 58, 52 Atl. 73. And so if he deposits the money in a bank in his own name and for his own benefit, and it is lost through the insolvency of the bank or through his own misconduct with respect to it. Brown v. Hannagan (1911) 210 Mass. 246, 96 N. E. 714; Morris v. Covey (1912) 104 Ark. 226, 148 S. W. 257.

Though part of the debt due from an executor or administrator may be made up of interest, it is none the less true that the whole debt is excepted from the operation of a discharge in bankruptcy, for the interest is a mere incident of the principal and cannot be separated from it. Johnson's Adm'r v. Parmenter (1901) 74 Vt. 58, 52 Atl. 73.

A debt due from an executor to the residuary legatee is of the fiduciary character excepted from the operation of a discharge in bankruptcy. Crisfield v. State (1880) 55 Md. 192.

It is not only in his dealings with the beneficiaries that a personal representative acts in a fiduciary character. If he has so administered the estate as to render himself personally liable to creditors, his debt to them is also a fiduciary debt. Laramore v. McKinzie (1878) 60 Ga. 582. But an agreement by an executor guarantying the payment of a demand against the estate, and admitting the possession of sufficient assets, does not constitute a debt of this kind. Amoskeag Mfg. Co. v. Barnes (1870) 49 N. H. 312. And where he settles with the distributees of the estate by giving them his personal notes, and they release him, there is a novation of the debts, and claims founded on the notes have no fiduciary character. Elliott v. Higgins (1880) 83 N. C. 459; Light v. Merriam (1882) 132 Mass. 283.

Where a party paid an executor for a portion of the assets of the estate which he purchased at a discount, but

without any actual fraud, and was, with the executor, held liable for a devastavit, his subsequent discharge in bankruptcy was held a complete defense to an action against him for the devastavit. Neal v. Clark (1877) 95 U. S. 704, 24 L. Ed. 586.

The liability of a guardian to his ward, with respect to the ward's property or money, is also a fiduciary debt, and not released by the guardian's discharge in bankruptcy. In re Maybin (D. C. 1876) 15 N. B. R. 468, Fed. Cas. No. 9,337; Simpson v. Simpson (1879) 80 N. C. 332; Cromer v. Cromer (Va. 1877) 29 Grat. 280. And so, where a guardian makes default, and his surety is forced to pay the deficit, the debt of the guardian to the surety for reimbursement is one contracted in a fiduciary capacity and is not affected by the former's discharge in bankruptcy. Halliburton v. Carter (1874) 55 Mo. 435.

16. —— **Agents.**—The relation of an agent to his principal is not an express or technical trust, so as to make a debt from the agent to the principal a fiduciary debt such as will not be released by the agent's discharge in bankruptcy. Keefauver v. Hevenor (1914) 163 App. Div. 531, 148 N. Y. Supp. 434; Boyd v. Agriculture Ins. Co. (1904) 20 Colo. App. 28, 76 Pac. 986; Young v. Clark (1907) 7 Cal. App. 194, 93 Pac. 1056.

In the case of an agent employed to collect periodical payments or other sums of money for his principal, there is no technical fraud in his mingling money so collected with his own funds, and if he misappropriates it or simply fails to account for it, it is not a breach of a technical trust, but only of a contract, and hence the claim against him is provable in bankruptcy and will be released by his discharge. Noble v. Hammond (1889) 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Grover & Baker Sewing Machine Co. v. Clinton (C. C. 1873) 8 N. B. R. 312, Fed. Cas. No. 5,845; Green v. Chilton (1874) 57 Miss. 598, 34 Am. Rep. 483; Guilfoyle v. Anderson (N. Y. 1880) 9 Daly, 64; Kaufman v. Alexander (1880) 53 Tex. 562; Hanan v. Long (1912) 150 App. Div. 327, 134 N. Y. Supp. 786. But compare Fulton v. Hammond (C. C. 1882) 11 Fed. 291; Shipley v. Platts (1903) 17 S. D. 357, 97 N. W. 1. And see Williams v. Virginia-Carolina Chemical Co. (Ala. 1913) 62 South. 755. An agent employed to collect rents due to his principal and remit the proceeds, does not act in the character of a trustee, and a debt created by his failure to account for money so collected is not excepted from the operation of his discharge in bankruptcy. In re Benoit (1909) 194 N. Y. 549, 87 N. E. 1115; Byrnes v. Byrnes (1891) 129 N. Y. 23, 29 N. E. 244; Stull v. Beddeo (1907) 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507.

An agent employed to sell and deliver goods of his principal (or simply to deliver goods sold) and collect and remit the proceeds, less his commission or other compensation, is not a trustee nor does he act in a fiduciary capacity. In re Camelo (D. C. 1912) 198 Fed. 632, 28 Am. Bankr. Rep. 353; In re Hale (D. C. 1908) 161 Fed. 387, 20 Am. Bankr. Rep. 633; American Agricultural Chemical Co. v. Berry (1913) 110 Me. 528, 87 Atl. 218; Barber v. Sterling (1877) 68 N. Y. 267.

A judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold and converted to his own use is not for a fiduciary debt. In re Wenham (D. C. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

An agent who retains money of his principal, which was sent to him with directions that he should take it to another place and there pay the note of his principal, cannot be treated as a defaulting trustee, but his liability will be discharged in bankruptcy. Pankey v. Nolan, 6 Humph. (Tenn. 1845) 154; Phillips v. Russell (1856) 42 Me. 360. Compare Matteson v. Kellogg (1854) 15 Ill. 547.

In the case of one who is intrusted with the funds of another for the purpose of loaning them on real estate security, and who is authorized to receive payment of the interest as due and of the principal of such loans, and directed to remit the same to his principal, when borrowers pay into his hands either the interest or the principal, he does not receive the money in the capacity of a trustee, and his failure to pay it over creates a simple debt which is dischargeable in bankruptcy. Bracken v. Milner (C. C. 1900) 104 Fed. 522, 5 Am. Bankr. Rep. 23. But if, instead of investing the money sent to him, as directed, he converts it to his own use and employs it in his own business, it is considered that such a misapplication of the funds is a breach of trust, so that the debt thereby created will not be barred by his discharge in bankruptcy. Flagg v. Ely (N. Y. 1846) 1 Edm. Sel. Cas. 206. And the same result follows where he lends the principal's money to himself, or where, on lending it to a third person, he takes security in the form of a trust deed to himself as trustee. In the latter case, if the property or its proceeds come into his hands through foreclosure, he is technically a trustee and holds the property in a fiduciary capacity. Bracken v. Milner (C. C. 1900) 104 Fed. 522, 5 Am. Bankr. Rep. 23.

An assignment of money to grow due in the future puts the assignor in the position of a trustee, so that if he collects the money when due and misappropriates it, he cannot plead his discharge in bankruptcy against the assignee's claim. J. L. Mott Ironworks

v. Toumey (1904) 94 App. Div. 216, 87 N. Y. Supp. 1020.

17. —— **Attorneys.**—The relation of attorney and client is one of trust, and a violation of duty by the attorney is an act done in a fiduciary capacity under the bankruptcy law, and a debt growing out of the conversion or embezzlement by an attorney of his client's money or property, while in his hands, is a debt created while he is acting in a fiduciary capacity and therefore not released by his discharge in bankruptcy. Flanagan v. Pearson (1875) 42 Tex. 1, 19 Am. Rep. 40; Heffren v. Jayne (1872) 39 Ind. 463, 13 Am. Rep. 281. CONTRA, Wolcott v. Hodge (Mass. 1860) 15 Gray, 547, 77 Am. Dec. 381; Woodward v. Towne (1879) 127 Mass. 41, 34 Am. Rep. 337.

18. —— **Bailees.**—Unless expressly constituted a trustee, a bailee of personal property does not hold it in a fiduciary capacity, nor act in such a capacity when dealing with it, so that a debt or claim against him for the loss, destruction, or conversion of the property is simply founded on his breach of contract and will be released by his discharge in bankruptcy. Sumner v. Richie (1880) 54 Iowa, 554, 6 N. W. 752; Phillips v. Russell (1856) 42 Me. 360; Grannis v. Cubbedge (1883) 71 Ga. 582. Compare Herman v. Lynch (1881) 26 Kan. 435, 40 Am. Rep. 320. And see Burnham v. Noyes (1878) 125 Mass. 85; Stokes v. Mason (1872) 10 R. I. 261, 12 N. B. R. 498.

Where one is intrusted with the effects of another to sell and dispose of them for the benefit of the latter, and to account to him therefor, the mere fact that such bailee has failed to account does not create a debt which is exempted from his discharge in bankruptcy. Georgia R. R. v. Cubbedge (1885) 75 Ga. 321.

Where the bankrupts pledged accounts due them for merchandise sold to secure a loan, and also agreed to hold any goods returned by customers whose accounts were assigned as the property of the creditor or resell the same as his agents and account for the proceeds, it was held that a failure to pay over the proceeds of goods so resold did not create a liability for "willful and malicious injury" to the property of the creditor, nor a debt created by the bankrupts while acting in a fiduciary capacity. In re Toklas Bros. (D. C. 1912) 201 Fed. 377, 29 Am. Bankr. Rep. 709.

A claim against a pledgee of a certificate of stock, based on his pledging the stock for an amount in excess of the pledgor's indebtedness, shortly before his adjudication in bankruptcy, and a refusal to deliver the certificate to the pledgor on tender of payment of his debt, is predicated merely on the pledgee's breach of contract, and is a liability discharged in bankruptcy. Wood v. Fisk (1913) 156 App. Div. 497, 141 N. Y. Supp. 342.

Where plaintiff sold personal property to defendant, under an agreement that the title should remain in the seller until the purchase price was paid, but defendant sold the property and appropriated the proceeds, it was held that his liability therefor was not created while he was acting in a fiduciary capacity. Bryant v. Kinyon (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801.

19. —— **Bankers and brokers.**—A banker does not occupy the position of a trustee with respect to funds placed in his hands on general deposit. The relation of the parties is simply that of debtor and creditor. Hence a claim against the banker for the loss or conversion of the money will be a provable debt against him in bankruptcy and will be barred by his discharge. Lewis v. Shaw (1907) 122 App. Div. 96, 106 N. Y. Supp. 1012; Sheldon v. Clews (N. Y. 1883) 13 Abb. New Cas. 40; Shaw v. Vaughan (1884) 52 Mich. 405, 18 N. W. 126; Maxwell v. Evans (1883) 90 Ind. 596, 46 Am. Rep. 234; Hervey v. Devereux (1875) 72 N. C. 463.

The dealings between a stockbroker and his customers are not of a fiduciary character, and the broker's discharge in bankruptcy will release him from claims against him growing out of his conversion or misappropriation of money placed in his hands by a customer as margin or for the purchase of stocks. In re Ennis & Stoppani (D. C. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; Halpine v. May (1868) 100 Mass. 498; Lawrence v. Harrington (1890) 122 N. Y. 408, 25 N. E. 406; Clarke v. Milliken (1911) 70 Misc. Rep. 492, 127 N. Y. Supp. 339. And from claims growing out of his failure or refusal to return securities deposited with him as collateral. Palmer v. Hussey (1886) 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362; Hennequin v. Clews (1884) 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; Crosby v. Miller, Vaughn & Co. (1903) 25 R. I. 172, 55 Atl. 328; Hennequin v. Clews (1879) 77 N. Y. 427, 33 Am. Rep. 641. And from a claim based on his unauthorized sale of stock purchased for a customer. Stratford v. Jones (1885) 97 N. Y. 586.

20. —— **Factors and commission merchants.**—A factor or commission merchant is not technically a trustee with respect to the goods of his principal in his hands or with respect to the proceeds of sales, and his failure to pay over money due to his principal is not a breach of trust. It creates a simple debt, which is provable and dischargeable in bankruptcy, and not a fiduciary debt. Chapman v. Forsyth (1844) 2 How. 202, 11 L. Ed. 236; Crawford v. Burke (1904) 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Adler (1907) 152 Fed. 422, 81 C. C. A. 564, 18 Am. Bankr. Rep. 240; In re Gulick (1911) 186 Fed. 350, 26 Am. Bankr. Rep. 362;

Mathieu v. Goldberg (C. C. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; In re Basch (D. C. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; In re Benedict (1902) 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Zeperink v. Card (C. C. 1882) 11 Fed. 295; Owsley v. Cobin (C. C. 1877) 15 N. B. R. 489, Fed. Cas. No. 10,636; In re Smith (D. C. 1878) Fed. Cas. No. 12,976; Hayman v. Pond (Mass. 1843) 7 Metc. 328; Scott v. Porter (1880) 93 Pa. 38, 39 Am. Rep. 719; Falkland v. Bank (N. Y. 1880) 21 Hun, 450; Austill v. Crawford (1845) 7 Ala. 335; Woolsey v. Cade (1875) 54 Ala. 378, 25 Am. Rep. 711; Maxwell v. Evans (1883) 90 Ind. 596, 46 Am. Rep. 234; Du Pont v. Beck (1881) 81 Ind. 271; Grover & Baker S. M. Co. v. Clinton (C. C. 1873) 8 N. B. R. 312, Fed. Cas. No. 5,845; Keime v. Graff (C. C. 1878) 17 N. B. R. 319, Fed. Cas. No. 7,650; Kaufman v. Alexander (1880) 53 Tex. 562.

In the absence of an agreement to the contrary, a principal has the right at any time to retake possession of goods consigned to a factor on payment of advances and liens; and where a factor, without legal excuse, refuses to return goods on demand of the consignor, his liability therefor is a debt created by his fraud, embezzlement, or misappropriation while acting in a fiduciary capacity, from which he is not released by a discharge in bankruptcy. Mathieu v. Goldberg (C. C. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191.

21. —— **Auctioneers.**—An auctioneer acts in a fiduciary capacity in respect to goods placed in his hands for sale, and that his liability for their proceeds will therefore not be released by his discharge in bankruptcy. Jones v. Russell (1871) 44 Ga. 460, 11 N. B. R. 478; In re Lord (C. C. 1842) Fed. Cas. 8,501; Crowther v. Elgood, L. R. 34 Ch. Div. 691.

A deposit of money made by the purchaser at a sale by auction is not received by the auctioneer in a fiduciary capacity. Gibson v. Gorman (1882) 44 N. J. Law, 325.

22. —— **Partners and joint adventurers.**—A claim of one partner against the other for fraud or mismanagement of the partnership business, or for misappropriation of the firm's assets, is not a debt contracted while acting in a fiduciary capacity so as to be excepted from the operation of a discharge in bankruptcy. Gee v. Gee (1901) 84 Minn. 384, 87 N. W. 1116; Karger v. Orth (1911) 116 Minn. 124, 133 N. W. 471; Inge v. Stillwell (1912) 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1093.

During a partnership between two persons, formed to conduct a banking business, the managing partner is not an officer, within the meaning of this section, neither does he act in any fiduciary capacity. Martin v. Starrett (1915) 97 Neb. 653, 151 N. W. 154.

Where one receives money from another to be invested on their joint account in the purchase of land or commodities, with an agreement that it is to be returned if no investment is made, or that the profits of any successful purchase and sale shall be divided between them, no fiduciary debt is thereby created. Such an arrangement does not constitute the party receiving the money a trustee for the other, but merely a partner with him, and a debt growing out of the joint adventure will be dischargeable in bankruptcy. Hill v. Sheibley (1882) 68 Ga. 556; Pierce v. Shippee (1878) 90 Ill. 371.

23. —— **Public and other officers.**—A debt created by the bankrupt's fraud while acting as an officer, or one created by his embezzlement while acting as an officer, or by his misappropriation of funds while acting as an officer, will be excepted from the operation of his discharge, in the same manner and to the same extent as a debt created by a technical "defalcation." Tindle v. Birkett (1907) 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Harper (D. C. 1904) 133 Fed. 970.

Among the public officers who are within this provision of the statute, so that money debts due from them in their official capacity are not affected by a discharge in bankruptcy, are collectors of taxes. Morse v. Lowell (Mass. 1843) 7 Metc. 152; Richmond v. Brown (1876) 66 Me. 373; Town of Grantham v. Clark (1882) 62 N. H. 426. Sheriffs, in so far as they receive or handle public money. Johnson v. Auditor (1879) 78 Ky. 282; Councill v. Horton (1883) 88 N. C. 222. Official auctioneers of cities. Jones v. Russell (1871) 44 Ga. 460. Any municipal officer whose duty requires him to collect and account for license fees. In re Johnson (D. C. 1842) Fed. Cas. No. 7,365a. Registers and receivers of the land office. Ex parte Wright (D. C. 1843) Fed. Cas. No. 18,064.

Debts created in their official capacity by officers of private corporations, such as presidents and cashiers of banks, treasurers of other corporations, and all officers who share in the management of the finances, are excepted from the operation of a discharge in bankruptcy. Harper v. Rankin (1905) 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608; Shepard v. Morgan (1908) 123 App. Div. 128, 108 N. Y. Supp. 379; Tatum v. Leigh (1911) 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216; Peterborough R. R. v. Wood (1881) 61 N. H. 418.

Where a defaulting public officer gives his note for the amount due (whether to his successor in office or to the officers authorized to demand the money in his hands), there is such a novation or change in the character of the debt that it loses its preferred

character in bankruptcy, and becomes dischargeable like any ordinary claim founded on a note. Wilkes County Com'rs v. Staley (1880) 82 N. C. 395. CONTRA, Madison Tp. v. Dunkle (1888) 114 Ind. 262, 16 N. E. 593.

24. —— **Sureties on bonds of fiduciary debtors.**—The obligation of a surety on the bond of a principal who acts in a fiduciary capacity is contractual and not in the nature of a trust, and if the surety become bankrupt, and his liability on the bond is so far fixed as to constitute a provable debt against his estate, it will be released by his discharge in bankruptcy. Jones v. Knox (1871) 46 Ala. 53, 7 Am. Rep. 583; Reitz v. People (1874) 72 Ill. 435, 16 N. B. R. 196; McDonald v. State (1881) 77 Ind. 26; Simpson v. Simpson (1879) 80 N. C. 332; Davis v. McCurdy (1880) 50 Wis. 569, 7 N. W. 665; Harmon v. McDonald (1905) 187 Mass. 578, 73 N. E. 883, 3 Ann. Cas. 64; Fowler v. Kendall (1858) 44 Me. 448; Saunders v. Commonwealth (Va. 1853) 10 Grat. 494; McMinn v. Allen (1872) 67 N. C. 131; Steele v. Graves (1880) 68 Ala. 21; Ex parte Taylor (C. C. 1877) 16 N. B. R. 40, Fed. Cas. No. 13,773.

A surety on an administrator's bond occupies no fiduciary relation that will prevent his discharge in bankruptcy from operating as a release from liability for contribution to his cosurety, who has been compelled to pay the debt of the administrator. Miller v. Gillespie (1881) 59 Mo. 220.

If a surety gives his personal note for the debt due from his principal, and pays the note at maturity, his claim against the principal for reimbursement is not of such a fiduciary character as to be excepted from the operation of the principal's discharge in bankruptcy. Light v. Merriam (1882) 132 Mass. 283; Cromer v. Cromer (Va. 1877) 29 Grat. 280; Leinkauf v. Wellhouse (1907) 1 Ga. App. 670, 57 S. E. 961.

25. **Liabilities for willful and malicious injuries.**—It is not necessary that a liability for willful and malicious injury to the person or property of another should have been reduced to judgment, in order to except it from the operation of a discharge in bankruptcy. Bever v. Swecker (1908) 138 Iowa, 721, 116 N. W. 704. But the fact that judgment has been obtained upon such a liability does not change the character of the claim so as to make it dischargeable in bankruptcy. Thompson v. Judy (1904) 169 Fed. 553, 95 C. C. A. 51, 22 Am. Bankr. Rep. 154; Stefanini v. Sroka (1904) 43 Misc. Rep. 614, 88 N. Y. Supp. 167; Woehrle v. Canclini (1910) 158 Cal. 107, 109 Pac. 888.

Where a defendant, against whom a judgment has been obtained for an assault and who has been arrested on execution, makes application to take the poor debtor's oath, and gives a recognizance under the local statute, such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered on the recognizance is a liability for willful and malicious injury, and not released in bankruptcy. In re Cololuca (D. C. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292.

As used in this section, the phrase "willful and malicious injury" does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act done intentionally and without cause or excuse. In re Halper (1913) 82 Misc. Rep. 205, 143 N. Y. Supp. 1005; Peters v. U. S. (1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206; McChristal v. Clisbee (1906) 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769; Kavanaugh v. McIntyre (1908) 128 App. Div. 722, 112 N. Y. Supp. 987.

Where a judgment had been recovered, in an action of trespass vi et armis in a state court, against a school-teacher for an assault upon a pupil alleged to have consisted in the infliction of corporal punishment with excessive severity, held, that the liability was for a willful and malicious injury, from which the defendant would not be released by his discharge in bankruptcy. Peters v. U. S. (1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206.

A judgment against a landlord for a personal injury inflicted by a vicious dog owned by the tenant and kept on the leased premises is not one for a willful and malicious injury, but is based on negligence only, and the debt is one from which the defendant is released by his discharge in bankruptcy. In re Lorde (D. C. 1906) 144 Fed. 320, 16 Am. Bankr. Rep. 201.

Negligence alone does not constitute either such malice or such willfullness as is contemplated by this provision of the act. In re Wakefield (D. C. 1913) 207 Fed. 181, 31 Am. Bankr. Rep. 42; Weisfield v. Beale (1910) 44 Pa. Super. Ct. 386. A discharge in bankruptcy does not bar an action in tort for the death of a servant caused by the bankrupt's negligence. Pearlman v. Booth (1914) 160 App. Div. 219, 145 N. Y. Supp. 539.

A judgment against an innkeeper for causing the death of plaintiff's husband while a guest at the inn, in consequence either of failing to take proper care of the decedent or of administering to him a dangerous drug when decedent was in a state of excited alcoholic intoxication, is not for a willful and malicious injury, and therefore is released by a discharge in bankruptcy. Tompkins v. Williams (1910) 137 App. Div. 521, 122 N. Y. Supp. 152.

A liability or a judgment for damages for slander or libel is for such an injury to the person as is not released or affected by a discharge in bankruptcy. In re Dowie (D. C. 1912) 202 Fed.

816, 29 Am. Bankr. Rep. 338; McDonald v. Brown (1902) 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; National Surety Co. v. Medlock (1907) 2 Ga. App. 665, 58 S. E. 1131; Parker v. Brattan (1913) 120 Md. 428, 87 Atl. 756; Sanderson v. Hunt (1903) 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168; Drake v. Vernon (1910) 26 S. D. 354, 128 N. W. 317. A judgment for damages for slander not being dischargeable in bankruptcy, a judgment against the plaintiff for costs in such an action partakes of the same character and is not released by the discharge. In re Dowie (D. C. 1912) 202 Fed. 816, 29 Am. Bankr. Rep. 338.

A discharge in bankruptcy does not release the bankrupt from a judgment in an action for false arrest or malicious prosecution. Mason v. Perkins (1904) 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Taylor v. Marshall (1910) 153 Ill. App. 409. CONTRA, Johnston v. Bruckheimer (1909) 133 App. Div. 649, 118 N. Y. Supp. 189. Or a judgment in forcible detainer against a landlord based on his wrongfully and forcibly removing an assignee of the lessee under a judgment for dispossession against the lessee alone. In re Munro (D. C. 1912) 195 Fed. 817, 28 Am. Bankr. Rep. 369. Or a judgment for personal injuries resulting from the sale of pure carbolic acid for a 2 per cent. solution. In re Halper (1913) 82 Misc. Rep. 205, 143 N. Y. Supp. 1005.

A fraudulent appropriation of the money or property of another is a "willful and malicious injury" to such property, within the meaning of the bankruptcy law. Hallagan v. Dowell (Iowa, 1913) 139 N. W. 883. An intentional sale by a brokerage firm of stock held by it upon an account and depositing the proceeds in bank in the firm name held to create a liability for willful and malicious "injury to the property of another." Kavanaugh v. McIntyre (1914) 104 N. E. 135, 210 N. Y. 175, affirming judgment (1912) 135 N. Y. S. 1120, 151 App. Div. 910, which affirms judgment (1911) 133 N. Y. S. 679, 74 Misc. Rep. 222. Liability of maker of a note converting to his own use the proceeds of a note deposited with the payee as collateral, held not to arise from willful and malicious injury to the property of the payee within Bankruptcy Act, § 17. First Nat. Bank of Enosburg Falls v. Bamforth (Vt. 1916) 96 A. 600.

A judgment against defendant for taking plaintiff's cattle without his consent, and appropriating them to his own use, is not released by defendant's discharge in bankruptcy. Bever v. Swecker (1908) 138 Iowa, 721, 116 N. W. 704.

26. Liabilities for seduction and criminal conversation.—A liability for the seduction of a woman or for criminal conversation or alienating the affecti of a husband or wife is not released a discharge in bankruptcy. Tinker Colwell (1904) 193 U. S. 473, 24 S Ct. 505, 48 L. Ed. 754, 11 Am. Ban Rep. 568; Colwell v. Tinker (1902) N. Y. 531, 62 N. E. 668, 58 L. R. 765, 98 Am. St. Rep. 587; Leicester Hoadley (1903) 66 Kan. 172, 71 P 318, 65 L. R. A. 523; In re Freche C. 1901) 109 Fed. 620, 6 Am. Ban Rep. 479; In re Maples (D. C. 19 105 Fed. 919, 5 Am. Bankr. Rep. 4 Exline v. Sargent (1901) 23 Ohio Ct. R. 180. Compare In re Tinker C. 1900) 99 Fed. 79, 3 Am. Ban Rep. 580; In re Sullivan, 1 Nat. Ban News, 380; Howland v. Carson (18 28 Ohio St. 625, 16 N. B. R. 372.

A judgment rendered against bankrupt in an action for breach promise of marriage, where there is proof of seduction of the plaintiff, or malice or any injury to character, for a mere contract debt, and con within the operation of the discharge bankruptcy. Finnegan v. Hall (19 35 Misc. Rep. 773, 72 N. Y. Supp. 3 Bond v. Milliken (1906) 134 Iowa, 4 109 N. W. 774, 120 Am. St. Rep. 4 And the same rule obtains where sed tion is shown as an element of da ages, but not made a substantive p of the cause of action. Disler v. M Cauley (1901) 66 App. Div. 42, 73 Y. Supp. 270.

A judgment obtained by an unm ried woman for breach of marri promise, accompanied by seduction, be regarded as entirely for the sed tion, and therefore not dischargeable bankruptcy, in the absence of a sho ing as to what part of the damages w awarded for the breach of promi In re Warth (1912) 200 Fed. 408, 1 C. C. A. 560, 29 Am. Bankr. Rep. 2 In re Grounds (D. C. 1914) 215 F 280.

27. Debts contracted by fraud Debts created by the fraud of the ba rupt are not excepted from the ope tion of the discharge, unless so crea while he was acting as an officer or a fiduciary capacity. Crawford Burke (1904) 195 U. S. 176, 25 S Ct. 9, 49 L. Ed. 147, 12 Am. Ban Rep. 659; Bullis v. O'Beirne (19 195 U. S. 606, 25 Sup. Ct. 118, 49 Ed. 340, 13 Am. Bankr. Rep. 1 Tindle v. Birkett (1907) 205 U. S. 1 27 Sup. Ct. 493, 51 L. Ed. 762, 18 A Bankr. Rep. 121; In re Ennis & St pani (D. C. 1909) 171 Fed. 755, 22 A Bankr. Rep. 679; Gee v. Gee (19 84 Minn. 384, 87 N. W. 1116; J. Smith & Wallace Co. v. Lambert (19 69 N. J. Law, 487, 55 Atl. 88; Cros v. Miller, Vaughn & Co. (1903) 25 I. 172, 55 Atl. 328; Morse v. Kaufm (1902) 100 Va. 218, 40 S. E. 9 Jewett Bros. & Jewett v. Bents (1905) 20 S. D. 175, 105 N. W. 1 Dilley v. Simmons Nat. Bank (A 1913) 158 S. W. 144; Martin v. St

rett (1915) 97 Neb. 653, 151 N. W. 154.

A cause of action does not become merged in a judgment thereon so as to preclude the creditor from showing that the original debt was created by fraud, and if it is established that the original debt would not have been dischargeable in bankruptcy, neither will the judgment recovered upon it be so dischargeable. Dilley v. Simmons Nat. Bank (Ark. 1913) 158 S. W. 144; Forsyth v. Vehmeyer (1898) 176 Ill. 359, 52 N. E. 55, affirmed (1900) 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Gee v. Gee (1901) 84 Minn. 384, 87 N. W. 1116; Packer v. Whittier (1899) 91 Fed. 511, 33 C. C. A. 658, 1 Am. Bankr. Rep. 621; In re Pettis (D. C. 1868) Fed. Cas. No. 11,046; Warner v. Cronkhite (C. C. 1875) Fed. Cas. No. 17,180; Horner v. Spelman (1875) 78 Ill. 206; Freiberg v. Popper (N. Y. 1851) 12 Hun, 658; Kaufman v. Lindner (N. Y. 1884) 67 How. Prac. 322; Young v. Grau (1884) 14 R. I. 340; In re Patterson (D. C. 1868) 1 N. B. R. 307, Fed. Cas. No. 10,817. CONTRA, see Shuman v. Strauss (1871) 34 N. Y. Super. Ct. 6; Kames v. Fox (Pa. 1880) 14 Phila. 208; Palmer v. Preston (1872) 45 Vt. 154, 12 Am. Rep. 191; Ford v. Blackshear Mfg. Co. (1913) 140 Ga. 670, 79 S. E. 576. This fact need not appear on the face of the judgment, but it is proper to look behind it and examine the entire record in order to ascertain the character of the debt on which it was founded. Ames v. Moir (1891) 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; In re Bullis (1902) 171 N. Y. 689, 64 N. E. 1119; Donald v. Kell (1887) 111 Ind. 1, 11 N. E. 782; Moody v. Muscogee Mfg. Co. (1910) 134 Ga. 721, 68 S. E. 604, 20 Ann. Cas. 301; Ziegler v. Suggit (1912) 118 Minn. 74, 136 N. W. 411. If it appears that fraud was the gravamen or gist of the action, the judgment will be held not affected by the discharge. Oberreich v. Foster (1909) 148 Ill. App. 397; In re Benoit (1908) 124 App. Div. 142, 108 N. Y. Supp. 889; In re Blumberg (D. C. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; Collins v. McWalters (1901) 35 Misc. Rep. 648, 72 N. Y. Supp. 203. The record is conclusive, and if it contains nothing to show the alleged fraudulent character of the claim sued on, it will not be sufficient to repel the plea of a discharge in bankruptcy. Barnes Mfg. Co. v. Norden (1902) 67 N. J. Law, 493, 51 Atl. 454; Barnes Cycle Co. v. Haines (1905) 69 N. J. Eq. 651, 61 Atl. 515; Quaker City Watch Co. v. Lamoreaux (1902) 21 Pa. Super. Ct. 493.

Where a plaintiff sued for money had and received and also on an indebtedness alleged to have been created by the bankrupt's embezzlement of trust funds, and the verdict was general, and there was nothing to show that it included the latter indebtedness alone, there is no ground for holding the judgment to be excepted from the operation of the discharge in bankruptcy. Cooke v. Plaisted (1902) 181 Mass. 82, 62 N. E. 1054.

If a plaintiff sues on a promissory note, an account stated, a written contract, a bond, or the like, it is an election to waive any fraud which induced or entered into the creation of the indebtedness, and such fraud cannot be brought up again and insisted on for the purpose of withdrawing the judgment from the effect of defendant's discharge in bankruptcy. Hargadine-McKittrick Dry Goods Co. v. Hudson (1903) 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Rhutassel (D. C. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Blumberg (D. C. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; Mulock v. Byrnes (1891) 59 Hun, 623, 13 N. Y. Supp. 190; Palmer v. Preston (1872) 45 Vt. 154, 12 Am. Rep. 191; Harrington & Goodman v. Herman (1903) 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885. CONTRA, Stewart v. Emerson (1872) 52 N. H. 301, 8 N. B. R. 462.

In this connection, the word "fraud" means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. Bullis v. O'Beirne (1904) 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, 13 Am. Bankr. Rep. 108; Neal v. Clark (1877) 95 U. S. 704, 24 L. Ed. 586; Strang v. Bradner (1885) 114 U. S. 555, 5 Sup. Ct. 1033, 29 L. Ed. 248; Noble v. Hammond (1889) 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Western Union Cold Storage Co. v. Hurd (C. C. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633; Lund v. Bull (1911) 76 N. H. 132, 80 Atl. 141, Ann. Cas. 1912B, 819; Ely v. Curtis (1881) 60 N. H. 513; Hennequin v. Clews (1879) 77 N. Y. 427, 33 Am. Rep. 641; Louisville & N. R. Co. v. Bryant (1912) 149 Ky. 359, 149 S. W. 830; Cooper Grocery Co. v. Gaddy (Tex. Civ. App. 1911) 141 S. W. 825; Brenner v. Duard (1879) 126 Mass. 400; Curtis v. Waring (1880) 92 Pa. 104; Allen v. Hickling (1882) 11 Ill. App. 549; Rowe v. Guilleaume (N. Y. 1879) 18 Hun, 556; In re Shepardson (D. C. 1915) 220 Fed. 186.

A legal fraud can be committed only by fraudulent representations of fact or by such conduct or artifice for a fraudulent purpose as will throw one off his guard and cause him to omit inquiry or examination which he would otherwise make. In re Nuttall (D. C. 1912) 201 Fed. 557, 29 Am. Bankr. Rep. 800.

Where a purchaser receives goods knowing himself to be insolvent, and with the intention of disposing of them without paying the price, this constitutes such fraud as will take the case

out of the operation of his discharge in bankruptcy. Ames v. Moir (1891) 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; Strauss v. Abrahams (C. C. 1887) 32 Fed. 310; Classen v. Schoenemann (1875) 80 Ill. 304, 16 N. B. R. 98; Ames v. Moir (1889) 130 Ill. 582, 22 N. E. 535. So a discharge will not release a bankrupt who was a public warehouseman from a claim or judgment arising by reason of his fraudulently removing property from his warehouse contrary to the provisions of a state statute. Halsey v. Jordan (1910) 155 Ill. App. 144. Nor can a discharge be set up by one who, after the sale of property and delivery of warehouse receipts for it, sells the same property to another. Taylor v. Farmer (1883) 81 Ky. 458. Nor by a debtor who, at the time of contracting the debt, pledges as security for it collateral which he knows to be worthless. Bank of North America v. Crandall (1885) 87 Mo. 208.

One who accepts a transfer of another's property, knowing that it is made for the purpose of defrauding the latter's creditors, is himself guilty of such actual fraud that a claim or judgment against him for the restoration of the property is not barred by his discharge. Mackel v. Rochester (D. C. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429.

Where plaintiff undertook to guaranty defendant's honesty in his capacity as an insurance agent, the liability of defendant to indemnify plaintiff for the amount plaintiff was compelled to pay under such guaranty is not a debt created by fraud in this sense. American Surety Co. v. Spice (1912) 119 Md. 1, 85 Atl. 1031. And so of a transaction by which one induced another to dismiss an action on a note by representing that he would pay it if not molested, and thereafter went into bankruptcy. Jenkins v. Pilcher (1910) 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423.

A debt, to be fraudulent within the meaning of the bankruptcy law, must be tainted with fraud in its inception. If the contract was fair and honest when made, although the debtor may subsequently be guilty of fraudulent conduct in respect to it, yet such conduct will not destroy the benefit of his discharge in bankruptcy. Brown v. Broach (1876) 52 Miss. 536.

28. —— **Deceit and false representations.**—A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations. J. K. Orr Shoe Co. v. Upshaw & Powledge (Ga. App. 1913) 79 S. E. 362. And see Nelson v. Petterson (1907) 131 Ill. App. 443; Atlanta Skirt Mfg. Co. v. Jacobs (1910) 8 Ga. App. 299, 68 S. E. 1077; Lee v. Tarplin (1907) 194 Mass. 47, 79 N. E. 786; Morse v. Hutchins (1869) 102 Mass. 439.

A claim against the bankrupt for obtaining property by false representations is not merged in the judgment recovered upon it in such sense as to bring the judgment within the operation of the discharge where the claim would not be. In re Lewensohn (D. C. 1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594; Nichols v. Doak (1908) 48 Wash. 457, 93 Pac. 919, 125 Am. St. Rep. 942; In re Lewensohn (1900) 104 Fed. 1006, 44 C. C. A. 309; In re Shepardson (D. C. 1915) 220 Fed. 186; Chambers v. Kirk (Okl. 1914) 139 Pac. 986.

A judgment in favor of plaintiff in an action for deceit is conclusive that the debt was the result of fraud, and not discharged in bankruptcy. In re Shepardson (D. C. 1915) 220 Fed. 186.

If the creditor, having parted with his property in reliance on false pretenses or representations, accepts a note for the amount due, no fraud being practised upon him to induce his acceptance of the note, neither the note nor a judgment recovered upon it will be excepted from the defendant's discharge. In re Rhutassel (D. C. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; Blackman v. McAdams (1908) 131 Mo. App. 408, 111 S. W. 599. And this provision of the statute does not embrace a case where the bankrupt obtained the property in question as a loan in the first instance, though he afterwards converted it. Maxwell v. Martin (1909) 130 App. Div. 80, 114 N. Y. Supp. 349.

As to the character of the pretenses or representations intended by the statute, it may be said that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money or property from another, and by means of which such money or property is so obtained, is a legal fraud and within the statute. Forsyth v. Vehmeyer (1900) 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807.

The overruling of objections to a discharge, based on the bankrupt's false representations to a commercial agency, held not an adjudication, precluding subsequent suit on the ground that the bankrupt had obtained credit by misrepresentations. E. I. Du Pont De Nemours Powder Co. v. Schwenger (1915) 154 N. Y. S. 186, 90 Misc. Rep. 678.

It is an obtaining of property by fraud when an intending buyer procures the sale and delivery of it to him without payment by means of false statements as to the nature and extent of his financial resources, or as to his ownership of particular property. Friend v. Talcott (1913) 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; Forsyth v. Vehmeyer (1900) 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Id. (1898) 176 Ill. 359, 52 N. E. 55; Talcott v. Friend (1910)

ed. 676, 103 C. C. A. 80, 24 Am. . Rep. 708; In re Taff & Con- (D. C. 1910) 182 Fed. 899, 25 Bankr. Rep. 600; In re Alsberg & D. C. 1877) 16 N. B. R. 116, Cas. No. 261; Broadnax v. Brad- 1874) 50 Ala. 270; Turner v. At- (1878) 124 Mass. 411. So also the purchaser falsely represents e is that day to receive a check certain amount and that he will ce turn it over to the creditor. l v. Ricker (1907) 79 Vt. 552, 66 69. Or where he lies as to the situation, or condition of proper- ch he really owns, as, by stating is free from incumbrances, that covered with valuable timber, or te. In re Bullis (1902) 171 N. , 64 N. E. 1119; Peel v. Bryson 72 Ga. 331. Or where he un- es to turn over to the seller, as f the consideration, a note of a person, knowing at the time that te is in the hands of an assignee, whom he cannot procure it. v. Thomas (1887) 22 Neb. 541, W. 411. Or where he fraudu- causes the owner of property to that he intends to pay for it g no such intention) or fraudu- conceals his intention not to pay. rt v. Emerson (1872) 52 N. H. Or where he obtains goods on with the intention of setting over ods to certain other favored per- leaving himself nothing with he could pay for them. Louis- ry Goods Co. v. Lanman (1909) y. 163, 121 S. W. 1042, 28 L. R. S.) 363, 135 Am. St. Rep. 451. cing a creditor to surrender a y promising immediately to take nefit of the bankruptcy law and fter to pay the amount of it in as been held not such a "false entation" as the statute contem- Landgraf v. Griffith (1908) 41 pp. 372, 83 N. E. 1021.

ey is property, and a liability for ng money by false representa- s not dischargeable in bankrupt- Callagan v. Dowell (Iowa, 1913) W. 883. Nor is a liability in- by obtaining another surety for nkrupt by his false representa- Gaddy v. Witt (Tex. Civ. App. 142 S. W. 926.

ansaction wherein a husband and ointly executed notes in settle- of a debt and agreed to procure lorsement of a person financially sible, but failed to do so, held btaining property by false pre- or false representations," where f retained the old notes and part- h no property or rights in reli- pon the agreement to procure lorsement; and hence the wife's ge in bankruptcy released her ability on the notes. Rudstrom ridan (1913) 142 N. W. 313, 122 262.

services and advice of an attor- law are not "property," and though they were procured by the client by false pretenses, yet the attorney's claim for a fee is barred by the client's discharge in bankruptcy. Gleason v. Thaw (1915) 236 U. S. 558, 35 Sup. Ct. 287, 59 L. Ed. 717, affirming judgment (1912) 196 Fed. 359, 116 C. C. A. 179.

It is not necessary that the false pretenses or representations should have been made in writing. Katzenstein v. Reid, Murdock & Co. (1906) 41 Tex. Civ. App. 106, 91 S. W. 360. A false representation by one partner, by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt. Frank v. Michigan Paper Co. (1910) 179 Fed. 776, 103 C. C. A. 268, 24 Am. Bankr. Rep. 261.

It is necessary that the creditor should have been induced actually to part with property or rights in reliance upon the representations made to him. Rudstrom v. Sheridan (Minn. 1913) 142 N. W. 313. And that he should not have any actual knowledge or notice of their falsity. Hoskins v. Velasco Nat. Bank (1908) 48 Tex. Civ. App. 246, 107 S. W. 598.

29. —— Conversion of property.—A judgment recovered in an action for the conversion of property, or of the proceeds of its sale, is not a judgment for fraud, nor for false pretenses, nor for willful and malicious injuries, and therefore is not excepted from the operation of a discharge in bankruptcy. In re Ennis & Stoppani (D. C. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; Fechter v. Postel (1906) 114 App. Div. 776, 100 N. Y. Supp. 207; Burnham v. Pidcock (1900) 33 Misc. Rep. 65, 66 N. Y. Supp. 806; Crosby v. Miller, Vaughn & Co., (1903) 25 R. I. 172, 55 Atl. 328; Ex parte Peterson (1905) 77 Vt. 226, 59 Atl. 828; State v. Beck (1911) 175 Ind. 664, 93 N. E. 664; Ulner v. Doran (1915) 167 App. Div. 259, 152 N. Y. Supp. 655.

The action of plaintiff, who had consigned goods to defendants for sale on commission, for converting the goods or their proceeds, was barred by defendants' discharge. Butler-Kyser Mfg. Co. v. O. D. Mitchell & Co. (Ala. 1915) 70 So. 665.

A wrongful repledge of security held not a willful and malicious injury to the property of another, so that the pledgor's claim was not barred by discharge in bankruptcy. Wood v. Fisk (N. Y. 1915) 109 N. E. 177, affirming judgment (1913) 141 N. Y. S. 342, 156 App. Div. 497.

A claim against a pledgee of certificate of stock based on his pledging the stock for an amount in excess of the pledgor's indebtedness a month before his adjudication as a bankrupt, and a refusal to deliver the certificate to the pledgor on tender of payment of his debt, is predicated on the pledgee's

liability of the stockholders or officers. In re Marshall Paper Co. (1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; Id. (D. C. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653; Elsbree v. Burt (1902) 24 R. I. 322, 53 Atl. 60; Way v. Barney (1911) 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913A, 719.

The fact that creditors may have proved their claims in bankruptcy against the corporation, and received dividends thereon, does not prevent them from collecting the unpaid balance in this way. First Nat. Bank v. Hingham Mfg. Co. (1879) 127 Mass. 563.

The fact that a corporation has been adjudged bankrupt does not relieve stockholders of debts contracted as partners. Virginia-Carolina Chemical Co. v. Fisher (1909) 58 Fla. 377, 50 South. 504.

33. **Effect of discharge as to securities and liens.**—While a discharge in bankruptcy releases the debtor from personal liability for the debts proved and frees his after-acquired property from the claims of creditors, it does not divest or in any way affect a valid lien existing on property of the bankrupt, provided, first, that the lien is not of the kind stricken down by the commencement of bankruptcy proceedings within four months after its inception, and second, that the property has not been brought within the jurisdiction of the bankruptcy court and administered by it. Wills v. E. K. Wood Lumber & Mill Co. (Cal. App. 1915) 154 Pac. 613; Frey v. McGaw (Md. 1915) 95 Atl. 960; Paxton v. Scott (1902) 66 Neb. 385, 92 N. W. 611; Mallin v. Wenham (1904) 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Taylor v. Marshall (1910) 153 Ill. App. 409; Morganstein v. Commercial Nat. Bank (1906) 125 Ill. App. 397; McDonald v. H. E. Taylor & Co. (1911) 144 App. Div. 329, 128 N. Y. Supp. 1048; Wyckoff v. Williams (1910) 136 App. Div. 495, 121 N. Y. Supp. 189; Stevenson v. Bird (1910) 168 Ala. 422, 53 South. 93; Newberry Shoe Co. v. Collier (1910) 111 Va. 288, 68 S. E. 974; John Leslie Paper Co. v. Wheeler (1912) 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; Causey Lumber Co. v. Connor (1909) 6 Ga. App. 444, 65 S. E. 194; McCall v. Herring (1902) 116 Ga. 235, 42 S. E. 468; Philmon v. Marshall (1902) 116 Ga. 811, 43 S. E. 48; Evans v. Rounsaville (1902) 115 Ga. 684, 42 S. E. 100; Smith v. Zachry (1902) 115 Ga. 722, 42 S. E. 102; Darling v. Woodward (1881) 54 Vt. 101.

Where a debt is discharged in bankruptcy pending an action in a state court to recover the same, and there is a lien created by law incident to such debt, a plea in bar of further proceedings in the case will not preclude the court from rendering such a judgment as may be necessary to enable the plaintiff to enforce the lien. Bank of Commerce v. Elliott (1901) 109 Wis. 648, 85 N. W. 417.

A discharge in bankruptcy does not extinguish a judgment lien, except in so far as it imposes a separate liability on the bankrupt. Olsen v. Nelson (Minn. 1914) 146 N. W. 1097; In re Levitan (D. C. 1915) 224 Fed. 241.

Where a judgment creditor proved his claim against the estate of a bankrupt, but got nothing thereon, and there was nothing to show that he had surrendered or waived the lien of his judgment on land not sold by the trustee, such lien was not affected by the discharge in bankruptcy of the judgment debtor. McCarty v. Light (1913) 139 N. Y. S. 853, 155 App. Div. 36.

Where pending appeal from justice court judgment against W., he was adjudged a bankrupt, and circuit court rendered judgment against him and his sureties, held that subsequent discharge in bankruptcy did not relieve sureties. Kohn, Weil & Co. v. Weinberg (Miss. 1915) 70 So. 353.

A discharge in bankruptcy does not release or dissolve a mechanic's lien. Holland v. Cunliff (1902) 96 Mo. App. 67, 69 S. W. 737; Jensen v. Dorr (1911) 159 Cal. 742, 116 Pac. 553; McCullough v. Caldwell (1843) 5 Ark. 237. Or a vendor's lien for purchase money. Graves v. Coutant (1879) 31 N. J. Eq. 763. See Graham v. Richerson (1902) 115 Ga. 1002, 42 S. E. 374; White v. Hartman (Colo. App. 1915) 145 Pac. 716. Or an equitable lien. Eisman v. Whalen (1874) 39 Ind. App. 350, 79 N. E. 514, 1072. Or a lien arising from a suit by a creditor to enforce a trust in land held by the debtor's wife. Evans v. Staalle (1903) 88 Minn. 253, 92 N. W. 951.

Under a state statute giving a lien for services or materials furnished in the construction, etc., of a vessel enforceable directly against the vessel, the fact that no personal judgment could be obtained against the owner by reason of his discharge in bankruptcy held not to prevent enforcement of the lien against the vessel. Jensen v. Dorr (1914) 139 P. 659, 23 Cal. App. 701.

A discharge in bankruptcy secured by the debtor in a judgment, without notice to an attorney, who had filed a lien against the judgment for his fee, no mention of the lien having been made in the schedule of debts, does not discharge the attorney's interest in the judgment or bar his right to use the judgment to collect the amount of his lien. Lown v. Casselman (N. D. 1913) 141 N. W. 73.

The right created by the assignment, as security, of one's expectancy in the estate of his living ancestor is a lien enforceable against him after his discharge in bankruptcy. Bridge v. Ke-

912) 163 Cal. 493, 126 Pac. 149, R. A. (N. S.) 404.

right of a judgment creditor to d under a state statute to reach cess above the statutory home- valuation of the homestead of ebtor is destroyed by the lat- lischarge in bankruptcy, if the ent was based on a claim le in bankruptcy, and no pro- gs to reach the homestead had begun at the time of the dis- . Boggs v. Dunn (1911) 160 Cal. 16 Pac. 743.

egard to an assignment of wages, ears that a discharge in bank- will not defeat the right of the ee to recover the wages in so the same have been earned and ed before the discharge. Wa- R. Co. v. Meyer (1905) 119 Ill. 08. But it will release the bank- rom personal liability. Mitchell and (1906) 190 Mass. 258, 76 670. See Ulner v. Doran (1915) pp. Div. 259, 152 N. Y. Supp. An assignment, as security for of wages thereafter to be earn- the debtor, either under a gen- specific employment, creates no ntil the wages have been earned, here, before that time, the debtor udged a bankrupt and is subse- y discharged the debt is extin- d from the date of the adju- n, and no lien arises as to wages thereafter, but the same be- he property of the bankrupt free he claims of all his creditors, in- the assignee. In re West (D. 4) 128 Fed. 205, 11 Am. Bankr. 782; In re Home Discount Co. . 1906) 147 Fed. 538, 17 Am. Rep. 168; In re Ludeke (D. C. 171 Fed. 292, 22 Am. Bankr. 467; Leitch v. Northern Pac. o. (1905) 95 Minn. 35, 103 N. W. Ann. Cas. 63; Levi v. Loeven- Co. (1910) 138 Ky. 133, 127 S. 8, 30 L. R. A. (N. S.) 375, 137 t. Rep. 377. But compare Mallin nham (1904) 209 Ill. 252, 70 N. , 65 L. R. A. 602, 101 Am. St. 33; Citizens' Loan Ass'n v. Bos- M. R. R. (1907) 196 Mass. 528, E. 696, 14 L. R. A. (N. S.) 1025, m. St. Rep. 584, 13 Ann. Cas.

validity of the bond of a receiv- not affected by his discharge as a upt, nor are his sureties dis- d or released thereby. (1843) 4 tty. Gen. 253.

— **Attachment and garnish-** -Where an attachment was lev- ithin four months prior to the uptcy proceedings, its lien will be ved by the adjudication in bank- and the discharge of the bank- and the liability of sureties on d given to dissolve the attachment likewise be released. Windisch-Muhlhauser Brewing Co. v. Simms (1911) 129 La. 134, 55 South. 739.

Where the attachment was levied more than four months before the bankruptcy and is otherwise valid, it will not be dissolved or released by the discharge of the bankrupt, though the original debt may be extinguished thereby. In re Blumberg (D. C. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; Grandin v. First Nat. Bank (1904) 70 Neb. 730, 98 N. W. 70; Powers Dry Goods Co. v. Nelson (1901) 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Sims v. Jacobson (1874) 51 Ala. 186. In that case, the plaintiff in attachment is entitled to the entry of a special judgment enforceable only against the attached property and an execution in accordance therewith. Stickney & Babcock Coal Co. v. Goodwin (1901) 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; American Agricultural Chemical Co. v. Huntington (1904) 99 Me. 361, 59 Atl. 515; Johnson v. Collins (1874) 116 Mass. 392; Stockwell v. Silloway (1873) 113 Mass. 382; Bosworth v. Pomeroy (1873) 112 Mass. 293; Bates v. Tappan (1868) 99 Mass. 376; Davenport v. Tilton (Mass. 1845) 10 Metc. 320.

A judgment against the bankrupt which is specified to be enforceable against certain attached property and not otherwise, though in form a judgment for money, sufficiently recognizes the effect of his discharge and protects him against any unsatisfied balance of the debt after execution sale. F. Mayer Boot & Shoe Co. v. Ferguson (1910) 19 N. D. 496, 126 N. W. 110.

If the attached property has already been released, on the execution of a forthcoming bond, recognizance, or other obligation permitted by the local practice, there is nothing in the bankruptcy act to prevent the rendition of a formal judgment against the bankrupt defendant, with a perpetual stay of execution, so as to enable the plaintiff to proceed against the sureties on such bond or obligation. Hill v. Harding (1889) 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083; C. D. Smith & Co. v. Lacey (1905) 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707; Barnstable Sav. Bank v. Higgins (1878) 124 Mass. 115; Danforth Mfg. Co. v. M. L. Barrett & Co. (1907) 138 Ill. App. 244. See Hamilton v. Bryant (1874) 114 Mass. 543, 14 N. B. R. 479; Carpenter v. Turrell (1868) 100 Mass. 450.

Where the interest which the plaintiff acquires in the property or credits of the defendant, by service of garnishee process on a person liable to the defendant as a debtor or a custodian of his property, is recognized as a lien, an action pending to recover a debt which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive the dis-

force an execution on such judgment against the debtor's property acquired after the discharge. Ford v. Blackshear Mfg. Co. (1913) 79 S. E. 576, 140 Ga. 670.

Where a third person holds title to land derived from the bankrupt, and the attempt is made to subject it to the lien of a judgment recovered against the bankrupt after his adjudication, but before his discharge, the owner of the property may set up the discharge in bankruptcy in defense. Blair v. Carter's Adm'r (1884) 78 Va. 621.

Whenever the attempt is made to escape liability on a judgment so rendered, the creditor may show, if such is the fact, that the debt or claim in suit was of such a character as to be excepted from the operation of the discharge. Linn v. Hamilton (1870) 34 N. J. Law, 305.

If the action is still pending at the time of the granting of a discharge in bankruptcy, it is the right of the defendant to plead the discharge in bar of its further prosecution, and the effect is to preclude the court from entering any personal decree against him. Phelps v. Curts (1875) 80 Ill. 109, 16 N. B. R. 85.

An order on a discharge in bankruptcy providing that it shall not affect a certain pending case until final judgment therein, and that as to such judgment the discharge shall have the same force as it would have had if the judgment had been recovered after the application for discharge and before the granting of the same, permits the prosecution of such suit. Standard Sewing Mach. Co. v. Alexander (1904) 68 S. C. 506, 47 S. E. 711. And even as against a plea of discharge, it is permissible for the court to enter a special judgment against the bankrupt with a perpetual stay of execution, where this course is necessary to enable the plaintiff to take measures against persons secondarily liable, such as sureties on bonds. Kendrick & Roberts v. Warren Bros. Co. (1909) 110 Md. 47, 72 Atl. 461; Rosenthal v. Nove (1900) 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512. See House v. Schnadig (1908) 138 Ill. App. 498. And where the defendant, in an action on a judgment, had the right when the action was brought to set off against the plaintiff's judgment his own judgment against the plaintiff, such right is not affected by the plaintiff's subsequent discharge in bankruptcy. Wyckoff v. Williams (1910) 136 App. Div. 495, 121 N. Y. Supp. 189.

38. —— **Cancellation of judgment of record.**—A statute authorizing a person, a certain length of time after he has obtained a discharge in bankruptcy, to apply to a court in which a judgment was rendered against him, and obtain an order directing the judgment to be canceled, if it appears that he has been discharged from payment of the judgment or the debt on which it was recovered, is mandatory. Walker v. Muir (1908) 127 App. Div. 163, 111 N. Y. Supp. 465, affirmed (1909) 194 N. Y. 420, 87 N. E. 680; John Leslie Paper Co. v. Wheeler (1912) 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292. Delay of the debtor in applying for his discharge is not ground for refusing to cancel such a judgment. Eberspacher v. Boehm (1890) 58 Hun, 603, 11 N. Y. Supp. 404. Costs should not be imposed on a bankrupt on granting his motion to cancel a judgment. Briefer v. Johnsen (1900) 32 Misc. Rep. 764, 66 N. Y. Supp. 477. The bankrupt is entitled to avail himself of such a statute, although he had an opportunity to plead his discharge in bar of the action in which the judgment was rendered, when leave to do so was coupled with conditions and he declined to avail himself of it. Hussey v. Judson (1904) 43 Misc. Rep. 370, 87 N. Y. Supp. 499. But not where his counsel consented to the entry of judgment for the amount claimed. Stevens v. Meyers (1902) 72 App. Div. 128, 76 N. Y. Supp. 332.

Such statute applies only to judgments entered before the granting of the discharge. Howe v. Noyes (1905) 47 Misc. Rep. 338, 93 N. Y. Supp. 476. The court, on such a motion, will look behind the judgment in order to determine the character of the liability on which it was founded, and refuse the motion if the debt was one from which a discharge would not release the bankrupt. Maier v. Maier (1912) 77 Misc. Rep. 145, 135 N. Y. Supp. 1038; Balliett v. Dearborn (D. C. 1886) 27 Fed. 507. The statute does not require the cancellation of a judgment not duly scheduled by the bankrupt, as it would not be affected by the discharge. Feldmark v. Weinstein (1904) 45 Misc. Rep. 329, 90 N. Y. Supp. 478; Woodward v. Schaefer (1904) 91 N. Y. Supp. 104. See West Philadelphia Bank v. Gerry (1887) 106 N. Y. 467, 13 N. E. 453.

If the judgment is a lien on real estate and not annulled by the adjudication in bankruptcy, an order for its cancellation will contain a reservation of the creditor's right to enforce his lien. Olsen v. Nelson (Minn. 1914) 146 N. W. 1097; Pickert v. Eaton (1903) 81 App. Div. 423, 81 N. Y. Supp. 50; In re David (1904) 44 Misc. Rep. 516, 90 N. Y. Supp. 85; Popham v. Barretto (1880) 20 Hun (N. Y.) 299; Arnold v. Treviranus (1903) 78 App. Div. 589, 79 N. Y. Supp. 732.

The benefit of a statutory provision of this kind may be claimed, not only by the bankrupt himself, but also by an owner of land on which a judgment against the bankrupt is an apparent lien. Graber v. Gault (1905) 103 App. Div. 511, 93 N. Y. Supp. 76.

The failure of the bankrupt to avail himself of the statute does not in any manner authorize the enforcement of a

ment which was discharged by the ruptcy proceedings. Leo v. Joseph 0) 56 Hun, 644, 9 N. Y. Supp. 612. the judgment creditor is aggrieved ne granting of a motion for cancel- n, the proper practice is for him ppeal from the order, or ask leave eargue, but not to move to vacate McKee v. Preble (1912) 154 App. 156, 138 N. Y. Supp. 915.

REVIVAL OF DEBTS BARRED BY DISCHARGE

Validity and consideration of new ise.—The moral obligation of a rupt to pay his debts furnishes a cient consideration for a new prom- to pay a debt provable and dis- geable in bankruptcy, and such a ise, given unequivocally, is binding ne debtor. Zavelo v. Reeves (1913) U. S. 625, 33 Sup. Ct. 365, 57 L. 876, 29 Am. Bankr. Rep. 493; Mu- Reserve Fund Life Ass'n v. Beatty C. A. 1899) 93 Fed. 747, 35 C. C. 73, 2 Am. Bankr. Rep. 244; Lam- v. Schmalz (1897) 118 Cal. 33, 50 13; Old Town Nat. Bank v. Par- (1913) 121 Md. 61, 87 Atl. 1105; e Burton (D. C. 1886) 29 Fed. German Exchange Bank v. Schnit- (1911) 72 Misc. Rep. 362, 130 N. upp. 223; Stern v. Bradner, Smith o. (1906) 127 Ill. App. 640; An- y v. Sturdivant (1911) 174 Ala. 56 South. 571; McNair v. Gilbert 9) 3 Wend. (N. Y.) 344; Post v. y (1887) 111 Ind. 74, 12 N. E. 121, m. Rep. 677; Craig v. Seitz (1886) Mich. 727, 30 N. W. 347; Ogden v. l (1877) 13 Bush (Ky.) 581; Ford idebottom (1883) 5 Ky. Law Rep. Ross v. Jordan (1879) 62 Ga. Carey v. Hess (1887) 112 Ind. 14 N. E. 235; Succession of An- a (1892) 44 La. Ann. 103, 10 South. Way v. Sperry (1850) 6 Cush. s.) 238, 52 Am. Dec. 779; Ed- ls v. Nelson (1883) 51 Mich. 121, N. W. 261; Wislizenus v. O'Fallon 6) 91 Mo. 184, 3 S. W. 837; Sec- Nat. Bank v. Wood (1879) 59 N. 407; Hobaugh v. Murphy (1886) Pa. 358, 7 Atl. 139; Murphy v. wford (1886) 114 Pa. 496, 7 Atl. Wells v. Mace (1845) 17 Vt. 503; zens' Nat. Bank v. Kerney (Ind. 1915) 108 N. E. 139; Cauley v. n (N. C. 1914) 83 S. E. 16.

ch new promise may be enforced, vithstanding the discharge of the krupt, in an action at law or any r proper form of proceeding. Tor- . Krauss (1907) 149 Ala. 200, 43 h. 184; Hill v. Trainer (1880) 49 537, 5 N. W. 926; Egbert v. Mc- ael (1848) 9 B. Mon. (Ky.) 44; iams v. Robbins (1850) 32 Me. Briggs v. Sutton (1846) 20 N. J. , 581; Hopkins v. Ward (1876) 67 o. (N. Y.) 452; Kearns v. Boyle 9) 13 Phila. (Pa.) 193; Katz v. ssenger (1884) 110 Ill. 372.

here a debtor, having been discharged in bankruptcy, gives his note to a particular creditor for the unpaid balance of the latter's claim, the moral obligation to pay constitutes a sufficient consideration for the note and will support an action on it. Wislizenus v. O'Fallon (1886) 91 Mo. 184, 3 S. W. 837; Succession of Andrieu (1892) 44 La. Ann. 103, 10 South. 388.

It is immaterial that the debtor's discharge was obtained by means of a composition with the creditors; there still remains a moral obligation to pay the balance of their claims which will support a new promise. In re Merriman (D. C. 1878) 44 Conn. 587, Fed. Cas. No. 9,479; Cohen v. Lachenmaier (1912) 147 Wis. 649, 133 N. W. 1099.

Where a new consideration is given by the creditor, such as his forbearance for a definite time to foreclose a mortgage, this will support a new promise to pay the original debt. Stapp v. Thomas (1884) 5 Ky. Law Rep. 603; Thornberry's Adm'r v. Dils (1882) 80 Ky. 241.

It is no objection to the enforcement of a promise to pay a debt discharged by bankruptcy that the debtor has selected some one or more of his creditors to be paid, to the exclusion of others. Thal v. Larmon (C. C. 1885) 25 Fed. 290.

The claim of a surety on a note which was not due at the time of the proceedings in bankruptcy may be revived by a new promise to pay it. Cheney v. Barge (1888) 26 Ill. App. 182.

The fact that the promisee had also been adjudged a bankrupt at the time the promise was made does not affect the validity of the promise. Swan v. Lullman (1882) 12 Mo. App. 584.

Where the partners in a firm had obtained their discharge in bankruptcy, and one of the partners, who had not surrendered a part of his separate property, agreed with a firm creditor to pay his claim, the partner, on paying it, cannot recover from his copartner unless the latter agreed to pay a moiety of the claim. Tyler v. Taylor (1872) 21 Grat. (Va.) 700.

40. To whom promise may be made.—A new promise to pay a debt discharged by bankruptcy is not enforceable or binding on the debtor unless made either to the creditor personally or to an accredited agent or attorney of his. Prewett v. Caruthers (1849) 12 Smedes & M. (Miss.) 491; Underwood v. Eastman (1847) 18 N. H. 582; Moseley v. Coldwell (1873) 3 Baxt. (Tenn.) 208; Stewart v. Reckless (1854) 24 N. J. Law, 427; Jones v. Talbott (1891) 13 Ky. Law Rep. 303.

Such a promise is equally binding and effective when made to a third person, —at least, a person who has some connection with the creditor and may be expected to repeat it to him, provided it identifies the debt intended with certainty and is definite and unequivocal. Bennett v. Everett (1855) 3 R. I. 152,

67 Am. Dec. 498; Evans v. Carey (1856) 29 Ala. 99; McKinley v. O'Keson (1847) 5 Pa. 369.

If the promise is made (whether verbally or in writing) to the creditor's attorney or to an agent authorized to act for him either in the particular matter or in similar matters in general, it may be enforced by the creditor. Underwood v. Eastman (1847) 18 N. H. 582; Hunt v. Jones (1891) 1 Ind. App. 545, 28 N. E. 98; Shaw v. Burney (1882) 86 N. C. 331, 41 Am. Rep. 461; Bolton v. King (1884) 105 Pa. 78; Hill v. Kendall (1853) 25 Vt. 528.

Where the agent of the holder of a note has the note in his possession, and does not know that a renewal note has been given therefor, a new promise to the agent will remove the bar of the discharge in bankruptcy. Jones v. Sennott (1885) 57 Vt. 355.

A collector to whom the debt has been committed for collection is the agent of the creditor for the purpose of receiving a new promise to pay it. Reith v. Lullman (1881) 11 Mo. App. 254. The wife of the creditor may act as his agent in such a matter, where the debt grew out of the sale of the wife's land. Jones v. Talbott (1891) 13 Ky. Law Rep. 303. The promise is considered as made to the creditor himself where it is transmitted to him by a person appointed for that purpose by the debtor. Hockett v. Jones (1880) 70 Ind. 227.

Where a bankrupt executed a written promise, intended to be binding on his executors as well as himself, to pay a note which had been released by his discharge, and handed the paper to his son, with directions to deliver it after his death, to the payee of the note, it was held that the latter, on receipt of the agreement, had a claim against the estate of the decedent, though he had no knowledge of the agreement when it was made. Hockett v. Jones (1880) 70 Ind. 227.

41. Time of making promise.—A new promise to pay a debt dischargeable in bankruptcy must have been made after the adjudication in bankruptcy. Stebbins v. Sherman (1850) 3 N. Y. Super. Ct. 510. But see Kingston v. Wharton (1816) 2 Serg. & R. (Pa.) 208. Or at least after the filing of the petition in bankruptcy. Katz v. Moessenger (1880) 7 Ill. App. 536; Stern v. Nussbaum (1874) 47 How. Prac. (N. Y.) 489. But a letter written by the debtor before the petition in bankruptcy was actually filed, but which, in the ordinary course of the mail, would not reach the creditor until after the adjudication, was held a sufficient new promise. Cheney v. Barge (1888) 26 Ill. App. 182.

A new promise to pay a debt dischargeable in bankruptcy is binding and sufficient if made after the filing of the petition in bankruptcy and pending the proceedings, though before the discharge is granted. Zavelo v. Reeves (1913) 227 U. S. 625, 33 Sup. Ct. 36 57 L. Ed. 676, 29 Am. Bankr. Re 493; Old Town Nat. Bank v. Parke (1913) 121 Md. 61, 87 Atl. 1105; Moor v. Trounstine (1906) 126 Ga. 116, 5 S. E. 810, 7 Ann. Cas. 971; Dicks v Andrews (1909) 132 Ga. 601, 64 S. E 788; Pearsall v. Tabour (1906) 9 Minn. 248, 108 N. W. 808; Wiggin v Hodgdon (1884) 63 N. H. 39; Jerse City Ins. Co. v. Archer (1890) 12 N. Y. 376, 25 N. E. 338; Fraley v Kelly (1872) 67 N. C. 78; Hornth v. McRae (1872) 67 N. C. 21; Gri v. Solomon (1886) 82 Ala. 85, 2 Soutl 322, 60 Am. Rep. 733; Lanagin v. Now land (1884) 44 Ark. 84; Knapp v. Ho (1881) 57 Iowa, 591, 10 N. W. 92 42 Am. Rep. 59; Corliss v. Shepher (1848) 28 Me. 550; Otis v. Gazli (1850) 31 Me. 567; Wheeler v. Whee er (1888) 28 Ill. App. 385; Thornberr v. Dils (1882) 3 Ky. Law Rep. 72 CONTRA, Thornton v. Nichols & Lem on (1903) 119 Ga. 50, 45 S. E. 78 Ogden v. Redd (1877) 13 Bush (Ky. 581; Graves v. McGuire (1881) 79 K 532; Chapman v. Pennie (Cal. 1895 39 Pac. 14; Holt v. Akarman (N. 1913) 86 Atl. 408.

It is necessary that the new promis should show distinctly that the bank rupt undertakes personally to pay th debt, and not to pay it out of his es tate in bankruptcy. Hornthal v. McRa (1872) 67 N. C. 21; Kirkpatrick v Tattersall, 13 Mees. & W. 766.

A defense of a discharge in bankrupt cy, set up in a pending action, may b waived by the making of a new promis to pay the debt, given after the institu tion of the suit and before verdic Decker v. Kitchen (1884) 33 Hun (N Y.) 268.

42. Sufficiency of new promise.—While no particular form of words i necessary in order to constitute an ef fective new promise to pay a debt bar red by a discharge in bankruptcy, ye it is required that the new promise shal be clear, distinct, and unequivocal, a well as certain and unambiguous. Al len v. Ferguson (1873) 18 Wall. 1, 2 L. Ed. 851; Stern v. Bradner Smit & Co. (1907) 225 Ill. 430, 80 N. E 307, 116 Am. St. Rep. 151; Brooks v Paine (1903) 77 S. W. 190, 25 K Law Rep. 1125; Apperson v. Stewar (1872) 27 Ark. 619; Shockey v. Mill (1880) 71 Ind. 288, 36 Am. Rep. 196 Hubbard v. Farrell (1882) 87 Ind. 215 Jersey City Ins. Co. v. Archer (1890 122 N. Y. 376, 25 N. E. 338; Ster v. Nussbaum (1874) 5 Daly (N. Y. 382; Riggs v. Roberts (1881) 85 N. C 151, 39 Am. Rep. 692; Turner v. Chris man (1851) 20 Ohio, 332; Huffma v. Johns (Pa. 1886) 6 Atl. 205; Mur phy v. Crawford (1886) 114 Pa. 49 7 Atl. 142; McDougall v. Page (1882 55 Vt. 187, 45 Am. Rep. 602; La Tour rette v. Price (1855) 28 Miss. 702 Wheeler v. Simmons (1891) 60 Hu 404, 15 N. Y. Supp. 462. Where th

dant, some days after obtaining scharge in bankruptcy, wrote the iff a letter in which he said: "I end you the first 'V' or 'X' I ' it was held that the expression t fairly import an absolute prom- pay five or ten dollars, and did ke the plaintiff's debt out of the of defendant's discharge. Bige- . Norris (1886) 141 Mass. 14, 6 88. But a sufficient new promise ade out from the following words, n to a surety on a note given e bankrupt for borrowed money: live and am prospered, no man elped me (without remuneration) e the poorer for me, if not other- That is all there is of it." Che- . Barge (1888) 26 Ill. App. 182.

re must be an express promise to the specific debt. Needham v. ewson (1909) 81 Kan. 340, 105 436. There must be a distinct nition and renewal of the debt as ding obligation. Allen v. Fergu- 1873) 18 Wall. 1, 21 L. Ed. 851; n v. Lamon (1885) 103 Ind. 515, E. 159, 53 Am. Rep. 540; Brewer ynton (1888) 71 Mich. 254, 39 . 49; Canfield's Appeal (1874) 4 (Pa.) 457.

h statements as the following been held sufficient: "I am going y you every dollar I owe you by st of July." St. John v. Stephen- 1878) 90 Ill. 82. "I will pay him day; can't say when." Bolton g (1884) 105 Pa. 78. "Your debt pay if I live." Fraley v. Kelly) 79 N. C. 348. "I will pay the Hunt v. Jones (1891) 1 Ind. 545, 28 N. E. 98; Farmers' & anics' Bank v. Richards (1906) 119 App. 18, 95 S. W. 290. "I will he debt before I leave the state." v. Talbott (1891) 13 Ky. Law 303. "The creditor shall have her y, even if it is but a little at a Sundling v. Willey (1905) 19 293, 103 N. W. 38, 9 Ann. Cas.

sufficient new promise cannot be out from such expressions as that ebtor is "going" to pay the debt, xpects" to pay it, or means to e it all right," or does not intend the creditor shall lose anything. v. Ferguson (1873) 18 Wall. 1, Ed. 854; Dennan v. Gould (1886) Mass. 16, 6 N. E. 222; Brewer v. ton (1888) 71 Mich. 254, 39 N. W. Meech v. Lamon (1885) 103 Ind. 3 N. E. 159, 53 Am. Rep. 540; tts v. Cotherson (1879) 3 Ill. 644; Shockey v. Mills (1880) d. 288, 36 Am. Rep. 196; Jones lbott (1891) 13 Ky. Law Rep. Porter v. Porter (1850) 31 Me. Riggs v. Roberts (1881) 85 N. C. 39 Am. Rep. 692; Turner v. man (1851) 20 Ohio, 332; Yoxt- r v. Keyser (1849) 11 Pa. 364, n. Dec. 555; Coe v. Rosene (1911) ash. 73, 118 Pac. 881, 38 L. R. A. S.) 577, Ann. Cas. 1913C, 741; Bartlett v. Peck (1850) 5 La. Ann. 669. But compare Mordaunt v. Monroe (1906) 124 Ill. App. 306; Hubbard v. Farrell (1882) 87 Ind. 215.

A sufficient new promise cannot be made out from the recognition by the bankrupt of a moral obligation resting on him. Mandell v. Levy (1905) 47 Misc. Rep. 147, 93 N. Y. Supp. 545. Nor from his declaration that "when I am in position to pay, there is no one I would more cheerfully pay." Kiernan v. Fox (1899) 43 App. Div. 58, 59 N. Y. Supp. 330. Nor from his statement: "I will make a desperate effort to pay you something on the note." Moore v. Trounstine (1906) 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971. Nor from his saying: "I will do all I can to pay you." Holt v. Akarman (N. J. 1913) 86 Atl. 408; Lawrence v. Harrington (1890) 122 N. Y. 408, 25 N. E. 406.

The new promise must be express and cannot be made out by implication. Evans v. Carey (1856) 29 Ala. 99; Willetts v. Cotherson (1879) 3 Ill. App. 644; Katz v. Moessenger (1884) 110 Ill. 372; Porter v. Porter (1850) 31 Me. 169; Stark v. Stinson (1851) 23 N. H. 259; In re Heazelton (1874) 32 Leg. Int. (Pa.) 13; Bennett v. Everett (1855) 3 R. I. 152, 67 Am. Dec. 498. At least the promise must be so far unqualified as necessarily to authorize the implication of an undertaking to pay the debt. Craig v. Seitz (1886) 63 Mich. 347, 30 N. W. 347.

There must be a clear and certain identification of the particular debt which the bankrupt has in mind and means to revive. Landis v. Roth (1885) 109 Pa. 621, 1 Atl. 49, 58 Am. Rep. 747; Hobough v. Murphy (1886) 114 Pa. 358, 7 Atl. 139. A written promise to pay a debt due from a bankrupt, made after his being adjudged a bankrupt, but prior to his discharge, need not describe the debt, where there is only one debt. Goldstein v. Saur (Tex. Civ. App. 1913) 162 S. W. 441.

The giving of a new note by the bankrupt, after his discharge, in renewal of a previous note, or simply for the amount of a pre-existing debt, will revive the debt and take it out of the effect of the discharge. Christie v. Bridgman (1893) 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Bown v. Thompson (Pa. 1876) 34 Leg. Int. 305; Lawrence v. Harrington (1890) 122 N. Y. 408, 25 N. E. 406. But not a mere unfulfilled offer or promise to give a new note. Porter v. Porter (1850) 31 Me. 169; Stern v. Bradner Smith & Co. (1906) 127 Ill. App. 640.

Where the defendant in a pending suit pleads his bankruptcy, but afterwards withdraws the plea and confesses judgment, this will amount to a new promise binding him on the judgment. Anderson v. Clark (1883) 70 Ga. 362; Dewey v. Moyer (1878) 72 N. Y. 70.

The fact that the debtor, after his discharge, states an account running prior to such discharge and fixes a cer-

tain balance, and agrees that his debtor may apply certain demands in his favor, does not avoid the effect of the discharge. Warren v. Bishop (1850) 22 Vt. 607; In re Heazelton (1874) 1 Wkly. Notes Cas. (Pa.) 67.

If there is contradictory evidence as to the making of the alleged new promise, or its terms, or as to the debtor's intention to bind himself to a specific promise to pay the debt, these questions must be left to the jury under proper instructions from the court. Pearsall v. Tabour (1906) 98 Minn. 248, 108 N. W. 808; Pratt v. Russell (1851) 7 Cush. (Mass.) 462; Shaw v. Burney (1882) 86 N. C. 331, 41 Am. Rep. 461.

43. —— **Part payment.**—Neither a payment of interest nor a part payment of the principal will suffice to revive a debt from which the debtor has been released by a discharge in bankruptcy or constitute a new promise to pay it. Allen v. Ferguson (1873) 18 Wall. 1, 21 L. Ed. 854; Meyer v. Bartels (1907) 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Stern v. Bradner Smith & Co. (1907) 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Wilson v. Chandler (1907) 133 Ill. App. 622; Jacobs v. Carpenter (1894) 161 Mass. 16, 36 N. E. 676; Heim v. Chapman (1898) 171 Mass. 347, 50 N. E. 529; Griel v. Solomon (1886) 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Stark v. Stinson (1851) 23 N. H. 259; Wheeler v. Simmons (1891) 60 Hun, 404, 15 N. Y. Supp. 462; Lawrence v. Harrington (1890) 122 N. Y. 408, 25 N. E. 406; Viele v. Ogilvie (1849) 2 G. Greene (Iowa) 326; Tolle v. Smith (1895) 98 Ky. 464, 33 S. W. 410.

Where there is a distinct and unambiguous promise, together with a partial payment, it fully and in every particular complies with the rule for the revival of a discharged debt. Huffman v. Johns (Pa. 1886) 6 Atl. 205; Lawrence v. Harrington (1888) 48 Hun, 618, 1 N. Y. Supp. 577.

Under Kirby's Dig. Ark. § 3655, part payment and oral promise to pay balance of note held not a waiver of discharge in bankruptcy. Polk v. Stephens (Ark. 1915) 176 S. W. 689.

No such promise can be made out from the fact that the debtor, in authorizing the creditor to draw on him for part of the original debt, said that he "hoped" to pay the balance in full. Scheper v. Briggs (1898) 28 App. Div. 115, 50 N. Y. Supp. 869.

The fact of part payment is admissible to identify the debt in reference to which an express promise to pay, otherwise of uncertain application, may be proved. Willetts v. Cotherson (1879) 3 Ill. App. 644.

44. —— **Written or oral promise.**—At common law, it does not need a written promise to revive a debt discharged by bankruptcy, but a merely oral promise will be sufficient for the purpose if distinct and positive. Mut Reserve Fund Life Ass'n v. Bes (1899) 93 Fed. 747, 35 C. C. A. 573 Am. Bankr. Rep. 244; Smith v. Stan field (1901) 84 Minn. 343, 87 N. 917; Farmers' & Merchants' Bank Richards (1906) 119 Mo. App. 18, S. W. 290; Blanc v. Banks (18 10 Rob. (La.) 115, 43 Am. Dec. 1 Worthington v. De Bardlekin (18 33 Ark. 651; Ross v. Jordan (18 62 Ga. 298; Craig v. Seitz (1886) Mich. 727, 30 N. W. 347; Henley Lanier (1876) 75 N. C. 172, 15 N. R. 280; Kull v. Farmer (1878) 78 C. 339; Lanier v. Tolleson (1883) S. C. 57; Farmers' & Mechanics' B v. Flint (1845) 17 Vt. 508, 44 A Dec. 351; Barron v. Benedict (18 44 Vt. 518; Holt v. Akarman (N. 1913) 86 Atl. 408. Compare Grab v. Hunt (1847) 8 B. Mon. (Ky.) 7.

In several states, the statutes p vide that no agreement or promise revive a debt barred by a discharge bankruptcy shall be binding and eff tive unless contained in some writ signed by the party to be charged. Spooner v. Russell (1849) 30 Me. 4 Otis v. Gazlin (1850) 31 Me. 5 Kingley v. Cousins (1860) 47 Me. Nathan v. Leland (1907) 193 Ma 576, 79 N. E. 793; Jacobs v. Carp ter (1894) 161 Mass. 16, 36 N. 676; Elwell v. Cumner (1883) Mass. 102; Bair v. Hilbert (1903) App. Div. 621, 82 N. Y. Supp. 10 Meyer v. Bartels (1907) 56 Misc. R 621, 107 N. Y. Supp. 778; Gruenb v. Treanor (1903) 40 Misc. Rep. 2 81 N. Y. Supp. 675; Mandell v. L (1905) 47 Misc. Rep. 147, 93 N. Supp. 545.

45. **Conditional promise.**—It is necessary that a new promise to a debt barred by a discharge in ba ruptcy should be absolute, but it n be made upon a condition or coup with a condition. Allen v. Fergu (1873) 18 Wall. 1, 21 L. Ed. 8 Knapp v. Hoyt (1881) 57 Iowa, 5 10 N. W. 925.

Where the condition is in the nat of a proposition offered to the credit it must be alleged and shown that accepted it or assented to it. Sm v. Stanchfield (1901) 84 Minn. 343, N. W. 917; International Harves Co. v. Lyman (1903) 90 Minn. 275, N. W. 87. If the creditor expres refuses to agree to the condition, insists on the immediate and uncon tional payment of his claim, the d is not revived and no action can maintained on it. International H vester Co. v. Lyman (1903) 90 Mi 275, 96 N. W. 87.

A condition accepted by the credi will not at all impair the effect of agreement in reviving the debt, as, example, where the bankrupt und takes to pay the debt if time is gra ed to him for the purpose and it is cordingly granted. Comfort v. Eis

(1849) 11 Pa. 13. Or where the upt promises to pay the debt in f the creditor will pay the taxes year on certain property, which e. Thornberry v. Dils (1882) 80 41.

romise to pay a particular cred- n full if he will refrain from op- g the bankrupt's application for a arge, or if he will dismiss a pro- g to set aside the discharge, is ulent and void. Tirrell v. Free- (1885) 139 Mass. 297, 1 N. E. Fell v. Cook (1876) 44 Iowa, 485. the condition was not in the na- of an election offered to the cred- but contained something personal e bankrupt, or involved the oc- nce of a future event or the fu- existence of a certain state of af- then it must be pleaded and n that the condition has been ful- or, as the case may be, that the has happened or that the con- lated state of affairs now exists. n v. Stanchfield (1901) 84 Minn. 87 N. W. 917; Stern v. Bradner h & Co. (1907) 225 Ill. 430, 80 N. 7, 116 Am. St. Rep. 151; Griel v. non (1886) 82 Ala. 85, 2 South. 60 Am. Rep. 733; Apperson v. art (1872) 27 Ark. 619; Tolle v. h (1895) 98 Ky. 464, 33 S. W. 410; v. Hollingsworth (1821) 5 Har. & Md.) 216; La Tourrette v. Price 5) 28 Miss. 702; Goldman v. Abra- (1880) 9 Daly (N. Y.) 223; er v. Tolleson (1883) 20 S. C. 57; man v. Hobart (1853) 26 Vt. 60; ing v. Moffitt (1844) 6 Ala. 776; ardson v. Bricker (1883) 7 Colo. Pac. 433, 49 Am. Rep. 344.

the bankrupt promises to pay the after the lapse of a certain time, ction can be maintained on the debt e new promise until such time has sed. Arnold v. Elliott (1846) 7 ph. (Tenn.) 354. The bankrupt's rtaking to pay the debt when he pletes a certain contract, when he cts certain claims due to him, when eturns from a contemplated jour- or the like, does not make the nise a conditional one, but is rather e regarded as a specification of the for payment. Eaton v. Yarbor- (1855) 19 Ga. 82; Swan v. Lull- (1882) 12 Mo. App. 584. A prom- o pay "as soon as possible," made r a discharge in bankruptcy, is not nditional promise. Sundling v. Wil- (1905) 19 S. D. 293, 103 N. W. 38, nn. Cas. 644. Where the bank- 's promise is that, if he had not a certain debt, contracted before bankruptcy, he would pay it, the itor has only to prove that the debt not been paid, and then the promise mes absolute. Hill v. Kendall 53) 25 Vt. 528. A promise that, if creditor should lose a certain case pending in the appellate court, the krupt would make it good to him, mes enforceable upon the deter- ation of the appeal adversely to the creditor. Herndon v. Givens (1849) 16 Ala. 261. A promise to do certain work and apply it on a debt discharged by bankruptcy cannot be construed into a promise to pay the debt in any other way. Lawrence v. Harrington (1890) 122 N. Y. 408, 25 N. E. 406. A promise to pay "as soon as I get through with that squaring up" is not sufficient to revive the debt, unless it is shown exactly what was meant by the "squaring up." Stern v. Nussbaum (1874) 5 Daly (N. Y.) 382.

A condition attached to the promise may be waived by the bankrupt, and will be considered as having been waived by his making payments on the debts prior to the happening of the condition. Tompkins v. Hazen (1898) 30 App. Div. 359, 51 N. Y. Supp. 1003. But see this case on appeal (1900) 165 N. Y. 18, 58 N. E. 762.

46. Promise to pay when able.—A promise by a discharged bankrupt to pay an antecedent debt as soon as he is able (or as soon as he can, or as soon as he has the money, or the like), though it is a conditional promise, is not void for uncertainty, but is capable of enforcement by suit. Kraus v. Torry (1905) 146 Ala. 548, 40 South. 956; Torry v. Krauss (1907) 149 Ala. 200, 43 South. 184; Griel v. Solomon (1886) 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Egbert v. McMichael (1848) 9 B. Mon. (Ky.) 44; Eckler v. Galbraith (1876) 12 Bush (Ky.) 71. Compare Bigelow v. Norris (1885) 139 Mass. 12, 29 N. E. 61; Elwell v. Cumner (1883) 136 Mass. 102.

In order to recover on such a promise, the creditor must plead and prove that the debtor is presently able to pay the debt. Patten v. Ellingwood (1850) 32 Me. 163; Green v. McGowan (1886) 7 Ky. Law Rep. 661; Taylor v. Nixon (1857) 4 Sneed (Tenn.) 352; Stern v. Gerber (Sup. 1912) 137 N. Y. Supp. 879; Torry v. Krauss (1907) 149 Ala. 200, 43 South. 184; Mason v. Hughart (1849) 9 B. Mon. (Ky.) 480. It is, however, no ground of demurrer to the declaration in such a suit that it does not state in what the defendant's ability to pay consists. Horner v. Speed (1857) 2 Pat. & H. (Va.) 616.

To sustain the burden of proving the debtor's ability to pay, the creditor must show his present possession of sufficient and available means. Proof of his ability to borrow the money is not sufficient. The defendant is entitled to show what portion of his earnings it is necessary for him to use for the support of himself and his family, and if the residue is insufficient to pay the debt, ability to pay is not shown. Kraus v. Torry (1905) 146 Ala. 548, 40 South. 956. And the law does not require the debtor to reduce his family expenditures to such a point that enough will remain to satisfy the creditor. Torry v. Krauss (1907) 149 Ala. 200, 43 South. 184. Though the plaintiff may show that the defendant has

sufficient property to pay the debt in suit, yet he cannot recover if it is shown that the payment of other just claims, contracted since his discharge in bankruptcy, would exhaust his estate and leave nothing for the plaintiff. Eckler v. Galbraith (1876) 12 Bush (Ky.) 71.

A promise clearly relating to financial ability at some future time will not sustain an immediate action. Samuel v. Cravens (1850) 10 Ark. 380.

The promise of an adjudicated bankrupt that, "just as soon as my counsel tells me my case is all cleaned up, I will place a policy * * * on my life in your favor, and as soon as I can get back in harness again will do all I can to pay you," falls short of an express promise to pay. Holt v. Akarman (N. J. 1913) 86 A. 408.

47. Remedies of creditor.—Where the new promise is made after the adjudication in bankruptcy, but before the end of the proceedings, the creditor cannot prove a claim on it in the bankruptcy. Kingston v. Wharton (1816) 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638. Nor sue on it until after the question of the bankrupt's discharge has been determined. Egbert v. McMichael (1848) 9 B. Mon. (Ky.) 44.

The fact that the creditor has proved the original debt in the bankruptcy proceedings, and received a dividend, does not prevent him from recovering the balance in an action on the new promise. Kingston v. Wharton (1816) 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638. And an express promise to pay part of a debt, discharged by the proceedings in bankruptcy, will revive the debt pro tanto. Badger v. Gilmore (1856) 33 N. H. 361, 66 Am. Dec. 729.

The original debt is revived only as of the date of the new promise, and where judgment is obtained upon the latter, the debtor is entitled to claim the exemption provided by law in force at the latter date. Willis v. Cushman (1888) 115 Ind. 100, 17 N. E. 168. Where he has agreed that work done by him for the creditor shall go towards the payment of the discharged debt, this constitutes a new promise to pay the debt, and he cannot maintain an action to recover the value of such work. Sampson v. Curtis (1855) 39 Me. 398.

The creditor may also recover interest on the original debt as well as the principal of it, where the bankrupt promised full payment, as the promise revives the debt on the original consideration. Stern v. Bradner Smith & Co. (1907) 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151.

Where the debt had been reduced to judgment, it is so far extinguished by the discharge in bankruptcy that the new promise to pay will not authorize the creditor at once to issue execution and sell the debtor's land, but he must first revive the judgment. Gra ham v. Dreutzer (1890) 75 Wis. 558, 4 N. W. 776, 17 Am. St. Rep. 205. No can he arrest the debtor and hold hi to bail. Glazier v. Stafford (1845) Har. (Del.) 240.

Where the original debt is in suc form as to be capable of assignment t a third person, the creditor may as sign the new promise with it, and s enable the assignee to sue on it. Wa v. Sperry (1850) 6 Cush. (Mass.) 23 52 Am. Dec. 779; Underwood v. East man (1847) 18 N. H. 582; Badger v Gilmore (1856) 33 N. H. 361, 66 An Dec. 729; Clark v. Atkinson (1853) E. D. Smith (N. Y.) 112; Wolffe v Eberlein (1883) 74 Ala. 99, 49 An Rep. 809. But compare White v. Cush ing (1849) 30 Me. 267; Wardwell v Foster (1850) 31 Me. 558; Moore v Viele (1830) 4 Wend. (N. Y.) 42 Walbridge v. Harroon (1846) 18 V 448.

Numerous cases hold that when th bankrupt has given a new promise suf ficient to revive a debt barred by hi discharge, the creditor, in bringing su for the recovery of the debt, must de clare on the original obligation or en gagement, and not on the new prom ise. Bush v. Stanley (1887) 122 Il 406, 13 N. E. 249; Gruenberg v Treanor (1903) 40 Misc. Rep. 232, 8 N. Y. Supp. 675; Turner v. Chrisma (1851) 20 Ohio, 332; Marshall v Tracy (1874) 74 Ill. 379; Apperso v. Stewart (1872) 27 Ark. 619; Badge v. Gilmore (1856) 33 N. H. 361, 66 An Dec. 729; Fraley v. Kelly (1872) 6 N. C. 78; Riggs v. Roberts (1881) 8 N. C. 151, 39 Am. Rep. 692; Duser bury v. Hoyt (1873) 53 N. Y. 521, 1 Am. Rep. 543. Other cases maintai that the original debt is extinguishe by the discharge, and the only caus of action is on the new promise. True man v. Fenton, 2 Cowp. 544; Post v Losey (1887) 111 Ind. 74, 12 N. E 121, 60 Am. Rep. 677; Murphy v Crawford (1886) 114 Pa. 496, 7 At 142; Hobough v. Murphy (1886) 11 Pa. 358, 7 Atl. 139; Bolton v. Kin (1884) 105 Pa. 78; Reeside v. Hadde (1849) 12 Pa. 243; Field's Estat (1830) 2 Rawle (Pa.) 351, 21 An Dec. 454; Chabot v. Tucker (1870 39 Cal. 434; Ross v. Jordan (187 62 Ga. 298; Fleming v. Lullman (1881 11 Mo. App. 104; Eckler v. Galbrait (1876) 12 Bush (Ky.) 71. Still othe decisions leave it to the election of th creditor which course he will pursu it being equally competent to him t sue directly on the new promise or t declare on the original debt and the plead the new promise in replication t the defendant's plea of his discharge i bankruptcy. Allen v. Ferguson (1873 18 Wall. 1, 21 L. Ed. 854; Torry v Krauss (1907) 149 Ala. 200, 43 Soutl 184; Horner v. Speed (1857) 2 Pa & H. (Va.) 616; Wolffe v. Eberlei

) 74 Ala. 99, 49 Am. Rep. 809; and v. Lanagan (1885) 45 Ark. Classen v. Schoenemann (1875) . 304, 16 N. B. R. 98; Turner v. man (1851) 20 Ohio, 332; Hub- v. Farrell (1882) 87 Ind. 215; er v. Russell (1849) 30 Me. 454; v. Seitz (1886) 63 Mich. 727, 30 . 347.

Burden of proof and evidence.— burden rests on the plaintiff in an , to prove a new promise to pay a released by the defendant's dis- e in bankruptcy, and this fact he establish by clear and satisfactory nce. Old Town Nat. Bank of more v. Parker (1913) 121 Md. 7 Atl. 1105; Goldstein v. Saur Civ. App. 1913) 162 S. W. 441; all v. Tabour (1906) 98 Minn. 248, . W. 808; Brooks v. Paine (1903) W. 190, 25 Ky. Law Rep. 1125; v. Solomon (1886) 82 Ala. 85, 2 . 322, 60 Am. Rep. 733; Badger lmore (1856) 33 N. H. 361, 66 Dec. 729; Spaulding v. Vincent) 24 Vt. 501; Haines v. Stauffer) 13 Pa. 541, 53 Am. Dec. 493; Dye v. Bertram, 6 Am. Law Rep. 355; Atwood v. Gillett (1846) 2 Doug. (Mich.) 206.

The proof must correspond with the allegations of the declaration, and if plaintiff alleges an unconditional promise of defendant to pay, proof of a conditional promise will not authorize a recovery. Buford v. Crigler (1886) 7 Ky. Law Rep. 662; Doom v. Snyder (1888) 10 Ky. Law Rep. 281. On any doubtful or conflicting testimony, the question whether a new promise was made must go to the jury. Bennett v. Bennett (1855) 3 R. I. 152, 67 Am. Dec. 498; United Society in Canterbury v. Winkley (1856) 7 Gray (Mass.) 460. If there is any doubt or ambiguity as to the debt to which the new promise was meant to apply, the plaintiff must identify it by strong and positive proof. Pearsall v. Tabour (1906) 98 Minn. 248, 108 N. W. 808. If the original debt was evidenced by a promissory note, the note itself may be given in evidence to show the consideration for the new promise. Egbert v. McMichael (1848) 9 B. Mon. (Ky.) 44.

CHAPTER FOUR

Courts and Procedure Therein

Sec.
Process, pleadings, and adjudications.
Jury trials.
Oaths, affirmations.
Evidence.
Reference of cases after adjudication.
Jurisdiction of United States and State courts.
9608. Jurisdiction of appellate courts.
9609. Appeals and writs of error.
9610. Arbitration of controversies.
9611. Compromises.
9612. Designation of newspapers.
9613. Offenses.
9614. Rules, forms, and orders.
9615. Computation of time.
9616. Transfer of cases.

502. (Act July 1, 1898, c. 541, § 18, as amended, Act Feb. 5, 1903, c. 487, § 6.) Process, pleadings, and adjudications.

rocess, Pleadings, and Adjudications.—a Upon the filing of a tion for involuntary bankruptcy, service thereof, with a writ ubpœna, shall be made upon the person therein named as de- ant in the same manner that service of such process is now had n the commencement of a suit in equity in the courts of the ted States, except that it shall be returnable within fifteen days, ss the judge shall for cause fix a longer time; but in case per- l service can not be made, then notice shall be given by publica- in the same manner and for the same time as provided by law for ce by publication in suits to enforce a legal or equitable lien in ts of the United States, except that, unless the judge shall other- direct, the order shall be published not more than once a week two consecutive weeks, and the return day shall be ten days after last publication unless the judge shall for cause fix a longer time. The bankrupt, or any creditor, may appear and plead to the tion within five days after the return day, or within such further as the court may allow.

All pleadings setting up matters of fact shall be verified under .

d If the bankrupt, or any of his creditors, shall appear, within t time limited, and controvert the facts alleged in the petition, the jud shall determine, as soon as may be, the issues presented by the plea ings, without the intervention of a jury, except in cases where a ju trial is given by this Act, and makes the adjudication or dismiss t petition.

e If on the last day within which pleadings may be filed none a filed by the bankrupt or any of his creditors, the judge shall on t next day, if present, or as soon thereafter as practicable, make t adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the di trict in which the petition is pending, on the next day after the la day on which pleadings may be filed, and none have been filed by t bankrupt or any of his creditors, the clerk shall forthwith refer t case to the referee.

g Upon the filing of a voluntary petition the judge shall hear t petition and make the adjudication or dismiss the petition. If t judge is absent from the district, or the division of the district in whi the petition is filed at the time of the filing, the clerk shall forthwi refer the case to the referee. (30 Stat. 551. 32 Stat. 798.)

Said subdivisions a and b were amended by Act Feb. 5, 1903, c. 487, § 6, cit above, to read as set forth here.

In this section, as originally enacted, subdivisions a and b were as follow

"a Upon the filing of a petition for involuntary bankruptcy, service there with a writ of subpœna, shall be made upon the person therein named as fendant in the same manner that service of such process is now had upon t commencement of a suit in equity in the courts of the United States, exce that it shall be returnable within fifteen days, unless the judge shall for ca fix a longer time; but in case personal service can not be made, then noti shall be given by publication in the same manner and for the same time as p vided by law for notice by publication in suits in equity in courts of the Unit States.

"b The bankrupt, or any creditor, may appear and plead to the petiti within ten days after the return day, or within such further time as the co may allow."

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, p vided that the act should not apply to bankruptcy cases pending when it to effect, but that such cases should be adjudicated and disposed of conformal to the provisions of the original act.

Notes of Decisions

1. Formal requisites of petition in bankruptcy.
2. —— In partnership cases.
3. Allegations of petition as to petitioning creditors and their claims.
4. —— Amenability of defendant to bankruptcy law.
5. —— Residence, domicile, or place of business.
6. —— Acts of bankruptcy.
7. —— Giving a preference.
8. —— Fraudulent transfer or concealment of property.
9. —— Suffering a preference through legal proceedings.
10. —— Appointment of receiver.
11. —— Multifarious and misjoined matter.
12. Signature and verification of petition.
13. —— By attorney or agent.
14. —— By officers or agents of corporation.
15. Amendment of petition.
16. —— Defects and omissions amendable.
17. —— Setting up new act of bankruptcy.
18. Filing and presenting petition.
19. Service of process.
20. Notice to creditors.
21. Parties.
22. —— Intervention and substitution of parties.
23. —— Persons entitled to oppose adju cation.
24. Answer and other pleadings.
25. —— Demurrer.
26. —— Replication.
27. —— Time for pleading.
28. Defenses and grounds of opposition.
29. —— Malicious or vexatious motives creditors.
30. Burden of proof and evidence.
31. Discontinuance and dismissal of p ceedings.
32. —— By consent or agreement of p ties.
33. —— Notice to creditors.
34. —— Reinstatement after dismissal.
35. Trial or hearing.
36. Adjudication.
37. —— Conclusiveness and effect.
38. —— Effect on status of bankrupt c poration.
39. —— Vacating and setting aside.

1. Formal requisites of petition bankruptcy. — A bankruptcy petiti must be addressed to the court auth ized by law to take cognizance of t case, as determined by the reside of the bankrupt. In re Mitchell (191

'ed. 690, 135 C. C. A. 362, affirm-
rder In re Mitchell & Co. (D. C.
211 Fed. 778.

itions in bankruptcy will not be
l on file nor considered unless
out on the prescribed printed
, written or typewritten petitions
returned to the parties without
. Mahoney v. Ward (D. C.
100 Fed. 278, 3 Am. Bankr. Rep.

s not a sufficient reason for re-
g a petition in bankruptcy that
etitioning creditor first wrote his
in the petition in an abbreviated
and that this was then erased
he name written in full. In re
m (D. C. 1842) Fed. Cas. No.

petition in bankruptcy filed before
romulgation of the official forms
e Supreme Court should not be
ssed for want of conformity there-
it the court will order a new pe-
, in the form prescribed, to be
nunc pro tunc, the original peti-
however, not to be withdrawn
the files. In re Ogles (D. C.
93 Fed. 426, 1 Am. Bankr. Rep.

creditor's petition in bankruptcy,
in fact an original petition, is not
ved of its character as such mere-
cause it contains a prayer by the
oner to intervene in earlier pro-
ngs, as a cautionary measure, in
that he might not be unrepre-
d in such earlier proceedings. In
aff (1905) 136 Fed. 78, 68 C. C.
6, 13 Am. Bankr. Rep. 362.

e court will consider a petition in
ruptcy as the joint act of all the
oners, and willful falsehood in one
oner's verification will cause the
ary dismissal of the petition as
raud of all, and no copetitioner's
r for an amendment will be heard.
Keiler (D. C. 1878) 18 N. B. R.
'ed. Cas. No. 7,647.

— In partnership cases.—In
edings in bankruptcy against a
ership, the general form for a
tors' petition should be used, with
adaptations as will meet the exi-
es of the particular case. Mather
e (D. C. 1899) 92 Fed. 333, 1 Am.
r. Rep. 504. And see In re Far-
D. C. 1902) 115 Fed. 359, 5 Am.
r. Rep. 266; In re Gay (D. C.
98 Fed. 870, 3 Am. Bankr. Rep.
In re Russell (D. C. 1899) 97
32, 3 Am. Bankr. Rep. 529.

ere a voluntary petition by part-
prays that "the petitioners" may
judged bankrupt, instead of "the
firm," but otherwise follows the
l form, the variance is not ma-
. In re Meyers (D. C. 1899) 97
757, 3 Am. Bankr. Rep. 260.

ceedings to adjudge a partner-
bankrupt, after its dissolution by
eath of one of the partners, are
nvalidated by the fact that the
on did not refer to the deceased
er, nor disclose that the partners
named were surviving partners, when the business was being continued as provided in the partnership articles. In re Coe (D. C. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618. And see Hawkins v. Quinette (1911) 156 Mo. App. 153, 136 S. W. 246.

A petition in bankruptcy, whether by or against the firm, should set out the individual names of all the partners. Adams v. May (C. C. 1885) 27 Fed. 907. This rule applies where one member of a firm files his own petition in bankruptcy, but with the object of obtaining a discharge from the firm debts as well as his individual debts. In re Laughlin (D. C. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1.

3. Allegations of petition as to petitioning creditors and their claims.—The allegation as to the number of the bankrupt's existing creditors need not be made as a direct assertion of fact, but may be made upon information and belief. In re Scammon (D. C. 1874) 10 N. B. R. 66, Fed. Cas. No. 12,430; In re Joliet Iron & Steel Co. (D. C. 1874) 10 N. B. R. 60, Fed. Cas. No. 7,436; In re Scammon (D. C. 1874) 11 N. B. R. 280, Fed. Cas. No. 12,429; In re Mann (C. C. 1876) 14 N. B. R. 572, Fed. Cas. No. 9,033; Perin & Gaff Mfg. Co. v. Peale (D. C. 1878) 17 N. B. R. 377, Fed. Cas. No. 10,981; In re Roberts (1880) 71 Me. 390.

The petition should allege that the claims of the petitioning creditors amount to the jurisdictional sum, but the want of such an averment may be cured by amendment. In re Pangborn (D. C. 1910) 185 Fed. 673, 26 Am. Bankr. Rep. 40; Roche v. Fox (D. C. 1877) 16 N. B. R. 461, Fed. Cas. No. 11,974; Ex parte Shouse (D. C. 1842) Fed. Cas. No. 12,815.

An allegation that the proposed bankrupt owes a debt, but not that it is due to the petitioning creditor, is insufficient. In re Western Sav. & Trust Co. (D. C. 1877) Fed. Cas. No. 17,442.

The particulars of the claims should be so far explained in the petition that the court may see, on the face of it, that they are provable debts. In re Farthing (D. C. 1913) 202 Fed. 557, 29 Am. Bankr. Rep. 732; In re Hadley (D. C. 1875) 12 N. B. R. 366, Fed. Cas. No. 5,894; In re Harmon (C. C. 1877) Fed. Cas. No. 6,078; In re White (D. C. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241.

The provision of section 9641, post, requiring the consideration of a claim to be set forth and sworn to, relates to the proof of the claim and not to the averments of the petition. In re Brett (D. C. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

The description of the several debts need not state whether they are secured or unsecured. In re Harmon (C. C. 1877) Fed. Cas. No. 6,078. An allegation that the indebtedness of the respondent to one of the petitioners was fraudulently contracted is imperti-

nent and should be stricken out on motion. In re Ewing (1902) 115 Fed. 707, 53 C. C. A. 289, 8 Am. Bankr. Rep. 269.

Where it is alleged that the claim is due, but the proof shows that it is owing but not yet due, the variance is not fatal, as the allegation was not necessary. Linn v. Smith (C. C. 1870) 4 N. B. R. 46, Fed. Cas. No. 8,375.

An allegation is sufficient which sets forth that the petitioning creditor is the owner of a promissory note, giving its date, made by the alleged bankrupt, payable to the order of said creditor in three months after date at a specified bank. In re Brett (D. C. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

An allegation is sufficient which avers that the claim of the creditor is for goods sold and delivered, and that the bankrupt purchased the same within a year from the date of the petition. In re Hark (D. C. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400.

Allegation in petition that claim of petitioning creditor was for money due on open account upon a stated account held not defective because of claimed inconsistency as to the nature of the account. Sabin v. Blake-McFall Co. (1915) 223 Fed. 501, 139 C. C. A. 49.

A debt sufficient to sustain the petition is not shown where the petitioner merely counts upon a judgment from which an appeal has been taken and is pending, with nothing to show the nature of his original claim, or that he would still have a provable debt if the judgment should be reversed. In re R. L. Radke Co. (D. C. 1911) 193 Fed. 735, 27 Am. Bankr. Rep. 950.

The petition is demurrable if it shows on its face that the claim of the petitioning creditor is barred by the statute of limitations. Id.

A petition in involuntary bankruptcy held insufficient, where it failed to show that the debts to petitioners were in existence at the time of the commission of an alleged act of bankruptcy by transfer and concealment of property with intent to defraud creditors. In re Stone (D. C. 1913) 206 Fed. 356.

Where the act of bankruptcy alleged in an involuntary petition is the making of a general assignment by the debtor, it is especially requisite that the petition should set out fully all facts which respect to the claim of petitioners, and show when they became creditors. In re Farthing (D. C. 1913) 202 Fed. 557.

4. —— Amenability of defendant to bankruptcy law.—A petition in involuntary bankruptcy must affirmatively show that the respondent is not within the excepted classes; and this may be done either by words of express negation or by such an allegation as to the nature of his (or its) business a will show plainly that the responden is not exempt from the operation o the statute. Armstrong v. Fernande (1908) 208 U. S. 324, 28 Sup. Ct. 41 52 L. Ed. 514, 19 Am. Bankr. Re 746; Conway v. German (1908) 16 Fed. 67, 91 C. C. A. 653, 21 An Bankr. Rep. 577; Edelstein v. U. S (1906) 149 Fed. 636, 79 C. C. A. 32 17 Am. Bankr. Rep. 649; In re Firs Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; I re Taylor (1900) 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515; I re Marion Contract & Const. Co. (D. C. 1909) 166 Fed. 618, 22 Am. Bank Rep. 81; In re Rutland Realty Co (D. C. 1907) 157 Fed. 296, 19 An Bankr. Rep. 546; Rise v. Bordner (D. C. 1905) 140 Fed. 506, 15 Am. Bank Rep. 297; In re Mero (D. C. 1904 128 Fed. 630, 12 Am. Bankr. Re 171; In re Callison (D. C. 1903) 13 Fed. 987, 12 Am. Bankr. Rep. 344; I re Bellah (D. C. 1902) 116 Fed. 69, Am. Bankr. Rep. 310; In re Bret (D. C. 1904) 130 Fed. 981, 12 An Bankr. Rep. 492; In re White (D. C 1905) 135 Fed. 199, 14 Am. Bankr. Re 241; McAfee v. Arnold & Mathi (1908) 155 Ala. 561, 46 South. 87 Sabin v. Blake-McFall Co. (1915) 22 Fed. 501, 139 C. C. A. 49.

The want of such an averment wi be ground for demurrer. Edelstein U. S. (1906) 149 Fed. 636, 79 C. C. A 328, 17 Am. Bankr. Rep. 649; In r First Nat. Bank (1907) 152 Fed. 6 81 C. C. A. 260, 18 Am. Bankr. Re 265; In re Taylor (1900) 102 Fe 728, 42 C. C. A. 1, 4 Am. Bankr. Re 515.

Such averment is not jurisdictiona In re Broadway Savings Trust C (1907) 152 Fed. 152, 81 C. C. A. 58, 1 Am. Bankr. Rep. 254; Conway v. Ge man (1908) 166 Fed. 67, 91 C. C. A 653, 21 Am. Bankr. Rep. 577; In r Marion Contract & Const. Co. (D. C 1909) 166 Fed. 618, 22 Am. Bank Rep. 81. But compare In re Elmir (Steel Co. (D. C. 1901) 109 Fed. 45 5 Am. Bankr. Rep. 484; In re Im perial Film Exchange (1912) 198 Fe 80, 117 C. C. A. 188, 28 Am. Bank Rep. 815.

The want of such averment may b cured by amendment. Armstrong Fernandez (1908) 208 U. S. 324, 2 Sup. Ct. 419, 52 L. Ed. 514, 19 An Bankr. Rep. 746; Conway v. Germa (1908) 166 Fed. 67, 91 C. C. A. 653, 2 Am. Bankr. Rep. 577; In re Fir Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 26 In re Marion Contract & Const. C (D. C. 1909) 166 Fed. 618, 22 An Bankr. Rep. 81; In re Bellah (D. C 1902) 116 Fed. 69, 8 Am. Bankr. Re 310; In re White (D. C. 1905) 13 Fed. 199, 14 Am. Bankr. Rep. 241.

If the parties go to trial on a pet

which is defective in this respect, out objection seasonably taken, an adjudication is made, the defect ured by the decree, and will not titute ground for setting aside the dication or impeaching it collater- In re First Nat. Bank (1907) Fed. 64, 81 C. C. A. 260, 18 Am. kr. Rep. 265; In re Stern (1902) Fed. 604, 54 C. C. A. 60, 8 Am. kr. Rep. 569.

a bankruptcy proceeding against m, a creditor's petition against an ed secret partner seeking to com- him to file schedules of assets and lities, but not alleging that he was vent, held not sustainable. In re uels (C. C. A. 1914) 215 Fed. 845, rsing decree In re Samuels & er (D. C. 1913) 207 Fed. 195.

e allegation that the respondent n involuntary petition owes debts e amount of $1,000 or over is in- ensable, and its omission leaves the t without jurisdiction. C. C. Taft v. Century Sav. Bank (1905) 141 369, 72 C. C. A. 671, 15 Am. kr. Rep. 594.

— Residence, domicile, or place usiness.—An allegation as to the or's "principal place of residence" not satisfy the statute, although a defect may be considered as aterial when the court has taken diction and granted a discharge. -Lewin v. Goold (1904) 113 Ill. 499, judgment affirmed (1904) Ill. 384, 71 N. E. 1028.

petition which states disjunctive- hat the respondent has had his cipal place of business, or has re- d, or has had his domicile, within district, is insufficient upon its face onfer jurisdiction. In re Laskaris, at. Bankr. News, 209.

a case of voluntary bankruptcy partnership, where the allegation esidence within the district as a nd of jurisdiction is false as to one he petitioning partners, the court have no jurisdiction as to any of . In re Beals (D. C. 1877) Fed. No. 1,165.

allegation, in a bankruptcy peti- as to the residence of three de- ants as individuals, held to suffi- ly show jurisdiction dependent on dence, both as to the individuals a partnership composed of them. e Mitchell & Co. (D. C. 1914) 211 778.

— Acts of bankruptcy.—It is ssary to allege the insolvency of respondent in all cases where in- ency is an essential element of the of bankruptcy charged and relied In re Lachenmaier (C. C. A. 1913) Fed. 32; In re Hammond (D. C.) 163 Fed. 548, 20 Am. Bankr. 776. In partnership cases it is enough to allege that the firm is vent, but there must also be an averment as to the solvency or insolvency of each of the partners. In re Blair (D. C. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588. CONTRA, In re Everybody's Grocery & Meat Market (D. C. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925.

A petition in bankruptcy is fatally defective if it fails to allege that the bankrupt has committed one or more of the acts of bankruptcy specified in the statute. In re Louisell Lumber Co. (1913) 209 Fed. 784, 126 C. C. A. 508. The petitioning creditors are not restricted to the allegation of a single act of bankruptcy, but they may include as many separate acts as they have knowledge of, provided they were all committed within the four months. Bradley Timber Co. v. White (1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; In re Nusbaum (D. C. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

The petition is fatally defective if it does not show that the act of bankruptcy charged was committed within four months prior to the filing of the petition. In re Louisell Lumber Co. (1913) 209 Fed. 784, 126 C. C. A. 508; Bradley Timber Co. v. White (1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; In re Muller (D. C. 1869) Fed. Cas. No. 9,912; Gross v. Potter (1860) 15 Gray (Mass.) 556.

It is not sufficient to charge the commission of an act of bankruptcy in the words of the statute, but there must be a specification of time, place, persons concerned, and other circumstances, such as to inform the respondent of the charge which he is to meet. In re Condon (1913) 209 Fed. 800, 126 C. C. A. 524; In re Pressed Steel Wagon Goods Co. (D. C. 1911) 193 Fed. 811, 27 Am. Bankr. Rep. 44; In re Cliffe (D. C. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Hark (D. C. 1905) 135 Fed. 604, 14 Am. Bankr. Rep. 400; In re Randall (D. C. 1870) 3 N. B. R. 18, Fed. Cas. No. 11,551; In re Nelson (D. C. 1899) 98 Fed. 76, 1 Am. Bankr. Rep. 63; Clark v. Henne & Meyer (1904) 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; In re Deer Creek Water & Water Power Co. (D. C. 1913) 205 Fed. 205, 29 Am. Bankr. Rep. 356; In re Stone (D. C. 1913) 206 Fed. 356, 30 Am. Bankr. Rep. 392; In re Sig. H. Rosenblatt & Co. (1912) 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401; In re Hallin (D. C. 1912) 199 Fed. 806, 28 Am. Bankr. Rep. 708.

Petitioning creditors are bound to as full a disclosure in their petition, in respect to the acts of bankruptcy charged, as their information enables them to make, supplemented by an explanation of its lack of completeness, so far as it may be thus lacking, and their case must rest on something more than rumor or vague hearsay or mere suspicion. In re Blumberg (D. C. 1904)

133 Fed. 845, 13 Am. Bankr. Rep. 343.

The statements made in a petition in involuntary bankruptcy in accordance with the form prescribed by the rules in bankruptcy, in which the petitioners "represent" certain facts to be true, are of matters which must necessarily be alleged on hearsay, and do not purport to be of facts to which the petitioners make oath as personal witnesses, and hence the statement in the petition that it is made on information and belief does not add to nor detract from the strength of the allegations made, nor is a statement, in the verification, that affiants believe the matters so alleged on information and belief to be true, ground for dismissing the petition, although improper in form. In re Ball (D. C. 1907) 156 Fed. 682, 19 Am. Bankr. Rep. 609.

7. —— **Giving a preference.**—Where the act of bankruptcy charged is the giving of a preference, it is necessary to aver that the transfer of property was made with the intent to prefer the particular creditor. In re Tupper (D. C. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; In re Hammond (D. C. 1908) 163 Fed. 548, 20 Am. Bankr. Rep. 776; In re Ewing (1902) 115 Fed. 707, 53 C. C. A. 289, 8 Am. Bankr. Rep. 269. The name of the preferred creditor must be alleged if known to the petitioners. In re Hadley (D. C. 1875) 12 N. B. R. 366, Fed. Cas. No. 5,894. Where a petition averred that the debtor, while insolvent, transferred and delivered a large number of good and collectible notes, of the value of over $5,000, to C. & Co. with intent to prefer them over other creditors, it was not objectionable for failure to charge that C. & Co. were creditors of the bankrupt. In re Vastbinder (D. C. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

An averment that the respondent paid money to one or more creditors with intent to prefer them is insufficient. In re Pure Milk Co. (D. C. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735. But if the petitioners do not know the name of the creditor preferred, the petition is good although it may only aver in general terms that the payment was made, adding a specific reason why a more particular allegation is not possible. In re Lackow (D. C. 1905) 140 Fed. 573, 14 Am. Bankr. Rep. 514.

The exact date of the preference should be alleged if known, but a petition which only shows that it was within the four months may be sustained as against a demurrer. In re Vastbinder (D. C. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

The property transferred, if other than money, should be particularly described, but an insufficient description of it, if not objected to by demurrer, may be cured by the evidence. First State Bank v. Haswell (1909) 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bank Rep. 330.

8. —— **Fraudulent transfer or con cealment of property.**—In alleging fraudulent transfer or concealment c property as an act of bankruptcy, th intent to hinder, delay, or defraud cred itors must be specifically charged. I re Heleker Bros. Mercantile Co. (I C. 1914) 216 Fed. 963; In re Tuppe (D. C. 1908) 163 Fed. 766, 20 An Bankr. Rep. 824. Or else facts an circumstances must be pleaded fro which such an intent may properly b inferred. In re White (D. C. 1905 135 Fed. 199, 14 Am. Bankr. Rep. 24

An allegation of a transfer of pro erty for an "improper consideration is not sufficient. In re Blumberg (I C. 1904) 133 Fed. 845, 13 Am. Bank Rep. 343. An allegation that claim due to the bankrupt were assigne without consideration, that suits there on have been commenced by the as signee, and that the assignments wer made to hinder and defraud creditor does not sufficiently charge an act c bankruptcy, because it does not ex clude the theory that the assignment were made merely for the purposes c collection. In re R. L. Radke Co. (I C. 1911) 193 Fed. 735, 27 Am. Bank Rep. 950.

The petition should state the partic ulars of any transfer alleged, describ ing the property transferred and whe and to whom the transfer was mad Conway v. German (1908) 166 Fe 67, 91 C. C. A. 653, 21 Am. Bank Rep. 577; In re Rosenblatt (C. C. A 1912) 193 Fed. 638, 28 Am. Bank Rep. 401. An act of bankruptcy b the fraudulent transfer of assets is suf ficiently charged by a petition whic alleges that, within four months befor the filing of the petition, the bankrup corporation permitted the two person who were its only stockholders to ap propriate portions of its property t their individual use. In re R. L. Radk Co. (D. C. 1911) 193 Fed. 735, 27 An Bankr. Rep. 950. So an averment i an involuntary petition that the de fendant, who was a merchant, commit ted an act of bankruptcy by conveyin a part of his property, consisting c real estate described, to a person nam ed, with intent to hinder, delay, an defraud his creditors, is sufficient. I re White (D. C. 1905) 135 Fed. 19 14 Am. Bankr. Rep. 241.

If the petitioners cannot obtain ex act knowledge of the details of an a leged fraudulent transfer, it is enoug if their allegation is as specific as the can make it. In re Mero (D. C. 1904 128 Fed. 630, 12 Am. Bankr. Rep. 17 In a case of removal and concealmen of property, the petitioners may stat that they have been unable to ascer tain to what place the goods have bee removed. In re Hark (D. C. 1905) 13 Fed. 604, 14 Am. Bankr. Rep. 400.

Where the evidence of a fraudulen

alment of assets is wholly circum-
ial, it is unnecessary to set out
recise details in the petition. In
ellah (D. C. 1902) 116 Fed. 69, 8
Bankr. Rep. 310. A charge that
espondent, at a certain time, re-
d a specific sum of money, and
he has ever since concealed it,
intent to hinder, delay, and de-
his creditors, is not defective for
g to set forth the manner and
ls of the concealment. In re Bel-
D. C. 1902) 116 Fed. 69, 8 Am.
r. Rep. 310.

—— Suffering a preference through proceedings.—Where the act of ruptcy alleged is the suffering a rence through legal proceedings, not sufficient to allege that the rupt suffered the recovery of a nent against him and had not "at five days before a sale or final sition of any property affected by preference vacated or discharged ame" (in the words of the stat- without alleging the issuance of an tion on the judgment, or the levy- thereof on any property of the r, and making no allegation of the of any proposed sale. In re ed Steel Wagon Goods Co. (D. 11) 193 Fed. 811, 27 Am. Bankr. 44. See In re Truitt (D. C. 203 Fed. 550, 29 Am. Bankr. 570.

is not enough to allege that at- nents have been issued and levied, "have not to the present time vacated." Seaboard Steel Cast- Co. v. William R. Trigg Co. (D. 03) 124 Fed. 75, 10 Am. Bankr. 594. It is not sufficient to al- that executions have been levied he bankrupt's property without g the further history of the ex- ons. In re Vastbinder (D. C. 126 Fed. 417, 11 Am. Bankr. 118.

bankruptcy petition alleging that lebtor was the owner of certain ibed real estate, and within four hs before the filing of the petition, insolvent, with intent to prefer in creditors, had transferred to by way of security his interest in by permitting confessed judg- s to be docketed against him, held fficiently charge the commission of econd act of bankruptcy. In re t (D. C. 1913) 203 Fed. 550.

petition which alleges that the rupt suffered and permitted certain tors to obtain a preference by ing a judgment to be rendered st him, and an attachment and ex- on issued thereon against the gar- e, and that judgment had been ned against the garnishee, is suffi- since the rendering of the judg- against the garnishee is as final position of the property as a sale execution. In re Fineman (D. 15) 223 Fed. 653.

10. —— Appointment of receiver.—Where the ground of the petition is the appointment of a receiver for the insolvent defendant on the ground of insolvency, it should allege the fact of the appointment, and show that it was made by a court of competent jurisdiction, and that the reason for the appointment was insolvency. In re Kennedy Tailoring Co. (D. C. 1909) 175 Fed. 871, 23 Am. Bankr. Rep. 656; Exploration Mercantile Co. v. Pacific Hardware & Steel Co. (1910) 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C. 1913) 206 Fed. 813, 30 Am. Bankr. Rep. 604.

Where a petition alleges as an act of bankruptcy that because of insolvency a receiver was put in charge of defendant's property and the order appointing the receiver does not state the grounds therefor, the record on which it was made must be referred to. In re Maplecroft Mills (D. C. 1914) 218 Fed. 659.

Allegation in an involuntary bankruptcy petition against a corporation, that it had made an assignment by filing a petition admitting its insolvency and inability to pay its debts and asking the appointment of a receiver, held an allegation that the corporation, being insolvent, applied for a receiver of its property. Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C. 1913) 206 Fed. 813.

Allegation that corporation permitted appointment of receiver because of insolvency, though its language was inartificial, held to allege an act of bankruptcy. In re Valentine Bohl Co. (1915) 224 Fed. 685, 140 C. C. A. 225.

11. —— Multifarious and misjoined matter.—It is improper to incorporate in a creditors' petition for an adjudication in bankruptcy allegations charging other creditors with having received voidable preferences, or a request for a warrant directing the marshal to seize and hold the debtor's property pending an adjudication, or a prayer for the seizure of property of the alleged bankrupt in the hands of adverse claimants, or for an injunction forbidding a third person having property of the respondent in his possession (such as a receiver appointed by a state court) to dispose of the same. All these are matters which can only be litigated in a separate proceeding. And hence such allegations and prayers are multifarious and will be stricken out, or treated as having been stricken. Mather v. Coe (D. C. 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671; In re Kelly (D. C. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306; In re Hadley (D. C. 1875) 12 N. B. R. 366, Fed. Cas. No. 5,894; Creditors v. Cozzens (D. C. 1869) 3 N. B. R. 281, Fed. Cas. No. 3,378; In re

Kintzing (D. C. 1869) 3 N. B. R. 217, Fed. Cas. No. 7,833.

12. Signature and verification of petition.—A petition in involuntary bankruptcy must be signed and verified in duplicate by the petitioning creditors. In re Bellah (D. C. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310. It must be signed and verified by each of the petitioning creditors separately and not by one for all. In re Simmons (D. C. 1874) 10 N. B. R. 253, Fed. Cas. No. 12,864. But a petition in bankruptcy is not subject to a motion to dismiss for want of jurisdiction because of a failure of one of the petitioners to verify it. Green River Deposit Bank v. Craig (D. C. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381. The verification of a petition must name the persons who swear to it, and although a creditor may have signed his name to the petition or to the verification, it is not sufficiently verified as to him unless his name is recited as being one of the persons who appeared and made the verification. In re Rosenfields (D. C. 1871) 11 N. B. R. 86, Fed. Cas. No. 12,061.

A petition in bankruptcy may be properly verified before a commissioner of deeds. In re Morse (D. C. 1914) 210 Fed. 900.

It is not a fatal defect that the notary public who took the verification was the bankrupt's own attorney. In re Kindt (D. C. 1900) 98 Fed. 403, 3 Am. Bankr. Rep. 443; In re Mauer (D. C. 1878) Fed. Cas. No. 9,304. The date of the jurat is not an essential part of the verification. In re Houghton (D. C. 1842) Fed. Cas. No. 6,727.

Jurisdiction attaches, upon the filing of the petition, and if the verification is insufficient or defective, the court may allow it to be amended, or, if it is not seasonably objected to, it will be cured by an adjudication. Green River Deposit Bank v. Craig (D. C. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; In re Simmons (D. C. 1874) 10 N. B. R. 253, Fed. Cas. No. 12,864; In re Donnelly (D. C. 1881) 5 Fed. 783; In re Getchell (D. C. 1875) Fed. Cas. No. 5,371.

Verification of a petition in bankruptcy on information and belief is insufficient. Sabin v. Blake-McFall Co. (1915) 223 Fed. 501, 139 C. C. A. 49. But the defect is not jurisdictional and may be cured by amendment. In re Farthing (D. C. 1913) 202 Fed. 557, 29 Am. Bankr. Rep. 732. Where an involuntary bankruptcy petition is heard on the merits without objection to the pleadings, the fact that one or more of them is verified on information and belief only is immaterial. Lackawanna Leather Co. v. La Porte Carriage Co. (C. C. A. 1914) 211 Fed. 318.

An objection to a petition in involuntary bankruptcy, on the ground of informality or insufficiency in its verification is waived by the tender of a plea and answer on the merits, and t respondent cannot afterwards have t proceedings dismissed on account such defect. Simonson v. Sinshein (1899) 95 Fed. 948, 37 C. C. A. 33 Leidigh Carriage Co. v. Stengel (189 95 Fed. 637, 37 C. C. A. 210, 2 A Bankr. Rep. 383; In re Simonson (C. 1899) 92 Fed. 904, 1 Am. Ban Rep. 197; In re Herzikopf (D. C. 190 118 Fed. 101, 9 Am. Bankr. Rep. 9 In re Chequasset Lumber Co. (D. 1901) 112 Fed. 56, 7 Am. Bankr. R 87; In re McNaughton (D. C. 1873) N. B. R. 44, Fed. Cas. No. 8,912; parte Jewett (D. C. 1875) 11 N. R. 443, Fed. Cas. No. 7,303.

Where a partnership is one of t petitioning creditors, the signing a verifying may be done for the firm one of its members. Walker v. Woo side (C. C. A. 1908) 164 Fed. 680, Am. Bankr. Rep. 132.

Where petition in bankruptcy w signed in firm name by partner pu chasing other partner's interest, pr ceeding held to be regarded as ins tuted by him individually doing busine in the firm name. In re Baker & E wards (D. C. 1915) 224 Fed. 611.

13. —— By attorney or agent.— petition in bankruptcy may be sign and verified for a petitioning credit by an attorney at law retained to re resent him in the proceedings, provi ed that the attorney has person knowledge of the facts directly alleg in the petition. In re Vastbinder (C. 1903) 126 Fed. 417, 11 Am. Ban Rep. 118; In re Hunt (D. C. 190 118 Fed. 282, 9 Am. Bankr. Rep. 25 In re Herzikopf (D. C. 1902) 118 Fe 101, 9 Am. Bankr. Rep. 90; In Raynor (C. C. 1873) 7 N. B. R. 52 Fed. Cas. No. 11,597. But in this ca the petition must state some good a sufficient reason why the creditor do not appear in person to sign and ve fy it, as that he is a nonresident or absent from the district. Rogers v. I Soto Placer Min. Co. (1905) 136 Fe 407, 69 C. C. A. 251, 14 Am. Ban Rep. 252; In re Hadley (D. C. 187 12 N. B. R. 366, Fed. Cas. No. 5,89 No other evidence of the attorney's a thority to act for his client need a pear than the fact that he has been a mitted to practice in the federal court In re Herzikopf (D. C. 1902) 118 Fe 101, 9 Am. Bankr. Rep. 90. Compa In re Sargent (D. C. 1875) 13 N. B. 144, Fed. Cas. No. 12,361. The fa that the attorney for a voluntary ban rupt, who signed the petition as su attorney, had not at that time been a mitted to practice in the district cou where the proceedings are brought, not a ground for dismissing the pet tion, but for an order, on notice to t bankrupt and the attorney, that t latter will no longer be recognized attorney in the case. In re O'Hallor (D. C. 1875) Fed. Cas. No. 10,463.

The petition may be signed and ve

on behalf of a creditor by an at-
ey in fact or an accredited agent.
d v. Wehl (C. C. 1881) 6 Fed. 163;
e California Pac. R. Co. (D. C.
) Fed. Cas. No. 2,315. But in
case, proof of his agency or of his
ess authority to do the particular
s necessary. In re Rosenfields (D.
871) 11 N. B. R. 86, Fed. Cas. No.
31. But if the petition is defec-
for failing to show such authority,
ay be amended. In re California
R. Co. (D. C. 1874) Fed. Cas. No.
5. Or supplementary proof may
eceived nunc pro tunc in the dis-
on of the court to establish the
ority of the agent. In re Rosen-
s (D. C. 1871) 11 N. B. R. 86, Fed.
No. 12,061.

—— **By officers or agents of cor-**
tion.—Where a corporation is a
ioning creditor, its name may be
ed and the petition verified for it
s attorney, by an agent, or by one
s officers duly authorized to act
t in this particular. In re Chequas-
Lumber Co. (D. C. 1901) 112 Fed.
7 Am. Bankr. Rep. 87; Walker v.
dside (C. C. A. 1908) 164 Fed.
21 Am. Bankr. Rep. 132; In re
h (D. C. 1902) 116 Fed. 69, 8 Am.
kr. Rep. 310; Merriam v. Sewall
7) 8 Gray (Mass.) 316. The au-
ty of an officer of a corporation to
and verify the petition must be
ally conferred by statute, by-law,
esolution of the directors, and must
ar on the face of the petition or
shown by evidence. In re Mc-
ghton (D. C. 1873) 8 N. B. R. 44,
Cas. No. 8,912; Roche v. Fox
C. 1877) 16 N. B. R. 461, Fed.
No. 11,974.

e president of a company has no
rent power to take the necessary
s to have the corporation adjudged
rupt, and hence a voluntary peti-
filed on behalf of the corporation,
signed and verified by the presi-
, but which fails to show that any
on had been taken by the board of
ctors authorizing the filing of the
ion, or empowering the president
xecute the petition in the name of
corporation, is insufficient to confer
diction on the court of bankruptcy.
e Jefferson Casket Co. (D. C. 1910)
Fed. 689, 25 Am. Bankr. Rep. 663.

. **Amendment of petition.**—The ref-
in bankruptcy has jurisdiction and
retion to order amendments to be
e in the petition and schedules of
luntary bankrupt referred to him,
articulars as to which he finds them
ctive or insufficient. In re Brum-
mp (D. C. 1899) 95 Fed. 814, 2
Bankr. Rep. 318.

a application for leave to amend is
lly defective if it does not state the
on for the error or defect sought
e amended, but the applicant may
granted time to supply this omis-
. In re Portner (D. C. 1907) 149
799, 18 Am. Bankr. Rep. 89.

The provision of General Order No. 11 (post, § 9614), with reference to allowing amendments, does not abrogate or restrict the general power of amendment in other respects vested in the courts of bankruptcy. In re Bellah (D. C. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; In re Hill (D. C. 1842) Fed. Cas. No. 6,485.

The privilege of amending a petition in bankruptcy rests in the sound judicial discretion of the court, which will not be interfered with on review unless an abuse of discretion is shown. Armstrong v. Fernandez (1908) 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514; Sabin v. Blake-McFall Co. (1915) 223 Fed. 501, 139 C. C. A. 49; In re Rosenblatt (C. C. A. 1912) 193 Fed. 638, 28 Am. Bankr. Rep. 401; Woolford v. Diamond State Steel Co. (D. C. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31.

Leave to amend a defective petition in involuntary bankruptcy should be denied where the amendment would not be in furtherance of justice nor in the interest of creditors. In re Farthing (D. C. 1913) 202 Fed. 557.

It is proper to refuse to allow an amendment as to jurisdictional facts, or one going to the very foundation of the proceeding. In re Wood (D. C. 1873) 13 N. B. R. 96, Fed. Cas. No. 17,935; In re Craft (C. C. 1868) 2 N. B. R. 111, Fed. Cas. No. 3,317; In re Farthing (D. C. 1913) 202 Fed. 557, 29 Am. Bankr. Rep. 732.

A creditor who has joined in the petition cannot object to an amendment thereof which is necessary to the prosecution of the same to final effect. In re Sargent (D. C. 1875) 13 N. B. R. 144, Fed. Cas. No. 12,361.

Amendments to a petition relate back to the time of the filing of the original petition, and have the same force and effect as if included in the petition itself. Millan v. Exchange Bank (1910) 183 Fed. 753, 106 C. C. A. 327, 24 Am. Bankr. Rep. 889; Ryan v. Hendricks (1908) 166 Fed. 94, 92 C. C. A. 78, 21 Am. Bankr. Rep. 570; Sherman v. International Bank (C. C. 1878) Fed. Cas. No. 12,765. For this reason, where a petition, sufficient in form to give the court jurisdiction, is filed within four months after the commission of the act of bankruptcy alleged, it is no sufficient objection to the allowance of an amendment that the four months have more than elapsed at the time the amendment is applied for. In re Shoesmith (1905) 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; International Bank v. Sherman (1879) 101 U. S. 403, 25 L. Ed. 866; Hark v. C. M. Allen Co. (1906) 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr. Rep. 3; In re Brown Commercial Car Co. (C. C. A. 1915) 227 Fed. 387. A petition in bankruptcy is amendable, and if the amendment does not set up new matter, or a new cause of action, the amended pleading will be regarded as a continuation of the original, and will

relate back so as to take effect as of the date the original was filed. In re Louisell Lumber Co. (1913) 209 Fed. 784, 126 C. C. A. 508. Where an involuntary bankruptcy petition was fatally defective prior to its amendment, the date of the amendment must be taken as the date from which the four months' period is to be calculated. In re Condon (1913) 209 Fed. 800, 126 C. C. A. 524, affirming judgment (D. C. 1912) 198 Fed. 947. If acts of bankruptcy charged in amended petition, filed more than four months after they were committed, were not mere enlargements and amendments, held, that they were not available. In re Brown Commercial Car Co. (C. C. A. 1915) 227 Fed. 387.

Amendments may be made in bankruptcy proceedings at any stage of the case, regardless of the time that has elapsed. In re Mercur (1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; In re Mercur (D. C. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275. But where petitioning creditors have delayed for nearly a year, without sufficient excuse, to correct an averment in their petition as to the residence of the debtor, their application to amend should be refused. In re Freudenfels (D. C. 1879) Fed. Cas. No. 5,112a. If otherwise meritorious, an amendment may be allowed after the sustaining of a demurrer to the petition. In re Riggs Restaurant Co. (1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; In re Brett (D. C. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492. Amendments may be made after the adjudication, as, on the trial of the issue before a jury, when the court has power to permit amendments to be made to cover the case shown by the evidence. In re Bininger (C. C. 1870) Fed. Cas. No. 1,420; In re Craft (C. C. 1868) Fed. Cas. No. 3,317.

16. —— Defects and omissions amendable.—Amendments to a petition in bankruptcy may be allowed to correct a mistake in the name of the alleged bankrupt. Gleason v. Smith (1906) 145 Fed. 895, 76 C. C. A. 427, 16 Am. Bankr. Rep. 602. Or in the allegation concerning his place of residence. In re Vanderhoef (D. C. 1878) 18 N. B. R. 543, Fed. Cas. No. 16,841. Or in the statement in regard to the length of time he has resided within the jurisdiction of the court. In re Elmira Steel Co. (D. C. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484. But a petition against a firm, naming only two of the three actual partners, cannot be amended so as to make the third a party after the testimony is taken and the cause is before the court on hearing. In re Pitt (D. C. 1876) Fed. Cas. No. 11,188. And the pendency of simultaneous proceedings against the individual members of a partnership do not necessarily bring the firm itself into court, so as to authorize an amendment calling for an adjudication agains it. In re Mercur (1903) 122 Fed. 38 58 C. C. A. 472, 10 Am. Bankr. Re 505. Where the petition is brough against an alleged partnership and it two members, but it appears tha there was no partnership in fact, an that the business was owned and th act of bankruptcy committed by on defendant individually, it is in the dis cretion of the court to permit the pe tition to be amended by dismissing a to the partnership and the other de fendant. In re Richardson (D. C 1911) 192 Fed. 50, 27 Am. Bankr. Re 590. Petition in involuntary bankrupt cy against a firm and partners may b amended, so as to proceed against partner acquiring the property of th firm on its dissolution as against a co partner obtaining claims after filing o petition. In re Young (D. C. 1915 223 Fed. 659.

If the petition does not show that th proposed bankrupt, whether a corpo ration or a natural person, is not with in the classes exempted from the oper ation of the bankruptcy law, the omis sion may be supplied by amendment Armstrong v. Fernandez (1908) 208 U S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514 19 Am. Bankr. Rep. 746; Conway v German (1908) 166 Fed. 67, 91 C. C A. 653, 21 Am. Bankr. Rep. 577; I re Marion Contract & Const. Co. (D C. 1909) 166 Fed. 618, 22 Am. Bankr Rep. 81; In re First Nat. Bank (1907 152 Fed. 64, 81 C. C. A. 260, 18 Am Bankr. Rep. 265; In re Plymouth Cordage Co. (1905) 135 Fed. 1000, 6 C. C. A. 434, 13 Am. Bankr. Rep. 665 In re Crenshaw (D. C. 1907) 156 Fed 638, 19 Am. Bankr. Rep. 502; Beach v. Macon Grocery Co. (1903) 120 Fed 736, 57 C. C. A. 150, 9 Am. Bankr Rep. 762; In re Bellah (D. C. 1902 116 Fed. 69, 8 Am. Bankr. Rep. 310 McAfee v. Arnold & Mathis (1908) 15 Ala. 561, 46 South. 870.

The petitioning creditors should show that their claims amount in the aggre gate to the jurisdictional minimum, bu the omission of this averment may be supplied by amendment. In re Scul (D. C. 1874) Fed. Cas. No. 12,568 In re McKibben (D. C. 1875) 12 N. B R. 97, Fed. Cas. No. 8,859; In re Blai (D. C. 1878) 17 N. B. R. 492, Fed Cas. No. 1,481. And an allegation o the nature and amount of their severa debts or claims may be added b amendment. In re White (D. C. 1905 135 Fed. 199, 14 Am. Bankr. Rep. 241 But an amended petition cannot se forth, as part of the indebtedness t the petitioning creditor, a note indors ed by the debtor which did not fall du until after the original petition wa filed. In re Morse (C. C. 1879) Fed Cas. No. 9,851. If the petition is in valid by reason of a defect in the verifi cation, it is amendable. In re Vast binder (D. C. 1903) 126 Fed. 417, 1 Am. Bankr. Rep. 118. And a clerica error in the jurat may be cured b

ıdment. In re Bellah (D. C. 1902) Fed. 69, 8 Am. Bankr. Rep. 310. tition which alleges the insolvency e debtor at the time of the filing he petition may be changed by ıdment so as to charge insolvency e date of the execution of the al- l preference. In re Pangborn (D. 910) 185 Fed. 673, 26 Am. Bankr. 40. But an amended petition, ex- ed as such by a creditor, to be filed proceedings previously instituted, ot thereafter and after the pro- ings have been dismissed by the t, be converted into an original pe- ı by striking out the word "amend- and so made the basis of a new independent proceeding. In re e & Gload Mfg. Co. (D. C. 1900) Fed. 617, 4 Am. Bankr. Rep. 602. e allegations in the petition con- ing the commission of an act of ruptcy may also be amended, e necessary, either in the way of g made more specific or in being e to conform more closely to the as developed. Thus, if these al- ions are vague, general, and lack- in detail, the particulars may be lied by amendment. In re Cliffe C. 1899) 94 Fed. 354, 2 Am. Bankr. 317; In re Nelson (D. C. 1899) ed. 76, 1 Am. Bankr. Rep. 63. the petition charges the commis- of an act of bankruptcy by a sfer of property with intent to er or defraud creditors, but it is loped at the hearing that the trans- was made in satisfaction of an ex- g debt or for a consideration, it is er for the court to permit an ıdment charging that the transfer made with intent to prefer the itor benefited by it. Hark v. C. M. ı Co. (1906) 146 Fed. 665, 77 C. . 91, 17 Am. Bankr. Rep. 3; In lark (D. C. 1905) 142 Fed. 279, 15 Bankr. Rep. 460; In re Henderson C. 1881) 9 Fed. 196.

. —— **Setting up new act of bank- cy.**—An amendment setting up a act of bankruptcy, not charged in original petition, is in the discre- of the court, and its allowance is improper, especially where the tes- ny at the trial or hearing plainly oses the commission of an act of ruptcy additional to that alleged e petition, and particularly if the f fails as to the act originally ged, so that the proceeding will be d and the ends of justice promoted ranting the amendment. Interna- l Bank v. Sherman (1879) 101 U. 03, 25 L. Ed. 866; Chicago Motor cle Co. v. American Oak Leather (1905) 141 Fed. 518, 72 C. C. A. 15 Am. Bankr. Rep. 804; In re rick (D. C. 1909) 175 Fed. 279, ım. Bankr. Rep. 721; In re Nus- ı (D. C. 1907) 152 Fed. 835, 18 Bankr. Rep. 598; In re Miller (D. 900) 104 Fed. 764, 5 Am. Bankr. 140; In re Lange (D. C. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; In re Mercur (D. C. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; In re Strait, 1 Nat. Bankr. News, 354; In re Gallinger (D. C. 1870) 4 N. B. R. 729, Fed. Cas. No. 5,202; Hardy v. Bininger, 4 N. B. R. 262, Fed. Cas. No. 6,057. An amendment may be allowed alleging any act of bankruptcy within the general scope of the facts set forth in the original petition. In re Irish (D. C. 1915) 228 Fed. 573. But it is necessary for the petitioning creditors, in order to obtain this privilege, to explain or excuse their omission to allege the new act of bankruptcy in their original petition. White v. Bradley Timber Co. (D. C. 1902) 116 Fed. 768, 8 Am. Bankr. Rep. 671; Wilder v. Watts (D. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57.

Numerous cases, however, rule that a new or entirely different act of bankruptcy cannot be introduced into the petition by an amendment. In re Pure Milk Co. (D. C. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Harris (D. C. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 204; In re Sears (1902) 117 Fed. 294, 54 C. C. A. 532, 8 Am. Bankr. Rep. 713; Reed v. Crowley (D. C. 1868) 1 N. B. R. 516, Fed. Cas. No. 11,644; In re Leonard (D. C. 1871) 4 N. B. R. 562, Fed. Cas. No. 8,255; Stern v. Schonfield (C. C. 1878) Fed. Cas. No. 13,377.

If the introduction of a new act of bankruptcy by amendment is permissible, it is wholly improper to permit an amendment of this kind where the new act of bankruptcy proposed to be set up was committed more than four months before the application for leave to amend, so that it could not be made the basis of a new original petition. In re Haff (1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; Walker v. Woodside (1908) 164 Fed. 680, 90 C. C. A. 644, 21 Am. Bankr. Rep. 132; In re Pure Milk Co. (D. C. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Perlhefter (D. C. 1910) 177 Fed. 299, 25 Am. Bankr. Rep. 576.

18. Filing and presenting petition.—Proceedings in involuntary bankruptcy take date from the filing of the petition, and not from the issuance of process or its service. In re Appel (D. C. 1900) 103 Fed. 931, 4 Am. Bankr. Rep. 722; In re Lewis (D. C. 1899) 91 Fed. 632, 1 Am. Bankr. Rep. 458; First Nat. Bank v. Masterson (1911) 29 Okl. 76, 116 Pac. 162.

The filing of a petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction. In re Schow (D. C. 1914) 213 Fed. 514; Hamilton v. Smith (1907) 36 Mont. 1, 92 Pac. 32, 122 Am. St. Rep. 330.

It is not necessary that the petition should be filed or presented to the court simultaneously with its execution; the fact that it was attested a number of

days before being filed affords no obstacle to its prosecution. In re Abrahams (D. C. 1842) Fed. Cas. No. 20.

All petitions are intended by the statute to be filed with the clerk of the court in which the proceeding is to be taken, and it is bad practice to send them directly to the judge or to present them to a referee. In re Sykes (D. C. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264. Relationship between the bankrupt and the deputy clerk of the court in whose office the petition was filed will be cause for transferring the cause to another seat of the court in the same district and division, and ordering the record to be filed and docketed in the office of the clerk of the court at the latter place. Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

A petition in bankruptcy is to be deemed "filed," within the meaning of the law, when it is delivered personally to the clerk of the court of bankruptcy and received by him for the purpose of being placed on file, although not at his office or during office hours. In re Von Borcke (D. C. 1899) 94 Fed. 352. See Franks v. Houston (1872) 9 Kan. 406. The time of filing does not date from the time when the clerk presents the petition to the judge for his action as to issuing an order to show cause. In re Bear (D. C. 1880) 5 Fed. 53.

Where a voluntary partnership petition in bankruptcy was signed, verified, and presented by all the members of the firm, and was accompanied by schedules of the firm's assets and debts, but not by any individual schedules, and no adjudication was made thereon, but subsequently the petition was in part withdrawn, and a new petition was filed, with parts of the old petition pasted thereon, and individual schedules of all the partners added by way of amendment, and thereupon an adjudication was made, it was held that the petition was "filed" on the later date and not the earlier. In re Washburn (D. C. 1900) 99 Fed. 84, 3 Am. Bankr. Rep. 585.

The clerk's indorsement on the petition of the day and hour of filing is evidence of the facts stated, and is for every legal purpose a certificate. In re Dean (D. C. 1868) 1 N. B. R. 249, Fed. Cas. No. 3,699. The record of the bankruptcy court showing that a petition was filed at a particular time is conclusive and cannot be contradicted by parol evidence. But if the recital as to the date of filing is actually incorrect, it may be made right by an order entered nunc pro tunc. Alabama & C. R. Co. v. Jones (C. C.) 7 N. B. R. 145, Fed. Cas. No. 127.

The requirement that petitions shall be filed in duplicate means that there shall be one petition in the form of two duplicate originals, each verified as prescribed, and both filed at the san time. In re Stevenson (D. C. 189 94 Fed. 110, 2 Am. Bankr. Rep. 6 In re Dupree (D. C. 1899) 97 Fe 28. Compare Millan v. Exchan Bank (1910) 183 Fed. 753, 106 C. A. 327, 24 Am. Bankr. Rep. 889. T omission of the petitioning credito to file both duplicates of the petiti within the time limited by the sta ute is not cured by the appearance the alleged bankrupt for the purpo of moving to dismiss the petition. re Stevenson (D. C. 1899) 94 Fed. 11 2 Am. Bankr. Rep. 66. Compare In Plymouth Cordage Co. (1905) 1 Fed. 1000, 68 C. C. A. 434, 13 A Bankr. Rep. 665. The power of allo ing amendments should not be exe cised so as to dispense with the r quirement that petitions shall be fil in duplicate within the four mont specified. In re Stevenson (D. C. 189 94 Fed. 110, 2 Am. Bankr. Rep. 6

An affidavit accompanying a volu tary petition in bankruptcy, stating th the petitioner has not the money to p the filing fees and cannot obtain it, prima facie evidence of the inabili of the petitioner to make the requi ed deposit of fees, and if, upon e amination as to his available mean proper inquiries being fairly answere it appears that there was no money property held by the petitioner at t institution of the proceedings, or o tainable through his individual earnin or efforts, the exemption from maki such deposit must be allowed and t case proceed. In re Levy (D. C. 190 101 Fed. 247.

19. Service of process.—If service process in a bankruptcy case is n effected before the return day, the p titioning creditors are entitled to ali and successive subpœnas until due ser ice is had. Gleason v. Smith, Perki & Co. (1906) 145 Fed. 895, 76 C. C. 427, 16 Am. Bankr. Rep. 602. There nothing to prevent service on the a leged bankrupt wherever he may found, though it is outside the distric Stuart v. Hines (1871) 33 Iowa, 6 Hills v. F. D. McKinniss Co. (D. 1910) 188 Fed. 1012, 26 Am. Bank Rep. 329.

Where the alleged bankrupt is a par nership, service of process on one me ber of the firm will give jurisdiction the firm and its property. Bail Hartman (1905) 9 Ariz. 321, 83 Pa 358.

Where the alleged bankrupt is a co poration, service is good if made any of its principal officers. In California Pac. R. Co. (D. C. 187 Fed. Cas. No. 2,315. Service may made on the cashier of a banking con pany. Platt v. Archer (C. C. 187 Fed. Cas. No. 11,213. In the case a foreign corporation, service may made on that officer of the state w has been appointed its attorney to r

service of process within the In re Magid-Hope Silk Co. (D. 01) 110 Fed. 352, 6 Am. Bankr. 610. If the corporation has been ved by decree of a state court, receiver appointed to wind up its s, service may be made by pub- on, as this is a case where the de- nt cannot be found. In re Wash- n Marine Ins. Co. (D. C. 1868) Cas. No. 17,246.

ile a defendant may ordinarily service of process, this cannot one in a bankruptcy proceeding, least it will not justify an adju- on before the return day of the because creditors have the right tervene and plead to the petition, hey must be allowed the full stat- time for that purpose. In re L. ert Co. (D. C. 1900) 100 Fed. 4 Am. Bankr. Rep. 76.

the defendant is temporarily ab- from the district, but has his ng house or usual place of abode n, the service may be made by g a copy there with some adult er of the family, as authorized e equity rules, this being a per- service within the meaning of the uptcy act. In re Norton (D. C. 148 Fed. 301, 17 Am. Bankr. 504.

validity of service was sustain- here it had been effected by leav- e subpœna and a copy of the pe- with the clerk of a hotel of which ankrupt was the proprietor and he usually resided, although, at ime, he was absent in another in the last stage of a fatal illness. Risteen (D. C. 1903) 122 Fed. 10 Am. Bankr. Rep. 494.

equity rule does not require the of the process to be left with a n within the dwelling-house, but is ied by a service at the door, out- the house. Phœnix Ins. Co. v. (C. C. 1880) 1 Fed. 775.

the case of bankruptcy proceedings st an absconding debtor, the law res the publication of an order nating a day on which the bank- is required to appear and answer, r, or plead; and where the order ublication did not designate a time appearance, and publication was of the citation issued by the clerk ting the marshal to summon the rupt, instead of the order for pub- on, it was held that this conferred risdiction on the court to make djudication. Sidney L. Bauman ond Co. v. Hart (C. C. A. 1911) Fed. 498, 27 Am. Bankr. Rep. 632.

he defendant in bankruptcy desires ise the objection that the court o jurisdiction because the writ was perly served, he may do so by n or by defense at the trial, but y demurrer. In re Seaboard Fire rwriters (D. C. 1905) 137 Fed. 13 Am. Bankr. Rep. 722. A gen- appearance will waive all irregularities in the service of process, and confer jurisdiction of the defendant's person. In re Ulrich (D. C. 1869) Fed. Cas. No. 14,327. Where there are several defendants, as in the case of a partnership, one who was not served may appear by attorney. In re Weyhausen (D. C. 1867) Fed. Cas. No. 17,474.

20. Notice to creditors.—Notice to creditors of the commencement of bankruptcy proceedings by the filing of a petition is not necessary, the filing of the proper petition by the proper parties in the proper court conferring jurisdiction, and being in itself a lis pendens and notice to all concerned. In re Billing (D. C. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80. And see International Bank v. Sherman (1879) 100 U. S. 406, 25 L. Ed. 866; Mueller v. Nugent (1902) 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; Wiley v. Pavey (1878) 61 Ind. 457, 28 Am. Rep. 677. There is an exception in the case where the bankrupt alleges in his answer the existence of more than twelve creditors, and files a sworn list of his creditors, whereupon the court shall cause such creditors to be notified of the proceeding, it being in the discretion of the court to decide whether notice shall be served personally or by mail, and by whom the service shall be made. In re Tribelhorn (1905) 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491. Notice of bankruptcy proceedings, given to the owner of an interest in a judgment against the bankrupt, is not notice to the other co-owner. Strickland v. Capital City Mills (1906) 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

Although a creditor has had no notice of the petition, this will not entitle him to impeach the decree of adjudication, where the records show a regular proceeding. The fact that his name did not appear on the list of creditors and that he was not notified of the proceeding would not affect the jurisdiction of the court to proceed to an adjudication, nor will it affect the trustee's right to maintain an action against him to recover a preference or to set aside a fraudulent conveyance. Roberts v. Fernald (1903) 72 N. H. 198, 55 Atl. 942.

21. Parties.—Persons having a lien on the property of a bankrupt passing to his trustee are not parties to the bankruptcy proceeding, unless they come into the bankruptcy court to enforce their rights. In re Reading Hat Mfg. Co. (D. C. 1915) 224 Fed. 786. The appearance of a nonresident as a witness in bankruptcy proceedings, in obedience to a subpœna, does not make him a party to the proceedings. In re Geller (D. C. 1914) 216 Fed. 558. Where an alleged nonresident of the district was claimed to be a member of a bankrupt partnership, but was not

joined in the original proceeding, the court had power to allow an amendment to bring him in under section 9586, ante, and to adjudicate the firm and its members bankrupt under section 2, subd. 1. In re J. & M. Schwartz (D. C. 1913) 204 Fed. 326. An assumption that a corporation, the assets of which are being administered in bankruptcy, is not insolvent, and that there will be a surplus, does not make a stockholder a proper party to the bankruptcy case. In re Witherbee (1913) 202 Fed. 896, 121 C. C. A. 254.

Where it is necessary to reform a contract in order to sustain a petition in bankruptcy against a corporation, the corporation should be made a party to the proceeding, notwithstanding its default as to the petition, which did not ask such reformation, or the assent of its board of directors to the bankruptcy. In re Imperial Corp. (D. C. 1904) 133 Fed. 73, 13 Am. Bankr. Rep. 199.

Where the act of bankruptcy alleged is the making of a general assignment for the benefit of creditors, it is not improper to join the assignee as a defendant in the bankruptcy proceeding, but his rights and interests cannot be adjudicated at this stage of the cause, and where the petition sets up no cause of action against him nor prays any special relief as to him, the mere fact of his being included does not make him continuously subject to the orders of the court without other process. Louisville Trust Co. v. Comingor (1902) 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

Where the alleged bankrupt in involuntary proceedings dies after the filing of the petition, but before service of process, the proceeding does not abate, but his heirs and personal representatives should be brought in and made parties to the proceeding before any adjudication. Shute v. Patterson (1906) 147 Fed. 509, 78 C. C. A. 75, 17 Am. Bankr. Rep. 99.

When the alleged bankrupt is insane, the court of bankruptcy has authority to appoint a guardian ad litem to defend against the petition, if he has no regular guardian or committee. If he has, then such guardian or committee must be brought in by process, as well as the lunatic, and may thereupon be appointed guardian ad litem for him. In re Burka (D. C. 1901) 107 Fed. 674, 5 Am. Bankr. Rep. 843.

22. —— **Intervention and substitution of parties.**—Any creditors having provable debts may enter their appearance and join in the petition. In re Etheridge Furniture Co. (D. C. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; In re Crenshaw (D. C. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; In re Black Diamond Copper Min. Co. (1906) 10 Ariz. 42, 85 Pac. 653. To sustain the intervention of other creditors, the petition should be sufficient on its face to give jurisdiction, and if it does not show that the requisite amount of debts is represented, it cannot be amended by the joinder of other creditors having sufficient claims. In re Stein (D. C. 1904) 130 Fed. 377, 12 Am. Bankr. Rep. 364. If there is no want of jurisdiction apparent on the face of the petition, but it transpires before adjudication that there is a deficiency in the amount of debts represented, then other creditors who have entered their appearance and joined in the petition may be reckoned in making up the statutory quorum. In re Crenshaw (D. C. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; In re Mackey (D. C. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; In re Bedingfield (D. C. 1899) 96 Fed. 190, 2 Am. Bankr. Rep. 355; In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; In re Vastbinder (D. C. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118. Where a petition in involuntary bankruptcy, good upon its face, has been filed, other creditors, acting in good faith, have the right to file intervening petitions at any time during the pendency of the proceeding though original petitioners were estopped to file petition. In re Freeman Cotting Coat Co. (D. C. 1913) 212 Fed. 551.

To establish a right to intervene, it is not necessary that the party should have proved his debt in the ordinary form, provided he can satisfy the court that he is in fact a creditor. In re Boston, H. & E. R. Co. (C. C. 1871) Fed. Cas. No. 1,677. The fact that his petition of intervention is defective in matter of form in setting out his claim is immaterial, where the deficiency is supplied by proof on the hearing. Hays v. Wagner (1907) 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163. But he must be a genuine creditor having a real and provable claim. In re Lewis F. Perry & Whitney Co. (D. C. 1909) 172 Fed. 752, 22 Am. Bankr. Rep. 780.

This right of additional creditors to come in and press the petition, being secured to them by law, cannot be defeated by any settlement or arrangement by which the original petitioners obtain satisfaction and seek to withdraw the petition or drop the proceedings. In re Lacey (C. C. 1874) 10 N. B. R. 477, Fed. Cas. No. 7,965; In re Calendar (D. C.) Fed. Cas. No. 2,307; In re Mammouth Pine Lumber Co. (D. C. 1901) 109 Fed. 308, 6 Am. Bankr. Rep. 84. Nor by their failure to appear or their omission or neglect to prosecute the proceeding to an adjudication. In re Sheffer (D. C. 1877) 17 N. B. R. 369, Fed. Cas. No. 12,742; In re Calendar (D. C. 1843) Fed. Cas. No. 2,307; In re Buchanan (C. C. 1874) 10 N. B. R. 97, Fed. Cas. No. 2,073; In re Lacey (C. C. 1874) 10 N. B. R. 477, Fed. Cas. No. 7,965; In re Stein (1901) 105 Fed. 749, 45 C. C. A. 29, 5 Am. Bankr. Rep. 288.

statute does not limit the time which creditors may thus in-, and therefore it is held that ay come in at any time before judgment is rendered on the pe- that is, before the court either the adjudication or dismisses tition. In re Lewis F. Perry & y Co. (D. C. 1909) 172 Fed. 2 Am. Bankr. Rep. 770; In re ith Cordage Co. (1905) 135 000, 68 C. C. A. 434, 13 Am. Rep. 665; In re Frisbee (C. C. Fed. Cas. No. 5,129. It is im- l that it may be more than four after the commission of the act kruptcy alleged. In re Charles Light & Power Co. (D. C. 1910) d. 160, 25 Am. Bankr. Rep. 687. n in involuntary bankruptcy, n its face, gives the court juris-, and other creditors, though by lapse of time from originat- proceeding, may, under section nte, intervene. In re Bolognesi 223 Fed. 771, 139 C. C. A. 351. e the parties appear and join and no further proceedings take and no formal adjournment is he matter will be regarded as from day to day until disposed permit any other creditor to in and prosecute the petition. Buchanan (C. C. 1874) 10 N. B. Fed. Cas. No. 2,073. But a ng and unreasonable delay will any creditors from the privilege ring the case and taking up the for action. Ex parte Freed- . C. 1844) Fed. Cas. No. 5,079. ter the petition has been defi- dismissed, whether for want of tion, for insufficiency of peti-, or because the issues were de- gainst them, it is then too late y other creditors to intervene, e petition cannot be revived for benefit. In re Tribelhorn (1905) d. 3, 69 C. C. A. 601, 14 Am. Rep. 491; In re Olmsted (D. 0) 4 N. B. R. 240, Fed. Cas. No. An order in an involuntary ding that the petition be dis- when the fees due the clerk arshal shall be paid, is not a iscontinuance, so as to deprive r creditor of the right to inter- nd prosecute the original peti- t any time before such fees are In re Lacey (C. C. 1874) 10 N. 477, Fed. Cas. No. 7,965 Their ourse is to bring a new and in- ent petition against the debtor, ey must found it on acts of ptcy committed within four before they file it; but in the tion of it they will not be es- by the judgment of dismissal. dter v. Chicago Dry Goods Co. 1899) 96 Fed. 830, 3 Am. Bankr. 6.

e are also some instances in a substitution of parties in a bankruptcy proceeding will be proper. This is the case, for example, where one of the creditors joining in an involuntary petition himself becomes a bankrupt before the hearing. In this event, his trustee in bankruptcy, who succeeds to all his rights and claims as against his debtors, should be substituted in his place as a petitioner. Hays v. Wagner (1907) 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163; In re Jones (D. C. 1873) 7 N. B. R. 506, Fed. Cas. No. 7,450.

23. —— **Persons entitled to oppose adjudication.**—Under the provision of this section that "any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow," and the provision of section 9643, post, that "creditors other than the original petitioners may at any time file an answer and be heard in opposition to the prayer of the petition," it rests in the discretion of the court to allow an extension of the time limited, but it is a proper exercise of such discretion to refuse to allow a creditor to file an answer when he knew of the proceeding and gives no sufficient excuse for his failure to answer within the five days. In re Marion Contract & Const. Co. (D. C. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Mutual Mercantile Agency (D. C. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607.

Any creditor whose interests are directly affected by the proceedings, or who conceives that he may be prejudiced by an adjudication of bankruptcy against the debtor, even a general unsecured creditor, may avail himself of this privilege and contest the petition, though the debtor himself fails to appear or to answer. In re Jonas (D. C. 1878) 16 N. B. R. 452, Fed. Cas. No. 7,442; In re Austin (D. C. 1878) 16 N. B. R. 518, Fed. Cas. No. 662; Johansen Bros. Shoe Co. v. Alles (1912) 197 Fed. 274, 116 C. C. A. 636, 28 Am. Bankr. Rep. 299; B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co. (C. C. A. 1913) 206 Fed. 885, 30 Am. Bankr. Rep. 424.

Where the act of bankruptcy alleged is the giving of an unlawful preference to a particular creditor, or the obtaining by that creditor of a preference through legal proceedings, such creditor may intervene, be made a defendant, and plead to the petition. Goldman v. Smith (D. C. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; In re Heusted (D. C. 1843) Fed. Cas. No. 6,440; In re Donnelly (D. C. 1881) 5 Fed. 783. A creditor who holds property of the alleged bankrupt under an attachment, the lien of which would be dissolved by an adjudication, may intervene and oppose the petition. In re C. Moench & Sons Co. (D. C. 1903)

123 Fed. 977, 10 Am. Bankr. Rep. 590; In re Williams (D. C. 1876) 14 N. B. R. 132, Fed. Cas. No. 17,706; In re Hatje (D. C. 1875) Fed. Cas. No. 6,-215; In re Mendelsohn (D. C. 1875) Fed. Cas. No. 9,420; In re Scrafford (D. C. 1876) Fed. Cas. No. 12,557; In re Burton (D. C. 1878) Fed. Cas. No. 2,214. So may a judgment creditor who would be injuriously affected by the bankruptcy proceedings. In re Jack (C. C. 1873) 13 N. B. R. 296, Fed. Cas. No. 7,119. And a receiver of the corporation defendant who is in possession of its property and conducting its business under the orders of the court which appointed him. In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191; In re Gold Run Mining & Tunnel Co. (D. C. 1912) 200 Fed. 162, 29 Am. Bankr. Rep. 563; Blackstone v. Everybody's Store (C. C. A. 1913) 207 Fed. 752, 30 Am. Bankr. Rep. 497. But stockholders of a corporation, as such, cannot ordinarily appear and defend involuntary proceedings against the corporation. In re Eureka Anthracite Coal Co. (D. C. 1912) 197 Fed. 216, 28 Am. Bankr. Rep. 758. And an assumption that the corporation is not insolvent and that there will be a surplus does not make a stockholder a proper party to the bankruptcy proceeding. In re Witherbee (C. C. A. 1913) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

As to the grounds of opposition open to creditors thus coming in, it may be said that any defense which would be available to the debtor himself may be pleaded and proved by the interveners. Thus, they may contest the allegations concerning the commission of an act of bankruptcy, or show that the respondent is not within the operation of the statute, or allege a want of jurisdiction or a defect in the number and amount of the petitioning creditors. Clinton v. Mayo (D. C. 1875) 12 N. B. R. 39, Fed. Cas. No. 2,899; In re Williams (D. C. 1876) 14 N. B. R. 132, Fed. Cas. No. 17,-706. And in addition, they may allege and show that the proceeding is not instituted in good faith, but is the product of fraud and collusion between the debtor and the petitioning creditors. In re Jack (C. C. 1873) 13 N. B. R. 296, Fed. Cas. No. 7,119; In re Mendelsohn (D. C. 1875) 3 Sawy. 342, 12 N. B. R. 533, Fed. Cas. No. 9,-420; In re Scrafford (D. C. 1876) 14 N. B. R. 184, Fed. Cas. No. 12,557; In re Hatje (D. C. 1875) 12 N. B. R. 548, Fed. Cas. No. 6,215. A creditor at large may suggest suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted. In re Hopkins (D. C. 1878) 18 N. B. R. 396, Fed. Cas. No. 6,684.

24. Answer and other pleadings. The terms of this section, as well the general orders in bankruptcy (se tion 9614, post), intend that there sh be a formal answer by the responde not only signed by him, but verified oath. Day v. Beck & Gregg Ha ware Co. (1902) 114 Fed. 834, 52 C. A. 468, 8 Am. Bankr. Rep. 1 When a petition in bankruptcy s forth the necessary jurisdictional fac and is in conformity with the statu an adjudication must follow, unless answer is interposed. In re Cohn C. 1915) 220 Fed. 956. Where an voluntary bankruptcy petition is ve fied on information and belief, the titioners are not entitled to have better verification of the answer. La awanna Leather Co. v. La Porte C riage Co. (C. C. A. 1914) 211 F. 3 The answer of the defendant sho conform to the general rules of ple ing applicable in actions at law. re Findlay (D. C. 1873) Fed. Cas. 4,789.

An answer to a petition in involu tary bankruptcy should follow the si ple form of denial prescribed by fo No. 6 (post, § 9614). If responsive multifarious matter in the petition, unnecessarily defensive, it must be p pared in proper form and refiled as the original date, the original answ however, remaining on file. Mather Coe (D. C. 1899) 92 Fed. 333, 1 A Bankr. Rep. 504. An answer is sufficient or objectionable which is necessarily prolix, or which neit admits nor unevasively denies the ma rial allegations of the petition. Br ley Timber Co. v. White (1903) Fed. 779, 58 C. C. A. 55, 10 Am. Ban Rep. 329.

It is necessary for the defendant his answer to deny explicitly the legation as to his insolvency, wh that is an essential element of the of bankruptcy charged, and if not nied, the allegation will be taken as mitted. In re American Pub. (1905) 15 Okl. 177, 79 Pac. 7 Where the act of bankruptcy char in the petition was the giving o preference while insolvent, a denial the answer that the defendant comm ted such act of bankruptcy must construed as a denial of insolvency, least where it has been so accepted the petitioners and evidence taken the issue. Troy Wagon Works v. Va binder (D. C. 1904) 130 Fed. 232, Am. Bankr. Rep. 352. A simple de of insolvency in the language of official form is ordinarily sufficient. re Ouimette (D. C. 1870) Fed. C No. 10,622. But see Bray v. Cobb C. 1898) 91 Fed. 102, 1 Am. Ban Rep. 153. If insolvency is not an ment of the act of bankruptcy char the allegation of it in the petition superfluous and need not be travers George M. West Co. v. Lea (1899)

. 590, 19 Sup. Ct. 836, 43 L. Ed.

he petition sets forth the debts al- to be due by the defendant, the er may contain detailed averments efenses and counterclaims to such , showing the solvency of the re- lent at the time alleged. In re (D. C. 1899) 99 Fed. 538, 3 Am. r. Rep. 679. The defendant may his insolvency and his willing- to be adjudged a bankrupt, and at case it is not necessary to sub- iate the various allegations of the on, but an adjudication may be at once. In re Cleary (D. C. 179 Fed. 990, 24 Am. Bankr. 742; Brinkley v. Smithwick (D. 03) 126 Fed. 686, 11 Am. Bankr. 500. Where the answer admitted the bankrupt owed debts which he unable to pay, and that he had ferred his property for cash, and pplied the proceeds in payment of of his debts, such answer was to constitute an admission that he prefered some of his creditors others, which constituted an act nkruptcy. Brinkley v. Smithwick, .

e respondent may plead that he is pt from the operation of the bank- y law, as being within one of the ted classes. In re Taylor (C. C. 00) 102 Fed. 728, 4 Am. Bankr. 515. He may allege that the pe- is not supported by the requisite er of creditors, or that they have rovable claims amounting to the red sum. In re John A. Etheridge iture Co. (D. C. 1899) 92 Fed. 1 Am. Bankr. Rep. 112. The n list of creditors required to ac- any the answer, in case exception ken to the sufficiency of the num- of petitioning creditors, should in a statement of the amount due ch creditor appearing on it, the of the debt, when it is due, wheth- is due by note or account or some form of contract, the considera- therefor, whether it is owed joint- ith another as partner or other- and such full particulars as will the necessity and cost of referring ase to ascertain the facts. W. A. & Co. v. Bell (D. C. 1903) 124 371, 10 Am. Bankr. Rep. 696.

e defendant may plead such facts ill show that the creditors acting st him are equitably estopped to cute the petition. Cummins Gro- Co. v. Talley (1911) 187 Fed. 507, C. C. A. 273, 26 Am. Bankr. Rep. The answer of opposing cred- in involuntary bankruptcy for en admission of inability to pay set up that the proceedings are result of fraud and collusion be- n the debtor and petitioning cred- In re Cohn (C. C. A. 1915) 227 843. In involuntary bankruptcy eeding, answer alleging that pro- ngs were collusive, to defraud tors, and would be withdrawn, and that the bankrupts, while insolvent, had bought largely of new stock, held not to warrant denial of adjudication. In re Cohn (D. C. 1915) 220 Fed. 956.

Distinct defenses to a petition in involuntary bankruptcy should be separately pleaded. In re Ouimette (D. C. 1870) Fed. Cas. No. 10,622.

Where the allegations in a proposed answer which stockholders of a corporation, defendant in bankruptcy, sought leave to file, were not specific enough in charging fraud against the directors, motion to make more specific would have been proper. Ogden v. Gilt Edge Consol. Mines Co. (C. C. A. 1915) 225 Fed. 723.

A debtor who contests a proceeding in involuntary bankruptcy against him, does so in his own behalf and not in the interest of his creditors, and he is at liberty to withdraw his opposition at any time, when done in good faith, without notice to his creditors or their consent. In re Billing (D. C. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

25. —— **Demurrer.**—In view of new equity rule 29 (ante, § 1536), abolishing demurrers, a demurrer will not lie to a petition in involuntary bankruptcy. In re Jones (D. C. 1913) 209 Fed. 717. Previously, it was held that the respondent might both demur and answer, where each pleading applied to only part of the petition, but if both demurrer and answer attacked the petition as a whole, the demurrer would be regarded as waived. In re Cooper Bros. (D. C. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392. But the sufficiency of the petition could not be tested by demurrer in a collateral matter, such as an application for an injunction to restrain the defendant from disposing of his property pending the hearing. Blackburn v. Stannard (D. C. 1842) Fed. Cas. No. 1,468. Petitioning creditors could not demur to the defendant's answer, but must set the case down for hearing on the petition and answer according to the rules of equity practice. Goldman v. Smith (D. C. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266. Demurrer was not the proper method of denying the substantive allegations of the petition, such as those with regard to the business or occupation of the defendant or the commission of acts of bankruptcy. In re Excelsior Café Co. (D. C. 1910) 175 Fed. 294, 28 Am. Bankr. Rep. 701; Orem v. Harley (D. C. 1869) 3 N. B. R. 263, Fed. Cas. No. 10,567. Where, after the trial and dismissal of a petition, other creditors file a petition asking leave to revive and prosecute the petition, the proper method of objecting is not by demurrer, but by motion to strike from the files. Neustadter v. Chicago Dry Goods Co. (D. C. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

26. —— **Replication.**—If the defendant answers in the form officially prescribed, no replication on the part of

the petitioning creditors is necessary, since it is in effect a plea of the general issue. In re Dunham (D. C. 1868) Fed. Cas. No. 4,143. But if the answer alleges new matter, there must be a replication, and if none is filed, and the case is submitted on the petition and answer, the allegations of the answer must be taken as true. Brinkley v. Smithwick (D. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500; In re Taylor (C. C. A. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

27. —— Time for pleading.—The defendant's answer or plea must be filed within five days after the return day, or within such further time as the court may allow. Amendment to Bankruptcy Act by Act Feb. 5, 1903, 32 Stat. 797. It is held that this authorizes the judge to receive and consider a meritorious pleading, though filed after the five days, if it is interposed in good faith and not merely for purposes of delay. In re Cooper Bros. (D. C. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392. But the time to plead cannot be extended by an agreement of counsel, without leave of the court and without the consent of the other creditors, especially in a case where, the allegations of the petition being simple and easily answered, the court would not have extended the time if applied to for that purpose. In re Simonson (D. C. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197. If an amended petition is filed, the defendant must be allowed a reasonable time to answer it; and if it charges him with new acts of fraud and bankruptcy, a single day is not a reasonable time, at least where the defendant is not in the district. Lockman v. Lang (1904) 132 Fed. 1, 65 C. C. A. 621, 12 Am. Bankr. Rep. 497.

Formal amendments to an answer filed by a creditor to a petition in involuntary bankruptcy may be allowed at any time before adjudication. In re Harris (D. C. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 204.

28. Defenses and grounds of opposition.—Want of jurisdiction is a complete defense to a petition in bankruptcy, and jurisdiction cannot be conferred by the consent of the parties or their failure to object, if the want of it appears on the face of the pleadings. Hopkins v. Carpenter (D. C. 1878) 18 N. B. R. 339, Fed. Cas. No. 6,686; Fogarty v. Gerrity (D. C. 1870) 4 N. B. R. 450, Fed. Cas. No. 4,895; In re Lady Bryan Min. Co. (C. C. 1870) 4 N. B. R. 394, Fed. Cas. No. 7,978. But compare Allen v. Thompson (D. C. 1882) 10 Fed. 116. The respondent may allege and show that the person bringing the petition is not a creditor, and so have the petition dismissed. In re Cornwall (C. C. 1871) Fed. Cas. No. 3,250. Or if the petitioner is a creditor, the defendant may show that his debt is not such as to be provable in bankruptcy. Sigsby v. Willis (D. C. 1869) Fed. Cas. No. 12,849. Or he may defend on the ground that the petitioning credito do not own debts sufficient in amount entitle them to maintain the petitio In re Ouimette (D. C. 1870) Fed. Ca No. 10,622; In re Skelley (D. C. 187 Fed. Cas. No. 12,921. Or he may sho that he is a farmer or a wage-earne or, if a corporation, that it is with the exempt classes. In re Tayl (1900) 102 Fed. 728, 42 C. C. A. 1, Am. Bankr. Rep. 515. An involunta bankruptcy proceeding is not void b cause facts show that the petitione are estopped from taking advantage the act of bankruptcy relied on. In Bolognesi (1915) 223 Fed. 771, 139 C. A. 351.

If the act of bankruptcy charged a fraudulent conveyance or concealme of property, it is a complete defen that the respondent is solvent at t time of the filing of the petitio George M. West Co. v. Lea (1899) 1 U. S. 590, 19 Sup. Ct. 836, 43 L. E 1098. But solvency is no defense to petition charging the fifth act of ban ruptcy. In re Russell Wheel & Fou dry Co. (D. C. 1915) 222 Fed. 569.

The personal disability of the defen ant may constitute an available defens as in case of insanity, infancy, or cove ture. In re Kehler (D. C. 1907) 1 Fed. 235, 18 Am. Bankr. Rep. 596; re Ward (D. C. 1908) 161 Fed. 755, Am. Bankr. Rep. 482.

An adjudication of bankruptcy du entered on the voluntary petition of t debtor, being personally within the j risdiction of the court, the petition b ing signed and verified by the ban rupt in person, will not be set aside motion of a creditor because the atto ney who appeared for the bankrupt h not been admitted to practice in t federal courts of the district, as su an irregularity does not affect the j risdiction of the court. In re Kin (D. C. 1900) 98 Fed. 867, 3 Am. Bank Rep. 546.

Under no circumstances can a pl of tender be a defense to a petition involuntary bankruptcy. In re Ou mette (D. C. 1870) Fed. Cas. No. 1 622; In re Williams (D. C. 1869) Fe Cas. No. 17,703. But payments ma to petitioning creditors, after the filin of the petition and before trial or hea ing thereon, are material facts on su trial, and if such payments are show to an amount sufficient to reduce t indebtedness of the alleged bankru below the minimum prescribed by t act, the court loses jurisdiction to a judge the debtor a bankrupt; and t receipt of such payments by the pe tioning creditors must be considered waiver of the alleged act of bankrupto In re Skelley (D. C. 1871) Fed. Ca No. 12,921; In re Merkle (D. C. 187 Fed. Cas. No. 9,458. And where t only debt on which an adjudication m be entered is that of the petitioner, t bankrupt may have the petition dismis ed on its payment with costs. In

han (D. C. 1873) 8 N. B. R. 353, Cas. No. 12,738.

ere the essential facts alleged in nkruptcy petition were admitted, s no answer to the creditors' right adjudication that after the peti- was filed foreclosure on the bank- s property was begun, and that alue of the property was less than lien. Vulcan Sheet Metal Co. v. h Platte Valley Irr. Co. (C. C. 915) 220 Fed. 106.

is not a defense to a petition in ruptcy that an insolvent corpora- after admitting its inability to its debts and its willingness to be iged a bankrupt, requested certain creditors to file an involuntary pe- against it. In re Duplex Radia- Co. (D. C. 1906) 142 Fed. 906, 15 Bankr. Rep. 324. An agreement vithdraw opposition to bankruptcy eedings, and to consent and sub- to an adjudication, is not in fraud e act. Sanford v. Huxford (1875) lich. 313, 20 Am. Rep. 647; First Bank v. Wyoming Valley Ice Co. C. 1905) 136 Fed. 466, 14 Am. r. Rep. 448. It is not a defense bankruptcy proceeding against a nership, on petition of one of its bers, that the firm is without as- having transferred all its property assignee for the benefit of credi- more than four months before the of the petition. In re J. M. Ce- s & Co. (D. C. 1908) 161 Fed. 445, m. Bankr. Rep. 459.

editors of alleged bankrupts held entitled to oppose adjudication on nds that bankrupts were solvent, preparing to conceal their assets, at false claims would be presented. e Cohn (D. C. 1915) 220 Fed. 956.

— Malicious or vexatious mo- of creditors.—In some cases under act of 1867 it was thought that, if court is satisfied that the petition ankruptcy is not presented in good , but for sinister, vexatious, or op- sive purposes, it has power to dis- the proceedings, as where one ber of a firm takes this method of ng and harassing his partner. In Hamlin (D. C. 1877) Fed. Cas. No. 4. But other cases stand upon the t rule that if an act of bankruptcy nown to have been committed, and jurisdictional requisites are present, adjudication must follow as a mat- of course, and the reasons or mo- which may have instigated the eeding are entirely immaterial. In imonson (D. C. 1899) 92 Fed. 904, n. Bankr. Rep. 197; In re Bininger C. 1870) Fed. Cas. No. 1,420; In Duncan (D. C. 1876) Fed. Cas. No. 1.

here there is ground to doubt the faith of the petitioning creditors, o suspect that they are speculating laims against the bankrupt with the ectation of realizing more by means proceedings in bankruptcy than un- a receivership managed by a state court, the court should be slow to lend its aid, and is justified in resolving all doubtful questions both of fact and law against the petitioners. Lowenstein v. Henry McShane Mfg. Co. (D. C. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601.

Proceedings to put a debtor into bankruptcy should never be resorted to as proceedings in terrorem to collect a debt; and if such action is taken by the creditor maliciously and without probable cause, and the petition is dismissed, the debtor is entitled to recover, in an action for that purpose, the damages he has sustained by the unlawful attempt to throw him into bankruptcy. Sonneborn v. Stewart (C. C. 1875) Fed. Cas. No. 13,176.

30. Burden of proof and evidence.—The creditors filing a petition in involuntary bankruptcy are charged with the burden of proving all the facts necessary to warrant an adjudication, in so far as the same are contested or not admitted by the alleged bankrupt, not beyond a reasonable doubt, but by a fair preponderance of the evidence. In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Rogers Milling Co. (D. C. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Oregon Bulletin Printing & Pub. Co. (D. C. 1876) 13 N. B. R. 503, Fed. Cas. No. 10,559; In re Scudder (D. C. 1843) Fed. Cas. No. 12,563; Brock v. Hoppock (D. C. 1873) 2 N. B. R. 7, Fed. Cas. No. 1,912. Compare In re Price (D. C. 1873) 8 N. B. R. 514, Fed. Cas. No. 11,411. They must show the jurisdictional facts as to the debtor's residence or maintaining his principal place of business within the district for the requisite length of time, although, in the case of a voluntary petition, if the facts are ambiguous, it is the petitioner who must satisfy the court on this point. In re Waxelbaum (D. C. 1899) 97 Fed. 562, 3 Am. Bankr. Rep. 267. Where an involuntary bankruptcy petition was filed in New York against a Missouri corporation organized under Rev. St. Mo. 1909, § 3035, the burden was on petitioning creditors to prove that the corporation's principal place of business was in New York. Evidence that certain of the officers of a Missouri corporation lived in New York, that they held two directors' meetings there, and that certain letters written by its officers were "headed" there, did not show that its principal place of business was in New York so as to confer bankruptcy jurisdiction on the federal courts sitting in that state. In re Tennessee Const. Co. (1914) 213 Fed. 33, 129 C. C. A. 627, affirming decree (D. C. 1913) 207 Fed. 203.

If the answer filed on behalf of the bankrupt by his guardian or committee alleges his insanity at the time the alleged act of bankruptcy was committed, the burden is on the petitioning creditors to show that the act was done

during a lucid interval. In re Kehler (1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513. They must also prove affirmatively, by a preponderance of evidence, that the person or corporation proceeded against is not within one of the classes specifically exempted from the operation of the bankruptcy act. Walker Roofing & Heating Co. v. Merchant & Evans Co. (1909) 173 Fed. 771, 97 C. C. A. 495, 23 Am. Bankr. Rep. 185; In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191; Philpot v. O'Brion (1903) 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205; In re Pilger (D. C. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244; In re Lake Jackson Sugar Co. (D. C. 1904) 129 Fed. 640; U. S. v. Freed (C. C. 1910) 179 Fed. 236, 25 Am. Bankr. Rep. 89; In re Leland (D. C. 1910) 185 Fed. 830, 25 Am. Bankr. Rep. 209; American Agricultural Chemical Co. v. Brinkley (C. C. A. 1912) 194 Fed. 411, 27 Am. Bankr. Rep. 438; Counts v. Columbus Buggy Co. (C. C. A. 1913) 210 Fed. 748. Likewise the burden is on them, if the point is disputed, to show that they have provable claims against the defendant, and that the same are sufficient in amount to support the petition. In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449; In re Morgan & Williams (D. C. 1911) 184 Fed. 938, 25 Am. Bankr. Rep. 861; In re Borelli & Callahan (D. C. 1906) 142 Fed. 296, 16 Am. Bankr. Rep. 115; In re Ferguson (D. C. 1904) 127 Fed. 407, 11 Am. Bankr. Rep. 371; In re Lewis F. Perry & Whitney Co. (D. C. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; Ex parte Foster (C. C. 1842) Fed. Cas. No. 4,959. If the debtor admits the existence of his promissory note in the hands of a creditor, but alleges that it is invalid because given in a gambling transaction, he must assume the burden of proving his contention. Hill v. Levy (D. C. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374.

If the proceeding is against persons alleged to constitute a partnership, the burden of proving the partnership is on the creditors. Jones v. Burnham, Williams & Co. (1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; Lott v. Young (1901) 109 Fed. 798, 48 C. C. A. 654, 6 Am. Bankr. Rep. 436. In bankruptcy proceedings against a firm, the bankruptcy court has jurisdiction to inquire and determine whether an alleged secret partner is or is not a member of the firm, and, if he is, whether he is solvent. In re Samuels (C. C. A. 1914) 215 Fed. 845. In bankruptcy proceedings against a partnership, the court had no concern with an alleged issue of fraud by which a partner had been induced to enter the firm. In re Mitchell & Co. (D. C. 1914) 211 Fed. 778.

The creditors must also assume the burden of proving the commission of act of bankruptcy. This is absolut essential, and there can be no adjudi tion until the fact is satisfactorily pr ed or admitted. In re Rome Plani Mill (D. C. 1899) 96 Fed. 812, 3 A Bankr. Rep. 123; In re Brown (D. 1877) 15 N. B. R. 416, Fed. Cas. 1,981; In re Safe-Deposit & Sav. In (D. C. 1872) 7 N. B. R. 392, Fed. C No. 12,211; Lennox v. Allen-Lane (1908) 167 Fed. 114, 92 C. C. A. 5 21 Am. Bankr. Rep. 648; In re Bill (D. C. 1906) 145 Fed. 395, 17 A Bankr. Rep. 80; Jones v. Coates (191 196 Fed. 860, 116 C. C. A. 422, 28 A Bankr. Rep. 249. An answer of an leged bankrupt to an involuntary ba ruptcy petition admitting his insolve and praying that he be adjudged bankrupt for the protection of all creditors, that they might all be tre ed alike, held not in effect a volunt petition, so as to relieve the credit from the burden of proving an act bankruptcy. In re Condon (1913) Fed. 800, 126 C. C. A. 524, affirm judgment (D. C. 1912) 198 Fed. 9 But if two distinct matters are alle conjunctively, each of which constitu an act of bankruptcy sufficient to w rant an adjudication, it is enough if ther of them be satisfactorily prov In re Drummond (D. C. 1873) 1 N. R. 231, Fed. Cas. No. 4,093. creditors cannot travel outside th petition, and they will not be perm ted to adduce evidence of acts of ba ruptcy not therein alleged. In re Sy (D. C. 1870) Fed. Cas. No. 13,7 Ex parte Potts (D. C. 1842) Fed. C No. 11,344; Ex parte Shouse (D. 1842) Fed. Cas. No. 12,815.

Where a fraudulent transfer of pr erty is charged as an act of bankrupt great latitude in the admission of e dence should be allowed on the tr and all the circumstances fairly c nected with the transaction may shown. In re Luber (D. C. 1907) Fed. 492, 18 Am. Bankr. Rep. 476.

The declarations, admissions, and ters of the respondent may be admit as evidence against him. In re Ha (D. C. 1875) Fed. Cas. No. 6,2 Where the only proof of an act bankruptcy given by the creditors i statement of the bankrupt, such sta ment must be accepted, in its entire as true, and if it admits a transact which would constitute an act of ba ruptcy if not explained, but also cludes an explanation, the latter as w as the former part of the statem must be taken as true. In re Frank (D. C. 1875) Fed. Cas. No. 5,053. T bankrupt's own testimony may be c tradicted and impeached, but the unc roborated testimony of a single witn to a declaration stated to have b made by the bankrupt will not prev as against his positive denial suppor by other witnesses. In re Foster (

903) 126 Fed. 1014, 11 Am. Bankr. 131.

ere the act of bankruptcy alleged e appointment of a receiver be- of insolvency, the record of the which appointed the receiver is ssible to show the fact and the n. Blue Mountain Iron & Steel . Portner (1904) 131 Fed. 57, 65 A. 295, 12 Am. Bankr. Rep. 559. the recitals of the record cannot ntradicted by evidence aliunde. In dward Ellsworth Co. (D. C. 1909) Fed. 699, 23 Am. Bankr. Rep. 284. e the decree of the court appoint- receiver is silent as to the rea- for the appointment, papers may onsulted or evidence aliunde pro- in involuntary bankruptcy pro- ngs to determine the reason for appointment. In re Muir (D. C. 212 Fed. 495. Evidence that in of a corporation's agents and ounsel procured a creditor to file for the appointment of receivers not to show that the corporation itted an act of bankruptcy by pro- g such appointment, in the absence idence that the agents and counsel authorized so to do by the direc- acting as a board or that their were ratified by the stockholders full knowledge. In re Wm. S. r & Co. (C. C. A. 1913) 207 Fed.

ere a bill for the appointment of eiver, though nominally by a cred- was actually filed by the debtor, court in subsequent bankruptcy eedings against the debtor can look d the allegations of solvency con- in the bill and answer in order etermine whether the debtor was vent. In re Muir (D. C. 1914) 212 495. Where the act of bankrupt- eged is that because of insolvency eiver was put in charge of the r's property, the issue is not di- that of insolvency, but whether receiver was appointed on that d. In re Maplecroft Mills (D. C. 218 Fed. 659.

ere a bankrupt intended to make, n fact executed, a general assign- for the benefit of creditors in the form, and the assignee, by send- notice of a meeting of creditors, g that the assignment had been to him, and by other acts, ac- ledged and ratified his appoint- thereunder, such facts were suf- t to establish a general assignment creditors, constituting an act of ruptcy, though the original assign- was lost, and the evidence failed now with certainty the form in it was signed. Griffin v. Dutton 3) 165 Fed. 626, 91 C. C. A. 614, m. Bankr. Rep. 449.

transfer, removal, or concealment operty, in order to constitute an f bankruptcy, must have been ef- d "with intent" to hinder or de- creditors, or "with intent" to a preference, as the case may be. To make out a case for adjudication, therefore, it is necessary for the petitioning creditors to show not only the fact of transfer, concealment, etc., but also the intent of the debtor with reference to defrauding creditors or giving a preference. Cribben & Sexton Co. v. North End House Furnishing Co. (1915) 222 Fed. 830, 138 C. C. A. 256; Clark v. Henne & Meyer (1904) 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; Cunningham v. Cady (D. C. 1876) 13 N. B. R. 525, Fed. Cas. No. 3,480; In re King (D. C. 1874) 10 N. B. R. 103, Fed. Cas. No. 7,783. This need not be, and ordinarily cannot be, established by direct testimony. But his conduct, actions, financial situation, and the method of dealing adopted by him on a particular occasion may be shown, and such an intent inferred therefrom, provided a careful examination of all the details warrants such an inference. Strauss v. Abrahams (C. C. 1887) 32 Fed. 310. Where the actual and necessary result of a payment or transfer of property is to give a preference to a particular creditor, a showing of this fact raises a presumption that a preference was intended by the debtor and casts upon him the burden of exculpating himself. In re Rome Planing Mill Co. (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Bloch (1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101.

Where the actual and necessary result of a conveyance or mortgage is to hinder or delay creditors or to put property out of their reach, a fraudulent intent on the part of the debtor will be presumed, and he must assume the burden of proving his good faith. Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son (1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558. This presumption is rebuttable by the defendant, and he may introduce evidence explaining the transaction and negativing the alleged fraudulent intention. Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son (1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; Ex parte Potts (D. C. 1842) Fed. Cas. No. 11,344. This may be done by showing that he was ignorant of his insolvency, and that his affairs were in such condition that he could reasonably expect to pay all his debts in full. In re Rome Planing Mill (D. C. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Pangborn (D. C. 1910) 185 Fed. 673, 26 Am. Bankr. Rep. 40; In re Bloch (1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; Wager v. Hall (1872) 16 Wall. 584, 21 L. Ed. 504; Toof v. Martin (1871) 13 Wall. 40, 20 L. Ed. 481; Macon Grocery Co. v. Beach (D. C. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558.

Where an involuntary bankruptcy petition is based on an alleged prefer-

ential transfer within section 9587, ante, the burden of proving insolvency is on the petitioning creditors, provided the bankrupt appears and produces his books. In re Electron Chemical Co. (D. C. 1913) 208 Fed. 954.

The presumption of a fraudulent or preferential intention is not of great strength where the transfer involved a comparatively small part of the debtor's property. In re Gilbert (D. C. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101. Although the debtor was certainly insolvent, the fact that he paid a sum of less than three dollars in settlement of a current store bill in the usual course of such dealings, where his total indebtedness amounted to thirteen thousand dollars, cannot raise a presumption of an intent to give a preference, as against his own testimony that the payment was not made with any such intention. Macon Grocery Co. v. Beach (D. C. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558.

A court of bankruptcy as a court of equity has power to appoint a special master to take evidence, and these special masters may be standing masters in chancery, or appointed pro hac vice in particular cases. U. S. v. Coyle (D. C. 1916) 229 Fed. 256.

31. Discontinuance and dismissal of proceedings.—It is the duty of the court to dismiss the proceedings when it appears that there is a want of jurisdiction over the person of the defendant. In re Waxelbaum (D. C. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392. See In re Tully (D. C. 1907) 156 Fed. 634, 19 Am. Bankr. Rep. 604. Or a want of sufficient petitioning creditors. Cummins Grocer Co. v. Talley (1911) 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484; In re Tribelhorn (1905) 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491. Or where, the case being submitted on the petition and answer, and the averments of the answer being therefore taken as true, it sufficiently negatives the commission of an act of bankruptcy. In re Doddy Jourdan & Co. (D. C. 1904) 127 Fed. 771, 11 Am. Bankr. Rep. 344.

If, after the institution of involuntary proceedings, the debtor files his own voluntary petition, and all the creditors, including the first petitioners, come in and prove their claims, under the last petition, this must be taken as a waiver of the involuntary petition, and it should be dismissed. In re Nounnan & Orr (1871) 1 Utah, 44. But see In re Waxelbaum (D. C. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392. Where an alleged bankrupt resists an involuntary proceeding, a judgment of dismissal is not res judicata nor a bar to a subsequent voluntary proceeding. It is only where creditors, through a bankrupt's trustee, might not be able to recover property and avoid preferences, that the court will suspend proceedings under a voluntary petition, or set them aside in order that a pending involu tary proceeding may be expedited. re Lachenmaier (1913) 203 Fed. 121 C. C. A. 368, 29 Am. Bankr. R 325.

It is in the discretion of the cou though perhaps not its imperative du to dismiss a petition in voluntary ban ruptcy which schedules no debts whi would be barred by a discharge. In Shepardson (D. C. 1915) 220 Fed. 18 In re Colaluca (D. C. 1904) 133 F 255, 13 Am. Bankr. Rep. 292. where the petitioner's only purpose to try again for a discharge from t same debts which were listed in pre ous proceedings, wherein he failed apply for a discharge or in which a d charge was denied. Kuntz v. You (1904) 131 Fed. 719, 65 C. C. A. 4 12 Am. Bankr. Rep. 505; In re El (D. C. 1907) 157 Fed. 935, 19 A Bankr. Rep. 734. But it is not grou for dismissing a petition in involunt bankruptcy that the petitioning cr itor, since filing the petition, has gun a suit at law against the ban rupt and prosecuted it to judgme Van Kleeck v. Thurber (D. C. 184 Fed. Cas. No. 16,861.

It is in the discretion of the court dismiss a petition in involuntary ban ruptcy for want of prosecution. In Levi & Klauber (1905) 142 Fed. 9 74 C. C. A. 132, 15 Am. Bankr. R 294; In re Camden Rolling Mill (D. C. 1869) 3 N. B. R. 590, Fed. C No. 2,338.

A voluntary bankruptcy proceedi may not be dismissed on motion of t bankrupt after adjudication by conse of all parties. In re McKee (D. 1914) 214 Fed. 885.

The mere fact that a corporation judged a bankrupt may be able to p its creditors in full is not ground dismissing the proceedings, although attempt has been made by one credit to use the bankruptcy court in an i proper way. In re Jamaica Slate Ro ing & Supply Co. (D. C. 1912) 1 Fed. 240, 28 Am. Bankr. Rep. 763.

Where an alleged bankrupt resists involuntary proceeding, a judgment dismissal is not res judicata, nor a b to a subsequent voluntary proceedi In re Lachenmaier (1913) 203 Fed. 121 C. C. A. 368.

32. —— By consent or agreement parties.—A petition may be dismis upon the consent or agreement of parties concerned, but the court m be a party to the agreement, and discontinuance by consent can only obtained upon an order of the co upon a special application. In re chanan (C. C. 1874) 10 N. B. R. Fed. Cas. No. 2,073. A bankrup court will not set aside a stipulati discontinuing the bankruptcy proce ings given upon a release procured fraud, until relief is sought in a co having jurisdiction to set aside the lease for fraud or to award damag

Bieler (D. C. 1873) 7 N. B. R. Fed. Cas. No. 1,394. Where proings before the referee on an intary petition warrant an inference the failure of petitioners to proany proof may be pursuant to an ment amounting to "consent of es" to a dismissal, the question d be investigated by the referee. Chalfen (D. C. 1915) 223 Fed. Application for leave to discon- or dismiss by consent of parties be made before an adjudication assed; after that, it is too late to with the debtor and drop the proings. In re Sherburne (D. C. 1 N. B. R. 558, Fed. Cas. No. 3.

oluntary petitioner in bankruptcy be permitted to withdraw his peti- f there are no creditors who have d their claims or who object to course. In re Hebbart (D. C. 104 Fed. 322, 5 Am. Bankr. Rep. But he cannot have the petition ssed against the objection and pro- of any creditor. In re Smith (D. 07) 155 Fed. 688, 19 Am. Bankr. 63. In involuntary proceedings, etition may be dismissed when the upt desires it and all the creditors onsent. In re Miller (D. C. 1868) B. R. 410, Fed. Cas. No. 9,553; ard v. Abel (C. C. A. 1907) 156 649, 19 Am. Bankr. Rep. 383. petitioner, praying that his debt- adjudged a bankrupt, may, in the tion of the court, withdraw from roceeding. In re Bolognesi (1915) Fed. 771, 139 C. C. A. 351. But or more of the petitioning cred- insists upon an adjudication being or an intervening creditor pro- and shows cause against a dis- l, it cannot be ordered if the statu- grounds for an adjudication ex- d no fraud, mistake, or oppres- is shown. In re Cronin (D. C. 98 Fed. 584, 3 Am. Bankr. Rep. In re Lewis (D. C. 1904) 129 147, 11 Am. Bankr. Rep. 683; In ndenhall (D. C. 1874) 9 N. B. R. Fed. Cas. No. 9,424. If a trustee nkruptcy has been appointed, he appear and oppose an application smissal. In re Pennsylvania Con- oal Co. (1908) 163 Fed. 579, 20 Bankr. Rep. 872. But where a upt moved to dismiss the invol- proceedings against him, and the required notice to all his ors, and all but one freely as- to a dismissal, held, that the n should be dismissed. In re blatt & Co. (1912) 193 Fed. 638, . Bankr. Rep. 401.

— **Notice to creditors.**—Notice ditors of an application to dismiss ition in bankruptcy for want of cution or by consent of parties, uired by Bankruptcy Act, § 59g § 9643), is indispensable, and smissal of the proceedings with- ving such notice is erroneous and reversible, if not absolutely void. In re Plymouth Cordage Co. (1905) 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Black Diamond Copper Min. Co. (1906) 10 Ariz. 42, 85 Pac. 653. Prior to the amendment of 1910, it was held that no such notice was necessary where no list of creditors had been filed and no creditors other than the petitioners had intervened or appeared in any way in the proceedings, since, in such a case the court would have no means of knowing whether there were any other creditors or their names or addresses, and therefore could not give them notice. In re Levi & Klauber (1905) 142 Fed. 962, 74 C. C. A. 132, 15 Am. Bankr. Rep. 294; In re Jemison Mercantile Co. (1902) 112 Fed. 966, 50 C. C. A. 641, 7 Am. Bankr. Rep. 588.

These provisions relate only to dismissals which withdraw the case without its having been submitted to the court for decision on the merits, and not to dismissals which follow as the result of a trial or hearing on the merits. Neustadter v. Chicago Dry Goods Co. (D. C. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

Orders by a court of bankruptcy in proceedings against a bankrupt corporation, directing that, on payment into court by a stranger to the proceedings of a stated sum, to be used in payment of the then proved claims of unsecured creditors, the proceedings should stand dismissed, made without notice to the bankrupt or its creditors, held without authority. Luxury Fruit Co. v. Harris (1914) 217 Fed. 740, 133 C. C. A. 434.

34. — **Reinstatement after dismissal.**—A petition which has been erroneously or improvidently dismissed may be reinstated and the proceedings resumed, but only when proper notice has been given to the defendant or he has appeared. Gage v. Gates (1876) 62 Mo. 412. But not where creditors have shown an unreasonable dilatoriness in applying for such reinstatement. In re Jemison Mercantile Co. (1902) 112 Fed. 966, 50 C. C. A. 641, 7 Am. Bankr. Rep. 588. Nor where the dismissal of the proceeding was ordered after a trial or hearing on the merits. Neustadter v. Chicago Dry Goods Co. (D. C. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

35. **Trial or hearing.**—If disputed questions of fact arise on a petition in bankruptcy, the judge may refer them to a special master or to a referee in bankruptcy to ascertain and report the facts. W. A. Gage & Co. v. Bell (D. C. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696. Where an answer of the alleged bankrupt and a further answer of an objecting creditor only raised one issue, the petitioning creditors were not relieved from appearing before a master for trial because the order of refer-

ence only submitted the issue formed by the petition and the "answer" thereto. Lackawanna Leather Co. v. La Porte Carriage Co. (C. C. A. 1914) 211 Fed. 318. A court of bankruptcy is within new equity rule 62 (ante, § 1536), relating to the powers of a master, and providing that he shall have full authority to examine the parties to the cause on oath touching all matters contained in the reference, and to examine all witnesses produced by the parties before him. In re Automatic Musical Co. (D. C. 1913) 204 Fed. 334. The report of the master or referee is entitled to the highest consideration, and, if responsive to the reference, will ordinarily be regarded as conclusive and not to be set aside at the mere discretion of the court. In re Murphy (D. C. 1915) 225 Fed. 392; In re Senoia Duck Mills (D. C. 1912) 193 Fed. 711; Philpot v. O'Brion (1903) 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205.

It is within the authority of the court of bankruptcy to grant continuances or adjournments under proper circumstances. In re Cohen (D. C. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; In re Pupke (D. C. 1867) Fed. Cas. No. 11,468. And the want of an adjournment to a day certain, after issue joined as to the acts of bankruptcy alleged, does not terminate the proceedings. In re Buchanan (C. C. 1874) 10 N. B. R. 97, Fed. Cas. No. 2,073. The alleged bankrupt cannot have the case set down for hearing on petition and answer. In re Fineman (D. C. 1915) 223 Fed. 652.

If the issues have been tried by a jury, the court has the same power over the verdict as a court of common law, and may set it aside and order a new trial for cause shown. In re De Forest (D. C. 1874) 9 N. B. R. 278, Fed. Cas. No. 3,745; Ex parte Corse (D. C. 1843) Fed. Cas. No. 3,254. Or the court may award a new trial on the ground of error in its own instructions. In re Marks Bros. (D. C. 1905) 135 Fed. 448, 14 Am. Bankr. Rep. 830.

The court may order the consolidation of different petitions in bankruptcy filed by different creditors against the same debtor. In re McCracken & McLeod (D. C. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95; Salt Lake Valley Canning Co. v. Collins (1910) 176 Fed. 91, 99 C. C. A. 611, 23 Am. Bankr. Rep. 716. But involuntary proceedings in bankruptcy against an individual cannot be changed, during their pendency and after testimony has been taken, by a mere order amending the title, so as to embrace also a proceeding against a partnership of which the original defendant is one member. In re Kaufman (1910) 176 Fed. 93, 99 C. C. A. 107, 23 Am. Bankr. Rep. 429.

Where a bankrupt against whom an involuntary petition is pending files a voluntary petition, notice should be given to the creditors filing the involuntary petition before any action on the voluntary one, and such action should then be taken with respect to the two petitions as appears to be for the best interest of the estate. Thus, it would not be proper to make an adjudication on the voluntary petition and dismiss the other, where the result would be to prevent the successful impeachment of certain conveyances alleged to be preferential. In re Dwyer (D. C. 1902) 112 Fed. 777, 7 Am. Bankr. Rep. 532.

A court of bankruptcy also has power to make proper orders respecting the pleadings. Young & Holland Co. v. Brandle Bros. (1908) 162 Fed. 663, 89 C. C. A. 455, 20 Am. Bankr. Rep. 612. But the rule is that if the petitioning creditors move for an adjudication on the petition and answer, they thereby admit the facts properly pleaded in the answer, in accordance with the general rules of equity practice, and the only question presented is as to the legal sufficiency of the answer; and if the motion is denied, the defendant is entitled to a final decree dismissing the petition. In re Cohn (D. C. 1915) 220 Fed. 956; In re Waugh (1904) 133 Fed. 281, 66 C. C. A. 659, 13 Am. Bankr. Rep. 187; In re Taylor (1900) 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

36. Adjudication.—If no pleadings have been filed on behalf of the bankrupt or any of his creditors, and the petition is sufficient on its face, it is the duty of the judge to make an adjudication of bankruptcy. In re Black Diamond Copper Min. Co. (1906) 10 Ariz. 42, 85 Pac. 653.

If an unreasonably long time elapses after the filing of the pleadings, without any attempt either on the part of the petitioning creditors or the court to bring the matter to a final determination, and more especially if creditors are allowed to take their own course, outside the bankruptcy proceedings, in regard to reorganizing the debtor's business and distributing his property, it may be concluded that the court of bankruptcy has lost its jurisdiction over the case, and a state court will be justified in entertaining and proceeding with an attachment suit of a single creditor. Acme Harvester Co. v. Beekman Lumber Co. (1911) 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208.

The entry of the order of court constitutes the adjudication; but a mere memorandum of the judge on the petition directing an order to be entered does not complete it. In re Hill (D. C. 1874) Fed. Cas. No. 6,484.

37. —— Conclusiveness and effect.—The filing of a petition in bankruptcy is a caveat, and, on adjudication, the trustee takes the property as of the time of filing the petition. Ledgerwood v. Dashiell (Tex. Civ. App. 1915) 177 S. W. 1010. An adjudication of bankruptcy relates back to the date of the

of the petition. In re Bear (D. 79) Fed. Cas. No. 1,177; Smith nkerhoff (1852) 6 N. Y. 305.

ecree of a federal district court in bankruptcy, upon a petition oluntary proceedings, whereby the is adjudged and declared a bank- is in the nature of a decree in ince it determines his legal status t respect, and is therefore notice, elf, to all creditors, and is con- e evidence that all the facts nec- to sustain the decree were prov- efore the court. Chapman v. er (1885) 114 U. S. 158, 5 Sup. 99, 29 L. Ed. 83; In re Billing C. 1906) 145 Fed. 395, 17 Am. . Rep. 80; Lewis v. Sloan (1873) C. 557; In re Wallace (D. C. 2 N. B. R. 134, Fed. Cas. No. 1; In re Banks (D. C. 1843) Fed. No. 958; In re Ordway (D. C. 19 N. B. R. 171, Fed. Cas. No. 2; Shawhan v. Wherritt (1849) w. 627, 12 L. Ed. 847; Morse v. ey (C. C. 1844) Fed. Cas. No. Rayl v. Lapham (1875) 27 Ohio 2; Thornton v. Hogan (1876) 63 43.

the creditors of a bankrupt are at constructively parties to the pro- g to have him so adjudged, and onclusively bound by the adjudica- at least in so far as it determines ct of his insolvency and his com- n of the act of bankruptcy charg- Cook v. Robinson (C. C. A. 1912) ed. 785, 28 Am. Bankr. Rep. 182; Broadway Savings Trust Co.) 152 Fed. 152, 81 C. C. A. 58, n. Bankr. Rep. 254; In re Billing C. 1906) 145 Fed. 395, 17 Am. . Rep. 80; Bear v. Chase (1900) ed. 920, 40 C. C. A. 182, 3 Am. . Rep. 746; In re American ng Co. (1902) 112 Fed. 752, 50 A. 517, 7 Am. Bankr. Rep. 463; us v. Eagen (D. C. 1912) 206 518, 30 Am. Bankr. Rep. 287; In ecox (1908) 164 Fed. 823, 90 C. 627, 21 Am. Bankr. Rep. 314; In lgin-Pace Contracting Co. (D. C. 224 Fed. 245.

insolvency of the debtor at the of making the conveyance or er of property alleged as an act nkruptcy is necessarily involved adjudication, and is conclusively ished by it when the question again arise at any stage of the edings, as, when it is sought to side the conveyance or recover the rence. In re V. & M. Lumber Co. C. 1910) 182 Fed. 231; In re ican Brewing Co. (1902) 112 Fed. 50 C. C. A. 517, 7 Am. Bankr. 463; Whitwell v. Wright (1910) App. Div. 246, 120 N. Y. Supp. De Graff v. Lang (1904) 92 App. 564, 87 N. Y. Supp. 78; Lazarus gen (D. C. 1912) 206 Fed. 518; vright v. West (Ala. 1913) 64 . 298. Bankruptcy adjudication h it may be res judicata, against attal mortgage creditor of the bankrupt, of the bankrupt's insolvency at the time he executed the mortgage does not determine the mortgagee's right to retain the security. Sheppard-Strassheim Co. v. Black (C. C. A. 1914) 211 Fed. 643.

If the validity of the claim of one of the petitioning creditors is put in issue by the bankrupt's answer and the issue is decided in favor of the creditor, the adjudication of bankruptcy is conclusive evidence upon that point, not only against the bankrupt and the trustee, but against all other creditors, since, under the statute, they might have become parties to the proceeding, and, failing to do so, are considered as represented by the bankrupt; so that, when the claim in question is filed for allowance before the referee, it cannot be again contested by any one. Ayres v. Cone (1905) 138 Fed. 778, 71 C. C. A. 144, 14 Am. Bankr. Rep. 739; In re Henry Ulfelder Clothing Co. (D. C. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425; In re Fallon (D. C. 1868) 2 N. B. R. 277, Fed. Cas. No. 4,628. But if issue is taken on the question of insolvency or the commission of an act of bankruptcy, and no inquiry is made into the claims of the petitioning creditors the adjudication cannot be considered as conclusive on the question of the precise amount which the bankrupt owed to any one creditor or that he was indebted to any particular creditor in any sum. Cartwright v. West (1908) 155 Ala. 619, 47 South. 93. Where the defendant took issue on the question of his insolvency, and the petitioning creditors, for the purpose of proving insolvency, undertook to show the amount of existing indebtedness and offered in evidence certain promissory notes made by the debtor to third parties (who were not parties to the proceeding), and the debtor contested the validity and consideration of the notes, but the point was decided against him, and an adjudication was made, it was held that the adjudication was not conclusive as to the validity of the notes so as to prevent the bankrupt from opposing their allowance as claims against his estate. In re Henry Ulfelder Clothing Co. (D. C. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425.

When the act of bankruptcy on which the petition was founded is made the basis of a subsequent suit by the trustee in bankruptcy (as, to set aside a fraudulent conveyance or recover a preference), the adjudication conclusively establishes the fact as against the bankrupt and all creditors. In re Hecox (C. C. A. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; Cook v. Robinson (C. C. A. 1912) 194 Fed. 785, 28 Am. Bankr. Rep. 182; Whitwell v. Wright (1909) 115 N. Y. Supp. 48; Hackney v. Raymond Bros. Clarke Co. (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675, 13 Am. Bankr. Rep. 164. But see Pepperdine v. Bank of Sey-

mour (1903) 100 Mo. App. 387, 73 S. W. 890; John Silvey & Co. v. Tift (1905) 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386. Where involuntary bankruptcy proceedings were instituted on the ground that the bankrupt had made a general assignment for the benefit of creditors, the order of adjudication held not res judicata that the transfer was a general assignment. In re McCrum (1914) 214 Fed. 207, 130 C. C. A. 555. But if the petition charges different acts of bankruptcy, and the adjudication does not show upon which one of them it proceeded, it does not render either charge res judicata in the further proceedings. In re Julius Bros. (1914) 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89; In re Letson (1907) 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

An adjudication in a partnership case would ordinarily be conclusive as to the existence of the partnership and the identity of the persons composing it, but not, as against the trustee in bankruptcy of one of the persons included in the adjudication, who was not heard, although he filed a denial and answer. Manson v. Williams (1909) 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869, 22 Am. Bankr. Rep. 22, affirming (1907) 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674, which affirmed In re Hudson Clothing Co. (D. C. 1906) 148 Fed. 305, 17 Am. Bankr. Rep. 826. Order of bankruptcy court declaring copartnership a bankrupt held not an adjudication that the members were bankrupts. In re Hansley & Adams (D. C. 1916) 228 Fed. 564.

It is not only in contested cases that the conclusive effect of a judgment is to be attributed to an adjudication of bankruptcy. One entered on default for want of an answer is as binding on the bankrupt and the creditors as one entered upon a trial or hearing. In re American Brewing Co. (1902) 112 Fed. 752, 50 C. C. A. 517, 7 Am. Bankr. Rep. 463.

From the conclusive character of an adjudication in bankruptcy it follows necessarily that it cannot be attacked or impeached as to its validity in any collateral proceeding in the same or any other court. Graham v. Boston, H. & E. R. Co. (1886) 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Michaels v. Post (1874) 21 Wall. 398, 22 L. Ed. 520; In re Dempster (C. C. A. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751; Gilbertson v. U. S. (1909) 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep. 32; In re New York Tunnel Co. (1908) 166 Fed. 284, 92 C. C. A. 202, 21 Am. Bankr. Rep. 531; In re Hintze (D. C. 1905) 134 Fed. 141, 13 Am. Bankr. Rep. 721; Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; Graham v. Boston, H. & E. R. Co. (C. C. 1883) 14 Fed. 753; Sutton v. Mandeville (1804) Fed. Cas. No. 13,651; Cromwell v. Gallup (1879) Hun (N. Y.) 49; Mount v. Manha Co. (1886) 41 N. J. Eq. 211, 3 726; Slaughter v. Louisville & N Co. (1911) 125 Tenn. 292, 143 S. 603; Corbett v. Riddle (1913) 209 811, 126 C. C. A. 535; Sabin v. kin-Green Logging Co. (D. C. 1 218 Fed. 984.

A want of jurisdiction in the c of bankruptcy is such a fatal de as may be availed of in a collat proceeding. Stuart v. Aumiller (1 37 Iowa, 102; In re Goodfellow C. 1870) Fed. Cas. No. 5,536; I Davis (D. C. 1914) 217 Fed. 113. pecially in voluntary bankruptcy w the creditors may have no opportu to plead a want of jurisdiction be the adjudication is made. In re neau (1904) 127 Fed. 677, 62 C. C 403, 11 Am. Bankr. Rep. 679. B jurisdiction appears on the face of proceedings, or if there is nothin the face of the proceedings to dis an absence of jurisdiction, then the judication is not impeachable colla ally even on this ground. Sloan v. L (1874) 22 Wall. 150, 22 L. Ed. In re Billing (D. C. 1906) 145 395, 17 Am. Bankr. Rep. 80; U. Freed (C. C. 1910) 179 Fed. 236 Am. Bankr. Rep. 89; In re Ives (1879) 19 N. B. R. 97, Fed. Cas. 7,115. In re Sage (D. C. 1915) Fed. 525. Jurisdiction does not s depend upon the question whether defendant is one of the persons or porations subject to the act, or is empt, as to open the adjudication t tack on this ground. In re First Bank (1907) 152 Fed. 64, 81 C. C 260, 18 Am. Bankr. Rep. 265; I Columbia Real Estate Co. (D. C. 1 101 Fed. 965, 4 Am. Bankr. Rep. And the same is true as to the ciency of the petitioning creditor number and amount. Roberts v. nald (1903) 72 N. H. 198, 55 Atl. Bail v. Hartman (1905) 9 Ariz. 32 Pac. 358; Larkin-Green Logging v. Sabin (1915) 222 Fed. 814, 13 C. A. 240. Even if it should be con ed that the question of jurisdictio always open, still this is not the where the bankrupt and all of his itors have recognized the validit the proceedings and have particip therein and sought the benefit the In re Worsham (1905) 142 Fed. 73 C. C. A. 665, 15 Am. Bankr. 672.

There are some decisions to the e that an adjudication in bankruptcy be impeached collaterally for frau its procurement or fraudulent collu between the debtor and the petitio creditors. In re Billing (D. C. 1 145 Fed. 395, 17 Am. Bankr. Rep. Benedict v. Smith (1882) 48 Mich. 12 N. W. 866. But the better op is that these are matters of defens ground for vacating the adjudic

irect proceeding for that purpose, ot for questioning its validity collly. Michaels v. Post (1874) 21 398, 22 L. Ed. 520; Bissell v. 1809) 4 Day (Conn.) 79.

adjudication cannot be assailed erally for mere errors of law or larities of practice, not going to risdiction of the court. In re (D. C. 1915) 224 Fed. 525; In tchell (D. C. 1875) Fed. Cas. No. Hobson v. Markson (C. C. 1843) Cas. No. 6,555; Edelstein v. U. 906) 149 Fed. 636, 79 C. C. A. 17 Am. Bankr. Rep. 649; In re bia Real Estate Co. (D. C. 1900) ed. 965, 4 Am. Bankr. Rep. 411.

the entry of an adjudication of uptcy against a corporation on the day on which the petition against filed is not a mere irregularity; an act entirely void. The statute to creditors a substantial right to mitation of a time within which may come in and be heard, which is not derived through the bankand consequently cannot be waived n, nor can they be deprived of it by ct of his or by the court; and they may attack the validity of an adjudication collaterally in edings previously instituted by in another district. In re Elmira Co. (D. C. 1901) 109 Fed. 456, Bankr. Rep. 484.

adjudication in bankruptcy brings roperty of the bankrupt into the ly of the law and appropriates the payment of his debts, as efully as if it were taken on execuor attachment, subject to the ication, except as otherwise pro that the property is appropriatthe same condition and subject to ame equities as when in the posn of the bankrupt. In re Young (1907) 153 Fed. 98, 82 C. C. A. 18 Am. Bankr. Rep. 572. The re of landlord and tenant is not ed by the tenant's adjudication in uptcy. Shapiro v. Thompson) 160 Ala. 363, 49 South. 391.

adjudication is also constructive to all persons, at least those the jurisdiction of the court, e transfer of title to the bank property, and they must take that the ownership of the bankhas ceased and that of his trusegun. Hough v. City of North s (1907) 196 Mass. 290, 82 N. 3. This applies to assessors of . Id.

adjudication does not create an l lien on the property in favor of rustee. In re Hager (D. C. 1909) Fed. 972; Marine Sav. Bank v. n (1910) 160 Mich. 614, 125 N. 54. But it operates as a caveat the world, and tacitly embodies junction against any interference any of the property by any perho has not a valid interest in it or lien upon it, so that intermeddling with the property by any such person amounts to a violation of the implied injunction and may be punished as a contempt of the court. Clay v. Waters (1910) 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; In re Reynolds (D. C. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758.

38. —— **Effect on status of bankrupt corporation.**—An adjudication in bankruptcy does not dissolve a corporation or terminate its existence. In re Russell Wheel & Foundry Co. (D. C. 1915) 222 Fed. 569; Morley v. Thayer (C. C. 1880) 3 Fed. 737; Holland v. Heyman (1878) 60 Ga. 174. CONTRA, State Savings Ass'n v. Kellogg (1873) 52 Mo. 583.

While a bankruptcy adjudication of a corporation remains in force, the corporation must be regarded as insolvent for all purposes of the bankruptcy administration, whatever the value of its assets or the amount of its liabilities. In re Witherbee (1913) 202 Fed. 896, 121 C. C. A. 254.

A decree adjudging a corporation bankrupt is in the nature of a decree in rem as respects the status of the corporation, and if the court rendering it had jurisdiction it can be assailed only by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was not given. New Lamp Co. v. Ansonia Brass Co. (1875) 91 U. S. 656, 23 L. Ed. 336.

39. —— **Vacating and setting aside.**—An adjudication of bankruptcy taken by default, for want of appearance or answer, may be opened by the bankruptcy court, on application of the bankrupt or a creditor, to permit him to file an answer and contest the petition, provided a good excuse is shown for the default or for any delay in the application, and provided the answer proposed to be filed shows a meritorious defense and not merely a technical objection. In re Imperial Corp. (D. C. 1904) 133 Fed. 73, 13 Am. Bankr. Rep. 199; In re Urban & Suburban Realty Title Co. (D. C. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687; In re Le Favour (D. C. 1875) Fed. Cas. No. 8,-208; In re Neilson (D. C.) 7 N. B. R. 505, Fed. Cas. No. 10,090; In re Gill (D. C. 1912) 195 Fed. 643, 28 Am. Bankr. Rep. 333. Where petitioner, with knowledge that the firm of which he was a member was about to be adjudicated a bankrupt, selected an attorney in fact who appeared formally and filed an answer and later chose to abandon the case, and the attorney at law who acted for the attorney in fact stated that he did not intend to appear at the hearing, petitioner was not entitled to have the adjudication vacated on the ground that it was entered by his default or excusable neglect. In

re Mitchell & Co. (D. C. 1914) 211 Fed. 778. Where an involuntary bankruptcy petition was denied, a motion for rehearing simply repeating petitioners' original charge of insolvency, but, containing no statements of new evidence to combat that offered by respondent, was properly denied. Lackawanna Leather Co. v. La Porte Carriage Co. (C. C. A. 1914) 211 Fed. 318.

After the entry of an adjudication as the result of a trial or hearing, it may be vacated or set aside, for good and sufficient cause, on the motion of the bankrupt himself. In re McFaun (D. C. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66. But a bankrupt who made no defense to the adjudication, filed his schedules, and appeared personally and by attorney, is not entitled to a vacation of the adjudication without showing that fraud was practiced on him. In re Gill (D. C. 1912) 195 Fed. 643, 28 Am. Bankr. Rep. 333. An adjudication in bankruptcy may be vacated on the application of a receiver of the bankrupt corporation appointed by a state court. In re Atlantic Mut. Life Ins. Co. (D. C. 1877) Fed. Cas. No. 628. Or on the application of any creditor who may conceive his interests to be injuriously affected by the adjudication. In re New England Breeders' Club (1909) 169 Fed. 586, 95 C. C. A. 84, 22 Am. Bankr. Rep. 124; In re Scott (D. C. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; In re Derby (D. C. 1872) Fed. Cas. No. 3,-815. Or on the application of an attaching creditor. In re Donnelly (D. C. 1881) 5 Fed. 783; In re Bergeron (D. C. 1875) 12 N. B. R. 385, Fed. Cas. No. 1,342. But a motion to vacate the adjudication cannot be made by a stranger, though it is in the discretion of the court to allow him to be heard as amicus curiæ, when the ground alleged is a want of jurisdiction. In re Columbia Real Estate Co. (D. C. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411.

An application to vacate an adjudication in bankruptcy must be made with reasonable promptness and will not be granted if the applicant is justly chargeable with laches. In re First Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; Altonwood Park Co. v. Gwynne (1908) 160 Fed. 448, 87 C. C. A. 409, 20 Am. Bankr. Rep. 31; In re Ives (1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; In re Baltimore County Dairy Ass'n (D. C. 1877) 11 N. B. R. 253, Fed. Cas. No. 828; In re Groome (D. C. 1880) 1 Fed. 464; In re Lalor (D. C. 1879) 19 N. B. R. 253, Fed. Cas. No. 8,001; In re Court (D. C. 1878) 17 N. B. R. 555, Fed. Cas. No. 3,284; In re Republic Ins. Co. (D. C. 1873) 8 N. B. R. 317, Fed. Cas. No. 11,706; In re Meade (D. C. 1879) 19 N. B. R. 335, Fed. Cas. No. 9,370. An adjudication entered upon a confession of the acts of bankruptcy charged cannot be set aside after the death of the bankrupt on the application of a creditor who has proved his debt. In re Thomas (D. C. 1875) 11 N. B. R. 330, Fed. Cas. No. 13,891. That the wife of a bankrupt has allowed three years to elapse since the adjudication of bankruptcy constitutes such laches as will preclude her from then contesting the allegations of insolvency in the petition upon which the adjudication was founded. In re Gibbons (D. C. 1915) 225 Fed. 420.

Want of jurisdiction is a sufficient ground for vacating an adjudication in bankruptcy. In re Niagara Contracting Co. (D. C. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643. It may be shown that the person or corporation proceeded against was within the exempt or excepted classes. In re Hudson River Electric Co. (D. C. 1909) 167 Fed. 986, 21 Am. Bankr. Rep. 915. But see In re Urban & Suburban Realty Title Co. (D. C. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687. The adjudication may be vacated where it was based upon waiver of important rights of the alleged bankrupt, made by his attorney. In re Republic Ins. Co. (D. C. 1873) 8 N. B. R. 317, Fed. Cas. No. 11,706. Or where it is shown to have been the result of fraud or collusion. In re Lalor (D. C. 1879) 19 N. B. R. 253, Fed. Cas. No. 8,001. Or where newly discovered evidence is presented. In re Great Western Tel. Co. (C. C. 1873) Fed. Cas. No. 5,739. And an adjudication may be set aside by consent, or proof of the assent of all known creditors. In re Magee (D. C. 1874) Fed. Cas. No. 8,941. But an adjudication will not be set aside merely on showing a prior filing of the petition against the bankrupt in another district. In re Harris (D. C. 1873) Fed. Cas. No. 6,111. Nor on the ground that the notary public who took the verification of the petition was the bankrupt's own attorney. In re Kindt (D. C. 1900) 9 Fed. 403, 3 Am. Bankr. Rep. 443. Nor because the attorney who appeared for the bankrupt had not been admitted to practice in the federal courts of the district. In re Kindt (D. C. 1900) 9 Fed. 867, 3 Am. Bankr. Rep. 546.

It is not necessary that creditors should be notified of an application or proceeding to vacate the adjudication in bankruptcy. Texas & P. Ry. Co. v. McNairy (1906) 42 Tex. Civ. App. 222, 94 S. W. 111. But notice must be given to the bankrupt himself. In re Bus (D. C. 1870) 6 N. B. R. 179, Fed. Cas. No. 2,222.

A referee in bankruptcy has jurisdiction to set aside an adjudication, at least in a case where he himself made the adjudication, the case having been referred to him by the clerk on account of the absence of the judge. Texas & P. Ry. Co. v. McNairy (1906) 42 Tex. Civ. App. 222, 94 S. W. 111.

Where, without unreasonable delay

cess having been issued, cred- bankrupt filed a petition to va- judication, held that, although d not formally ask to defend, ould have been permitted to do a trial should have been had on the allegations of the involuntary petition, rather than on the allegations of the petition to vacate. B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co. (1913) 206 Fed. 885, 124 C. C. A. 545.

. (Act July 1, 1898, c. 541, § 19.) Jury trials.

Trials.—a A person against whom an involuntary petition een filed shall be entitled to have a trial by jury, in respect question of his insolvency, except as herein otherwise pro- and any act of bankruptcy alleged in such petition to have ommitted, upon filing a written application therefor at or before ne within which an answer may be filed. If such application is ed within such time, a trial by jury shall be deemed to have been l.

a jury is not in attendance upon the court, one may be specially oned for the trial, or the case may be postponed, or, if the case ding in one of the district courts within the jurisdiction of a court of the United States, it may be certified for trial to the court sitting at the same place, or by consent of parties when at any other place in the same district, if such circuit court has o have a jury first in attendance.

e right to submit matters in controversy, or an alleged offense this Act, to a jury shall be determined and enjoyed, except as ed by this Act, according to the United States laws now in force h as may be hereafter enacted in relation to trials by jury. at. 551.)

Notes of Decisions

ght to trial by jury.—The right and a trial by jury is given to krupt only, and creditors, while ay oppose the adjudication, can- and a jury trial, if the respond- s not ask it. In re Herzikopf 121 Fed. 544, 57 C. C. A. 606, Bankr. Rep. 745. The bankrupt, r to be entitled to this mode of nust enter his appearance and answer at the proper time. In hardt (D. C. 1869) 3 N. B. R. d. Cas. No. 5,294. And he must or a jury in the manner and at e prescribed by the statute, oth- he will be deemed to have waiv- privilege in this respect and afterwards demand it. In re th (1906) 147 Fed. 160, 77 C. 402, 17 Am. Bankr. Rep. 128; . Cobb (D. C. 1898) 91 Fed. Am. Bankr. Rep. 153; In re 8 N. B. R. 142; In re Hunter 1843) Fed. Cas. No. 6,902. In se, it is the province of the o determine all the issues arising ne petition and answer without ervention of a jury. Carpenter l (1909) 174 Fed. 603, 98 C. C. , 23 Am. Bankr. Rep. 463. If ged bankrupt files a general de- to the petition, which is over- after argument, it is then too him to file a general denial and l a trial by jury. In re Benham, . R. 94.

estions triable by jury.—If the dent admits or does not traverse egations of the petition with respect to his insolvency or the commission of an act of bankruptcy, but takes issue on the ground that the petitioner is not a creditor of his, that he does not owe him the debt alleged, or that it is not a debt provable in bankruptcy, he cannot demand a trial by jury. Phelps v. Clasen (C. C. 1868) 3 N. B. R. 87, Fed. Cas. No. 11,074; Morss v. Franklin Coal Co. (D. C. 1903) 125 Fed. 998, 11 Am. Bankr. Rep. 423; Ex parte Foster (C. C. 1842) 5 Law Rep. 406, Fed. Cas. No. 4,959. So where he chooses to contest the proceeding on the ground that he is a farmer or a wage-earner and therefore not amenable to involuntary bankruptcy; this is not an issue on which he is entitled as of right to a jury trial. Carpenter v. Cudd (1909) 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463; Stephens v. Merchants' Nat. Bank (1907) 154 Fed. 341, 83 C. C. A. 119, 18 Am. Bankr. Rep. 560. And so of the question whether one of the respondents was in fact a member of the partnership against which the proceedings are directed. In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; In re Samuels & Lesser (D. C. 1913) 207 Fed. 195, 30 Am. Bankr. Rep. 293.

As to contested issues of fact other than the question of insolvency or the commission of an act of bankruptcy, it is always in the discretion of the court to refer them to a jury, but this cannot be demanded as of right, and the verdict is advisory only, and not neces-

sarily conclusive on the court. Barton v. Barbour (1881) 104 U. S. 126, 26 L. Ed. 672; Carpenter v. Cudd (1909) 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463; Oil Well Supply Co. v. Hall (1904) 128 Fed. 875, 63 C. C. A. 343, 11 Am. Bankr. Rep. 738; In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128.

As to the issue of insolvency, this involves as elements the question of the amount of indebtedness and the fair valuation of the bankrupt's property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury on the trial of such issue. Schloss v. Strellow (1907) 156 Fed. 662, 84 C. C. A. 374, 19 Am. Bankr. Rep. 359.

As to the issue of the commission of an act of bankruptcy, the question whether or not the defendant made a general assignment for the benefit of his creditors is a question of fact on which he is entitled to demand a jury. Day v. Beck & Gregg Hardware Co. (1902) 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175. And so, in respect to the fourth act of bankruptcy, it is proper to submit to a jury the questions whether the respondent was insolvent, whether receivers were appointed because of such insolvency, and whether such receivers took charge and possession of his property and still continue to hold it. Blue Mountain Iron & Steel Co. v. Portner (1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559. Whether the procurement of a receivership for an insolvent corporation was the act of the corporation so as to constitute it an act of bankruptcy held a question for the jury. Jan Supply & Hardware Co. v. Dayton C & Iron Co. (1915) 223 Fed. 991, 139 C. A. 367. But where the act of ba ruptcy charged is a transfer of prop ty with intent to prefer a creditor, the answer admits the respondent's solvency and the act charged, but me ly denies the intent, this does not ra such an issue as to entitle him to trial by jury. In re Harris (D. 1907) 155 Fed. 216, 19 Am. Ban Rep. 204.

3. Proceedings and review. — T bankruptcy court may, in its discreti issue a special venire and impanel jury to try the issue, at any time, wi out regard to the question of its be term time or vacation in the dist court proper. In re Findlay (D. 1873) Fed. Cas. No. 4,789; Lehman Strassberger (C. C. 1875) Fed. C No. 8,216. The proceedings on a j trial held under this provision of bankruptcy act are the same in form on the trial of an ordinary action at in a federal court. In re Ward (D. 1908) 161 Fed. 755, 20 Am. Bankr. R 482; Morss v. Franklin Coal Co. (D 1903) 125 Fed. 998, 11 Am. Ban Rep. 423; In re Jelsh (D. C. 1874 N. B. R. 412, Fed. Cas. No. 7,257. error is committed, it can only be viewed on an application for a n trial or on a writ of error, and not appeal. In re Neasmith (1906) Fed. 160, 77 C. C. A. 402, 17 A Bankr. Rep. 128.

Requiring the jury, in an involunt bankruptcy proceeding, to find a sup mental verdict on an issue which been overlooked held not error. B ders Clothing Co. v. Burnham-Mung Root Dry Goods Co. (C. C. A. 19 228 Fed. 470.

§ 9604. (Act July 1, 1898, c. 541, § 20.) Oaths, affirmations.

Oaths, Affirmations.—a Oaths required by this Act, except up hearings in court, may be administered by (1) referees; (2) o cers authorized to administer oaths in proceedings before t courts of the United States, or under the laws of the State where t same are to be taken; and (3) diplomatic or consular officers of t United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in l thereof, affirm. Any person who shall affirm falsely shall be punish as for the making of a false oath. (30 Stat. 551, 552.)

§ 9605. (Act July 1, 1898, c. 541, § 21, as amended, Act Feb. 1903, c. 487, § 7.) Evidence.

Evidence.—a A court of bankruptcy may, upon application any officer, bankrupt, or creditor, by order require any designat person, including the bankrupt and his wife, to appear in court or fore a referee or the judge of any State court, to be examined co cerning the acts, conduct, or property of a bankrupt whose estate in process of administration under this Act: Provided, That the w may be examined only touching business transacted by her or to wh she is a party, and to determine the fact whether she has transac or been a party to any business of the bankrupt.

b The right to take depositions in proceedings under this Act sh be determined and enjoyed according to the United States la

in force, or such as may be hereafter enacted relating to the tak-
f depositions, except as herein provided.

Iotice of the taking of depositions shall be filed with the referee
ery case. When depositions are to be taken in opposition to
lowance of a claim notice shall also be served upon the claimant,
when in opposition to a discharge notice shall also be served
the bankrupt.

Certified copies of proceedings before a referee, or of papers,
issued by the clerk or referee, shall be admitted as evidence
like force and effect as certified copies of the records of district
s of the United States are now or may hereafter be admitted as
nce.

A certified copy of the order approving the bond of a trustee shall
itute conclusive evidence of the vesting in him of the title to
roperty of the bankrupt, and if recorded shall impart the same
e that a deed from the bankrupt to the trustee if recorded would
imparted had not bankruptcy proceedings intervened.

A certified copy of an order confirming or setting aside a com-
ion, or granting or setting aside a discharge, not revoked, shall
vidence of the jurisdiction of the court, the regularity of the
edings, and of the fact that the order was made.

A certified copy of an order confirming a composition shall con-
e evidence of the revesting of the title of his property in the
rupt, and if recorded shall impart the same notice that a deed
the trustee to the bankrupt if recorded would impart. (30
551. 32 Stat. 798.)

In this section, as originally enacted, subdivision a was as follows:
"a A court of bankruptcy may, upon application of any officer, bankrupt, or
editor, by order require any designated person, including the bankrupt, who
a competent witness under the laws of the State in which the proceedings
e pending, to appear in court or before a referee or the judge of any State
urt, to be examined concerning the acts, conduct, or property of a bankrupt
ose estate is in process of administration under this Act."

It was amended by Act Feb. 5, 1903, c. 487, § 7, cited above, to read as set
th here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, pro-
ded that the act should not apply to bankruptcy cases pending when it took
ect, but that such cases should be adjudicated and disposed of conformably
the provisions of the original act.

Notes of Decisions

o may apply for examination.
ne and place of examination.
plication and order for examination.
- Notice of application.
duction and examination of books
nd papers.
mpelling attendance of witnesses.
amination of nonresident witnesses.
sons subject to examination.
- Wife of bankrupt.
ond examination of bankrupt.
nduct of the examination.
- Right to counsel.
- Objections to questions and rul-
ngs thereon.
pe and extent of the inquiry.
vileged communications.
vilege against self-criminating testi-
mony.
e and effect of evidence.
tness fees and costs of examination.
ntempts by witnesses.

Who may apply for examination.—
eiver of the bankrupt's property,
ted in the bankruptcy proceed-
s an "officer," within the meaning
s section, and may apply for an
nation in bankruptcy. In re Fix-
en & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822. Any person who has connected himself with the proceedings in the character of a creditor and has proved his debt has the right to call for the examination of the bankrupt or of other witnesses. Ex parte Jewett (D. C. 1875) 11 N. B. R. 443, Fed. Cas. No. 7,303. A bankrupt summoned at the instance of a creditor who has proved his claim cannot refuse to be sworn and examined on the ground that the claim is not valid unless such invalidity has been proved. In re Winship (D. C. 1874) Fed. Cas. No. 17,878. Nor on the ground that he has a set-off which will extinguish the claim of the creditor at whose instance the order for examination issued. In re Kingsley (D. C. 1873) 7 N. B. R. 558, Fed. Cas. No. 7,818. Creditors whose claims have been protested against, if duly proved, will be entitled to an order for the examination of the bankrupt. In re Belden (D. C. 1870) 4 N. B. R. 194, Fed. Cas. No. 1,241. When the bank-

rupt is summoned to an examination at the instance of a creditor who has proved his claim, counsel for other creditors have no right to interpose objections to his examination. In re Winship (D. C. 1874) Fed. Cas. No. 17,878.

Any person who has a provable debt and who shows that he is actually a creditor of the bankrupt, by being named as a creditor in the bankrupt's schedule, or by other evidence satisfactory to the referee, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim. In re Samuelsohn (D. C. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528; In re Rose (D. C. 1907) 163 Fed. 636, 19 Am. Bankr. Rep. 169; In re Kuffler (D. C. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587; In re Jehu (D. C. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re Walker (D. C. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35. On a similar principle, where the proposed examination of the bankrupt has a bearing on the question of his discharge, it is not a necessary prerequisite to the order for such examination that the creditor applying therefor should have filed specifications in opposition to the discharge. In re Baum (D. C. 1867) 1 N. B. R. 5, Fed. Cas. No. 1,116. But the right of a creditor to examine the bankrupt is suspended by the creditor's acceptance of a proposed composition. In re Tifft (D. C. 1878) 18 N. B. R. 177, Fed. Cas. No. 14,032.

2. Time and place of examination.—An examination in bankruptcy may be ordered and held after the filing of the petition, though prior to the adjudication. Cameron v. U. S. (1911) 192 Fed. 548, 113 C. C. A. 20, 27 Am. Bankr. Rep. 657. The court has authority to order the examination of a bankrupt or other witnesses at any time after the filing of an involuntary petition, although there has been no adjudication, nor appointment of a receiver. Rawlins v. Hall-Epps Clothing Co. (1914) 217 Fed. 884, 133 C. C. A. 594. The examination of a bankrupt under oath could be ordered by a bankruptcy court on application of the receiver, where adjudication in bankruptcy had not been made, as the estate must be regarded as in "process of administration" within § 9591 ante. Cameron v. U. S. (1914) 34 Sup. Ct. 244, 231 U. S. 710, 58 L. Ed. 448; Ex parte Bick (C. C. 1909) 155 Fed. 908, 19 Am. Bankr. Rep. 68; In re Fleischer (D. C. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194. CONTRA, In re Davidson (D. C. 1907) 158 Fed. 678, 19 Am. Bankr. Rep. 833; In re Crenshaw (D. C. 1907) 155 Fed. 271, 19 Am. Bankr. Rep. 266; Skubinsky v. Bodek (1909) 172 Fed. 332, 97 C. C. A. 116, 24 L. R. A. (N. S.) 985, 22 Am. Bankr. Rep. 689.

Under former bankruptcy acts it was held that, at least for the purposes of an examination, a person was to be considered a bankrupt from the tim the filing of the petition, whether it voluntary or involuntary; and he for example, if certain creditors fil petition against their debtor, and tain other creditors contested the s the debtor might be examined in tion to his indebtedness to the peti ing creditors, not only before an a dication had been made, but for the purpose of preventing one. In re H ted (D. C. 1843) Fed. Cas. No. 6, Ex parte Lee (D. C. 1842) Fed. No. 8,178; In re Bromley (Utah) B. R. 686; In re Salkey (C. C. 1 9 N. B. R. 107, Fed. Cas. No. 12,2

Under the former law, it was that the bankrupt could not be com led to submit to an examination a he had received his discharge, o least after the expiration of the within which an application to set a the discharge might be made. I Jones (D. C. 1872) 6 N. B. R. 386, Cas. No. 7,449; In re Witkowski C. 1874) 10 N. B. R. 209, Fed. Cas. 17,920; In re Dole (C. C. 1874) B. R. 193, Fed. Cas. No. 3,964. C pare In re Heath (D. C. 1873) 7 N R. 448, Fed. Cas. No. 6,304.

Where, proceedings in involun bankruptcy against a corporation been at issue on the petition, demu and answers denying insolvency fo months without being brought t hearing, a creditor is not entitled t order for an examination without s ing a present necessity for it. I Wilkes-Barre Light Co. (1913) 208 539, 125 C. C. A. 541.

3. Application and order for exam tion.—It is in the discretion of the c of bankruptcy to order the examina of a designated witness on a me oral application therefor. In re A Press (1904) 134 Fed. 51, 67 C. C 161, 13 Am. Bankr. Rep. 11.

In the case of a receiver or tru in bankruptcy, his simple applicatio demand for an order or summons i that is required to support it, and w a third person is to be examined, not necessary for the trustee to forth, in the form of an application the summons, the questions which to be asked upon the examination the particular facts or transaction to which he proposes to interrogate witness. In re Bryant (D. C. 1911) Fed. 530, 26 Am. Bankr. Rep. 504; re Fixen & Co. (D. C. 1899) 96 748, 2 Am. Bankr. Rep. 822; In Howard (D. C. 1899) 95 Fed. 41 Am. Bankr. Rep. 582.

An order requiring bankrupts to pear for examination before a ref at a distance from their residence, generally to produce their books, w ings, and memoranda, held unrea able and erroneous, as too broad. R lins v. Hall-Epps Clothing Co. (19 217 Fed. 884, 133 C. C. A. 594.

Power and jurisdiction to make order requiring the bankrupt or

competent witness to appear and t to examination are vested in the e in bankruptcy. In re Pioneer Co. (D. C. 1869) 7 N. B. R. 250, Cas. No. 11,178; In re Brandt 1868) 2 N. B. R. 215, Fed. Cas. ,812; In re Lanier (D. C. 1868) B. R. 154, Fed. Cas. No. 8,070; Abbey Press (1904) 134 Fed. 51, C. A. 161, 13 Am. Bankr. Rep. 11. en a bankruptcy proceeding has referred generally to a given ref- he has jurisdiction to order a person to appear before him for nation. In re Abbey Press) 134 Fed. 51, 67 C. C. A. 161, 13 Bankr. Rep. 11.

— **Notice of application.**—When ankrupt is cited before the ref- for examination before any meet- f his creditors has been held and e the appointment of a trustee, he object of the examination is y to obtain information on which repare the schedules, it is not tial to the validity of the proceed- at notice should have been given e creditors. In re Franklin Syn- (D. C. 1900) 101 Fed. 402, 4 Bankr. Rep. 244.

s proper that an examination of ankrupt should be had to enable ors to prepare specifications in ition to his discharge. Notice of examination must be given, it be open to all creditors, and or- ly it will be had once for all. To expense and delay, the notice to ors to attend in opposition to ischarge may embrace a notice amination of the bankrupt. In re (D. C. 1899) 91 Fed. 635, 1 Am. r. Rep. 419.

order for examination of a bank- should not be granted in invol- y proceedings, where there has no adjudication, nor appointment receiver, without notice to the rupt. Rawlins v. Hall-Epps ing Co. (1914) 217 Fed. 884, 133 A. 594.

en the trustee desires to examine ness for the purpose of discover- roperty of the bankrupt, and caus- summons to issue, it is not nec- y to give notice to the bankrupt e time and place of such exami- n. In re Levy (D. C. 1867) Fed. No. 8,295; In re Duncan (D. 76) Fed. Cas. No. 4,132.

to informing third parties, whose ests may be affected by an ex- ation in bankruptcy and the or- which may be founded on it, it is that the proceeding is administra- n character, and one in which the liction of the court is not depend- n the service of regular process, would be in a suit, and hence a e given by mail a reasonable time e the hearing is sufficient. In re n (D. C. 1900) 103 Fed. 850, 4 Bankr. Rep. 632.

5. Production and examination of books and papers.—A referee in bankruptcy has jurisdiction to pass an order, in the course of the examination of a bankrupt at a statutory meeting of his creditors, to compel the bankrupt to produce necessary books of account for the proper administration of the estate in the interest of the creditors. In re Soloway & Katz (D. C. 1912) 195 Fed. 103, 28 Am. Bankr. Rep. 228.

When the bankrupt is ordered to attend before the referee for examination, he may be required in the same order, or by a separate similar order, to produce his books of account and other papers needed in the investigation of his affairs, and a formal subpœna duces tecum is not necessary. Id.

Where creditors of a bankrupt corporation contend that another corporation is in fact the bankrupt under another name, the bankruptcy court has jurisdiction to order such other corporation to produce its books and papers before the special master on the hearing of orders to show cause why the receiver should not be extended over the property of such company. In re Ironclad Mfg. Co. (1912) 201 Fed. 66, 119 C. C. A. 404.

Where it is alleged that the bankrupt's stock of goods was sold by him to a certain corporation without adequate consideration, the sale being induced by the fraud of the vendee, a receiver of the bankrupt's estate has the right, under process from the court of bankruptcy, to examine any books or documents of such corporation showing or tending to show its receipt or disposition of said stock, or in any other way relating thereto. In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

Where a corporation organized as the successor of a partnership is a mere fiction, its business and assets being those of the partnership, and the firm is adjudged bankrupt, the books of the corporation must be submitted for examination in the bankruptcy proceedings, if demanded. In re Horgan (D. C. 1899) 97 Fed. 319.

6. Compelling attendance of witnesses.—Where the bankrupt is a prisoner in jail, his attendance before the referee for examination may be secured by means of the writ of habeas corpus ad testificandum. But this writ does not issue as a matter of right, on the request of creditors, but its employment rests in the discretion of the court, and it will not be granted except where it is strictly necessary, and especially when the prisoner is confined by authority of a state court. In re Thaw (1908) 166 Fed. 71, 91 C. C. A. 657, 21 Am. Bankr. Rep. 561;

Id. (D. C. 1908) 172 Fed. 288, 22 Am. Bankr. Rep. 687.

Where a witness is actually present before the referee in bankruptcy for examination when an order that he shall be sworn is made, the fact that the subpœna issued and served upon him was not under seal is immaterial. In re Abbey Press (1904) 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

If the witness fails or refuses to appear, he is to be dealt with by the judge, on a certificate of the facts from the referee, and may be punished as for contempt; but an application to the court for an attachment in the first instance, without such certificate, is irregular and improper. In re Kerber (D. C. 1903) 125 Fed. 653, 10 Am. Bankr. Rep. 747.

7. Examination of nonresident witnesses.—In the matter of securing the attendance of a witness in bankruptcy proceedings, the court may exercise all the power conferred upon it in ordinary civil cases, and hence the process may run into another district. In re Woodward (D. C. 1875) Fed. Cas. No. 18,000.

A person cannot be compelled to leave the state where he resides, to be a witness before a referee in bankruptcy, though his residence is less than 100 miles from the place of the hearing. In re Cole (D. C. 1904) 133 Fed. 414, 13 Am. Bankr. Rep. 300. And one cannot be compelled to attend an examination in bankruptcy at a distance of more than 100 miles from his residence, though it is within the same state. In re Hemstreet (D. C. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760.

The witness may be required to appear before a designated referee in the district where the witness lives, and in this case the referee conducts the examination in the capacity and with the powers of a referee in bankruptcy, and not merely as an examiner with the powers granted under the general equity rules. In re Sturgeon (1905) 139 Fed. 608, 71 C. C. A. 592, 14 Am. Bankr. Rep. 681; In re Williams (D. C. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; In re Kyler (D. C. 1868) 2 N. B. R. 649, Fed. Cas. No. 7,956. Or the trustee or a creditor may apply to the court of bankruptcy in the district where the witness lives, and that court will have ancillary jurisdiction to order the examination within its own territory. In re Sutter Bros. (D. C. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632. Compare In re Williams (D. C. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538.

A court of bankruptcy is authorized to take the depositions of witnesses who reside more than 100 miles from the place of trial, whether within or without the state. In re Washington Steel & Bolt Co. (D. C. 1914) 2 Fed. 984.

When a commission is issued by court of bankruptcy and sent into other state, the federal court in su state may compel the witness to tes fy or punish him for refusal. In Johnston (C. C. 1876) 14 N. B. R. 5 Fed. Cas. No. 7,423. On an applicat for attachment of witnesses for co tempt in not making answers on exa ination under a commission sent by bankruptcy court into another distr and state, the attachment will be fused where no written interrogator accompanied the commission, and no formation is furnished as to the part ular inquiry. In re Glaser (C. C. 186 2 N. B. R. 398, Fed. Cas. No. 5,4

If the witness resides in a fore country, his testimony cannot be tak upon a deposition, but a commiss must issue. Cortes Co. v. Tannhau (C. C. 1883) 18 Fed. 667.

8. Persons subject to examination The bankrupt, when summoned for amination, cannot demand payment his fees as a witness, as a condition his being sworn. In re O'Kell (D. 1868) Fed. Cas. No. 10,474. Where bankrupt who has been ordered to su mit to a further examination depa from the district before the time pointed, without an examination, discharge will not be granted until has duly submitted to the examinati In re Kingsley (D. C. 1877) 16 N. R. 301, Fed. Cas. No. 7,820.

Any creditor of the estate may ap for the examination of a third pers though his right to do so is not unqu ified, it being the duty of the court exercise its discretion as to awardi the summons asked for. In re A drews (D. C. 1904) 130 Fed. 383, Am. Bankr. Rep. 267. This exami tion of a third person is a proceedi entirely independent of the examinati of the bankrupt himself at the instan of the creditors; and a witness can object to being examined on the grou that there has not yet been any exa nation of the bankrupt. In re Le (D. C. 1867) Fed. Cas. No. 8,295; re Fredenberg (D. C. 1868) Fed. C No. 5,075. Nor can he object to bei sworn and examined on the ground t no issue has been made up for deter nation, or that there is no fact in d pute, and that therefore he cannot questioned in the character of a "w ness." The object of such an exami tion is to obtain information as to bankrupt's property and conduct, to prove or disprove some controvert fact. In re Blake (D. C. 1868) 2 N. R. 10, Fed. Cas. No. 1,492. A pers summoned for examination in a p ceeding in bankruptcy, on the appli tion of a temporary receiver appoint by the court of bankruptcy, cannot fuse to attend or be examined on ground that the order appointing receiver was erroneous or improvide

de. In re Fixen & Co. (D. C. 96 Fed. 748, 2 Am. Bankr. Rep.

editor, as well as any other per- ay be subject to this examination, ay be interrogated as to his own against the bankrupt, to the end t may be stricken out if the evi- shows that it cannot be support- n re Kyler (D. C. 1868) 2 N. B. 9, Fed. Cas. No. 7,956; In re (D. C. 1899) 97 Fed. 540, 3 Bankr. Rep. 257. Where a wit- is the assignee of certain debts om the bankrupt to his creditors, not a sufficient reason for him to to testify before the referee as actual consideration paid for the , that the consideration did not from the bankrupt or his estate, at to answer would be revealing ivate business of the witness un- arily and prejudice him in anoth- t then pending. In re Trask (D. 73) Fed. Cas. No. 14,141.

assignee for the benefit of credi- r a trustee in insolvency appoint- a state court, though more than nonths before the bankruptcy pro- gs, may be summoned for exami- and interrogated concerning the ition made by him of the bank- assets. In re Pursell (D. C. 114 Fed. 371, 8 Am. Bankr. Rep.

trustee in bankruptcy may be naed and required to testify in me manner as any other witness. e is not subject to examination at me on the mere motion of a cred- and an order for his examination not be granted unless it is asked some issue regularly referred to eferee. In re Smith (D. C. 1876) B. R. 432, Fed. Cas. No. 12,988. eceiver appointed by a state court, t whom a suit is pending by the e in bankruptcy for the posses- of the bankrupt's books, is not ged to refuse to produce the and testify before the referee. Hulst (D. C. 1873) Fed. Cas. ,864.

officers of a corporation repre- t, and may be required to submit examination at the first creditors' g in bankruptcy. Powell v. orn (1914) 145 N. Y. S. 1073, 161 Div. 453.

— **Wife of bankrupt.**—Prior to mendment of 1903, where, by the of the state, a wife could not be ness for or against her husband, ould not be required, in proceed- n bankruptcy against her husband, stify concerning property in her ssion alleged to have been con- to her in fraud of the bankrupt's ors, though the trustee, seeking cover such property, may proceed ll of discovery against the wife. Kessler (D. C. 1915) 225 Fed. In re Fowler (D. C. 1899) 93 417, 1 Am. Bankr. Rep. 555; In re Jefferson (D. C. 1899) 96 Fed. 826, 3 Am. Bankr. Rep. 174; In re Mayer (D. C. 1899) 97 Fed. 328, 3 Am. Bankr. Rep. 222. But, if competent as a witness, the wife of the bankrupt might be interrogated as to money or other property in her possession, and as to how and when the same was received or acquired, provided only that the testimony showed such questions to be reasonably pertinent to the subject of inquiry, which is, in a general sense, the nature and location of the assets of the bankrupt. In re Foerst (D. C. 1899) 93 Fed. 190, 1 Am. Bankr. Rep. 259.

If reasonable ground has been laid, the wife of a bankrupt may be interrogated to determine whether a business conducted in her name is in fact hers or the bankrupt's, and she may be asked such questions as are pertinent to that inquiry. In re Worrell (D. C. 1903) 125 Fed. 159, 10 Am. Bankr. Rep. 744.

The bankrupt's wife cannot be required to testify as to confessions or admissions of her husband in regard to his dealings with third persons; there is nothing in the bankruptcy law to destroy the privilege of such confidences. In re Jefferson (D. C. 1899) 96 Fed. 826, 3 Am. Bankr. Rep. 174; In re Gilbert (D. C. 1869) Fed. Cas. No. 5,410.

If the wife of the bankrupt, being duly summoned to appear and be examined, fails or refuses to attend before the referee, or declines to be sworn or to answer any proper question, she is to be dealt with as any other witness, that is, by an attachment to enforce her attendance, and punishment as for contempt if she will not respond to the questions. In re Bellis (D. C. 1869) 3 N. B. R. 270, Fed. Cas. No. 1,276; In re Woolford (D. C. 1870) 3 N. B. R. 444, Fed. Cas. No. 18,029; In re Van Tuyl (D. C. 1868) 2 N. B. R. 70, Fed. Cas. No. 16,881.

10. Second examination of bankrupt.—A full and fair opportunity must be allowed to all the creditors to inquire into the matters pertinent to such investigation, and it is unquestionably within the authority of the court to order the bankrupt to appear and be examined a second time, or as often as proper occasion for it may be found to exist. In re Bryant (D. C. 1911) 188 Fed. 530, 26 Am. Bankr. Rep. 504; In re Mellen (D. C. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 226; In re Vogel (D. C. 1871) 5 N. B. R. 393, Fed. Cas. No. 16,984; In re Brandt (D. C. 1868) 2 N. B. R. 345, Fed. Cas. No. 1,813. When the bankrupt has once fully submitted to an examination, he has a right to be protected against unreasonable demands upon his time for further examination, and after ample opportunity has been afforded and an apparently full examination had, a second examination will not be ordered unless some substantial reason for such an order is presented and established. In

re Frisbie (D. C. 1876) 13 N. B. R. 349, Fed. Cas. No. 5,131; In re Adams (D. C. 1868) 2 N. B. R. 272, Fed. Cas. No. 40; In re Isidor (D. C. 1868) 1 N. B. R. 264, Fed. Cas. No. 7,105; In re Gilbert (D. C. 1869) 3 N. B. R. 152, Fed. Cas. No. 5,410. Where an examination of the bankrupt is abruptly terminated by the failure of the trustee's counsel to appear, and an order for a new examination is taken, the bankrupt cannot refuse to attend or to testify. In re Van Tuyl (D. C. 1868) 2 N. B. R. 70, Fed. Cas. No. 16,881.

11. Conduct of the examination.—Although the bankruptcy act gives latitude in the examination of a bankrupt, it does not otherwise abrogate the rule as to the examination and cross-examination of witnesses which prevails in the federal courts. In re Kinnane Co. (D. C. 1914) 217 Fed. 488, confirmation denied (D. C. 1915) 221 Fed. 762.

The attorney for the trustee in bankruptcy may act as attorney for the creditors in the examination of the bankrupt. In re Levy (D. C. 1867) 1 N. B. R. 184, Fed. Cas. No. 8,299. Where an attorney offers to examine the bankrupt in behalf of a creditor, and it appears that his power of attorney has been revoked, it is not error for the referee to refuse the attorney the right to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained. In re Tifft (D. C. 1878) 17 N. B. R. 550, Fed. Cas. No. 14,030. On the examination of a witness respecting the bankrupt's estate, on the application of a creditor, it is held that other creditors have no right to intervene and object to questions asked. In re Stuyvesant Bank (D. C. 1872) 7 N. B. R. 445, Fed. Cas. No. 13,582.

When the bankrupt has been examined by a creditor or by the trustee, he may be cross-examined by his own counsel so far as may be necessary to explain or qualify any matters brought out on the direct examination which may seem to bear unfavorably upon his conduct or dealings, or which are obscure. In re Noyes (D. C. 1874) 11 N. B. R. 111, Fed. Cas. No. 10,370; In re Leachman (D. C. 1868) 1 N. B. R. 391, Fed. Cas. No. 8,157; In re Levy (D. C. 1867) 1 N. B. R. 136, Fed. Cas. No. 8,296. Compare In re Bragg (D. C. 1842) Fed. Cas. No. 1,799.

The examining party has the right to have the examination reduced to writing. In re Jackson (D. C. 1874) 8 N. B. R. 424, Fed. Cas. No. 7,128. The referee, as a judicial officer, is not required either by custom, the bankruptcy act, or the rules, to take the notes of testimony personally, or to incur the expense of clerical or stenographic aid therein for the benefit of a creditor examining the bankrupt, without indemnity therefor. He should supervise or direct the taking of testimony at the expense of the parties desiring it, or may allow it to be taken by the part themselves. In re Warszawiak, 1 N Bankr. News, 135. But the refer upon the application of the trustee bankruptcy, may authorize the empl ment of a stenographer to report transcribe the proceedings at the pense of the estate. Bankruptcy A § 38, cl. 5. A witness, having been amined before a referee and his te mony taken down, is entitled to r over the testimony before he is co pelled to sign it. In re Waters-Col Co. (D. C. 1914) 212 Fed. 761. Wh a bankrupt's examination before a s cial master was taken by a stenog pher and a transcript made, it was bankrupt's duty to sign the transcr though he now claims that certain his answers were incorrect by rea of his misunderstanding the questi or not being correctly informed w he answered; he being entitled only make such entry on the record bef his signature and jurat. In re Samu (C. C. A. 1914) 213 Fed. 447.

The bankrupt cannot require the eree to have his testimony taken d in longhand when the trustee furnis a stenographer. In re Frey (D. 1877) Fed. Cas. No. 5,114.

The referee has a general con over the conduct and course of the amination; but it is said that he no authority to limit in advance time within which the examinat must be concluded. In re Tift (D. 1878) 17 N. B. R. 421, Fed. Cas. 14,036; In re Waitzfelder (D. C. 18 Fed. Cas. No. 17,047. He may journ the examination for suffici cause. In re Robinson (D. C. 1869 N. B. R. 516, Fed. Cas. No. 11,9 And although he is required to cer to the judge for decision questions a ing in the course of the proceeding, may properly refuse to suspend the amination which is pending until the cision of such questions, at least wh no creditor is at that time entitled priority. In re Tifft (D. C. 1878) N. B. R. 550, Fed. Cas. No. 14,030.

12. —— Right to counsel.—A str ger to the proceedings (that is, who is neither the bankrupt himself a creditor) when summoned to app and be examined in bankruptcy, at instance of the trustee or the credit has no right to have the attenda and advice of counsel at his exami tion. In re Feinberg (D. C. 1869 N. B. R. 425, Fed. Cas. No. 4,716; re Fredenberg (D. C. 1868) 1 N. B. 268, Fed. Cas. No. 5,075; In re Fe (D. C. 1870) Fed. Cas. No. 4,715; re Stuyvesant Bank (D. C. 1872) 7 B. R. 445, Fed. Cas. No. 13,582; In Schonberg (D. C. 1874) Fed. Cas. 12,477; In re Comstock (D. C. 18 Fed. Cas. No. 3,080; In re Howard C. 1899) 95 Fed. 415, 2 Am. Ba Rep. 582.

A creditor of the bankrupt is no

y" to the proceeding, in any such as to entitle him to interfere with be represented in it by counsel, or st it is in the judicial discretion referee to permit or refuse such sentation. In re Abbey Press) 134 Fed. 51, 67 C. C. A. 161, n. Bankr. Rep. 11; In re Com- (D. C. 1875) Fed. Cas. No. 3,080. bankrupt is entitled to be attend- his counsel on his examination, he attorney may interpose objec- to any improper questions pro- ed to the bankrupt. In re Tan- D. C. 1868) Fed. Cas. No. 13,745. he bankrupt has no absolute right nsult with his counsel before an- ng any given questions, or to take vice as to the necessity of his an- ng the question or the form of his er. This privilege may be allowed n by the referee, if the circum- es render it proper, but it cannot aimed as of right. The referee discretionary power to allow such sultation of the bankrupt with his el, and whether or not it shall be ed must be determined by him ac- ng to the circumstances of each ular case. In re Patterson (D. 67) 1 N. B. R. 150, Fed. Cas. No. 9; In re Tanner (D. C. 1868) 1 R. 316, Fed. Cas. No. 13,745; In dson (D. C. 1868) 1 N. B. R. 364, Cas. No. 7,562; In re Collins (D. 68) 1 N. B. R. 551, Fed. Cas. No. ; In re Lord (D. C. 1868) 3 N. 243, Fed. Cas. No. 8,502.

—— Objections to questions and s thereon.—Where the bankrupt attorney, he has the right to raise uestion on his examination which torney for him could raise, and he in contempt for refusal to answer ions to which he presents in good well-founded objections. In re er (D. C. 1900) 104 Fed. 982, 4 Bankr. Rep. 728.

Scope and extent of the inquiry. bankrupt may be examined sub- ially as under a reference upon a tor's bill, or in proceedings sup- entary to execution. In re Pioneer r Co. (D. C. 1869) 7 N. B. R. 250, Cas. No. 11,178. All questions proper which elicit answers tend- show an interest of the bankrupt operty at the time the petition was In re Carson (D. C. 1868) 2 N. 107, Fed. Cas. No. 2,461. A ion as to whether a bankrupt did nake a certain statement in writ- as to his assets within a few hs prior to his bankruptcy, on he obtained property on credit certain of his creditors, is materi- d proper to be asked him on his ination. In re Jacobs & Roth (D. 907) 154 Fed. 988, 18 Am. Bankr. 728.

s the duty of the bankrupt to dis- whatever it may concern any par- interested to know concerning his debts, business, or estate. In re Cooke (D. C. 1874) 10 N. B. R. 126, Fed. Cas. No. 3,168. He may be examined on the question whether a composition offered to his creditors should be accepted by them and confirmed by the court, as being for the best interest of all concerned. In re Ash (D. C. 1878) 17 N. B. R. 19, Fed. Cas. No. 571. He may be required to make known to the trustee the combination of a safe alleged to contain property of his. In re Hooks Smelting Co. (D. C. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83.

If the bankrupt has testified that he is not the owner of certain property, questions relating to the identity of the owner, and the duration, extent, and character of the ownership of such property, are not relevant. In re Van Tuyl (D. C. 1868) 1 N. B. R. 636, Fed. Cas. No. 16,880.

It is not necessary for the examining creditor or trustee first to show that the bankrupt actually has an interest in the property, before questioning him about it, but only to show that he may have such an interest. In re Bonesteel (D. C. 1868) 2 N. B. R. 330, Fed. Cas. No. 1,628. Where the examination has shown that the wife of the bankrupt holds valuable property transferred to her by third persons after his insolvency, and enough has come out to furnish reasonable support for the theory that the consideration for such transfer moved from the bankrupt himself, or that the transfer to the wife was a mere cover, then it is the right of the creditor to examine the bankrupt fully and minutely with reference to the whole transaction, and the bankrupt must answer all pertinent questions. Id. And see In re Clark (D. C. 1870) 4 N. B. R. 237, Fed. Cas. No. 2,805. So where a bankrupt stated that he had sold certain property and used part of the proceeds in paying a debt for money borrowed, all the circumstances of the transaction are open to inquiry on the bankrupt's examination by his creditors. In re Brundage (D. C. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47.

A creditor who has filed proof of debt, claiming that it was contracted by fraud, cannot examine the bankrupt as to the facts constituting the alleged fraud, the inquiry being irrelevant to the scope and purpose of the examination. In re Wright (D. C. 1868) Fed. Cas. No. 18,065. Compare In re Koch (D. C. 1868) 1 N. B. R. 549, Fed. Cas. No. 7,916.

It is not proper, on the examination of the bankrupt, to interrogate him as to any property which he may have acquired since the commencement of the proceedings, as any such property is his own and is not subject to the bankruptcy. In re Levy (D. C. 1867) 1 N. B. R. 136, Fed. Cas. No. 8,296; In re Rosenfield (D. C. 1868) 1 N. B. R. 319, Fed. Cas. No. 12,059. But he may be asked questions tending to show

that, within a short time after filing his petition, he had money in his possession not acquired by the transaction of any business subsequent to such filing. In re McBrien (D. C. 1869) 3 N. B. R. 344, Fed. Cas. No. 8,666. And if he has acquired valuable property during the proceedings under suspicious circumstances, he may be questioned concerning it. In re Walton, 1 Nat. Bankr. News, 533. And see In re Tudor (D. C.) 96 Fed. 942, 2 Am. Bankr. Rep. 808.

A creditor who is examining the bankrupt is not limited in his questions to transactions taking place since his own debt accrued. In re Craig (D. C. 1869) Fed. Cas. No. 3,322. And the examination is not limited to facts and transactions occurring within four months prior to the bankruptcy, but may be directed to matters anterior to that time, if the circumstances in question will throw any light upon the facts or issues pertinent to the proceedings. In re Brundage (D. C. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47.

In the examination of others than the bankrupt, the witness may be interrogated generally as to the acts, conduct, and property of the bankrupt, the object being to obtain information touching the estate of the bankrupt, its condition and location, and his conduct as affecting his property and his disposal of it, in order that the necessary steps may be taken for its recovery and preservation. In re Blake (D. C. 1868) 2 N. B. R. 10, Fed. Cas. No. 1,492; In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822. The witness may be required to give information as to property of the bankrupt fraudulently held in his name, as to preferences alleged to have been given, as to his knowledge of any property concealed by the bankrupt, as to any secret trust or other arrangement between the bankrupt and himself, so far as it affects the estate or the rights of other creditors, as to alleged liens on the property, and so forth. In re Lathrop, Haskins & Co. (D. C. 1910) 184 Fed. 534, 24 Am. Bankr. Rep. 911; In re Pioneer Paper Co. (D. C. 1869) 7 N. B. R. 250, Fed. Cas. No. 11.178; Garrison v. Markley (C. C. 1872) 7 N. B. R. 246, Fed. Cas. No. 5,256.

The course of the examination must be confined within legal limits, and though the court is vested with a wide measure of discretion as to its scope, it must not be pushed so far as to encroach upon the witness' right of privacy in relation to his own affairs, where the concerns of the bankrupt are not involved. In re Horgan (1899) 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253; In re Howard (D. C. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582. See In re Earle (D. C. 1869) 3 N. B. R. 304, Fed. Cas. No. 4,244; In re Stuyvesant Bank (D. C. 1872) 7 N. B. R. 445, Fed. Cas. No. 13,582; In re Lathrop (D. C. 1870) 4 N. B. R. 94, F Cas. No. 8,106.

While the statute should be libera construed, so as to enforce full a frank answers by a witness in aid the bankruptcy proceedings, yet it do not authorize an inquiry into his p vate affairs which have no relation the "acts, conduct, or property" of t bankrupt, nor can the court require h to produce private papers having relation thereto; and a mere affida of belief on the part of creditors others is not sufficient to overcome positive statement of the witness th the transactions inquired about or p pers demanded have no relation to t bankrupt, so as to authorize the cou to compel him to answer or to produ the papers. In re Carley (D. C. 190 106 Fed. 862, 5 Am. Bankr. Rep. 5 In re E. S. Wheeler & Co. (D. C. 190 151 Fed. 542, 18 Am. Bankr. Rep. 4

The court cannot compel an officer a corporation in which the bankru had stock, the same being admittedly the bankrupt's possession, to give e dence as to his opinion of the value the stock and to produce in supp thereof the records relating to the fina cial condition of the company. In Seligman (D. C. 1911) 192 Fed. 750, Am. Bankr. Rep. 664.

A witness cannot be compelled to a swer as to the original considerati for a negotiable bond issued by t bankrupt where the creditor is a bo fide holder for value. In re Leland (C. 1872) Fed. Cas. No. 8,229.

Where the bankrupt, more than year before the enactment of the ban ruptcy law, had made an assignme for the benefit of his creditors und the state law, it is not material proper, in his examination in the ban ruptcy proceedings, to inquire into t circumstances under which the assig ment was made, nor to require the signee to produce the books and p pers turned over to him at the tim unless a foundation is first laid for t belief that property of the bankru was withheld by him at the time such assignment and was still held his at the time of the enactment the bankruptcy law. In re Hayden (C. 1899) 96 Fed. 199, 1 Am. Ban Rep. 670.

It is not left to the judgment of t witness to decide whether or not t question put to him is relevant. If declines to answer any question on t ground, he does so at his peril, the decision as to relevancy of any qu tion or line of inquiry is for the cou People's Bank of Buffalo v. Bro (1902) 112 Fed. 652, 50 C. C. A. 4 7 Am. Bankr. Rep. 475; In re Fi & Co. (D. C. 1899) 96 Fed. 748, 2 A Bankr. Rep. 822. In examinations bankruptcy, saving the right of the w ness to refuse to criminate hims and respecting the inviolability of pr ileged communications, the courts

ally rule on the side of relevancy, equire the witness to answer if it s even probable that the facts to icited may be relevant. People's of Buffalo v. Brown (1902) 112 652, 50 C. C. A. 411, 7 Am. Bankr. 475. See Robinson v. Philadelphia R. Co. (C. C. 1886) 28 Fed. 340; son Steel Street-Rail Co. v. North ch Steel Co. (C. C. 1891) 48 Fed.

editors cannot use the process of inations in bankruptcy for the pur- of obtaining information (from ons other than the bankrupt him- which they can use in opposition is discharge. In regard to such esses, and the facts they may know, editor must be left to the risk of olishing them upon the trial of the s as parties are in ordinary trials w. In re Brandt (D. C. 1868) 2 . R. 215, Fed. Cas. No. 1,812.

attorney cannot refuse to answer s the facts, which he is asked to ose came to his knowledge while g in his professional capacity and from the client or from some one g for the client. In re O'Donohoe C. 1869) 3 N. B. R. 245, Fed. Cas. 10,435.

. **Privileged communications.**—The which forbids the disclosure, as er of evidence, of confidential com- cations passing between an attor- and his client will be respected and rced in examinations in bankruptcy ess than in other judicial investiga- . In re Krueger (D. C. 1872) Fed. No. 7,942. Counsel for the bank- , when examined as a witness, will ound to answer all questions ex- such as require him to disclose in- ation as to the affairs of the bank- which he received, as such coun- from the bankrupt or from persons hom he was referred by the bank- for the purpose of obtaining in- ation. In re Aspinwall (D. C.) 7 Ben. 433, Fed. Cas. No. 591; e Donohue (D. C. 1876) Fed. Cas. 3,990; In re Bellis (D. C. 1869) Cas. No. 1,274. A witness sum- ed for examination in a bankruptcy eeding cannot refuse to be sworn ely on the ground that he had been sel for the bankrupt and was still legal adviser. In re Woodward (D. 1870) Fed. Cas. No. 17,999. Nor it be permitted to the attorney of bankrupt to add to his oath as a ess a reservation as to privileged munications. In re Adams (D. C.) Fed. Cas. No. 42.

hether the privilege is properly ned and should be allowed is a ques- which must be determined by the t and not by the witness, and e, by way of preliminary investiga- , the witness may be subjected to an interrogation as will put the t in position to decide the ques- . People's Bank of Buffalo v. Brown (1902) 112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475.

16. Privilege against self-criminating testimony.—The provision of Bankruptcy Act, § 4, ante, § 9591, that no testimony given by the bankrupt "shall be offered in evidence against him in any criminal proceeding," does not take away the right of the bankrupt to decline answering questions which tend to criminate him, because it is not a sufficient protection, not being as broad and comprehensive as the constitutional provision, and therefore not to be taken as a substitute for it or as equivalent to it. In re Hess (D. C. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559; U. S. v. Goldstein (D. C. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; In re Nachman (D. C. 1902) 114 Fed. 995, 8 Am. Bankr. Rep. 180; In re Franklin Syndicate (D. C. 1900) 114 Fed. 205, 4 Am. Bankr. Rep. 511; In re Feldstein (D. C. 1900) 103 Fed. 269, 4 Am. Bankr. Rep. 321; In re Gilbert, 2 Nat. Bankr. News, 378; In re Rosser (D. C. 1899) 96 Fed. 305, 2 Am. Bankr. Rep. 755; In re Scott (D. C. 1899) 95 Fed. 815, 1 Am. Bankr. Rep. 49; In re Patterson (D. C. 1867) 1 N. B. R. 152, Fed. Cas. No. 10,816; In re Graham (D. C. 1876) Fed. Cas. No. 5,659; In re Koch (D. C. 1868) 1 N. B. R. 549, Fed. Cas. No. 7,916. CONTRA, Mackel v. Rochester (1900) 102 Fed. 314, 42 C. C. A. 427, 4 Am. Bankr. Rep. 1. This provision of the statute has reference only to crimes committed previous to the giving of such testimony, and not to any criminal proceeding based on a crime inherent in the bankrupt's examination, and it does not protect him from a prosecution for perjury committed by false swearing during the course of his examination. And in such a prosecution, not only may the alleged false testimony be given in evidence, but any other testimony of the defendant given in the examination may be put in evidence, provided it is relevant to the issue and tends to establish the falsity of that on which the prosecution is based. Glickstein v. U. S. (1911) 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128, 27 Am. Bankr. Rep. 786; Daniels v. U. S. (C. C. A. 1912) 196 Fed. 459, 27 Am. Bankr. Rep. 790; U. S. v. Brod (C. C. 1910) 176 Fed. 165, 23 Am. Bankr. Rep. 740; Cameron v. U. S. (1911) 192 Fed. 548, 113 C. C. A. 20, 27 Am. Bankr. Rep. 657. Further, it is to be noted that the protection afforded to the bankrupt by § 9591, ante, extends only to the testimony given by the bankrupt upon his examination under that clause and section, and does not render inadmissible, on a criminal prosecution, the schedules filed by him in the bankruptcy proceedings, or the testimony of an expert accountant based upon an examination of his books which he had turned over to the trus-

tee. Ensign v. Pennsylvania (1913) 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658, 30 Am. Bankr. Rep. 408.

The constitutional privilege of a witness applies to a bankrupt and entitles him to refuse not only to give oral testimony, but to produce books and papers that will tend to incriminate him. U. S. v. Rhodes (D. C. 1913) 212 Fed. 518.

Where a person against whom indictments are pending in a state court is adjudged bankrupt on an involuntary petition, and brought before the referee in bankruptcy for examination, he cannot be compelled to answer any questions propounded on such examination where his answers would tend to criminate him on the trial of the pending indictments. In re Scott (D. C. 1899) 95 Fed. 815, 1 Am. Bankr. Rep. 49; In re Hooks Smelting Co. (D. C. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83; In re Kanter (D. C. 1902) 117 Fed. 356, 9 Am. Bankr. Rep. 104; In re Gilbert, 2 Nat. Bankr. News, 378.

The constitutional privilege is to be claimed only when necessary, and only with reference to some particular question propounded to the witness. It does not exempt a witness from being sworn, nor permit him to add to his oath a reservation as to criminating matters; it only enables him to decline a particular question. In re Scott (D. C. 1899) 95 Fed. 815, 1 Am. Bankr. Rep. 49.

A witness cannot avoid answering a question by the mere statement that his answer would tend to criminate him, without regard to whether the statement is reasonable or not. In re Rosenblatt (D. C. 1906) 143 Fed. 663, 16 Am. Bankr. Rep. 306. Where, from the course of the evidence and the nature of the question, the court can definitely see that the question, if answered in a particular way, would tend to criminate the witness, the privilege claimed by the witness must be allowed. Ex parte Irvine (C. C. 1896) 74 Fed. 954; In re Feldstein (D. C. 1900) 103 Fed. 269, 4 Am. Bankr. Rep. 321; In re Shera (D. C. 1902) 114 Fed. 207, 7 Am. Bankr. Rep. 552. But if it is apparent that the answer could not possibly tend to criminate the witness, it must be given, notwithstanding the claim of privilege. In re Levin (D. C. 1904) 131 Fed. 388, 11 Am. Bankr. Rep. 382; In re Edward Hess & Co. (D. C. 1905) 136 Fed. 988. While a bankrupt has a privilege against self-crimination, the privilege can only be exercised after a showing of reasonable ground to suppose that answers to questions would be liable to incriminate him. In re Tobias, Greenthal & Mendelson (D. C. 1914) 215 Fed. 815.

Where a bankrupt attempts to withhold his books of account and other papers from his trustee or receiver, on the assertion that they contain matter which might be used against him in criminal proceeding and so tend criminate him, the rule is that th bankrupt must produce and deposit th books, in order that the question privilege may be determined by th court or referee, and if it appears th they do contain such criminating ev dence, the court will make such an o der as will protect the bankrupt fro its use in any criminal case, and the same time give the trustee the u of the books in the administration the estate. In re Harris (1911) 2 U. S. 274, 31 Sup. Ct. 557, 55 L. E 732, 26 Am. Bankr. Rep. 302; Id. (1 C. 1908) 164 Fed. 292, 20 Am. Bank Rep. 911; In re Hark (D. C. 190 136 Fed. 986, 14 Am. Bankr. Rep. 62 In re Hess (1905) 134 Fed. 109, 14 A Bankr. Rep. 559. No constitution or statutory rights of an accused pe son (either under the constitution provisions against unreasonable searc es and seizures and against the co pelling of self-criminating testimon or under the act of Congress prohib ing the use of a party's pleadings evidence to his prejudice in a subs quent criminal proceeding against hi are infringed by the use by a gra jury, in the investigation of the char es contained in an indictment, of books and papers procured from his r ceiver or trustee in bankruptcy, whom they had been delivered und an unconditional order of the ban ruptcy court, and which books and p pers contain information with resp to the matters charged in the indi ment against him. And further, the constitutional and statutory provisio do not prohibit the use of the boo and papers of a bankrupt, in the han of his receiver or trustee in bankru cy, as evidence against him in a cri inal prosecution for embezzlement a false pretenses, based upon the disc sures in such books and papers. U. v. Halstead (D. C. 1905) 38 App. C. 69.

A person undergoing an examinati in bankruptcy cannot refuse to answ questions concerning his dealings wi the bankrupt on the ground that h answers may furnish evidence again him in a civil action pending or to brought on behalf of the trustee bankruptcy. In re Cliffe (D. C. 189 97 Fed. 540, 3 Am. Bankr. Rep. 25 In re Fay (D. C. 1870) 3 N. B. R. 6 Fed. Cas. No. 4,708; In re Danfor (D. C. 1842) Fed. Cas. No. 3,560. A the constitutional privilege of refusi to give self-criminating testimony w not intended to shield the witness fr the personal disgrace or opprobri attaching to the exposure of his cri but only from actual prosecution a punishment. Hence, if the crime which he was implicated was such th a prosecution against him would barred by the statute of limitations, if he has already received a pardon f it, he may be compelled to answ

n v. Walker (1896) 161 U. S. 591, up. Ct. 644, 40 L. Ed. 819. Nor a sufficient reason for refusing to er a proper and pertinent ques- that the answer will expose the ess to the contempt of the com- ty, or humiliate him, or bring him general disgrace, if he would not be liable to prosecution. In re ards (D. C. 1870) Fed. Cas. No. 9. But if the question does not e to any matter of fact in issue, any matter contained in his di- testimony, the witness need not er it, and will not be compelled to er it, where he states that a truth- nswer would tend to degrade him. Danforth (D. C. 1842) Fed. Cas. 3,560; In re Lewis (D. C. 1870) Cas. No. 8,312.

the bankrupt volunteers a dis- re concerning property, assets, or ess dealings, he can be compelled into the matter fully. He cannot short at his own discretion, and e to answer further questions, on assertion that he might be crim- d. In re Bendheim (D. C. 1910) Fed. 918, 24 Am. Bankr. Rep. 254.

e bankrupt cannot claim the pro- on of the constitution where the tion objected to is clearly in the of cross-examination on what he volunteered himself, either in his ion and schedules or in testimony dy given. In re Walsh (D. C.) 104 Fed. 518, 4 Am. Bankr. Rep.

Where a bankrupt has filed dules, it is a representation that he no other property; and he cannot t to legitimate cross-examination reference thereto, on the ground it may incriminate him, so long as es not tend to develop any inde- ent fact. In re Tobias, Greenthal endelson (D. C. 1914) 215 Fed.

The bankrupt waives the privi- if he makes no objection to testi- before the referee, but answers questions put to him, so that any ssions made by him in the course he examination can properly be on his cross-examination in a inal proceeding against him. State urrell (1902) 27 Mont. 282, 70 982, affirmed, Burrell v. Montana 4) 194 U. S. 572, 24 Sup. Ct. 787, L. Ed. 1122. And where, at the nencement of the proceedings in ruptcy, he surrenders his books to receiver without raising any ques- of privilege as to their use against so far as it is a proper use of books by the trustee in bankruptcy llow prosecuting authorities to use , the bankrupt is chargeable with vledge of that right and has waiv- is privilege. In re Tarcy & Co. C. 1910) 177 Fed. 532, 23 Am. kr. Rep. 438.

. Use and effect of evidence.—The mony of a bankrupt, taken on his nination before the referee, is a of the record, to which creditors generally are entitled to access while it remains in the custody of the referee, and this remains true although the interests of the creditor seeking to examine the testimony are antagonistic to those of the trustee, in that the latter intends to sue the former to recover an alleged preference, and though a disclosure of the bankrupt's testimony, in view of his hostility to the trustee, may result prejudicially to the creditor. In re Samuelsohn (D. C. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528. On the other hand, statements made by a bankrupt on his examination concerning the ownership of a particular article of property in his possession at the time of the filing of the petition, and in the absence of any documentary evidence as to the capacity in which he held it, are competent evidence, as admissions, though not conclusive, against his trustee on the hearing of a petition by an adverse claimant to reclaim the property, the trustee being at least to this extent in privity with the bankrupt. In re Thompson (D. C. 1912) 197 Fed. 681, 28 Am. Bankr. Rep. 794. But see Breckons v. Snyder (1905) 211 Pa. 176, 60 Atl. 575, holding that, where a trustee in bankruptcy sues to recover money of a bankrupt said to be in the hands of the defendant, the testimony of the bankrupt at the preliminary examination before the referee as to his assets and liabilities is not admissible in evidence, the issue not being between the same parties. The testimony of the bankrupt, taken on his examination and reduced to writing is admissible against him in a subsequent proceeding by the trustee to require him to surrender money or property of the estate alleged to be in his possession or under his control, and when the bankrupt is a corporation, the same rule applies to the testimony of any of its officers; but this does not apply in the case of any third person examined as a witness in the bankruptcy proceedings. In re Alphin & Lake Cotton Co. (D. C. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

18. Witness fees and costs of examination.—The fees of a witness must be paid or tendered at the time of the service of the summons or subpœna upon him. In re Griffen (D. C. 1868) 1 N. B. R. 371, Fed. Cas. No. 5,810; In re Kerber (D. C. 1903) 125 Fed. 653, 10 Am. Bankr. Rep. 747. If the witness attends without the prepayment of the fees, the fees are to be collected as in ordinary actions and according to the practice of the courts therein. If there is an adjournment, the witness is entitled to be paid his attendance fee for the adjourned day before he is obliged to return on such adjourned day, and also travel fees, if it is reasonable for him to return to his home in the interval, as to which the referee is to judge. In re Griffen

(D. C. 1868) Fed. Cas. No. 5,810. The wife (or husband) of the bankrupt, if attending under an order and being examined as a witness, is entitled to the same fee and mileage as any other witness. In re Marcus (D. C. 1908) 160 Fed. 229, 20 Am. Bankr. Rep. 397; In re Griffen (D. C. 1868) Fed. Cas. No. 5,810.

In regard to "expert witnesses," it has been decided that extra compensation to such persons, over and above the statutory witness fee and mileage, cannot be taxed as costs or allowed against a losing party in a court of bankruptcy, nor will the court be bound to make such an allowance because counsel have so agreed. In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 604, holding also that any extra compensation to such witness may be a matter of private arrangement between the witness and the party calling him.

The cost of taking testimony must be defrayed by the party at whose instance it is taken, whether it be creditors seeking for information which will enable them to prepare opposition to the bankrupt's application for discharge, or the bankrupt himself desiring to have additional statements or explanations appear in the testimony after the examining creditors have finished their questions. In re Price (D. C. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419; In re Mealy (D. C. 1868) 2 N. B. R. 128, Fed. Cas. No. 9,378; In re Eidom (D. C. 1869) 3 N. B. R. 160, Fed. Cas. No. 4,315; Scofield v. Moorhead (D. C. 1868) 2 N. B. R. 1, Fed. Cas. No. 12,-510. But this provision of the statute does not apply to hearings on the examination of the bankrupt before a special commissioner, and that, in such cases, the stenographer may be allowed a larger compensation if his bill is approved by the receiver and it is shown that all the examination was necessary and resulted in benefit to the estate. In re Stark (D. C. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

19. Contempts by witnesses.—Disobedience on the part of a bankrupt to an order of the court requiring him to appear for examination, or refusal to be sworn or to answer a proper question, or to produce books and papers, is a contempt of court which may be punished, and the bankrupt's compliance compelled, by fine and imprisonment. Bankruptcy Act 1898, § 2, cl. 13. See In re Carpenter (D. C. 1868) 1 N. B. R. 299, Fed. Cas. No. 2,427; In re Holt (D. C. 1869) 3 N. B. R. 241, Fed. Cas. No. 6,646; In re Rosenfield (D. C. 1868) 1 N. B. R. 319, Fed. Cas. No. 12,059; In re Allen (C. C. 1876) Fed. Cas. No. 208; In re Winship (D. C. 1874) Fed. Cas. No. 17,878.

Where a bankrupt was examined before a special commissioner and failed to produce the cashbook of the bankrupt firm, testifying that he last saw it in the firm's office, but did not take it, such evidence did not indicate on face falsity or concealment suffici to justify contempt proceedings in absence of a certificate of the comm sioner that he was persuaded that witness' statements were false and t he was guilty of concealment. In Cantor (C. C. A. 1914) 215 Fed. 61. to contempt of court by refusal to p duce books, papers, and other do ments, see In re Herr (D. C. 191 182 Fed. 715, 25 Am. Bankr. Rep. 1 In re Sorkin (D. C. 1908) 166 F 831, 20 Am. Bankr. Rep. 637; In Alper (D. C. 1907) 162 Fed. 207, Am. Bankr. Rep. 612; In re Fellerm (D. C. 1906) 149 Fed. 244, 17 A Bankr. Rep. 785; In re Johnson Knox Lumber Co. (1907) 151 Fed. 2 80 C. C. A. 259, 18 Am. Bankr. R 50; In re Soloway & Katz (D. C. 191 196 Fed. 132, 28 Am. Bankr. Rep. 3 In re Ironclad Mfg. Co. (C. C. A. 191 201 Fed. 66.

It is a contempt of court to interr and violently break up the examinati of a witness by persisting in the tempt to dictate to and prompt the w ness and control his answers, when t is done in an overbearing and viol manner and so as to prevent the f ther continuance of the examinati U. S. v. Anonymous (C. C. 1884) Fed. 761.

If the witness, after being duly su moned and after he has had a reaso ble time in which to make his appe ance, does not attend before the ref ee as ordered, the proper method of curing his presence is by an atta ment. Bowen v. Thornton (Pa. 18 9 Wkly. Notes Cas. 575. But this plies only to ordinary witnesses, compulsory measures of this kind not be directed, unless strictly nec sary, against one called as an expert one wanted only in the character of interpreter. In re Roelker (D. 1854) Fed. Cas. No. 11,995. And t process cannot be resorted to in case unless the witness was duly ord ed to appear by a summons, subpœ rule to show cause, or other pro process, and was tendered his pro fees and mileage. In re Johnson Knox Lumber Co. (1907) 151 Fed. 2 80 C. C. A. 259, 18 Am. Bankr. R 50. Nor unless the summons or or for examination was duly served wit the jurisdiction of the bankruptcy cou In re Hodges (D. C. 1875) 11 N. B. 369, Fed. Cas. No. 6,562. But wher federal court orders the arrest of witness charged with having failed obey a subpœna issued by it, and d served, and the witness departs into other district before he can be arre ed, any judge of the United States h ing jurisdiction in the district to wh the witness has removed, may order arrest and removal back to the distr in which he is charged with the offen In re Ellerbe (C. C. 1882) 13 Fed. 5

When the contumacious conduct the part of the witness consists in

al to answer a proper question, out any legal excuse or justification efor, he may be committed as for minal contempt, to stand commit- until he will answer the question h was propounded to him. People avidson (N. Y. 1885) 35 Hun, 471; le v. Fancher (N. Y. 1874) 4 np. & C. 467. But it must appear the matter in regard to which he interrogated was material and rele- to the point in issue, and that his er would not require him to crim- himself or to disclose privileged nunications. In re Romine (D. C.) 138 Fed. 837, 14 Am. Bankr. 785; Ex parte Peck (C. C.) Fed. Cas. No. 10,885.

hile a refusal to answer is contu- and a contempt, yet when an an- has been given, the judge in bank- cy cannot assume or decide that the er was false and punish the wit- for perjury as for a contempt. e v. Lazarus (1885) 37 La. Ann.

False swearing in an examina- in bankruptcy is a contempt of the t and punishable as such, notwith- ding that it is also a crime and pun- ble on indictment. In re Michaels C. 1912) 194 Fed. 552, 28 Am. kr. Rep. 38; In re Wiesebrock (D. 911) 188 Fed. 757, 26 Am. Bankr. 745; In re Shear (D. C. 1911) 188 677; Magen v. Campbell (1911) Fed. 675, 108 C. C. A. 531, 26 Bankr. Rep. 594; In re Bron- (D. C. 1910) 182 Fed. 349, 24 Bankr. Rep. 524; In re Magen C. 1910) 179 Fed. 572, 24 Am. kr. Rep. 63; In re Schulman (1910) Fed. 191, 101 C. C. A. 361, 23 Am. kr. Rep. 809; In re Singer (D. C.) 174 Fed. 208, 23 Am. Bankr. 28; In re Schulman (D. C. 1909) Fed. 237, 21 Am. Bankr. Rep. 288; re Gordon (D. C. 1909) 167 Fed. 21 Am. Bankr. Rep. 290; In re in (D. C. 1908) 164 Fed. 71, 21 Bankr. Rep. 113; Ex parte Bick C. 1907) 155 Fed. 908, 19 Am. kr. Rep. 68; In re Fellerman (D. 906) 149 Fed. 244, 17 Am. Bankr. 785.

the witness refuses to answer tions or to produce books or pa- , but does so under the direction ounsel who in good faith advise him ursue that course, the circumstance palliate though it does not excuse contumacy, and he should not be ished (except, perhaps, to the ex- of paying costs) if he will profess readiness to submit to the exami- on, produce the books, etc., on the sion being rendered against him. S. v. Goldstein (D. C. 1904) 132 789, 12 Am. Bankr. Rep. 755; In re Fixen & Co. (D. C. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; In re Rosenfield (D. C. 1868) 1 N. B. R. 319, Fed. Cas. No. 12,059; In re Winship (D. C. 1874) Fed. Cas. No. 17,878. Where a bankrupt and two witnesses failed to appear for examination at an adjourned date, and after contempt proceedings were instituted against them appeared, apologized, and offered themselves freely for examination, they thereby purged themselves of the civil contempt, and the only question remaining was the punishment to be imposed to secure respect for the court's authority. In re Farkas (D. C. 1913) 204 Fed. 343.

Where proceedings to examine a bankrupt were instituted by petitioning creditors before the appointment of a receiver or trustee, an outside creditor, without applying to intervene and without leave, was not authorized to institute proceedings to punish the bankrupt for contempt in such examination. In re Cantor (C. C. A. 1914) 215 Fed. 61.

The referee in bankruptcy has no power to punish for contempts committed by witnesses before him. Bank of Ravenswood v. Johnson (1906) 143 Fed. 463, 74 C. C. A. 597, 16 Am. Bankr. Rep. 206; In re Schulman (1910) 177 Fed. 191, 101 C. C. A. 361, 23 Am. Bankr. Rep. 809. The referee must certify the facts to the judge, but if the judge shall find that they warrant the punishment of the witness, he may punish him in the same manner and to the same extent as for a contempt committed before the court of bankruptcy. See post, § 9625.

A rule requiring a bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him during his examination before the referee is not insufficient, although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, from which they fully appear. U. S. v. Goldstein (D. C. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

Section 9591, ante, providing that bankrupt's testimony shall not be offered in evidence in any criminal proceeding, does not make the testimony inadmissible in a proceeding to punish him for contempt in giving evasive answers. Imprisonment of bankrupts for fixed term for contempt in giving evasive answers held justified; the proceeding having been initiated and prosecuted to punish the bankrupts and not to obtain civil relief. In re Kaplan Bros. (1914) 213 Fed. 753, 130 C. C. A. 267.

606. (Act July 1, 1898, c. 541, § 22.) Reference of cases after adjudication.

Reference of Cases after Adjudication.—a After a person has n adjudged a bankrupt the judge may cause the trustee to pro- d with the administration of the estate, or refer it (1) generally

to the referee or specially with only limited authority to act in t premises or to consider and report upon specified issues; or (to any referee within the territorial jurisdiction of the court, the convenience of parties in interest will be served thereby, or f cause, or if the bankrupt does not do business, reside, or have l domicile in the district.

b The judge may, at any time, for the convenience of parties or f cause, transfer a case from one referee to another. (30 Stat. 552

Notes of Decisions

Reference of petitions and cases in bankruptcy.—Where a petition in bankruptcy is filed by certain of the members of a partnership, praying an adjudication against the firm, and averring that a partner who has not joined in the petition is not a resident of the district, and that his residence is unknown to the petitioners, if the judge of the court of bankruptcy is absent from the district, or the division of the district in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee. In re Murray (D. C. 1899) 96 Fed. 600.

The authority to refer a petition in bankruptcy to the referee, in the absence of the judge, has not been conferred upon a deputy clerk of the court, but can be exercised only by the clerk in person. Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153. CONTRA, Gilbertson v. U. S. (1909) 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep. 32. The referee cannot act on a petition sent to him by the clerk of the court if it is contested and issues raised by the bankrupt or any of his creditors on the facts stated, but he must certify the case to the judge. In re L. Humbert Co. (D. C. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76; In re Murray (D. C. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601.

This section does not permit a reference of the case to a referee until after an adjudication has been made. In re Back Bay Automobile Co. (D. C. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835. But see In re Ruos (D. C. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257. But where answers are filed to a petition in involuntary bankruptcy, it is proper for the court to refer the case to the referee (in the character of a special commissioner or master) to take and return the evidence and report upon the questions presented. Clark v. American Mfg. & E. Co. (1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351; In re Lacov (1900) 134 Fed. 237, 67 C. C. A. 19, 13 Am. Bankr. Rep. 400. But compare, as to this point, In re King (1910) 179 Fed. 694, 103 C. C. A. 240, 24 Am. Bankr. Rep. 606. After an adjudication has been made, the judge may exercise his discretion as to which of the referees within his jurisdiction shall be placed in charge of the case, supposing none of them to be perso ally disqualified, and in so doing should consider what will best su serve the convenience of the parties terested in the estate. In re Weste Inv. Co. (D. C. 1908) 170 Fed. 677, Am. Bankr. Rep. 367. Where t place of business of a bankrupt fir and also the residence of one of members, were in one of the count comprised within the federal judic district where the adjudication w made, but the other partners resided two other counties in the same distri it was held to be within the discreti of the court of bankruptcy to send t case to the referee in either one the three counties. In re Watkins (1913) 205 Fed. 145, 123 C. C. 377. But this section refers only referees appointed within the distr where the case is pending, and t court has no jurisdiction to refer case, for any purpose whatever, to referee appointed and residing in a other district. In re Schenectady E gineering & Construction Co. (D. 1906) 147 Fed. 868, 17 Am. Ban Rep. 279.

As to referring a case specially, it the general practice, when petitio are presented for the reclamation of property by or from a trustee, requiring the determination of que tions respecting assets claimed as part of the bankrupt's estate, to ref them to a special master, or to a re eree in bankruptcy acting as spec master, to take the testimony and r port his conclusions of fact and la thereon. In re Tracy (1910) 179 Fe 366, 102 C. C. A. 644, 24 Am. Bank Rep. 539; In re Thomas (D. C. 188 35 Fed. 337. The powers of a spec referee, appointed on the petition a receiver for the property of an leged bankrupt pending a hearing the petition, with authority to exa ine the bankrupt and other witness in relation to the property and asse of the bankrupt, and for that spec purpose, with a view to discover wh had become of the bankrupt's pro erty, are superseded on the making an adjudication and an order of gene reference. In re Ruos (D. C. 190 164 Fed. 749, 21 Am. Bankr. Rep. 25

The fact that the order of refe ence designates a day "on" which t bankrupt shall attend before the re

does not prevent that officer from g proper proceedings when the upt appears within a reasonable after the day fixed. His failure pear on or before the appointed vill not make it necessary to ob- a new order of reference. In re Hatcher (D. C. 1868) 1 N. B. R. 390, Fed. Cas. No, 6,210. But if the petitioner does not appear before the referee at the time fixed in the order, or within a reasonable time thereafter, excusing his delay, the petition may be dismissed. Id.

07. (Act July 1, 1898, c. 541, § 23, as amended, Act Feb. 5, 1903, c. 487, § 8, and Act June 25, 1910, c. 412, § 7.) Jurisdiction of United States and State courts.

risdiction of United States and State Courts.—a The United es circuit courts shall have jurisdiction of all controversies at and in equity, as distinguished from proceedings in bankcy, between trustees as such and adverse claimants concerning property acquired or claimed by the trustees, in the same manner to the same extent only as though bankruptcy proceedings had been instituted and such controversies had been between the rupts and such adverse claimants.

Suits by the trustee shall only be brought or prosecuted in the ts where the bankrupt, whose estate is being administered by trustee, might have brought or prosecuted them if proceedings nkruptcy had not been instituted, unless by consent of the pro- d defendant, except suits for the recovery of property under sec- sixty, subdivision b; section sixty-seven, subdivision e; and on seventy, subdivision e.

The United States circuit courts shall have concurrent jurisdic- with the courts of bankruptcy, within their respective territorial s, of the offenses enumerated in this Act. (30 Stat. 552. 32 798. 36 Stat. 840.)

In this section, as originally enacted, subdivision b thereof was as follows: "b Suits by the trustee shall only be brought or prosecuted in the courts here the bankrupt, whose estate is being administered by such trustee, might ave brought or prosecuted them if proceedings in bankruptcy had not been in- ituted, unless by consent of the proposed defendant."

Said subdivision was amended by Act Feb. 5, 1903, c. 487, § 8, cited above, by lding, at the end thereof, the words "except suits for the recovery of property nder section 60, subdivision b, and section sixty-seven, subdivision e."

It was further amended by Act June 25, 1910, c. 412, § 7, last cited above, by lding to said exception added by the previous amendment, at the end thereof, e words "section 70, subdivision e," making said subdivision b read as set rth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, rovided that the act should not apply to bankruptcy cases pending when it ok effect, but that such cases should be adjudicated and disposed of con- rmably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 42, also provided that the act should not apply to bankruptcy cases pending hen it took effect, but that such cases be adjudicated and disposed of con- rmably to the provisions of the original act as previously amended.

The circuit courts were abolished and their jurisdiction transferred to the istrict courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

its by or against trustees in bankruptcy in general

rustee's right of action.
— Torts to bankrupt's property.
— Bankruptcy of corporations.
— Trustee's right of action exclusive.
eave or direction to sue.
uit by foreign assignee in bankruptcy.
uits against trustee.
— Form of action.
— Defenses.
— Judgment and enforcement thereof.
— Recovery of damages against trustee personally.
— Leave to sue.
13. Enjoining proceedings against trustee.
14. Garnishment of trustee.
15. Nature and form of remedy.
16. —— Suits in equity by trustee.
17. Summary proceedings in court of bankruptcy.
18. —— Against adverse claimants.
19. —— Determination of character of claim.
20. Joinder of causes of action.

II. Jurisdiction

21. Statutory provisions.
22. Jurisdiction of courts of bankruptcy.
23. —— Claims on property in possession of trustee.

II. Jurisdiction—Cont'd

24. —— Independent suits against third persons.
25. —— Preferences and fraudulent conveyances.
26. —— Suits which bankrupt could not have maintained.
27. —— Consent or waiver of objections.
28. Jurisdiction of other federal courts.
29. Jurisdiction of state courts.
30. Conflicting jurisdiction of state and federal courts.

III. Limitation of actions

31. Limitation of actions in general.
32. —— What suits and proceedings barred.
33. —— Ignorance of cause of action and concealed fraud.
34. —— Parties affected by statute.
35. —— Pleading the statute.
36. —— Laches of trustee.
37. —— Effect of reopening estate.

IV. Parties, pleading, evidence, and procedure

38. Parties.
39. —— Joinder of bankrupt.
40. Representation of trustee by counsel for bankrupt.
41. Injunction and receivership.
42. Allegations of trustee's bill or complaint.
43. Defenses to trustee's bill or complaint.
44. Pleadings in suits against trustees.
45. Burden of proof and evidence in trustee's suit.
46. Evidence in actions against trustee.
47. Trial and judgment.
48. Liability of trustee for costs.

I. SUITS BY OR AGAINST TRUSTEES IN BANKRUPTCY IN GENERAL

1. Trustee's right of action.—Though the bankruptcy act does not explicitly grant the right to sue to trustees in bankruptcy, yet the right of such trustee to bring and maintain whatever actions may become necessary in the process of collecting and reducing to money the assets of the estate may be derived by clear and necessary implications from various provisions of the act. Pease v. McQuillin (1901) 180 Mass. 135, 61 N. E. 819; Brunnemer v. Cook & Bernheimer Co. (1903) 89 App. Div. 406, 85 N. Y. Supp. 954; Johnson v. Bishop (C. C. 1868) 8 N. B. R. 533, Fed. Cas. No. 7,373; Babbitt v. Burgess (C. C. 1873) 7 N. B. R. 561, Fed. Cas. No. 693. The right to bring and maintain proper actions and suits is to be regarded as a necessary incident to the office of trustee. Mclanahan v. Blackwell (1903) 119 Ga. 64, 45 S. E. 785. The limitations upon the trustee's right to sue are, first, that the thing sought to be recovered shall be such as when recovered, shall be assets of the estate; and, second, that the action brought shall not be an action of tort for damages such as, at common law, is strictly personal and dies with the person. Trustees of Mutual Building Fund v. Bosseiux (D. C. 1880) 3 Fed. 817. But aside from questions of prefere or fraudulent conveyance, it is nec sary that the relation of debtor creditor should have existed betw the defendant and the bankrupt, circumstances must have existed wh equity would hold equivalent to s relation. Monroe v. Bushnell (19 158 Mich. 115, 122 N. W. 508. Th the trustee cannot maintain a suit the recovery of a statutory forfeit not claimed by the bankrupt either fore or after the beginning of bankruptcy proceedings. Bromley Smith (D. C. 1871) Fed. Cas. No. 922. But since the statute vests with title to all the bankrupt's pr erty as of the date when he was judged a bankrupt, the trustee is hampered in suing for its recovery the previous appointment of a ceiver in a creditor's bill and the tra fer of the legal title to such recei Shainwald v. Davis (D. C. 1895) Fed. 687. But a trustee in bankrup has no right to sue on an agreem made between state receivers of bankrupt and one of its creditors; receivers must settle with the co which appointed them. Love v. port Storage Co. (1906) 143 Fed. 1, C. C. A. 155, 16 Am. Bankr. Rep. 1

A trustee in bankruptcy should in his own name, not in the name the bankrupt, nor as use plain Ward v. Jenkins (Mass. 1846) 10 M 583; West v. Bank of Lahoma (19 16 Okl. 508, 86 Pac. 59.

A trustee in bankruptcy has a dis tion as to whether or not he will in vene in a suit pending in the name the bankrupt as plaintiff, and may pr erly refuse to continue its prosecut if it cannot result in benefit to the tate. In re Throckmorton (1906) Fed. 145, 79 C. C. A. 15, 17 Bankr. Rep. 856.

The trustee in bankruptcy represe the creditors and may sue to avoid conveyance which a creditor could h avoided. Blake v. Thwing (1914) Ill. App. 187. Crane v. Brewer (19 73 N. J. Eq. 558. 68 Atl. 78; In Geiver (D. C. 1912) 193 Fed. 128, Am. Bankr. Rep. 413. He may pay a creditor and be subrogated to rights in a pending suit against a t person, if it will be for the benefi the estate. In re Babcock (C. C. 18 Fed. Cas. No. 696. It is not a co tion to the filing of a bill by a tru in bankruptcy to reduce to posses the bankrupt's equitable assets that ecution should have issued upon judgments obtained by the bankru creditors. McKey v. Emanuel (19 104 N. E. 1051, 263 Ill. 276. As trustee represents the whole body creditors, he cannot ordinarily m tain an action in the name or for benefit of a single creditor or for advantage of less than all. Steven v. Bird (1910) 168 Ala. 422, 53 So 93; Smith v. Lawton (1869) 39 Ga.

mpare In re Bothe (1909) 173 97, 97 C. C. A. 547, holding that ee in bankruptcy represents all s interested in the estate, and force in the court of bankruptcy le rights existing in favor of cer- the creditors only.

contract made in a given state foreign corporation, and to be ned there, is void because of the of the corporation to comply he law of the state, its trustee kruptcy cannot sue on the con- in a federal court. Thomas v. gham Ry., Light & Power Co. 1912) 195 Fed. 340, 28 Am. Rep. 152.

trustee may recover property in nds of the bankrupt's assignee benefit of creditors. Faulkner lon (D. C. 1913) 203 Fed. 114. ay sue to set aside fraudulent rs of property or payments of made by the bankrupt. Meyer kins (Cal. App. 1913) 130 Pac. rewer v. Brown (1915) 268 Ill. 09 N. E. 264; Gregory v. Bing- Trust Co. (1915) 168 App. 05, 154 N. Y. Supp. 376. Trus- ld entitled to recover property rred to corporation organized by pt to defraud creditors, and to de chattel mortgage by the bank- and the corporation. Hane v. & Keystone Co. (D. C. 1915) ed. 439. A diamond engagement iven by a bankrupt to his fiancée, e was insolvent and within four s prior to his bankruptcy, held rable by his trustee. Pollock v. (D. C. 1913) 205 Fed. 1005. nce only such fraudulent convey- by bankrupts are null and void as t made to purchasers in good and for a present fair considera- e bankrupts may be denied a dis- because of a fraudulent convey- nd yet the property so conveyed recoverable. Lewis v. Julius (D. 3) 212 Fed. 225.

re a trustee had been appointed bankrupt, it was his duty to in- proceedings to recover alleged tant fees paid by the bankrupt to torneys to represent him in the dings; and such action could not en by creditors, in the absence averment that the trustee had equested, and had failed or re- to move. In re Oakley (D. C. 215 Fed. 265.

trustee may maintain suits to ide preferences given to particu- editors or to recover their pro- Lovell v. Latham & Co. (D. C. 211 Fed. 374; Rosenthal v. Nat. Bank (D. C. 1915) 222 83; In re Walsh Bros. (D. C. 163 Fed. 352, 21 Am. Bankr. 14; Jackman v. Eau Claire Nat. (1905) 125 Wis. 465, 104 N. W. 5 Am. St. Rep. 955. Demand and l are not conditions precedent to ght of a trustee in bankruptcy to recover property received as a voidable preference. McCulloch v. Davenport Savings Bank (D. C. 1915) 226 Fed. 309.

The purchase price of land conveyed by a bankrupt to a stockholder of a creditor company, which furnished the money and received it back from the bankrupt, cannot be recovered by the trustee in bankruptcy as a preference, when the conveyance itself is set aside as a preference. Golden & Co. v. Loving (1914) 42 App. D. C. 489. One conspiring with L. to commit a fraud on the bankruptcy act, by advancing money to bankrupt to keep him going four months after preference to L., is, as well as L., liable to the trustee for accounts assigned by bankrupt on consideration of the advancement. Rubenstein v. Lottow (1915) 107 N. E. 718, 220 Mass. 156.

If an execution was levied on property of one who afterwards became bankrupt, and within such a time as to be avoided by the adjudication in bankruptcy, the trustee may claim the proceeds of the sale on such execution if they remain in the hands of the sheriff or have been paid into court, or if the money has been paid over to the execution creditor, the trustee may maintain a plenary suit against him to recover the proceeds as a voidable preference. In re Bailey (D. C. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; In re Knickerbocker (D. C. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; In re Blair (D. C. 1900) 102 Fed. 987, 4 Am. Bankr. Rep. 220; Horton v. Bamford (1911) 79 N. J. Eq. 356, 81 Atl. 761; Jordan v. Downey (1874) 40 Md. 401. Trustee in bankruptcy held entitled to sue for property sold under execution within four months before bankruptcy, or its value, without tendering back amount paid. Dreyer v. Kicklighter (D. C. 1916) 228 Fed. 744.

A trustee in bankruptcy may sue for the recovery of usurious interest paid by the bankrupt. Darby v. Boatman's Sav. Inst. (C. C. 1870) Fed. Cas. No. 3,571; Bromley v. Smith (D. C. 1871) Fed. Cas. No. 1,922. And for the bankrupt's share in a community estate. Collins v. Bryan (1905) 40 Tex. Civ. App. 88, 88 S. W. 432. And for an interest in a remainder assigned by the bankrupt. Clowe v. Seavey (1911) 74 Misc. Rep. 254, 131 N. Y. Supp. 817. And for property erroneously or improvidently surrendered to claimants by a previous receiver of the same estate in bankruptcy. Whitney v. Wenman (D. C. 1905) 140 Fed. 959, 14 Am. Bankr. 591. Where a bankrupt's trustee was in possession of certain gasoline engines received by the bankrupt under a conditional sale contract, and at the seller's direction by mistake delivered 4 of the machines to D. without payment or authority from the bankruptcy court, the trustee was entitled to recover from D. either the en-

gines or their value. In re Caldwell Machinery Co. (D. C. 1914) 215 Fed. 428. The trustee in bankruptcy may sue for the profits of a manufacturing plant leased by the bankrupt corporation. Gill v. Bell's Knitting Mills (1910) 137 App. Div. 553, 121 N. Y. Supp. 692. And for an accounting on the part of a pledgee of property of the bankrupt, who has sold the same improvidently or contrary to the agreement of pledge. In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159.

Where defendant took charge of a corporation's business under a factor's agreement entitling him to a lien for advances on stock, accounts receivable, etc., the corporation's trustee in bankruptcy was entitled to an accounting from defendant for merchandise sold, or its value, for accounts collected, and for loans and advances. Boise v. Talcott (D. C. 1914) 212 Fed. 268. Though it was decided in bankruptcy proceedings that possession of certain property was not in the bankrupt when the petition was filed, an assumpsit by the trustee and receiver for the proceeds of a sale thereof by a creditor who held warehouse receipts for the property, questions concerning such creditor's right to the proceeds may be litigated and the proceeds may be recovered by the trustee if the creditor was not bona fide or if an unlawful preference was given him. Chicago Title & Trust Co. v. First Nat. Bank (1912) 174 Ill. App. 339, judgment affirmed Chicago Title & Trust Co. v. National Storage Co. (1913) 103 N. E. 227, 260 Ill. 485.

It is within the province of a trustee in bankruptcy to maintain suits for the removal of clouds on the title of property coming into his hands as trustee. Lance v. Tainter (1904) 137 N. C. 249, 49 S. E. 211; Gazlay v. Williams (1906) 147 Fed. 678, 77 C. C. A. 662, 17 Am. Bankr. Rep. 249.

Rights of creditors enforceable under state statutes are enforceable by trustee in bankruptcy, though not available to him under the bankruptcy act. Courtney v. Fidelity Trust Co. (1914) 219 Fed. 57, 134 C. C. A. 595.

2. —— Torts to bankrupt's property. —A trustee in bankruptcy may sue on such torts as are not purely personal, but involve pecuniary injury or loss or diminution of the estate in bankruptcy. Brunnemer v. Cook & Bernheimer Co. (1903) 89 App. Div. 406, 85 N. Y. Supp. 954.

A suit by a trustee in bankruptcy against a mortgagee of the bankrupt to recover possession of property taken by the mortgagee under an alleged invalid mortgage is an independent and plenary suit by the trustee, and the mortgagee, answering to the merits, thereby admits the trustee's capacity to sue. In re Federal Contracting Co. (1914) 212 Fed. 688, 129 C. C. A. 224.

Creditors who obtain possession the debtor's property without his thority or consent, and proceed to minister it, by turning it into mo and paying off debts and claims, also liable to his trustee in bankrup afterwards appointed, who may them as for a conversion, or, waiv the tort, for the value of the prope In re Thomas (D. C. 1912) 199 I 214, 29 Am. Bankr. Rep. 945; S Bank of Chicago v. Cox (1906) Fed. 91, 74 C. C. A. 285, 16 Am. Ba Rep. 32. But the trustee cannot m tain a suit in tort for conspiracy in sisting the bankrupt to place his pr erty beyond the reach of credit against persons who are alleged have performed their acts of conspi pending the bankruptcy proceedings, before the adjudication, where it is alleged that any of the defendants ceived any portion of the estate, the only result of the conspiracy i turn the bankrupt's property into m ey in his hands, for which he has fa to account to the trustee. Fried v. Myers (1907) 30 Ohio Cir. Ct. 303.

The bankrupt himself is liable at suit of his trustee for a tort commi on the bankrupt's property when went into bankruptcy, and it is no fense to such an action that he has property of his own with which to spond. Carr v. Gale (C. C. 1847) Cas. No. 2,435.

It is not the duty of the trustee bring suits for the infringement patent owned by the bankrupt, and failure to do so is not negligence. tle v. Hall (C. C. 1887) 29 Fed.

3. —— Bankruptcy of corporatio The trustee of a bankrupt corpora may maintain appropriate proceed to enforce the liability of stockhol on their unpaid subscriptions for st Babbitt v. Read (D. C. 1914) 215 395; Bernard v. Carr (1914) 167 C. 481, 83 S. E. 816; Kiskadde Steinle (C. C. A. 1913) 203 Fed. 29 Am. Bankr. Rep. 346; Babbit Read (C. C. 1909) 173 Fed. 712 Am. Bankr. Rep. 254; Edward Schillinger (1909) 148 Ill. App. Rathbone v. Ayer (1903) 84 App. 186, 82 N. Y. Supp. 235; Stocke Davidson (1906) 74 Kan. 214, 86 136, 118 Am. St. Rep. 315. Com Hunt v. Sharkey (1913) 20 Cal. 690, 130 Pac. 21.

Where a corporation becomes b rupt, payment upon unpaid subsc tions for capital stock cannot be enf ed, unless an assessment has been n by the proper court, or under its di tion, ratably distributing the liabili the bankrupt estate among the subsc ers. Hunt v. Sharkey (Cal. App. 1 130 P. 21. Notice to stockholder an opportunity to be heard as to validity of claims, and entry of an der directing proceedings against stockholders, held conditions prece

ction by trustee in bankruptcy for id stock subscriptions. Chamber- v. Piercy (Wash. 1914) 143 P. 977. here, in proceedings to wind up an vent corporation, it was not clear the indebtedness would require ent in full of unpaid stock sub- tions, the corporation's trustee in ruptcy could not maintain a suit efor without a preliminary investi- n and assessment of the amount ssary to pay debts and expenses. ff v. Gilbert Transp. Co. (D. C.) 204 Fed. 349.

e trustee of a bankrupt corpora- may sue for the recovery of div- ds unlawfully paid out of capital. rell v. Albany Card & Paper Mfg. (1911) 142 App. Div. 148, 126 N. upp. 1070.

e trustee for a bankrupt corpora- may maintain an action under sec- 66 of the New York Stock Corpo- n Law against a trustee under a to recover payments made when vent and with intent to prefer the tor paid. Cardozo v. Brooklyn t Co. (C. C. A. 1915) 228 Fed.

der the law of Ohio, where a part- transfers his interest in the part- hip property to a corporation, and ves in exchange stock of the cor- tion which at par exceeds the value uch property, he is liable for the rence on the bankruptcy of the cor- tion, and such liability may be en- ed by the trustee. Kiskadden v. le (1913) 203 Fed. 375, 121 C. C. 59.

— Trustee's right of action ex- ve.—Upon an adjudication in bank- cy, the bankrupt's property and s of action vest in his trustee, and eafter suits in respect to the same be brought in the name of the tee, not in that of the bankrupt. au v. Johnson (N. Y. 1883) 66 . Prac. 4; Rea v. Richards (1876) la. 396; First Nat. Bank v. Waite 5) 57 Vt. 608; Elderkin v. Elder- (Conn. 1789) 1 Root, 139. If the rupt sues, it is a good plea in ement that he has been adjudicated a trustee appointed. Cook v. Lans- (C. C. 1847) Fed. Cas. No. 3,162. conversely, it is no defense to a by the trustee to recover a debt to the bankrupt that the same has been claimed by the bankrupt set-off in a pending suit. Miller Delaware, L. & W. R. Co. (C. C.) Fed. Cas. No. 9,566.

fore the election and qualification trustee, any creditor of the bank- has the right to institute a suit et aside a fraudulent conveyance or ver a preference, but when a trus- is elected pending such a suit, he ntitled to become a party plaintiff ein. Frost v. Latham & Co. (C. C.) 181 Fed. 866, 25 Am. Bankr. 313. If creditors, acting inde- lently, bring suits for the recovery of assets which the trustee is negligently or intentionally permitting to escape, it does not lie with the trustee to complain of their action. Davis v. W. F. Vandiver & Co. (1905) 143 Ala. 202, 38 South. 850.

After the trustee is in the exercise of his official functions, it belongs to him alone to institute and maintain a suit to set aside a fraudulent conveyance or recover a preference, at least to the exclusion of any creditor who has not a special lien on the property affected. Viquesney v. Allen (1904) 131 Fed. 21, 65 C. C. A. 259, 12 Am. Bankr. Rep. 402; Moore-Schafer Shoe Mfg. Co. v. Billings (1905) 46 Or. 401, 80 Pac. 422; New Orleans Nat. Banking Ass'n v. Le Breton (C. C. 1882) 14 Fed. 646. And the fact that creditors of a bankrupt had acquired a lien on property fraudulently transferred more than four months before the bankruptcy, and are therefore entitled to sue to set aside the conveyance, notwithstanding the bankruptcy proceedings, does not deprive the bankrupt's trustee of the right to maintain a similar suit, especially where the creditors have not yet brought their suit, and are joined as defendants in the trustee's suit. Thomas v. Roddy (1907) 122 App. Div. 851, 107 N. Y. Supp. 473.

5. **Leave or direction to sue.**—Before attempting to take the place of the bankrupt in a pending suit, the trustee should obtain the consent or order of the court of bankruptcy. Hahlo v. Cole (1906) 112 App. Div. 636, 98 N. Y. Supp. 1049; In re Haensell (D. C. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286; The Alert (D. C. 1912) 199 Fed. 542.

A suit to collect a debt, set aside a fraudulent transfer, or recover a preference may be brought in a state court by the trustee on his own initiative and responsibility, without first obtaining the leave or direction of the court of bankruptcy, and the fact that he proceeds without any order from that court is no defense or valid objection. Traders' Ins. Co. v. Mann (1903) 118 Ga. 381, 45 S. E. 426; Cartwright v. West (1908) 155 Ala. 619, 47 South. 93; Chism v. Citizens' Bank (1900) 77 Miss. 599, 27 South. 637; Chism v. Bank of Friars Point (Miss. 1900) 27 South. 610; Edwards v. Schillinger (1909) 148 Ill. App. 227; Avery v. Ryerson (1876) 34 Mich. 362; Hallack v. Tritch (C. C. 1878) 17 N. B. R. 293, Fed. Cas. No. 5,956. Compare Chisolm v. Wallace (1906) 146 Ala. 683, 40 South. 219. And see, under the act of 1867, Pollock v. Hill (1881) 69 Ala. 515; Maybin v. Raymond (C. C. 1877) 15 N. B. R. 353, Fed. Cas. No. 9,338. As to necessity of previous demand or notice to defendant, see Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712.

The provision of the statute that

trustees shall collect and liquidate the assets of the estate "under the direction of the court" does not require an express order or direction to institute any particular suit. Callahan v. Israel (1904) 186 Mass. 383, 71 N. E. 812.

A trustee who hesitates or refuses to bring a suit for the recovery of assets may be ordered to do so on the petition of a creditor, provided the latter will give a bond to protect the estate from liability for costs and expenses. In re Bailey (D. C. 1907) 151 Fed. 953, 18 Am. Bankr. Rep. 226.

Stockholders cited by the federal court which authorized the trustee of the bankrupt corporation to collect sums due on stock subscriptions can question the order authorizing suit only in a direct proceeding in the federal court. Bernard v. Carr (1914) 83 S. E. 816, 167 N. C. 481.

6. Suit by foreign assignee in bankruptcy.—While the right of a foreign assignee in bankruptcy, as respects the assets of the bankrupt, must yield to the claims of creditors of the bankrupt seeking the aid of the domestic courts, yet such foreign assignee may, as the representative of the bankrupt, sue to collect the assets to the same extent as the bankrupt could have done had not bankruptcy intervened, though whether he may sue in his own name or must sue in the name of the bankrupt is a local question, depending upon whether or not an assignment by operation of law is sufficient to enable the assignee to sue in his own name. Hunt v. Jackson (C. C. 1866) Fed. Cas. No. 6,893; Blane v. Drummond (C. C. 1803) Fed. Cas. No. 1,531; Merrick's Estate (Pa. 1842) 5 Watts & S. 9; In re Merrick (Pa. 1841) 2 Ashm. 485. CONTRA, Mosselman v. Caen (N. Y. 1861) 34 Barb. 66; Id. (1874) 1 Hun. 647: Id., 4 Thomp. & C. 171, 10 N. B. R. 512.

7. Suits against trustee.—A trustee in bankruptcy may be sued by any one having a valid claim against him for acts done in the administration of the estate, as, for the recovery of money which has come into his hands but which does not constitute assets of the estate, properly belonging to the plaintiff, or for the conversion of goods similarly claimed by such plaintiff as his own. In re Snelling (D. C. 1912) 202 Fed. 258; Gardner v. Planters' Nat. Bank (1909) 54 Tex. Civ. App. 572, 118 S. W. 1146; Schall v. Kinsella (1906) 117 La. 687, 42 South. 221; Hosmer v. Jewett (D. C. 1872) Fed. Cas. No. 6,713; Smith v. Gordon (D. C. 1843) 6 Law Rep. 313, Fed. Cas. No. 13,052; North Carolina v. Trustees of University (C. C. 1871) 65 N. C. 714, 5 N. B. R. 466, Fed. Cas. No. 10,318; Cogdell v. Exum (1873) 69 N. C. 464, 12 Am. Rep. 657, 10 N. B. R. 326. A petition for reclamation from a receiver in bankruptcy of property s to the bankrupt conditionally was p maturely filed before the maturity o note whereby the time of payment v extended. In re Wegman Piano (D. C. 1915) 221 Fed. 128. So, a s may be maintained against the trus to establish the validity and lien of incumbrance on property of the ba rupt in his hands. Chattanooga N Bank v. Rome Iron Co. (C. C. 18 99 Fed. 82, 3 Am. Bankr. Rep. 5 Nauman Co. v. Bradshaw (1912) Fed. 350, 113 C. C. A. 274, 27 A Bankr. Rep. 565. Or by a chattel mo gagee to establish his claim upon fund arising from the trustee's sale the mortgaged goods, where a s was ordered reserved out of the p ceeds of the sale to satisfy any li which might be established. Skilton Codington (1906) 185 N. Y. 80, 77 E. 790, 113 Am. St. Rep. 885. Or trustee may officially be made a defe ant in a suit to foreclose a mortgage property of the bankrupt, commen after his appointment and qualificat Landon v. Townshend (1889) 112 Y. 93, 19 N. E. 424, 8 Am. St. R 712. So, also, an action lies aga him for money received by him as sets of the estate and not paid over creditors. Hall v. Cushing (1812 Mass. 521. A trustee in bankrup who has been charged by the ba ruptcy court in a summary proceed with the value of property which ca into his possession as assets of the tate, and was improperly delivered him to a firm in which he was a pa ner, may be enjoined by a state co from using the partnership assets satisfy the judgment against hims Hebert v. Crawford (1913) 228 U. 204, 33 Sup. Ct. 484, 57 L. Ed. 800 Am. Bankr. Rep. 24.

An action lies against a trustee bankruptcy for wrongfully paying ou fund in his hands to other credi than the one solely entitled to it. S. v. Dewey (C. C. 1889) 39 Fed. But a suit against the trustee is a proper or permissible procedure one who is simply a creditor of bankrupt and seeks thereby to col his debt. He must take the cou prescribed by the statute, proving claim in the bankruptcy proceedings taking his dividend with the rest. lin v. Foster (C. C. 1870) Fed. Cas. 2,519. In an ancillary suit by a ba rupt's trustee in a different jurisdic to recover alleged assets, claima may not intervene to impress a t on such assets in their favor. Kna Nachod & Kuhne v. Latham & (1915) 219 Fed. 721, 135 C. C. A. modifying order Lovell v. Same (D 1914) 211 Fed. 374.

The owner of timber, which one sequently adjudged bankrupt has tracted to cut and remove, may in on payment of damages by the tru

reach of contract, as well as the before delivering the timber, and t a general creditor as to such ges. Mankins v. Forward Move- Syndicate (Cal. App. 1915) 152 3.

cannot sue a trustee in bank- y in a state court whose claim perly to be presented to the court nkruptcy as a part of the legiti- expenses of administration. In npire Construction & Supply Co. C. 1907) 157 Fed. 495, 19 Am. r. Rep. 704.

bankrupt himself has no stand- sue the trustee in respect to any rty vesting in the latter by vir- f the adjudication. In re Kranich C. 1909) 174 Fed. 908, 23 Am. r. Rep. 550.

the trustee dies or absconds pend- he suit, his co-trustee or his suc- r in the office of trustee may be ght in. Fenton v. Collerd (D. C.) Fed. Cas. No. 4,731.

e who purchases property pending t concerning it against the trustee nkruptcy is bound by the subse- proceedings. Kimberling v. Hart- . C. 1880) 1 Fed. 571.

— **Form of action.**—If the trus- alleged to have in his possession, have converted to the use of the e, property which did not consti- a part of the assets in bankruptcy, ay be sued in trespass or trover ts value by the rightful owner. In pitzer (1904) 130 Fed. 879, 66 C. . 35, 12 Am. Bankr. Rep. 346; In ussell (C. C. A. 1900) 101 Fed. 3 Am. Bankr. Rep. 658; Truda v. od (1901) 71 N. H. 185, 51 Atl. But compare In re Mertens (D. 904) 131 Fed. 507, 12 Am. Bankr. 698. But not in replevin, since atter form of action would involve physical change of possession of erty which, being in the hands of rustee as an officer, is in the cus- and exclusive control of the court bankruptcy. Weeks v. Fowler 2) 71 N. H. 221, 51 Atl. 624; by v. Spear (1904) 98 Me. 542, tl. 881, 99 Am. St. Rep. 424; Con- Iron & Metal Co. v. Couch (1909) N. H. 593, 73 Atl. 301; Yegen v. hern Pac. Ry. Co. (1909) 19 N. D. 121 N. W. 205. But see Ayers v. well (1907) 196 Mass. 349, 82 N. 5, holding that one may maintain evin in a state court to obtain pos- ion of the property of a bankrupt, the adjudication in bankruptcy, before anything else has been done btain possession of his property in Federal courts.

state court has no jurisdiction to rtain a suit to enjoin the collection ssets by a trustee in bankruptcy. hern v. Fisher (1875) 6 S. C. 345, N. B. R. 414; Keegan v. King (D. 899) 96 Fed. 758, 3 Am. Bankr. 79.

Under Code Ala. 1907, §§ 5858, 5859, a defendant in a suit by a trustee in bankruptcy of a corporation held entitled by cross-bill to set off claims. West v. Cowan (Ala. 1914) 66 So. 816.

9. — **Defenses.**—In a suit against a trustee in bankruptcy, he is limited to such defenses on behalf of creditors as they themselves would be entitled to rely on. Marine Sav. Bank v. Norton (1910) 160 Mich. 614, 125 N. W. 754. He may plead usury, and probably it is his duty to do so. In re Hoole (D. C. 1880) 3 Fed. 496. He may plead the illegality of the consideration, as where the note in suit was given in a gambling transaction. In re Hill (D. C. 1911) 187 Fed. 214, 26 Am. Bankr. Rep. 133. The defense of usury held available to the trustee in bankruptcy of the debtor. Loganville Banking Co. v. Forrester (Ga. App. 1916) 87 S. E. 694.

10. — **Judgment and enforcement thereof.**—If the trustee, being made defendant to a suit, fails to come in and assert his rights, he will be as much barred by a default judgment or decree as any other party. Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,259.

Where, in an action in a circuit court against the trustee of a bankrupt in his official capacity, a judgment has been rendered against the trustee, the plaintiff should be required to apply to the bankruptcy court, which has exclusive possession of and jurisdiction to administer the estate, and of which defendant is an officer, for all orders relating to the satisfaction or payment of such judgment. J. B. McFarlan Carriage Co. v. Solanas (1901) 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442.

A court of bankruptcy cannot, by a summary order, require a trustee to pay a judgment for costs rendered against him in another jurisdiction, where there are no funds of the estate in his hands. In re Howard (D. C. 1904) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

11. — **Recovery of damages against trustee personally.**—A trustee in bankruptcy is not liable to suit in a state court for any acts done in the performance of his duty under the orders of the court of bankruptcy. Wood v. Cummings (1908) 197 Mass. 80, 83 N. E. 318. But he may be sued for damages for any wrongful acts which were entirely beyond his authority or duty and which resulted in injury to third persons. Berman v. Smith (D. C. 1909) 171 Fed. 735, 22 Am. Bankr. Rep. 662. An action lies against a trustee in bankruptcy for willful injury to creditors of the estate, resulting from his omission or improper performance of his duties as to notifying them of meetings, or retaining sufficient funds to provide for their known but

undetermined claims. Russell v. Phelps (1880) 42 Mich. 377, 4 N. W. 1. For wrongful acts done by a trustee in bankruptcy beyond the scope of his authority or duty the estate of the bankrupt is not liable, but only the trustee individually. Adams v. Meyers (D. C. 1870) Fed. Cas. No. 62.

The jurisdiction of the court of bankruptcy over the estate of the bankrupt does not exclude the jurisdiction of the state courts to entertain an action for the abatement of a liquor nuisance on property of the estate, that being a matter of police regulation, which does not interfere with the proper jurisdiction of the federal court. Radford v. Thornell (1890) 81 Iowa, 709, 45 N. W. 890.

12. —— Leave to sue.—A trustee in bankruptcy cannot be sued in a state court, unless upon leave first obtained from the court of bankruptcy under which he is acting, where the object of the suit is to recover or reclaim specific property claimed by the trustee to constitute part of the estate in his hands and which he has reduced to possession. In re Russell (1900) 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; Turrentine v. Blackwood (1900) 125 Ala. 436, 28 South. 95, 82 Am. St. Rep. 254; Carney v. Averill (1912) 110 Me. 172, 85 Atl. 494. A suit of this character brought against him without leave may be enjoined at his request by the court of bankruptcy. Lloyd v. Ball (D. C. 1896) 77 Fed. 365. If leave to sue was improvidently granted, it may be revoked by the court of bankruptcy on being fully advised of all the facts. In re Schermerhorn (1906) 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507.

But if the object of the suit is only to establish a lien or recover a money judgment, and it does not seek in any way to disturb the trustee's possession of property in his hands, or to interfere with or contravene the proceedings of the courts of bankruptcy, it may be maintained without leave of the bankruptcy court. Gardner v. Planters' Nat. Bank (1909) 54 Tex. Civ. App. 572, 118 S. W. 1146; In re Smith (D. C. 1903) 121 Fed. 1014, 9 Am. Bankr. Rep. 603.

13. Enjoining proceedings against trustee.—Since the possession of property of a bankrupt by his trustee is the possession of the court of bankruptcy, and that possession cannot be lawfully disturbed or ousted by any person without the permission of the court, the court has undoubted power and jurisdiction to enjoin any proceeding intended to take specific property out of the hands of the trustee. In re Schermerhorn (1906) 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507; Lloyd v. Ball (D. C. 1896) 77 Fed. 365; In re Russell (1900) 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; Keegan v. King (D. 1899) 96 Fed. 758, 3 Am. Bankr. 79; In re People's Mail S. S. Co. C. 1869) 2 N. B. R. 552, Fed. No. 10,970; Hewett v. Norton (C. 1870) 13 N. B. R. 276, Fed. Cas. 6,441; In re Miller (C. C. 1874) Cas. No. 9,551. And a similar rule plies to any proceeding which w seriously interfere with the admi tration of the estate in bankruptcy cause unnecessary loss to creditors, for example, a suit in ejectment to cover premises leased to the bankr and which the receiver in bankrup continues to occupy for the purpos closing up the business of the ba rupt. In re Chambers (D. C. 19 98 Fed. 865, 3 Am. Bankr. Rep. 53

But the court will not stay suits ceeding in the state courts betw different creditors of the bankr when the trustee in bankruptcy ready has possession of the prope which is the subject-matter of s suits, and cannot be bound or in way affected by the results of s litigation. Main v. Bromley (D. 1881) 6 Fed. 477. And where a in equity is pending in another co to establish a lien on a fund in hands of a trustee in bankruptcy, i doubtful whether that court has ju diction to restrain the trustee from tributing the fund to creditors, pend the determination of the suit, pr ably the better rule requiring the c plainant to resort to the court of ba ruptcy for an order to that eff Chattanooga Nat. Bank v. Rome I Co. (C. C. 1899) 99 Fed. 82, 3 A Bankr. Rep. 582.

14. Garnishment of trustee.—A tr tee in bankruptcy cannot be requi by the process of garnishment, to count to a judgment creditor of bankrupt with respect to money property in his hands as such trus for it is in the custody of the law under the control of the court of ba ruptcy alone, and moreover the tr tee does not hold as the debtor or agent of the bankrupt, but adversely him. Colby v. Coates (Mass. 1850 Cush. 558; Lord v. Meachem (18 32 Minn. 66, 19 N. W. 346; Oliver Smith (1809) 5 Mass. 183; Field Jones (1852) 11 Ga. 413; Com. Hide & Leather Ins. Co. (1875) Mass. 155. But see In re Kranich C. 1910) 182 Fed. 849, 25 Am. Ban Rep. 50.

Neither money in the hands of trustee which is distributable in form of dividends, nor money paya under a composition agreement, can reached or tied up by the process attachment or garnishment from other court. In re Kohlsaat (D. 1878) 18 N. B. R. 570, Fed. Cas. 7,918. And this is true even afte dividend has been declared, the pre sum ascertained to which the particu creditor will be entitled, and the tr

ordered to pay him that sum. Still udgment creditor of that creditor not obtain satisfaction of his claim garnishment of such distributive e. For it remains within the exive jurisdiction of the court of kruptcy, not only until its payment he creditor is ordered, but until it actually been paid to him. In re ningham (D. C. 1879) 19 N. B. R. Fed. Cas. No. 3,478.

5. Nature and form of remedy.—If trustee in bankruptcy brings his ac- in the court of bankruptcy, it will governed by the ordinary rules of edure in the federal courts, such hat which preserves the distinction veen legal and equitable causes of on, and if the suit is essentially one quitable cognizance, it will be tria- by the court without a jury. Dok- v. Page (1906) 147 Fed. 438, 77 C. A. 674, 17 Am. Bankr. Rep. 228. the other hand, if he goes into the e courts, he must bring an action gnized by the state laws as apriate to secure the relief for which sks. McCormick v. Page (1901) 96 App. 447. And he will be bound he rules of procedure in the state ts. Bacon v. George (1910) 206 s. 566, 92 N. E. 721. In a suit by ustee in bankruptcy to set aside a dulent conveyance of the bankrupt, trustee must bring his case within rules of pleading and proof preed by the statutes and decisions of state wherein the suit is brought. man v. Hagey (Mo. 1913) 158 S. 829.

trustee in bankruptcy may sue in mpsit for the value of a preferen- transfer of goods by the bankrupt creditor, as the latter takes the ls impressed with the obligation ted by the bankruptcy act to re- e or pay on the trustee's electing ue, such obligation being a quasi ract. Reber v. Ellis Bros. (D. C. 1) 185 Fed. 313, 25 Am. Bankr. 567; Edwards v. Schillinger Bros. (1910) 153 Ill. App. 219. An ac- to recover property received by ndant as a voidable preference unsection 9644, post, held not a part he bankruptcy proceedings, but a roversy between the trustee and a d party. McCulloch v. Davenport ings Bank (D. C. 1915) 226 Fed.

the action concerns goods in the ession of a third person, but claim- s assets of the estate in bankrupt- the trustee may maintain replevin. don v. Farrington (1881) 46 Mich. 9 N. W. 456; Godwin v. Tuttle 1914) 141 Pac. 1120. If the ob- of the suit is to recover the value property transferred by the bank- t in fraud of the act or for the pur- e of hindering or defrauding his litors, the proper form of action is er. Lyon v. Clark (1902) 129 h. 381, 88 N. W. 1046; Jackman Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Chickering v. Raymond (1854) 15 Ill. 362; Carr v. Gale (C. C. 1847) Fed. Cas. No. 2,435. See Shuman v. Fleckenstein (D. C. 1877) 15 N. B. R. 224, Fed. Cas. No. 12,826; Brooke v. McCraken (C. C.) 10 N. B. R. 461, Fed. Cas. No. 1,932. But in the case of a sale of the debtor's property under attachment, if the trustee desires to pursue the attaching creditor, the officer making the sale, and the purchaser at the sale, on the ground that the attachment was dissolved by the debtor's adjudication in bankruptcy and that the defendants had notice thereof, the proper form of action is trespass, and not trover. Wallace v. Camp (1901) 200 Pa. 220, 49 Atl. 942. A creditor of a bankrupt which caused an attachment suit to be brought by one to whom it assigned its claim, and after the bankruptcy had property of the bankrupt sold by the sheriff to pay its judgment, held liable in conversion to the trustee. Withoft v. Western Meat Co. (D. C. 1913) 210 Fed. 986.

If property seized by the marshal has been surrendered to a claimant on a forthcoming bond, and the title of the claimant is finally adjudged invalid, but he is then insolvent, the trustee may proceed directly on the bond. Storrs v. Engel (D. C. 1879) Fed. Cas. No. 13,494.

He may also maintain a writ of error to reverse a judgment rendered against the bankrupt. Day v. Laflin (Mass. 1843) 6 Metc. 280.

But a refund of taxes formerly paid by the bankrupt and ordered by the state legislature to be restored to him, cannot be enforced by mandamus against the state auditor. Graham v. Norton (1872) 15 Wall. 427, 21 L. Ed. 177. And the trustee in bankruptcy of a tenant in common will not be allowed to sue in a state court for partition, when the provisions of the state laws and those of the bankruptcy act, which would be applicable to the resulting sale, are so irreconcilable that a conflict of jurisdiction would inevitably arise between the state court and the court of bankruptcy. Lindsay v. Rumkle (1910) 82 Ohio St. 325, 92 N. E. 489, 29 L. R. A. (N. S.) 659, 137 Am. St. Rep. 781.

16. —— Suits in equity by trustee.—A trustee in bankruptcy may bring a bill in equity, in the proper court, when the case is properly one of equitable cognizance. In re Plant (D. C. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272. Assumpsit by the trustee and receiver of a bankrupt against creditors for the proceeds of the sale of certain property is in the nature of an equitable action. Chicago Title & Trust Co. v. First Nat. Bank (1912) 174 Ill. App. 339.

The trustee in bankruptcy must pursue appropriate remedies in all cases, and not resort to equity when he has a plain and adequate remedy at law, nor

seek an injunction, receivership, or other equitable relief, where the proper course is to bring trover or replevin, or where a simple money judgment will give him all the relief to which he is entitled. In re Oregon Iron Works (D. C. 1877) 17 N. B. R. 404, Fed. Cas. No. 10,562; Sessler v. Nemcof (D. C. 1910) 183 Fed. 656, 25 Am. Bankr. Rep. 618. Where a bill by a trustee in bankruptcy of a person having a license by contract to conduct a concession in an amusement park alleges that by a conspiracy between the park and the principal stockholder the license was forfeited and that property was withheld from the concessionaire, and the decree ordered the forfeiture to be set aside and awarded a sum of money for the value of the concession, the theory of the bill and the decree is fallacious, since the remedy is at law for a breach of the contract. Day v. Luna Park Co. (1912) 174 Ill. App. 477.

Where the object is to set aside a fraudulent conveyance or recover the value of property fraudulently transferred by the debtor, a bill in equity in the form of a creditor's bill may be an appropriate form of action. Stotesbury v. Cadwallader (D. C. 1874) Fed. Cas. No. 13,498; Taylor v. Rasch (D. C. 1871) 5 N. B. R. 399, Fed. Cas. No. 13,801; Simpson v. Western Hardware & Metal Co. (D. C. 1915) 227 Fed. 304. In the case of an alleged preferential payment by the bankrupt, where no actual fraud is charged, and there is no demand for the cancellation or setting aside of any conveyance, it is thought that a bill in equity will not lie, the case being one for an action at law as for money had and received. Maxwell v. Davis Trust Co. (1911) 69 W. Va. 276, 71 S. E. 270; Reber v. Ellis Bros. (D. C. 1911) 185 Fed. 313, 25 Am. Bankr. Rep. 567; Edwards v. Schillinger Bros. Co. (1910) 153 Ill. App. 219. But other decisions justify the maintenance of a bill in equity in this case on the ground that it is analogous to a creditor's suit to vacate a fraudulent conveyance. Parker v. Sherman (1914) 212 Fed. 917, 129 C. C. A. 437; Pond v. New York Exchange Bank (D. C. 1903) 124 Fed. 992, 10 Am. Bankr. Rep. 343; Parker v. Black (D. C. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; Arnold v. Knapp (W. Va. 1915) 84 S. E. 895.

A trustee in bankruptcy is not entitled to an order restraining the bankrupt and his wife from conveying real estate of which they are seised as tenants by entirety, since the court has no power to restrain the wife, and whatever title the bankrupt had, which he could have conveyed, passed from him to the trustee by operation of law on the adjudication. In re Beihl (D. C. 1912) 197 Fed. 870, 28 Am. Bankr. Rep. 310.

17. Summary proceedings in court of bankruptcy.—When the trustee seeks to recover property of the bankrupt whic is in the hands of a third person, wh makes no claim of title to it in his ow right, he need not resort to a plenar suit, but may institute summary pro ceedings in the court of bankruptcy by simple petition and order to show caus In re Fogelman (D. C. 1911) 188 Fe 755, 26 Am. Bankr. Rep. 742; In r Holland (D. C. 1910) 176 Fed. 62 23 Am. Bankr. Rep. 835; In re Ho brook Shoe & Leather Co. (D. C. 1908 165 Fed. 973, 21 Am. Bankr. Rep. 511 In re Wiesen Bros. (D. C. 1905) 13 Fed. 164, 15 Am. Bankr. Rep. 27; I re Breslauer (D. C. 1903) 121 Fe 910, 10 Am. Bankr. Rep. 33. If n adverse claim to money or propert was made at the time the petition i bankruptcy was filed, the title theret passes to the trustee on his appoint ment, and the court has jurisdiction t require its surrender to him by a sum mary order, notwithstanding any ad verse right subsequently asserted by th party in possession. In re Davis (D C. 1903) 119 Fed. 950, 9 Am. Bankr Rep. 670. Where there is an advers claim to property, based on a transfe antedating bankruptcy, it can only b determined in a plenary suit; but wher the property is in the physical posses sion of a third person or agent of th bankrupts, who refuses to deliver, th trustee may recover it by means of a summary order. In re Goldstein (C. C A. 1914) 216 Fed. 887. A summary order of a court of bankruptcy, direct ing an adverse claimant of property t deliver possession of the same to it receiver, is not an adjudication of th title or right to ultimate possession. I re Petronio (C. C. A. 1914) 220 Fed 269.

Summary proceedings by the trustee are proper where the defendant holds the property merely as the agent o bailee of the bankrupt, not pretending himself to be the owner. Mueller v Nugent (1902) 184 U. S. 1, 22 Sup. Ct 269, 46 L. Ed. 405, 7 Am. Bankr. Rep 224; Wayne Knitting Mills v. Nugent (D. C. 1900) 104 Fed. 530, 4 Am Bankr. Rep. 747. The right to draw checks against an account in a bank distinguishes the possession of the bank from that of an ordinary debtor, and gives the bankruptcy court the right to order payment to the trustee of such deposits as are not claimed by the bank on some other ground than its holding as a depository. In re Radley Steel Const. Co. (D. C. 1914) 212 Fed. 462. Summary proceedings are proper where the object is to reach surplus income in the hands of a testamentary trustee. In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55. Or where the person holding the property is a mere cover or receptacle for it, for the purpose of concealing it and placing it beyond the reach of the bankrupt's creditors. Salsburg v. Blackford (C. C. A. 1913) 204 Fed. 438, 29 Am. Bankr. Rep. 320; In re

dman (D. C. 1907) 153 Fed. 939, Am. Bankr. Rep. 112. But see In Mayer (D. C. 1900) 98 Fed. 839, 3 Bankr. Rep. 533, holding that the mary power of the court of bankcy cannot be employed to reach perty which is in the hands of third ons claiming title thereto by transor conveyance from the bankrupt r to the bankruptcy proceedings, gh such transfer was manifestly dulent. And see In re Stevens (D. 877) Fed. Cas. No. 13,390. Whethn bankrupt's trustee may maintain mary proceedings against the bank: and his wife to recover funds and rities in her hands alleged to be: to the estate, or is required to inte a plenary action against her, ends on whether she holds the prop pursuant to a bona fide claim or ely as agent for the bankrupt. In Shea (D. C. 1914) 211 Fed. 365. to justify the recovery of assets of estate by summary proceedings, it necessary that the property should followed into the hands of the detory and sufficiently identified to ble the marshal to take possession it without mistake. In re Jackier C. 1910) 179 Fed. 720, 24 Am. kr. Rep. 790. Where there is a inous contrivance between the bankt and others to embezzle the estate the benefit of the bankrupt and his ferred creditors, the court of bankcy may interpose by injunction. In Connolly (D. C. 1900) 100 Fed. 620, m. Bankr. Rep. 842; In re Smith C. 1843) Fed. Cas. No. 12,993. ere the bankrupt, after the filing of petition, sells goods in his possesn to one chargeable with knowledge the fraudulent character of the nsaction, the court of bankruptcy compel the restitution of the prop or its proceeds in a summary proding. In re Denson (D. C. 1912) Fed. 854, 28 Am. Bankr. Rep. 158. so also where an insolvent debtor made a gift of personal property to wife, or given her a bill of sale, hout any actual change of possesn. In re Pierce (C. C. 1877) Fed. No. 11,139; In re Norris (D. C. 0) 177 Fed. 598, 24 Am. Bankr. . 444; In re Hopkins (C. C. A. 6) 229 Fed. 378.

bankrupt's trustee appointed withfour months after the making of a eral assignment for the benefit of ditors may recover the assets asned from the assignee in summaproceedings; the assignee being a e naked bailee for creditors and an adverse claimant. In re Mcm (1914) 214 Fed. 207, 130 C. A. 555; In re Karp (D. C. 1915) Fed. 798.

court of bankruptcy held to have sdiction to make a summary order the return of a preferential payt made by a bankrupt after the g of the petition against him. In re Leigh (D. C. 1913) 208 Fed. 486. And money paid by a bankrupt partnership on one of its debts after the filing of the petition, is recoverable in a summary proceeding. In re R. & W. Skirt Co. (1915) 222 Fed. 256, 138 C. C. A. 67.

Attaching creditors may be proceeded against summarily, when their levies constituted the act of bankruptcy on which the adjudication was based, or where made after the filing of the petition and with knowledge thereof. Bear v. Chase (1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; In re Graessler & Reichwald (1907) 154 Fed. 478, 83 C. C. A. 304, 18 Am. Bankr. Rep. 694. And this applies also to an execution sale of the debtor's property, if held after the filing of the petition, and if the judgment creditor and the purchaser are chargeable with knowledge of the pendency of the bankruptcy proceedings. In re Breslauer (D. C. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33. But if a sale on execution has been held and the proceeds paid over to the judgment creditor before the commencement of the bankruptcy proceedings, the mere fact that the judgment and sale are voidable under the bankruptcy act will not enable the trustee to recover the proceeds in a summary proceeding; his remedy is a plenary suit to recover the proceeds as a preference. In re Resnek (D. C. 1909) 167 Fed. 574, 21 Am. Bankr. Rep. 740; Stone-Ordean-Wells Co. v. Mark (C. C. A. 1915) 227 Fed. 975.

It is also held that a person claiming property as collateral security pledged to him by the bankrupt may be summarily ordered to surrender it, if the referee decides that the title to it is in the estate. In re Belfast Mesh Underwear Co. (D. C. 1911) 185 Fed. 834. And so a proceeding to recover or reduce the amount of money paid by a bankrupt to his counsel, in contemplation of bankruptcy and for services to be rendered therein, may be summary. In re Wood (1908) 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046. There is no jurisdiction to proceed summarily in proceedings under section 9644, post, to re-examine as to an attorney's fee paid by a debtor, where the contract with the attorney was not made by the debtor in contemplation of bankruptcy proceedings. Tripp v. Mitschrich (C. C. A. 1914) 211 Fed. 424.

If the court of bankruptcy is in the actual possession of any given property, through its officers, such as the referee, a receiver, or a trustee in bankruptcy, it has jurisdiction to determine in a summary proceeding all claims of third persons asserting ownership of it or liens upon it, whether hostile and adverse or not. In re Rathman (1910) 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246; In re Plymouth Elevator Co. (D. C.

1911) 191 Fed. 633. See Johnston v. Spencer (C. C. A. 1912) 195 Fed. 215, 27 Am. Bankr. Rep. 800; Shea v. Lewis (C. C. A. 1913) 206 Fed. 877, 30 Am. Bankr. Rep. 436; In re Flanigan (D. C. 1915) 228 Fed. 339. But jurisdiction to foreclose a mortgage on the estate of the bankrupt, at the instance of the mortgagee, is not included in the powers to be exercised summarily. In re Casey (C. C. 1873) Fed. Cas. No. 2,495. Nor can the court thus determine the rights of a third person who is apparently a joint owner of certain property with the bankrupt, although the trustee alleges that he is only nominally connected with it and has no real financial interest in it. In re Brodbine (D. C. 1899) 93 Fed. 643, 2 Am. Bankr. Rep. 53. Nor is this an appropriate proceeding for the trustee of a bankrupt corporation who seeks to compel a stockholder to pay the corporate debts because of his alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock. In re Haley (1908) 158 Fed. 74, 85 C. C. A. 404; In re Howe Mfg. Co. (D. C. 1912) 193 Fed. 524, 27 Am. Bankr. Rep. 477.

The summary jurisdiction of a court of bankruptcy may not only be invoked at the instance of the trustee, but also against him, since he is an officer of the court and always subject to its lawful orders. Thus, if the judgment of a competent court has decided that a fund in his hands does not belong to the estate in bankruptcy, but to a third person, he may be summarily ordered to pay it over. In re Howard (1905) 135 Fed. 721, 68 C. C. A. 359, 14 Am. Bankr. Rep. 296. A petition to have a trustee in bankruptcy decreed to hold certain real estate standing in the name of the bankrupt in trust for petitioner, and required to convey the same, is a summary proceeding. In re Snelling (D. C. 1912) 202 Fed. 258.

Finding in summary proceedings in bankruptcy that the trustee had received, as such, certain property as assets, was conclusive against him and not subject to collateral attack by third persons. Hebert v. Crawford (1913) 33 Sup. Ct. 484, 228 U. S. 204, 57 L. Ed. 800. A court of bankruptcy is without jurisdiction in a summary proceeding to decree specific performance of a contract made by a bankrupt by directing his trustee to execute a conveyance of land. Dreyer v. Perkins (1914) 217 Fed. 889, 133 C. C. A. 599.

18. —— Against adverse claimants.— A stranger to the bankruptcy proceedings, setting up an adverse title to property which is claimed by the trustee in bankruptcy as assets of the estate, cannot be compelled to submit his claim to adjudication in a summary proceeding in the court of bankruptcy, provid his claim is made with the apparent i tention of defending it in good faith a is not merely colorable, but is entitl to be heard in a plenary suit, at law in equity as the case may require. In Cotton (D. C. 1913) 209 Fed. 12 In re Flanigan (D. C. 1915) 228 Fe 339; Smith v. Mason (1871) 14 Wa 419, 20 L. Ed. 748; First Nat. Ba v. Hopkins (C. C. A. 1912) 199 Fe 873, 29 Am. Bankr. Rep. 434; In Cantelo Mfg. Co. (D. C. 1912) 2 Fed. 158, 29 Am. Bankr. Rep. 70 Johnston v. Spencer (1912) 195 Fe 215, 115 C. C. A. 167, 27 Am. Bank Rep. 800; In re Denson (D. C. 191 195 Fed. 854, 28 Am. Bankr. Re 158; In re Iron Clad Mfg. Co. (D. 1912) 194 Fed. 906; In re Mimms Parham (D. C. 1911) 193 Fed. 276, Am. Bankr. Rep. 469; In re Big C haba Coal Co. (D. C. 1911) 190 Fe 900, 26 Am. Bankr. Rep. 910; In Jackier (D. C. 1910) 179 Fed. 720, Am. Bankr. Rep. 790; Cooney v. Co lins (1910) 176 Fed. 189, 99 C. C. 543, 23 Am. Bankr. Rep. 840; In Hersey (D. C. 1909) 171 Fed. 99 22 Am. Bankr. Rep. 856; In re Drig (D. C. 1909) 171 Fed. 897, 22 A Bankr. Rep. 621; In re Horgan (190 158 Fed. 774, 86 C. C. A. 130, 19 A Bankr. Rep. 857; In re Edwards (D C. 1907) 156 Fed. 794, 19 Am. Bank Rep. 632; In re Sunseri (D. C. 190 156 Fed. 103, 18 Am. Bankr. Rep. 23 In re Davis Tailoring Co. (D. C. 190 144 Fed. 285, 16 Am. Bankr. Rep. 48 In re New York Car Wheel Worl (D. C. 1904) 132 Fed. 203, 13 A Bankr. Rep. 60; In re Green (D. 1901) 108 Fed. 616, 6 Am. Bankr. Re 270; In re Sheinbaum (D. C. 190 107 Fed. 247, 5 Am. Bankr. Rep. 18 In re Baudouine (1900) 101 Fed. 57 41 C. C. A. 318, 3 Am. Bankr. Re 651; In re Cohn (D. C. 1899) Fed. 75, 3 Am. Bankr. Rep. 421; Mitc ell v. McClure (D. C. 1899) 91 Fe 621, 1 Am. Bankr. Rep. 53; In Staib (D. C. 1880) 3 Fed. 209; In Griffith, 1 Nat. Bankr. News, 546; re Fowler, 1 Nat. Bankr. News, 21 In re Waitzfelder (D. C. 1878) 18 B. R. 260, Fed. Cas. No. 17,048; re Bonesteel (C. C. 1870) 3 N. B. 517, Fed. Cas. No. 1,627; Ferguson Peckham (D. C. 1872) 6 N. B. R. 56 Fed. Cas. No. 4,741. As to an amen ment, converting a summary proceed ing into a plenary suit, see In re Bo ton-Cerrillos Mines Corporation (D. 1913) 206 Fed. 794, 30 Am. Bank Rep. 739.

This is a right which the claima may waive, and he may do so by su rendering the disputed property to th trustee for sale and presenting to th bankruptcy court his claim against th proceeds. In re Plymouth Elevat Co. (D. C. 1911) 191 Fed. 633. Or b answering the trustee's petition f

urrender of the property by de-
ng on the merits without raising
bjection to the jurisdiction of the
or referee. In re Carrier (D.
91) 48 Fed. 161; In re Emrich
C. 1900) 101 Fed. 231, 4 Am.
r. Rep. 89; People v. Brennan
Y. 1875) 3 Hun, 666.

ere, in a summary proceeding to
er goods alleged to have been
ulently transferred by a bankrupt,
ransferee, after a holding that the
might be tried in such proceed-
participated in the trial, which
conducted at great expense, he
by waived his right to have the is-
etermined in a plenary suit. Sals-
v. Blackford (C. C. A. 1913) 204
438, affirming decree In re Schoen-
(D. C. 1911) 190 Fed. 53.

arty claiming title to certain store
es in the possession of a bankrupt
not precluded by his failure to
ar and answer an order to show
why such fixtures as were never
d by the bankrupt should not be
from afterwards asserting that
fixtures were never owned by the
upt. Murphy v. John Hofman Co.
) 141 N. Y. S. 900, 157 App. Div.

But jurisdiction is not conferred
e appearance of the adverse claim-
n answer to an order to show
, merely for the purpose of filing
swer asserting his claim and his
tion to contest the application. In
alsh Bros. (D. C. 1908) 163 Fed.
21 Am. Bankr. Rep. 14.

e case of a transfer or conveyance
operty by the bankrupt which the
ee claims to have been fraudulent
oid as against creditors, but which
rantee claims to have been in good
and for a consideration, falls with-
is rule, and the issue cannot be
in summary proceedings. Court-
v. Shea (1915) 225 Fed. 358, 140
A. 382; Camp v. Zellars (1899)
ed. 799, 36 C. C. A. 501; In re
ox (D. C. 1910) 185 Fed. 985, 26
Bankr. Rep. 432. Nor can that
is presented when the trustee
to recover money or property on
round that the transaction consti-
a preference voidable under the
te, and is met with a denial ap-
tly interposed in good faith. In re
rber (D. C. 1904) 131 Fed. 121, 12
Bankr. Rep. 616; In re Adams
C. 1904) 130 Fed. 788, 12 Am.
r. Rep. 367; In re Keystone Press
C. 1913) 203 Fed. 710, 29 Am.
r. Rep. 715.

ransfer of property by a bankrupt
y debts owing by himself and an-
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enefit of creditors, held, that cred-
having objected to a surrender
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ransferee was an adverse claimant
st whom the trustee could not
er in summary proceedings. In re
um (1914) 214 Fed. 207, 130 C.
555.

The wife of the bankrupt may be an adverse claimant, within this rule, if the law of the state removes the common-law disabilities of married women and gives them capacity to contract as if sole. Courtney v. Shea (1915) 225 Fed. 358, 140 C. C. A. 382; Shea v. Lewis (C. C. A. 1913) 206 Fed. 877; In re Markel (D. C. 1915) 228 Fed. 926; Blumberg v. Bryan (1901) 107 Fed. 673, 46 C. C. A. 552, 6 Am. Bankr. Rep. 20. And the holder of an assignment of money due to the bankrupt from a third person at the date of the bankruptcy is an adverse claimant. In re Lineberry (D. C. 1910) 183 Fed. 338, 25 Am. Bankr. Rep. 164. And so is a bank in which the bankrupt has money on deposit, but which claims the right to set off a debt due to it from the bankrupt. In re Gill (1911) 190 Fed. 726, 111 C. C. A. 454, 26 Am. Bankr. Rep. 883; First Nat. Bank v. Hopkins (1912) 199 Fed. 873, 118 C. C. A. 321, 29 Am. Bankr. Rep. 434. And the claims of a bank to corporate stock as a pledgee thereof are adverse to the trustee of the bankrupt pledgor, and not determinable by summary proceedings. In re Bacon (1913) 210 Fed. 129, 126 C. C. A. 643. A surety on the bail bond of the bankrupt is an adverse claimant, where the bankrupt, before the commencement of the bankruptcy proceedings, had deposited money to indemnify him against liability. In re Horgan (1907) 158 Fed. 774, 86 C. C. A. 130, 19 Am. Bankr. Rep. 857; Jaquith v. Rowley (1903) 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620.

The claim of a right to apply moneys of a bankrupt for the purpose of indemnity on some contingent liability carries the right to possession, and is such a claim of title that it cannot be disposed of summarily upon motion. In re Radley Steel Const. Co. (D. C. 1914) 212 Fed. 464. A stockholder in the bankrupt corporation against whom the trustee is proceeding to compel him to pay the balance due on his subscription for stock, is an adverse claimant and cannot be proceeded against summarily. In re Howe Mfg. Co. (D. C. 1912) 193 Fed. 524, 27 Am. Bankr. Rep. 477.

Where the trustee of a corporation in bankruptcy files a petition against two of its officers in their official capacity to compel them to account for the proceeds of sales of the corporation's stock and also to pay the balance due on their own shares, and it appears that they had controlled the corporation absolutely from its inception, the other incorporators and directors being mere dummies, they cannot be regarded as adverse claimants, in determining the jurisdiction of the court of bankruptcy. In re Kornit Mfg. Co. (D. C. 1911) 192 Fed. 392, 27 Am. Bankr. Rep. 244. But see In re Spalding Cotton Mills (D. C. 1912) 193 Fed. 554. And so, where a receiver in bankruptcy, with the consent of the court, has vacated premises of which a third person was

claiming the right of possession, and the latter has thereupon resumed the possession, a subsequently appointed trustee of the estate cannot oust the possessor and get possession of the premises by a summary proceeding. In re Rothschild (1907) 154 Fed. 194, 83 C. C. A. 288, 18 Am. Bankr. Rep. 682. But it has been held that the court of bankruptcy may summarily require a person in possession to turn over property to the trustee, although held under a claim of title, where such title depends on a question of law and not of fact. In re Michaelis & Lindeman (D. C. 1912) 196 Fed. 718.

The district court, appointing the superintendent of banks, taking possession under Banking Law N. Y. § 57, of a private banker's assets, books, and papers, as receiver in bankruptcy, would not compel district attorney of New York to deliver to receiver books and papers about to be used in a criminal case. In re Mandel (D. C. 1915) 224 Fed. 642.

Where property of which the receiver in bankruptcy has taken possession is subject to a judicial lien duly obtained in a state court, the court of bankruptcy will not determine a controversy between the judgment creditors and third persons claiming the property. In re Pilcher & Son (D. C. 1915) 228 Fed. 139.

19. —— Determination of character of claim.—Whenever a trustee in bankruptcy lays claim to money or property which is in the possession of a third person, and petitions for an order requiring its surrender to him, the court of bankruptcy has jurisdiction to cite such person to show cause why he should not be required to yield up the money or property to the trustee. In re Waukesha Water Co. (D. C. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715; In re Cantelo Mfg. Co. (D. C. 1912) 201 Fed. 158. And if the respondent denies that the property in question belongs to the estate in bankruptcy and sets up a claim of title in himself, the court has jurisdiction to inquire and determine whether or not such claim is genuine, really adverse, and interposed in good faith. If it shall determine that such claim is merely colorable or fictitious, frivolous on its face or plainly false, or manifestly pretended and without any foundation in law, it may proceed to make the order asked by the trustee; but on the other hand, if it shall be determined that the respondent's claim to the property is genuine and interposed in good faith and with the intention of supporting it, the court cannot proceed to inquire into the merits, but must dismiss the petition and remit the trustee to his remedy by a plenary suit. Johnston v. Spencer (C. C. A. 1912) 195 Fed. 215, 27 Am. Bankr. Rep. 800; In re Ironclad Mfg. Co. (C. C. A. 1911) 191 Fed. 831, 27 Am. Bankr. Rep. 490; In re Rathman (1910) 183 Fed. 913, 106 C. C. A. 2 25 Am. Bankr. Rep. 246; In re No (D. C. 1910) 177 Fed. 598, 24 A Bankr. Rep. 444; In re Hayden (D. 1908) 172 Fed. 623, 22 Am. Ban Rep. 764; In re Ellis Bros. Print Co. (D. C. 1907) 156 Fed. 430, 19 A Bankr. Rep. 472; In re Gilroy Bloomfield (D. C. 1905) 140 Fed. 7 14 Am. Bankr. Rep. 627; In re K (D. C. 1904) 131 Fed. 386, 12 A Bankr. Rep. 444; In re Teschmac & Mrazay (D. C. 1904) 127 Fed. 7 11 Am. Bankr. Rep. 547; In re Br lauer (D. C. 1903) 121 Fed. 910, Am. Bankr. Rep. 33; In re Baird C. 1902) 116 Fed. 765, 8 Am. Ban Rep. 649; In re Tune (D. C. 19 115 Fed. 906, 8 Am. Bankr. Rep. 2 In re Radley Steel Const. Co. (D. 1914) 212 Fed. 462; Courtney v. S (1915) 225 Fed. 358, 140 C. C. A. 3 In other words, if the responde plea sets forth facts showing that claim is adverse and in good faith, trustee should file a pleading deny the averments relating to this po and an issue should be framed as whether the claim pleaded is substan or merely colorable, and this p should be decided on investigation; is error simply to overrule the p and proceed to judgment. In re (C. C. A. 1911) 190 Fed. 726, 26 A Bankr. Rep. 883; In re Goldstein C. A. 1914) 216 Fed. 889.

If there is nothing to impeach good faith of the claim, and it is s stantiated by verified pleadings or o testimony, the issue cannot be he summarily. In re Kane (D. C. 19 131 Fed. 386, 12 Am. Bankr. Rep. 4 In fact, it has been said that it is o in clear cases, in which the proof is cisive, that the court of bankruptcy justified in making a peremptory or for the surrender of property. In Gilroy & Bloomfield (D. C. 1905) Fed. 733, 14 Am. Bankr. Rep. 6

Where a transferee of a bankru assets, alleged to have been frau lently transferred, claimed that he purchased and paid for the same w the bankrupt was engaged in his o nary business, the transferee was titled to have the question determi in a plenary suit, regardless of the f that his testimony was incredible. re Green (D. C. 1913) 207 Fed. 6 Where a bankrupt's trustee brings su mary proceedings to recover prope in the hands of a third person, a n colorable claim, requiring dismissal, pears on the filing of the claimant's v ified answer, which, if true, shows t and possession antedating the bankru cy petition. In re Goldstein (C. C. 1914) 216 Fed. 887.

Where a claimant's right to hold c seized under a distress warrant agai a bankrupt depended on whether lien was obtained within four mon prior to the bankruptcy proceedi as provided by section 9651, post, validity of such lien was not so v

color as to authorize the bankrupt-court to determine it by summary ceedings over protest. In re Luken . C. A. 1914) 216 Fed. 890.

0. Joinder of causes of action.—In a t against the bankrupt and his trans-ees to set aside alleged fraudulent nveyances of property, the trustee s the right to include all such matters d causes of action as might have en included by the creditors in a editors' bill against the defendants. rcross v. Nathan (D. C. 1900) 99 d. 414, 3 Am. Bankr. Rep. 613; aulding v. McGovern (C. C. 1874) N. B. R. 188, Fed. Cas. No. 13,217. A petition by the trustee against the nkrupt and one of his creditors, to ocure the setting aside of a mort-ge on land, a chattel mortgage, and lease of real and personal property, l made by the bankrupt at different nes to the defendant creditor, and al-ged to be fraudulent as to other cred-ors, and to have been given and ac-pted with intent to prefer the cred-or receiving the same, is not demur-ble for multifariousness. Carter v. obbs (D. C. 1899) 92 Fed. 594, 1 m. Bankr. Rep. 215; Hunt v. Doyal 1907) 128 Ga. 416, 57 S. E. 489. And o, a bill is not multifarious though rought to recover from several de-endants different portions of the es-ate of the debtor, if the alleged illegal ransfers were the result of a common urpose on the part of the defendants o dismember the estate. Van Kleeck . Miller (D. C. 1879) 19 N. B. R. 484, Fed. Cas. No. 16,860.

II. JURISDICTION

21. Statutory provisions.—This sec-ion of the statute is intended to define and limit the jurisdiction of the courts of bankruptcy, and it operates as an ex-ception to, or limitation upon, the more extended expressions of § 9586, ante, so that jurisdiction of civil actions at law and plenary suits in equity, to de-termine title to and reduce to posses-sion assets of the bankrupt cannot be claimed under § 9586, if not within the terms of this section. Bardes v. First Nat. Bank (1900) 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

The provision of the amendatory cts of 1903 and 1910, giving courts f bankruptcy and state courts concur-ent jurisdiction of suits by trustees to et aside fraudulent conveyances or ecover preferences, is not unconstitu-ional as imposing on state courts ju-isdiction over causes of action which rise solely under the constitution and aws of the United States. French v. . P. Smith & Sons Co. (1900) 81 Minn. 341, 84 N. W. 44.

The final clause of this section, that the United States circuit courts shall ave concurrent jurisdiction with the courts of bankruptcy of the offenses enumerated in this act," has no applica-bility to civil actions, the "offenses enumerated" meaning the crimes else-where described in the act. Goodier v. Barnes (C. C. 1899) 94 Fed. 798, 2 Am. Bankr. Rep. 328.

22. Jurisdiction of courts of bank-ruptcy.—The mere fact that the plain-tiff in a suit is a trustee in bankruptcy is not sufficient to give jurisdiction to a federal court. McEldowney v. Card (C. C. 1911) 193 Fed. 475, 27 Am. Bankr. Rep. 937. Such court has no jurisdiction of a formal action at law or a plenary suit in equity between a trustee in bankruptcy and an adverse claimant, unless the action might have been maintained in that court by the bankrupt himself, if bankruptcy pro-ceedings had not intervened. Brumby v. Jones (1905) 141 Fed. 318, 72 C. C. A. 466, 15 Am. Bankr. Rep. 578; Plaut v. Gorham Mfg. Co. (D. C. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42; Real Estate Trust Co. v. Thompson (D. C. 1902) 112 Fed. 945, 7 Am. Bankr. Rep. 520. Compare In re Hammond (D. C. 1899) 98 Fed. 845.

A proceeding by the trustee of a bankrupt corporation to have an as-sessment ordered on unpaid stock is not a "suit" within the meaning of the statute, but is an administrative pro-ceeding within the jurisdiction of the court of bankruptcy, since it does not require notice to nor the presence of the stockholders, whose personal rights are not involved, but remain to be de-termined in subsequent suits to collect the assessment if made. In re New-foundland Syndicate (D. C. 1912) 196 Fed. 443, 28 Am. Bankr. Rep. 119. See, also, In re Crystal Spring Bottling Co. (D. C. 1899) 96 Fed. 945, 3 Am. Bankr. Rep. 194. So the court has jurisdic-tion of a controversy between persons, each claiming the right to a conveyance of land as a purchaser from the trus-tee in bankruptcy, since, while the title remains in the trustee, its jurisdiction with respect to such lands is exclusive. In re Henderson (D. C. 1905) 142 Fed. 568, 15 Am. Bankr. Rep. 760. This decision was reversed (Henrie v. Hen-derson [1906] 145 Fed. 316, 76 C. C. A. 196, 16 Am. Bankr. Rep. 617), but on the ground that the sale to one of the contending parties had been con-firmed and the price paid, though no deed made, before any controversy arose. The court of bankruptcy has ju-risdiction of proceedings to recover property in the possession of a receiver appointed by a state court. In re He-cox (C. C. A. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314.

The court of bankruptcy has juris-diction of an application for the rejec-tion of a claim, and, in addition thereto, to require the creditor to repay to the trustee the amount of a dividend pre-viously paid on the claim. Pirie v. Chi-cago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. And of a proceeding to re-examine and reduce a payment made by an intend-

ing bankrupt to an attorney for services to be rendered in the bankruptcy proceedings. In re Wood (1908) 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046.

The bankruptcy court, in summary proceedings to recover property in the hands of third persons, has jurisdiction over the latter's protest to determine only whether the adverse claim is colorable, and may not pass on the weight of the evidence and determine the merits of the claim. In re Yorkville Coal Co. (C. C. A. 1914) 211 Fed. 619.

In a summary proceeding by a trustee to require a third person to turn over money and property alleged to belong to the bankrupt estate, the court of bankruptcy has jurisdiction to determine the question whether respondent has such money or property; a denial of possession not being the assertion of an adverse claim. In re Kramer (D. C. 1914) 218 Fed. 138. Where, on the bankruptcy of a corporation, it owned certain whisky subject to the rights of a pledgee of warehouse receipts covering the same the bankruptcy court had jurisdiction to determine the rights of the bankrupt and the pledgee and the claims of stockholders in the corporation, nor was such jurisdiction affected by the sale of the whisky and substitution of the proceeds. In re Miller Pure Rye Distilling Co. of Pennsylvania (1914) 214 Fed. 189, 130 C. C. A. 537.

But the provision of the statute which allows the court of bankruptcy to take jurisdiction of controversies with the consent of the proposed defendant relates only to plenary actions, and does not enlarge such portion of the court's jurisdiction as may be exercised summarily, even with the consent of the respondent. In re Teschmacher & Mrazay (D. C. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547. Since this portion of the statute only speaks of suits "by" the trustee, it places no restriction upon the jurisdiction of the court of bankruptcy as to suits "against" the trustee or the estate; so that, when its jurisdiction is voluntarily invoked by an adverse claimant as plaintiff, it may take cognizance of the action without regard to the citizenship of the parties or the amount in controversy. In re McCallum (D. C. 1902) 113 Fed. 393, 7 Am. Bankr. Rep. 596; In re Whitener (1900) 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198; Swann v. Sanborn (C. C. 1878) Fed. Cas. No. 13,-675. The Supreme Court of the District of Columbia, sitting as a court of equity, has jurisdiction to entertain a suit for the establishment of an equitable lien against the estate of a bankrupt. Crosby v. Ridout (1906) 27 App. D. C. 481. But nothing in the bankruptcy act operates to abolish the distinction between legal and equitable remedies, so far as regards suits or controversies arising out of, but not constituting a part of, the bankrup proceeding. Hence a suit in equity a trustee is not maintainable in district court, though otherwise wit its jurisdiction, where a plain, a quate, and complete remedy might had at law. Warmath v. O'Dar (1908) 159 Fed. 87, 86 C. C. A. 277, Am. Bankr. Rep. 101. See Grant National Bank of Auburn (D. C. 191 197 Fed. 581, 28 Am. Bankr. Rep. 7

23. —— Claims on property in p session of trustee.—If any particu item or parcel of property has co into the custody of the court of ba ruptcy, by actual possession vesting one of its officers, such as a trustee receiver, and is claimed as a part of estate in bankruptcy, that court full jurisdiction to hear and determi all controversies involving the ass tion of a title to such property, or right or interest in it, or a lien up it, in a summary manner if that fo of proceeding is otherwise justified, else in a plenary action where all nec sary parties are duly served a brought into court. Whitney v. We man (1905) 198 U. S. 539, 25 Sup. 778, 49 L. Ed. 1157, 14 Am. Ban Rep. 45; Clay v. Waters (1910) 1 Fed. 385, 101 C. C. A. 645, 24 A Bankr. Rep. 293; Bray v. United Stat Fidelity & Guaranty Co. (1909) 1 Fed. 689, 96 C. C. A. 9, 22 Am. Ban Rep. 363; Thomas v. Woods (190 173 Fed. 585, 97 C. C. A. 535, 23 A Bankr. Rep. 132; Treat v. Wood (C. C. 1905) 138 Fed. 934, 14 A Bankr. Rep. 736; J. B. McFarlan Ca riage Co. v. Solanas (1901) 106 F 145, 45 C. C. A. 253, 5 Am. Ban Rep. 442; In re Kellogg (D. C. 190 113 Fed. 120, 7 Am. Bankr. Rep. 62 In re Rodgers (1903) 125 Fed. 16 60 C. C. A. 567, 11 Am. Bankr. Re 79; In re McCallum (D. C. 1902) 1 Fed. 393, 7 Am. Bankr. Rep. 596; D vis v. Coe (1899) 19 Ohio Cir. Ct. 639; In re Sabin (D. C. 1878) 18 N. R. 151, Fed. Cas. No. 12,195.

Property having been found in t possession of the bankrupt and havi passed into the possession of his tru tee, the court of bankruptcy has juri diction to determine the claim of third person, who sold the property the bankrupt and asserts the right rescind the sale for fraud. In re Me tens (D. C. 1904) 131 Fed. 507, 12 A Bankr. Rep. 698. And so, bailors consignors, who permit their goods the hands of the bankrupt to pass in the custody of the receiver or truste cannot occupy the position of adver claimants in determining the jurisdi tion of the court. In re Leeds Wool Mills (D. C. 1904) 129 Fed. 922, Am. Bankr. Rep. 136; In re McCallu (D. C. 1902) 113 Fed. 393, 7 A Bankr. Rep. 596. And a controver between a trustee in bankruptcy a one asserting an adverse title to pro erty which is in the custody of t

t is a "proceeding in bankruptcy" hich the court has jurisdiction, and "controversy at law or in equity" as can only be tried there with consent of the proposed defendant. e Rochford (1903) 124 Fed. 182, . C. A. 388, 10 Am. Bankr. Rep. In re Leeds Woolen Mills (D. C.) 129 Fed. 922, 12 Am. Bankr. 136. See Havens & Geddes Co. v. ek (1903) 120 Fed. 244, 57 C. C. A. Am. Bankr. Rep. 569. A court of ruptcy has jurisdiction to deter- a controversy as to the ownership roperty between the trustees of different estates, both of which being administered by such court. e Rosenberg (D. C. 1902) 116 Fed. 8 Am. Bankr. Rep. 624.

e property being in the possession n officer of the court, the court of ruptcy has jurisdiction of a pro- ing in equity to establish the lien mortgage or other incumbrance on property. Cleminshaw v. Interna- l Shirt & Collar Co. (D. C. 1908) Fed. 797, 21 Am. Bankr. Rep. 616. o impeach the validity of an exist- mortgage covering the property. e Kellogg (1903) 121 Fed. 333, 57 . A. 547, 10 Am. Bankr. Rep. 7; e Waterloo Organ Co. (D. C. 1902) Fed. 904, 9 Am. Bankr. Rep. 427. o set aside the mortgage as fraud- or preferential or as having been within four months previous to ankruptcy. In re McMahon (1906) Fed. 684, 77 C. C. A. 668, 17 Am. r. Rep. 530; Carter v. Hobbs (D. 899) 92 Fed. 594, 1 Am. Bankr. 215. Or to recover property un- ully sold on foreclosure of a chat- nortgage after an adjudication in ruptcy and before the appointment trustee. In re Brooks (D. C.) 91 Fed. 508, 1 Am. Bankr. Rep. But not of a suit to foreclose a gage. In re San Gabriel Sanatori- Co. (1901) 111 Fed. 892, 50 C. C. 6, 7 Am. Bankr. Rep. 206.

here a bankrupt's trustee had pos- iop of real property of the bank- , located in another state, the bank- cy court in which the proceedings pending had jurisdiction, by any eedings which would constitute due ess of law, to determine whether a gage, executed to secure a pre-ex- g debt, was a voidable preference. raith v. Robson-Hilliard Grocery (C. C. A. 1914) 216 Fed. 842. But court has not jurisdiction of a pro- ing to impeach a mortgage as dulent where the property affected the possession of the creditor, and of the trustee. Bardes v. Haward- Nat. Bank (1900) 178 U. S. 524, 20 Ct. 1000, 44 L. Ed. 1175.

order thus to confer jurisdiction, e must be actual possession on the of the receiver or trustee, not a e claim to possession. But it may constructive or symbolic. Thus, re the trustee in bankruptcy locks up the bankrupt's store and keeps the key, this brings the goods in the store into the custody and jurisdiction of the court of bankruptcy. Wood v. Cummings (1908) 197 Mass. 80, 83 N. E. 318. And jurisdiction, having thus vested in virtue of possession of the res, cannot be divested or impaired by the unauthorized surrender of possession of the property by the officers of the court or by a seizure thereof by an adverse claimant. In re Schermerhorn (1906) 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507; Plaut v. Gorham Mfg. Co. (D. C. 1908) 159 Fed. 754, 20 Am. Bankr. Rep. 269.

In an action against defendant trustee in bankruptcy to restrain him from cutting timber, the petition held not to allege constructive possession of such timber, either in the bankrupt or the trustee so as to give the bankruptcy court jurisdiction to determine conflicting claims to such timber. Bennette v. Lewis (Tex. Civ. App. 1915) 176 S. W. 660.

24. —— Independent suits against third persons.—A district court of the United States, in its capacity as a court of bankruptcy, has no jurisdiction of an independent suit brought by a trustee in bankruptcy against a stranger (that is, one who has not been in any way made a party to the bankruptcy proceedings) to collect a debt due to the bankrupt or to recover money or property claimed as assets of his estate, unless by consent of the proposed defendant, such jurisdiction being expressly denied by the twenty-third section of the bankruptcy act. Bardes v. First Nat. Bank (1900) 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163; Wall v. Cox (1901) 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, 5 Am. Bankr. Rep. 727; Jaquith v. Rowley (1903) 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, 9 Am. Bankr. Rep. 525; In re Horgan (C. C. A. 1908) 164 Fed. 415, 21 Am. Bankr. Rep. 31; In re Bailey (D. C. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470; Hull v. Burr (1907) 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; Hatch v. Curtin (C. C. 1906) 146 Fed. 200, 16 Am. Bankr. Rep. 629; In re Flynn & Co. (D. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318; In re Hartman (D. C. 1903) 121 Fed. 940, 10 Am. Bankr. Rep. 387; In re Rochford (1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; J. B. McFarlan Carriage Co. v. Solanas (C. C. A. 1901) 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442; In re Tollett (D. C. 1900) 105 Fed. 425, 5 Am. Bankr. Rep. 305; In re Silberhorn (D. C. 1900) 105 Fed. 899, 5 Am. Bankr. Rep. 568; Chattanooga Nat. Bank v. Rome Iron Co. (C. C. 1899) 99 Fed. 82, 3 Am. Bankr. Rep. 582; Woods v. Forsyth (C. C. 1868) Fed. Cas. No. 17,992; Tate v. Brinser (D. C. 1915) 226 Fed. 878; Chicago Title & Trust

Co. v. National Storage Co. (1913) 260 Ill. 485, 103 N. E. 227. This rule does not apply as to any property which has come into the hands of the trustee, the court of bankruptcy having jurisdiction to determine adverse claims to it or liens asserted upon it. Chattanooga Nat. Bank v. Rome Iron Co. (C. C. 1899) 99 Fed. 82, 3 Am. Bankr. Rep. 582.

Since the 1903 and 1910 amendments to the bankruptcy act, the court has jurisdiction of a suit to set aside a fraudulent transfer or recover a preference, but not where the property is in the defendant's possession under a conveyance not preferential nor made within four months, unless he consents to the jurisdiction. Wood v. A. Wilbert's Sons Shingle & Lumber Co. (1912) 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. 264. Even under the amendments of 1903 and 1910, the court of bankruptcy has no jurisdiction of an action by a trustee in bankruptcy to recover property from a third person who sets up an adverse claim to it in his own right, where the trustee does not contend that the property was ever "transferred" to the defendant by the bankrupt, but only that the defendant holds it under a secret trust for the bankrupt. Newcomb v. Biwer (D. C. 1912) 199 Fed. 529, 29 Am. Bankr. Rep. 15.

The court of bankruptcy has jurisdiction of a suit between the trustee and a third person where the bankrupt and the defendant are citizens of different states and the amount in controversy is sufficient to give jurisdiction, though, in trying such a suit, it does not sit as a court of bankruptcy. Scott v. George's Creek Coal & Iron Co. (D. C. 1913) 202 Fed. 251; In re Ballou (D. C. 1914) 215 Fed. 810; In re MacDougall (D. C. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; Sims v. Union Assur. Soc. (C. C. 1903) 129 Fed. 804; In re Nugent (1901) 105 Fed. 581, 44 C. C. A. 620, 5 Am. Bankr. Rep. 176. Diversity of citizenship between the defendant and the trustee in bankruptcy is not necessary; the test is whether the citizenship of the bankrupt and of the defendant is such that the former might have sued in a federal court if bankruptcy had not intervened. Bush v. Elliott (1906) 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114, 15 Am. Bankr. Rep. 656. The district court, in a suit by a trustee in bankruptcy against nonresidents and residents, held without jurisdiction of residents merely holding claims against the bankrupt and having nothing belonging to him, where many necessary parties are nonresidents and cannot be brought in. In re Smith Const. Co. (D. C. 1915) 224 Fed. 228.

A suit by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, is cogniz in the court of bankruptcy, becs "arising under the laws of the Un States." Reed v. German-Ameri Nat. Bank (C. C. 1907) 155 Fed. 19 Am. Bankr. Rep. 140.

The bankruptcy court has no ju diction of an action of replevin, brou by a receiver or trustee in bankrup to recover the possession of chat alleged to belong to the bankr but held adversely by the defe ant under a claim of title. Mitchel McClure (1900) 178 U. S. 539, 20 S Ct. 1000, 44 L. Ed. 1182; Waite Gottstein (D. C. 1915) 224 Fed. Nor of a suit by the trustee of a ba rupt corporation to compel a sto holder to pay corporate debts beca of his alleged participation in a frau lent overvaluation of the corpor assets in payment for stock. In Haley (1908) 158 Fed. 74, 85 C. C. 404. Nor of an action to enforc mechanic's lien existing in favor of bankrupt, a contractor, at the date his adjudication. In re Grissler (19 136 Fed. 754, 69 C. C. A. 406, 13 Bankr. Rep. 508. Proceeding to c pel wife, claiming title to insura policy, to turn it over to trustee, to be dismissed, where she never c sented to exercise of summary ju diction over her. In re Flanigan C. 1915) 228 Fed. 339.

While the trustee may petition court to examine summarily into reasonableness of a fee paid by a p spective bankrupt to his attorney, if, instead of taking this course, files a petition to compel the attor to account for moneys claimed to h been paid to him in contemplation bankruptcy, the case falls within jurisdictional clause of the statute, cannot be maintained in the bankrup court except with the consent of defendant. In re Raphael (C. C. 1911) 192 Fed. 874.

25. —— **Preferences and fraudul conveyances.**—Prior to the 1903 ame ment to the bankruptcy act, the cou of bankruptcy as such had no ju diction of actions brought to vac fraudulent transfers or to recover pr erences, unless with the consent of proposed defendant. Bardes v. Fi Nat. Bank (1900) 178 U. S. 524, Sup. Ct. 1000, 44 L. Ed. 1175, 4 Bankr. Rep. 163; Mitchell v. M Clure (1900) 178 U. S. 539, 20 S Ct. 1000, 44 L. Ed. 1182, 4 Am. Ban Rep. 177; In re San Gabriel Sanato um Co. (1901) 111 Fed. 892, 50 C. A. 56, 7 Am. Bankr. Rep. 206; In Michie (D. C. 1902) 116 Fed. 749 Am. Bankr. Rep. 734; Perkins v. M Cauley (D. C. 1899) 98 Fed. 286 Am. Bankr. Rep. 445; Hicks v. Kn (D. C. 1899) 94 Fed. 625, 2 Am. Ban Rep. 153; Camp v. Zellars (1899) Fed. 799, 36 C. C. A. 501; Goodier Barnes (C. C. 1899) 94 Fed. 798, 2 A

kr. Rep. 328; Burnett v. Morris cantile Co. (D. C. 1899) 91 Fed. , 1 Am. Bankr. Rep. 229; Jackman Eau Claire Nat. Bank (1905) 125 . 465, 104 N. W. 98, 115 Am. St. . 955; Nye v. Hart (1901) 22 Ohio Ct. R. 427; Heath v. Shaffer (D. 1899) 93 Fed. 647, 2 Am. Bankr. . 98. But since the act of 1903, sdiction of such actions is vested the courts of bankruptcy, without ard to diverse citizenship of the ties. Shutts v. First Nat. Bank C. 1899) 98 Fed. 705, 3 Am. Bankr. . 492; Pepperdine v. Headley (D. 1900) 98 Fed. 863, 3 Am. Bankr. . 455; Carter v. Hobbs (D. C. 9) 92 Fed. 594, 1 Am. Bankr. Rep. ; In re Hammond (D. C. 1899) Fed. 845; In re Woodbury (D. C. 0) 98 Fed. 833, 3 Am. Bankr. Rep. ; Norcross v. Nathan (D. C. 1900) Fed. 414, 3 Am. Bankr. Rep. 613; man v. Crosby (D. C. 1900) 99 . 542, 3 Am. Bankr. Rep. 662; re Kerski, 1 Nat. Bankr. News, 328; ll v. Cox (1900) 101 Fed. 403, 41 C. A. 408, 4 Am. Bankr. Rep. 659; l v. Kincell (1900) 102 Fed. 301, 42 C. A. 360; Louisville Trust Co. v. x (D. C. 1899) 98 Fed. 456, 3 Am. kr. Rep. 450.

he effect of the amendment is to fer jurisdiction on the courts of kruptcy of plenary proceedings at or in equity brought by a trustee bankruptcy to avoid preferences n contrary to the act, or to recover perty transferred in violation of the which jurisdiction is concurrent that of the proper state courts, may be exercised without the con- t of the proposed defendant. Mc- ain v. Hardesty (1909) 169 Fed. 31, C. C. A. 399, 22 Am. Bankr. Rep. ; Wallace v. Jefferson County Sav. k (C. C. A. 1907) 157 Fed. 838; v. Hakes (1905) 142 Fed. 364, C. C. A. 464, 15 Am. Bankr. Rep. ; Frost v. Latham & Co. (C. C. 0) 181 Fed. 866, 25 Am. Bankr. . 313; Lynch v. Bronson (D. C. 8) 160 Fed. 139, 20 Am. Bankr. . 409; Bowman v. Alpha Farms C. 1907) 153 Fed. 380, 18 Am. kr. Rep. 700; Horskins v. Sander- (D. C. 1904) 132 Fed. 415, 13 Am. kr. Rep. 101; McNulty v. Feingold C. 1904) 129 Fed. 1001, 12 Am. kr. Rep. 338; Kraver v. Abrahams C. 1913) 203 Fed. 782, 29 Am. kr. Rep. 365; Breit v. Moore (1915) Fed. 97, 135 C. C. A. 573. This arged jurisdiction was not confined rights of action arising subsequent the amendatory statute, but was ilable to enforce rights of action n existing. Pond v. New York Nat. change Bank (D. C. 1903) 124 Fed. , 10 Am. Bankr. Rep. 343. The ending act did not apply to bank- tcy cases then pending. In re Hart- n (D. C. 1903) 121 Fed. 940, 10 Am. nkr. Rep. 343.

An action by a trustee in bankruptcy to recover damages from defendants, upon allegations that they conspired with the bankrupt, knowing him to be insolvent, and pursuant to such conspiracy he purchased goods on credit, which he turned over to defendants for less than their value, is an action merely to recover damages for the conspiracy, and not to set aside a fraudulent transfer of property, and therefore is not brought within the jurisdiction of the court of bankruptcy by the amendatory statute. Lynch v. Bronson (D. C. 1910) 177 Fed. 605, 24 Am. Bankr. Rep. 513.

A suit by a trustee in bankruptcy against directors of the bankrupt corporation cannot be regarded as one to recover property fraudulently transferred by the bankrupt, and hence justiciable in a court of bankruptcy, where the import of the allegations of the bill is not that the corporation has done anything, but that certain of its officers by false pretenses have withdrawn its funds. Park v. Cameron (1915) 237 U. S. 616, 35 Sup. Ct. 719, 59 L. Ed. 1147.

United States district court held to have jurisdiction of suit to recover payments by insolvent corporation preferential under Stock Corporation Law N. Y. § 66, though not constituting preferences under section 9644, post. Grandison v. Robertson (D. C. 1915) 220 Fed. 985.

Prior to the amendment of 1910, the court of bankruptcy could not take jurisdiction of an action by the trustee, founded on the provision of section 9654, post, that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from any person to whom it was transferred, unless he was a bona fide holder for value prior to the adjudication," unless the consent of the proposed defendant was given. Wood v. A. Wilbert's Sons Shingle & Lumber Co. (1912) 226 U. S. 384, 33 Sup. Ct. 125, 29 Am. Bankr. Rep. 220; Harris v. First Nat. Bank (1910) 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, 23 Am. Bankr. Rep. 632; Hull v. Burr (1907) 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; Sheppard v. Lincoln (D. C. 1910) 184 Fed. 182, 25 Am. Bankr. Rep. 804; In re Rathman (1910) 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246; Palmer v. Roginsky (D. C. 1910) 175 Fed. 883, 23 Am. Bankr. Rep. 358; Gregory v. Atkinson (D. C. 1904) 127 Fed. 183, 11 Am. Bankr. Rep. 495; Skewis v. Barthell (D. C. 1907) 152 Fed. 534, 18 Am. Bankr. Rep. 429. Compare Hurley v. Devlin (D. C. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 793. But since the amendment of 1910, an action under section 70e may be maintained by a trustee in bankruptcy in a court

of bankruptcy, without the consent of the proposed defendant. Newcomb v. Biwer (D. C. 1912) 199 Fed. 529, 29 Am. Bankr. Rep. 15; Parker v. Sherman (D. C. 1912) 195 Fed. 648, 28 Am. Bankr. Rep. 379.

26. —— **Suits which bankrupt could not have maintained.**—The provision of this section that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," does not give to the court of bankruptcy jurisdiction of actions by the trustee which the bankrupt himself could not have brought or prosecuted in any court, such as suits upon causes of action created by the bankruptcy proceedings, or vesting originally in the trustee as trustee, in cases where it would not otherwise have jurisdiction of such actions. Bardes v. First Nat. Bank (1900) 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1182. This decision in effect overruled numerous previous decisions of the inferior federal courts to the contrary. See In re Baudouine (1900) 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651; Skillin v. Magnus (D. C. 1907) 162 Fed. 689, 19 Am. Bankr. Rep. 397; Pepperdine v. Headley (D. C. 1900) 98 Fed. 863, 3 Am. Bankr. Rep. 455; Murray v. Beal (D. C. 1899) 97 Fed. 567, 3 Am. Bankr. Rep. 284; Carter v. Hobbs (D. C. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; In re Gutwillig (D. C. 1898) 90 Fed. 481, 1 Am. Bankr. Rep. 78; Jones v. Smith (C. C. 1889) 38 Fed. 380; Main v. Glen (D. C. 1875) Fed. Cas. No. 8,973.

27. —— **Consent or waiver of objections.**—The consent of the defendant to be sued by the trustee in the court of bankruptcy need not expressly appear of record, but may be sufficiently shown by conduct necessarily implying such consent. McEldowney v. Card (C. C. 1911) 193 Fed. 475, 27 Am. Bankr. Rep. 937.

If an adverse claimant of property, or a creditor alleged to have received a preference or a voidable lien, voluntarily appears in the court of bankruptcy and himself invokes its jurisdiction in his own behalf, that court may proceed to determine the controversy. In re D. H. McBride & Co. (D. C. 1904) 132 Fed. 285, 12 Am. Bankr. Rep. 81; In re Riker (1901) 109 Fed. 63, 48 C. C. A. 220, 5 Am. Bankr. Rep. 720; Philips v. Turner (1902) 114 Fed. 726, 52 C. C. A. 358, 8 Am. Bankr. Rep. 171; Fisher v. Cushman (1900) 103 Fed. 860, 43 C. C. A. 381, 4 Am. Bankr. Rep. 646; In re Hadden Rodee Co. (D. C. 1904) 135 Fed. 886, 13 Am. Bankr. Rep. 604. This rule applies where such a claimant applies to the court of bankruptcy for an order or decree recognizing and establishing his claims or giving him any affirmative relief whatever. In re Mertens (D. C. 1904) 131 Fed. 507, Am. Bankr. Rep. 698; In re Rik (1901) 109 Fed. 63, 48 C. C. A. 2 5 Am. Bankr. Rep. 720; Id. (D. 1901) 107 Fed. 96, 5 Am. Bankr. R 720. But see In re Keystone Pre (D. C. 1913) 203 Fed. 710, 29 A Bankr. Rep. 715. Or where he plea a set-off, on which he asks judgme McEldowney v. Card (C. C. 1911) 1 Fed. 475, 27 Am. Bankr. Rep. 937. where he shows that the money clai ed to be recovered from him by t trustee is also claimed by a third par and that he occupies the position of mere stakeholder and offers to pay t money into court. In re Blake (C. A. 1906) 150 Fed. 279, 17 Am. Bank Rep. 668. But merely proving claim against a bankrupt does not co stitute a consent to the jurisdiction a federal court in a suit subsequent brought by the trustee against t claimant. Tate v. Brinser (D. C. 191 226 Fed. 878.

If the defendant in an action by t trustee enters a general appearan and pleads to the merits, and procee to a hearing before the referee court, without raising any objection the jurisdiction of the court, he mu be taken to have "consented" that t court might try the case, and cann object to the jurisdiction after a d cision adverse to him. Detroit Tru Co. v. Pontiac Sav. Bank (C. C. 1912) 196 Fed. 29, 27 Am. Bankr. Re 821; McEldowney v. Card (C. C. 191 193 Fed. 475, 27 Am. Bankr. Rep. 93 In re Elletson Co. (D. C. 1909) 1 Fed. 859, 23 Am. Bankr. Rep. 53 Mitchell v. Mitchell (D. C. 1906) 1 Fed. 280, 17 Am. Bankr. Rep. 38 In re Blake (C. C. A. 1906) 150 Fe 279, 17 Am. Bankr. Rep. 668; Rytte berg v. Schefer (D. C. 1904) 131 Fe 313, 11 Am. Bankr. Rep. 652; In Durham (D. C. 1902) 114 Fed. 75 8 Am. Bankr. Rep. 115; Sinsheimer Simonson (D. C. 1901) 106 Fed. 87 In re Leeds Woolen Mills (D. C. 190 129 Fed. 922, 12 Am. Bankr. Re 136; In re Steuer (D. C. 1900) 1 Fed. 976, 5 Am. Bankr. Rep. 209; re Emrich (D. C. 1900) 101 Fed. 23 4 Am. Bankr. Rep. 89; In re Connol (D. C. 1900) 100 Fed. 620, 3 A Bankr. Rep. 842; Cohen v. America Surety Co. (1908) 192 N. Y. 227, 84 E. 947; In re Raphael (1911) 192 Fe 874, 113 C. C. A. 198. But a me entry of a general appearance is n a waiver of objections to the jurisdi tion, when the petition of the trust does not state a cause of action, a objection to the jurisdiction is promp ly taken upon the filing of an amen ed petition. In re Hemby-Hutchins Pub. Co. (D. C. 1900) 105 Fed. 909, Am. Bankr. Rep. 569.

A respondent who files a paper which he sets up that the court without jurisdiction of the action, a who repeats and urges the same o jection in a proceeding to have t

ge of the court of bankruptcy re-
v a decision of the referee adverse
im, cannot be said to have consent-
to the jurisdiction, although he also
epts to the petition as not stating a
se of action and further pleads a
eral denial. In re Michie (D. C.
2) 116 Fed. 749, 8 Am. Bankr. Rep.

he consent of a defendant to be
d in the court of bankruptcy means
sent to the tribunal in which the
troversy is to be carried on, and
to the mode of procedure, which is
ulated by general principles of law,
ess other provision is made. In
Raphael (1911) 192 Fed. 874, 113
C. A. 198. And if the mode of pro-
ure adopted is unlawful, the appear-
e of the defendant and his contest-
the proceedings will not confer ju-
diction. Sinsheimer v. Simonson
01) 107 Fed. 898, 47 C. C. A. 51,
m. Bankr. Rep. 537.

he consent of the defendant, pro-
ed for in this part of the bank-
tcy act, governing the jurisdiction
suits by a trustee in bankruptcy,
not intended to enlarge the juris-
ion of the federal circuit courts so
to confer a jurisdiction which they
ld not have because of diverse citi-
ship of the parties or because of a
eral question being involved. Lovell
Isidore Newman & Son (1913) 227
S. 412, 33 Sup. Ct. 375, 57 L. Ed.

8. Jurisdiction of other federal rts.—A court of bankruptcy may ex-
se ancillary jurisdiction to enable
rustee appointed in another jurisdic-
to reduce to possession property
the bankrupt within its district. In
Sage (D. C. 1915) 224 Fed. 525.
Babbitt v. Dutcher (1910) 216 U.
102, 30 Sup. Ct. 372, 54 L. Ed. 402,
Ann. Cas. 969, 23 Am. Bankr. Rep.
; In re Elkus (1910) 216 U. S. 115,
Sup. Ct. 377, 54 L. Ed. 407; The
rt (D. C. 1912) 199 Fed. 542; In
Lipman (D. C. 1912) 201 Fed. 169,
Am. Bankr. Rep. 139.

bankruptcy court in Louisiana has
illary jurisdiction of a suit by a
krupt's trustee to subject property
Louisiana to distribution in bank-
tcy in Mississippi under a bill al-
ing that property of less value than
000 had been omitted from the bank-
t's schedules and conveyed to de-
dant after adjudication. Hartman
Ackoury (D. C. 1914) 210 Fed. 188.
s to plenary actions, for the recov-
of property against adverse claim-
s or the like, the jurisdiction of the
rts of bankruptcy is territorially re-
icted, and such a court cannot take
isdiction of a trustee's suit for the
overy of property outside the bound-
es of its own district, but, in order
obtain the possession of such prop-
y or its avails, the trustee must in-
e the jurisdiction of the proper lo-
court, either state or federal. In re Brittania Mining Co. (D. C. 1912) 197 Fed. 459, 28 Am. Bankr. Rep. 651; Paine v. Caldwell (D. C. 1872) 6 N. B. R. 558, Fed. Cas. No. 10,674; In re Farrell (1912) 201 Fed. 338, 119 C. C. A. 576; In re Geller (D. C. 1914) 216 Fed. 558.

A trustee in bankruptcy desiring to sue for the recovery of a preference or to avoid a fraudulent conveyance, may go into the federal district court in the district where the proposed defendant resides, and there prosecute his action. Parker v. Sherman (D. C. 1912) 195 Fed. 648, 28 Am. Bankr. Rep. 379; Teague v. Anderson Hardware Co. (D. C. 1908) 161 Fed. 765, 20 Am. Bankr. Rep. 424; Lawrence v. Lowrie (D. C. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012, 26 Am. Bankr. Rep. 329; Sherman v. Bingham (C. C. 1872) 7 N. B. R. 490, Fed. Cas. No. 12,762. He may also sue in another district to collect assets of the estate. In re Farrell (C. C. A. 1912) 201 Fed. 338. In re Rathfon Bros. (D. C. 1912) 200 Fed. 108, 29 Am. Bankr. Rep. 22; Shainwald v. Lewis (D. C. 1880) 5 Fed. 510; Goodall v. Tuttle (D. C. 1872) 7 N. B. R. 193, Fed. Cas. No. 5,533; In re Murphy, 2 Nat. Bankr. News, 393. Or to recover a sum of money due to the bankrupt under a written contract. Babbitt v. Burgess (C. C. 1873) Fed. Cas. No. 693. Or to redeem mortgaged property of the bankrupt. Barnard v. Hartford, P. & F. R. Co. (C. C. 1878) Fed. Cas. No. 1,003.

The jurisdiction thus to be exercised by the court in another district in a plenary suit is not a jurisdiction in bankruptcy, but its ordinary jurisdiction, in law or equity as the case may be, and therefore the trustee must pursue the same remedies and is subject to the same rules as those would be whose rights he represents, that is, either the bankrupt or the creditors according to the nature of the suit. Markson v. Heaney (C. C. 1871) 4 N. B. R. 510, Fed. Cas. No. 9,098; In re Williams (D. C. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; Hull v. Burr (1907) 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541. And see United States Fidelity & Guaranty Co. v. Bray (1912) 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, 28 Am. Bankr. Rep. 207; Scott v. George's Creek Coal & Iron Co. (D. C. 1913) 202 Fed. 251.

The trustee cannot maintain a plenary suit in a court of bankruptcy of another district to recover alleged excessive payments or transfers to counsel made by the bankrupt in contemplation of bankruptcy and for services to be rendered therein, when the court in which the proceeding is pending has made no order for the re-examination and reduction of such payments or transfers. In re Wood (1908) 210 U.

S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1.

29. Jurisdiction of state courts.—Under former bankruptcy statutes, many state courts held that they had no jurisdiction of actions brought by trustees in bankruptcy to recover property alleged to have been transferred by the bankrupt in violation of, or in fraud of, the provisions of the bankruptcy act, as in cases of preferences and fraudulent conveyances, but that the jurisdiction of the federal courts in such cases was exclusive. Olcott v. McLean (N. Y. 1877) 10 Hun, 277, 16 N. B. R. 79; Brigham v. Claflin (1872) 31 Wis. 607, 11 Am. Rep. 623; Bromley v. Goodrich (1876) 40 Wis. 131, 22 Am. Rep. 685, 15 N. B. R. 289; Gilbert v. Priest (N. Y. 1873) 65 Barb. 444; Shaw v. Meldrum (N. Y. 1862) 14 Abb. Prac. (N. S.) 165, note; Voorhies v. Frisbie (1872) 25 Mich. 476, 12 Am. Rep. 291, 8 N. B. R. 152; Redd v. Wallace (1906) 145 Ala. 209, 40 South. 407. Compare Otis v. Hadley (1873) 112 Mass. 100; Dambmann v. White (1874) 48 Cal. 439.

In view of the provision of section 9654, post, giving concurrent jurisdiction in certain cases to the state and federal courts, it is now held that any state court of competent jurisdiction may enforce actionable rights arising under the bankruptcy law. Maxwell v. Davis Trust Co. (1911) 69 W. Va. 276, 71 S. E. 270; Nisbet v. Sigel-Campion Live Stock Commission Co. (1912) 21 Colo. App. 494, 123 Pac. 110; Robinson v. White (D. C. 1899) 97 Fed. 33. But any suit brought in a state court by a trustee in bankruptcy, except as specially authorized by the bankruptcy law, is without the jurisdiction of the court. Glover v. Love (1880) 68 Ala. 219. Such a court, in passing upon the claims of a trustee in bankruptcy, is not proceeding under the bankruptcy law, but simply recognizes that statute as the source of the trustee's title, in the same manner as it would if he derived his title from a deed or contract. Cook v. Whipple (1873) 55 N. Y. 150, 14 Am. Rep. 202. The jurisdiction exercised by the state courts concurrently with the federal courts, in enforcing rights and duties created by the bankruptcy law, is discretionary on their part, and may at any time be renounced or incumbered with onerous conditions. In re Woodbury (D. C. 1900) 98 Fed. 833, 3 Am. Bankr. Rep. 457.

Any state court which would have jurisdiction of the subject-matter as between citizens of the state, and which acquires jurisdiction of the persons of the litigants, has jurisdiction, concurrent with that of the courts of bankruptcy, of actions by trustees in bankruptcy to set aside alleged fraudulent transfers or conveyances of property made by the bankrupts upon whose estates they are appointed to administer. Frank v. Vollkommer (1907) 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911, 1 Am. Bankr. Rep. 806; McKenna v Simpson (1889) 129 U. S. 507, 9 Sup Ct. 365, 32 L. Ed. 771; Johnston v Forsyth Mercantile Co. (D. C. 1904 127 Fed. 845, 11 Am. Bankr. Rep. 669 In re Steed (D. C. 1901) 107 Fe 682, 6 Am. Bankr. Rep. 73; Robinso v. White (D. C. 1899) 97 Fed. 33, Am. Bankr. Rep. 88; Cox v. Wall (I C. 1900) 99 Fed. 546; Norcross v Nathan (D. C. 1900) 99 Fed. 414, Am. Bankr. Rep. 613; Andrews v Mather (1902) 134 Ala. 358, 32 Soutl 738; Rison v. Powell (1873) 28 Arl 427; Hull v. Hudson (1911) 9 Del. Cl 205, 80 Atl. 674; Hobbs v. Frazie (1911) 61 Fla. 611, 55 South. 848 Isett v. Stuart (1875) 80 Ill. 404, 2 Am. Rep. 194; Lyon v. Clark (1900 124 Mich. 100, 82 N. W. 1058, 83 N W. 694; Sheldon v. Parker (1902) 6 Neb. 610, 92 N. W. 923, 95 N. W. 1015 Bindseil v. Smith (1900) 61 N. J. Ec 654, 47 Atl. 456; Jones v. Schermer horn (1900) 53 App. Div. 494, 65 N Y. Supp. 999; Bouton v. Wheeler (1907 118 App. Div. 426, 104 N. Y. Supp. 33 Small v. Muller (1901) 67 App. Div 143, 73 N. Y. Supp. 667; Breckons v Snyder (1905) 211 Pa. 176, 60 At 575; Mueller v. Bruss (1901) 112 Wis 406, 88 N. W. 229; Blick v. Nimm (1913) 121 Md. 139, 88 Atl. 116. CON TRA, Frost v. Hotchkiss, 14 N. B. R 443; McLean v. Lafayette Bank (C C. 1843) Fed. Cas. No. 8,885; Hull v Fifty-Second St. Storage House (1915 166 App. Div. 739, 152 N. Y. Supp 363; Corey v. Blackwell Lumber Co (1913) 24 Idaho, 642, 135 Pac. 742 Union Banking Co. v. Truscott Boa Mfg. Co. (Mich. 1916) 155 N. W. 717 In case the conveyance is voidable a the suit of the trustee only because i is voidable under the laws of the state the trustee must show that he repre sents creditors of that class who alon would be entitled to attack it, as, fo example, creditors having a lien on th particular property. Sparks v. Weath erly (Ala. 1912) 58 South. 280.

In a suit in the state court by a trus tee in bankruptcy to set aside voidabl conveyances by the bankrupt, it is im material as to how the fund is to b administered, or who is to get the ben efit of it, and hence the validity of al other claims cannot be litigated. A bil in a state court by a trustee to se aside a voluntary conveyance by th bankrupt need only show one existin creditor who could have avoided th conveyance, and the court will set i aside in favor of all existing creditor who file and prove their claims in th bankruptcy court. Cartwright v. Wes (Ala. 1914) 64 So. 293.

The jurisdiction of the state cour over a suit to set aside a fraudulen conveyance is not divested by the institution of bankruptcy proceeding more than four months after the commencement of the suit. Blick v. Nim-

(1913) 88 A. 116, 121 Md. 139.
re a receiver is appointed in a
by a trustee in bankruptcy to set
conveyances, the money recovered
in should not be appropriated by
rustee, but paid first to the receiv-
Hull v. Fifty-Second St. Storage
e (1915) 152 N. Y. S. 363, 166
Div. 739.

e state courts have jurisdiction
an action by a trustee in bank-
cy to recover money or property
or transferred by the bankrupt to
editor by way of a voidable prefer-
Claflin v. Houseman (1876) 93
. 130, 23 L. Ed. 833; Russell v.
n (1875) 61 Mo. 185, 15 N. B. R.
Dambmann v. White (1874) 48
439, 12 N. B. R. 438; Jordan v.
ney (1875) 40 Md. 401, 12 N. B. R.
Boudinot v. Hamann (1902) 117
, 22, 90 N. W. 497; Goodrich v.
on (1876) 119 Mass. 429, 14 N.
. 555; Detroit Trust Co. v. Old
Bank (1908) 155 Mich. 61, 118 N.
729; Drew v. Myers (1908) 81 Neb.
116 N. W. 781, 17 L. R. A. (N.
350; Bindseil v. Cashion (1900) 60
. Eq. 116, 45 Atl. 697; Vollkom-
v. Frank (1905) 107 App. Div.
95 N. Y. Supp. 324; Stern v.
er (1904) 99 App. Div. 427, 91 N.
Supp. 292; Silberstein v. Stahl
00) 32 Misc. Rep. 353, 66 N. Y.
p. 646; Exler v. American Box Co.
10) 226 Pa. 384, 75 Atl. 661, 134
St. Rep. 1067; Maxwell v. Davis
st Co. (1911) 69 W. Va. 276, 71 S.
270. But in an action of the latter
in a state court, it is not permis-
to enter into an inquiry into the
lity of all other claims against the
krupt and into the question whether
r creditors have received voidable
erences and have not been requir-
o surrender them, since this would,
ffect, transfer the administration of
bankrupt's estate from the bank-
cy court to the state courts. Eau
re Nat. Bank v. Jackman (1907)
U. S. 522, 27 Sup. Ct. 391, 51 L.
596, 17 Am. Bankr. Rep. 675.

ne state courts have jurisdiction of
ons by trustees in bankruptcy to
ect the assets of the estate, realize
choses in action, enforce contracts,
recover debts due to the bankrupt.
ter v. Gaff (1875) 91 U. S. 521, 23
Ed. 403; Burbank v. Bigelow (1875)
U. S. 179, 23 L. Ed. 542; Cox v.
l (D. C. 1900) 99 Fed. 546; Heath
Shaffer (D. C. 1899) 93 Fed. 647, 2
Bankr. Rep. 98; In re Gerdes, 2
. Bankr. News, 131; In re Mur-
, 2 Nat. Bankr. News, 393; Clark
wing (D. C. 1880) 3 Fed. 83; Farn-
v. Friedmeyer (1903) 109 Ill. App.
McIntyre v. Malone (1902) 3 Neb.
of.) 159, 91 N. W. 246; Frank v.
dams (Sup. Ct. 1900) 32 Misc.
. 512, 66 N. Y. Supp. 379; Peiper
Harmer (Pa. 1871) 8 Phila. 100;
y v. Arnot (N. D. 1915) 154 N. W.

And to hear and determine the rights or titles of third persons, not parties to the bankruptcy proceedings, claiming property adversely to the bankrupt or in hostility to the trustee. In re Russell (1900) 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; McLeod's Trustee v. McLeod (1905) 89 S. W. 199, 28 Ky. Law Rep. 284; In re Kane (D. C. 1907) 152 Fed. 587, 18 Am. Bankr. Rep. 654; Bennette v. Lewis (Tex. Civ. App. 1915) 176 S. W. 660.

A bank which had been appointed a depositary for bankruptcy funds became insolvent and passed into the hands of the state superintendent of banks. A trustee in bankruptcy claimed that deposits made by him in such bank in his official character were entitled to priority of payment out of its assets, in view of the act of Congress giving preference to debts due to the United States. But the state statute declares that dividends to be paid by the superintendent of banks, out of the assets of institutions in his charge, shall be paid to such persons and in such amounts as shall be directed by the local state court. Held, that the question raised by the trustee in bankruptcy was within the exclusive jurisdiction of the state court, and could not be determined on a motion in the court of bankruptcy for an order requiring the superintendent of banks to pay out money so deposited. In re Bologh (D. C. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

An action which merely seeks a money judgment, to recover an amount alleged to have been paid out by the bankrupt to a creditor as a preference, is not a suit in equity but an action at law. Cohen v. Small (1908) 190 N. Y. 568, 83 N. E. 1123; Merritt v. Halliday (1905) 107 App. Div. 596, 95 N. Y. Supp. 331. But on the other hand, it is not triable in a state court of inferior and limited statutory jurisdiction. Dyer v. Kratzenstein (1905) 103 App. Div. 404, 92 N. Y. Supp. 1012.

In one state, it is held that, in an action by a trustee in bankruptcy to vacate a deed executed by the bankrupt, a state court has jurisdiction of the subject-matter, notwithstanding the fact that the property is located in another state. Bowler v. First Nat. Bank (1907) 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725. But elsewhere it is held that a trustee in bankruptcy cannot maintain, in the district court of one county, a suit to set aside as fraudulent a sale of land made under a decree of the district court of another county, in a foreclosure suit against the bankrupt which was pending therein when the petition in bankruptcy was filed. W. C. Belcher Land Mortgage Co. v. Bush (Tex. Civ. App. 1902) 67 S. W. 444.

Assuming that the state court has jurisdiction of an action by the trustee, or of one in which he voluntarily ap-

pears, its judgment rendered in the case is binding and conclusive upon him and upon those whom he represents. Winchester v. Heiskell (1886) 119 U. S. 450, 7 Sup. Ct. 281, 30 L. Ed. 462; Lindstroth Wagon Co. y. Ballew (1907) 149 Fed. 960, 79 C. C. A. 470, 18 Am. Bankr. Rep. 23. And it is thereafter too late for him to allege that the federal court alone had jurisdiction of the controversy. Scott v. Kelly (1874) 22 Wall. 57, 22 L. Ed. 729. Nor will the judgment of the state court be reviewed or in any manner revised by the court of bankruptcy. Robinson v. White (D. C. 1899) 97 Fed. 33, 3 Am. Bankr. Rep. 88.

Under proper conditions, an action of trover will lie in a state court to recover the value of property unlawfully taken by the trustee as a part of the bankrupt estate but really belonging to the plaintiff. Weeks v. Fowler (1902) 71 N. H. 518, 53 Atl. 543.

A state court may have jurisdiction of a suit to quiet title to real estate, at the instance of a person in possession, against the bankrupt and his trustee. Reinhard v. Reinhard (1901) 22 Ohio Cir. Ct. R. 362. And of a suit by the solvent partner of a solvent firm against the trustee in bankruptcy of the insolvent partner for an accounting and to gain control of the administration of the firm's assets. Williams v. Lane (1910) 158 Cal. 39, 109 Pac. 873. A trustee in bankruptcy charged with the value of certain property which had come into his possession as an asset and improperly delivered to a firm of which he was a member may be enjoined by a state court at the instance of the other partners from using the partnership assets to satisfy the judgment in summary proceedings against himself. Hebert v. Crawford (1913) 33 Sup. Ct. 484, 228 U. S. 204, 57 L. Ed. 800.

A suit by a state against one of its own citizens, being a trustee in bankruptcy, cannot be maintained in a federal court, but only in a court of the state. North Carolina v. Trustees of University (C. C. 1871) 65 N. C. 714, Fed. Cas. No. 10,318.

Claims against a bankrupt's estate are not to be settled or liquidated by suit in a state court (unless so ordered by the court of bankruptcy), since this is properly a step or proceeding in the bankruptcy case. In re Heim Milk Product Co. (D. C. 1910) 183 Fed. 787, 25 Am. Bankr. Rep. 746. Nor will a state court take jurisdiction of any action which seeks to determine the title to, or gain the possession of, any property which has already passed into the actual custody of the court of bankruptcy. In re Reynolds (D. C. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758; Mishawaka Woolen Mfg. Co. v. Powell (1903) 98 Mo. App. 530, 72 S. W. 723.

A state court has jurisdiction of a garnishment proceeding by a judgment creditor of the bankrupt against a trustee in bankruptcy, who had collected note after it had been set apart the bankrupt as exempt. Barker-Bo Lumber Co. v. Whaley (Va. 1915) S. E. 160.

Where the state court has no jur diction of the subject-matter of an tion against a trustee in bankrupt the trustee cannot confer jurisdiction answering and praying for affirmati relief. Goodnough Mercantile Co. Galloway (1906) 48 Or. 239, 84 P 1049.

The judgment rendered by a st court against a trustee in bankrupt while it may bind him personally, is effective against the assets of the ba rupt in his hands for administrati and hence, if such a judgment und takes to direct the payment of a cert sum out of such assets, it is erro ous and not at all binding on the co of bankruptcy. In re Central Bank C. 1875) 12 N. B. R. 286, Fed. C No. 2,549; Skilton v. Codington (190 185 N. Y. 80, 77 N. E. 790, 113 A St. Rep. 885; In re Rogers & Stef (D. C. 1907) 156 Fed. 267, 19 A Bankr. Rep. 566.

30. Conflicting jurisdiction of st and federal courts.—In bankruptcy m ters, as between a state court and federal court, each will respect t jurisdiction of the other lawfully a quired, and neither will attempt to d turb or interfere with the possessi of property rightfully in the custody under the control of the other. In Kellogg (1903) 121 Fed. 333, 57 C. A. 547, 10 Am. Bankr. Rep. 7; Be v. Chase (1900) 99 Fed. 920, 40 C. A. 182, 3 Am. Bankr. Rep. 746; Dau ters v. Christy (1906) 223 Ill. 612, N. E. 292; National Surety Co. Medlock (1907) 2 Ga. App. 665, 58 E. 1131; Simmons v. Richards (190 28 Tex. Civ. App. 112, 66 S. W. 68 Scott v. George's Creek Coal & Ir Co. (1913) 202 Fed. 251; Mutual L Ins. Co. v. Fleischman (1912) 149 A Div. 23. 133 N. Y. Supp. 512.

If property which is claimed as p of the assets of an estate in ban ruptcy is found to be in the possessi of a receiver previously appointed a state court, the proper course is f the trustee in bankruptcy to apply the state court for an order directi the receiver to turn over the proper to him, which order the state court m and should make; but if it refuses, t trustee should not seek coercive mea to force the surrender of the proper but should intervene in the proceedin in the state court for the protection the interests which he represents. Ca ling v. Seymour Lumber Co. (1902) 1 Fed. 483, 51 C. C. A. 1, 8 Am. Ban Rep. 29; In re Lesser (D. C. 190 100 Fed. 433, 3 Am. Bankr. Rep. 81 Mauran v. Crown Carpet Lining C (1901) 23 R. I. 324, 50 Atl. 331; W son v. Parr (1902) 115 Ga. 629, 42

. And see In re Sage (D. C. 1915) Fed. 525.

either of the courts will undertake eview, modify, or vacate a judgment fully rendered by the other in the exercise of its jurisdiction. In re nolds (D. C. 1904) 133 Fed. 585, Am. Bankr. Rep. 245; Robinson v. te (D. C. 1899) 97 Fed. 33, 3 Am. kr. Rep. 88; Clendening v. Red er Valley Nat. Bank (1903) 12 N. D. 94 N. W. 901.

I. LIMITATION OF ACTIONS

. Limitation of actions in general.—provision of section 9595, ante, that ts shall not be brought by or against ustee of a bankrupt estate subse- t to two years after the estate has closed," is applicable in all courts, e as well as federal, and its effect be in some cases to prolong, and thers to shorten, the period of limi- on given by the law of the state. er v. Harmer (1871) 8 Phila. (Pa.) 5 N. B. R. 252; Rock v. Dennett 92) 155 Mass. 500, 30 N. E. 171; old Grocery Co. v. Shackelford (Ga. 3) 79 S. E. 470.

n action by a bankrupt's trustee ght in 1911 before the estate was ed to recover against a transferee value of goods received from the krupt in 1907 in payment of a pre- ting debt less than four months r to the filing of the petition is gov- d by the limitation prescribed by ion 9595, ante, requiring actions e brought within two years from closing of the estate. Arnold Gro- Co. v. Shackelford (1913) 79 S. 70, 140 Ga. 585.

nce the title of the trustee in kruptcy relates back to the date of adjudication, but no further, if a icular cause of action was then ed by the state statute of limita- s, the trustee cannot sue upon it. e Dunavant (D. C. 1899) 96 Fed. 3 Am. Bankr. Rep. 41; Sheldon v. ker (1902) 66 Neb. 610, 92 N. W. 95 N. W. 1015. But it is not nec- ry that a cause of action should inally accrue or arise within two s before suit is brought upon it the trustee; he may sue at any within two years after the closing the estate, provided the cause of on existed at the time of the filing the petition in bankruptcy. Trus- of Mutual Building Fund v. Bos- x (D. C. 1880) 3 Fed. 817.

here the action is commenced in season, but the trustee directs the k of the court not to issue the sum- s, and it is not issued or served un- nore than two years after the clos- of the estate, the action will be ed. Walker v. Towner (C. C. 1877) . Cas. No. 17,089.

elay by a party in bringing on his tion that a trustee be required to l shares of stock until his rights e determined held not laches bar- ring recovery. In re Jamison Bros. & Co. (C. C. A. 1915) 227 Fed. 30.

32. —— What suits and proceedings barred.—The special statute of limitations prescribed by the bankruptcy act applies to all judicial contests between the trustee in bankruptcy and any person whose interest is adverse to his. Bailey v. Glover (1874) 21 Wall. 342, 22 L. Ed. 636. It applies to a suit to collect a debt or to recover any property constituting assets of the estate. Jenkins v. International Bank (1882) 106 U. S. 571, 2 Sup. Ct. 1, 27 L. Ed. 304; Doty v. Johnson (D. C. 1881) 6 Fed. 481; Payson v. Coffin (C. C. 1877) Fed. Cas. No. 10,858; Ross v. Wilcox (1883) 134 Mass. 21. But see Smith v. Crawford (D. C. 1873) 9 N. B. R. 38, Fed. Cas. No. 13,030. And to an action to compel specific performance of a contract to sell and convey land to the bankrupt. Ruff's Appeal (1887) 117 Pa. 310, 11 Atl. 553. Or to set aside a deed absolute in form under which the grantee claims adversely to the bankrupt. Jenkins v. Rosenberg (1882) 105 Ill. 157. Or to annul a judgment confessed by the bankrupt under such circumstances as to make it a voidable preference. Reber v. Gundy (C. C. 1883) 16 Fed. 801. Or to enforce against stockholders of the bankrupt corporation the payment of the balance due on their shares. Payson v. Coffin (C. C. 1878) Fed. Cas. No. 10,859. Or to compel a transfer of stock on the books of the corporation. Moses v. St. Paul (1880) 67 Ala. 168. And to an action against the administrator of a deceased bankrupt to recover the proceeds of insurance policies on the bankrupt's life. Avery v. Cleary (1890) 132 U. S. 604, 10 Sup. Ct. 220, 33 L. Ed. 469. Or to set aside a sale under foreclosure of a mortgage. Phelan v. O'Brien (D. C. 1882) 12 Fed. 428. Or to set aside a tax deed on property of the estate in bankruptcy. Gage v. Du Puy (1889) 127 Ill. 216, 19 N. E. 878. And to a suit to enjoin the trustee in bankruptcy from selling property claimed adversely by the plaintiff. West Portland Homestead Ass'n v. Lownsdale (D. C. 1883) 17 Fed. 205.

The special statute of limitation does not apply to a proceeding against the bankrupt himself, not cast in the form of a plenary suit, to compel him to surrender property omitted from his schedule and alleged to be fraudulently withheld from the trustee. Phelps v. McDonald (1878) 99 U. S. 298, 25 L. Ed. 473; Thomas v. Blythe (1893) 55 Fed. 961, 5 C. C. A. 356. Nor to a proceeding taken merely as a step in the administration of the estate and involving merely the authority of the court of bankruptcy to ascertain and settle liens claimed upon the property

of the estate. In re Anderson (D. C. 1885) 23 Fed. 482. But see In re Churchman (D. C. 1881) 5 Fed. 181. Nor to a proceeding to review a bill in equity. Wilt v. Stickney (D. C. 1876) 15 N. B. R. 23, Fed. Cas. No. 17,854. Nor to an action founded upon a cause arising after the estate comes to the hands of the trustee. Bowen v. Delaware, L. & W. R. Co. (1897) 153 N. Y. 476, 47 N. E. 907, 60 Am. St. Rep. 667. Compare Norton v. De La Villebeuve (C. C. 1871) 13 N. B. R. 304, Fed. Cas. No. 10,350; Rock v. Dennett (1892) 155 Mass. 500, 30 N. E. 171. It does not apply to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamentary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy. Hammond v. Whittredge (1907) 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606. In cases where the trustee in bankruptcy would be barred by the statute, it will not prevent an action by his grantee. Burton v. Perry (1893) 146 Ill. 71, 34 N. E. 60.

33. —— **Ignorance of cause of action and concealed fraud.**—Under the bankruptcy act of 1867, it was held that when the assignee's cause of action arose from a fraud concealed by the opposite party, or which from its nature remained secret, the statute did not begin to run until the fraud was discovered. Rosenthal v. Walker (1884) 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Bailey v. Glover (1874) 21 Wall. 342, 22 L. Ed. 636; Scott v. Devlin (D. C. 1898) 89 Fed. 970; Shainwald v. Davids (D. C. 1895) 69 Fed. 687; Duff v. First Nat. Bank (C. C. 1882) 13 Fed. 65; Martin v. Fullings (D. C. 1880) 3 Fed. 206; Nicholas v. Murray (C. C. 1878) 18 N. B. R. 469, Fed. Cas. No. 10,223; Pritchard v. Chandler (C. C. 1855) Fed. Cas. No. 11,436; Forbes v. Overby (D. C. 1881) Fed. Cas. No. 4,928a; Fullings v. Fullings (D. C. 1880) Fed. Cas. No. 5,-151a; Toney v. Spragins (1886) 80 Ala. 541. This rule was applied if there was no reason to impute laches to the assignee or want of due diligence in discovering the fraud. Pearsall v. Smith (1893) 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; Andrews v. Dole (D. C. 1875) 11 N. B. R. 352, Fed. Cas. No. 373.

Where claimant, having been fraudulently induced to sell goods to the bankrupt which were delivered December 9, 1912, though having knowledge of the bankruptcy proceedings on December 10th or 12th, filed no intervening petition claiming the goods or the proceeds until May 24, 1913, its right to rescind was barred by laches. In re Watmough (D. C. 1913) 210 Fed. 539.

34. —— **Parties affected by statute** The special limitation of the ba ruptcy act does not apply to an act by or against a purchaser from trustee in bankruptcy, where the ca of action arose after the purcha Brewer v. Yazoo & M. V. R. (1911) 128 La. 544, 54 South. 9 Burton v. Perry (1893) 146 Ill. 71, N. E. 60. But if the statute had ready begun to run against the tr tee at the time of the sale, it will c tinue to run against his vend Greene v. Taylor (1889) 132 U. S. 4 10 Sup. Ct. 138, 33 L. Ed. 411; R v. Dennett (1892) 155 Mass. 500, N. E. 171. And the purchaser can sue on a cause of action which was ready barred before the transfer the property to him. Lewis v. Pr dergast (1891) 45 Minn. 533, 48 N. 439. The limitation does not aff an action brought by the bankrupt hi self respecting property rights wh the trustee has abandoned or elec not to take. Sessions v. Roma (1892) 145 U. S. 29, 12 Sup. Ct. 7 36 L. Ed. 609. Nor a suit by a per claiming under a conveyance made the bankrupt before the adjudicat in bankruptcy. Ludeling v. Ch (1892) 143 U. S. 301, 12 Sup. Ct. 4 36 L. Ed. 313.

Where a decree was made by court of bankruptcy establishing priority of the lien of one cert creditor over all other creditors, was held that a creditor who had been made a party to the proceed and had no notice of it was not bar by the statute from asserting rights more than two years after date of the decree. Tennessee & C. Co. v. East Alabama Ry. Co. (1883) Ala. 516, 51 Am. Rep. 475. But wh a creditor brings an action to set as an alleged fraudulent conveyance, claiming any peculiar rights for hi self, but simply because the assig has refused to sue, he is as m bound by the statute as the assig himself would be. Freelander v. H loman (D. C. 1873) 9 N. B. R. 3 Fed. Cas. No. 5,081.

35. —— **Pleading the statute.**—T special short statute of limitations p scribed by the bankruptcy act, like other statute of limitations, must taken advantage of either by demur or answer; if not pleaded, it will waived, since it does not take away jurisdiction of the court in which action may be brought, but only p an end to the action if seasonably up. Upton v. McLaughlin (1881) U. S. 640, 26 L. Ed. 1197; Bartles Gibson (C. C. 1883) 17 Fed. 293.

If an action begun by the bankru and in which the trustee is substitu as plaintiff, is allowed to proceed judgment without any objection be taken on the ground that the stat

limitations had run against it, the ceeds of the judgment cannot be med by the bankrupt, but belong to estate in bankruptcy. Maybin v. ymond (C. C. 1877) 15 N. B. R. 353, l. Cas. No. 9,338.

6. —— **Laches of trustee.**—Without cial reference to the statute of limions, an action by a trustee in kruptcy to collect a debt, avoid a udulent conveyance, or recover a ference, may be successfully defendon the ground of his laches, if he unreasonably and negligently reined from asserting his claims as stee, and rights have meanwhile aced which are of value and should be pected. Sparhawk v. Yerkes (1891) U. S. 1, 12 Sup. Ct. 104, 35 L. 915; Swartz v. Frank (1904) 183 438, 82 S. W. 60; Beall v. Dune (1892) 149 Pa. 439, 24 Atl. 284; obson v. Sims (1877) 60 Ala. 185.

he statute requires claims against estate in bankruptcy to be exhibited hin one year after the adjudication, l also requires a creditor who has eived a preference to surrender the e as a condition precedent to his nt to prove his claim. But where a stee in bankruptcy failed to take any ps towards the avoidance of an aled preference until the year had so rly expired that there did not rein to the preferred creditor a reably sufficient time in which to surder his preference and prove his m, it was held that the trustee's sequent suit to avoid the preference uld be dismissed on account of his es. Swartz v. Frank (1904) 183 438, 82 S. W. 60.

he trustee is not barred, on the und of laches, from asserting rights er the liens of execution creditors n property held by the bankrupt er a contract of conditional sale, ch liens had been preserved for the efit of the estate by order of the rt of bankruptcy, simply because he t based his right to relief solely upon ground that an unlawful preference created through the payment of an ebtedness by the transfer of the perty to the vendor by the bankrupt n insolvent. Rock Island Plow Co. Reardon (1912) 222 U. S. 354, 32 . Ct. 164, 56 L. Ed. 231, 27 Am. kr. Rep. 492.

hat the trustee allowed an attaching ditor to proceed to judgment in her against a debtor of the bankrupt l not laches preventing him from ing aside judgment in her favor. son v. Van Buren County Farmers' t. Fire Ins. Co. (Mich. 1915) 151 N. 752.

7. —— **Effect of reopening estate.**—en a closed estate is reopened on etition by creditors or the former stee, showing that certain solvent ms had not been collected, subsent suits brought to collect such ms are not barred by the special statute of limitations, although the estate was not reopened until more than two years after the final settlement and closing of it. Bilafsky v. Abraham (1903) 183 Mass. 401, 67 N. E. 318. CONTRA, under the act of 1867, see Geisreiter v. Sevier (1878) 33 Ark. 522; Scott v. Little (D. C. 1896) 76 Fed. 563.

An estate cannot thus be reopened for the purpose of allowing the trustee to bring a suit to set aside an alleged fraudulent conveyance by the bankrupt, on the theory that property conveyed away by a bankrupt, although for the purpose of defrauding his creditors, is not property of his estate until the sale is set aside, and therefore the existence of a cause of action in the trustee to vacate such a conveyance is insufficient to show that the estate was not fully administered when it was closed by order of the court. Kinder v. Sharff (1911) 129 La. 218, 55 South. 769, judgment affirmed (1913) 34 S. Ct. 164, 231 U. S. 517, 58 L. Ed. 343.

The two years' limitation after the closing of an estate prescribed by section 9595, ante, of suits by or against trustees in bankruptcy, bars an action by a former trustee to set aside a conveyance as in fraud of creditors after the bankruptcy proceedings had been reopened for that purpose, on the ground that he had just discovered the facts, where pending the original proceedings the trustee made some inquiries but dropped the matter. Kinder v. Scharff (1913) 34 S. Ct. 164, 231 U. S. 517, 58 L. Ed. 343, affirming judgment (1911) 55 So. 769, 129 La. 218.

IV. PARTIES, PLEADING, EVIDENCE, AND PROCEDURE

38. Parties.—In an action by a trustee in bankruptcy, the complaint should represent him as suing in his official capacity, and not as an individual, but when this is done, the fact that his name, in the caption, is followed by the word "trustee," instead of the words "as trustee," is immaterial. Newland v. Zodikow (1902) 39 Misc. Rep. 541, 80 N. Y. Supp. 375. If the same trustee is appointed for two bankrupts individually and also for the firm of which they are the members, in the same proceeding, he holds but one office, and may sue to set aside a fraudulent conveyance made by the bankrupts jointly. Wright v. Simon (1907) 52 Misc. Rep. 360, 102 N. Y. Supp. 1108. He generally sues in his own name as trustee in bankruptcy, but if a technical legal title to the property in suit is outstanding in the name of another, it will be necessary for the trustee (the local rules of practice so requiring) to use the name of such other as the nominal plaintiff in the action. Bacon v. George (1910) 206 Mass. 566, 92 N. E. 721; Traders' Ins. Co. v. Mann (1903) 118 Ga. 381, 45 S. E. 426. In any proceedings affecting property or assets

of the estate, the trustee in bankruptcy must be made a party, or he will not be bound by the decree. Atkinson v. Farmers' Bank (D. C. 1844) Fed. Cas. No. 609; Magruder v. Hattiesburg Trust & Banking Co. (Miss. 1915) 67 South. 485. See Virginia-Carolina Chemical Co. v. Floyd (1912) 158 N. C. 455, 74 S. E. 465. Thus, he is a necessary party to a bill to foreclose a mortgage given by the bankrupt. Clark v. Clark (1875) 56 N. H. 105.

As to the joinder of parties, bankruptcy follows the general rule of equity, that all those should be brought in who have any interests in the subject-matter of the suit or claims upon it, or whose rights may be prejudicially affected by the decree to be made in the case, in order that complete justice to all concerned may be effected at one time. United Sheet & Tin Plate Co. v. Hess (1908) 159 Fed. 889, 87 C. C. A. 69, 20 Am. Bankr. Rep. 254; In re Kane (D. C. 1908) 161 Fed. 633, 20 Am. Bankr. Rep. 616; In re Beede (D. C. 1903) 126 Fed. 853, 11 Am. Bankr. Rep. 387; In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55. See In re Frey's Estate (1912) 237 Pa. 269, 85 Atl. 147. A trustee in bankruptcy, suing for money paid by bankrupt without consideration to a corporation, should as a protection, in case of the corporation becoming insolvent, join as defendants all those shown by the complaint to be personally liable. The complaint of a trustee in bankruptcy to recover money paid defendant, alleging that persons constituting a majority of the board of directors both of bankrupt and defendant, acting for bankrupt, caused it to pay money to defendant without consideration, "knowing" the facts, shows a personal liability, as regards propriety of joining them as defendants. Billings v. Charles Millar & Son Co. (D. C. 1915) 227 Fed. 185. Under Civ. Code Ga. 1910, § 2251, all shareholders of an insolvent corporation who received dividends paid out of the capital assets may be joined in one action instituted by the trustees in bankruptcy to recover the amount of the dividends. Carlisle v. Ottley (1915) 85 S. E. 1010, 143 Ga. 797.

An objection on the ground of a want of necessary parties will be available only in so far as it prevents the doing of complete justice without the presence of the omitted parties, and it will not be allowed to prevent relief which can be given as between the parties before the court, and which will not affect the rights of the omitted parties. Greenhall v. Carnegie Trust Co. (D. C. 1910) 180 Fed. 812, 25 Am. Bankr. Rep. 300. But it is not necessary to bring in parties who may have some contingent or ultimate rights in the subject of the suit, if those rights are not to be affected by the proceeding immediately before the court. Vollkommer v. Frank (1905) 107 App. Div. 594, 95 N. Y. Supp. 324; Bank of Waldron v. Euper (1910) 93 Ark. 609, 125 S. W. 1022. Thus, in suits to vacate fraudulent transfers and the like, judgment creditors of the bankrupt are not necessary parties. Traders' Bank v. Campbell (1871) 14 Wall. 87, 20 L. Ed. 832; Smith v. Belden (1901) 35 Misc. Rep. 113, 71 N. Y. Supp. 246; Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. So, in a suit to set aside a transfer of the bankrupt's interest in a partnership to a third person, the bankrupt's partner is not a necessary party. Lamb v. Hall (1905) 147 Cal. 37, 81 Pac. 286. And in an action to vacate an alleged fraudulent chattel mortgage, persons to whom the bankrupt had subsequently given other chattel mortgages on the same property are not necessary parties. Shanks v. National Casket Co. (1904) 95 App. Div. 187, 88 N. Y. Supp. 839. And a fraudulent transferee of property, who has transferred the property to another fraudulent transferee, need not be joined. Skillen v. Endelman (1902) 39 Misc. Rep. 261, 79 N. Y. Supp. 413. And in a suit by the trustee against the bankrupt's wife, to whom he had assigned policies of insurance on his life, to determine the amount of premiums paid in fraud of creditors, the insurer is not a necessary party. Bailey v. Wood (1909) 202 Mass. 562, 89 N. E. 149.

A bill by the trustee in bankruptcy of an insolvent corporation to recover from a former shareholder money received from the corporation upon purchase of his shares is not objectionable because joining other stockholders charged with similar transactions. Sherrill v. Hutson (Ala. 1914) 65 So. 538.

It is no objection to the trustee's bringing a suit to recover assets in the form of a creditors' bill, that there are also other creditors of the defendant, for in such a bill, the complainant sues as one of a class for the benefit of all members thereof who may become parties. Stotesbury v. Cadwallader (D. C. 1874) Fed. Cas. No. 13,498. But see Biggs v. Westen (1913) 248 Mo. 333, 154 S. W. 708. But if property of the bankrupt is subject to a valid lien, the mere taking possession of the property by the court of bankruptcy does not make the holder of the lien a party to the proceedings in bankruptcy. In re Platteville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

In a suit by a trustee to establish rights in property within the district, a nonresident defendant claiming adversely may be brought in by an order and service by publication. Horskins v. Sanderson (D. C. 1904) 132 Fed. 415, 13 Am. Bankr. Rep. 101; Olcott v. Maclean (1878) 73 N. Y. 223.

9. —— **Joinder of bankrupt.**—The ıkrupt is neither a necessary nor a ›per party to any action relative to assets of his estate in the hands of trustee; and it is not necessary to ı him as a party of record in any h proceeding, whether the suit be ›ught by the trustee or brought ıinst him, and whether its object is collect a debt, recover a preference, ›id a fraudulent transfer, or estab- ı a title to, or lien upon, property in possession of the trustee. Wall v. x (1900) 101 Fed. 403, 41 C. C. A. 3, 4 Am. Bankr. Rep. 659; Cox v. ıll (D. C. 1900) 99 Fed. 546; Good- ıgh Mercantile & Stock Co. v. Gallo- y (D. C. 1906) 156 Fed. 504, 19 ı. Bankr. Rep. 244; Buckingham v. tes (1904) 128 Fed. 584, 63 C. C. 20, 12 Am. Bankr. Rep. 182; French R. P. Smith & Sons Co. (1900) 81 nn. 341, 84 N. W. 44; Edwards v. billinger (1909) 148 Ill. App. 227; ank v. Musliner (1902) 76 App. Div. 3, 78 N. Y. Supp. 369; Fry v. Street 881) 37 Ark. 39.

0. **Representation of trustee by unsel for bankrupt.**—A rule of the ırt of bankruptcy forbidding the nkrupt's counsel to represent the ıstee in litigation applies only to pro- edings in the bankruptcy case before e bankruptcy court, and has no ap- cation to a suit by the trustee in a ıte court, and it is no defense to a it brought by a trustee in bankruptcy, equity, to recover assets of the bank- pt alleged to be in the possession of e defendant, that the plaintiff's at- rney was attorney for the bankrupt the bankruptcy proceedings. Calla- n v. Israel (1904) 186 Mass. 383, 71 E. 812.

1. **Injunction and receivership.**—hen the trustee in bankruptcy brings it to recover an alleged preference, to set aside an alleged fraudulent nveyance, he may obtain an injunc- ›n restraining the defendant from dis- sing of the property or letting it go t of his hands pending the suit. In Norris (D. C. 1910) 177 Fed. 598, Am. Bankr. Rep. 444; In re chwartzman (D. C. 1909) 167 Fed. 9, 21 Am. Bankr. Rep. 885; Blake Nesbet (D. C. 1905) 144 Fed. 279, Am. Bankr. Rep. 269; In re Latimer D. C. 1905) 141 Fed. 665, 15 Am. ankr. Rep. 461; Jobbins v. Montague 872) 23 N. J. Eq. 182. But the trus- e must show some emergency justify- ; such action or some imminent dan- r of loss which the court would be un- le to redress. Beecher v. Bininger C. C. 1870) Fed. Cas. No. 1,222; Row- ıd v. Auto Car Co. (C. C. 1905) 133 ed. 835, 13 Am. Bankr. Rep. 799. here his claim is to the possession of ecific property, presently within the ach of the court, he may be entitled to injunction restraining its shipment t of the district until after the termi- nation of the suit. Pyle v. Texas Transport & Terminal Co. (D. C. 1911) 185 Fed. 309, 25 Am. Bankr. Rep. 829. A trustee in bankruptcy of a husband cannot maintain a bill to restrain the husband and wife from alienating property which they hold by that peculiar tenure still surviving in some states, known as "tenancy by entireties." Weiss v. Beihl (1911) 232 Pa. 97, 81 Atl. 148.

A court of bankruptcy held to have power to enjoin violation of a contract made with a trustee. In re Consumers' Albany Brewing Co. (D. C. 1915) 224 Fed. 235.

To enable court to pass on motion to vacate injunction restraining sale of property fraudulently transferred and other property, plaintiff held to be required to furnish a bill of particulars separating the classes of property. Hane v. Crown & Keystone Co. (D. C. 1915) 223 Fed. 439.

A receiver was held properly appointed at the instance of a trustee in bankruptcy, as plaintiff in an action, where the property alleged to have been fraudulently transferred to the defendants was a stock of merchandise, and it appeared that it consisted of goods subject to deterioration and fluctuation in price, and that it had not been inventoried, so that its value could not be correctly estimated, and that the defendants were probably not worth much more than the amount of their debts. Cox v. Wall (D. C. 1900) 99 Fed. 546. But proof of the defendant's insolvency or unstable financial condition is essential to the appointment of a receiver. Webb v. Manheim (1905) 109 App. Div. 63, 95 N. Y. Supp. 1003; McKenzie v. Thomas (1903) 118 Ga. 728, 45 S. E. 610. And a receiver should not be appointed where there is a probability that a valid claim of set-off existing in the defendant may wipe out the indebtedness sued for. Rowland v. Auto Car Co. (C. C. 1905) 133 Fed. 835, 13 Am. Bankr. Rep. 799. Where respondent corporation did an independent business, and had goods honestly belonging to it, and creditors to whom it was indebted, and was not insolvent, a receiver would not be appointed to assist a trustee in bankruptcy of respondent's managing stockholder to trace property which he fraudulently concealed from his creditors by means of respondent corporation. Sprague v. L. D. Margolis Co. (D. C. 1913) 211 Fed. 171.

A receiver appointed at the instance of a trustee in bankruptcy as plaintiff in a suit should only be charged with the preservation of the property, and should not be authorized to sell it. Small v. Muller (1901) 67 App. Div. 143, 73 N. Y. Supp. 667. Compare Cox v. Wall (D. C. 1900) 99 Fed. 546.

Even if a sufficient case for the appointment of a receiver is not made out, the trustee in bankruptcy, suing in equity to establish rights in property,

may have a writ of sequestration to prevent the removal of the property from the district. Horskins v. Sanderson (D. C. 1904) 132 Fed. 415, 13 Am. Bankr. Rep. 101, citing Steam Stone Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8; Same v. Jones (C. C. 1882) 13 Fed. 567. And if his attempt to realize the value of assets claimed to belong to the estate in bankruptcy, by a suit to quiet title, is met by an assertion of title on the part of the defendant and an attempt to enjoin him from proceeding with his suit, he may be entitled to a writ of prohibition, addressed to the state court in which the injunction is asked, forbidding it to grant the writ. Hudson v. Judge of Superior Court (1879) 42 Mich. 239, 3 N. W. 913.

42. Allegations of trustee's bill or complaint.—In a bill or complaint by a trustee in bankruptcy it is not necessary to set out in detail the various steps in the bankruptcy proceeding, but only the fact of the adjudication and the appointment of the trustee, and these may be alleged to have been by orders or decrees "duly made or given." Bouton v. Wheeler (1907) 118 App. Div. 426, 104 N. Y. Supp. 33; Mears v. Shaw (1905) 32 Mont. 575, 81 Pac. 338; Wheelock v. Lee (1873) 15 Abb. Prac. N. S. (N. Y.) 24, 10 N. B. R. 363; Seaton v. Scovill (1877) 18 Kan. 433, 21 Am. Rep. 212, note, 26 Am. Rep. 779. It has been said that, in suing for the recovery of assets, the trustee need not aver in his complaint the various steps in the bankruptcy proceeding, as they are not ultimate but probative facts; the pleading is good if he alleges ownership in himself, for under such an allegation he can prove the bankruptcy and his own appointment. Dambmann v. White, 48 Cal. 439. But if he undertakes to set out in detail the manner in which he claims to have become the owner of the property, by alleging the proceedings in bankruptcy, it is fatal to the declaration if he omits to allege the adjudication in bankruptcy. Wright v. Johnson (C. C. 1871) 4 N. B. R. 626, Fed. Cas. No. 18,082. But compare, as to this last point, Lakin v. First Nat. Bank (D. C. 1875) Fed. Cas. No. 7,999. Where the plaintiff's appointment as trustee in bankruptcy is denied, it must be proved, and judgment given in his favor without proof of such appointment is erroneous. Van Houten v. Oliver (Sup. 1904) 91 N. Y. Supp. 36. Further, as to showing authority of trustee to sue, see Security Trust Co. v. Glazier (1912) 170 Mich. 26, 135 N. W. 904. The trustee of a bankrupt cannot delay taking charge of the property, so as to work an injustice to the parties interested; and a bill by a trustee to take possession of the bankrupt's property should know that there has been no unnecessary delay. Trenholm v. Miles (Miss. 1914) 64 So. 209.

The trustee should also aver that he is the beneficial owner of the property in question, or that it belongs to the bankrupt's estate, or was held for him or for his benefit, as the case may be. A. Dreher & Co. v. National Surety Co. (1911) 174 Ala. 490, 57 South. 34. And he should show whether the right of action is one vesting originally in himself as trustee or one originally accruing to the bankrupt. Murray v. Beal (D. C. 1899) 97 Fed. 567, 3 Am. Bankr. Rep. 284. Where, pending an action on unpaid stock subscription, a trustee in bankruptcy was appointed and substituted as plaintiff, held that the complaint must allege notice to the stockholder and an opportunity to be heard as to the validity of the claims, etc. Chamberlain v. Piercy (Wash. 1914) 143 P. 977. But when he sues in trover for a conversion of goods occurring either before or after the bankruptcy, he may join in the declaration a count upon the bankrupt's title and a count upon the trustee's title. Burns v. O'Gorman Co. (C. C. 1906) 150 Fed. 226, 17 Am. Bankr. Rep. 815.

If the action is at law, and for the recovery of money alleged to belong to the bankrupt, a demand should be alleged and also the fact that the money has not already been paid over to the bankrupt. Cohen v. Wagar (1903) 87 App. Div. 255, 84 N. Y. Supp. 377. The complaint, in an action by a trustee to avoid assignment by the bankrupt, held to sufficiently allege that the money assigned was still in the assignee's hands and part of the estate and that at the time the trustee became subrogated to an attachment of the property in the hands of the assignee the attachment was still in force. Corey v. Blackwell Lumber Co. (1913) 135 P. 742, 24 Idaho, 642. But in equity, no allegation of a previous demand is necessary, the rule in equity being that the bringing of the suit is itself a sufficient demand. Wright v. Skinner (D. C. 1905) 136 Fed. 694, 14 Am. Bankr. Rep. 500.

When the action is to recover a mere debt, or, generally, where it is a suit which the bankrupt himself might have prosecuted, it is not necessary for the trustee to allege that he has not sufficient assets in his hands to pay all the debts of the estate. Drew v. Myers (1908) 81 Neb. 750, 116 N. W. 781, 17 L. R. A. (N. S.) 750. But otherwise where the suit is to set aside a fraudulent transfer or recover the proceeds thereof. Seager v. Armstrong (1905) 95 Minn. 414, 104 N. W. 479; Roney v. Conable (1904) 125 Iowa, 664, 101 N. W. 505; Mayhew v. Todisman (1912) 246 Mo. 288, 151 S. W. 436; Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. CONTRA, Kraver v. Abra-

hams (D. C. 1913) 203 Fed. 782, 29 Am. Bankr. Rep. 365. A bill by a trustee in bankruptcy, attacking a conveyance as voluntary, must show that there were existing creditors, or charge a fraudulent intent. Cartwright v. West (Ala. 1913) 64 So. 293.

The trustee's declaration, complaint, or bill is likewise subject to the ordinary rules of pleading which require certainty and definiteness in the statement of a plaintiff's case and the inclusion of all facts necessary to make out a clear right of action. See Crowe v. Baumann (D. C. 1911) 190 Fed. 399, 27 Am. Bankr. Rep. 100; Cohen v. Wagar (1905) 183 N. Y. 33, 75 N. E. 691; Rathbone v. Ayer (1903) 84 App. Div. 186, 82 N. Y. Supp. 235; Carr v. Myers (1905) 211 Pa. 349, 60 Atl. 913; Herzberg v. Riddle (1911) 171 Ala. 368, 54 South. 635; Dickey v. Gray Lumber Co. (1907) 127 Ga. 460, 56 S. E. 481; Smith v. Auerbach (1876) 2 Mont. 348; McKey v. Smith (1912) 255 Ill. 465, 99 N. E. 695; Sparks v. Weatherly (Ala. 1912) 58 South. 280; Rodolf v. First Nat. Bank (1912) 30 Okl. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204; In re Berkman (D. C. 1901) 201 Fed. 180; In re Young (D. C. 1913) 206 Fed. 187, 31 Am. Bankr. Rep. 82; McEwen v. Kelly (1913) 140 Ga. 720, 79 S. E. 777.

On an issue in bankruptcy as to the priority of a mortgage lien, the bill should allege the names of all the creditors of the bankrupt other than the mortgagee, the amounts of their debts, the character of the same, and when they arose or were created. Teague v. Anderson Hardware Co. (D. C. 1908) 161 Fed. 765, 20 Am. Bankr. Rep. 424.

43. Defenses to trustee's bill or complaint.—In an action by a trustee in bankruptcy, the defendant may deny the plaintiff's official capacity or right to sue, which constitutes a plea in bar, and not in abatement. Peel v. Ringgold (1847) 6 Ark. 546. Or he may allege that a suit upon the same cause of action, brought by the bankrupt himself in another court, and in which the trustee should have intervened, is still pending and undetermined. Radford v. Folsom (D. C. 1882) 14 Fed. 97. If the trustee's bill is to set aside a conveyance or transfer and contains allegations of fraud, there must be an answer denying the fraud, without which a general demurrer should not be allowed. Johnston v. Forsyth Mercantile Co. (D. C. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669. And generally in actions of this kind, although the answer need not set forth in detail all the circumstances of the transaction, it should be responsive to the bill and should contain specific allegations covering the ground of intended defense, as, that the defendant paid a present and adequate consideration in cash, that he purchased in good faith and without intention to delay or defraud the bankrupt's creditors, or otherwise as the case may be. McNulty v. Wiesen (D. C. 1904) 130 Fed. 1012, 12 Am. Bankr. Rep. 341. Or that the property in question was exempt from execution and therefore not within the statute. Meyer v. Perkins (1913) 20 Cal. App. 661, 130 Pac. 206.

In an action to recover an alleged preference, the defendant should plead the essential facts of his defense, as, that the property transferred did not belong to the bankrupt, but to his wife. Goode v. Elwood Lodge (1903) 160 Ind. 251, 66 N. E. 742. That he had no knowledge of the insolvency of the debtor and no reasonable cause to believe that a preference was intended. Gamble v. Elkin (1903) 205 Pa. 226, 54 Atl. 782. Or that the goods in question were not taken by defendant in payment of a debt, but on the rescission of a sale of them to the bankrupt, which had been induced by the latter's false and fraudulent representations. American Lumber & Mfg. Co. v. Taylor (1905) 137 Fed. 321, 70 C. C. A. 21, 14 Am. Bankr. Rep. 231.

44. Pleadings in suits against trustees.—A bill in equity against a trustee in bankruptcy which alleges that the complainant held a mortgage on property of the bankrupt, and was induced by the fraudulent representations of the bankrupt to release the same, and offers to restore the consideration received therefor, states a sufficient cause of action for equitable relief by the restoration of the lien. Cleminshaw v. International Shirt & Collar Co. (D. C. 1908) 165 Fed. 797, 21 Am. Bankr. Rep. 616.

Great particularity is required in the case of a petition for the restoration to the plaintiff of goods in the hands of the trustee, and which the plaintiff claims under his right to rescind the contract by which they were sold to the bankrupt, on account of its having been induced by the latter's fraud. Such a petition must not only allege all the facts necessary to entitle the petitioner to rescind, but must also set out all the circumstances of the transaction and describe the goods in detail. In re Levi & Pickard (D. C. 1906) 155 Fed. 262, 17 Am. Bankr. Rep. 430. But see In re Pierce (C. C. A. 1907) 157 Fed. 757, 19 Am. Bankr. Rep. 664.

In a suit to trace and recover the proceeds of certain drafts with forged bills of lading attached into the hands of the trustee in bankruptcy of the bankrupt drawers, averments of the bill held consistent with the idea that the drafts were deposited for collection only with the right to charge back if uncollected, and not that they were discounted by the local bank. Knauth, Nachod & Kuhne v. Lovell (D. C. 1914) 212 Fed. 337.

Answer of a bankrupt's trustee in

proceedings to show cause why the proceeds of mortgaged property should not be turned over to the mortgage claimant held sufficient for that purpose and to entitle the trustee to an accounting. In re Keystone Press (D. C. 1913) 203 Fed. 710.

45. Burden of proof and evidence in trustee's suit.—In an action in a state court by a trustee in bankruptcy, it is not necessary for him to establish the jurisdiction of the court of bankruptcy or the petition on which the bankruptcy proceedings were based, in order to sustain the action; but it is sufficient for him to show the adjudication in bankruptcy and his appointment as trustee. Cone v. Purcell (1874) 56 N. Y. 649; Carr v. Gale (C. C. 1847) Fed. Cas. No. 2,434; Burk v. Winters (1872) 28 Ark. 6, 15 N. B. R. 140. But see Pace v. Roberts, Johnson & Rand Shoe Co. (1903) 103 Mo. App. 662, 78 S. W. 52, where it was held that, since the bankruptcy law primarily commits the making of an adjudication in bankruptcy to the judge of the court, and only in his absence authorizes the clerk to refer the case to the referee, where an action is brought by a trustee in bankruptcy, and it appears that the adjudication was made by a referee, the jurisdiction of the referee must be established by affirmative proof that the judge was absent. And see also McKey v. Smith (1913) 255 Ill. 465, 99 N. E. 695.

The presumption is in favor of the regularity of all the proceedings leading up to the appointment of the trustee, and that, as trustee, he has complied with all the requirements of the law and is qualified to act. Breckons v. Snyder (1905) 211 Pa. 176, 60 Atl. 575; Laubaugh v. Pennsylvania R. Co. (1905) 28 Pa. Super. Ct. 247. He is not required to produce record proof of an acceptance in writing of his appointment as trustee, or that he has given notice of such appointment. Rogers v. Stevenson (1871) 16 Minn. 68 (Gil. 56); Wooldbridge v. Rickert (1881) 33 La. Ann. 234. And see Babbitt v. Walbrun (C. C. 1871) 6 N. B. R. 359, Fed. Cas. No. 695. He is presumed to represent the creditors of the bankrupt, and the burden is on one who denies his authority to prove the contrary. Oliver v. Hilgers (1902) 88 Minn. 35, 92 N. W. 511.

Where the suit is to recover specific property or its proceeds, the trustee must assume the burden of proving that it belonged to the bankrupt at the time of the adjudication, but this need not be done by direct or positive testimony, if the circumstances of the case do not permit it, but by evidence of facts sufficiently strong to justify the jury in inferring such ownership. Burleigh v. Foreman (1904) 130 Fed. 13, 64 C. C. A. 381, 12 Am. Bankr. Rep. 88; Clay v. Waters (C. C. A. 1908) 161 Fed. 815, 20 Am. Bankr. Rep. 561; Waters v. Davis (1906) 145 Fed. 91 76 C. C. A. 444, 16 Am. Bankr. Re 667; Talcott v. Goodwin (1808) 3 D (Conn.) 264; Makins v. Crocker (191 193 Fed. 976, 113 C. C. A. 596; Uni Trust & Savings Bank v. Amery (191 72 Wash. 648, 131 Pac. 199; Walkof Fox (Sup. 1915) 153 N. Y. Supp. 27.

If the suit is for the recovery of mo ey or property in the hands of a thi person, but alleged to belong to t bankrupt, it is essential to show t actual possession of the property the defendant, and the trustee has t burden of establishing this fact. B the trustee is only bound to establi his possession by evidence plain a convincing beyond reasonable contr versy. In re Alphin & Lake Cott Co. (D. C. 1905) 134 Fed. 477, 14 A Bankr. Rep. 194; In re Feldser (D. 1905) 134 Fed. 307, 14 Am. Ban Rep. 216; Mowry v. Reed (1905) 1 Mass. 174, 72 N. E. 936; Clay v. W ters (C. C. A. 1908) 161 Fed. 815, Am. Bankr. Rep. 561; In re Rose zweig (D. C. 1913) 206 Fed. 360, Am. Bankr. Rep. 680.

The trustee has also the burden showing exactly what property of t bankrupt is in the defendant's posse sion. Mattley v. Wolfe (D. C. 190 175 Fed. 619, 23 Am. Bankr. Rep. 67 But if he shows the fraudulent posse sion of property of the bankrupt the defendant, he may recover t value of the goods, even if they cann be precisely identified. In re Jacki (D. C. 1910) 179 Fed. 720, 24 A Bankr. Rep. 790; Page v. Moo (1912) 235 Pa. 161, 83 Atl. 580. A if a fund is once traced into the han of the defendant, the latter must a sume the burden of making some re sonable explanation of its dispositio in order to avoid being required to su render it. In re Alphin & Lake Co ton Co. (D. C. 1905) 134 Fed. 477, Am. Bankr. Rep. 194; Pope v. Ca well (D. C. 1913) 206 Fed. 908; re Silverman (D. C. 1913) 206 Fe 960; Woodford v. Rice (D. C. 191 207 Fed. 473, 30 Am. Bankr. Rep. 45 Williams v. Noyes & Nutter Mfg. C (1914) 112 Me. 408, 92 Atl. 482.

If the action is to recover proper conveyed away in fraud of creditors by way of preference, the trustee h the burden of showing the wrongf character of the transaction, or t defendant's knowledge of its purpos as the case may be. Smith v. Auerba (1876) 2 Mont. 348; Lynam v. B fast Nat. Bank (1904) 98 Me. 448, Atl. 799.

In a suit by a trustee in bankrupt of a corporation against its directo and officers to recover dividends, e dence held to show that the directo knew, or by the exercise of care mu have known, the dividends were pa out of the capital stock. E. L. Moo & Co. v. Murchison (C. C. A. 191 226 Fed. 679.

In an action by the trustee of a ban

: corporation to recover money paid the corporation for its stock from rson who claimed that he sold the k to a third person, the burden of ving that the sale was to the cor- ation was on plaintiff. Union Trust Savings Bank v. Amery (1913) 131 99, 72 Wash. 648.

ie burden of proving that a sale of perty of the bankrupt by one hold- it in pledge, made conformably to contract of pledge, was unfair or rwise voidable, is on the trustee. cock v. Varick Bank (1907) 206 U. 8, 27 Sup. Ct. 681, 51 L. Ed. 945.

may be necessary for the trustee prove the insolvency of the bank- at a given date. Clark v. Mulcahy 06) 190 Mass. 64, 76 N. E. 236; re F. M. & S. Q. Carlile (D. C. 2) 199 Fed. 612, 29 Am. Bankr. . 373; Ernst v. Mechanics' & Met- Nat. Bank (D. C. 1911) 200 Fed.

The burden is on him who claims a lien is void under section 9651, , to plead and prove the insolvency the person against whom the lien obtained at the time of its being ined. Stone-Ordean-Wells Co. v. k (C. C. A. 1915) 227 Fed. 975.

testimony of the bankrupt at the iminary examination before the ref- , touching his assets and liabilities, ot admissible on the question of his lvency, in a suit between the trus- and a third party, as the issue is between the same parties. Breck- v. Snyder (1905) 211 Pa. 176, 60 575.

6. Evidence in actions against trus- —One seeking to recover or reclaim perty from a trustee in bankruptcy the burden of proving that it con- uted part of the bankrupt's estate n the same passed into the hands the trustee. In re Marsh (D. C. 2) 116 Fed. 396, 8 Am. Bankr. Rep. . And since, presumptively, any perty in the possession of the bank- t and passing from him to his trus- belongs to the estate, the burden is a claimant to show his superior ti- or right thereto. In re Burke (D. 1909) 168 Fed. 994, 22 Am. Bankr. . 69; In re Heckathorn (D. C. 6) 144 Fed. 499, 16 Am. Bankr. . 467. Evidence that the bank- t did not include the property in schedule of assets filed in the bank- tcy proceeding is admissible on this ie. Rudy v. Katz (1902) 23 Ky. w Rep. 1697, 66 S. W. 18. But it inarily requires stronger proof, and s said such a claim cannot be sup- ted by the uncorroborated testimony the claimant, where, if true, he could e produced other evidence to fortify In re Mayer (D. C. 1907) 156 Fed. 2, 19 Am. Bankr. Rep. 480.

ikewise the burden is on the claim- to establish by evidence the par- ular ground on which he claims the perty or fund as against the cred- rs represented by the trustee, as, t the sale of the property to the bankrupt was induced by false and fraudulent representations as to his financial condition. Ellett-Kendall Shoe Co. v. Ward (1911) 187 Fed. 982, 110 C. C. A. 320, 26 Am. Bankr. Rep. 114; In re O'Connor (C. C. 1902) 114 Fed. 777, 9 Am. Bankr. Rep. 18; In re Berg (D. C. 1910) 183 Fed. 885, 25 Am. Bankr. Rep. 170. Or that the sale was conditional and the article not accepted by the bankrupt. In re Simpson Mfg. Co. (1904) 130 Fed. 307, 64 C. C. A. 553, 12 Am. Bankr. Rep. 212. Or that the transaction was not a sale, but a mere consignment for sale, the title remaining in the claimant. In re Leeds Woolen Mills (D. C. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136. Party seeking to reclaim property conditionally sold from trustee in bankruptcy held to have burden of showing that there were prior creditors, as to whom the contract was not invalid, and that the claims of subsequent creditors would not exhaust the property. Potter Mfg. Co. v. Arthur (1915) 220 Fed. 843, 136 C. C. A. 589.

47. Trial and judgment.—In an action by a creditor against the trustee in bankruptcy of his debtor to recover personal property claimed under a transfer from the debtor, held, under the evidence, a question for the jury whether the debtor was insolvent at the time of the transfer, and, if so, whether the creditor had notice of such facts as to put him upon inquiry. L. A. & Scharff Distilling Co. v. Dennis (Ark. 1914) 168 S. W. 141.

In an action by a bankrupt's trustee against a mortgagee creditor, it was proper for the court to render judgment requiring the creditor to pay the reasonable value of property taken under a bill of sale, which was in fact a mortgage, instead of delivering the property to the trustee. Gill v. Ely-Norris Safe Co. (1913) 156 S. W. 811, 170 Mo. App. 478.

The legal effect of a decree in bankruptcy proceedings that certain property was not in possession of the bankrupt when the petition was filed is not changed by words, "without prejudice to the rights of the trustee, if this court shall authorize, to litigate in any proper court the question of the right of the said trustee to recover said fund as a part of the bankrupt estate." Chicago Title & Trust Co. v. First Nat. Bank (1912) 174 Ill. App. 339.

48. Liability of trustee for costs.—Where a statute exempts "trustees of an express trust" from personal liability for costs in the absence of misconduct or bad faith, it is held that a trustee in bankruptcy is the trustee of an express trust, and the question of his liability is not affected by the fact that the fund is under the jurisdiction and control of another court. Reade v. Waterhouse (1873) 52 N. Y. 587.

The estate must bear the costs of actions or proceedings properly un-

dertaken by the trustee for the purpose of recovering assets or contesting spurious claims, but he will not be allowed the costs of unfounded or unnecessary litigation, and more especially he is personally chargeable with costs incurred willfully or recklessly in litigation, when the exercise of ordinary prudence and foresight would have taught him that litigation was necessary or would fail. In re Jose son (D. C. 1903) 121 Fed. 146 Am. Bankr. Rep. 608; Kingsbury Powers (1889) 131 Ill. 182, 22 N. 479; In re Preston (D. C. 1873) N. B. R. 454, Fed. Cas. No. 11,394; re Brinkman (D. C. 1872) 6 N. B. 541, Fed. Cas. No. 1,883.

§ 9608. (Act July 1, 1898, c. 541, § 24.) Jurisdiction of appell courts.

Jurisdiction of Appellate Courts.—a The Supreme Court of t United States, the circuit courts of appeals of the United Stat and the supreme courts of the Territories, in vacation in chambe and during their respective terms, as now or as they may be he after held, are hereby invested with appellate jurisdiction of co troversies arising in bankruptcy proceedings from the courts bankruptcy from which they have appellate jurisdiction in oth cases. The Supreme Court of the United States shall exercise a li jurisdiction from courts of bankruptcy not within any organized c cuit of the United States and from the supreme court of the Distr of Columbia.

b The several circuit courts of appeal shall have jurisdiction equity, either interlocutory or final, to superintend and revise in ma ter of law the proceedings of the several inferior courts of bankrupt within their jurisdiction. Such power shall be exercised on d notice and petition by any party aggrieved. (30 Stat. 553.)

Judgments and decrees of the circuit courts of appeals in proceedings a causes arising under the Bankruptcy Act are made final, except that the S preme Court may, by certiorari, require such proceedings and causes to be c tified to it for review and determination with the same power and authority a with like effect as if taken to it by appeal or writ of error, by Act Jan. 1915, c. 22, § 4, as amended by Act Sept. 6, 1916, c. 448, § 3, ante, § 1120a.

Provisions conferring appellate and supervisory jurisdiction on the circ court of appeals were made by Jud. Code, § 130, ante, § 1122.

Provisions conferring appellate jurisdiction on the supreme court were ma by Jud. Code, § 252, ante, § 1229.

Notes of Decisions

1. Jurisdiction of United States supreme court.
2. —— Cases involving jurisdiction of court below.
3. —— On certiorari.
4. —— Writ of error to supreme court of state.
5. —— Rules governing appeal.
6. Jurisdiction of circuit court of appeals on writ of error.
7. Appellate jurisdiction of circuit court of appeals.
8. Revisory jurisdiction of circuit court of appeals.

8½. —— Construction of rules of Court.

9. Appellate and revisory jurisdiction contrasted.
10. Controversies and proceedings in bankruptcy distinguished.
11. Reviewing discretionary action of district court.
12. Jurisdiction of territorial supreme courts.

1. Jurisdiction of United States supreme court.—Appellate jurisdiction under this section is restricted to "controversies arising in bankruptcy proceedings," as distinguished from steps taken in the ordinary course of the bankruptcy proceeding, and a ruling of the lower court allowing or rejecting a claim against the bankrupt's e tate is not such a controversy. Tefft Munsuri (1911) 222 U. S. 114, 32 Su Ct. 67, 56 L. Ed. 118, 27 Am. Bank Rep. 338. And see Munsuri v. Fric er (1911) 222 U. S. 121, 32 Sup. C 70, 56 L. Ed. 121, 27 Am. Bankr. Re 344. But a contest in the bankrupt court over distribution of a fund fro sale under order of state court of pro erty conveyed by bankrupt in fraud creditors is a controversy arising u der bankruptcy proceedings, the d cree in which is appealable under A March 3, 1891, to the circuit court appeals, and to the supreme cou Globe Bank & Trust Co. of Paduca Ky., v. Martin (1915) 35 S. Ct. 37 236 U. S. 288, 59 L. Ed. 583, denyi certiorari In re Martin (1912) 193 Fe 841, 113 C. C. A. 627.

The general provisions of this se tion do not broaden the jurisdiction the supreme court, and have no rel tion to appeals from the circuit cou of appeals, and do not give author to entertain an appeal from every d cision in bankruptcy rendered by t intermediate courts, the same bei

ifically limited by other provisions the statute. Hutchinson v. Otis 2) 123 Fed. 14, 59 C. C. A. 94, Am. Bankr. Rep. 275.

n appeal will not lie to the federal eme court from a circuit court of eals which affirmed a judgment of bankruptcy court, refusing a dis- ge, but the only appeal contem- ed under this section is from the kruptcy court to the circuit court appeals. James v. Stone & Co. 3) 33 S. Ct. 351, 227 U. S. 410, L. Ed. 573.

nder Judicial Code, § 128, ante, §), providing that "in any case in ch the judgment or decree of the uit court of appeals is not made by the provisions of this title, e shall be of right an appeal or of error to the supreme court of United States, where the matter ontroversy shall exceed one thou- l dollars besides costs," an appeal lie to the supreme court from a judgment or decree of a circuit t of appeals, entered on a formal al from a district court sitting in kruptcy, where the other condi- s are fulfilled and the matter at e is a "controversy arising in bank- cy proceedings," that is, not a e step in the progress of the pro- ing in bankruptcy, but a separable roversy, such as might have arisen een the parties independently of bankruptcy. Hurley v. Atchison, & S. F. Ry. Co. (1909) 213 U. S. 29 Sup. Ct. 466, 53 L. Ed. 729, Am. Bankr. Rep. 17; Hewit v. lin Mach. Works (1904) 194 U. S. 24 Sup. Ct. 690, 48 L. Ed. 986, Am. Bankr. Rep. 709; Hobbs v. d & Dowst Co. (1911) 191 Fed. 112 C. C. A. 325, 27 Am. Bankr. . 484; O'Reilly v. Edrington (1877) U. S. 724, 24 L. Ed. 659; Milner v. k (1877) 95 U. S. 252, 24 L. Ed. ; J. W. Calnan Co. v. Doherty 2) 224 U. S. 145, 32 Sup. Ct. 460, L. Ed. 702, 27 Am. Bankr. Rep. 880. lecree of a federal circuit court of eals affirming an order of a court bankruptcy enjoining temporarily prosecution in a state court of a affecting the bankrupt estate is rlocutory and not reviewable under division "a" of this section, al- ugh the case is not one which Act rch 3, 1891, § 6 (ante, § 1120), es final in the circuit court of ap- ls. Mitchell Store Bldg. Co. v. roll (1914) 34 S. Ct. 410, 232 U. S. , 58 L. Ed. 650, dismissing appeal denying certiorari (1912) 193 Fed. , 113 C. C. A. 484.

n appeal does not lie to the supreme rt of the United States from a de- on of a circuit court of appeals dered in the exercise of its jurisdic- n to "superintend and revise in mat- of law the proceedings of the in- ior courts of bankruptcy," but such a decision is final unless the supreme court will grant a writ of certiorari to review it. Mitchell Store Building Co. v. Carroll (1914) 232 U. S. 379, 34 Sup. Ct. 410; Holden v. Stratton (1903) 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, 10 Am. Bankr. Rep. 786; Bryan v. Bernheimer (1901) 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; Hutchinson v. Otis, 123 Fed. 14, 59 C. C. A. 94, 10 Am. Bankr. Rep. 275; Kyle v. Hammond (1912) 225 U. S. 692, 32 Sup. Ct. 406, 56 L. Ed. 1260. And see Morgan v. Thornhill (1870) 11 Wall. 65, 20 L. Ed. 60; Conro v. Crane (1876) 94 U. S. 441, 24 L. Ed. 145; Hall v. Allen (1870) 12 Wall. 452, 20 L. Ed. 458; Coit v. Robinson (1873) 19 Wall. 274, 22 L. Ed. 152; Mead v. Thompson (1872) 15 Wall. 635, 21 L. Ed. 242; Marshall v. Knox (1872) 16 Wall. 551, 21 L. Ed. 481; Hill v. Thompson (1876) 94 U. S. 322, 24 L. Ed. 193; Nimick v. Coleman (1877) 95 U. S. 266, 24 L. Ed. 447; Cleveland Ins. Co. v. Globe Ins. Co. (1878) 98 U. S. 366, 25 L. Ed. 201; Graham v. Boston, H. & E. R. Co. (1886) 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Kyle v. Hammond (1912) 225 U. S. 692, 32 Sup. Ct. 406, 56 L. Ed. 1260.

An appeal to the United States supreme court, under subdivision "a" of this section from a decree of a circuit court of appeals, opens up the whole case as in other equity cases, and the provision of the general orders in bankruptcy relating to findings of fact has no application. Houghton v. Burden (1913) 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780, 30 Am. Bankr. Rep. 16.

Under the provision of this section, an appeal may be taken directly to the supreme court of the United States from the United States district court for Porto Rico. Tefft v. Munsuri (1911) 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118, 27 Am. Bankr. Rep. 338. And see Munsuri v. Fricker (1911) 222 U. S. 121, 32 Sup. Ct. 70, 56 L. Ed. 121, 27 Am. Bankr. Rep. 344.

2. —— Cases involving jurisdiction of court below.—Under the provisions of Judicial Code, § 238, ante, § 1215, the circuit courts of appeals have no jurisdiction of a writ of error from the district court, when the jurisdiction of that court is in question for review, the appellate jurisdiction in such cases being in the supreme court of the United States. In re Abbey Press (1904) 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11; U. S. v. Sutton (C. C. A. 1891) 47 Fed. 129; Davis & Rankin Bldg. Co. v. Barber (1894) 60 Fed. 465, 9 C. C. A. 79; Cabot v. McMaster (1895) 65 Fed. 533, 13 C. C. A. 39. The fact that the ruling of the district court, involving

a question of jurisdiction, has been affirmed by the circuit court of appeals on a petition for revision, will not preclude a writ of error from the supreme court to the district court to review the final decision in the case. Frederic L. Grant Shoe Co. v. W. M. Laird Co. (1909) 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591, 21 Am. Bankr. Rep. 484.

The question whether the petition in a case of involuntary bankruptcy alleges an act of bankruptcy does not go to the jurisdiction of the court and therefore the decision is reviewable by the circuit court of appeals rather than by the supreme court. Exploration Mercantile Co. v. Pacific Hardware & Steel Co. (1910) 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216. So also, the question whether a corporation against which a petition is filed comes within one of the classes of corporations made amenable to the bankruptcy law is a question upon which the jurisdiction may depend, but it is an issue which the district court has jurisdiction to determine, and hence an appeal cannot be taken direct to the supreme court. Columbia Ironworks v. National Lead Co. (1904) 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340. Since the act confers upon courts of bankruptcy jurisdiction to determine all claims of bankrupts to their exemptions, the decision of such a court that it has authority to adjudicate the validity of an alleged equitable lien upon property which it decides to be assets of the estate in bankruptcy and not exempt property, does not create a question of jurisdiction which will sustain a direct appeal to the supreme court. Lucius v. Cawthon-Coleman Co. (1905) 196 U. S. 149, 25 Sup. Ct. 214, 49 L. Ed. 425, 13 Am. Bankr. Rep. 696. It has also been ruled that the acts of congress do not authorize a district court to certify questions of its jurisdiction to the supreme court for decision, in order to obtain the instruction of that court for its guidance, before deciding the case; and such a certificate, made before the final judgment or decree in the case, will be dismissed. Bardes v. Hawarden Bank (1899) 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262.

3. —— **On certiorari.**—A decree rendered by the circuit court of appeals in the exercise of its jurisdiction to "superintend and revise in matter of law" the proceedings of the inferior courts of bankruptcy, and not in the way of allowing or rejecting a claim, is not the proper subject for an appeal to the supreme court, but it may be reviewed by that court on writ of certiorari. Holden v. Stratton (1903) 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, 10 Am. Bankr. Rep. 786; Bryan v. Bernheimer (1901) 175 U. S. 724, 21 Sup. Ct. 557, 44 L. Ed. 338, 5 Am. Bankr. Rep. 623; Louisville Trust Co. v. Comingor (1902) 181 U. S. 620, Sup. Ct. 293, 45 L. Ed. 1031, 7 A Bankr. Rep. 421; Kyle v. Hamm (C. C. A. 1911) 192 Fed. 559.

4. —— **Writ of error to supre court of state.**—Where the only c troversy in a case in a state court as to the effect to be given to an or of a district court of the United Sta sitting in bankruptcy, for the sale mortgaged property free from liens writ of error will lie from the fede supreme court to review a decision nying the right claimed by one of parties. Factors' & Traders' Ins. v. Murphy (1884) 111 U. S. 738 Sup. Ct. 679, 28 L. Ed. 582; New leans, S. F. & L. R. Co. v. Delam (1885) 114 U. S. 501, 5 Sup. Ct. 1 29 L. Ed. 244. So when a state co decides against the claim of a trus in bankruptcy to certain property the bankrupt, the decision is agai a right or title claimed under a stat of the United States, within the me ing of the judiciary act, and the ju ment of the court of last resort of state is subject to review by the U ed States supreme court. William Heard (1891) 140 U. S. 529, 11 S Ct. 885, 35 L. Ed. 550. Where issue is as to the validity of a tra fer by a trustee in bankruptcy, whether the suit is barred by the l itation of the bankruptcy act, the preme court has jurisdiction on v of error to the highest court of state. Traer v. Clews (1885) 115 S. 528, 6 Sup. Ct. 155, 29 L. Ed. 4

Where the question actually deci by the state court was whether bankrupt had title to certain prope and not whether the title would p to the trustee in bankruptcy by ope tion of the bankruptcy law, this is such a decision as can be reviewed error. Scott v. Kelly (1874) 22 W 57, 22 L. Ed. 729.

The United States supreme court no jurisdiction to review the deci of a state court dismissing a bill brou by creditors against a bankrupt to aside his discharge, and to which defendant demurred on the ground staleness; for if the state court m any decision on the bankruptcy act must have sustained, not denied, privilege claimed by the bankr Calcote v. Stanton (1855) 18 How. 2 15 L. Ed. 348.

5. —— **Rules governing appeal.**—' limitation of thirty days after the ju ment or decree prescribed by gen order No. 36 (post, § 9614), for tak an appeal to the supreme court of United States, relates only to appe taken expressly under the bankrup act, and not to an appeal from a d sion rendered on a formal appeal fr the district court in a controversy a ing in a bankruptcy proceeding. Ho v. Head & Dowst Co. (1911) 191 F 811, 112 C. C. A. 325, 27 Am. Ban Rep. 484. But the fact that an app

allowed from a circuit court of ap-
ls in a bankruptcy case, on the cer-
cate of a justice of the supreme
rt, cannot operate as an adjudication
t the appeal was taken in due time.
hboy v. First Nat. Bank (1906) 203
S. 141, 27 Sup. Ct. 50, 51 L. Ed.
.

'he requirement of general order No.
that the court from which the ap-
l lies shall, at or before the time
entering its judgment or decree,
ke and file a finding of the facts, and
conclusions of law thereon, stated
arately, does not require a circuit
rt of appeals, of its own motion, to
ertain and determine in advance of
decision, whether a question is rais-
on which a party is entitled to the
wance of an appeal to the supreme
rt, but such right, if claimed, should
called to the court's attention in
ance of its decision, by a request for
lings in the event of an adverse rul-
on the question claimed to be ap-
lable. Knapp v. Milwaukee Trust
(1908) 162 Fed. 675, 89 C. C. A.
, 20 Am. Bankr. Rep. 671; Crucible
el Co. v. Holt (1909) 174 Fed. 127,
C. C. A. 101, 23 Am. Bankr. Rep.
. Where the parties to an appeal
m an order disallowing a claim as
ured against a bankrupt's estate did
give notice at the argument that
ther appeal to the supreme court
uld be taken, the court of appeals
uld not make separate findings of
t and conclusions of law within
neral Bankr. Order No. 36 (post, §
4), but would decide the case as
ugh it was a court of final jurisdic-
n. Lumpkin v. Foley (C. C. A.
3) 204 Fed. 372, affirming decree
re Walden Bros. Clothing Co. (D.
1912) 199 Fed. 315. This require-
nt as to findings does not apply
ere the appeal is from a "controver-
arising in bankruptcy proceedings,"
distinguished from a proceeding in the
kruptcy case proper, since, in such
case, the manner of review in the
preme court is not governed by the
kruptcy statute but by the act cre-
ng the circuit courts of appeals.
app v. Milwaukee Trust Co. (1910)
6 U. S. 545, 30 Sup. Ct. 412. Nor
es this requirement of findings on
peal apply to appeals from decisions
adverse claims to property. Baker
Mach. Co. v. Bailey (1913) 209
d. 844, 126 C. C. A. 568.

When a party appeals from a decision
the circuit court of appeals to the
preme court of the United States,
e allowance of the appeal is to re-
te back to the time when the original
plication was made for an appeal to
e judge of the circuit court, and en-
les a party to a stay of proceedings.
hornhill v. Bank of Louisiana (C. C.
70) 5 N. B. R. 377, Fed. Cas. No.
,991.

**6. Jurisdiction of circuit court of ap-
als on writ of error.**—A proceeding in bankruptcy is in the nature of a proceeding in equity, and orders and decrees made therein cannot ordinarily be reviewed by writ of error. Lockman v. Lang (1903) 128 Fed. 279, 62 C. C. A. 550, 11 Am. Bankr. Rep. 597.

Where an alleged bankrupt in involuntary proceedings against him demands as of right and receives a trial by jury, the judgment of the court of bankruptcy, entered on the verdict and making the adjudication of bankruptcy, may be reviewed by the circuit court of appeals on writ of error, and this is the exclusive method of obtaining such review. Frederick L. Grant Shoe Co. v. W. M. Laird Co. (1906) 203 U. S. 502, 27 Sup. Ct. 161, 51 L. Ed. 292, 17 Am. Bankr. Rep. 1; Elliott v. Toeppner (1902) 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, 9 Am. Bankr. Rep. 50; Knickerbocker Ins. Co. v. Comstock (1872) 16 Wall. 258, 21 L. Ed. 493; Bower v. Holzworth (1905) 138 Fed. 28, 70 C. C. A. 396, 15 Am. Bankr. Rep. 22; In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; Lennox v. Allen-Lane Co. (1908) 167 Fed. 114, 92 C. C. A. 566, 21 Am. Bankr. Rep. 648; Duncan v. Landis (1901) 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

An order of the district court in bankruptcy adjudging a defendant in contempt for disobeying a previous order whereby he was required to surrender certain property to the trustee in bankruptcy, and imposing a fine payable to the United States as a punishment, and not as compensation to the trustee for damages, is in effect a criminal judgment, although made as a part of the proceeding in bankruptcy, and is therefore reviewable by a writ of error, and not by a petition for revision. Brown v. Detroit Trust Co. (1912) 193 Fed. 622, 113 C. C. A. 490. So also of a suit brought by a trustee in bankruptcy against a third person to enjoin him from interfering with the alleged possession by the trustee of property claimed by both parties. Stelling v. G. W. Jones Lumber Co. (1902) 116 Fed. 261, 53 C. C. A. 81, 8 Am. Bankr. Rep. 521. And so of a suit by the trustee to recover property alleged to have been transferred in fraud of creditors. Delta Nat. Bank v. Easterbrook (1904) 133 Fed. 521, 67 C. C. A. 236, 13 Am. Bankr. Rep. 338.

7. Appellate jurisdiction of circuit court of appeals.—The appellate jurisdiction of the circuit court of appeals, as defined in this section, is not revoked or limited by the enumeration in section 25a (post, § 9609), of three kinds of appealable orders, as the latter are "proceedings in bankruptcy," as distinguished from "controversies arising in bankruptcy proceedings," within the meaning of this section. Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re Mueller (1905) 135 Fed.

711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256. CONTRA, Ogden v. Gilt Edge Consol. Mines Co. (C. C. A. 1915) 225 Fed. 723.

The circuit court of appeals has jurisdiction to review on appeal a decision of the court of bankruptcy on an application to transfer the bankruptcy proceeding from one district to another. Kyle Lumber Co. v. Bush (1905) 133 Fed. 688, 66 C. C. A. 592, 13 Am. Bankr. Rep. 535.

An order denying to a stranger the right to intervene in a bankruptcy proceeding, not being a final decision upon the merits of his case, is not appealable. In re Columbia Real Estate Co. (1902) 112 Fed. 643, 50 C. C. A. 406, 7 Am. Bankr. Rep. 441. But a voluntary intervention in bankruptcy proceedings to assert a claim to property in possession of the trustee is reviewable by appeal to the circuit court of appeals. Houghton v. Burden (1913) 33 Sup. Ct. 491, 228 U. S. 161, 57 L. Ed. 780, affirming decree In re Canfield (1912) 193 Fed. 934, 113 C. C. A. 562. And where, in bankruptcy proceedings in controversy between mortgagee and vendor of machinery, the court dismissed the vendor's intervening petition, appeal held the proper remedy, and a writ of error will be dismissed. Triumph Electric Co. v. Patterson (C. C. A. 1914) 211 Fed. 244, affirming decree In re W. O. Craig Mfg. Co. (D. C. 1912) 201 Fed. 548. Appearance of mortgagees on notice of petition of mortgagor's trustees in bankruptcy, and their assertion of conflicting rights, held equivalent to an affirmative intervention in connection with the trustees' petition so as to constitute a controversy over which the circuit court of appeals had jurisdiction, with the same appellate jurisdiction which it possesses under Judicial Code, § 128. Robert Moody & Sons v. Century Sav. Bank (1915) 36 Sup. Ct. 111.

An order enjoining the prosecution of an action of replevin, brought in a state court against a trustee in bankruptcy by a third person claiming goods in his possession, and referring the claim of such party to a referee in bankruptcy to ascertain and report the facts, is not a final decision nor appealable. In re Russell (1900) 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658. And so of an interlocutory order entered by a court of bankruptcy, reversing a ruling of the referee, made during the examination of the bankrupt, refusing to require him to produce his books. Goodman v. Brenner (1901) 109 Fed. 481, 48 C. C. A. 516, 6 Am. Bankr. Rep. 470.

An order in a so-called omnibus proceeding in bankruptcy, directing the distribution of the proceeds of sale of certain securities, is a final order, and so is a final decree, within Act Feb. 13, 1911, which abolishes the clerk's supervision fee where a final order or decree is sought to be reviewed by the circuit court of appeals. In re B Mfg. Co. (C. C. A. 1914) 215 Fed. 8

Order sustaining referee's dismi of rule to compel trustees to con land to highest bidder held not revi able by appeal. Untereiner v. Cam (C. C. A. 1916) 228 Fed. 890.

An interlocutory order granting injunction, made by a district court bankruptcy, is reviewable on app where the nature of the cause or p ceeding is such that the final dec therein would be reviewable by app under the provisions of the act; it is not appealable where the final cree or order would be one in a "p ceeding in bankruptcy," reviewable o on petition to "revise in matter of la O'Dell v. Boyden (1906) 150 Fed. 7 80 C. C. A. 397, 17 Am. Bankr. R 751.

A decree in a suit by a bankrup trustee to set aside an instrument form a deed from the bankrupt c veying certain described real estate v reviewable by appeal and not by w of error. Carey v. Donohue (191 209 Fed. 328, 126 C. C. A. 254.

Where an order setting aside a ch tel mortgage of a bankrupt's ass resulted from consideration of the d puted facts and depended on findi made thereon, it was reviewable o by appeal, and not by petition to revi T. E. Wells & Co. v. Sharp (C. C. 1913) 208 Fed. 399.

Order of bankruptcy court affirmi order and findings of referee that de of trust had been paid held reviewa only by appeal and not by petition superintend and revise. Rison v. P ham (1915) 219 Fed. 176, 134 C. A. 550.

8. Revisory jurisdiction of circ court of appeals.—The revisory jur diction of the circuit court of appe extends only to orders made in t bankruptcy proceedings proper, s does not embrace proceedings in p nary suits by the trustee against th parties which might have been ma tained in a state court. In re Rus (1902) 116 Fed. 270, 53 C. C. A. 6 8 Am. Bankr. Rep. 518; In re Jac (1900) 99 Fed. 539, 39 C. C. A. 6 3 Am. Bankr. Rep. 671. Compare re Bonesteel (C. C. 1870) 3 N. B. 517, Fed. Cas. No. 1,627. Where court of bankruptcy has erroneously tained jurisdiction to adjudicate t rights of an adverse claimant, its jud ment may be reviewed by a petition revise. Shea v. Lewis (1913) 206 F 877, 124 C. C. A. 537.

A petition lies under this clause this section to review an order requ ing the bankrupt to surrender to trustee money or property alleged be in his possession and to belong his estate in bankruptcy. In re Gr boyes (D. C. 1915) 228 Fed. 574; re Shidlovsky (1915) 224 Fed. 450, 1 C. C. A. 654; In re Purvive (1899) Fed. 192, 37 C. C. A. 446, 2 Am. Ban

p. 787. Or an order adjudging him contempt for disobeying an order re-ring him to pay over money to his stee. Kirsner v. Taliaferro (C. C. 1912) 202 Fed. 51; In re Cole 907) 163 Fed. 180, 90 C. C. A. 50, L. R. A. (N. S.) 255, 20 Am. Bankr. p. 761. Or an order requiring him indorse a liquor license so that it y be transferred to the trustee. her v. Cushman (1900) 103 Fed.), 43 C. C. A. 381, 51 L. R. A. 292, Am. Bankr. Rep. 646. Or an order uiring the surrender of property by bankrupt's voluntary assignee for ditors, or by his alienee. Lazarus, chel & Lazarus v. Harding (1915) 3 Fed. 50, 138 C. C. A. 414; In re pkins (C. C. A. 1916) 229 Fed. 378; re Abraham (1899) 93 Fed. 767, C. C. A. 592, 2 Am. Bankr. Rep. 3; Davis v. Bohle (1899) 92 Fed. 5, 34 C. C. A. 372, 1 Am. Bankr. p. 412; In re Gutwillig (1899) 92 d. 337, 34 C. C. A. 377, 1 Am. Bankr. p. 388. Or an order denying a trus-'s petition to recover dividends paid claimants, involving questions of only. Nelson v. Heckscher (1914) 9 Fed. 682, 135 C. C. A. 354.

The decision of a court of bankruptcy a petition claiming ownership of nds in the hands of a trustee in bank-ptcy may be reviewed on petition ere the facts are not in dispute. In Petronio (C. C. A. 1914) 220 Fed. 9; Hutchinson v. Le Roy (1902) 113 d. 202, 51 C. C. A. 159, 8 Am. Bankr. p. 20.

Where a mortgagee in possession of operty of the bankrupt surrenders it the trustee, reserving the right to sert his lien against the proceeds of sale, the proceeds are held by the urt as assets of the bankrupt estate, d in dealing with the fund it acts as court of bankruptcy, and its action the claim of the mortgagee is sub-ct to review on petition. In re An-go Screen Door Co. (1903) 123 Fed. 9, 59 C. C. A. 248, 10 Am. Bankr. p. 359. And see In re Flatland 912) 196 Fed. 310, 116 C. C. A. 130, Am. Bankr. Rep. 476. This is also e proper method of reviewing a cision as to the effect of the ad-dication in bankruptcy upon a judg-ent lien acquired within four months ior thereto. In re Richards (1899) Fed. 935, 37 C. C. A. 634, Am. Bankr. Rep. 145; Moore v. reen (1906) 145 Fed. 472, 76 C. C. 242, 16 Am. Bankr. Rep. 648. An der made in a bankruptcy proceeding, nying a lien claimed by a creditor, is viewable by petition to revise. J. M. adford Grocery Co. v. Powell (C. C. 1915) 228 Fed. 1.

Any order made by the bankruptcy urt in the exercise of its summary risdiction may be reviewed on petition revise. In re Goldstein (C. C. A. 914) 216 Fed. 887; In re Casey (C. 1873) Fed. Cas. No. 2,495; Hurst v. Teft (C. C. 1874) Fed. Cas. No. 6,-939.

A petition lies to revise in matter of law an order appointing a referee in bankruptcy. Ex parte Steele (D. C. 1908) 162 Fed. 694, 20 Am. Bankr. Rep. 575. Or an order removing or refusing to remove a trustee in bankruptcy from his office. In re Briggs (1894) 61 Fed. 498, 9 C. C. A. 585. Or an order refusing to a bankrupt the right to amend his schedule in order to supply an accidental omission and claim his exemptions. Goodman v. Curtis (1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504. Or an order made on petition of a creditor directing the sale of property which had previously been set apart to the bankrupt as a homestead. Ingram v. Wilson (1903) 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192. Or a decision upon an application to confirm a sale of the bankrupt's estate. Pindel v. Holgate (1915) 221 Fed. 342, 137 C. C. A. 158; In re York (C. C. 1870) Fed. Cas. No. 18,139. CONTRA, In re Chotiner (1914) 218 Fed. 813, 134 C. C. A. 501. Or an order directing the distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy. In re Groetzinger & Sons (1903) 127 Fed. 124, 62 C. C. A. 124, 11 Am. Bankr. Rep. 467. Or an order made on appeal from an order of the referee regarding the disposition of a balance in the trustee's hands. In re John W. Farley & Co. (C. C. A. 1915) 227 Fed. 378. Or a decision of the court of bankruptcy upon an application for the confirmation of a composition. In re South Boston Iron Co. (C. C. 1876) Fed. Cas. No. 13.183. Or an order directing that a set-off of mutual debts be allowed. Wilson v. National Bank of Rolla (C. C. 1880) 3 Fed. 391.

Where a proceeding in bankruptcy is dismissed for want of jurisdiction, the trustee, having duly excepted, is entitled to have the order of dismissal reviewed, for error in matters of law, on an original petition in the circuit court of appeals. In re New England Breeders' Club (1909) 169 Fed. 586, 95 C. C. A. 84, 22 Am. Bankr. Rep. 124. And see In re Seebold (1901) 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358.

An order of the bankruptcy court refusing leave to intervene to stockholders of a corporation, defendant in involuntary bankruptcy proceedings, held reviewable by circuit court of appeals on petition to revise. Ogden v. Gilt Edge Consol. Mines Co. (C. C. A. 1915) 225 Fed. 723.

The circuit court of appeals will not ordinarily review a mere incidental question of practice in the district court. In re Robinson (C. C. 1868) Fed. Cas. No. 11,939. This provision of this section does not require the circuit court of appeals to revise every interlocutory order in a bankruptcy proceeding, but

only such decrees as have a certain degree of definiteness and finality. In re Chotiner (1914) 218 Fed. 813, 134 C. C. A. 501, dismissing petition to review (D. C. 1914) 216 Fed. 916.

The jurisdiction of the circuit court of appeals to review the proceedings of the district courts in bankruptcy, under this provision of the statute, is not limited by any measure of the amount in controversy or the value of the property involved. In re Clark (C. C. 1872) Fed. Cas. No. 2,802; In re Rouse, Hazard & Co. (1899) 91 Fed. 96, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234.

Proceedings for review do not operate to transfer to the appellate court the entire bankruptcy proceeding, to be continued there as in a court of first instance. The proceeding is not a removal of the case to the appellate court, and the statute confers no power to execute the decrees of the district court, or to assume primary exercise of the jurisdiction conferred on the latter as a court of bankruptcy. In re Bininger (C. C. 1870) Fed. Cas. No. 1,418.

8½. —— Construction of rules of court.—Under rule 38 of the Circuit Court of Appeals for the Second Circuit (set forth ante, vol. 2, p. 1353) which provides that petitions to review orders in bankruptcy under the provision of subd. b of this section Bankr. Act "must be filed and served within 10 days after the entry of the order sought to be reviewed, and a transcript of the record * * * filed and the cause docketed within 30 days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time, * * * the order of enlargement to be made and filed with the clerk of this court before the times hereby limited for filing the petition and record, respectively," stipulations by the parties cannot take the place of the discretionary order of enlargement by the bankruptcy court, made and filed within the time required by the rule, nor, except under unusual circumstances, will a nunc pro tunc order of said court, made after the time limited has expired, be effective. In re Brown (1909) 174 Fed. 339, 98 C. C. A. 211; In re Light (1909) 174 Fed. 341, 98 C. C. A. 213. Under such rule petition to review not served and filed until 11 days after entry of the order, will be dismissed. In re Tanenhaus (1914) 211 Fed. 971, 128 C. C. A. 469. Under such rule where the District Judge on October 30th fixed the allowance to the trustee's attorney, and on December 3d a creditor obtained an order to show cause why the allowance should not be reduced, which the District Judge denied, a petition to revise subsequently filed was too late, as it should have been taken within 10 days after the original order was entered, and could not be extended by a motion to resettle. In re John M. Linck Const. Co. (1915) 225 Fed. 488, 140 C. A. 18.

Circuit Court of Appeals Rule subd. 2 (set forth ante, vol. 2, pp. 13 1352) relating to petitions to sup intend and revise and providing t petitioner shall cause a certified tr script of the record and proceedings the bankruptcy court of the matter be reviewed to be filed in the cle office of the Circuit Court of Appe within 30 days from the date of filing of such petition, contemplates certification of the record and p ceedings by the clerk of the bankrup court, and not a transcript certified the referee. Cook Inlet Coal Fi Co. v. Caldwell (1906) 147 Fed. 4 78 C. C. A. 17.

Under rule 39 of the Circuit Cou of Appeals (set forth ante, vol. 2, 1354) which provides that the respo to a petition to revise, under subd. b this section shall be filed at least days before the day set for the he ing, the failure of the defendant to ny allegations of fact in such petit will be taken as an admission that t are true. In re Frank (1910) 182 F 794, 105 C. C. A. 226.

9. Appellate and revisory jurisdict contrasted.—Several of the circ courts of appeals have held that two grants of appellate jurisdiction those courts contained in the bankru cy act—that which gives them autho to review by appeal a controversy, that which gives them authority to s erintend and revise in matter of the proceedings of the several infe courts of bankruptcy—are not exclus of each other, but are concurrent cumulative grants, the former allow a review of both questions of law questions of fact, and the latter be restricted to the review of matters law only, and that consequently an grieved party often has, and may ex cise, a choice of remedy as betw these two methods of bringing his c tention before the appellate court. re McKenzie (1905) 142 Fed. 383, C. C. A. 483, 15 Am. Bankr. Rep. 6 In re Lee (1910) 182 Fed. 579, C. C. A. 117, 25 Am. Bankr. Rep. 4 In re Holmes (1905) 142 Fed. 391, C. C. A. 491, 15 Am. Bankr. Rep. 6 Dodge v. Norlin (1904) 133 Fed. 3 66 C. C. A. 425, 13 Am. Bankr. R 176.

The circuit court of appeals sho not decline to take jurisdiction of petition for revision, notwithstandi the fact that the controversy is which ought to have been brought by appeal, where no objection to method of seeking a review is prese ed by the parties, and where only qu tions of law are presented for its c sideration. In re Endlar (1911) 1 Fed. 763, 113 C. C. A. 48. And Samson v. Blake (C. C. 1873) 6 N. R. 401, Fed. Cas. No. 12,284.

. party who has made a mistake in ›ealing from an order which is not ›ealable may be permitted, in lieu of appeal, to file a petition for revi-n. In re Abraham (1899) 93 Fed. , 35 C. C. A. 592, 2 Am. Bankr. ›. 266.

Vhere a party has duly taken an ap-l from an order in bankruptcy, ch is not appealable, the appellate rt need not dismiss the appeal and the party to the necessity of com-ncing anew with a petition for revi-n, but may simply treat the appeal f it were a petition for revision, and ceed to decide the controversy, pro-ed that questions of fact are not in-ved. Chesapeake Shoe Co. v. Seld-(1903) 122 Fed. 593, 58 C. C. A. , 10 Am. Bankr. Rep. 466; Gaudette Graham (1908) 164 Fed. 311, 90 C. A. 243; In re Williams' Estate 07) 156 Fed. 934, 84 C. C. A. 434, Am. Bankr. Rep. 389; In re Abra-n (1899) 93 Fed. 767, 35 C. C. A. , 2 Am. Bankr. Rep. 266. But this rse cannot be taken where the ques-s presented for review all involve ters of fact. In re Whitener (1900) Fed. 180, 44 C. C. A. 434, 5 Am. kr. Rep. 198. A writ of error ch aims to correct only errors of arising on the common-law or ninal law side of a court of bank-tcy may be treated as a petition to se, and especially in contempt cas-where a liberal practice should be pted. Freed v. Central Trust Co. Illinois (C. C. A. 1914) 215 Fed. .

he circuit court of appeals, having n an appeal and a petition before it, dismiss the one which it deems roper and retain and adjudicate up-the other, or may retain both pro-dings and hear both and grant re-upon either or both, according to view of the justice and necessity of case. In re Worcester County 00) 102 Fed. 808, 42 C. C. A. 637, Am. Bankr. Rep. 496; Fisher v. hman (1900) 103 Fed. 860, 43 C. C. 381, 51 L. R. A. 292, 4 Am. Bankr. ›. 646; Nauman Co. v. Bradshaw 12) 193 Fed. 350, 113 C. C. A. 274, Am. Bankr. Rep. 565; Hendricks v. bster (1908) 159 Fed. 927, 87 C. A. 107, 20 Am. Bankr. Rep. 112; avelle v. Washington Trust Co. (C. A. 1915) 226 Fed. 400.

n numerous cases it has been held t the right of appeal and the right review on petition to revise are mu-lly exclusive; that an appealable gment cannot be brought up on peti-n, and a question properly subject to reviewed on petition cannot be made subject of an appeal; that an ap-l erroneously brought cannot be rd and determined as if it were a ition, and vice versa; and conse-ently, that a party who has mistaken remedy must be dismissed and put the institution of a new proceeding in the proper form. In re Mueller (1905) 135 Fed. 711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256; Brady v. Bernard (1909) 170 Fed. 576, 95 C. C. A. 656, 22 Am. Bankr. Rep. 342; Dickas v. Barnes (1905) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566; In re Kuffler (1903) 127 Fed. 125, 61 C. C. A. 259, 11 Am. Bankr. Rep. 469; First Nat. Bank v. State Nat. Bank (1904) 131 Fed. 430, 65 C. C. A. 414, 12 Am. Bankr. Rep. 440; In re Friend (1905) 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 595; Salsburg v. Blackford (1913) 204 Fed. 438, 122 C. C. A. 624, 29 Am. Bankr. Rep. 320; In re Martin (1912) 201 Fed. 31, 119 C. C. A. 363, 29 Am. Bankr. Rep. 935; Kirsner v. Taliaferro (1912) 202 Fed. 51, 120 C. C. A. 305, 29 Am. Bankr. Rep. 832; Courtney v. Shea (1914) 225 Fed. 358, 140 C. C. A. 382; Bothwell v. Fitzgerald (1915) 219 Fed. 408, 135 C. C. A. 212.

The revisory proceeding authorized by this section is not intended as a substitute for an appeal in cases where an appeal would lie under Bankruptcy Act, § 25a. Matter of Loving (1912) 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

10. Controversies and proceedings in bankruptcy distinguished.—The term "proceedings in bankruptcy" includes all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming a composition. Morehouse v. Pacific Hardware & Steel Co. (C. C. A. 1910) 177 Fed. 337, 24 Am. Bankr. Rep. 178.

Proceedings in bankruptcy are confined to questions arising between the bankrupt and his creditors, and are the subject of administrative orders and judgments of the district court, from the petition for adjudication to the discharge, including intermediate administrative steps, and such controversies as arise between the parties to the bankruptcy proceedings as are involved in the allowing of claims and fixing their priorities, sales, allowances, and other matters which are disposed of summarily. Thompson v. Mauzy (1909) 174 Fed. 611, 98 C. C. A. 457, 23 Am. Bankr. Rep. 489.

The "controversies" spoken of in the act are distinct and separable issues, raised between intervening parties, involving substantial rights, and such as might arise at common law or in equity, and of which the circuit courts of appeals would have had jurisdiction if those controversies had arisen in the federal courts in other cases outside of bankruptcy proceedings. Burleigh v.

Foreman (1903) 125 Fed. 217, 60 C. C. A. 109, 11 Am. Bankr. Rep. 74; Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176. They are those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors. Barnes v. Pampel (1912) 192 Fed. 525, 113 C. C. A. 81, 27 Am. Bankr. Rep. 192.

"Proceedings in bankruptcy," as used in sections 23–25, held to cover questions between the alleged bankrupt or the receiver or trustee on the one hand and the general creditors, arising in the settlement of the estate, while "controversies at law and in equity arising in the course of bankruptcy proceedings" involve questions between the receiver or trustee and adverse claimants concerning property, to be litigated in suits. In re Breyer Printing Co. (C. C. A. 1914) 216 Fed. 878.

A dispute between the assignor of a bankrupt's accounts and his trustee in bankruptcy over proceeds of assigned accounts collected by the trustee on a petition filed in bankruptcy proceedings is a controversy arising in bankruptcy. Greey v. Dockendorff (1913) 34 S. Ct. 166, 231 U. S. 513, 58 L. Ed. 339, affirming decree In re Schwab-Kepner Co. (1913) 203 Fed. 475, 121 C. C. A. 597.

A question raised by the claimant of property adverse to a trustee in bankruptcy, whether the bankruptcy court had jurisdiction to determine that claim is a question of a bankruptcy proceeding, reviewable by petition to revise, under subdivision "b" of this section. Gibbons v. Goldsmith (1915) 222 Fed. 826, 138 C. C. A. 252.

An order of the court of bankruptcy requiring the bankrupt to assign and turn over to his trustee certain life insurance policies as assets of the estate is a "proceeding in bankruptcy" and reviewable by petition for revision. In re Mertens (1905) 142 Fed. 445, 73 C. C. A. 561, 15 Am. Bankr. Rep. 701. And so is an order requiring the members of a bankrupt partnership to schedule and surrender their individual property. Dickas v. Barnes (1905) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566. And an order, made in the exercise of the summary jurisdiction, directing the turning over of money or property by any third person to a trustee in bankruptcy. Courtney v. Shea (1915) 225 Fed. 358, 140 C. C. A. 382; In re Rose Shoe Mfg. Co. (1909) 168 Fed. 39, 21 Am. Bankr. Rep. 725; O'Dell v. Boyden (1906) 150 Fed. 731, 80 C. C. A. 397, 17 Am. Bankr. Rep. 751. Such an order is a proceeding in bankruptcy when it requires the surrender of property by one to whom the bankrupt had previously made a general assignm for the benefit of his creditors. In Farrell (1910) 176 Fed. 505, 100 C. A. 63, 23 Am. Bankr. Rep. 826; In Abraham (1899) 93 Fed. 767, 35 C. A. 592, 2 Am. Bankr. Rep. 266. O receiver of a state court similarly possession of assets of the estate. re Hecox (1908) 164 Fed. 823, 21 A Bankr. Rep. 314. And an order quiring a creditor of the bankrupt return property which was mistake surrendered to him by a receiver bankruptcy is a proceeding in ba ruptcy. In re Strobel (C. C. A. 190 160 Fed. 916, 20 Am. Bankr. Rep. And so is an order requiring s creditor to pay to the trustee amount of an unlawful preference. re First Nat. Bank (1907) 155 F 100, 84 C. C. A. 16, 18 Am. Ban Rep. 766. And an order relating to sale of property of the estate in ba ruptcy. Schuler v. Hassinger (191 177 Fed. 119, 100 C. C. A. 539; Fi Nat. Bank v. Chicago Title & Trust (1905) 198 U. S. 280, 25 Sup. Ct. 6 49 L. Ed. 1051, 14 Am. Bankr. R 102; In re McMahon (C. C. A. 190 147 Fed. 684, 17 Am. Bankr. Rep. 5 But a controversy between a trus and a claimant of property who s rendered the same for sale is revie able by appeal, and not by petition revise. Scandinavian-American Ba v. Sabin (C. C. A. 1915) 227 Fed. 5

A decision of the court of bankrup concerning the validity of a mortg on his property made by the bankr is a proceeding in bankruptcy. M gan v. First Nat. Bank (1906) 145 F 466, 76 C. C. A. 236, 16 Am. Ban Rep. 639; Ritchie County Bank McFarland (1910) 183 Fed. 715, 1 C. C. A. 153, 24 Am. Bankr. Rep. 8 And so of an order determining right to participate in the proceeds admittedly valid securities. Snow Dalton (1913) 203 Fed. 843, 29 A Bankr. Rep. 240. And so is an or allowing or rejecting the claim of creditor offered for proof in the ba ruptcy proceedings. Tefft v. Muns (1911) 222 U. S. 114, 32 Sup. Ct. 56 L. Ed. 118. And where petitio filed a claim against a bankrupt, also claimed a lien on property h by the trustee, the issue of petitione right to a lien was a controversy a ing in the bankruptcy proceedings, viewable by petition to superintend revise, and not by appeal. Hutt Sash & Door Co. v. Stitt (1914) 2 Fed. 1, 133 C. C. A. 641. A cl against a bankrupt and an applicati for the establishment of a mechani lien held a bankruptcy proceeding, not a controversy arising in a ba ruptcy proceeding; and hence an or denying the application was reviewa by appeal, and not by petition to revi In re Streator Metal Stamping (1913) 205 Fed. 280, 123 C. C. A. 4

A decision on objections by credit

the accounts rendered by the trus- is a proceeding in bankruptcy, and t a "controversy." In re Moore 09) 166 Fed. 689, 92 C. C. A. 285, Am. Bankr. Rep. 651. And so is an ler dismissing a petition for the rev- ation of the bankrupt's discharge. ompson v. Mauzy (1909) 174 Fed. 1, 98 C. C. A. 457, 23 Am. Bankr. p. 489.

A separate and independent litiga- n, whether instituted by petition in bankruptcy court in the nature of bill in equity or by intervention or a plenary suit at law, concerning perty alleged to belong to the estate bankruptcy, and maintained between trustee in bankruptcy, as repre- ting the estate, and an adverse imant representing some right or erest adverse to the bankrupt or general creditors, is a "controversy sing in bankruptcy proceedings." wit v. Berlin Machine Works (1904) 4 U. S. 296, 24 Sup. Ct. 690, 48 L. . 986, 11 Am. Bankr. Rep. 709; der v. Arts (1909) 213 U. S. 223, Sup. Ct. 436, 53 L. Ed. 772, 22 Am. nkr. Rep. 1; Tefft v. Munsuri (1911) 2 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 3, 27 Am. Bankr. Rep. 338; Barnes Pampel (1912) 192 Fed. 525, 113 C. A. 81, 27 Am. Bankr. Rep. 192; roshow v. Ott (1905) 134 Fed. 740, C. C. A. 644, 14 Am. Bankr. Rep. ; Hinds v. Moore (1905) 134 Fed. 1, 67 C. C. A. 149, 14 Am. Bankr. p. 1; Mound Mines Co. v. Hawthorn 09) 173 Fed. 882, 97 C. C. A. 394, Am. Bankr. Rep. 242; Loeser v. vings Deposit Bank & Trust Co. 908) 163 Fed. 212, 89 C. C. A. 642, Am. Bankr. Rep. 845; Knapp v. lwaukee Trust Co. (1908) 162 Fed. 5, 89 C. C. A. 467, 20 Am. Bankr. p. 671; Security Warehousing Co. Hand (1906) 143 Fed. 32, 74 C. A. 186, 16 Am. Bankr. Rep. 49; dge v. Norlin (1904) 133 Fed. 363, C. C. A. 425, 13 Am. Bankr. Rep. 6; John Deere Plow Co. v. Mc- vid (1905) 137 Fed. 802, 70 C. C. A. 2, 14 Am. Bankr. Rep. 653; In re rst Nat. Bank (1905) 135 Fed. 62, C. C. A. 536, 14 Am. Bankr. Rep. 0; Walter Scott & Co. v. Wilson 902) 115 Fed. 284, 53 C. C. A. 76, Am. Bankr. Rep. 349; Warren v. nth Nat. Bank (C. C. 1871) Fed. s. No. 17,201.

Wherever a third person claims the operty held by the trustee in bank- ptcy, he institutes a controversy in a nkruptcy proceeding in which the dgment is appealable. Gibbons v. oldsmith (1915) 222 Fed. 826, 138 C. A. 252. A proceeding by an ad- rse claimant to recover property in ossession of a trustee is a "contro- rsy arising in a bankruptcy proceed- g," and the decree therein is ap- alable at any time within six months. re Gold (C. C. A. 1913) 210 Fed. 410. A controversy in bankruptcy, appealable under Judicial Code, § 128, ante, § 1120, to the circuit court of appeals, and thence to the federal supreme court, was not initiated by an attempted intervention in a summary proceeding in a court of ancillary jurisdiction to restore certain property of bankrupts in the custody of those having no right to it, to the bankruptcy court where the interveners claim under assignments made after the filing of the petition in bankruptcy. Lazarus, Michel & Lazarus v. Prentice (1914) 34 S. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305, dismissing appeal Musica v. Prentice (1914) 211 Fed. 326, 127 C. C. A. 575.

Where a trustee instituted proceedings to set aside certain conveyances of real estate alleged to have been made in fraud of the bankrupt's creditors, and also to vacate the lien of a mortgage thereon as against the mortgagee, who was not a party to the bankruptcy proceedings and not a creditor of the estate, but a stranger thereto, asserting rights paramount to and independent of those of the estate, the proceeding was held to be a "controversy," as distinguished from a "proceeding in bankruptcy." Barnes v. Pampel (1912) 192 Fed. 525, 113 C. C. A. 81, 27 Am. Bankr. Rep. 192. And see McCarty v. Coffin (C. C. A. 1907) 150 Fed. 307, 18 Am. Bankr. Rep. 148. And so of a petition by a trustee to have certain adverse claims and liens on property belonging to the estate declared void, and for a sale of the property free and clear of the same. Thomas v. Woods (1909) 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132. And of a decision that a chattel mortgage on the property of the bankrupt is voidable by the trustee, and that the mortgagee has no lien and no preference in payment out of its proceeds. Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176. So, where proceedings are instituted by the trustee to compel the payment to him of the proceeds of a sale of the bankrupt's assets, this is a controversy arising in bankruptcy proceedings. Mason v. Wolkowich (1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709. And the same is true of a proceeding on a petition filed by an adverse claimant to recover property from a trustee in bankruptcy. Smith v. Means (1906) 148 Fed. 89, 78 C. C. A. 10, 17 Am. Bankr. Rep. 433; Liddon & Bro. v. Smith (1905) 135 Fed. 43, 67 C. C. A. 517, 14 Am. Bankr. Rep. 204. So also is a dispute between a receiver in bankruptcy and an outside person as to whether a contract was made between them for the sale and purchase of property of the estate, brought before the bankruptcy court for determination. In re J.

Jungmann, Inc. (1911) 186 Fed. 302, 108 C. C. A. 380, 26 Am. Bankr. Rep. 401. And an order of the court of bankruptcy requiring the bankrupt's attorney to account for a payment received in contemplation of bankruptcy. In re Raphael (C. C. A. 1911) 192 Fed. 874. Petition of a bankrupt's landlord to be paid rent in arrear out of the proceeds of property seized, in which the trustee claimed a superior title to the chattels, held not a proceeding in bankruptcy, reviewable by petition to review, but a controversy arising in the course of bankruptcy proceedings, reviewable by appeal. In re Breyer Printing Co. (C. C. A. 1914) 216 Fed. 878; In re Orr, Id. 883.

An order dissolving a temporary injunction restraining proceedings in the state court against the bankrupt is a controversy arising under bankruptcy proceedings, reviewable on appeal, and not by a petition for revision, under section 24b. Bothwell v. Fitzgerald (1915) 219 Fed. 408, 135 C. C. A. 212.

And an order to show cause why petitioners should not be punished for contempt for violating an injunction of the court of bankruptcy in a collateral matter is a controversy and not a proceeding in bankruptcy. Morehouse v. Pacific Hardware & Steel Co. (1910) 177 Fed. 337, 100 C. C. A. 647, 24 Am. Bankr. Rep. 178.

Where a claim to personal property sold by the claimant to the bankrupt under a conditional sale was denied, because not filed within a year after the adjudication in bankruptcy, and also because the state law regulating such sales had not been complied with, the decision of the district court may be reviewed on appeal. Nauman Co. v. Bradshaw (C. C. A. 1912) 193 Fed. 350, 27 Am. Bankr. Rep. 565.

An action on the bond of a trustee in bankruptcy is a plenary action, and the judgment therein is not reviewable by petition to revise. U. S. v. Ruggles (1915) 221 Fed. 256, 137 C. C. A. 109.

11. Reviewing discretionary action of district court.—The power given circuit courts of appeals to superintend and revise in matter of law the proceedings of inferior courts of bankruptcy, does not authorize the revising court to exercise the discretion vested in the courts of bankruptcy, nor in ordinary cases to revise the exercise of such discretion. In re J. B. Judkins Co. (1913) 205 Fed. 892, 124 C. C. A. 205; Blackstone v. Everybody's Store (C. C. A. 1913) 207 Fed. 752, 30 Am. Bankr. Rep. 497. Thus, rejection of charges against a receiver in bankruptcy for expenses incurred under receiver's orders or contracts for the preservation or care of the bankrupt's estate is within the discretion of the bankruptcy court, and its action thereon will not be reviewed on appeal. O'Brien v. Ely (C. C. A. 1912) 195 Fed. 64, 28 A Bankr. Rep, 247.

The circuit court of appeals will r attempt to control the discretion of t district court in the matter of appoi ing and removing referees. Birch Steele (1908) 165 Fed. 577, 91 C. A. 415, 21 Am. Bankr. Rep. 539. N in the approval by the district co of the trustee in bankruptcy selec by the creditors. In re Merritt Co Co. (1914) 219 Fed. 555, 135 C. C. 323.

The bankruptcy act provides t suits pending against a bankrupt "n be stayed" for a period of twe months or until the question of his d charge is determined. This invests bankruptcy court with authority, does not impose upon it an invaria duty; and the granting or refusing an order staying a pending suit rests the discretion of the district court, a its action will not be interfered w by the appellate court unless it is pl that such discretion has been abus In re Lesser (1900) 99 Fed. 913, C. C. A. 177, 3 Am. Bankr. Rep. 7 New River Coal Land Co. v. Ruff Bros. (1908) 165 Fed. 881, 91 C. A. 559, 20 Am. Bankr. Rep. 100; re Guanacevi Tunnel Co. (C. C. 1912) 201 Fed. 316, 29 Am. Ban Rep. 229. The determination of district judge as to whether admin tration of mortgaged stock of merch dise should be left to the state cou which had taken jurisdiction, or brought into bankruptcy, will not reviewed unless his discretion is cle ly abused. Bank of Dillon v. Murc son (1914) 213 Fed. 147, 129 C. C. 499.

In the examination of third pers as witnesses in bankruptcy proceedi and the scrutiny of their books and pers, the court of bankruptcy sho see to it that the examination is c fined to the legitimate objects of s an investigation, that is, the discov of assets of the bankrupt or of grou of opposition to his discharge. But this matter it is invested with a w discretion, and a manifest abuse such discretion must be shown bef the appellate court will interfere. re Horgan (1899) 98 Fed. 414, 39 C. A. 118, 3 Am. Bankr. Rep. 253.

The same rule has been applied review of the action of the court bankruptcy in refusing to permit amendment of a petition in involunt bankruptcy for the purpose of insert additional alleged acts of bankrupt Pittsburgh Laundry Supply Co. v. I perial Laundry Co. (1907) 154 F 662, 83 C. C. A. 486, 18 Am. Ban Rep. 756; Sabin v. Blake-McFall (1915) 223 Fed. 501, 139 C. C. A. And to the action of the court of ba ruptcy in denying to a creditor right to amend his specifications in position to the bankrupt's applicat for discharge. In re Carley (190 117 Fed. 130, 55 C. C. A. 146, 8 A

kr. Rep. 720. And to the dismissal
petition in involuntary bankruptcy
want of prosecution. In re Levi
Klauber (1905) 142 Fed. 962, 74
C. A. 132, 15 Am. Bankr. Rep. 294.
to the refusal of the judge to
ction an arrangement between the
krupt and certain of his creditors
persons who have received prefer-
al transfers. Mulford v. Fourth
eet Nat. Bank (1907) 157 Fed. 897,
C. C. A. 225, 19 Am. Bankr. Rep.
. And the refusal to allow a com-
sion to a broker who had negotiat-
a sale of property of the bankrupt.
d v. South Side Trust Co. (1910)
Fed. 210, 102 C. C. A. 476, 24
. Bankr. Rep. 578. And to the ac-
of the district court in fixing the
e, terms, and conditions of a sale
he bankrupt's property. Schuler v.
ssinger (1910) 177 Fed. 119, 100 C.
A. 539, 24 Am. Bankr. Rep. 184;
re Throckmorton (1912) 196 Fed.
, 116 C. C. A. 348, 28 Am. Bankr.
. 487. And to its action in adopt-
or rejecting the verdict of a jury
ich was taken as advisory only. Oil
ll Supply Co. v. Hall (1904) 128
d. 875, 63 C. C. A. 343, 11 Am.
nkr. Rep. 738.

n a petition to revise an order mak-
certain allowances to a bankrupt's
eiver and his counsel, the record
rely showing receipts and disburse-
nts and that nearly half the assets
re used for expenses of administra-
n, held insufficient to show an abuse
the trial court's discretion. In re
sh-Papworth Grow-Sir (1913) 210
d. 24, 126 C. C. A. 604.

ction of the referee in bankruptcy,
proved by the district court and cir-
t court of appeals in subrogating
stee in bankruptcy to the liens of
gment creditors, will be accepted as
rrect in the absence of proof of
use of discretion. Fallows v. Conti-
ntal & Commercial Trust & Savings
nk (1914) 35 S. Ct. 29, 235 U. S.
0, 59 L. Ed. 238, affirming decree In
Tengwall Co. (1912) 201 Fed. 82,
9 C. C. A. 420.

Where the granting of a discharge to
bankrupt was objected to on the
und that he had fraudulently con-
led property, and there was rea-
able ground for the action of the
trict court in discrediting his testi-
ny given in explanation, the exercise
of its discretion will not be reviewed. Seigel v. Cartel (1908) 164 Fed. 691, 21 Am. Bankr. Rep. 140.

A mere order of the district court, allowing the trustee to amend his specifications of objection to discharge of bankrupt, has not the finality necessary for review. In re Pechin (C. C. A. 1915) 227 Fed. 853.

12. Jurisdiction of territorial supreme courts.—Under this and the following section, the supreme courts of the territories have appellate jurisdiction to review judgments making or refusing an adjudication of bankruptcy, judgments granting or refusing a discharge, and judgments allowing or rejecting a debt or claim of $500 or over. In re McCasland (1906) 16 Okl. 499, 85 Pac. 1118. An appeal does not lie from a judgment allowing or rejecting a debt or claim of less than five hundred dollars. Ex parte Stumpff (1900) 9 Okl. 639, 60 Pac. 96.

The supreme courts of the territories have no jurisdiction to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy," but petitions for such revision must be brought in the proper circuit court of appeals. Ex parte Stumpff (1900) 9 Okl. 639, 60 Pac. 96; In re American Copper Co. (1907) 11 Ariz. 36, 89 Pac. 516.

The summary revisory power of the circuit court of appeals for the eighth circuit under this provision of the bankruptcy act, extended to questions of law arising in the progress of bankruptcy proceedings in a district court of the territory of Oklahoma, which was assigned to the eighth circuit, although jurisdiction by appeal or writ of error was vested in the territorial supreme court. Plymouth Cordage Co. v. Smith (1904) 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992.

The Circuit Court of Appeals of the Eighth Circuit has no revisory jurisdiction over the proceedings of the courts of bankruptcy in the Indian Territory, the court of appeals for the territory alone having appellate jurisdiction over such courts since its creation three years before the enactment of the bankruptcy law. In re Blair (1901) 106 Fed. 662, 45 C. C. A. 530, 5 Am. Bankr. Rep. 793; In re Crawford (1907) 152 Fed. 169, 81 C. C. A. 419, 18 Am. Bankr. Rep. 258.

9609. (Act July 1, 1898, c. 541, § 25.) Appeals and writs of error.

Appeals and Writs of Error.—a That appeals, as in equity cases, ay be taken in bankruptcy proceedings from the courts of bankptcy to the circuit court of appeals of the United States, and the supreme court of the Territories, in the following cases, wit, (1) from a judgment adjudging or refusing to adjudge the efendant a bankrupt; (2) from a judgment granting or denying a ischarge; and (3) from a judgment allowing or rejecting a debt or aim of five hundred dollars or over. Such appeal shall be taken ithin ten days after the judgment appealed from has been rendered,

and may be heard and determined by the appellate court in term or cation, as the case may be.

b From any final decision of a court of appeals, allowing or rej ing a claim under this Act, an appeal may be had under such r and within such time as may be prescribed by the Supreme Cour the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two th sand dollars, and the question involved is one which might h been taken on appeal or writ of error from the highest court State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United St shall certify that in his opinion the determination of the questio questions involved in the allowance or rejection of such claim is es tial to a uniform construction of this Act throughout the Un States.

c Trustees shall not be required to give bond when they take peals or sue out writs of error.

d Controversies may be certified to the Supreme Court of United States from other courts of the United States, and the for court may exercise jurisdiction thereof and issue writs of certio pursuant to the provisions of the United States laws now in force such as may be hereafter enacted. (30 Stat. 553.)

See notes to preceding section.

Notes of Decisions

1. Appeal to United States supreme court.
2. Appeals to circuit court of appeals.
3. —— Adjudication of bankruptcy.
4. —— Decision on discharge or composition.
5. —— Allowance or rejection of claims.
6. Time for taking appeal.
7. Time for filing petition for revision.
8. Parties to appeal or review.
9. —— From order allowing or rejecting claim.
10. —— On petition for revision.
11. Practice on appeal.
12. Practice on petition for revision.
13. Assignment of errors and bill of exceptions.
14. Record on appeal.
15. —— On petition for revision.
16. —— Bringing up evidence.
17. Scope of review—Law and facts.
18. —— Questions not raised below.
19. Review of evidence and findings.
20. Effect of appeal and stay of proceedings.
21. Determination on appeal.

1. Appeal to United States supreme court.—Under the express provisions of this section, an appeal lies to the supreme court of the United States from an order allowing or rejecting a claim against the estate of a bankrupt, where the amount involved is more than $2,000. Lumpkin v. Foley (1913) 204 Fed. 372, 122 C. C. A. 542. This provision excludes an appeal to the supreme court from a decision of a circuit court of appeals allowing or rejecting a claim save in the specified cases. Hutchinson v. Otis (1902) 123 Fed. 14, 59 C. C. A. 94, 10 Am. Bankr. Rep. 275. And see Wynkoop, Hallenbeck, Crawford Co. v. Gaines (1913) 227 U. S. 4, 33 Sup. Ct. 214, 57 L. Ed. 391, 29 Am. Bankr. Rep. 369.

As to the allowance of an appeal on a certificate of a justice of the supr court, that the determination of question involved is essential to a form construction of the bankru act, see Conboy v. First Nat. B (1906) 203 U. S. 141, 27 Sup. Ct. 51 L. Ed. 128, 16 Am. Bankr. 773, where an appeal was allowe the certificate of a justice of the preme court, the decision in the c below (In re Philip Semmer Glass [1905] 135 Fed. 77, 67 C. C. A. 551 Am. Bankr. Rep. 25) turning o question of the right of set-off in a where a national bank was indebte a bankrupt on a deposit, and he indebted to the bank as indorser note, which liability, however, did become absolute until after the f of the bankrupt's petition. But the peal in this case was dismissed bec not taken in time.

An appeal involving a question w would have sustained a writ of e to the highest court of a state a where, in determining the validity lien asserted to secure a claim ag the bankrupt's estate, a construc of the statute is directly involved, party contending for an interpreta which would defeat the lien, and other for a construction which w sustain it. Coder v. Arts (1909) U. S. 223, 29 Sup. Ct. 436, 53 L. 772, 22 Am. Bankr. Rep. 1. A de of a circuit court of appeals affir a decree of a district court dismis the petition of a trustee in bankru to prevent the enforcement of a in a state court for labor and mate is appealable to the federal supr court. Hobbs v. Head & Dowst (1914) 34 S. Ct. 253, 231 U. S.

L. Ed. 440, affirming decrees (1911) Fed. 409, 106 C. C. A. 519, and 11) 185 Fed. 1006, 107 C. C. A. 663. assertion of a right of set-off in a ceeding in bankruptcy presents a n of federal right which will sus- an appeal from a decision of the uit court of appeals, rejecting the n, to the supreme court. Western & Timber Co. v. Brown (1905) 196 S. 502, 25 Sup. Ct. 339, 49 L. Ed. 13 Am. Bankr. Rep. 447. But the e denial by a trustee in bankruptcy claim presented against the estate a creditor is not the assertion by trustee of a right under the act of gress, in such sense as to give him right to appeal from a decision of circuit court of appeals in favor of creditor. Chapman v. Bowen 07) 207 U. S. 89, 28 Sup. Ct. 32, L. Ed. 116, 18 Am. Bankr. Rep. 844. decision of the circuit court of ap- ls that a creditor is entitled to have claim allowed against the bankrupt te of an individual partner, as well against the estate of the bankrupt tnership, which proceeds upon a l-settled principle of general law, ad enough to sustain it without ref- nce to the bankruptcy act, is not ewable by the supreme court. pman v. Bowen (1907) 207 U. S. 28 Sup. Ct. 32, 52 L. Ed. 116, 18 Bankr. Rep. 844.

he question whether an order of the kruptcy court from which no appeal taken, postponing a part of the m of an officer of a bankrupt cor- ation to the claim of an intervener, correctly interpreted below, is not concerning the allowance or rejec- of claim, but is a matter which supreme court has no authority to iew. Wynkoop, Hallenbeck, Craw- d Co. v. Gaines (1913) 33 S. Ct. 227 U. S. 4, 57 L. Ed. 391.

Appeals to circuit court of ap- ls.—In the three particular cases cified in this section, appeal is the per and only method of obtaining a iew of the judgment of the court of kruptcy. Cook Inlet Coal Fields v. Caldwell (1906) 147 Fed. 475, C. C. A. 17, 17 Am. Bankr. Rep. As regards proceedings in bank- tcy, that is, the successive steps in ordinary administration of an es- e in bankruptcy, as distinguished m "controversies arising in bank- tcy proceedings," the specification these three classes of appealable gments implies an exclusion of all ers, and in matters of this kind no eal lies from any order or decree the court of bankruptcy unless it es within one of the specified class- Bank of Clinton v. Kondert (1908) Fed. 703, 86 C. C. A. 571, 20 Am. kr. Rep. 178; In re Whitener 00) 105 Fed. 180, 44 C. C. A. 434, m. Bankr. Rep. 198.

— Adjudication of bankruptcy. n adjudication on a petition in involuntary bankruptcy without the intervention of a jury can be reviewed only on appeal, and not on a petition for revision. In re Good (1900) 99 Fed. 389, 39 C. C. A. 581, 3 Am. Bankr. Rep. 605; Cook Inlet Coal Fields Co. v. Caldwell (1906) 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 136. When an appeal is taken from such an adjudication, it is an "appeal as in equity cases," under the terms of the statute, and both the facts and the law are brought before the reviewing court. In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128.

An order of the district court dismissing a petition in involuntary bankruptcy, on the ground that it does not state facts sufficient to constitute an act of bankruptcy, is a judgment "refusing to adjudge the defendant a bankrupt," and is therefore appealable under the statute. Stevens v. Nave-McCord Mercantile Co. (1906) 150 Fed. 71, 80 C. C. A. 25, 17 Am. Bankr. Rep. 609. But no appeal lies from an order refusing to vacate and set aside an adjudication of bankruptcy. B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co. (1913) 206 Fed. 885, 124 C. C. A. 545, 30 Am. Bankr. Rep. 424; In re Ives (1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692. And an order which simply adjudges an individual to be a member of a bankrupt partnership and to be liable for its debts is not appealable under this section. Francis v. McNeal (1909) 170 Fed. 445, 95 C. C. A. 168, 22 Am. Bankr. Rep. 337.

4. **— Decision on discharge or composition.**—An order simply affirming the report of a special master on a contested application for a discharge, is not a "judgment granting or denying a discharge," and therefore is not appealable. Ragan Malone & Co. v. Cotton & Preston (1912) 195 Fed. 69, 118 C. C. A. 640, 28 Am. Bankr. Rep. 246. Under the act of 1867, an order granting a discharge could not be reviewed on writ of error, where only questions of fact were presented, but could be reviewed under the superintending and revisory jurisdiction of the circuit court. Ruddick v. Billings (C. C. 1868) 3 N. B. R. 61, Fed. Cas. No. 12,110.

An order of a court of bankruptcy dismissing an application for discharge on the ground of want of prosecution is, in substance and effect, one denying a discharge and is therefore appealable. In re Kuffler (1903) 127 Fed. 125, 61 C. C. A. 259, 11 Am. Bankr. Rep. 469. A denial of a motion to dismiss an application of a bankrupt for a discharge on undisputed facts presents a question of law reviewable by petition to revise. Lindeke v. Converse (1912) 198 Fed. 618, 117 C. C. A. 322, 28 Am. Bankr. Rep. 596.

But where a creditor applies for an order to set aside the discharge of the

bankrupt, and it is denied on the ground that, if all the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge, this action of the court is more properly reviewable on a petition for revision. In re Louisville Nat. Banking Co. (1908) 158 Fed. 403, 85 C. C. A. 513. See Comercial Bank of Manchester v. Buckner (1857) 20 How. 108, 15 L. Ed. 862.

Where a bankrupt's application for discharge was dismissed for a technical error, but no order was entered on the judge's minutes, and new proceedings were instituted, in which the former denial was pleaded as res judicata, it was held that the bankrupt was still entitled to have an order entered on the prior decision and to appeal therefrom. In re Elkind (1909) 175 Fed. 64, 99 C. C. A. 86, 23 Am. Bankr. 166.

Review of order overruling objections to bankrupt's discharge will be denied until the order is amended to show whether the objections were overruled on the merits, or under the impression that a proposed compromise had made them immaterial. In re Doyle (C. C. A. 1915) 220 Fed. 434.

An order denying an application for discharge will be reversed on appeal where clearly inconsistent with the testimony in the case and the referee's report overruling the specifications of objection. Boyd v. Arnold (1906) 149 Fed. 187, 79 C. C. A. 135, 17 Am. Bankr. Rep. 839.

A judgment confirming a composition is in effect a judgment granting a discharge, and is therefore reviewable on appeal under this provision of the act. In re Bay State Milling Co. (1915) 223 Fed. 778, 139 C. C. A. 598; In re Friend (1905) 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 595. An appeal lies from an order of the district court refusing to confirm a composition tendered by the debtor and accepted by the required number of creditors. U. S. v. Hammond (1900) 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736, reversing In re Adler (D. C. 1900) 103 Fed. 444, 4 Am. Bankr. Rep. 583. But see In re McVoy Hardware Co. (C. C. A. 1912) 200 Fed. 949, 29 Am. Bankr. Rep. 322.

5. —— Allowance or rejection of claims.—A judgment of the court of bankruptcy allowing or rejecting a debt or claim of a creditor against the estate of the bankrupt may be reviewed on appeal to the circuit court of appeals, provided the sum in controversy amounts to $500. Southern Cotton Oil Co. v. Elliotte (1914) 218 Fed. 567, 134 C. C. A. 295; Sterne v. Merchants' Nat. Bank (C. C. A. 1914) 216 Fed. 862; Duff v. Carrier (1893) 55 Fed. 433, 5 C. C. A. 177.

In this case the remedy by appeal is exclusive, and the contested matter cannot be brought before the reviewing court on petition for the exercise of its power to superintend and revise matters of law. Pindel v. Holg (1915) 221 Fed. 342, 137 C. C. A. 1 In re Lane Lumber Co. (1914) Fed. 546, 133 C. C. A. 398; Adam Deckers Valley Lumber Co. (1912) Fed. 48, 120 C. C. A. 302; In re D son (1901) 111 Fed. 726, 49 C. C. 574, 55 L. R. A. 349, 7 Am. Ba Rep. 186; Cooper v. Miller (19 203 Fed. 383, 121 C. C. A. 567, Am. Bankr. Rep. 194; Matter of I ing (1912) 224 U. S. 183, 32 Sup. 446, 56 L. Ed. 725, 27 Am. Bankr. R 852; First Nat. Bank v. Cooper (18 20 Wall. 171, 22 L. Ed. 273; In Place (C. C. 1871) 4 N. B. R. 5 Fed. Cas. No. 11,200. But the de of an application by an individual cr itor of a bankrupt member of a f for an allowance of interest out of individual estate, subsequent to allowance of his claim, is reviewable original petition to revise. In re Ch dler (1911) 184 Fed. 887, 107 C. A. 209, 25 Am. Bankr. Rep. 865. Wh an order involved both rejection allowance of claims each for more t $500, and a controversy of fact as t preference, it was reviewable by peal, and not by petition to rev Cooper v. Miller (1913) 203 Fed. 3 121 C. C. A. 567.

Where there is no dispute as to validity or amount of the claim, only as to whether or not it is enti to priority of payment out of the sets of the estate, the decision may reviewed on petition for revision, stead of on appeal. In re Rouse, H ard & Co. (1899) 91 Fed. 96, 33 C. A. 356, 1 Am. Bankr. Rep. 234; re Worcester County (1900) 102 F 808, 42 C. C. A. 637, 4 Am. Ba Rep. 496. But although the validity the claim as a general claim agai the estate is not denied, still an or of the district court establishing it a lien against the estate is appeala and is not the proper subject of a view under the revisory power of circuit court of appeals. Matter Loving (1912) 224 U. S. 183, 32 S Ct. 446, 56 L. Ed. 725, 27 Am. Ba Rep. 852; Bernard v. Lea (C. C. 1913) 210 Fed. 583; Home Bank Savings v. Lohm (1915) 223 Fed. 6 139 C. C. A. 179. And a decree rej ing a landlord's claim against the ba rupt, but allowing a lien covering portion of the rent, is reviewable appeal. Courtney v. Fidelity Trust (1914) 219 Fed. 57, 134 C. C. A. 59

If a claim is reduced by the co and allowed for an amount sma than that asserted by the creditor, if a claim made up of various items sifted, and some of the items disall ed and others allowed, it is necessa in order to give a right of appeal, t the matter which will come before appellate court, namely, the amount the reduction or of the partial all ance or rejection, should reach the

ictional sum. Gray v. Grand Forks cantile Co. (1905) 138 Fed. 344, 70 C. A. 634, 14 Am. Bankr. Rep. 780, g Hilton v. Dickinson (1883) 108 . 165, 2 Sup. Ct. 424, 27 L. Ed. 688; s v. Johnson (1884) 110 U. S. 233, ıp. Ct. 640, 28 L. Ed. 128. Where ate filed a claim against a bankrupt oration for the amount of a fran- e tax alleged to be in arrear, and e than $500 of the claim was disal- ed, the state was entitled to appeal. e Cosmopolitan Power Co. (1905) Fed. 858, 70 C. C. A. 388, 14 Am. kr. Rep. 604. Where the allowed n against bankrupt is for $2,500, specific liens as security, appeal to the circuit court of appeals, gh no one of the liens amounts to), and the contest is only as to n. Stuart v. Britton Lumber Co. 5) 227 Fed. 49.

here claims are made for the al- ınce of expenses, costs, and counsel , incurred by the petitioning cred- s in involuntary cases, or by the tee or by creditors who co-operate him in contesting claims and ecuting suits, it is held that an or- of the court of bankruptcy allow- or disapproving such a claim is not judgment allowing or rejecting a or claim," but is an administra- order reviewable only on petition revise. Ohio Valley Bank Co. v. tzer (1907) 153 Fed. 362, 82 C. C. 438, 18 Am. Bankr. Rep. 689; W. Davidson & Co. v. Friedman (1906) Fed. 853, 72 C. C. A. 553, 15 Bankr. Rep. 489. And see Street- . Lowe (1911) 184 Fed. 263, 106 C. A. 405, 25 Am. Bankr. Rep. 774. ıpare In re Curtis (1900) 100 Fed. , 41 C. C. A. 59, 4 Am. Bankr. Rep.

Where a mortgage creditor of a krupt proves his claim as a secured t, including the amount stipulated e paid as an attorney's fee in case foreclosure, and the district court erses the action of the referee in cting the latter item, and orders its wance, this constitutes an appeal- judgment. In re Roche (1900) 101 . 956, 42 C. C. A. 115, 4 Am. Bankr. . 369.

decision of the court of bankrupt- n a contest between the trustee and adverse claimant of property may reviewed on appeal, but not under provision here under consideration, on the ground that it involves a ntroversy arising in a bankruptcy ceeding." See Rode & Horn v. pps (1912) 195 Fed. 414, 115 C. C. 316, 27 Am. Bankr. Rep. 827; Fidel- Trust Co. v. Gaskell (1912) 195 . 865, 115 C. C. A. 527, 28 Am. nkr. Rep. 4; In re Hamilton Auto- bile Co. (1912) 198 Fed. 856, 117 C. A. 135, 29 Am. Bankr. Rep. 163; kpatrick v. Harnesberger (1912) Fed. 886, 118 C. C. A. 334, 29 Am. nkr. Rep. 439; Franklin v. Stough- Wagon Co. (1909) 168 Fed. 857, 94 C. A. 269, 22 Am. Bankr. Rep. 63; Houghton v. Burden (1913) 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780, 30 Am. Bankr. Rep. 16; Kiskadden v. Steinle (1913) 203 Fed. 375, 29 Am. Bankr. Rep. 346; Shea v. Lewis (C. C. A. 1913) 206 Fed. 877, 30 Am. Bankr. Rep. 436.

An order allowing (or refusing to allow) a certain claim to be filed for the purpose of voting in the election of a trustee, is not appealable. Duryea Power Co. v. Sternbergh (1910) 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047. So of an order denying the right of a petitioner to participate in the individual assets of a member of a bankrupt firm, until after the individual creditors should have been paid. Euclid Nat. Bank v. Union Trust & Deposit Co. (1906) 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 834. Where a referee announces that, as the proofs stand before him, he declines to allow a creditor's claim as established, and the district court approves and affirms his decision, the creditor's claim has been "rejected" so as to give him a right of appeal. Hiscock v. Varick Bank (1907) 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. And so there is an "allowance" where a creditor holding a note given by a bankrupt firm, and signed as surety by a member of the firm, also in bankruptcy, having proved the debt against the firm estate, also files it as an individual debt against the estate of the surety, and the court decides that it is provable against such individual estate. In re Mueller (1905) 135 Fed. 711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256. And there is an appeal where the court of bankruptcy decides that the bankrupt is not entitled to a business homestead in certain property covered by a deed of trust, and orders that the incumbered property shall be applied to the claim of the creditor holding the security. Burow v. Grand Lodge of Sons of Hermann (1905) 133 Fed. 708, 66 C. C. A. 538, 13 Am. Rep. 542.

Where a creditor of the bankrupt, after the filing of the petition, sold securities which he held, credited the proceeds on his debt, and filed a claim for the balance due, an order disallowing such sale and directing a resale of the securities at public auction, is an order rejecting the claim and therefore appealable. In re Mertens (1906) 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

If there is no contest as to the validity of the claim as such, nor as to its amount, a decision of the district court either allowing or disallowing the creditor's claim to priority or to a lien is an appealable judgment under the statute. Coder v. Arts (1909) 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1; Matter of Loving (1912) 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852; Bell v. Arledge (1912) 192 Fed. 837, 113 C. C. A. 161,

27 Am. Bankr. Rep. 773; In re Doran (1907) 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760; Nauman Co. v. Bradshaw (1912) 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565; In re Streator Metal Stamping Co. (C. C. A. 1913) 205 Fed. 280, 30 Am. Bankr. Rep. 55. Compare Hutchinson v. Otis (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135; Gaudette v. Graham (1908) 164 Fed. 311, 90 C. C. A. 243; In re York (C. C. 1870) 4 N. B. R. 479, Fed. Cas. No. 18,139. Where the disallowance of a claim against the bankrupt's estate is properly before the circuit court of appeals on an appeal respecting the provability of the claim in general or respecting its amount, any question concerning an alleged lien, security, rank, or priority of the claim is an incident to its allowance or rejection and may therefore be reviewed by the appellate court, and such an appeal brings up both questions of law and of fact. In re Cosmopolitan Power Co. (1905) 137 Fed. 858, 70 C. C. A. 388, 14 Am. Bankr. Rep. 604; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co. (1900) 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; Cunningham v. German Ins. Bank (1900) 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192; Morris v. Brush (C. C. 1876) 14 N. B. R. 371, Fed. Cas. No. 9,828; New Hampshire Savings Bank v. Varner (1914) 216 Fed. 721. On presentation for allowance of a demand against a bankrupt's estate, an appeal lies, and if both a demand and lien are presented at the same time the lien is treated as an incident, though the creditor may have an independent assertion of the lien so as to create a controversy appealable under section 24a. In re Hartzell (1913) 209 Fed. 775, 126 C. C. A. 499.

Where a proof of debt is disallowed by the district court and an appeal taken to the circuit court of appeals, the cause of action prosecuted in the latter court must be the same one which was rejected by the former; and it is not permissible, under cover of an appeal, to transform the claim into a new and distinct cause of action. In re Jaycox (C. C. 1874) Fed. Cas. No. 7,237.

The right of appeal in cases of this kind is not confined to the trustee and the creditor whose claim is in question, but may be exercised by a creditor who has opposed its allowance. In re Joseph (C. C. 1875) Fed. Cas. No. 7,532. A trustee in bankruptcy may also appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered by the creditor. Livingstone v. Heineman (1903) 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39.

An order of the district judge reversing a referee's order denying a trustee's application to introduce c tain testimony, and allowing the cl without passing on the merits of application to confirm the referee's port, held interlocutory and not appe able. In re Strauss (C. C. A. 19 211 Fed. 123.

6. Time for taking appeal.—The p vision of general order in bankrup No. 36, that appeals to the supre court of the United States must taken within thirty days after the ju ment or decree, does not apply to writ of error from the federal supre court to a court of bankruptcy, p senting the question of the jurisdict of the latter to make an adjudication bankruptcy, but such proceeding is g erned by the two-year limitation fi by other statutes. Frederic L. Gr Shoe Co. v. W. M. Laird Co. (190 212 U. S. 445, 29 Sup. Ct. 332, 53 Ed. 591, 21 Am. Bankr. Rep. 484. an appeal to the Supreme Court fr a decree of a circuit court of appe on a bill in equity brought by a trus in bankruptcy to set aside a trans of property by the bankrupt, alle to have been made in fraud of creditc need not be taken within the thi days prescribed by the general orde but as the appellate jurisdiction is der, or the same as that under, circuit court of appeals act of 1891, appeal is in time if taken within a ye Thomas v. Sugarman (1910) 218 U. 129, 30 Sup. Ct. 650, 54 L. Ed. 9 29 L. R. A. (N. S.) 250, reversing ju ment (1907) 157 Fed. 669, 85 C. C. 337, 15 L. R. A. (N. S.) 1267. In eff the limitation of time in the bankrup act and in the general orders rela only to appeals taken expressly un the bankruptcy statute, and does apply to an appeal from a decision r dered on a formal appeal taken un subd. a of the preceding section i "controversy" arising in a bankrup proceeding. Hobbs v. Head & Do Co. (C. C. A. 1911) 191 Fed. 811, Am. Bankr. Rep. 484. But where limitation of thirty days is applica the time cannot be extended by filin petition for rehearing after the thi days have expired. Conboy v. Fi Nat. Bank (1906) 203 U. S. 141, Sup. Ct. 50, 51 L. Ed. 128, 16 A Bankr. Rep. 773.

The same order requires that court below, at or before the time entering the judgment, shall make file findings of fact and conclusions law. A sufficient compliance with t direction is shown where, the app having been taken within the thi days, the circuit court of appeals m its findings of fact and conclusions law a part of the record by an or made within the thirty days, direct the same to be filed nunc pro tunc of the date of the judgment. Co v. Arts (1909) 213 U. S. 223, 29 S Ct. 436, 53 L. Ed. 772, 16 Ann. C 1008, 22 Am. Bankr. Rep. 1.

judgment of a court of bankruptcy resumptively "rendered" on the date ts filing with the clerk, and the ten s for taking an appeal will begin to from that time, notwithstanding the er bears an earlier date. Peterson Nash Bros. (1901) 112 Fed. 311, C. C. A. 260, 55 L. R. A. 344, 7 . Bankr. Rep. 181.

Vhere an appeal in a proper case is yed and allowed within the ten days, prescribed by the statute, the failure ile a bond and serve the citation un- a few days after such period will necessitate a dismissal of the ap- l, no material prejudice being shown. umbia Ironworks v. National Lead (1904) 127 Fed. 99, 62 C. C. A. 64 L. R. A. 645, 11 Am. Bankr. . 340; Morris v. Brush (C. C. 6) 14 N. B. R. 371, Fed. Cas. No. 8; Fellows v. Burnap (C. C. 1876) l. Cas. No. 4,721. Compare Nor- s v. Nave & McCord Mercantile (1900) 101 Fed. 796, 42 C. C. A. 4 Am. Bankr. Rep. 317. Appeal l taken in time, where petition for eal was filed within 10 days and mptly presented, though allowed e than 10 days after the decree. ertson Banking Co. v. Chamberlain C. A. 1916) 228 Fed. 500. Under S. § 4982, providing that an appeal n the district to the circuit court ll be entered at the term of the uit court which shall be held with- the district next after the expira- of 10 days from the time of claim- the same, the filing in the district rt of a petition of appeal within 10 s after the appeal was claimed and notice of it was given to the clerk the court and to the opposite solic- is an entry of the appeal in the uit court. Platt v. Preston, 8 Fed. . But the requirement as to the e of taking the appeal itself is im- ative. If the appeal is not taken hin the ten days limited, the appel- court will have no jurisdiction of case and must dismiss the attempt- appeal. Williams Bros. v. Savage 03) 120 Fed. 497, 56 C. C. A. 647, m. Bankr. Rep. 720; Nazima Trad- Co. v. Martin (C. C. A. 1908) 164 d. 838, 21 Am. Bankr. Rep. 159; lgwick v. Fridenberg, 11 Blatchf. 77, d. Cas. No. 12,611; In re Alexander C. 1869) 3 N. B. R. 29, Fed. Cas. 160; In re Kyler (C. C. 1869) 3 B. R. 46, Fed. Cas. No. 7,957; In Place (C. C. 1872) 4 N. B. R. 541, d. Cas. No. 11,200; Ex parte Wool- (1881) 104 U. S. 300, 26 L. Ed. 3; Wood v. Bailey (1874) 21 Wall. , 12 N. B. R. 132, 22 L. Ed. 689.

The time limited by the statute cannot extended or revived by any subse- ent proceeding whatever. Brady v. rnard (1909) 170 Fed. 576, 95 C. A. 656, 22 Am. Bankr. Rep. 342. us, when the right to appeal from adjudication of bankruptcy has been t by the expiration of the ten days, cannot be revived by moving to vacate the adjudication. In re Billing (D. C. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; In re Goldberg (1909) 167 Fed. 808, 21 Am. Bankr. Rep. 828. Nor by the subsequent entry of an alias adjudication. In re Berkebile (1906) 144 Fed. 577, 75 C. C. A. 333, 16 Am. Bankr. Rep. 277.

Where the district court, in a controversy between a trustee in bankruptcy and a creditor of the estate, has rendered a decree on the merits adverse to the trustee, and the latter, without culpable neglect, has lost his right of appealing therefrom by the expiration of the time limited, the district court may grant a rehearing, on his petition filed thereafter, for the purpose of reviving his right of appeal. In re Wright (D. C. 1899) 96 Fed. 820, 3 Am. Bankr. Rep. 184.

While the district court has power to grant a rehearing for the sole purpose of reviving a right of appeal, the effect is to nullify the explicit provisions of the statute, and therefore if the court is of opinion that there is no sufficient ground for a rehearing on the merits (aside from any question of appealing) it should not be granted on a mere pretense and for the real purpose of permitting an appeal to be taken. Conboy v. First Nat. Bank (1906) 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, 16 Am. Bankr. Rep. 773; In re Hudson Clothing Co. (D. C. 1905) 140 Fed. 49, 15 Am. Bankr. Rep. 254; Morgan v. Benedum (1907) 157 Fed. 232, 84 C. C. A. 675, 19 Am. Bankr. Rep. 601; In re Girard Glazed Kid Co. (D. C. 1904) 129 Fed. 841, 12 Am. Bankr. Rep. 295; Rode & Horn v. Phipps (C. C. A. 1912) 195 Fed. 414, 27 Am. Bankr. Rep. 827. But if a petition for rehearing is filed within ten days after the judgment or order complained of, an appeal taken within ten days after the court's ruling on the petition will be in time. Mills v. J. H. Fisher & Co. (1908) 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237.

The ten-day limitation of time for taking an appeal, prescribed by this section, is imperative in the case of an appeal from an order denying an application to revoke a bankrupt's discharge. Thompson v. Mauzy (1909) 174 Fed. 611, 98 C. C. A. 457, 23 Am. Bankr. Rep. 489. And from a judgment allowing or rejecting a claim of $500 or over. Postlethwaite v. Hicks (1908) 165 Fed. 897, 91 C. C. A. 575, 21 Am. Bankr. Rep. 70.

An order of a bankruptcy court held not a judgment allowing claims, within the meaning of subdivision a(3) of this section, from which an appeal could only be taken within 10 days, but an order made in a controversy arising in a bankruptcy proceeding, appealable under section 24a (ante, § 9608). In re Martin (1912) 201 Fed. 31, 119 C. C. A. 363, denying rehearing (1912) 193 Fed. 841, 113 C. C. A. 627.

Appeal from order in bankruptcy dis-

allowing claim of lien on proceeds of specific property held to be treated as taken under section 24a (ante, § 9608), and not required to be taken within 10 days under subdivision "a" of this section. Massachusetts Bonding & Ins. Co. v. Kemper (1915) 220 Fed. 847, 136 C. C. A. 593.

This limitation does not apply to appeals in "controversies arising in bankruptcy proceedings," or independent proceedings instituted for the recovery of assets of the estate, or to set aside alleged preferences, which are governed by the general provisions regulating appeals to the circuit courts of appeals, and may be brought within the time fixed by the statute creating those courts, which is six months. Boonville Nat. Bank v. Blakey (1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; Steele v. Buel (1900) 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; In re Youngstrom (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; Kenova Loan & Trust Co. v. Graham (1905) 135 Fed. 717, 68 C. C. A. 355, 14 Am. Bankr. Rep. 313; In re Martin (C. C. A. 1912) 201 Fed. 31, 29 Am. Bankr. Rep. 935.

7. Time for filing petition for revision.—Where a rule of court provides that a petition for revision must be filed and served within ten days after the entry of the order sought to be reviewed, unless the time is enlarged by order of the court of bankruptcy, stipulations by the parties cannot take the place of the discretionary order of enlargement by the court. In re Strobel (C. C. A. 1908) 160 Fed. 916, 20 Am. Bankr. Rep. 22; In re Brown (1909) 174 Fed. 339, 98 C. C. A. 211, 23 Am. Bankr. Rep. 93; In re Light (1909) 174 Fed. 341, 98 C. C. A. 213. And a petition not filed until eleven days after entry of the order will be dismissed. In re Tanenhaus (1914) 211 Fed. 971. And the time for filing a petition to review an order fixing the allowance to the trustee's attorney is not extended by applying for a reduction of the allowance. In re John M. Link Const. Co. (1915) 225 Fed. 488, 140 C. C. A. 18.

In some circuits, the time for filing a petition for revision has been fixed by rule of court at six months. (See notes under section 1114, pp. 1346, 1350, 1353, 1354, ante.) In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Thomlinson Co. (1907) 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691; In re Holmes (1905) 142 Fed. 391, 73 C. C. A. 491, 15 Am. Bankr. Rep. 689.

Where the rules of court do not prescribe any particular time within which a petition for revision must be filed, the application must be made within a reasonable time, in order that the purpose of the act to effect a speedy settlement of the bankrupt's affairs may not be thwarted, but it should not be dismissed unless it appears that there has b an unreasonable delay, amounting laches, and operating to the prejudice parties in interest. First Nat. Bank Cooper (1873) 20 Wall. 171, 22 L. 273; In re Beck (C. C. 1887) 31 F 554; In re New York Economi Printing Co. (1901) 106 Fed. 839, C. C. A. 665, 5 Am. Bankr. Rep. 6 In re Groetzinger & Sons (1903) Fed. 124, 62 C. C. A. 124, 11 A Bankr. Rep. 467; In re Milgraum C. 1904) 133 Fed. 802, 13 Am. Ban Rep. 337. A delay of 30 days in fil a petition for revision is not unreas ably great. Littlefield v. Delaware H. Canal Co. (C. C. 1871) Fed. C No. 8,400. CONTRA, In re Wink C. 1913) 206 Fed. 348. The lapse more than six months is not necessa an imperative reason for dismissing petition. In re Groetzinger & S (1903) 127 Fed. 124, 62 C. C. A. 1 11 Am. Bankr. Rep. 467. But a de of six months and twelve days may unreasonably great. In re Milgra (D. C. 1904) 133 Fed. 802, 13 A Bankr. Rep. 337. Neglect to file petition for over seven months amou to laches. First Nat. Bank v. Pe (1905) 133 Fed. 1019, 66 C. C. A. 1 A petition filed three years after matter sought to be reviewed had b disposed of was too late. Blanchard Ammons (1910) 183 Fed. 556, 106 C. A. 102, 25 Am. Bankr. Rep. 590.

The right of review on petition be claimed only in respect to some p ceeding which is pending in the court bankruptcy. In re Alexander (C. 1869) Fed. Cas. No. 160. But supervisory jurisdiction may be ex cised by the circuit court of appeals fore the district court has taken final even interlocutory action on the mat in question, if it has been conside and an opinion rendered by the lat court. In re Kyle (C. C. 1910) Fed. 617. And exceptions to a p posed distribution of the bankrupt's tate must be filed before the final cree of confirmation is entered; exc tions taken, and a petition for revi based thereon, if not filed until af the confirmation and after the final d idend has been distributed in acco ance with it, will not be consider In re Heebner (D. C. 1904) 132 F 1003, 13 Am. Bankr. Rep. 256. Time file a petition of review held to co mence from entry of orders direct payment to a trustee in bankruptcy a denying an application to open the c for additional testimony. In re Pl (D. C. 1915) 224 Fed. 778.

8. Parties to appeal or review Where a single order or judgment made by a district court in a ban ruptcy proceeding, which determines question affecting alike different clai ants, they may unite in an app therefrom, although their interests a several and distinct. Crim v. Woo ford (1905) 136 Fed. 34, 68 C. C.

4, 14 Am. Bankr. Rep. 302. And it mmaterial that some complain of one eged error and some of another, ce, on such an appeal, all prior rul- s are reviewable. Stevens v. Nave-Cord Mercantile Co. (C. C. A. 1906)) Fed. 71, 17 Am. Bankr. Rep. 609. necessary parties are not joined in appeal in due time, it will become perative in so far as it challenges or ects their rights. Gray v. Grand rks Mercantile Co. (1905) 138 Fed. 4, 70 C. C. A. 634, 14 Am. Bankr. p. 780.

Creditors who appear in opposition a petition in involuntary bankruptcy l contest the adjudication have a ht to appeal from the decree of ad- ication. In re Meyer (1899) 98 d. 976, 39 C. C. A. 368, 3 Am. Bankr. p. 559. On appeal from a decree re- ing to adjudge a defendant bankrupt, ditors other than the original peti- ners who intervened and joined in petition must join in or be severed m the appeal. In re Dandridge & gh (1913) 209 Fed. 838, 126 C. C. 562. Where, pending a motion to miss an appeal from a bankruptcy udication because the bankrupt was joined as a party, he voluntarily peared, waived notice, and submitted nself to the court's jurisdiction, he reby became a party as though orig- lly joined, and the motion to dismiss uld be denied. Hill v. Western Elec- Co. (1914) 214 Fed. 243, 130 C. A. 613, affirming order In re Ran- (D. C. 1913) 210 Fed. 529. Cred- rs who oppose a bankrupt's applica- n for discharge have a right to ap- l from an order granting the dis- rge; and a creditor's right to be rd on appeal with respect to the nting of a bankrupt's discharge can- be prejudiced by the acceptance of proposed compromise by a majority the other creditors. In re Doyle (C. A. 1915) 220 Fed. 434.

A bankrupt whose application to have composition confirmed was not for- lly opposed by creditors cannot ap- l from a decree of refusal, there ng a want of parties, as the ques- n is merely between the bankrupt d the court. Ross v. Saunders (1901) 5 Fed. 915, 45 C. C. A. 123, 5 Am. nkr. Rep. 350. But if a composition confirmed, and the assenting cred- rs have received the amounts to ich they are entitled, they are neces- y parties to an appeal by another editor. Marshall Field & Co. v. Wolf Bro. Dry Goods Co. (1903) 120 Fed. 5, 57 C. C. A. 326, 9 Am. Bankr. p. 693.

9. —— From order allowing or re- ting claim.—In the case where a editor presents a claim against the tate of the bankrupt, and another editor objects to and contests it, and is allowed, an appeal may be taken rectly by the contesting creditor. In Roche (1900) 101 Fed. 956, 42 C. A. 115, 4 Am. Bankr. Rep. 369; Gray v. Grand Forks Mercantile Co. (1905) 138 Fed. 344, 70 C. C. A. 634, 14 Am. Bankr. Rep. 780. Trustees in bankruptcy do not represent creditors in prosecuting their claims to an allowance in the bankruptcy proceeding or to a judgment in other courts, and hence where, in a suit against stockholders of bankrupt corporation, the court disallowed the claim of a creditor, it was improper for the trustee to appeal at the instance of such creditor. Biggs v. Westen (Mo. 1913) 154 S. W. 708. Where, after proof of a claim against a bankrupt's estate by an importer of wool, it was assigned to another and later expunged, on a holding that the claim belonged to a bank, there was a sufficient controversy between the bank and the assignee to entitle the latter to appeal. Assets Realization Co. v. Sovereign Bank of Canada (1914) 210 Fed. 156, 126 C. C. A. 662, affirming judgment In re Dunlap Carpet Co. (D. C. 1913) 206 Fed. 726. A creditor of a bankrupt's estate is not entitled to appeal from an order allowing claims, where the referee has found that the assets are amply sufficient to pay all scheduled claims. Claimant against the estate of a bankrupt, having continually assumed the status of a creditor, could not appeal from an order allowing other claims against the estate on the ground that he was a stockholder. In re National Pressed Brick Co. (1914) 212 Fed. 878, 129 C. C. A. 398.

But other authorities hold that an appeal from the allowance of a claim in bankruptcy can be taken only by the trustee in bankruptcy, who represents all the creditors. Chatfield v. O'Dwyer (1900) 101 Fed. 797, 42 C. C. A. 30, 4 Am. Bankr. Rep. 313; Foreman v. Burleigh (1901) 109 Fed. 313, 48 C. C. A. 376, 6 Am. Bankr. Rep. 230. If the trustee, in such a case, refuses to appeal, the objecting creditor may move the district court to direct the trustee to take an appeal or to permit the creditor to prosecute an appeal in the name of the trustee. The granting of such leave is in the discretion of the court, and may be conditioned on the payment of the costs of the litigation by the objecting creditor, if the appeal is unsuccessful. Chatfield v. O'Dwyer (1900) 101 Fed. 797, 42 C. C. A. 30, 4 Am. Bankr. Rep. 313; Ohio Valley Bank Co. v. Mack (1906) 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 919. A bankrupt's creditor under proper circumstances may be permitted to appeal from an order allowing claims against the bankrupt's estate when the trustee has refused to do so. In re National Pressed Brick Co. (1914) 212 Fed. 878, 129 C. C. A. 398. The circuit court of appeals refused to dismiss an appeal taken by the objecting creditor, instead of by the trustee, where it appeared that the latter had refused to allow the use of his name for the purpose of an appeal,

when the time for appealing had so nearly expired that it was impossible to obtain an order requiring him to consent in time, and that the district court had subsequently made an order that the appeal taken should be continued in the name of the trustee in connection with the appealing creditor. McDaniel v. Stroud (1901) 106 Fed. 486, 45 C. C. A. 446, 5 Am. Bankr. Rep. 685.

10. —— On petition for revision.—Since there must be a "party aggrieved" to sustain a petition for revision, a person who is not a party to the bankruptcy proceedings cannot file such a petition. Alabama & C. R. Co. v. Jones (C. C.) 7 N. B. R. 145, Fed. Cas. No. 127. The appellate court will not review an order or decision at the instance of a petitioner who cannot be in any manner prejudiced by it. In re Shoe & Leather Reporter (1904) 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248. Nor at the instance of one who no longer has any interest in the particular matter to be determined. In re Baker (1900) 104 Fed. 287, 43 C. C. A. 536, 4 Am. Bankr. Rep. 778.

Where an order requiring a bankrupt to turn over to his trustee a life insurance policy which he had assigned to another person prior to the adjudication does not purport to affect the rights of the assignee, neither such assignee nor the bankrupt can be heard to complain of it, the former because his rights are not in jeopardy, the latter because his title, whatever it was, passed to the trustee by operation of law. In re Madden (1901) 110 Fed. 348, 49 C. C. A. 83, 6 Am. Bankr. Rep. 614.

The bankrupt himself may bring a petition for revision, and the fact that he has accepted the benefit of a decision of the referee allowing him certain personal property exemptions, does not preclude him from appealing from so much of the same order as relates to his homestead exemption. In re Letson (1907) 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

Any lien creditor may maintain a petition for revision of the proceedings of the court below. In re Taliafero (C. C. 1874) Fed. Cas. No. 13,736. A judgment creditor who has proved his claim may maintain such petition. Clark v. Pidcock (1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309.

Where claims adverse or paramount to the rights of the estate in bankruptcy are put forward by attaching or other creditors, the trustee is a proper party to maintain a petition for revision, as the representative of creditors in general. In re Utt (1901) 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Glen Iron Works (C. C. 1884) 20 Fed. 674.

A statement by counsel that they are authorized by a corporation to file su a petition, for a review of proceedin in bankruptcy against the corporati and to appear for it in the appell court, will be taken as conclusive e dence of their authority, in the abse of proof to the contrary. Alabama C. R. Co. v. Jones (C. C. 1871) F Cas. No. 126.

11. Practice on appeal.—The pract on an appeal in bankruptcy is govern by substantially the same rules as appeal in equity, except where oth wise directed. Cook Inlet Coal Fie Co. v. Caldwell (1906) 147 Fed. 4 78 C. C. A. 17, 17 Am. Bankr. R 135; First Nat. Bank v. Abbott (190 165 Fed. 852, 91 C. C. A. 538, 21 A Bankr. Rep. 436.

Any party appealing from a judgme or order in bankruptcy affecting rights must comply strictly with t requirements of the act and of the ge eral orders in bankruptcy applicable the case, and in default of such co pliance the appellate court must d miss the attempted appeal. In re Co man (C. C. 1870) Fed. Cas. No. 2,9

Notice and citation and bond are n under the existing bankruptcy act, risdictionally requisite in an app proper, in the sense that notice m issue within the time limited for taki the appeal, though notice is necess in order to perfect the appeal, unl prayed in open court, and the appell court will not proceed to a hearing til citation has been issued and serv In re Quality Shop Co. (1912) 202 F 196, 120 C. C. A. 410; In re T. E. E Co. (1906) 148 Fed. 832, 78 C. C. 522, 17 Am. Bankr. Rep. 517; Colu bia Iron Works v. National Lead C (1904) 127 Fed. 99, 62 C. C. A. 64 L. R. A. 645, 11 Am. Bankr. R 340; Lockman v. Lang (1904) 132 F 1, 65 C. C. A. 621, 12 Am. Bankr. R 497; Gray v. Grand Forks Mercant Co. (1905) 138 Fed. 344, 70 C. C. 634, 14 Am. Bankr. Rep. 780; Ruby Atkinson (1899) 93 Fed. 577, 35 C. A. 458; Norcross v. Nave & McCo Mercantile Co. (1900) 101 Fed. 7 42 C. C. A. 29, 4 Am. Bankr. Rep. 3

Appellants other than the trustee bankruptcy are not exempt from t necessity of giving a proper bond appeal, and unless such bond is fil and is sufficient in form and substan the appeal must be dismissed. In Miller (1904) 13 Okl. 557, 75 P 1128; Hawkins v. Hastings Nat. Ba (C. C. 1870) Fed. Cas. No. 6,245; re Alexander (C. C. 1869) 3 N. B. 29, Fed. Cas. No. 160; Benjamin Hart (D. C. 1871) 4 N. B. R. 408, F Cas. No. 1,302. But compare In re E. Hill Co. (1906) 148 Fed. 832, 78 C. A. 522, 17 Am. Bankr. Rep. 5 As to form and sufficiency of bond, s In re Barton's Estate (D. C. 1906) 1 Fed. 540, 16 Am. Bankr. Rep. 56 Flickinger v. First Nat. Bank (190

Fed. 162, 76 C. C. A. 132, 16 Am. kr. Rep. 678. The bond on appeal t be approved by the judge, and ority to approve it may not be del- ed to the clerk of the court. In re k Diamond Copper Min. Co. (1906) Ariz. 39, 85 Pac. 656.

proceeding for the appointment of eceiver under section 3e (ante, § ') is separate and distinct from a eeding to adjudicate; so that, re an appeal is taken from an order issing the petition, the filing of an al bond does not operate as a su- edeas so as to prolong the receiv- ip, but operates to supersede only order of dismissal. T. E. Hill Co. United States Fidelity & Guaranty (1914) 184 Ill. App. 528, judgment med (1914) 107 N. E. 194, 265 Ill.

. Practice on petition for revision. n application for review under the sory jurisdiction of the circuit court ppeals is made by petition, which ld be addressed to and filed in the er circuit court of appeals. In re iams (D. C. 1901) 105 Fed. 906.

petition may be presented to, and wed by, a judge of the circuit t of appeals, but not by the judge he district court. In re Williams C. 1901) 105 Fed. 906. Compare e Abraham (1899) 93 Fed. 767, 35 C. A. 592, 2 Am. Bankr. Rep. 266. see Meyer Bros. Drug Co. v. in Drug Co. (1905) 136 Fed. 396, C. C. A. 240, 14 Am. Bankr. Rep. holding that a petition for revi- will not be dismissed because it not allowed by a judge.

petition for review which fails to e that the error complained of was matter of law" or to assign any ific errors of law, is insufficient. e Witherbee (1913) 202 Fed. 896, C. C. A. 254. It should state spe- ally the question of law which was lved and ruled upon by the district t, and as to which a reversal of its on is sought, and should be ac- panied by a certified copy of so h of the record as will exhibit the ner in which the question arose and determination; and the question of so presented is the only question h will be decided by the appellate t. Steiner v. Marshall (1905) 140 710, 72 C. C. A. 103, 15 Am. kr. Rep. 486; In re Taft (1904) Fed. 511, 66 C. C. A. 385, 13 Am. kr. Rep. 417; Courier-Journal Job ting Co. v. Schaefer-Meyer Brew- Co. (1900) 101 Fed. 699, 41 C. C. 314, 4 Am. Bankr. Rep. 183; In re er (1900) 104 Fed. 287, 43 C. C. 536, 4 Am. Bankr. Rep. 778; In re ards (1899) 96 Fed. 935, 37 C. C. 334, 3 Am. Bankr. Rep. 145; In re aham (1899) 93 Fed. 767, 35 C. C. 592, 2 Am. Bankr. Rep. 266; Little- v. Delaware & H. Canal Co. (C. 871) 4 N. B. R. 257, Fed. Cas. No. 8,400; In re South Boston Iron Co. (C. C. 1876) Fed. Cas. No. 13,183; In re Sutherland (C. C. 1843) Fed. Cas. No. 13,636; In re Grant (C. C. 1843) Fed. Cas. No. 5,690. The statements in a petition for review, like those in any other pleading, must be taken as true on demurrer, and if sufficient, the decree below will be reversed. Curran v. Munger (C. C. 1871) 6 N. B. R. 33, Fed. Cas. No. 3,487. A stipulation that two petitions to review orders in bankruptcy, with certified copies transmitted by the clerk of the district court, should be printed in one appeal book, is not sufficient to constitute a waiver of any legal objection to the petitions. In re Strobel (C. C. A. 1908) 160 Fed. 916, 20 Am. Bankr. Rep. 22.

Where petitioners in bankruptcy ask the court of appeals to review restraining and reference orders made by the district court, enjoining the prosecution of suits against the bankrupt in a state court, and referring the claims in suit to a special master for liquidation, they cannot obtain a review of the district court's jurisdiction of the entire bankruptcy proceeding. In re New York Tunnel Co. (1908) 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25.

Where the response to such a petition is not filed within the time prescribed by the applicable rule of court, the failure of the defendant to deny allegations of fact in such petition will be taken as an admission that they are true. In re Frank (1910) 182 Fed. 794, 25 Am. Bankr. Rep. 486.

By the terms of the statute, "due notice" is a prerequisite to the exercise of the jurisdiction of the reviewing court. This means that proper and sufficient notice of the petition for review must be served upon the party occupying a position in the controversy adverse to that of the petitioner, or upon his attorney, within a reasonable time. Alabama & C. R. Co. v. Jones (C. C. 1871) 5 N. B. R. 97, Fed. Cas. No. 126; In re Seebold (1901) 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358. See In re Sweetser (C. C. A. 1909) 168 Fed. 1018.

There must be something in the nature of an appealable decision to be brought before the reviewing court. An order of the district court setting aside a sale of the bankrupt's property and directing a resale is not reviewable on petition until after the resale has been made and confirmed. Sturgiss v. Corbin (1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

13. Assignment of errors and bill of exceptions.—The rule of the circuit courts of appeals requiring the filing of an assignment of errors in the court below is applicable to appeals taken under the bankruptcy act, such as an appeal from a judgment making or refusing to make an adjudication, granting or denying a discharge, or al-

lowing or rejecting a claim. If, on such an appeal, no assignment of errors is filed, the judgment of the district court will be affirmed. In re Dunning (1899) 94 Fed. 709, 36 C. C. A. 437; Lloyd v. Chapman (1899) 93 Fed. 599, 35 C. C. A. 474; In re Smith (C. C. A. 1913) 203 Fed. 369, 29 Am. Bankr. Rep. 628. In re Federal Contracting Co. (1914) 212 Fed. 693, 129 C. C. A. 229. And an assignment not conforming to the rule, in failing to point out the errors complained of, is not entitled to be considered, although, where a general assignment is made, the court is not without jurisdiction and may permit an amendment. Flickinger v. First Nat. Bank (1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678. And where specific questions are raised by the assignment of errors, no others will be reviewed by the appellate court. Buckingham v. Estes (1904) 128 Fed. 584, 63 C. C. A. 20, 12 Am. Bankr. Rep. 182.

In the case of a petition for revision, as distinguished from an appeal, no formal assignment of errors is necessary. But the petition must set forth clearly and specifically the matter of law, or questions of law, decided by the district court and as to which a reversal of its judgment is desired, so that the issue may be clearly defined before the appellate court, and only such errors of law as are thus plainly presented will be considered on the review. Ross v. Stroh (1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; In re Lans (1907) 158 Fed. 610, 85 C. C. A. 432, 19 Am. Bankr. Rep. 458. But compare Davis v. Crompton (1907) 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53. See In re Witherbee (C. C. A. 1913) 202 Fed. 896, 30 Am. Bankr. Rep. 314. But where there is no sufficient specification of legal error, presenting the questions sought to be reviewed, but the evidence is such as to raise a doubt as to the merits of the petitioner's claim, the revisory petition may be dismissed without prejudice to such further proceedings as the district court may consider to be proper. Ross v. Stroh (1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644.

As a proceeding in bankruptcy is substantially a proceeding in equity, no bill of exceptions is ordinarily necessary. Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176. Formal exceptions to a referee's ruling allowing fees to a bankrupt's attorneys were not essential to a review thereof on appeal. In re Lane Lumber Co. (D. C. 1913) 206 Fed. 780. A bill of exceptions is necessary in the case of a trial by jury, except where the verdict was taken as merely advisory. In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128.

14. Record on appeal.—The rule the circuit courts of appeals pro ing that "no case will be heard u a complete record, containing in self, and not by reference, all the pers, exhibits, depositions, and ot proceedings which are necessary to hearing in this court, shall be fil (see section 1114, p. 1294, ante) applicable to appeals in bankrup cases. Cook Inlet Coal Fields Co. Caldwell (1906) 147 Fed. 475, 78 C. A. 17, 17 Am. Bankr. Rep. 135. see Synnott v. Tombstone Con Mines Co. (C. C. A. 1913) 207 F 544. And if the record is not f within the time allowed by law, nor application made for an extension the time, the appeal will be dismi ed. In re Alden Electric Co. (19 123 Fed. 415, 59 C. C. A. 509, 10 A Bankr. Rep. 370. If it does not cle ly set forth facts necessary to a termination of the questions involv it will be remanded to the dist court with directions to have the fa fully reported to it and to pass on same. Devries v. Shanahan (19 122 Fed. 629, 58 C. C. A. 482, 10 A Bankr. Rep. 518.

In bankruptcy appeals, the record quired to be certified and filed is record of the case in the bankrup court. Cook Inlet Coal Fields v. Caldwell (1906) 147 Fed. 475, C. C. A. 17, 17 Am. Bankr. Rep. 1 And in the absence of a stipulation agreement of the parties, the whole the record, in the strict sense of word, must be transmitted to the pellate court. In re A. L. Robertsh Mfg. Co. (D. C. 1905) 135 Fed. 2 14 Am. Bankr. Rep. 341; Dodge Norlin (1904) 133 Fed. 363, 66 C. A. 425, 13 Am. Bankr. Rep. 176. the court of bankruptcy from which appeal is taken has no jurisdiction designate what records shall be certif on which the appellate court shall termine the appeal. The parties to appeal may agree as to the contents the appeal record, but if they are u ble to do so, it is the duty of the pellant to file a præcipe with the cl pointing out specifically what recor in his judgment, should be certifi leaving the appellee, if he thinks records certified are insufficient, to s gest a diminution of the record and for a certiorari. In re A. L. Robe shaw Mfg. Co. (D. C. 1905) 135 F 220, 14 Am. Bankr. Rep. 341. On appeal from an order under subdivisi "a" of this section, the court is not quired to state its findings of fact a conclusions of law. In re Mar (1912) 201 Fed. 31, 119 C. C. A. 3 denying rehearing (1912) 193 Fed. 8 113 C. C. A. 627. A decree of a distr court, disallowing a claim in bankrupt based on written instruments on t ground that they constituted a c tingent liability, cannot be reviewed appeal where the record does not d

e the terms, provisions, or condi-
s of such instruments. Synnott v.
bstone Consol. Mines Co. (C. C.
913) 207 Fed. 544, rehearing denied
C. A. 1913) 208 Fed. 251.

e appellate court will not travel
ide the record, nor pass upon ques-
s which it does not raise or which
not clearly defined by the facts and
included. Buckingham v. Estes
4) 128 Fed. 584, 63 C. C. A. 20,
Am. Bankr. Rep. 171; In re Oak-
Lumber Co. (1909) 174 Fed. 634,
C. C. A. 388, 23 Am. Bankr. Rep.
In re Myer (1907) 14 N. M. 45,
Pac. 246; In re Grant (C. C. 1843)
Cas. No. 5,690. Except in so far
may be aided by the presumptions
l and proper in such cases. Shaf-
v. Koblegard Co. (1910) 183 Fed.
105 C. C. A. 363, 24 Am. Bankr.
898. Without a special finding or
fficient transcript, or showing that
rneys had contracted for employ-
t in advance of the selection of a
tee for the bankrupt, the court of
eals could not review an objection
n allowance for the attorney's serv-
on that ground. In re Smith
3) 203 Fed. 369, 121 C. C. A. 485.

. —— **On petition for revision.**—On
etition to superintend and revise in
ter of law, the rules in some cir-
s require that a record shall be fil-
the same as in case of an appeal.
k Inlet Coal Fields Co. v. Caldwell
06) 147 Fed. 475, 78 C. C. A. 17, 17
Bankr. Rep. 135. And at any rate
record brought up must contain a
ing of facts, or so far disclose the
s as clearly to show the question
aw which was raised and passed up-
by the district court, and also show
ther the particular question sought
e reviewed was decided by the dis-
t court as one of fact or of law.
dry v. San Antonio Brewing Ass'n
08) 159 Fed. 700, 86 C. C. A. 568,
Am. Bankr. Rep. 226; Hegner v.
erican Trust & Sav. Bank (1911)
Fed. 599, 109 C. C. A. 429, 26 Am.
kr. Rep. 571; In re Pettingill &
(1905) 137 Fed. 840, 70 C. C. A.
, 14 Am. Bankr. Rep. 757; In re
ton Dry Goods Co. (1903) 125 Fed.
, 60 C. C. A. 118, 11 Am. Bankr.
. 97; In re Throckmorton (1912)
Fed. 656, 116 C. C. A. 348, 28 Am.
kr. Rep. 487; Johansen Bros. Shoe
v. Alles (1912) 197 Fed. 274, 116
C. A. 636, 28 Am. Bankr. Rep. 299.
want of such findings or state-
nts of the facts cannot be supplied
the mere opinion rendered by the
rict court in deciding the case. In
Boston Dry Goods Co. (1903) 125
l. 226, 60 C. C. A. 118, 11 Am.
kr. Rep. 97; In re Pettingill & Co.
05) 137 Fed. 840, 70 C. C. A. 338,
Am. Bankr. Rep. 757. But still the
nion may be looked to for the pur-
e of determining in a general way
propositions on which the case was
posed of, and especially the questions of law which were passed upon. Samel v. Dodd (1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re Pettingill & Co. (1905) 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757.

Where an order appointing a referee in bankruptcy was in the usual form and contained no suggestions that proceedings in the case might be heard by referees in another county, the fact that such suggestion was contained in the court's memorandum did not render it a part of the record, or reviewable on petition to revise. In re Watkinson (1913) 205 Fed. 145, 123 C. C. A. 377.

16. —— **Bringing up evidence.**—Where questions of fact or of mixed law and fact are sought to be reviewed on an appeal in bankruptcy, the evidence must be brought up. In re Myer (1907) 14 N. M. 45, 89 Pac. 246. Otherwise, it will be presumed that the facts disclosed were sufficient to sustain the decision of the court below, and only such matters of law as are apparent on the face of the record can be considered. In re Baum (1909) 169 Fed. 410, 94 C. C. A. 632, 22 Am. Bankr. Rep. 295. And see Chestertown Bank v. Walker (C. C. A. 1908) 163 Fed. 510, 20 Am. Bankr. Rep. 840. If the record does not contain all the evidence, a motion to include additional matter may be granted, reserving the right to determine which party shall ultimately bear the expense thereof. Herman Keck Mfg. Co. v. Lorsch (1910) 179 Fed. 485, 103 C. C. A. 65, 24 Am. Bankr. Rep. 705. But the failure to incorporate any evidence in the record on an appeal from an adjudication of bankruptcy will not be ground for dismissal where it does not appear from the record that any evidence was taken, but rather that the case was submitted on petition and answer. C. C. Taft Co. v. Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. Bankr. Rep. 594. A court of bankruptcy in a proceeding on its equity side may allow and certify a bill of exceptions nunc pro tunc to bring on the record evidence introduced on a prior hearing. Freed v. Central Trust Co. of Illinois (1914) 215 Fed. 873.

When a referee has certified to the district judge the question presented before him and his decision thereon, with a summary of the evidence relating thereto, and the matter has been heard and determined by the district judge on the record so made, it is that summary, and not the original evidence before the referee, which should be included in the record on appeal to the circuit court of appeals. Cunningham v. German Ins. Bank (1900) 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192. And see In re French & Holmes (1904) 13 Okl. 549, 75 Pac. 278. It has also been laid down that examiners, masters, referees, and the court taking evidence in bankruptcy in

the absence of a jury, should record, and in case of appeal, return, all the evidence, so that, if the appellate court thinks that the evidence rejected should have been received, it may consider it and render a final decree without remanding the suit. But from this rule should be excepted evidence plainly privileged and evidence so clearly irrelevant or immaterial that it would be an abuse of process to compel its production. Missouri-American Electric Co. v. Hamilton-Brown Shoe Co. (1908) 165 Fed. 283, 91 C. C. A. 251, 21 Am. Bankr. Rep. 270; First Nat. Bank v. Abbott (1908) 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436.

17. Scope of review—Law and facts.—An appeal in bankruptcy (as distinguished from a petition for revision) is subject to the rules governing appeals in equity, and therefore, on such an appeal, the facts as well as the law are before the appellate court, if proper assignments of error have been filed, and it is its duty to review questions of fact as well as of law. Ross v. Stroh (1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Hatch v. Curtin (1907) 154 Fed. 791, 83 C. C. A. 495, 19 Am. Bankr. Rep. 82; Rush v. Lake (1903) 122 Fed. 561, 58 C. C. A. 447, 10 Am. Bankr. Rep. 455; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co. (1900) 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; Simonson v. Sinsheimer (1900) 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824; In re Richards (1899) 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145. But since the statute explicitly provides that an appeal may be taken from a "judgment adjudging or refusing to adjudge the defendant a bankrupt," such an adjudication may be reviewed on appeal, although only questions of law are presented for the consideration of the appellate court. C. C. Taft Co. v. Century Sav. Bank (1905) 141 Fed. 369, 72 C. C. A. 671, 15 Am. Bankr. Rep. 594.

On a petition to "superintend and revise in matter of law" the proceedings of a court of bankruptcy, the statute does not contemplate any review of the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision in this mode. Stuart v. Reynolds (1913) 204 Fed. 709, 123 C. C. A. 13; Hall v. Reynolds (1915) 224 Fed. 103, 139 C. C. A. 659; Whitla & Nelson v. Boyd (1914) 213 Fed. 587, 130 C. C. A. 167; In re Donnelly (1911) 187 Fed. 121, 109 C. C. A. 39; In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; Ryan v. Hendricks (C. C. A. 1908) 166 Fed. 94, 21 Am. Bankr. Rep. 570; Ross v. Stroh (1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Lesaius v. Goodman (1908) 165 Fed. 889, 91 C. C. A. 567, 21 Am. Bankr. Rep. 446; In re Graessler & Reichwald (1907) Fed. 478, 83 C. C. A. 304, 18 Bankr. Rep. 694; In re Throckmor (1906) 149 Fed. 145, 79 C. C. A. 15, Am. Bankr. Rep. 856; Kenova Loa Trust Co. v. Graham (1905) 135 717, 68 C. C. A. 355, 14 Am. Ba Rep. 313; In re Antigo Screen D Co. (1903) 123 Fed. 249, 59 C. C. 248, 10 Am. Bankr. Rep. 359; Cour Journal Job Printing Co. v. Schae Meyer Brewing Co. (1900) 101 699, 41 C. C. A. 614, 4 Am. Ba Rep. 183; In re Rosser (1900) Fed. 562, 41 C. C. A. 497, 4 Am. Ba Rep. 153; In re Richards (1899) Fed. 935, 37 C. C. A. 634, 3 Bankr. Rep. 145; In re Purvine (18 96 Fed. 192, 37 C. C. A. 446, 2 Bankr. Rep. 787; In re Great West Tel. Co. (C. C. 1873) Fed. Cas. No. 739; In re Salkey (C. C. 1875) 11 B. R. 516, Fed. Cas. No. 12,254; In Zinner (C. C. A. 1912) 202 Fed. 1 29 Am. Bankr. Rep. 860; B-R El tric & Telephone Mfg. Co. v. Æ Life Ins. Co. (C. C. A. 1913) 206 885, 30 Am. Bankr. Rep. 424; Willi son v. Richardson (C. C. A. 1913) Fed. 245, 30 Am. Bankr. Rep. 559; re Witherbee (C. C. A. 1913) 202 896, 30 Am. Bankr. Rep. 314; In Holden (C. C. A. 1913) 203 Fed. 2 In re J. B. Judkins Co. (C. C. A. 191 205 Fed. 892, 30 Am. Bankr. Rep. 5

The issue whether an order should made requiring the bankrupt to t over money or property to his trus is purely of a civil character, det minable on a preponderance of e dence, and at least partially depend on the question of fact whether money or property is in the possess or under the control of the bankr and the finding thereon cannot be viewed by the circuit court of appe on a petition for revision in matter law, unless so wholly unsupported the proofs that the court would be j tified, on a writ of error, in setti aside a verdict of a jury for want any evidence whatever to sustain In re Cole (1906) 144 Fed. 392, 75 C. A. 330, 16 Am. Bankr. Rep. 3 Ellis v. Krulewitch (1905) 141 954, 73 C. C. A. 270, 15 Am. Ba Rep. 615. But the question of whether there was any substantial e dence to sustain an order that a ba rupt turn over assets to the trus could be determined by the appell court on a petition to revise such ord Good v. Kane (C. C. A. 1914) 211 956.

The question whether money depos ed by a bankrupt in a bank in his o name as attorney belonged to him to his wife cannot be reviewed on pe tion to revise, being one of fact. In Donnelly (1911) 187 Fed. 121, 109 C. C. A. 39. And for the same reason revisory jurisdiction does not extend the question whether or not the ba rupt was guilty of fraud in a giv

asaction, where, so far as appears n the record, there may have been onflict of testimony as to the facts. re Letson (1907) 157 Fed. 78, 84 C. A. 582, 19 Am. Bankr. Rep. 506. to the question whether a certain was a reasonable allowance for attorney's fee in a case of volun- bankruptcy. In re Irwin (1909) Fed. 642, 98 C. C. A. 396, 23 Am. kr. Rep. 487. And an allowance the bankruptcy court for services the attorneys for the petitioning ditors in involuntary bankruptcy in- ves questions of fact only, and a ition to revise will be denied. Hall Reynolds (1915) 224 Fed. 103, 139 C. A. 659. The same rule applies to question whether a creditor of the krupt did or did not have reasona- ground to believe his debtor to be olvent at the time he obtained se- ity for his debt. In re Eggert (1900) Fed. 735, 43 C. C. A. 1, 4 Am. nkr. Rep. 449. And to the question ether the lien claimed by a creditor the bankrupt under a trust deed stituted a valid preference under bankruptcy law. Kenova Loan & ust Co. v. Graham (1905) 135 Fed. , 68 C. C. A. 355, 14 Am. Bankr. p. 313. And to the question wheth- or not the court below erred in or- ing a sale of property free from in- nbrances, on the ground that it was vered by a mortgage which left no ity of redemption of value to the es- e. In re Union Trust Co. (1903) Fed. 937, 59 C. C. A. 461.

On petition to revise an order refus- to vacate adjudication, the court ld not consider the evidence, but ld only determine, as matter of law, ether the petitioning creditors had a ht to come in and defend. B-R ectric & Telephone Mfg. Co. v. Ætna e Ins. Co. (1913) 206 Fed. 885, 124 C. A. 545.

8. —— Questions not raised below.

On appeals in bankruptcy the general e obtains that the appellate court l review only those issues and ques- ns which were raised in the court ow and passed on and decided by parties will not be permitted to ge for the first time, on appeal, ob- tions or contentions which they neg- ted to take advantage of in the court ow when they might have done so. re Friedman (C. C. A. 1908) 161 d. 260, 20 Am. Bankr. Rep. 37; In Bacon (1908) 159 Fed. 424, 86 C. A. 404, 20 Am. Bankr. Rep. 107; ve v. Export Storage Co. (1906) 143 d. 1, 74 C. C. A. 155, 16 Am. Bankr. p. 171; In re O'Connell (1904) 137 d. 838, 70 C. C. A. 336, 14 Am. nkr. Rep. 237; Buckingham v. Estes 904) 128 Fed. 584, 63 C. C. A. 20, Am. Bankr. Rep. 182; In re Cale 911) 191 Fed. 31, 111 C. C. A. 89. t see In re Cole (C. C. A. 1908) 163 d. 180, 20 Am. Bankr. Rep. 761.

On appeal from a district court's decree in a controversy arising in bankruptcy proceedings, the only objection as to a want of jurisdiction available to the appellant, when raised for the first time in the court of appeals, is that the district court had no jurisdiction to render the decree appealed from. Knapp v. Milwaukee Trust Co. (1908) 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671.

A court of bankruptcy has jurisdiction of a suit in behalf of the bankrupt's estate to recover an alleged preference, if the defendant consents; and after a hearing on the merits, without any objection by the defendant on the ground of a want of jurisdiction, he cannot raise that objection for the first time on an appeal. Boonville Nat. Bank v. Blakey (1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; In re Canfield (1912) 193 Fed. 934, 113 C. C. A. 562.

On an appeal from an adjudication of bankruptcy, where creditors appeared and contested the adjudication solely on the ground that the occupation of the alleged bankrupt was such as to exempt him from the statute, and they appeal from the decree, they cannot be heard to raise the objection of a want of evidence or of findings as to the alleged act of bankruptcy. Armstrong v. Fernandez (1908) 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746. So, where the capacity of a trustee in bankruptcy to sue, on account of alleged defects in the petition for adjudication and the proofs on which it was based, was not challenged at the trial, the question cannot be raised on appeal. Knapp v. Milwaukee Trust Co. (1908) 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671. And where it was not objected in the court below that property of a bankrupt ordered to be sold had not been inventoried in the manner required by the statute, the objection will not be considered on a revisory petition. In re Shoe & Leather Reporter (1904) 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248.

An appeal from an order discharging a bankrupt will be dismissed on the motion of the appellee, when the record does not show that the question of law suggested in the assignment of errors on which the appeal is based was ruled by the court below. Fidelity Trust Co. v. Robinson (1912) 192 Fed. 562, 27 Am. Bankr. Rep. 784; Vehon v. Ullman (1906) 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435.

Where a referee passed upon only one of a number of objections filed to the discharge of the bankrupt, which objection he sustained, and his report was confirmed by the district court, an appeal from the order denying the discharge brings only that specific objection before the appellate court for consideration. Shaffer v. Koblegard Co.

(1910) 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898.

Where creditors appear in opposition to the bankrupt's application for discharge and file their specifications of objection, as provided by the act, objections to the sufficiency of such specifications must be presented to and decided by the district court, and if no objection is there made, no criticism of the specifications will be heard on appeal. Osborne v. Perkins (1901) 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; E. H. Godshalk Co. v. Sterling (1904) 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302.

19. Review of evidence and findings. —On an appeal in bankruptcy (as distinguished from a petition for revision), where the evidence is in the record, it is within the province of the appellate court to review the same and thereupon to scrutinize the correctness of the decisions of the court below on questions of fact or evidence, proper assignments of error having been made. Bernard v. Lea (1913) 210 Fed. 583, 127 C. C. A. 219; In re Neasmith (1906) 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; In re Salkey (C. C. 1875) 11 N. B. R. 516, Fed. Cas. No. 12,254; In re Picton (C. C. 1873) 11 N. B. R. 420, Fed. Cas. No. 11,136. On a petition to revise, a decision may not be reviewed where such a review would require a consideration of conflicting evidence, or of evidence, although not conflicting, from which different deductions or conclusions may reasonably be drawn. In re Frank (C. C. A. 1910) 182 Fed. 794, 25 Am. Bankr. Rep. 486. A petition to revise in matter of law the proceedings of a district court in bankruptcy does not usually bring the prior proceedings of a referee before the circuit court of appeals for review. In re Pettingill & Co. (1905) 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757. On a proceeding to revise in matter of law an order of the court of bankruptcy, findings of fact cannot be questioned. In re Stearns Salt & Lumber Co. (1915) 225 Fed. 1, 140 C. C. A. 461.

Where the proceedings to be reviewed are had, in the first instance, before a referee, parties who desire a review of the evidence should either have the testimony before the referee taken down stenographically, and by him certified to the judge, or they should specifically point out to the referee the particular evidence which they wish summarized and should ask him to certify specific findings of fact. In re Cohen (D. C. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

Where the evidence is not in the record, the appellate court will presume that it was sufficient to establish the particular facts on which the decision was based. First State Bank v. Haswell (1909) 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330. The district court is not required to make find ings of fact for the purposes of an ap peal from its decision to the circui court of appeals in a bankruptcy cas In re Meyers (D. C. 1900) 105 Fe 353. 5 Am. Bankr. Rep. 4.

Where an application for dischar was heard by the referee, and the cou affirmed his report and ordered the di charge, it will be presumed in suppo of the order that the court investigat objections made thereto and overrul the same on the merits. Kentucky N Bank v. Carley (1904) 127 Fed. 68 62 C. C. A. 412, 12 Am. Bankr. Re 119.

Where the decision complained of w based on the court's opinion of t weight and tendency of conflicting e dence, it will not be reversed on a peal unless some error of law has i tervened, or unless a serious mistake fact is plainly apparent. First N Bank v. Abbott (1908) 165 Fed. 8 91 C. C. A. 538, 21 Am. Bankr. Re 436; In re Sullivan (1904) 14 Okl. 4 78 Pac. 85; In re Straschnow (C. A. 1910) 181 Fed. 337, 24 Am. Ban Rep. 948. A stipulation, between parties in interest before the cou submitting an involuntary bankrupt petition to the court without a ju constitutes the trial judge an arbit tor; and his decision, if supported evidence, will not be disturbed by t appellate court. Ft. Worth Hea Hardware Co. v. Shapleigh Hardwa Co. (1915) 221 Fed. 257, 137 C. C. 110.

On an appeal to the supreme court the United States, where the question one of fact, as, concerning the exi ence of a partnership, the concurri decisions of the two courts below w not be reversed on appeal if the e dence fairly tends to support the Manson v. Williams (1909) 213 U. 453, 29 Sup. Ct. 519, 53 L. Ed. 869, Am. Bankr. Rep. 22.

When it is sought, on appeal to the c cuit court of appeals, to reverse order made by the district court on question of fact, the appellant m very clearly satisfy the appellate co that the decision of the court below w erroneous; it will not be reversed u less plain and manifest error appea or unless plainly contrary to the weig of the evidence. In re Schulman (191 177 Fed. 191, 101 C. C. A. 361, Am. Bankr. Rep. 809; In re No Bros. (1903) 127 Fed. 286, 62 C. C. 218, 11 Am. Bankr. Rep. 506; Osbor v. Perkins (1901) 112 Fed. 127. C. C. A. 158, 7 Am. Bankr. Rep. 2 In re D. Levy & Co. (1905) 142 F 442, 73 C. C. A. 558, 15 Am. Ban Rep. 166; Adler v. Jones (1901) 1 Fed. 967, 48 C. C. A. 761, 6 Am. Ban Rep. 245; In re Mooney (C. C. 187 15 N. B. R. 456, Fed. Cas. No. 9,74 In re Dorr (C. C. A. 1912) 196 F 292, 28 Am. Bankr. Rep. 505.

Findings of fact made by a referee bankruptcy upon the testimony of w

sses examined before him, especially the evidence was conflicting, have ery reasonable presumption in their vor, and (particularly after they have en approved or confirmed by the dis- ct court) will not be disregarded or aside on appeal, unless it very clear- appears that there was error or mis- e on his part, but in the absence of ch plain error, they will be accepted thout review by the appellate court. ge v. Rogers (1909) 211 U. S. 575, Sup. Ct. 159, 53 L. Ed. 332, 21 Am. nkr. Rep. 496; Canner v. Webster pper Co. (C. C. A. 1909) 168 Fed. 9, 21 Am. Bankr. Rep. 872; Ells- rth v. Lyons (C. C. A. 1910) 181 d. 55; Stephens v. Merchants' Nat. nk (1907) 154 Fed. 341, 83 C. C. A. 9, 18 Am. Bankr. Rep. 560; John ylon & Co. v. Christiansen Harness g. Co. (1908) 158 Fed. 290, 85 C. C. 522, 19 Am. Bankr. Rep. 789; South- n Pine Co. v. Savannah Trust Co. 905) 141 Fed. 802, 73 C. C. A. 60, Am. Bankr. Rep. 618; In re Sween- (1909) 168 Fed. 612, 94 C. C. A. , 21 Am. Bankr. Rep. 866; In re ponigri (1910) 183 Fed. 307, 105 C. A. 519, 25 Am. Bankr. Rep. 509; ard v. Buffalo, N. Y. & P. R. Co. . C. 1879) Fed. Cas. No. 12,831; mpkin v. Foley (C. C. A. 1913) 204 d. 372, 29 Am. Bankr. Rep. 673; lsburg v. Blackford (C. C. A. 1913) 4 Fed. 438, 29 Am. Bankr. Rep. 320; re Coney Island Lumber Co. (D. C. 12) 199 Fed. 803; In re San Miguel ld Min. Co. (D. C. 1912) 197 Fed. 6, 27 Am. Bankr. Rep. 901; In re J. ngmann (1912) 197 Fed. 159, 116 C. A. 596; In re Walden Bros. othing Co. (D. C. 1912) 199 Fed. 315, Am. Bankr. Rep. 80; Epstein v. einfeld (C. C. A. 1914) 210 Fed. 6; Carroll v. Stern (1915) 223 Fed. 3, 139 C. C. A. 253; Deupree v. atson (1914) 216 Fed. 483; In re nnell (1914) 214 Fed. 337, 130 C. C. 645.

Where there are no findings of fact either the referee or the district urt, the court of appeals, lacking the d of the presumption which ordina- y attaches to such findings, must de- rmine the questions of fact for itself on a review of the evidence. Bur- gh v. Foreman (1904) 130 Fed. 13, C. C. A. 381, 12 Am. Bankr. Rep. 88. On a petition for revision, the ap- llate court will not review findings fact on which the order of the lower urt was based, and the evidence will considered only for the purpose of certaining whether the order com- ained of was wholly unsupported by e evidence. Shea v. Lewis (1913) 206 ed. 877, 124 C. C. A. 537, 30 Am. ankr. Rep. 436; Stuart v. Reynolds C. C. A. 1913) 204 Fed. 709, 29 Am. ankr. Rep. 412.

20. Effect of appeal and stay of pro- ceedings.—Where an appeal has been ly taken and perfected under the bankruptcy act, the district court is thereby deprived of jurisdiction to consider further or act upon any matters involved in the appeal. First Nat. Bank v. State Nat. Bank (1904) 131 Fed. 430, 65 C. C. A. 414, 12 Am. Bankr. Rep. 440. Where involuntary petition in bankruptcy proceeding in which receiver was appointed was dismissed, held, that it was within the discretion of the bankruptcy court to continue the receivership pending an appeal to the circuit court of appeals. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194, 265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528. The proceeding is still pending in the court of first instance while the case stands on appeal in the appellate court, and the appeal bond does not operate to stay proceedings, unless a supersedeas is also taken, so that, as to other steps or proceedings in the cause, it is still competent for the court of bankruptcy to act. In re Barton's Estate (D. C. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569; In re Chandler (D. C. 1904) 135 Fed. 893, 13 Am. Bankr. Rep. 614.

Bond on appeal from order dismissing petition in bankruptcy proceeding held not operative as a supersedeas bond, and the surety was therefore not liable for the damages from the wrongful receivership, which continued pending the appeal. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194, 265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528.

It is within the authority of the circuit court of appeals to order a stay of proceedings pending the appeal, on an application made to the court, not to a judge. In re Ironclad Mfg. Co. (C. C. A. 1911) 190 Fed. 320; In re Oregon Bulletin Co. (C. C. 1875) 14 N. B. R. 394, Fed. Cas. No. 10,560. But it ought not to be granted where it does not appear that the rights of the party applying will be prejudiced or seriously endangered if the proceedings in the court below are allowed to continue in their ordinary course. In re Oregon Bulletin Co. (C. C. 1875) 14 N. B. R. 394, Fed. Cas. No. 10,560.

An appeal from an adjudication of bankruptcy does not stay further proceedings in the case, such as ruling the bankrupt to file his schedules, unless a supersedeas is also taken. In re Brady (D. C. 1908) 169 Fed. 152, 21 Am. Bankr. Rep. 364.

21. Determination on appeal.—The appeal will be dismissed where the same question has previously been fully determined in another appeal in the same case. In re Kehler (1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669; Beach v. Macon Grocery Co. (1903) 120 Fed. 736, 57 C. C. A. 150, 9 Am. Bankr. Rep. 762. Where, pending an appeal in a bankruptcy proceeding, a stipulation was filed for re-

versal and dismissal, and it appeared that practically there was no unpaid claim, either proved or provable, against the bankrupt's estate which was not represented in the petition, the appeal would be dismissed without determination of the merits. In re Donnelly (C. C. A. 1914) 211 Fed. 118, reversing order In re Donnelly (D. C. 1915) 193 Fed. 755. The appeal will be dismissed where the question has become merely academic, as where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendant has been adjudged bankrupt in the district court of another district. In re Sears, Humbert & Co. (1904) 128 Fed. 275, 62 C. C. A. 623. Where, after the denial of a motion to withdraw a petition to revise after submission, petitioner filed consent that the petition be dismissed, the bankrupt's trustees were nevertheless entitled to a decision of the court. In re Witherbee (1913) 202 Fed. 896, 121 C. C. A. 254. The appeal will be dismissed where a person appeals from an order made in summary proceedings requiring him to indorse a liquor license, held by him jointly with the bankrupt, in order that it may be sold, with which order he has nevertheless complied. Fisher v. Cushman (1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646. But it was held under the former statute that if an order of the district court, removing a trustee in bankruptcy, was right when made, it cannot be reversed on appeal, notwithstanding the only creditors who were competent to move against the trustee have since withdrawn from the proceedings and are no longer in the case. In re Prouty (C. C. 1885) 24 Fed. 554.

If the appellate court proceeds with the appeal, it is not bound to reverse on strictly legal grounds, if satisfied that the facts were correctly found and that no injustice has been done. In re Clark (C. C. 1872) Fed. Cas. No. 2,802. If an adjudication of bankruptcy is supported by a sufficient allegation and proof of an act of bankruptcy, it cannot be set aside on appeal because other acts alleged were neither properly pleaded nor sufficiently proved. In re Lynan (1903) 127 Fed. 123, 62 C. C. A. 123, 11 Am. Bankr. Rep. 466.

The motion of a bankrupt to dismiss an appeal from a judgment allowing certain exemptions, for want of jurisdiction, may be denied without consideration on the merits, when the bankrupt fails to take a cross appeal. McGahan v. Anderson (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

In disposing of the appeal, the court of appeals may reverse or modify the judgment of the court below, or r mand the cause with specific instru tions as to the further steps to taken. White v. Thompson (1903) 1 Fed. 868, 56 C. C. A. 398, 9 Am. Banl Rep. 653. And see In re Medina Quar Co. (1912) 197 Fed. 308, 117 C. C. 54. Or, where the rights of the pa ties are perfectly plain, it may iss its own order to a receiver or trust in bankruptcy to perform the du which it decides to be incumbent him. Sprague Canning & Machine Co. v. Fuller (1908) 158 Fed. 588, C. C. A. 46, 20 Am. Bankr. Rep. 1 But where a claimant in bankrupt did not appeal from an order allowi him only a small portion of his clai as filed, he cannot be allowed more the appeal of objecting creditor Spencer v. Lowe (1912) 198 Fed. 96 117 C. C. A. 497, 29 Am. Bankr. Re 876.

Dismissal of appeal from so much order as disallowed general claim, b cause not taken within 10 days, as r quired by subdivision "a" of this se tion held not to require dismissal appeal from so much of the order disallowed a claim of lien. Massach setts Bonding & Ins. Co. v. Kemp (1915) 220 Fed. 847, 136 C. C. A. 59

It is the duty of the district court make such orders or take such actio as may be directed by the mandate the appellate court in sending the ca back. Brown v. Persons (1903) 1 Fed. 212, 58 C. C. A. 658, 10 A Bankr. Rep. 416; Ex parte First Na Bank of Chicago (1907) 207 U. S. 6 28 Sup. Ct. 23, 52 L. Ed. 103, 19 A Bankr. Rep. 542. But, except as directed, it has no further power deal with the judgment or order a pealed from. If reversed, it is annull for all purposes. If affirmed, it mu stand as made. In neither case, h the district court any authority change or modify or amend the jud ment or order or to grant a rehea ing. In re Lesaius (C. C. A. 1910) 1 Fed. 690, 25 Am. Bankr. Rep. 102; re Lennox (D. C. 1909) 181 Fed. 42 24 Am. Bankr. Rep. 922; In re Hu son River Electric Co. (D. C. 191 184 Fed. 970, 25 Am. Bankr. Rep. 87

On an appeal in a bankruptcy pr ceeding, findings of fact and conclusio of law will not ordinarily be stated the circuit court of appeals, unless n tice is given of an intended appeal the supreme court, or unless they a requested, and in that case the reque should be made at the time of the arg ment. Washington v. Tearney (191 197 Fed. 307, 117 C. C. A. 53, 28 A Bankr. Rep. 633; Lumpkin v. Fol (C. C. A. 1913) 204 Fed. 372, 29 A Bankr. Rep. 673; In re Martin (C. A. 1912) 201 Fed. 31, 29 Am. Bank Rep. 157.

9610. (Act July 1, 1898, c. 541, § 26.) Arbitration of controversies.

Arbitration of Controversies.—a The trustee may, pursuant to e direction of the court, submit to arbitration any controversy ising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by e trustee, one by the other party to the controversy, and the ird by the two so chosen, or if they fail to agree in five days after eir appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as the issues presented, may be filed in court and shall have like rce and effect as the verdict of a jury. (30 Stat. 553.)

Notes of Decisions

Arbitration and award.—The method selecting arbitrators prescribed by s section must be followed. It is an egularity if one of the arbitrators selected by the trustee, one by the ner party, and the third agreed upon the two contending parties. In re cLam (D. C. 1899) 97 Fed. 922, 3 n. Bankr. Rep. 245.

Under the act of 1867, a disputed im might be submitted to the decision of the register by stipulation, but his judgment was not final, but was subject to review by the court. In re Ford (D. C. 1878) 18 N. B. R. 426, Fed. Cas. No. 4,932.

The finding of the arbitrators, when filed in court, has no greater effect than a verdict of a jury, and is subject to be set aside or adjudged upon by the court in like manner as a verdict would be. In re McLam (D. C. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245.

9611. (Act July 1, 1898, c. 541, § 27.) Compromises.

Compromises.—a The trustee may, with the approval of the urt, compromise any controversy arising in the administration the estate upon such terms as he may deem for the best interts of the estate. (30 Stat. 553, 554.)

Notes of Decisions

Compromise and settlement of controversies.—A compromise should not be ected by the trustee without first taining leave of the court, but if the rcumstances are such that the apoval of the court would have been ven if asked, the compromise may be stained if afterwards questioned. icot v. Heyward (1875) 5 S. C. 441. nd see Simmons v. Richards (1902) Tex. Civ. App. 112, 66 S. W. 687.

trustee in bankruptcy has no power give his consent to a decree of a ate court, in a suit to which he is ade defendant, brought for the purse of determining the right and title property scheduled by the bankrupt part of his assets. In re Anderson D. C. 1885) 23 Fed. 482. Leave to mpromise a controversy will be resed where the claim of the trustee n apparently be collected in full if roper measures are taken, or where is secured. In re Furbish (D. C. 1876) ed. Cas. No. 5,159. When the court s been misled into making an order thorizing the compromise of a conoversy by misrepresentations as to e true state of the facts in question, application to have such order vated may be made by any creditor of e estate. In re Hoole (D. C. 1880) 3 ed. 496.

The fact that a proposed compromise s been approved by the creditors asembled in a meeting does not prevent its disapproval by the judge or the referee. In re Heyman (D. C. 1901) 108 Fed. 207, 5 Am. Bankr. Rep. 808. No compromise can be made by the creditors or any of them directly with the bankrupt, but any such agreement must have the concurrence of the trustee and the approval of the court. In re Ford (D. C. 1878) 18 N. B. R. 426, Fed. Cas. No. 4,932; In re Anderson (C. C. 1874) Fed. Cas. No. 351.

An order of the bankruptcy court made upon the ex parte application of the trustee, approving the terms of an agreement of compromise, and authorizing the trustee to consummate the same, has no binding effect upon the other party to the proposed compromise. Duff v. Hopkins (D. C. 1887) 33 Fed. 599. But compare Lake v. Dredge (Iowa, 1912) 138 N. W. 869.

Payment under compromise of controversy over stock transferred to bankrupt's wife, and release of claims by wife, held to be returned, where provision of compromise as to withdrawing objections to discharge was not carried out. In re Doyle (C. C. A. 1915) 220 Fed. 434.

The expense and delay of a litigation will not justify a compromise in a case where public interests and the due administration of the bankruptcy law require the settlement of the questions of law involved by the judgment of the court. In re Rowe (D. C. 1878) Fed.

Cas. No. 12,092. Nor where the proposed settlement would result in creating an illegal preference, contrary to the spirit and purpose of the statute. In re Geiselhart (D. C. 1910) 181 Fed. 622, 25 Am. Bankr. Rep. 318.

A court of bankruptcy is not authorized by this section to confirm a proposed plan for the reorganization of a bankrupt corporation, under which dissenting creditors would be compelled to accept stock in a new corporation in exchange for their claims and submit to the creation of a prior mortgage lien to provide a working capital. In re Northampton Portland Cement Co. (D. C. 1911) 185 Fed. 542, 25 Am. Bankr. Rep. 565. And see In re Woodend (D. C. 1904) 133 Fed. 593, 12 Am. Bankr. Rep. 768.

Stockholders of a bankrupt corporation, at whose instance a suit has been brought by the trustee against officers and directors to recover damages for the alleged wrecking of the corporati are entitled to have an offer of co promise rejected by the bankrupt court, on giving security to protect t estate against any loss consequent u on the failure to realize the amou offered. In re John H. Woodbury D matological Institute (C. C. A. 191 191 Fed. 819, 27 Am. Bankr. Rep. 4

A compromise may be confirmed whe the interests of all concerned will promoted by a judicious settlement of court, as where a claim against third person for money and prope alleged to belong to the bankrupt contested, and the evidence is confli ing, and it is apparent that if the tr tee could recover at all, it would o be at the end of a long and costly su In re Kranich (D. C. 1909) 174 F 908, 23 Am. Bankr. Rep. 550. S Matter of Croton Ins. Co. (N. Y. 184 3 Barb. Ch. 642.

§ 9612. (Act July 1, 1898, c. 541, § 28.) Designation of new papers.

Designation of Newspapers.—a Courts of bankruptcy shall order designate a newspaper published within their respective te ritorial districts, and in the county in which the bankrupt resid or the major part of his property is situated, in which notices r quired to be published by this Act and orders which the court may rect to be published shall be inserted. Any court may in a particul case, for the convenience of parties in interest, designate son additional newspaper in which notices and orders in such case sh be published. (30 Stat. 554.)

Notes of Decisions

Designation of newspapers for publication of bankruptcy notices.—Where the referee in bankruptcy, pursuant to a rule of the court, designates certain newspapers, approved by the court wherein all notices required under the bankruptcy law shall be published, this amounts to a designation of such papers by the court for each particular notice therein published. Hills v. Alden (D. C. 1878) Fed. Cas. No. 6,507.

A referee may also, in the exercise of a wise discretion, select additional newspapers, published elsewhere th in the district, for the publication such notices. Thus, where many the creditors of a particular bankru lived in other states, it was held tirely proper for the referee to requ the publication of notices, for that tate, in papers published in those o er states, as well as in the papers d ignated by the court within the distri Ex parte Robinson (C. C. 1876) F Cas. No. 11,933.

§ 9613. (Act July 1, 1898, c. 541, § 29.) Offenses.

Offenses.—a A person shall be punished, by imprisonment f a period not to exceed five years, upon conviction of the offense having knowingly and fraudulently appropriated to his own u embezzled, spent, or unlawfully transferred any property or s creted or destroyed any document belonging to a bankrupt esta which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not exceed two years, upon conviction of the offense of having kno ingly and fraudulently (1) concealed while a bankrupt, or after discharge, from his trustee any of the property belonging to his esta in bankruptcy; or (2) made a false oath or account in, or in relati to, any proceeding in bankruptcy; (3) presented under oath any fal claim for proof against the estate of a bankrupt, or used any su claim in composition personally or by agent, proxy, or attorne or as agent, proxy, or attorney; or (4) received any material amou

property from a bankrupt after the filing of the petition, with ent to defeat this Act; or (5) extorted or attempted to extort any ney or property from any person as a consideration for acting forbearing to act in bankruptcy proceedings.

A person shall be punished by fine, not to exceed five hundred lars, and forfeit his office, and the same shall thereupon become ant, upon conviction of the offense of having knowingly (1) acted a referee in a case in which he is directly or indirectly inter- ed; or (2) purchased, while a referee, directly or indirectly, any perty of the estate in bankruptcy of which he is referee; or refused, while a referee or trustee, to permit a reasonable oppor- ity for the inspection of the accounts relating to the affairs of, l the papers and records of, estates in his charge by parties in erest when directed by the court so to do.

A person shall not be prosecuted for any offense arising under s Act unless the indictment is found or the information is filed court within one year after the commission of the offense. (30 t. 554.)

Notes of Decisions

Persons liable.
Concealment of property by bankrupt.
Making false oath or account.
Conspiring with bankrupt.
Aiding and abetting commission of offense.
Indictment or information.
—— Concealment of property.
—— Perjury or false oath in bankruptcy.
—— Conspiracy to conceal assets.
Burden of proof and evidence.
—— Self-criminating evidence.
Limitation of prosecution.

Persons liable.—A bankrupt cor- ation may be guilty of the offense concealing assets, and its president any other officer, though not him- a bankrupt, may be indicted and ished for that offense if he brought ut the concealment or participated rein or conspired with others to ef- it, and it is immaterial that the oration is not or cannot be indict- for the same offense or as one of conspirators. Kaufman v. U. S. 14) 212 Fed. 613, 129 C. C. A. 149; en v. U. S. (1907) 157 Fed. 651, C. C. A. 113, 19 Am. Bankr. Rep. 8; S. v. Freed (C. C. 1910) 179 Fed. , 25 Am. Bankr. Rep. 89. CON- A, Field v. U. S. (1905) 137 Fed. 9 C. C. A. 568, 14 Am. Bankr. Rep. ; U. S. v. Lake (D. C. 1904) 129 l. 499, 12 Am. Bankr. Rep. 270.

Concealment of property by bank- t.—To constitute a criminal con- lment of assets by a bankrupt, such ets must have been concealed from trustee by the bankrupt as such, after his discharge; the assets must e belonged to the estate; and the cealment must have been knowingly l fraudulently made. U. S. v. Rhodes . C. 1913) 212 Fed. 513.

he offense of concealing assets con- s of a continuous concealment dur- the whole course of the bankruptcy ceedings, or after discharge, or un- discovery, and the crime may be iated, but is not necessarily consummated, by the fraudulent omission of property from the schedule. Johnson v. U. S. (1908) 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; Kern v. U. S. (1909) 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223. Compare U. S. v. Clark (C. C. 1869) Fed. Cas. No. 14,806. A mere omission of property from the bankrupt's schedule through mistake or accident is not a fraudulent concealment of it in the sense of this section. In re Scott (D. C. 1880) 11 Fed. 133. But the fact that the bankrupt used a part of the proceeds of property which he had concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment. Corenman v. U. S. (1911) 188 Fed. 424, 110 C. C. A. 341. And see U. S. v. Lowenstein (D. C. 1904) 126 Fed. 884, 11 Am. Bankr. Rep. 134.

Where a bankrupt conceals property prior to the appointment of a trustee, and continues the concealment after such appointment, it is a concealment of property "from his trustee." U. S. v. Rhodes (D. C. 1913) 212 Fed. 513; U. S. v. Goldstein (D. C. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

After a successful concealment of assets has been practiced, and an indictment found against the bankrupt therefor, he cannot purge himself of his criminal liability by filing an amended schedule, setting forth the assets alleged to have been concealed. Such conduct may properly influence the court in determining the measure of punishment after conviction, but does not render the bankrupt any the less guilty of the statutory offense. Kern v. U. S. (1909) 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223.

Where a state statute makes it a punishable offense, under certain circumstances, for an insolvent debtor to conceal his property, the proper state court is not deprived of jurisdiction to try and punish a person violating the

statute by the fact that he afterwards becomes bankrupt and thereupon becomes liable to punishment under the bankruptcy act in respect to the same concealment of property. State v. Thompson (1878) 58 N. H. 270.

3. Making false oath or account.—The provision of this section for the punishment of any person who shall have "made a false oath in, or in relation to, any proceeding in bankruptcy" does not create a new offense, but merely prescribes a different penalty for the crime of perjury when committed in or in relation to bankruptcy proceedings. Wechsler v. U. S. (1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

A bankrupt commits this offense if he intentionally, and with a fraudulent purpose, omits from his sworn schedule of assets any material amount of property which should have been included. U. S. v. Nihols (C. C. 1845) Fed. Cas. No. 15,880. But not where he fairly submitted the facts to his counsel, and, acting on advice then received, withheld a certain item from the schedule. U. S. v. Conner (C. C. 1845) Fed. Cas. No. 14,847. And not where the item omitted was of very doubtful value, or where the bankrupt's title to it was doubtful in law. In re Shoemaker (D. C. 1868) Fed. Cas. No. 12,799.

This provision of the statute applies to any false testimony which may be given by the bankrupt on his examination concerning his property and assets before the referee. U. S. v. Coyle (D. C. 1916) 229 Fed. 256; Wechsler v. U. S. (1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1. Or on his examination before the referee on an investigation of specifications in opposition to his application for discharge. Edelstein v. U. S. (1906) 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re Kretsch (D. C. 1909) 172 Fed. 523, 22 Am. Bankr. Rep. 284.

On an examination of a third person in bankruptcy, a false statement that the witness had received currency from the bankrupts for a check for $1,500 given them on the day they began business held sufficiently material to be the subject of a prosecution for perjury. Ulmer v. U. S. (1915) 219 Fed. 641, 134 C. C. A. 127.

Accused in a prosecution for perjury, though having made the same false statement on three occasions and convicted under three counts, held only guilty of one offense, and not subject to successive sentence on each conviction. Id.

4. Conspiring with bankrupt.—Persons may be indicted for conspiring with a bankrupt to commit the acts made criminal by the bankruptcy law, although no one but the bankrupt himself is mentioned in that connection. U. S. v. Bayer (C. C. 1876) Fed. (
No. 14,547.

The offense of conspiring to conce
bankrupt's property from his tru
may be committed although it is
shown that a trustee was ever appo
ed, as in a case where, by the carr
out of the conspiracy, all the ba
rupt's property was removed out
the jurisdiction of the court before
adjudication in bankruptcy, so that
appointment of a trustee would h
been a useless formality. Radin v.
S. (1911) 189 Fed. 568, 111 C. C.
6, 25 Am. Bankr. Rep. 640.

An indictment does not state an
fense when it charges that the defe
ants, who were not in any manner
ficially connected with the bankr
corporation, either as directors
stockholders, conspired to conceal
sets of the corporation from the tr
tee in bankruptcy (that is, conspi
with each other, but not with the ba
rupt or its officers), and in pursua
of such conspiracy removed the
poration's stock of goods from its pl
of business and sold the same and c
cealed the proceeds. U. S. v. Waldr
(C. C. 1911) 188 Fed. 524, 26
Bankr. Rep. 677.

**5. Aiding and abetting commissio
offense.**—Concealment of assets f
the trustee in bankruptcy is an offe
which can be committed only w
there is a person in bankruptcy,
with his participation, but when i
so committed, not only the bankrup
punishable, but also any others
aid and abet in the concealment. U
v. Young & Holland Co. (C. C. 19
170 Fed. 110, 22 Am. Bankr. Rep.

Where accused was charged with
ing and abetting a corporation of wh
he was president and manager in c
cealing its assets from its trustee
bankruptcy, it was not necessary t
the corporation be first convicted
fore accused could be convicted, un
Cr. Code, § 332, making aiders
abettors principals. Kaufman v. U
(1914) 212 Fed. 613, 129 C. C. A.

6. Indictment or information.—
offenses enumerated and denounced
the bankruptcy act are mere mis
meanors, and not "infamous crim
within the meaning of the term as u
at common law or in the fifth ame
ment to the constitution, and theref
may be prosecuted by information
stead of indictment. U. S. v. Bl
(D. C. 1877) 15 N. B. R. 325, Fed. C
No. 14,609; U. S. v. Reilly (C. C. 18
20 Fed. 46. Compare Mackin v. U.
(1886) 117 U. S. 348, 6 Sup. Ct. 7
29 L. Ed. 909; Ex parte Wilson (18
114 U. S. 417, 5 Sup. Ct. 935, 29 L.
89. In an indictment for an offe
against the bankruptcy act, the w
"feloniously" should be omitted,
offenses being indictable as misdeme
ors. U. S. v. Prescott (D. C. 1870

B. R. 112, Fed. Cas. No. 16,084. an indictment against the presi- t and manager of a bankrupt cor- ation, charging him with knowingly fraudulently aiding and abetting n the concealment of its assets from trustee, held to charge a felony un- subdivision "b" of this section, and Code, §§ 332, 335. Kaufman v. U. (1914) 212 Fed. 613, 129 C. C. A.

he indictment must set forth the ceedings in the court of bankruptcy h such particularity as to show af- atively that an adjudication of kruptcy was made in a case in which court, describing it, had jurisdic- n. U. S. v. Prescott (D. C. 1870) l. Cas. No. 16,084. An indictment ch does not state the name of the rt or the time or place where the ceedings were instituted is not suf- ent. U. S. v. Latorre (C. C. 1871) l. Cas. No. 15,567. But see U. S. Deming (C. C. 1845) Fed. Cas. No. 945, holding an indictment for per- y in a proceeding in bankruptcy icient in alleging the petition as de "to a judge sitting as a bankrupt rt." It is not necessary to set th in detail the petition in bank- tcy on which the adjudication was de, but only to refer to it in such nanner as to show its character and ect. U. S. v. Deming (C. C. 1845) l. Cas. No. 14,945. And as an in- tment need not ordinarily negative exception, the jurisdiction of the rt to make an adjudication in bank- tcy against the corporation in ques- n may be sufficiently alleged without particular averment that it was one the classes of corporations made ject to the bankruptcy law. U. S. Freed (C. C. 1910) 179 Fed. 236, Am. Bankr. Rep. 89. And in fact as been held sufficient simply to al- e that the defendant "was lawfully udged a bankrupt." U. S. v. Crane C. 1868) Fed. Cas. No. 14,887.

. —— **Concealment of property.**— e word "conceal" is of plain import, l when coupled in an indictment with words "unlawfully, knowingly, and udulently" clearly excludes uninten- nal acts, as the provisions of the tute relating to this offense set th all the elements of the offense, indictment in the words of the stat- is sufficient, and the particular man- of concealment of the property in estion need not be described in the ictment, as this is a matter of evi- ce and not of pleading. U. S. v. odes (D. C. 1913) 212 Fed. 513; S. v. Comstock (C. C. 1908) 161 l. 644, 20 Am. Bankr. Rep. 520.

t is necessary to plead the time of the cealment, sufficiently to show that occurred while the defendant was in kruptcy or after his discharge. But nay be laid as of any date when the cealment continues, and hence it is per to charge the commission of the offense as of the date when the bankrupt refused to turn over the property in question to the trustee. U. S. v. Stern (D. C. 1911) 186 Fed. 854, 26 Am. Bankr. Rep. 110.

The ownership of the property must be alleged. But an averment that the defendant concealed property "which then and there belonged to the estate in bankruptcy" sufficiently alleges the ownership of the property, and is not rendered insufficient or uncertain by the further averment that the property was "then and there the personal property of" the bankrupt, which must be construed in conjunction with the prior averment, or, even if the two averments must be regarded as repugnant, the latter may be rejected as surplusage. U. S. v. Comstock (C. C. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520. So, where the indictment alleged the concealment, some months after the adjudication, of property "all then and there the property of him the said bankrupt," the failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication was a defect of form only, and not of substance. U. S. v. Jackson (C. C. 1880) 2 Fed. 502. And an averment that the bankrupt "unlawfully, knowingly, willfully, and fraudulently" concealed the property carries with it a sufficient averment of his knowledge that such property belonged to his estate in bankruptcy. McNiel v. U. S. (C. C. A. 1907) 150 Fed. 82, 18 Am. Bankr. Rep. 18.

It is not an essential element of this offense, such as must be averred in the indictment, that the bankrupt at the time of concealing the property knew either the fact that a trustee had been appointed for his estate or the name of the trustee. U. S. v. Comstock (C. C. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

Under section 1, subd. 19 (ante, § 9585), and subdivision "b" of this section, counts of an indictment against an individual, merely alleging that, while a corporation was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a sale of the bankrupt's property, etc., but not alleging that he was an officer or agent of the corporation, were demurrable. U. S. v. Rosenstein (D. C. 1914) 211 Fed. 738.

Indictment for concealing property from trustee in bankruptcy, under subdivision "b" of this section, held not demurrable for failure to allege a demand. Meyer v. U. S. (1915) 220 Fed. 822, 136 C. C. A. 432.

8. —— **Perjury or false oath in bankruptcy.**—An indictment for making a false oath in bankruptcy, by swearing to a schedule of assets known to be false or incomplete, must allege the facts concerning the omission or understatement of assets sufficiently to show

the materiality of the false statement, but need not expressly aver that it was material. U. S. v. Lake (D. C. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270.

The particular property claimed to have been fraudulently and knowingly omitted from the schedule must be described in the indictment, but an allegation that it consisted of "one hundred and fifty thousand dollars in lawful money of the United States" is sufficiently specific. U. S. v. Lake (D. C. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270. But it will not do to allege that the bankrupt knew that his schedule was false and that he knew that he was the owner of a specified sum of money in addition to what was mentioned in the schedule. It is not the bankrupt's knowledge that is in question in this averment, but the fact itself. Hence the indictment must charge directly that he did have other property than that listed in the schedule. Bartlett v. U. S. (1901) 106 Fed. 884, 46 C. C. A. 19, 5 Am. Bankr. Rep. 678.

In an indictment for perjury committed in an examination or other proceeding in bankruptcy, if it is founded on the general provision of the federal criminal law as to perjury, it is essential to allege that the false oath was taken "willfully," and the omission of this word is a fatal defect. U. S. v. Lake (D. C. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270. But where the alleged perjury consists in not giving a full and true account of his property by the bankrupt, the items on the schedule need not be set out in the indictment. U. S. v. Chapman (C. C. 1844) Fed. Cas. No. 14,784. And an indictment is sufficient which, after alleging the prior proceedings and that an examination of the bankrupt was held and that he was sworn to make true answers, avers that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss. U. S. v. Crane (C. C. 1868) Fed. Cas. No. 14,887.

Indictment charging alleged bankrupt with testifying falsely concerning transfers of money to wife or son held not insufficient for failure to show that his attention was called to a payment which he failed to disclose. U. S. v. Coyle (D. C. 1916) 229 Fed. 256.

An indictment which charges that defendant committed perjury when he swore that his books were burned on a certain day in April, that instead of being burned on that day they were in existence and in his possession as late as November following, and that he knew that he was making a false oath when he swore that they were burned in April, is good and sufficient, the defects, if any, being merely in matter of form not prejudicial to the defendant. Kovoloff v. U. S. (C. C. A. 1912) 202 Fed. 475, 28 Am. Bankr. Rep. 767.

An indictment for perjury assigned on defendant's testimony in a bankruptcy proceeding, that he received $1,500 in currency from the bankrupts, held not objectionable for failure to charge that he did not receive $1,500 or any substantially similar sum. Ulmer v. U. S. (1915) 219 Fed. 641, 134 C. C. A. 127.

9. —— Conspiracy to conceal assets.—An indictment charging a bankrupt and another with conspiracy to conceal property from the bankrupt's trustee, and also alleging such concealment by the bankrupt, is not bad for duplicity. Steigman v. U. S. (1915) 220 Fed. 63, 135 C. C. A. 631.

Indictment for conspiring to conceal bankrupt's property held not defective for failure to use the words "knowingly and fraudulently," in view of R. S. § 1025, ante, § 1691. Tapack v. U. S. (C. C. A. 1915) 220 Fed. 445.

In an indictment under Cr. Code, § 37, post, § 10201, for conspiracy to conceal property from a trustee in bankruptcy, in violation of subdivision b (1) of this section, an averment that a trustee was appointed is not essential. Steigman v. U. S. (1915) 220 Fed. 63, 135 C. C. A. 631.

Where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustee alleged, as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that the removal was illegal and not under legal process, it was held insufficient. U. S. v. Waldman (C. C. 1911) 188 Fed. 524, 26 Am. Bankr. Rep. 677.

10. Burden of proof and evidence.—In a prosecution of a bankrupt for the offense of concealing assets from his trustee, the burden is on the government to establish the defendant's guilt beyond a reasonable doubt, and where the charge concerns property which he had previously transferred, he is entitled to the presumption of law that he acted legally and in good faith in conveying it. Chodkowski v. U. S. (1912) 194 Fed. 858, 114 C. C. A. 624, 28 Am. Bankr. Rep. 62. But if the evidence traces valuable property into the recent possession of the bankrupt, and then shows that he has failed to surrender it or account for it, it is incumbent on him to give a reasonable and credible account of its disappearance or disposition, and the jury will not be bound to accept his bare denial under oath. In re Lasky (D. C. 1908) 163 Fed. 99, 20 Am. Bankr. Rep. 729; U. S. v. Stern (D. C. 1911) 186 Fed. 854, 26 Am. Bankr. Rep. 110; Stern v. U. S. (1912) 193 Fed. 888, 114 C. C. A. 102, 28 Am. Bankr. Rep. 101.

The offense of concealing assets in bankruptcy may be proved by circumstantial evidence. Stern v. U. S. (1912) 193 Fed. 888, 114 C. C. A. 102, 28 Am.

nkr. Rep. 101. In a prosecution for jury committed by defendant in his mination concerning the estate of krupts, evidence of defendant's con- ntial relations with the bankrupts l admissible to show motive. Ul- v. U. S. (1915) 219 Fed. 641, 134 C. A. 127.

is not improper to admit evidence the amount and value of defendant's k in trade a few days prior to the g of the petition in bankruptcy and a short time afterwards. Jacobs J. S. (C. C. A. 1908) 161 Fed. 694, Am. Bankr. Rep. 550. And the stee may testify that he was never rmed by the bankrupt that property nging to him was stored in a par- lar place, the property described he indictment having been found by trustee in that place. Johnson v. S. (1909) 170 Fed. 581, 95 C. C. A. , 22 Am. Bankr. Rep. 359. To ve a continuous concealment of perty, it is not necessary to take up h moment of the bankrupt's life le the proceedings lasted, and prove t he did as a means of proving what failed to do. Johnson v. U. S. 08) 163 Fed. 30, 89 C. C. A. 508, Am. Bankr. Rep. 724. It is not essary to prove the concealment of h and every article or sum of mon- et forth in the indictment, but proof the concealment of any part of the perty or money described is suffi- t to sustain a conviction. U. S. v. n (D. C. 1911) 186 Fed. 854, 26 Bankr. Rep. 110. It is not nec- ry to prove that a demand for the ender of the property was made the trustee. U. S. v. Smith (D. C. 4) 13 N. B. R. 61, Fed. Cas. No. 39.

charge against a bankrupt of con- ing property belonging to the es- from his trustee cannot be sus- ed without proof of an adjudication bankruptcy, though the evidence ws a concealment of property from rustee de facto. Gilbertson v. U. (1909) 168 Fed. 672, 94 C. C. A. , 22 Am. Bankr. Rep. 32.

a prosecution for false swearing bankruptcy, evidence which not only tradicts defendant's testimony, but far preponderates it as to justify a ing that the latter was not only e, but was given knowingly and dulently, is sufficient to sustain a viction. Kahn v. U. S. (1914) 214 . 54, 130 C. C. A. 494.

alse swearing in bankruptcy is not equal enormity with perjury, and is within the common-law rule that, to tain a conviction of perjury, it must proved by two witnesses, or one ness and corroborating circumstanc- Id.

n indictment for perjury which al- es that the accused gave false tes- ony before the referee in bankrupt- is sustained by evidence that the ring at which the accused testified was had in the referee's office, that the referee administered the oath to the accused as a witness, and personally conducted part of the examination, while the rest was conducted by counsel, that all the testimony was taken by a stenographer, and that the referee was at all times in the same room, or in an adjacent or adjoining room, in the absence of anything to show that the referee was not within the hearing of the examination at all times, as against the objection that the perjury was not committed before the referee in person, based on the statement of the stenographer, deduced from signs in her notes, that the referee was out of the room part of the time, but without any independent recollection on her part that such was the case. Kovoloff v. U. S. (1912) 202 Fed. 475, 120 C. C. A. 605, 28 Am. Bankr. Rep. 767.

In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting it in the concealment of assets from its trustee, the fact that there was no evidence that defendant was holding the money for the bankrupt did not impair the government's case. Kaufman v. U. S. (1914) 212 Fed. 613, 129 C. C. A. 149.

11. —— Self-criminating evidence.—The provision of Bankruptcy Act, § 7 (ante, § 9591), with reference to the examination of the bankrupt, that no testimony given by him shall be offered in evidence against him in any criminal proceeding, does not render bankrupts immune from prosecutions for perjury committed on their examination. U. S. v. Coyle (D. C. 1916) 229 Fed. 256; Wechsler v. U. S. (1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1. Nor from a prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed in opposition to the bankrupt's application for discharge. Edelstein v. U. S. (1906) 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649.

The protection afforded to the bankrupt by Bankruptcy Act, § 7 (ante, § 9591), providing for the examination of bankrupts and that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," extends only to the testimony given by the bankrupt on his examination under that section, and does not render inadmissible, on a criminal prosecution, the schedules filed by him in the bankruptcy proceedings. Ensign v. Pennsylvania (1913) 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658.

On trial for conspiring to conceal bankrupt's assets, schedules held not excluded by any statute. U. S. v. Green (D. C. 1915) 220 Fed. 973.

12. Limitation of prosecution.—Where all of a bankrupt's acts in reference to property alleged to have been concealed from his trustee occurred at a time more than 12 months prior to the find-

ing of the indictment, the offense of concealment could not be regarded as a continuing one, and the bankrupt having done nothing during the 12-months period except to remain passive and silent, a prosecution was barred by the limitation prescribed by this section. Warren v. U. S. (1912) 199 Fed. 753, 118 C. C. A. 191, 29 Am. Bankr. Rep. 555.

§ 9614. (Act July 1, 1898, c. 541, § 30.) Rules, forms, and orders.

Rules, Forms, and Orders.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States. (30 Stat. 554.)

GENERAL ORDERS AND FORMS IN BANKRUPTCY.*

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 28, 1898.

GENERAL ORDERS IN BANKRUPTCY, 1898.

In pursuance of the powers conferred by the constitution and laws upon the supreme court of the United States, and particularly by the act of congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

Notes of Decisions

Rules of practice and forms in general.—The rules and forms prescribed by the Supreme Court of the United States under and by virtue of the Bankruptcy Act for its administration have the force and effect of law. In re Gerber (1911) 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608. In case of inconsistency or disagreement between the statute and a rule or general order so made, the statute must prevail and the rule or order give way. In re Baker (D. C. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101. The general orders and forms in bankruptcy adopted and established by the Supreme Court have the force and effect of law. Sabin v. Blake-McFall Co. (1915) 223 Fed. 501, 139 C. C. A. 49.

The practice in proceedings in bankruptcy, when not controlled by the statute and the rules of the Supreme Court, must be prescribed by the district courts sitting in bankruptcy. In re Kerosene Oil Co. (D. C. 1868) Fed. Cas. No. 7,725.

When a rule made by a district court in bankruptcy is in conflict with one of the official forms prescribed by the Supreme Court, the rule is void and must give way. In re Johnson (D. C. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814.

Bankruptcy rules of circuit courts of appeals.—These rules are printed in the notes to § 1114, ante.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall

*Rules of Circuit Court of Appeals in matters of bankruptcy are set forth in Vol. 2, pages 1346 to 1355, inclusive.

ntain a memorandum of the filing of the petition and of the action the court thereon, of the reference of the case to the referee, and the transmission by him to the clerk of his certified record of the oceedings, with the dates thereof, and a memorandum of all proceedgs in the case except those duly entered on the referee's certified cord aforesaid. The docket shall be arranged in a manner convenient r reference, and shall at all times be open to public inspection.

Notes of Decisions

Necessary entries to be made in docket.—See note 4 under § 9635, post.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him e day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, der the seal thereof, and be tested by the clerk; and blanks, with e signature of the clerk and seal of the court, may, upon application, furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in rson in his own behalf, or by a petitioning or opposing creditor; but creditor will only be allowed to manage before the court his individl interest. Every party may appear and conduct the proceedings by torney, who shall be an attorney or counsellor authorized to practice the circuit or district court. The name of the attorney or counsellor, th his place of business, shall be entered upon the docket, with the te of the entry. All papers or proceedings offered by an attorney to filed shall be indorsed as above required, and orders granted on otion shall contain the name of the party or attorney making the otion. Notices and orders which are not, by the act or by these genal orders, required to be served on the party personally may be served on his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or ritten out plainly, without abbreviation or interlineation, except where ch abbreviation and interlineation may be for the purpose of referce.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individl in different districts, the first hearing shall be had in the district in hich the debtor has his domicil, and the petition may be amended by serting an allegation of an act of bankruptcy committed at an earlier te than that first alleged, if such earlier act is charged in either of e other petitions; and in case of two or more petitions against the me partnership in different courts, each having jurisdiction over the

case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

Notes of Decisions

Retention of jurisdiction—Transfer.—See note under § 9616, post.

"Individual."—See note under § 9616, post.

What constitutes "district of domicile."—See note under § 9616, post.

Involuntary petition in one district and voluntary petition in another.—See note under § 9616, post.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same

nner as is required by the act in cases of debtors against whom ad-
ication of bankruptcy shall be made.

Notes of Decisions

Duty of partner not adjudged bankrupt to file schedule.—See note 4 under § 9591, ante.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

n all cases of involuntary bankruptcy in which the bankrupt is ab-
t or can not be found, it shall be the duty of the petitioning creditor
file, within five days after the date of the adjudication, a schedule
ing the names and places of residence of all the creditors of the
krupt, according to the best information of the petitioning creditor.
the debtor is found, and is served with notice to furnish a schedule
his creditors and fails to do so, the petitioning creditor may apply
an attachment against the debtor, or may himself furnish such
edule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or
travelling, or in procuring the attendance of witnesses, or in per-
uating testimony, the clerk, marshal or referee may require, from
bankrupt or other person in whose behalf the duty is to be per-
med, indemnity for such expense. Money advanced for this pur-
se by the bankrupt or other person shall be repaid him out of the
ate as part of the cost of administering the same.

Notes of Decisions

lling fees of clerk.—See note 1 un-
§ 9635, post.

xpenses of claimants on re-examination of labor claims.—See note 37 under § 9641, post.

Expense of stenographer.—See note 31 under § 9586, ante.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on
plication of the petitioner. Amendments shall be printed or written,
ned and verified, like original petitions and schedules. If amend-
nts are made to separate schedules, the same must be made sepa-
ely, with proper references. In the application for leave to amend,
e petitioner shall state the cause of the error in the paper originally
d.

Notes of Decisions

**ower to allow amendments irrespec-
e of this order.**—See note 15, § 9602, te.

Effect of amendments to petition and defects curable by amendment.—See note 15 et seq., § 9602, ante.

Correction of schedule.—See note 11 under § 9591, ante.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon
hich the bankrupt shall attend before the referee; and from that day
e bankrupt shall be subject to the orders of the court in all matters
lating to his bankruptcy, and may receive from the referee a protec-
n against arrest, to continue until the final adjudication on his ap-

plication for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

Notes of Decisions

Filing exceptions to master's report.—See note 56 under § 9598, ante.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

Notes of Decisions

Power of referee to remove trustee.—See note 2 under § 9630, post.

Disapproval of trustee selected.—See note 10 under § 9628, post.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

Notes of Decisions

Direction of court.—See note 4 under § 9628, post.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

Notes of Decisions

Specification of items—Appraisal.—See note 24 under § 9590, ante.

Assignment of exemption right.—See note 24 under § 9590, ante.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

Notes of Decisions

"Perishable property."—See note 29 under § 9586, ante.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. [As amended and promulgated November 1, 1915.]

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on

whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

Notes of Decisions

Time of making proof.—See note 4 under § 9641, post.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

Notes of Decisions

Sufficiency of certification.—See note 15 under § 9622, post.

Mode of review prescribed as exclusive.—See note 11 under § 9622, post.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

Notes of Decisions

Deposit and disbursement of funds by trustee.—See note 17 under § 9631, post.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

Notes of Decisions

Construction with section 9 of bankruptcy act.—See note 2 under § 9593, ante.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

Notes of Decisions

Restricting creditor to hour of day appointed.—See note 41 under § 9598, ante.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

Notes of Decisions

Amount and items of cost.—See note 31 under § 9586, ante.

Resistance of adjudication by debtor.—See notes 30 and 37 under § 9586, ante.

XXXV.

COMPENSATION OF CLERKS, REFEREES, AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned. [Last sentence promulgated December 11, 1905.]

Notes of Decisions

Fees of clerks for copies of petition and notice of application for discharge.—See note 1 under § 9636, post.

Duties of clerks—Deposit of filing fees.—See note 1 under § 9635, post.

Per diem for services of referee when away from home.—See note under § 9624, post.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regu-

lated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the supreme court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the supreme court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

Notes of Decisions

Compliance with order.—See note 11 under § 9609, ante.

Application alone to appeals taken under bankruptcy act.—See note 5 under § 9608, ante.

Application to writ of error from supreme court to determine question of jurisdiction.—See note 6 under § 9609, ante.

Action by court sua sponte in allowance of appeal.—See note 5 under § 9608, ante.

Separate findings of fact and conclusions of law.—See note 5 under § 9608, ante.

Findings made part of record by order nunc pro tunc.—See note 6 under § 9609, ante.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

Notes of Decisions

Application to summary proceedings to compel bankrupt to turn over property to trustee.—See note 14 under § 9591, ante.

Filing exceptions to master's report.—See note 56 under § 9598, ante.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

Notes of Decisions

Observance of forms.—The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and less suitable forms of special pleadings and procedure used in chancery cases. W. A. Gage & Co. v. Bell (D. C. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696. Importance and necessity of closely following provisions of bankruptcy act and prescribed forms and methods of procedure in preparing papers stated. Sabin v. Blake-McFall Co. (1915) 223 Fed. 501, 139 C. C. A. 49.

FORMS IN BANKRUPTCY

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20, ante, § 9604.]

[Form No. 1.]

Debtor's Petition.

To the Honorable ————,
Judge of the District Court of the United States
for the —— District of ——:

The petition of ————, of ——, in the county of ——, and district and state of ——, —— [state occupation], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

————,

————, Attorney.

United States of America, District of ——, ss:

I, ————, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

————, Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,

————,
[Official character.]

Notes of Decisions

Form to be used in proceedings against a partnership.—See note 2 under § 9602, ante.
Averments on information and belief.—See note 6 under § 9602, ante.
Variance from the official form.—See note 2 under § 9602, ante.

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

Schedule A. (1)

Statement of All Creditors Who are to be Paid in Full, or to Whom Priority is Secured by Law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
(1.) Taxes and debts due and owing to the United States.						$	c.
(2.) Taxes due and owing to the state of ——, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
					Total.....		

——————, Petitioner.

(11395)

Schedule A. (2)

Creditors Holding Securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total.....				

_____, Petitioner.

Schedule A. (3)

Creditors Whose Claims are Unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

_____, Petitioner.

Schedule A. (4)

Liabilities on Notes or Bills Discounted Which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

_____, Petitioner.

Schedule A. (5)

Accommodation Paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
					Total.....		

_____, Petitioner.

Oath to Schedule A.

United States of America, District of _____ ss:

On this _____ day of _____, A. D. 18—, before me personally came _____, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of congress relating to bankruptcy.

Subscribed and sworn to before me this _____ day of _____, A. D. 18—.

_____,
[Official character.]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

Schedule B. (1)

Real Estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total.....		

———, Petitioner.

Schedule B. (2)

Personal Property.

a.—Cash on hand.....		$	c.
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately)			
c.—Stock in trade, in —— business of ——, at ——, of the value of ——			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.			
e.—Books, prints, and pictures, viz.....			
f.—Horses, cows, sheep, and other animals (with number of each), viz.....			
g.—Carriages and other vehicles, viz.....			
h.—Farming stock and implements of husbandry, viz.			
i.—Shipping, and shares in vessels, viz.....			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.			
l.—Patents, copyrights, and trade-marks, viz.....			
m.—Goods or personal property of any other description, with the place where each is situated, viz..			
	Total.....		

———, Petitioner.

Schedule B. (3)

Choses in Action.

		Dollars.	Cents.
a.—Debts due petitioner on open account.....			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds....			
c.—Policies of insurance.....			
d.—Unliquidated claims of every nature, with their estimated value			
e.—Deposits of money in banking institutions and elsewhere			
	Total.....		

———, Petitioner.

Schedule B. (4)

Property in Reversion, Remainder, or Expectancy, Including Property Held in Trust for the Debtor or Subject to Any Power or Right to Dispose of or to Charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
		$.	c.
Interest in land.....			
Personal property			
Property in money, stock, shares, bonds, annuities, etc.			
Rights and powers, legacies and bequests.....	Total.....		
Property Heretofore Conveyed for Benefit of Creditors.		Amount realized from proceeds of property conveyed.	
		$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy	Total.....		

———, Petitioner.

Schedule B. (5)

A Particular Statement of the Property Claimed as Exempted from the Operation of the Acts of Congress Relating to Bankruptcy, Giving Each Item of Property and Its Valuation; and, if Any Portion of It is Real Estate, Its Location, Description, and Present Use.

		Valuation.	
		$	c.
Military uniform, arms, and equipments.....			
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the state creating the exemption.....			
	Total.....		

———, Petitioner.

Schedule B. (6)

Books, Papers, Deeds, and Writings Relating to Bankrupt's Business and Estate.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

———, Petitioner.

Oath to Schedule B.

United States of America, District of ——, ss:

On this —— day of ——, A. D. 18—, before me personally came ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of congress relating to bankruptcy.

———,

———,

[Official character.]

(11400)

Summary of Debts and Assets.

[From the Statements of the Bankrupt in Schedules A and B.]

Schedule A.....	1 (1)	Taxes and debts due United States.....			
" ".....	1 (2)	Taxes due states, counties, districts, and municipalities.			
" ".....	1 (3)	Wages.....			
" ".....	1 (4)	Other debts preferred by law.....			
Schedule A.....	2	Secured claims.....			
Schedule A.....	3	Unsecured claims.....			
Schedule A.....	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A.....	5	Accommodation paper.....			
		Schedule A, total.....			
Schedule B.....	1	Real estate			
Schedule B.....	2-a	Cash on hand.....			
" ".....	2-b	Bills, promissory notes, and securities			
" ".....	2-c	Stock in trade.....			
" ".....	2-d	Household goods, &c.....			
" ".....	2-e	Books, prints, and pictures.....			
" ".....	2-f	Horses, cows, and other animals.....			
" ".....	2-g	Carriages and other vehicles.....			
" ".....	2-h	Farming stock and implements.....			
" ".....	2-i	Shipping and shares in vessels.....			
" ".....	2-k	Machinery, tools, &c.....			
" ".....	2-l	Patents, copyrights, and trade-marks.			
" ".....	2-m	Other personal property.....			
Schedule B.....	3-a	Debts due on open accounts.....			
" ".....	3-b	Stocks, negotiable bonds, &c.....			
" ".....	3-c	Policies of insurance.....			
" ".....	3-d	Unliquidated claims.....			
" ".....	3-e	Deposits of money in banks and elsewhere.....			
Schedule B.....	4	Property in reversion, remainder, trust, &c.....			
Schedule B.....	5	Property claimed to be excepted.....			
Schedule B.....	6	Books, deeds, and papers.....			
		Schedule B, total.....			

[Form No. 2.]

Partnership Petition.

To the Honorable ————,
Judge of the District Court of the United States
for the —— District of ——:

The petition of ———— respectfully represents:

That your petitioners and ———— have been partners under the firm name of ————, having their principal place of business at ——, in the county of ——, and district and state of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ———— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ———— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his

individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ———— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ———— further states that the schedule hereto annexed, marked J., verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

————,
————,
————,
Petitioners.

————, Attorney.

————, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

————,
————,
————.
Petitioners.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]
————.

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[Form No. 3.]

Creditors' Petition.

To the Honorable ————, Judge of the District Court of the United States for the —— District of ——:

The petition of ————, of ——, and ————, of ——, and ————, of ——, respectfully shows:

That ————, of ——, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicil] at ——, in the county of —— and state and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ————, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows: _____

_____

And your petitioners further represent that said ———— is insolvent, and that within four months next preceding the date of this petition, the said ———— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of _____

_____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ————, as provided in the acts of congress

relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

———,
———,
———,
Petitioners.

———, Attorney.

United States of America, District of ——, ss:

———, ———, ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ———, this —— day of ——, 189—.

———,
———.
(Official character.)

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[Form No. 4.]

Order to Show Cause upon Creditors' Petition.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— ——— ———	In Bankruptcy.

Upon consideration of the petition of ——— that ——— be declared a bankrupt, it is ordered that the said ——— do appear at this court, as a court of bankruptcy, to be holden at ——, in the district aforesaid, on the —— day of ——, at — o'clock in the —— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the honorable ———, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{Seal of the Court.}
———,
Clerk.

[Form No. 5.]

Subpœna to Alleged Bankrupt.

United States of America, —— District of ——.

To ———, in Said District, Greeting:

For certain causes offered before the district court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said district court to be holden at ——, in said district, on the —— day of ——, A. D. 189—, ——— to answer to a petition filed by ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said district court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ———, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 189—.

{Seal of the Court.}
———,
Clerk.

[Form No. 6.]

Denial of Bankruptcy.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————————— ———————————— ————————————

deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ————, judge of the said court, and the seal thereof, at ——, in said district, on the —— of ——, A. D. 189—.

{ Seal of the Court. } ————, Clerk.

Return by Marshal Thereon.

By virtue of the within warrant, I have taken possession of the estate of the within-named ————, and of all his deeds, books of account, and papers which have come to my knowledge.

————, Marshal [or Deputy Marshal].

Fees and Expenses.

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way.....		
3. Actual expenses in custody of property and other services as follows.....		
[Here state the particulars.]		

————, Marshal [or Deputy Marshal].

District of ——, A. D. 18—

Personally appeared before me the said ————, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

————, Referee in Bankruptcy.

[Form No. 9.]

Bond of Petitioning Creditor.

Know all men by these presents. That we, ————, as principal, and ————, as sureties, are held and firmly bound unto ————, in the full and just sum of —— dollars, to be paid to the said ————, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of —— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of —— against the said ——, and the said —— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ————, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ———— shall indemnify the said ———— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of ———— [Seal.]
———— ———— [Seal.]
———— ———— [Seal.]

Approved this —— day of ——, A. D., 189—.

————, District Judge.

[Form No. 10.]

Bond to Marshal.

Know all men by these presents: That we, ————, as principal, and ————, as sureties, are held and firmly bound unto ————, marshal of the United States for the —— district of ——, in the full and just sum of —— dollars, to be paid to the said ————, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189–.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of ——, against the said ————, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ————, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ———— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ————, and the said ————, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of ———— [Seal.]
———— ———— [Seal.]
———— ———— [Seal.]

Approved this —— day of ——, A. D. 189–.

————,
District Judge.

[Form No. 11.]

Adjudication that Debtor is not Bankrupt.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————————— ———————————— ————————————

[Form No. 12.]

Adjudication of Bankruptcy.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before the Honorable ————, judge of said court in bankruptcy, the petition of ———— that ———— be adjudged a bankrupt, within the true intent and meaning of the acts of congress relating to bankruptcy, having been heard and duly considered, the said ———— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ————, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{Seal of the Court.} ————, Clerk.

[Form No. 13.]

Appointment, Oath, and Report of Appraisers.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

It is ordered that ————, of ——, ———— of ——, and ————, of ——, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ——, A. D. 18—.

————, Referee in Bankruptcy.

—— District of ——, ss:

Personally appeared the within-named ———— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

————.
————.
————.

Subscribed and sworn to before me this —— day of ——, A. D. 189—.

————, [Official character.]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ——, this —— day of ——, A. D. 18—.

———.
———.
———.

[Form No. 14.]

Order of Reference.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— Bankrupt .	In Bankruptcy.

Whereas ————, of ——, in the county of —— and district aforesaid, on the —— day of ——, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the —— day of ——, A. D. 189—, according to the provisions of the acts of congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ————, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ———— shall attend before said referee on the —— day of —— at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said —— bankruptcy.

Witness the Honorable ————, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{ Seal of the Court. } ———, Clerk.

[Form No. 15.]

Order of Reference in Judge's Absence.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— .	In Bankruptcy.

Whereas on the —— day of ——, A. D. 18—, a petition was filed to have ————, of ——, in the county of —— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ————, one of the ref-

erees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ———— shall attend before said referee on the —— day of ——, A. D. 189—, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the —— day of ——, A. D. 189—.

{ Seal of the Court. } ————,
Clerk.

[Form No. 16.]

Referee's Oath of Office.

I, ————, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

————.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
District Judge.

[Form No. 17.]

Bond of Referee.

Know all men by these presents: That we ———— of —— as principal, and ———— of —— and ———— of ——, as sureties are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189—.

The condition of this obligation is such that whereas the said ————, has been on the —— day of ——, A. D. 18—, appointed by the Honorable ————, judge of the district court of the United States for the —— district of ——, a referee in bankruptcy, in and for the county of ——, in said district, under the acts of congress relating to bankruptcy.

Now, therefore, if the said ———— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

————, [L. S.]
————, [L. S.]
————, [L. S.]

Approved this —— day of ——, A. D. 189—.

————,
District Judge.

[Form No. 18.]

Notice of First Meeting of Creditors.

In the District Court of the United States for the —— District of ——.
In Bankruptcy.

In the Matter of ———— Bankrupt .	In Bankruptcy.

To the creditors of ————, of ——, in the county of ——, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ——, A. D. 18—, the said ———— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at —— in ——, on the —— day of ——, A. D. 18—, at —— o'clock in the —— noon, at which time the said creditors may at-

tend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

———,
Referee in Bankruptcy.

———, 18—.

[Form No. 19.]

List of Debts Proved at First Meeting.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before ———, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

———,
Referee in Bankruptcy.

[Form No. 20.]

General Letter of Attorney in Fact When Creditor is not Represented by Attorney at Law.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— Bankrupt .	In Bankruptcy.

To ———:

———.

I, ———, of ——, in the county of —— and state of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court,

which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 189—.

————. [L. S.]

Signed, sealed, and delivered in presence of

————.

Acknowledged before me this —— day of ——, A. D. 189—.

————,
[Official character.]

[Form No. 21.]

Special Letter of Attorney in Fact.

In the Matter of ———— Bankrupt	In Bankruptcy.

To ————:

————.

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ——, on the —— day of ——, before ——, or any adjournment thereof, and then and there —— for —— and in —— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

————. [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 189—.

Signed, sealed, and delivered in presence of

————.

Acknowledged before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 22.]

Appointment of Trustee by Creditors.

In the District Court of the United States for the —— District of ——.

In the Matter of ———— Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before ————, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ————,

of ——, in the county of —— and state of ——, to be the trustee— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved.

——————,
Referee in Bankruptcy.

[Form No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————————— Bankrupt	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before ——————, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——————, of ——, in the county of —— and state of ——, as trustee of the same.

——————,
Referee in Bankruptcy.

[Form No. 24.]

Notice to Trustee of His Appointment.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————————— Bankrupt .	In Bankruptcy.

To ——————, of ——, in the County of ——, and District Aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of ——, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at —— the —— day of ——, A. D. 18—.

——————,
Referee in Bankruptcy.

[Form No. 25.]

Bond of Trustee.

Know all men by these presents: That we, ————, of ——, as principal, and ————, of ——, and ————, of ——, as sureties, are held and firmly bound unto the United States of America in the sum of —— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189—.

The condition of this obligation is such, that whereas the above-named ———— was, on the —— day of ——, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ———— is the bankrupt, and he, the said ————, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ————, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in presence of

———— ————, [Seal.]
———— ————, [Seal.]
————, [Seal.]

[Form No. 26.]

Order Approving Trustee's Bond.

At a court of bankruptcy, held in and for the —— district of ——, at ——, ——, this —— day of ——, 189—.

Before ————, referee in bankruptcy, in the district court of the United States for the —— district of ——.

In the Matter of ———— Bankrupt .	In Bankruptcy.

It appearing to the court ————, of ——, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of —— dollars, it is ordered that the said bond be, and the same is hereby, approved.

————,
Referee in Bankruptcy.

[Form No. 27.]

Order that No Trustee be Appointed.

In the District Court of the United States for the —— District of ——.

In the Matter of ———— Bankrupt .	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

————,
Referee in Bankruptcy.

[Form No. 28.]

Order for Examination of Bankrupt.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

Upon the application of ————, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ————, one of the referees in bankruptcy of this court, at —— on the —— day of ——, at —— o'clock in the ——noon, to submit to examination under the acts of congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

————, Referee in Bankruptcy.

[Form No. 29.]

Examination of Bankrupt or Witness.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before ————, one of the referees in bankruptcy of said court.

————, of ——, in the county of ——, and state of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says. [Here insert substance of examination of party.]

————, Referee in Bankruptcy.

[Form No. 30.]

Summons to Witness.

To ————:

Whereas ————, of ——, in the county of ——, and state of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the district court of the United States for the —— district of ——,

These are to require you, to whom this summons is directed, personally to be and appear before ————, one of the referees in bankruptcy of the said court, at ——, on the —— day of ——, at —— o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ———— judge of said court, and the seal thereof at ——, this —— day of ——, A. D. 189—.

————. Clerk.

Return of Summons to Witness.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

On this —— day of ——, A. D. 18—, before me came ————, of ——, in the county of —— and state of ——, and makes oath, and says that he did, on ——, the —— day of ——, A. D. 189—, personally serve ————, of ——, in the county of —— and state of ——, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

————.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————.

[Form No. 31.]

Proof of Unsecured Debt.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ————, of ——, in the county of ——, in said district of ——, and made oath, and says that ————, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt is as follows:

————————————————

————————————————

that no part of said debt has been paid [except————————————]; that there are no set-offs or counterclaims to the same [except————————————]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

————,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 32.]

Proof of Secured Debt.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ————, of ——, in the county of ——, in said district of ——,

and made oath and says that ————, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of —— dollars; that the consideration of said debt is as follows ————; that no part of said debt has been paid [except ————]; that there are no set-offs or counterclaims to the same [except ————]; and that the only securities held by this deponent for said debt are the following: ————

————,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 33.]

Proof of Debt Due Corporation.

In the District Court of the United States for the —— District of ——.

In the Matter of ———— Bankrupt .	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ————, of ——, in the county of —— and state of ——, and made oath and says that he is —— of the ——, a corporation incorporated by and under the laws of the state of ——, and carrying on business at ——, in the county of —— and state of ——, and that he is duly authorized to make this proof, and says that the said ————, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows: ————; that no part of said debt has been paid [except ————]; that there are no set-offs or counterclaims to the same [except ————]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

————,
—— of Said Corporation.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 34.]

Proof of Debt by Partnership.

In the District Court of the United States for the —— District of ——.

In the Matter of ———— Bankrupt .	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ————, of ——, in the county of ——, in said district of ——,

and made oath and says that he is one of the firm of ————, consisting of himself and ————, of ——, in the county of —— and state of ——; that the said ————, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of —— dollars; that the consideration of said debt is as follows:

————————————————————————————————;

that no part of said debt has been paid [except————————————

————————————————————————————————];

that there are no set-offs or counterclaims to the same [except————————

————————————————————————————————];

and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

————,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 35.]

Proof of Debt by Agent or Attorney.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————————— Bankrupt .	In Bankruptcy.

At —— in said district of —— on the —— day of ——, A. D. 189—, came ————, of ——, in the county of ——, and state of ——, attorney [*or* authorized agent] of ——, in the county of ——, and state of ——, and made oath and says that ————, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ————, in the sum of —— dollars; that the consideration of said debt is as follows:————————————————————————

————————————————————————————————;

that no part of said debt has been paid [except————————————

————————————————————————————————];

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because————————

————————————————————————————————,

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

————.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 36.]

Proof of Secured Debt by Agent.

In the District Court of the United States for the —— District of ——.

In the Matter of _____ Bankrupt .	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ————, of ——, in the county of ——, and state of ——, attorney [*or*, authorized agent] of ——, in the county of ——, and state of ——, and made oath, and says that ————, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ———— in the sum of —— dollars; that the consideration of said debt is as follows:_____;

that no part of said debt has been paid [except_____];

that there are no set-offs or counterclaims to the same [except_____];

and that the only securities held by said ———— for said debt are the following_____

and this deponent further says that this deposition can not be made by the by the claimant in person because_____,

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

————.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 37.]

Affidavit of Lost Bill, or Note.

In the District Court of the United States for the —— District of ——.

In the Matter of _____ Bankrupt .	In Bankruptcy.

On this —— day of ——, A. D. 18—, at ——, came ————, of ——, in the county of ——, and state of ——, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, _____

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ————, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or Note above Referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

[Official character.]

[Form No. 38.]

Order Reducing Claim.

In the District Court of the United States for the —— District of ——.

In the Matter of —— Bankrupt	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ——, A. D. 18—].

Referee in Bankruptcy.

[Form No. 39.]

Order Expunging Claim.

In the District Court of the United States for the —— District of ——.

In the Matter of —— Bankrupt	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to the court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

Referee in Bankruptcy.

[Form No. 40.]

List of Claims and Dividends to be Recorded by Referee and by Him Delivered to Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

A List of Debts Proved and Claimed under the Bankruptcy of ——, with —— Dividend at the Rate of —— per Cent. This Day Declared Thereon by ————, a Referee in Bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

————,
Referee in Bankruptcy.

[Form No. 41.]

Notice of Dividend.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To ————,
Creditor of ————, Bankrupt:

I hereby inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

————, Trustee.

(11420)

Creditor's Letter to Trustee.

To ————,

Trustee in Bankruptcy of the Estate of ————, Bankrupt:

Please deliver to ———— the warrant for dividend payable out of the said estate to me.

————, Creditor.

[Form No. 42.]

Petition and Order for Sale by Auction of Real Estate.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [here describe it and its estimated value] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ————————

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ——, A. D. 18—.

————, Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ———— in favor of said petition and ———— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189—.

————,
Referee in Bankruptcy.

[Form No. 43.]

Petition and Order for Redemption of Property from Lien.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

Respectfully represents ————, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [here describe the estate or property and its estimated value] is subject to a mortgage [describe the mortgage], or to a conditional contract [describing it], or to a lien [describe the origin and nature of the lien], [*or, if the property be personal property,* has been pledged or deposited and is subject to a lien] for [describe the nature of the lien], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ——, A. D. 18—.

————, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ———— in favor of said petition and ———— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ——, A. D. 189—.

————,
Referee in Bankruptcy.

[Form No. 44.]

Petition and Order for Sale Subject to Lien.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

Respectfully represents ————, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [here describe the estate or property and its estimated value] is subject to a mortgage [describe mortgage], or to a conditional contract [describe it], or to a lien [describe the origin and nature of the lien], or [if the property be personal property] has been pledged or deposited and is subject to a lien for [describe the nature of the lien], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ——, A. D. 189—.

————, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ———— in favor of said petition and ———— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or* at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189—.

————,
Referee in Bankruptcy.

[Form No. 45.]

Petition and Order for Private Sale.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

Respectfully represents ————, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ————————

————————

————————

it is desirable and for the best interest of the estate to sell at private sale a

certain portion of the said estate, to wit:_____

_____

_____

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ——, A. D. 189—.

_____, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing _____ in favor of said petition and _____ in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189—.

_____,
Referee in Bankruptcy.

[Form No. 46.]

Petition and Order for Sale of Perishable Property.

In the District Court of the United States for the —— District of ——.

In the Matter of _____ Bankrupt .	In Bankruptcy.

Respectfully represents ——, the said bankrupt, [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit,_____

_____

_____

now in ——, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ——, A. D. 189—.

_____.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now after due hearing, no adverse interest being represented thereat, [*or* after hearing _____ in favor of said petition and _____ in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189—.

_____,
Referee in Bankruptcy.

[Form No. 47.]

Trustee's Report of Exempted Property.

In the District Court of the United States for the —— District of ——.

In the Matter of Bankrupt .	In Bankruptcy.

At ——, on the —— day of ——, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments.....			
Property exempted by state laws.			

——,
Trustee.

[Form No. 48.]

Trustee's Return of No Assets.

In the District Court of the United States for the —— District of ——.

In the Matter of Bankrupt .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

On the day aforesaid, before me comes ——, of ——, in the county of —— and state of ——, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 18—.

——,
Referee in Bankruptcy.

[Form No. 49.]

Account of Trustee.

Dr. The Estate of ———, Bankrupt, in Account with ———, Trustee. Cr.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[Form No. 50.]

Oath to Final Account of Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ——— Bankrupt.	In Bankruptcy.

On this —— day of ——, A. D. 18—, before me comes ———, of ——, in the county of —— and state of ——, and makes oath, and says that he was, on the —— day of ——, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [reference may here also be made to any prior account filed by said trustee] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made

by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts

————, Trustee.

Subscribed and sworn to before me at ——, in said —— district of ——, this —— day of ——, A. D. 18—.

————,
[Official character.]

[Form No. 51.]

Order Allowing Account and Discharging Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

————,
Referee in Bankruptcy.

[Form No. 52.]

Petition for Removal of Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

To the Honorable ————,
Judge of the District Court for the —— District of ——:

The petition of ————, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ————, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following to wit: [here set forth the particular cause or causes for which such removal is requested.]

Wherefore ———— pray that notice may be served upon said ————, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

————.

[Form No. 53.]

Notice of Petition for Removal of Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To ————,
Trustee of the estate of ————, bankrupt:

You are hereby notified to appear before this court, at ——, on the —— day of ——, A. D. 18—, at —— o'clock —. m., to show cause (if any you

have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ————, one of the creditors of said bankrupt, filed in this court on the —— day of ——, A. D. 18—, in which it is alleged [here insert the allegation of the petition].

————, Clerk.

[Form No. 54.]

Order for Removal of Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

Whereas ————, of ——, did, on the —— day of ——, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, ————, the trustee of the estate of said ————, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ———— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ———— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ————, trustee [*or*, out of the estate of the said ————, subject to prior charges].

Witness the Honorable ————, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{Seal of the Court.} ————.
Clerk.

[Form No. 55.]

Order for Choice of New Trustee.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ————, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ——, in ——, in said district, on the —— day of ——, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

————, Referee in Bankruptcy.

[Form No. 56.]

Certificate by Referee to Judge.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

I, ————, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.]

And the said question is certified to the judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. 18—.

————,
Referee in Bankruptcy.

[Form No. 57.]

Bankrupt's Petition for Discharge.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

To the Honorable ————,
Judge of the District Court of the United States for the District of ——.

————, of ——, in the county of —— and state of ——, in said district, respectfully represents that on the —— day of ——, last past, he was duly adjudged bankrupt under the acts of congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ——, A. D. 189—.

————, Bankrupt.

Order of Notice Thereon.

District of ——, ss:

On this —— day of ——, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the —— day of ——, A. D. 189—, before said court, at ——, in said district, at —— o'clock in the —— noon; and that notice thereof be published in ————, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ————, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 189—.

{ Seal of the Court. }

————,
Clerk.

—— hereby depose, on oath, that the foregoing order was published in the ———— on the following —— days, viz.:

On the —— day of —— and on the —— day of ——, in the year 189—.

————,

District of ——.

——————, 189—.

Personally appeared ——————, and made oath that the foregoing statement by him subscribed is true.

Before me,

——————,
[Official character.]

I hereby certify that I have on this —— day of ——, A. D. 189—, sent by mail copies of the above order, as therein directed.

——————,
Clerk.

Notes of Decisions

Notice of hearing of application for discharge.—See note 36 under § 9598, ante.
Fees of clerks for giving notices.—See note 1 under § 9636, post.

[Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the —— District of ——.

In the Matter of —————————— Bankrupt .	In Bankruptcy.

——————, of ——, in the county of —— and state of ——, a party interested in the estate of said ——————, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [Here specify the grounds of opposition.]

——————, Creditor.

[Form No. 59.]

Discharge of Bankrupt.

District Court of the United States,
—— District of ——.

Whereas, ——————, of ——, in said district, has been duly adjudged a bankrupt, under the acts of congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —————— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 189—, on which day the petition for adjudication was filed —— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——————, judge of said district court, and the seal thereof this —— day of ——, A. D. 189—.

{Seal of the Court.}

——————,
Clerk.

[Form No. 60.]

Petition for Meeting to Consider Composition.

District Court of the United States for the —— District of ——.

—————————— Bankrupt .	In Bankruptcy.

To the Honorable ——————, Judge of the District Court of the United States for the —— District of ——:

The above-named bankrupt respectfully represent that a composition of —— per cent. upon all unsecured debts, not entitled to a priority —————— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of congress relating to bankruptcy, and —— verily

believe that the said composition will be accepted by a majority in number and in value of —— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

————,
Bankrupt.

[Form No. 61.]

Application for Confirmation of Composition.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

To the Honorable ————, Judge of the District Court of the United States for the —— District of ——.

At ——, in said district, on the —— day of ——, A. D. 189—, now comes ————, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of —— dollars, has been deposited, subject to the order of the judge, in the —— National Bank, of ——, a designated depository of money in bankruptcy cases.

Wherefore the said ———— respectfully asks that the said composition may be confirmed by the court.

————, Bankrupt.

[Form No. 62.]

Order Confirming Composition.

In the District Court of the United States for the —— District of ——.

In the Matter of ———————— ———————— ————————

[Form No. 63.]

Order of Distribution on Composition.

ited States of America:

n the District Court of the United States for the —— District of ——.

In the Matter of ———————— Bankrupt .	In Bankruptcy.

'he composition offered by the above-named bankrupt in this case having en duly confirmed by the judge of said court, it is hereby ordered and de- ed that the distribution of the deposit shall be made by the clerk of the urt as follows, to wit: 1st, to pay the several claims which have priority; to pay the costs of proceedings; 3d, to pay, according to the terms of the nposition, the several claims of general creditors which have been allowed, d appear upon a list of allowed claims, on the files in this case, which list made a part of this order.

Vitness the Honorable ————, judge of said court, and the seal thereof, s —— day of ——, A. D. 189—.

Seal of the Court. } ————, Clerk.

9615. (Act July 1, 1898, c. 541, § 31.) Computation of time.

Computation of Time.—a Whenever time is enumerated by days this Act, or in any proceeding in bankruptcy, the number of ys shall be computed by excluding the first and including the t, unless the last fall on a Sunday or holiday, in which event the y last included shall be the next day thereafter which is not a nday or a legal holiday. (30 Stat. 554.)

9616. (Act July 1, 1898, c. 541, § 32.) Transfer of cases.

Transfer of Cases.—a In the event petitions are filed against the ne person, or against different members of a partnership, in ferent courts of bankruptcy each of which has jurisdiction, the ses shall be transferred, by order of the courts relinquishing isdiction, to and be consolidated by the one of such courts which n proceed with the same for the greatest convenience of parties interest. (30 Stat. 554.)

Notes of Decisions

'riority of petitions and transfer of es.—The provisions of this section, l of General Order in Bankruptcy . 6 for carrying it into effect, apply a case where an involuntary peti- n is presented in one district and debtor's own voluntary petition in ther. In re Waxelbaum (D. C. 99) 98 Fed. 589, 3 Am. Bankr. Rep. 2.

f a debtor files two petitions in vol- tary bankruptcy, setting forth the ne debts, and the first is still pend- , proceedings under the second will stayed. In re Wielarski (D. C. 71) Fed. Cas. No. 17,619.

'riority of jurisdiction, as between itions in bankruptcy filed in differ- t courts of bankruptcy, each having isdiction, is determined by the date the filing of the petition, rather than the date of the adjudication. In Elmira Steel Co. (D. C. 1901) 109 d. 456, 5 Am. Bankr. Rep. 484; In Tybo Mining & Reduction Co. (D. C. 1904) 132 Fed. 697, 13 Am. Bankr. Rep. 62.

Creditors, by filing a second petition against an individual in another district, and obtaining a first hearing and adjudication thereon, cannot thereby oust the jurisdiction of the court in the district of the bankrupt's domicile, in which a petition had been first filed by other creditors. In re Elmira Steel Co. (D. C. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484.

Where two petitions have been filed against the same person, one in the district in which he has resided for the greater portion of the preceding six months, and the other in a district to which he has recently removed and established his residence there, the former is the "district of his domicile," within the meaning of the general order. In re Isaacson (D. C. 1908) 161 Fed. 779, 20 Am. Bankr. Rep. 430. It is also held that the word "individual" is used in the order in the sense of a

single person, and as a corporation is a person under the statute, so it is also an individual under the order. In re United Button Co. (D. C. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454; In re Globe Sec. Co. (D. C. 1904) 132 Fed. 709. And where two petitions are filed against a corporation, one in the state by which it was incorporated, and one in a district in which it does business, the first hearing should be had at the former place, as that is the place of its domicile, and proceedings in the other court will be stayed to await such hearing and the decision thereon. In re Globe Sec. Co. (D. C. 1904) 132 Fed. 709; In re United Button Co. (D. C. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761. In case there is substantial doubt as to the domicile or place of residence of a debtor, against whom petitions are filed in different districts, the court having jurisdiction of the petition earliest in date should be allowed to hear and determine the question of jurisdiction as depending on domicile, and the other court, without dismissing the petition before it, will stay proceedings thereon to await the result. In re Waxelbaum (D. C. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

The provision of the general order that the court which makes the first adjudication shall "retain jurisdiction over all proceedings," is to be taken subject to the directions of this section with reference to the transfer of cases to other districts. In re Isaacson (D. C. 1908) 161 Fed. 779, 20 Am. Bankr. Rep. 430. This provision is not to be read as narrowly restricted to the bankruptcy of single debtors, but it applies equally to cases where different petitions are filed against a partnership. In re Sears (D. C. 1901) 112 Fed. 58, 7 Am. Bankr. Rep. 279. The "parties in interest" whose convenience is to be consulted, are not limited to unsecured creditors of the bankrupt, but the term is intended to include all persons whose pecuniary interests may be directly affected by the bankruptcy proceedings. In re United Button Co. (D. C. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454. The burden of proof, however, as to the place where the proceedings will be most convenient for parties in interest rests upon those who ask for a transfer. And where the applicants are a minority of the creditors, and represent only a small part of the indebtedness, a transfer will not be warranted by the single fact that the greater part or all of the bankrupt's property is in the other district, a court has power to order its sale if deemed best. In re Tybo Min Reduction Co. (D. C. 1904) 132 978, 13 Am. Bankr. Rep. 68. transfer will not be ordered whe request therefor is presented by ors who have received prefe which they do not offer to surr and it is doubtful whether the fer will be for the greater conve of the creditors who have not bee ferred. In re Sears (D. C. 1901 Fed. 58, 7 Am. Bankr. Rep. 279. imity of the place of business of a rupt to the court entertaining pr ings in bankruptcy, and proxim a majority of the bankrupt's cre in number or amount of claims, i suasive, but not conclusive, in mining the court which shall a final jurisdiction. In re United ton Co. (D. C. 1904) 137 Fed. 6 Am. Bankr. Rep. 454.

Where a petition in involuntary ruptcy against a debtor was fi Georgia, and, pending a hearing on, he filed his voluntary petit New York, alleging that he was dent of the latter state, but it a ed that he had formerly been e in business in Georgia, that the to be affected were all contracted that his present business was agent or employé of the corpo which succeeded his former firm he was accustomed to spend a p his time in Georgia, and that his itors desired that the bankruptc ceedings should be conducted i latter state, it was held that it be for the "greatest convenie the parties in interest" that the in Georgia should proceed wit case. In re Waxelbaum (D. C. 98 Fed. 589, 3 Am. Bankr. Rep And see further as to consider affecting question of "greatest c ience." In re Southwestern Bri Iron Co. (D. C. 1904) 133 Fed 13 Am. Bankr. Rep. 304; In re G Metals Co. (D. C. 1904) 133 F 12 Am. Bankr. Rep. 770.

Relationship between the ba and the deputy clerk of the c court in whose office the petitio filed will be cause for transferri case to another seat of the court same district and division and o the record to be filed and docke the office of the clerk of the co the latter place. Bray v. Cobb 1898) 91 Fed. 102, 1 Am. Bank 153.

CHAPTER FIVE

Officers, Their Duties and Compensation

c.
17. Creation of two offices.
18. Appointment, removal, and districts of referees.
19. Qualifications of referees.
20. Oaths of office of referees.
21. Number of referees.
22. Jurisdiction of referees.
23. Duties of referees.
24. Compensation of referees.
25. Contempts before referees.
26. Records of referees.
27. Referee's absence or disability.
28. Appointment of trustees.

Sec.
9629. Qualifications of trustees.
9630. Death or removal of trustees.
9631. Duties of trustees.
9632. Compensation of trustees, receivers, and marshals.
9633. Accounts and papers of trustees.
9634. Bonds of referees and trustees.
9635. Duties of clerks.
9636. Compensation of clerks and marshals.
9637. Duties of Attorney-General.
9638. Statistics of bankruptcy proceedings.

9617. (Act July 1, 1898, c. 541, § 33.) Creation of two offices.

Creation of Two Offices.—a The offices of referee and trustee are ereby created. (30 Stat. 555.)

9618. (Act July 1, 1898, c. 541, § 34.) Appointment, removal, and districts of referees.

Appointment, Removal, and Districts of Referees.—a Courts of ankruptcy shall, within the territorial limits of which they reectively have jurisdiction, (1) appoint referees, each for a term two years, and may, in their discretion, remove them because eir services are not needed or for other cause; and (2) designate, nd from time to time change, the limits of the districts of referees, that each county, where the services of a referee are needed, ay constitute at least one district. (30 Stat. 555.)

Notes of Decisions

1. Appointment of referees.—The ovision of the Bankruptcy Act which legates to the several courts of bankptcy the appointment of the necesry referees, is justified by the provion of the Constitution that Congress ay vest the appointment of such inrior officers as they think proper in e courts of law. Birch v. Steele 908) 165 Fed. 577, 91 C. C. A. 415, Am. Bankr. Rep. 539.

Where there are two district judges r the same federal judicial district, th authorized to hold the district urt and sit in bankruptcy cases, eier one of them, holding the court at e time, has power to appoint or reove a referee in bankruptcy, and such tion does not require the concurrence the two judges. Birch v. Steele 908) 165 Fed. 577, 91 C. C. A. 415, Am. Bankr. Rep. 539. And see In Steele (D. C. 1908) 161 Fed. 886, Am. Bankr. Rep. 446; In re Steele D. C. 1907) 156 Fed. 853, 19 Am. ankr. Rep. 671; Ex parte Steele (D. 1908) 162 Fed. 694, 20 Am. Bankr. ep. 575.

A referee in bankruptcy cannot fulfill e duties of his appointment for any unty in which the business in bankptcy must wait upon his convenience, in which he cannot hold sessions whenever business may require them, or cannot continue them at convenient intervals; nor can he fulfill the requirements of his official duty as to any county in which the books and papers of his office are not open to inspection at the local seat of justice. In re Sherwood (D. C. 1868) 1 N. B. R. 344, Fed. Cas. No. 12,774.

While probably the action of a district court in appointing a referee in bankruptcy may be subject to review by the circuit court of appeals on petition to revise, yet the latter court will not in any way attempt to control the discretion of the district court in making an appointment to an office so intimately connected with its own functions, and where the qualifications of the nominee are so peculiarly within its own knowledge. Birch v. Steele (1908) 165 Fed. 577, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539.

2. —— Special referees.—When the referee to whom a case in bankruptcy would regularly be referred is absent or disqualified, the judge may appoint a special referee and send the case to him; and this may be done before the answer of the alleged bankrupt is filed, and does not require the consent or approval of the respondent or his attor-

ney. Bray v. Cobb (D. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

3. Removal of referees.—The provision of section 24b (ante, § 9608), giving to the circuit courts of appeals jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bank confers no power on such cou control the discretion of a court in making an order for moval of a referee in bank Birch v. Steele (1908) 165 Fe 91 C. C. A. 415, 21 Am. Bank 539.

§ 9619. (Act July 1, 1898, c. 541, § 35.) Qualifications of ref

Qualifications of Referees.—a Individuals shall not be el to appointment as referees unless they are respectively (1) petent to perform the duties of that office; (2) not holdin office of profit or emolument under the laws of the United Sta of any State other than commissioners of deeds, justices c peace, masters in chancery, or notaries public; (3) not relat consanguinity or affinity, within the third degree as determin the common law, to any of the judges of the courts of bankr or circuit courts of the United States, or of the justices or jud the appellate courts of the districts wherein they may be appo and (4) residents of, or have their offices in, the territorial di for which they are to be appointed. (30 Stat. 555.)

The circuit courts were abolished and their jurisdiction transferred district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

Disqualification of referees by interest.—The provision of section 39b (post, § 9623), that referees shall not act in cases in which they are directly or indirectly interested, does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends. In re Abbey Press (1904) 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

A referee is not disqualified by interest from acting in a particular case because he is a debtor to the bankrupt. The interest which will disqualify is an interest either in the proceedi bankruptcy or in the estate bankrupt; and the bankrupt's cannot be said to be "interested" way, since his liability is not i ed, diminished, or in any way c by the proceedings. But the ju being apprised of the fact that t eree is a debtor of the bankrupt in his discretion, revoke the or reference and send the case to a referee. Bray v. Cobb (D. C. 91 Fed. 102, 1 Am. Bankr. Rep.

§ 9620. (Act July 1, 1898, c. 541, § 36.) Oaths of office of ref

Oaths of Office of Referees.—a Referees shall take the same of office as that prescribed for judges of United States courts. Stat. 555.)

§ 9621. (Act July 1, 1898, c. 541, § 37.) Number of referees.

Number of Referees.—a Such number of referees shall b pointed as may be necessary to assist in expeditiously transa the bankruptcy business pending in the various courts of ruptcy. (30 Stat. 555.)

§ 9622. (Act July 1, 1898, c. 541, § 38.) Jurisdiction of refere

Jurisdiction of Referees.—a Referees respectively are hereb vested, subject always to a review by the judge, within the of their districts as established from time to time, with jur tion to (1) consider all petitions referred to them by the clerk make the adjudications or dismiss the petitions; (2) exercise the ers vested in courts of bankruptcy for the administering of oa and the examination of persons as witnesses and for requirin production of documents in proceedings before them, excep power of commitment; (3) exercise the powers of the judge fo taking possession and releasing of the property of the ban in the event of the issuance by the clerk of a certificate showin absence of a judge from the judicial district, or the division c district, or his sickness, or inability to act; (4) perform such p the duties, except as to questions arising out of the applicatio

nkrupts for compositions or discharges, as are by this Act confer-
d on courts of bankruptcy and as shall be prescribed by rules or
ders of the courts of bankruptcy of their respective districts, except
herein otherwise provided; and (5) upon the application of the
ustee during the examination of the bankrupts, or other proceed-
gs, authorize the employment of stenographers at the expense of
e estates at a compensation not to exceed ten cents per folio for
porting and transcribing the proceedings. (30 Stat. 555.)

Notes of Decisions

Jurisdiction and powers of referees.
— Determination of adverse claims.
Specific powers and authorities of referees.
— Ordering surrender of property.
— In proceedings for reclamation of property.
— Grant of injunction.
— Appointment of receiver.
Proceedings before referees.
— Taking and preservation of evidence.
— Review and reopening of case.
Certifying questions for review by judge.
— Parties entitled to review.
— Time of petitioning for review.
— Exceptions.
— Record on petition for review.
Review of proceedings by judge.
— Effect of referee's findings of fact.

1. Jurisdiction and powers of referees. The jurisdiction of referees in bankptcy is confined to the limits of the tricts for which they are appointed the judge, and does not extend to ses pending outside such districts, cept where the referees are specially pointed to fill a vacancy temporarily. re Schenectady Engineering & Const. . (D. C. 1906) 147 Fed. 868, 17 Am. nkr. Rep. 279.

A referee in bankruptcy has no judiction of summary proceedings to mpel a corporation to issue stock to e trustee pursuant to an agreement ade with the bankrupt. A referee in nkruptcy, having no jurisdiction of a it by a trustee to enforce specific rformance of a contract between the nkrupt and a third person, acquires jurisdiction by the consent of such ird person. In re Ballou (D. C. 14) 215 Fed. 810.

On a petition to sell mortgaged property free from the lien and transfer the me to the proceeds, there being no egation in the petition nor in the tice that an attack was made on the lidity of the mortgage, the referee d no jurisdiction to adjudge it void. re Martin (C. C. A. 1914) 210 Fed. 0.

2. —— Determination of adverse ims.—The referee has no power or risdiction to order third persons, in ssession of property claimed by the ustee, to deliver it to the latter, where e possession of the third person is t admitted to be in subordination to e bankrupt's title, but is based on a na fide adverse claim. In re Blum . C. A. 1913) 202 Fed. 883, 29 Am. nkr. Rep. 332; In re Gill (1911) 190 Fed. 726, 111 C. C. A. 454, 26 Am. Bankr. Rep. 883; In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re F. M. & S. Q. Carlile (D. C. 1912) 199 Fed. 612, 29 Am. Bankr. Rep. 373; In re Bacon (D. C. 1912) 196 Fed. 986, 28 Am. Bankr. Rep. 565. As to consent of defendant conferring jurisdiction in such cases, see Kilgore v. Barr (1912) 114 Va. 70, 75 S. E. 762. A referee in bankruptcy has no jurisdiction of a proceeding to determine the validity of a transfer of property by bankrupts to one claiming adversely, and who objects to the jurisdiction. In re Petronio (C. C. A. 1914) 220 Fed. 269. Where a creditor asserted that he had received goods from a bankrupt in payment of his debt, and refused consent to a summary adjudication, the referee is without jurisdiction, and must remit the trustee to a plenary suit. In re Vallozza (D. C. 1915) 225 Fed. 334.

Where such a case arises, it is the duty of the referee to hear the testimony, in order to determine whether the third person's claim is real or pretended. If he finds that the claim is made in good faith and is probably real, but of doubtful validity or questionable faith, it should then be determined in a plenary suit; but if he finds that the claim is without any actual merit or legal foundation, he should require a surrender of the property to the trustee. In re Holbrook Shoe & Leather Co. (D. C. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

Within the rule that a referee has jurisdiction to determine claims of third persons which are merely colorable, a claim to property alleged to belong to a bankrupt's estate is not "colorable" when the claimant sets up as facts and not as conclusions of law matters which, if true, would constitute a statement of an adverse claim. In a proceeding by a trustee against a bankrupt's wife to recover $3,000, alleged to belong to his estate, her answer, that she had owned the money since 1910, had loaned it to her son-in-law, and that he had repaid it in May, 1911, did not indicate that her claim was merely colorable, and she was therefore entitled to a determination thereof in a plenary suit. In re Blum (1913) 202 Fed. 883, 121 C. C. A. 241.

The administrator of an estate, who appeared in bankruptcy proceedings in response to an order of the referee to show cause, and went to trial upon the

merits without questioning the jurisdiction, waived his right to insist that the trustee should have proceeded against him by an action. In re F. W. Hall & Sons (D. C. 1913) 208 Fed. 578.

A referee in bankruptcy has jurisdiction to determine whether a preference has been received by a secured creditor. In re Keystone Press (D. C. 1913) 203 Fed. 710.

3. Specific powers and authorities of referees.—The referee has power to make an order requiring the trustee to give the bankrupt a certificate of the names and addresses of the creditors who have proved their claims, to enable him to apply for his discharge. In re Blaisdell (D. C. 1871) 6 N. B. R. 78, Fed. Cas. No. 1,488.

The referee, in case there is delay in winding up the estate in bankruptcy, may properly inquire why a settlement has not been made, and suggest the propriety of making progress, and indicate what steps the trustee should take. In re Bank of North Carolina (D. C. 1879) 19 N. B. R. 164, Fed. Cas. No. 896.

The referee has authority to order notice to creditors of a meeting to authorize the trustee to oppose the bankrupt's application for discharge. In re Hockman (D. C. 1912) 205 Fed. 330. He may call a meeting of creditors, if deemed advisable, before action is taken with respect to property subject to liens. In re Cutler & John (D. C. 1916) 228 Fed. 771. An order continuing a meeting of creditors of a bankrupt estate was a matter of discretion with the referee. In re Rosenfeld-Goldman Co. (D. C. 1915) 228 Fed. 921.

Referees in bankruptcy may administer the oath to witnesses appearing for examination or in any hearing before them. U. S. v. Simon (D. C. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41; In re Dean (D. C. 1874) 2 N. B. R. 89, Fed. Cas. No. 3,700.

It is within the jurisdiction and the discretion of a referee in bankruptcy to order amendments to be made in the petition and schedules of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors until such amendments are made. In re Brumelkamp (D. C. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318.

A referee in bankruptcy has no authority to dismiss a bankruptcy proceeding generally, or any particular matter in bankruptcy referred to him after the adjudication. In re Elby (D. C. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734.

A referee in bankruptcy has no authority to collect or receive money belonging to an estate in bankruptcy. In re Pierce (D. C. 1901) 111 Fed. 516, 6 Am. Bankr. Rep. 747.

Although courts of bankruptcy have jurisdiction and authority to auth the business of the bankrupt to be tinued for a limited time, when is for the best interests of the es yet a referee in bankruptcy shoul take it upon him to exercise such thority, where it involves transac of considerable magnitude, espe since the amount of his own com sation may be directly involved, n any case should he authorize the of trustee's certificates to raise m to accomplish that end. Bray v. J son (1908) 166 Fed. 57, 91 C. C 643, 21 Am. Bankr. Rep. 383.

4. —— Ordering surrender of p erty.—A referee in bankruptcy ha risdiction of an application by a tee in bankruptcy for an order re ing the bankrupt to surrender mon property of his estate alleged to b his possession or control and t withheld or concealed from the tee, to cite the bankrupt before to show cause, and to make an o in accordance with his findings. I Oliver (D. C. 1899) 96 Fed. 85, 2 Bankr. Rep. 783; In re Tudor (D. 96 Fed. 942, 2 Am. Bankr. Rep. In re Mayer (D. C. 1900) 98 Fed. 3 Am. Bankr. Rep. 533; In re M (D. C. 1900) 105 Fed. 57, 5 Bankr. Rep. 184; Prather v. Pra (1882) 4 Ky. Law Rep. 454. His tion is subject to review by the j of the court of bankruptcy, but his cision will not be reversed unless p ly erroneous or based on clearly in cient evidence. In re Tudor (D. C Fed. 942, 2 Am. Bankr. Rep. 808. the order of the referee requiri surrender of property was based mistake of fact, the referee has po on petition of the bankrupt, filed in the time limited for review o decision, to reopen and reconsider matter, and, the mistake being sh to set aside the order. In re Bre (D. C. 1911) 190 Fed. 209, 26 Bankr. Rep. 646. If the bankrupt or refuses to obey an order of kind, lawfully made, the referee enter the fact on his record, and then his duty to certify the fact the judge, as the latter alone has authority to adjudge the bankrup contempt and impose a punish therefor. In re Miller (D. C. 1900) Fed. 57, 5 Am. Bankr. Rep. 184.

The referee has power in the instance to enter an order again third person to show cause why should not be required to surrende pay over to the trustee propert money in his hands, alleged to belo the estate in bankruptcy, and up hearing, to make an order requ such surrender or payment withi limited time. Mueller v. Nugent (1 184 U. S. 1, 22 Sup. Ct. 269, 46 L 405, 7 Am. Bankr. Rep. 224; I Famous Clothing Co. (D. C. 1910) Fed. 1015, 24 Am. Bankr. Rep.

ompare Woodward v. McDonald 1902) 116 Ga. 748, 42 S. E. 1030. ee, also, In re Logan (D. C. 1912) 96 Fed. 678, 28 Am. Bankr. Rep. 543. hus he may compel a creditor to return money received from the bankupt after the institution of the proeedings. Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 65, 20 Am. Bankr. Rep. 355. He may rder the officers of a bankrupt corporation to pay over the proceeds of ales of its stock alleged to belong to he corporation, and also to pay an mount assessed against them for unaid shares. In re Kornit Mfg. Co. D. C. 1911) 192 Fed. 392, 27 Am. Bankr. Rep. 244. And see Bilder v. Ellis (1912) 75 Misc. Rep. 255, 133 N. Y. Supp. 425.

5. —— **In proceedings for reclamation of property.**—A referee has jurisdiction to entertain and determine a claim set up by a third person, by intervening petition or otherwise, asserting a lien upon or interest in property which is lawfully in the possession of the trustee, or asserting that it is he property of the petitioner and not of the estate in bankruptcy. In re Rochford (1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; In re Drayton (D. C. 1904) 135 Fed. 383, 13 Am. Bankr. Rep. 602.

The referee in bankruptcy has power to fix a time limit for customers and creditors of a bankrupt stockbroker to file petitions for the reclamation of securities and claims to establish liens on cash in possession of the trustee. In re Gay & Sturgis (D. C. 1915) 224 Fed. 127.

6. —— **Grant of injunction.**—A referee in bankruptcy has no jurisdiction to grant an injunction staying proceedings in a state or federal court. In re Berkowitz (D. C. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251; In re Siebert (D. C. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348.

In cases other than those designed to obtain a stay of pending proceedings in a state or federal court, it is within the power of a referee in bankruptcy, in a proper case, to issue a restraining order or an order having the force of an injunction. In re Matthews (D. C. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96, 5 Am. Bankr. Rep. 720; In re Booth (D. C. 1899) 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Steuer (D. C. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209; In re Wilkes (D. C. 1902) 112 Fed. 975, 7 Am. Bankr. Rep. 574; In re Northrop, 1 Am. Bankr. Rep. 427; In re Adams, 1 Am. Bankr. Rep. 94, 1 Nat. Bankr. News, 167; In re Rogers, 1 Am. Bankr. Rep. 541, 1 Nat. Bankr. News, 211; In re Kilian, 1 Nat. Bankr. News, 267; In re Kerski, 2 Am. Bankr. Rep. 79.

Where a trustee in bankruptcy was entitled to the possession of premises leased by the bankrupt, as against persons to whom the landlord had granted a lease after the adjudication, the referee had power to enjoin those persons from interfering with the possession of the trustee. In re Adams (D. C. 1905) 134 Fed. 142, 14 Am. Bankr. Rep. 23. The courts refuse to interfere with his action in granting an injunction where the parties in interest have voluntarily appeared before him and submitted the questions at issue to his determination, as, where his decision is that incumbered property of the bankrupt estate shall be taken in charge by the trustee and sold free of liens, and the proceeds distributed among those entitled, and this includes an order enjoining the incumbrancer from making a sale. In re Matthews (D. C. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; In re Benjamin (D. C. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351. But where a referee has already decided that certain property does not belong to the estate in bankruptcy, but to a third person, he has no further jurisdiction over it, and therefore cannot enjoin its seizure by a sheriff under a writ of replevin issued from a state court, in an action brought therein by the trustee against such third person. In re Berkowitz (D. C. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251.

Referee in bankruptcy held without jurisdiction to restrain trustee from proceeding for commitment of bankrupt for failure to comply with order modified by district court, and affirmed by circuit court of appeals, for delivery of assets. In re Epstein (D. C. 1915) 219 Fed. 635.

7. —— **Appointment of receiver.**—A referee in bankruptcy has jurisdiction and authority to appoint a receiver to take charge of the property of a bankrupt until the appointment and qualification of a trustee, where it is absolutely necessary for the preservation of the estate. In re Florcken (D. C. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

But the referee's authority to appoint a receiver dates from the time the order of court referring the case to him is actually placed in his hands, and not from the time of its signing or filing. Hence the action of a referee in appointing a receiver before the delivery of the order of reference to him, and immediately upon his being informed by a telephone message that such an order had been made, would be improvident and unauthorized. Id.

8. **Proceedings before referees.**—A referee in bankruptcy may grant adjournments or postponements of proceedings before him, but should not do so except for good cause properly substantiated. In re Finkelstein (C. C. 1899) 93 Fed. 989; In re Hyman (D. C. 1868) Fed. Cas. No. 6,984. The postponement of a meeting of the bankrupt's creditors for the purpose of al-

lowing a restatement or perfecting of a proof of debt is a matter within the discretion of the referee, which will not be interfered with except for abuse. In re Morris (D. C. 1907) 154 Fed. 211, 18 Am. Bankr. Rep. 828.

It is in the discretion of a referee to allow or refuse a proposed amendment to a pleading in a case before him, on the same terms and in the same circumstances as would ordinarily be operative in a court of justice. Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355. Where part of the subject-matter of a petition filed by a trustee before a referee is within the jurisdiction of the court, and a part is not, it should be retained, and an amendment allowed limiting it to the matter within the jurisdiction. In re Newfoundland Syndicate (D. C. 1912) 196 Fed. 443, 28 Am. Bankr. Rep. 119. He should dismiss a petition presented to him by a trustee in bankruptcy but not filed in the office of the clerk of the court where such filing is necessary. In re Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346.

While the referee is to preside at the first meeting of the creditors, when a trustee is to be chosen, and the choice of the creditors is subject to his approval, it is highly improper for him to interfere in any way with their election of a trustee or to attempt to influence them in their choice, and on a petition by creditors alleging such interference the cause will be sent to another referee. In re Smith (D. C. 1868) Fed. Cas. No. 12,971.

Where there is an appearance in a contest before a referee, the litigating parties should be notified of his decision; but where creditors do not appear, or they appear and their appearance is not noted, no duty rests upon the referee to give notice of his decisions, especially where claims are presented and no objection is made. In re Nichols (D. C. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

A referee's order, directing the bankrupts to pay to the trustee a definite sum and to deliver merchandise, was sufficient in so far as it provided for the payment of money, but was fatally defective as to the merchandise for indefiniteness in failing to describe the goods. In re Kramer (D. C. 1913) 209 Fed. 627.

9. —— Taking and preservation of evidence.—It is the duty of the referee to be present in person throughout the progress of an examination and hear the evidence, unless, perhaps, where his presence is waived by the parties. It is not a proper practice to administer the oath to a witness, and then leave the parties to proceed with a stenographer. In re Wilde's Sons (D. C. 1904) 131 Fed. 142, 11 Am. Bankr. Rep. 714.

It is the duty of the referee to take and preserve all the evidence offere on the examination, and the remed his refusal to do so is by applic to the district court, and, failing t to the circuit court of appeals, fo order that it be taken and prese First Nat. Bank v. Abbott (1908) Fed. 852, 91 C. C. A. 538, 21 Bankr. Rep. 436.

In a proceeding before a refer bankruptcy to compel the delive property by a third person to trustee, it was irregular to receive hear the evidence before the trus petition was filed and the rule to cause order to the third person is In re Ballou (D. C. 1914) 215 Fed.

Upon an examination or hearin fore a referee in bankruptcy, whe objection to a question is interp it is the duty of the referee to i porate in the deposition the que asked, the fact of objection and reasons given for objection, and ruling on the objection, and then, though he decides the question t improper, to allow and require be answered and the answer to b tered in the deposition. Bank of venswood v. Johnson (1906) 143 463, 74 C. C. A. 597, 16 Am. B Rep. 206; In re Sturgeon (C. C 1905) 139 Fed. 608, 14 Am. B Rep. 681; In re Harrison (D. C. 1 197 Fed. 320, 28 Am. Bankr. Rep. In re Romine (D. C. 1905) 138 837, 14 Am. Bankr. Rep. 785; In r Gottardi (D. C. 1902) 114 Fed. 3 Am. Bankr. Rep. 723; In re L (D. C. 1902) 119 Fed. 379, 9 Bankr. Rep. 32; Dressel v. North Lumber Co. (D. C. 1902) 119 Fed. 9 Am. Bankr. Rep. 541; First Bank v. Abbott (1908) 165 Fed. 91 C. C. A. 538, 21 Am. Bankr. 436. CONTRA, In re Graves (I 1910) 182 Fed. 443, 25 Am. B Rep. 372; In re Wilde's Sons (I 1904) 131 Fed. 142, 11 Am. B Rep. 714.

The referee has power absolute exclude evidence attempted to be tracted from a witness who is priv ed against testifying, also parti items of evidence as to which priv is claimed and where the claim s clearly be allowed, and further, dence which is clearly and unmista incompetent, irrelevant, or immat in so much that it would be an abu process or of the power of the cou compel its production or permit it troduction. First Nat. Bank v. A (1908) 165 Fed. 852, 91 C. C. A. 21 Am. Bankr. Rep. 436; In re (D. C. 1914) 218 Fed. 860.

10. —— Review and reopening case.—Before the end of the time for filing a petition for a review order or decision of the refere bankruptcy by the court, such ord decision is in the control of the eree, and he may set it aside, r sider the case, and make a new o

or cause shown, as, where the original rder was based on a mistake of fact. n re Brenner (D. C. 1911) 190 Fed. 09, 26 Am. Bankr. Rep. 646. But fter the expiration of such time, the emedy by petition for review is exlusive, and the referee cannot reiew or revoke his own orders. In e Marks (D. C. 1909) 171 Fed. 281, 2 Am. Bankr. Rep. 568; In re Greek Mfg. Co. (D. C. 1908) 164 Fed. 211, 1 Am. Bankr. Rep. 111. But some of he authorities hold that a referee may evise and change his findings and orlers on proper application and for suficient reasons, such as mistake, misnderstanding of counsel, or new evilence, though in such a case it is the roper practice to give notice to counel, so that they may be reheard on the uestion if they desire. In re Hawley (D. C. 1902) 116 Fed. 429, 8 Am. Bankr. Rep. 629; In re Porter (Pa. 1881) 14 Phila. 449.

Where a party has had an opportunity to call and examine his witnesses in a proceeding before a referee, and the matter is closed, he should not be permitted to reopen the case for the purpose of introducing omitted evidence, unless there is a special reason therefor. In re Booss (D. C. 1907) 154 Fed. 494, 18 Am. Bankr. Rep. 658.

A petition filed before a referee to review an order previously entered by him after a hearing is in the nature of a bill of review in equity and governed by the same rules of procedure. It can only be filed for error of law apparent upon the face of the decree, or because of the discovery of new evidence since the hearing, and, when on the latter ground, it can only be filed by express leave, and the evidence relied on must be relevant, material, and such as would have produced a different result, and it must have been unknown to the petitioner at the time of the hearing and such as he could not have discovered by the exercise of due diligence. In re McIntire (D. C. 1906) 142 Fed. 593, 16 Am. Bankr. Rep. 80.

Where a proceeding before a referee is dismissed by the court for want of jurisdiction, all that has been done in the proceeding is necessarily annulled, including the findings of the referee and the taking of evidence by him; and he cannot thereafter, in a new proceeding, base a determination of the same issues on the findings made in the prior proceeding, or consider the evidence taken therein, unless by stipulation of the parties. In re Rosenberg (D. C. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624.

11. Certifying questions for review by judge.—The mode prescribed by General Order in Bankruptcy No. 27, for obtaining a review by the judge of orders or decisions of the referee is exclusive, and the party desiring a review must file his petition therefor in the manner prescribed, in default of which the application for review will be dismissed. In re Octave Mining Co. (D. C. 1914) 212 Fed. 457; In re Home Discount Co. (D. C. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; Craddock-Terry Co. v. Kaufman (D. C. 1900) 175 Fed. 303, 23 Am. Bankr. Rep. 724; In re Sharick (1901) 1 Alaska, 398; In re Smith (D. C. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; In re Schiller (D. C. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704. Specific questions arising in proceedings before a referee in bankruptcy, and upon which the opinion of the district judge is desired, should be presented on the certificate of the referee, or, in the case of orders entered, on petition for review, and not in the form of an assignment of errors. In re T. L. Kelly Dry-Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528. Counsel desiring to be heard by the court must file exceptions to the findings of the referee, as required by the rule of the court. In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 604. An attempted appeal from an order of the referee rejecting a claim as a secured claim confers no power of review on the court. In re Octave Mining Co. (D. C. 1914) 212 Fed. 457.

The decision of the referee on a contest between the bankrupt and one of his creditors cannot be certified to the judge for review when the referee's finding is not followed by any order made by him. In re Smith (D. C. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190. An order of a referee denying a motion to dismiss a petition by the trustee to require the bankrupt to turn over property is not reviewable because not a final order. In re Schimmel (D. C. 1913) 203 Fed. 181, 29 Am. Bankr. Rep. 361.

In order to be properly certified to the judge, the question must arise regularly in the course of proceedings before the referee, and between parties having the legal right to raise it. No opinion can be asked, or will be given, upon merely abstract questions or hypothetical questions, nor upon such as are merely anticipated or likely to arise. The question must be one actually arising and existing on issues of law or fact in proceedings had. Questions stated by consent must be by parties in a particular case upon proceedings actually had. In re Pulver (D. C. 1867) 1 N. B. R. 46, Fed. Cas. No. 11,466; In re Wright (D. C. 1873) 1 N. B. R. 393, Fed. Cas. No. 18,069; In re Sturgeon (D. C. 1868) 1 N. B. R. 498, Fed. Cas. No. 13,564; In re Bray (D. C. 1869) 2 N. B. R. 139, Fed. Cas. No. 1,818; In re Peck (D. C. 1870) 3 N. B. R. 757, Fed. Cas. No. 10,887; In re Haskell (D. C. 1871) 4 N. B. R. 558, Fed. Cas. No. 6,191.

The petition for review is not to be filed in the office of the clerk of the court, but with the referee, but if it is wrongly filed, by inadvertence, it rests within the discretion of the court, in the absence of any rule on the subject,

to permit the mistake to be corrected, even though the time ordinarily limited for the filing of such petitions has elapsed. In re Nippon Trading Co. (D. C. 1910) 182 Fed. 959, 25 Am. Bankr. Rep. 695.

In the absence of any provision in the statute or the rules of the court, a petition to review an order of a referee in bankruptcy does not of itself operate as a supersedeas, and whether or not it shall have that effect rests in the discretion of the reviewing or reviewed authority in the particular case; but the district court may provide by rule that such a petition for review shall not operate as a supersedeas, unless a bond be given to indemnify the opposite party in such sum as may be prescribed by the referee or the judge, or it may require the petitioner to give security for the costs of the review. In re Home Discount Co. (D. C. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

12. —— Parties entitled to review.—The review must be asked for by some person entitled. The referee should not certify any question to the court until requested to do so in a proper manner. In re Ruos (D. C. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281; In re Clark Coal & Coke Co. (D. C. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273. And where no party in interest has asked that an order of the referee be certified for review, it is not reviewable merely on a report by the referee of his proceedings in the case, including the order. In re Kimmel (D. C. 1910) 183 Fed. 665, 25 Am. Bankr. Rep. 595. And the referee himself has no jurisdiction, of his own motion, to certify a question not raised by the parties to the bankruptcy proceeding, but which the referee anticipates may arise, and on which he desires to be advised. In re Reukauff, Sons & Co. (D. C. 1905) 135 Fed. 251, 14 Am. Bankr. Rep. 344.

13. —— Time of petitioning for review.—Since neither the statute nor the rules prescribed by the supreme court fix any particular time within which a party aggrieved by a ruling or order of a referee must file his petition for review, the time may be limited by a rule of the particular court, and if this is not done, the only limitation is that the petition must be filed within a reasonable time. In re Verdon Cigar Co. (D. C. 1911) 193 Fed. 813, 27 Am. Bankr. Rep. 56; In re Foss (D. C. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439; In re Rome (D. C. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; Bacon v. Roberts (1906) 146 Fed. 729, 77 C. C. A. 155, 17 Am. Bankr. Rep. 421; In re Grant (D. C. 1906) 143 Fed. 661, 16 Am. Bankr. Rep. 256; In re Sharick (1901) 1 Alaska, 398; Crim v. Woodford (1905) 136 Fed. 34, 68 C. C. A. 584, 14 Am. Bankr. Rep. 302; In re Nichols (D. C. 1908) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

Whether a petition for review was filed within a reasonable time in a g en case is to be determined by the d trict court in its discretion, in the sence of any rule of court on the s ject, and its action will not be review by the appellate court except for abuse of discretion or manifest err Bacon v. Roberts (1906) 146 Fed. 7 77 C. C. A. 155, 17 Am. Bankr. R 421.

A reasonable time to file a petit for review of an order of a referee bankruptcy is the time fixed for an peal from the same class of orders. re Nichols (D. C. 1909) 166 Fed. 6 22 Am. Bankr. Rep. 216; In re N pon Trading Co. (D. C. 1910) 182 F 959, 25 Am. Bankr. Rep. 695.

The filing of a petition for review an order of a referee, 30 days af such order was made, held to have b within a reasonable time, in the sence of any rule of court on the s ject, and where it appeared that prejudice resulted from the delay. re Foss (D. C. 1906) 147 Fed. 790, Am. Bankr. Rep. 439. Where a cr itor's petition for review was filed days after the making of an order punging his claim, the creditor hav been away from home a considera part of the intervening time, he not guilty of such laches as authori the dismissal of the petition. In Rome (D. C. 1908) 162 Fed. 971, Am. Bankr. Rep. 820. A petition review a referee's order in bankrup not filed until 30 days after the en of the order, is too late. In re W (D. C. 1913) 206 Fed. 348, 30 Bankr. Rep. 298. A delay of ne five months in filing a petition to view a referee's ruling in bankru constituted laches for which the p tion would be dismissed, where the excuse was the pendency of an ap taken by another party from an or disallowing a part of another cl which prevented the closing and settlement of the estate. In re Ver Cigar Co. (D. C. 1913) 193 Fed. 27 Am. Bankr. Rep. 56. An order missing a petition for review filed days after the making of the or sought to be reviewed, on the groun unreasonable delay, was not an abus discretion, where no good reason the delay was shown. Bacon v. Rob (1906) 146 Fed. 729, 77 C. C. A. 17 Am. Bankr. Rep. 421. A peti filed more than three months after order was made, and on the day f for the declaring of a dividend, was reasonably late, especially as the eree had repeatedly called the at tion of counsel to the matter, and it held that, on the objection of the tr tee, the referee was justified in re ing to certify the matter to the co In re Grant (D. C. 1906) 143 Fed. 16 Am. Bankr. Rep. 256. A peti filed six months after the date of order complained of is clearly and tainly too late and should be dismis In re Sharick (1901) 1 Alaska,

petition to review the order of a ref-
e in bankruptcy comes too late, when
d nearly 11 months after the decision
nplained of. In re Octave Mining
. (D. C. 1914) 212 Fed. 457.

But this rule does not apply to a mo-
n to vacate an order made by a ref-
ee in bankruptcy, on the ground that
had no jurisdiction to make it. Such
notion should be entertained at any
e and disposed of on the merits, as
doctrine of laches does not apply
such a case. In re Willis W. Russell
rd Co. (D. C. 1909) 174 Fed. 202,
Am. Bankr. Rep. 300.

A referee is not required to stop pro-
edings before him and certify to the
urt for decision questions raised on
jections to evidence. Bank of Ra-
nswood v. Johnson (1906) 143 Fed.
3, 74 C. C. A. 597, 16 Am. Bankr.
p. 206.

4. —— Exceptions.—It is not neces-
y for the purpose of obtaining a re-
w that formal exceptions should have
en taken to the decision and ruling
the referee; the want of them will
t prevent the court from reviewing
e matter in question, unless they are
quired by a local rule of court. In
Peoples' Department Store Co. (D.
1908) 159 Fed. 286, 20 Am. Bankr.
p. 244; In re Swift (D. C. 1902) 118
d. 348, 9 Am. Bankr. Rep. 237; In
Miner (D. C. 1902) 117 Fed. 953,
Am. Bankr. Rep. 100. But if ex-
ptions are taken before a referee in
nkruptcy, they must be specific, as
quired by the settled practice of the
deral courts. Dressel v. North State
mber Co. (D. C. 1902) 119 Fed. 531,
Am. Bankr. Rep. 541. In the absence
such exceptions, the specific errors
law complained of must be clearly
d distinctly pointed out in the peti-
on for review. In re Carver (D. C.
02) 113 Fed. 138, 7 Am. Bankr. Rep.
9; In re Covington (D. C. 1901) 110
ed. 143, 6 Am. Bankr. Rep. 373.

**15. —— Record on petition for re-
ew.**—Where the referee transmits to
e clerk of the court the creditor's pe-
tion for review, the notes of the tes-
mony, and his own opinion, this is not
compliance with General Order in
ankruptcy No. 27, requiring him to
ertify "the question presented, a sum-
ary of the evidence relating thereto,
nd the finding or order of the referee
hereon." In re Kurtz (D. C. 1903)
25 Fed. 992, 11 Am. Bankr. Rep. 129.
Where it appeared that the referee, in-
tead of making a summary of the evi-
ence, returned all the evidence that
as taken, and the matter was determin-
d by the judge without any motion
aving been made to require the evi-
ence to be summarized, it was held
at the proceeding for review was not
validated, where it involved substan-
al matters, because the rule was not
bserved by the referee. Crim v.
Foodford (1905) 136 Fed. 34, 68 C. C.
A. 584, 14 Am. Bankr. Rep. 302. Where objections to evidence offered before a referee were sustained, the referee, at the request of the party offering the same, was not required to certify the objections made to the court for revision. In re Romine (D. C. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785.

The report of a referee of a hearing and order on a motion to require delivery of property to a trustee should contain his finding of the ultimate facts in issue, and not merely a summary of the evidence on which his order was based. In re Turetz (D. C. 1913) 205 Fed. 400.

Where a referee's findings were not sufficiently definite to enable the court on a petition to review to determine the legal questions involved, the proceeding will be remanded to the referee for further hearing and additional findings. In re Hawley Down Draft Furnace Co. (D. C. 1914) 214 Fed. 500.

Where any matter is referred to a referee in bankruptcy to find the facts, it is proper for him in his report to state his conclusions on the facts found. In re Baker (D. C. 1913) 212 Fed. 765.

16. Review of proceedings by judge.—The jurisdiction of the district courts to review the orders and rulings of referees is exclusive, and an appeal cannot be taken directly from the referee to the circuit court of appeals, but only from a decision of the district court. Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355.

Where a court of bankruptcy, on a petition for review of an order of a referee requiring a bankrupt to turn over certain property to his trustee, or to pay its value, made an order giving the bankrupt a stated time within which to comply with the order of the referee, it was impliedly an affirmance of such order, and it is not again subject to review in subsequent proceedings. But the fact that the court, in affirming such order, struck out a provision for the commitment of the bankrupt in case of his default, and gave him additional time, is not an adjudication that he should not be so punished, but leaves that matter to be brought up anew by motion in case the bankrupt fails to obey the order within the time allowed. In re Hershkowitz (D. C. 1903) 136 Fed. 950, 14 Am. Bankr. Rep. 86.

A petition to review an order or ruling of a referee in bankruptcy does not contemplate a general review of the entire proceeding before the referee. In re T. L. Kelly Dry-Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; In re Stokes (D. C. 1910) 185 Fed. 994, 26 Am. Bankr. Rep. 255. And see In re Tudor (D. C.) 96 Fed. 942, 2 Am. Bankr. Rep. 808. Where the only matter certified to the district court for review by the referee was an order overruling a demurrer to and denying a motion to strike out portions

of a motion filed by a trustee, a subsequent order made by the referee on such motion was not before the district court for review. Ellis v. Krulewitch (1905) 141 Fed. 954, 73 C. C. A. 270, 15 Am. Bankr. Rep. 615. A petition for review of a referee's order in bankruptcy does not contemplate a trial of the whole proceeding de novo by the district judge. In re Home Discount Co. (D. C. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168. Upon a review of a referee's decision, the judge is not bound to reverse because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issue de novo upon all the evidence in the record which he decides to be competent. In re De Gottardi (D. C. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723. On such review, the court may properly consider any point presented by the record before it, whether or not such point was discussed before or by the referee. In re Samuel Wilde's Sons (1906) 144 Fed. 972, 75 C. C. A. 601, 16 Am. Bankr. Rep. 386; In re Elmore Cotton Mills (D. C. 1914) 217 Fed. 810.

It is perfectly permissible for the judge to take new testimony if it is offered before him. In re Leech (1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599. But generally, the judge will restrict his consideration of the case to the specific errors complained of in the petition, and to such objections and exceptions as were raised in the proceedings before the referee, and matters not then pressed, or not mentioned in the petition, will be considered as waived. In re McCann Bros. Ice Co. (D. C. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555; In re Rome (D. C. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Scott (D. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 604; In re Cohn (D. C. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

On petition to review an order of the referee, the court is authorized to protect and secure to the bankrupt any substantial right of his which may have been overlooked by the referee, though there may be no specific assignment of error in relation thereto. In re Monongahela Distillery Co. (D. C. 1910) 186 Fed. 220.

In a summary proceeding before a referee in bankruptcy to enforce performance of a contract between the bankrupt and a third party, it was not too late to question the referee's jurisdiction on a petition to review his order. In re Ballou (D. C. 1914) 215 Fed. 810.

The discretionary power of a referee to direct a private sale of a bankrupt's estate will not be disturbed unless it clearly appears to have been improvidently exercised. In re Knox Automobile Co. (D. C. 1913) 210 Fed. 569.

Creditors who petitioned for review of an order of a referee and ob its reversal held not entitled to p ence over other creditors havin cisely similar claims who did no in the petition. In re Jamison B Co. (1913) 209 Fed. 541, 126 C. 363.

17. —— Effect of referee's fi of fact.—On review of a ruling or of a referee in bankruptcy, his de upon a question of fact will be e to respectful consideration, but wi possess any conclusive or constr force, where it is a deduction or ence from admitted or established of which the judge may take a dif view. In re McCrary Bros. (1 1909) 169 Fed. 485, 22 Am. B Rep. 161; Ohio Valley Bank C Mack (1906) 163 Fed. 155, 89 A. 605, 20 Am. Bankr. Rep. 40; Peoples' Department Store Co. (1908) 159 Fed. 286, 20 Am. B Rep. 244. The referee's findin fact, while presumptively correct not as conclusive as the verdict jury, or as findings of fact made judge in an action at law, where a has been waived. In re Hawks (1913) 204 Fed. 309, 30 Am. B Rep. 365.

If the referee's decisions or fin on questions of fact are based u review of conflicting evidence, or involved the necessity of weighin credibility of witnesses, they are titled to very great weight, and not be rejected or disregarded b court unless clearly and manifestl roneous. In re Booth (D. C. 189 Fed. 943, 2 Am. Bankr. Rep. 77 re Rome Planing Mill Co. (D. C. 1 99 Fed. 937, 3 Am. Bankr. Rep. In re Waxelbaum (D. C. 1900) Fed. 228, 4 Am. Bankr. Rep. 120 re Stout (D. C. 1900) 109 Fed. 7 Am. Bankr. Rep. 505; In re Covi (D. C. 1901) 110 Fed. 143, 6 Bankr. Rep. 373; In re Miner (1 1902) 117 Fed. 953, 9 Am. B Rep. 100; In re Williams (D. C. 1 120 Fed. 542, 9 Am. Bankr. Rep. In re Shults (D. C. 1905) 135 623, 14 Am. Bankr. Rep. 378; Benjamin (D. C. 1905) 140 Fed. 15 Am. Bankr. Rep. 351; In re S & Sternberg (D. C. 1907) 151 Fed. 18 Am. Bankr. Rep. 204; In re yon (D. C. 1907) 156 Fed. 863, 19 Bankr. Rep. 194; In re Littman C. 1908) 159 Fed. 233, 20 Am. B Rep 300; In re Hatem (D. C. 1 161 Fed. 895, 20 Am. Bankr. Rep. Ohio Valley Bank Co. v. Mack (1 163 Fed. 155, 89 C. C. A. 605, 20 Bankr. Rep. 40; In re Braselton C. 1909) 169 Fed. 960, 22 Am. B Rep. 419; In re MacKissic (D 1909) 171 Fed. 259, 22 Am. B Rep. 817; Fouche v. Shearer (D 1909) 172 Fed. 592, 22 Am. B Rep. 828; In re Hoffman (D. C. 1 173 Fed. 234, 23 Am. Bankr. Rep In re C. K. Hutchins Co. (D. C. 1

9 Fed. 864, 24 Am. Bankr. Rep. 647; re Schwartz (D. C. 1909) 179 Fed. 7, 23 Am. Bankr. Rep. 37; In re umhauer (D. C. 1910) 179 Fed. 966, Am. Bankr. Rep. 750; In re Boner D. C. 1910) 189 Fed. 93, 26 Am. ankr. Rep. 321; In re Brenner (D. 1911) 190 Fed. 209, 26 Am. Bankr. ep. 646; In re American National everage Co. (D. C. 1912) 193 Fed. 2; In re Silverman (D. C. 1913) 6 Fed. 960; Couts v. Townsend (D. 1903) 126 Fed. 249, 11 Am. Bankr. ep. 126; In re Soloway & Katz (D. 1912) 195 Fed. 103, 28 Am. Bankr. ep. 228; In re Charlestown Light & ower Co. (D. C. 1912) 199 Fed. 846, Am. Bankr. Rep. 721; In re Cox D. C. 1912) 199 Fed. 952, 29 Am. ankr. Rep. 456; McCulloch v. Davenort Savings Bank (D. C. 1915) 226 ed. 309; In re Cozatsky (D. C. 1914) 6 Fed. 920; In re Heffron Co. (D. 1914) 216 Fed. 642; In re Gay & urgis (D. C. 1915) 224 Fed. 127; In re Malschick & Levin (D. C. 1913) 206 Fed. 71.

A finding by a referee that a claim for a mechanic's lien did not involve "construction," and therefore that the lien was not filed in time, held a finding of fact which, being based on evidence, would not be set aside on review. In re Kligerman (D. C. 1915) 219 Fed. 758.

On review by the district judge of an order made by the referee in bankruptcy, requiring the bankrupt to surrender to his trustee money or property alleged to be in his possession and to constitute assets of his estate, the ordinary rule as to the force of the referee's findings of fact is not applicable, because the determination is not governed by the weight of testimony, but it is the duty of the judge to ascertain that cause is shown for making such an order beyond a reasonable doubt. In re Mayer (D. C. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

9623. (Act July 1, 1898, c. 541, § 39.) Duties of referees.

Duties of Referees.—a Referees shall (1) declare dividends and repare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules f property and lists of creditors filed by bankrupts and cause such as re incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them s may be requested by the parties in interest; (4) give notices to reditors as herein provided; (5) make up records embodying the vidence, or the substance thereof, as agreed upon by the parties n all contested matters arising before them, whenever requested to o so by either of the parties thereto, together with their findings herein, and transmit them to the judges; (6) prepare and file the chedules of property and lists of creditors required to be filed by he bankrupts, or cause the same to be done, when the bankrupts ail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit o the clerks the records, herein required to be kept by them, when he cases are concluded; (8) transmit to the clerks such papers s may be on file before them whenever the same are needed in any roceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit he original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or ndirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy. (30 Stat. 555, 556.)

Notes of Decisions

See notes under § 9622, ante.

§ 9624. (Act July 1, 1898, c. 541, § 40, as amended, Act Feb. 5, 1903, c. 487, § 9.) Compensation of referees.

Compensation of Referees.—a Referees shall receive as full compensation for their services, payable after they are rendered, a fee

of fifteen dollars deposited with the clerk at the time the petitic filed in each case, except when a fee is not required from a volun bankrupt, and twenty-five cents for every proof of claim filed allowance, to be paid from the estate, if any, as a part of the of administration, and from estates which have been administ before them one per centum commissions on all moneys disbu to creditors by the trustee, or one-half of one per centum on amount to be paid to creditors upon the confirmation of a c position.

b Whenever a case is transferred from one referee to anothe judge shall determine the proportion in which the fee and commiss therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before concluded, and when the case is specially referred, the judge determine what part of the fee and commissions shall be paid tc referee. (30 Stat. 556. 32 Stat. 799.)

In this section, as originally enacted, subdivision a was as follows:

"a Referees shall receive as full compensation for their services, payabl er they are rendered, a fee of ten dollars deposited with the clerk at the the petition is filed in each case, except when a fee is not required from a v tary bankrupt, and from estates which have been administered before the per centum commissions on sums to be paid as dividends and commissio one-half of one per centum on the amount to be paid to creditors upo confirmation of a composition."

Said subdivision was amended by Act Feb. 5, 1903, c. 487, § 9, cited abo read as set forth here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801 vided that the act should not apply to bankruptcy cases pending when it effect, but that such cases should be adjudicated and disposed of confor to the provisions of the original act.

Referees were prohibited from receiving any further compensation than allowed by the act, by section 72, added thereto by amendment by Act 5, 1903, c. 487, § 18, post, § 9656.

Notes of Decisions

Fees and expenses of referees.—Prior to the amendment of 1903, particular matters or issues arising in the course of a bankruptcy case could be referred to the referee in the character of a special master, and fees or compensation allowed to him as such. In re Hurley (D. C. 1913) 204 Fed. 126, 29 Am. Bankr. Rep. 567; In re Goldville Mfg. Co. (D. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552. See In re Talton (D. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617. Where objections to a bankrupt's application for discharge were referred to the referee for hearing and report, he was entitled to a reasonable allowance for his services, in addition to the fees allowed him by the bankruptcy act. Fellows v. Freudenthal (1900) 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re Grossman (D. C. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510; Bragassa v. St. Louis Cycle (1901) 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700. CONTRA, In re Wilcox (D. C. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241.

Since the amendatory act of 1903, the court is absolutely prohibited from allowing any extra or additional compensation to the referee for any services whatever. In re Daniels (D. C. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446; In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; Dressel v. North State ber Co. (D. C. 1902) 119 Fed. Am. Bankr. Rep. 541; In re Trot C. 1900) 104 Fed. 291, 4 Am. Rep. 780. And the court cannot convert a referee in bankruptcy special master and compensate h such. In re Sweeney (1909) 168 612, 94 C. C. A. 90, 21 Am. Bankr 866. Power of court to allow co sation to a referee for services re ed as special master considered. Langford, Felts & Myers. (D. C. 225 Fed. 311.

On an issue raised on an involu bankruptcy petition as to whethe court had jurisdiction and the a bankrupt was subject to adjudic the fees of the referee under ruptcy Rule 10 cannot exceed $1 re Hurley (D. C. 1913) 204 Fed

The compensation of the refer fixed by the statute will not be aba diminished in a particular case be some of the duties which ordi would be discharged by the refer the holding of hearings and mak orders, were assumed by the jud the request of the parties, on ac of the magnitude of the interes volved and the unusual character proceedings. In re Barber (1 1899) 97 Fed. 547, 3 Am. Bankr. 306.

A referee cannot make an

arge for his services in presiding at editors' meetings, conducting the examination of the bankrupt, or making it the dividend sheet, as these services are particularly required of him by the statute, and are supposed to be compensated by the $15 fee. In re Barker (D. C. 1901) 111 Fed. 501, 7 Am. Bankr. Rep. 132.

Under General Order in Bankruptcy No. 35, a referee is entitled only to necessary expenses incurred by him in publishing or mailing notices, in traveling, in perpetuating testimony, or in the performance of other duties under the act and allowed by special order of the court. He is not entitled to the allowance of a per diem for his services when away from home, to traveling expenses of a clerk, nor to hire of a clerk or stenographer unless the necessity therefor is shown. In re Elk Valley Coal Mining Co. (D. C. 1914) 213 Fed. 383.

The referee may make a general charge for blanks used in mailing notices to creditors and for orders entered, and also for the hire of a clerk, where the extent of his business is such that a clerk is needed, which charge should be a gross sum, and uniform in each case, regardless of the amount of work done. In re Pierce (D. C. 1901) 111 Fed. 516, 6 Am. Bankr. Rep. 747; In re Tebo (D. C. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651. Compare In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Dean (D. C. 1868) 1 N. B. R. 249, Fed. Cas. No. 3,699.

Expenses incurred by the referee in the publication of notice of the bankrupt's application for discharge, and for stationery, are chargeable against the bankrupt. In re Dixon (D. C. 1902) 114 Fed. 675, 8 Am. Bankr. Rep. 145.

The referee's order allowing fees to himself and the trustee is reviewable by the court. In re Allert (D. C. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101. It may be so reviewed even after payment has been made to the trustee, if the referee's account was not presented to and passed upon by the court as required. In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651. But not where his account was duly kept, presented, and approved and distribution of the estate has already been made. In re Tebo (D. C. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235.

Commissions of referees.—A referee in bankruptcy is only entitled to commissions on moneys disbursed to creditors under his authority, and not on the claims and liabilities scheduled. In re Philips & McEachin (C. C. A. 1914) 210 Fed. 889.

As originally enacted, the bankruptcy act allowed commissions to the referee and trustee on sums disbursed "as dividends and commissions." And it was held that this restricted them to the specified percentage on such sums as were available for, and distributed to, the general or unsecured creditors; that the payment in full of those claims which were entitled to priority (taxes, labor claims, etc.) was not the payment of a "dividend," and that commissions could not be reckoned either on the amount so paid out or on sums paid over to mortgagees or other secured creditors or lien holders. In re Iowa Falls Mfg. Co. (D. C. 1905) 140 Fed. 527, 15 Am. Bankr. Rep. 384; In re Hinckel Brewing Co. (D. C. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Goldville Mfg. Co. (D. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 522; In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co. (1911) 50 Colo. 342, 116 Pac. 122; In re Barker (D. C. 1901) 111 Fed. 501, 7 Am. Bankr. Rep. 132; In re Smith (D. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re Utt (1901) 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Barber (D. C. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; In re Fielding (D. C. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135; In re Fort Wayne Electric Corp. (D. C. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 706; In re Fielding, 2 Nat. Bankr. News, 735; In re Sabine, 1 Nat. Bankr. News, 312. Where pledged securities having a market value about equal to the secured loans were sold in bankruptcy, realizing a small surplus, referee held entitled to commissions only on the surplus. In re Meadows (C. C. A. 1914) 211 Fed. 948, affirming order (D. C. 1912) 199 Fed. 304. The setting apart of a homestead exemption to the bankrupt from the proceeds of property sold by the trustee, was not the making of a dividend so as to entitle the referee to a commission on the amount. In re Gardner (D. C. 1900) 103 Fed. 922, 4 Am. Bankr. Rep. 420. This rule was applied although the whole estate in bankruptcy might be consumed in the payment of priority claims and secured debts, leaving nothing on which a commission for the referee could be computed. Smith v. Township of Au Gres (C. C. A. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

Since the amendments of 1903 and 1910, referees are entitled to commissions on moneys received and disbursed by the trustee which were derived from the sale of mortgaged property, and which were covered by and applicable to the payment of the lien. In re Howard (D. C. 1913) 207 Fed. 402; In re Anders Push Button Telephone Co. (D. C. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643; In re Holmes Lumber Co. (D. C. 1911) 189 Fed. 178, 26

Am. Bankr. Rep. 119. The referee is not entitled to recover fees out of the proceeds of a sale of mortgaged property when it brings less than the amount of the mortgage debt. In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529. And this rule applies although the property is purchased by the party holding the incumbrance, the price in such case being treated as constructively paid to the trustee. In re Columbia Cotton Oil & Provision Corporation (C. C. A. 1913) 210 Fed. 824; In re Sanford Furniture Mfg. Co. (D. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414; In re Morse Iron Works & Dry Dock Co. (D. C. 1906) 154 Fed. 214, 18 Am. Bankr. Rep. 846. Compare In re Ft. Wayne Electric Corp. (D. C. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 706.

The referee is entitled to commissions on sums which would have been paid through the trustee but for an outside agreement between the parties and their attorneys. In re Sanford Furniture Mfg. Co. (D. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414. The referee in bankruptcy held entitled to fees upon the total amount of the assets transferred to a new corporation, not upon the amount actually received at the sale of the assets subject to existing liens. In re Breakwater Co. (D. C. 1915) 220 Fed. 226, decree reversed American Surety Co. v. Freed (1915) 224 Fed. 333, 140 C. C. A. 19. Where, to preserve assets of a bankrupt, they were transferred to corporation for a small sum, and secured and unsecured creditors received stock, the commissions to referee must be based on the cash. American Surety Co. v. Freed (1915) 224 Fed. 333, 140 C. C. A. 19, reversing decree In re Breakwater (D. C. 1915) 220 Fed. 226. An agreement by a referee in bankruptcy to reduce his fees to enable a reorganization plan to be carried out, which was approved by practically all of the creditors, is not illegal. In re Breakwater Co. (D. C. 1915) 220 Fed. 226, decree reversed American Surety Co. v. Freed (19 224 Fed. 333, 140 C. C. A. 19.

When the trustee is permitted to pledged collaterals on paying the for which they were pledged, the ance of the price after paying the constitutes the "money disbursed" which the commissions are to be mated. In re Meadows (D. C. 19 199 Fed. 304, 29 Am. Bankr. Rep. Property which comes into the pos sion of the trustee through the frau the bankrupt, and which is restore the defrauded party, is not a par the estate in bankruptcy out of w the officers may be allowed their st tory percentage. Gillespie v. J. C. & Co. (1910) 178 Fed. 886, 102 C A. 120, 24 Am. Bankr. Rep. 502. the same is true of real estate for recovery of which the trustee brought suit, but which never co into the estate, because it is made subject of a private settlement betw the claimant and the creditors, the tee thereupon dismissing his suit. re Kaiser (D. C. 1902) 112 Fed. 8 Am. Bankr. Rep. 108.

A referee is not entitled to com sions on money paid out by a trust conducting the business of the bank In re J. Bacon & Sons (D. C. 1915) Fed. 764. Where a bankrupt's tru is permitted to continue the bankr business under the supervision of referee, the latter is not entitle commissions on funds disbursed the trustee on debts incurred by but is limited to commissions on eys disbursed by the trustee to c tors. In re M. F. Rourke Co. (D 1913) 209 Fed. 877. Where the ref continued the bankrupt's business in der to complete certain governm contracts, and for that purpose r and paid out nearly $500,000 durin period of 18 months, and as a r distributed to creditors about $30 he was entitled to commissions onl the latter sum. Bray v. Joh (1908) 166 Fed. 57, 91 C. C. A. 64 Am. Bankr. Rep. 383.

§ 9625. (Act July 1, 1898, c. 541, § 41.) Contempts before refer

Contempts before Referees.—a A person shall not, in proce ings before a referee, (1) disobey or resist any lawful or process, or writ; (2) misbehave during a hearing or so near the p thereof as to obstruct the same; (3) neglect to produce, after hav been ordered to do so, any pertinent document; or (4) refuse to pear after having been subpœnaed, or, upon appearing, refuse to t the oath as a witness, or, after having taken the oath, refuse to be amined according to law: Provided, That no person shall be quired to attend as a witness before a referee at a place outside of State of his residence, and more than one hundred miles from s place of residence, and only in case his lawful mileage and fee one day's attendance, shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any per shall do any of the things forbidden in this section. The judge s thereupon, in a summary manner, hear the evidence as to the complained of, and, if it is such as to warrant him in so do

unish such person in the same manner and to the same extent as or a contempt committed before the court of bankruptcy, or commit uch person upon the same conditions as if the doing of the forbidden ct had occurred with reference to the process of, or in the presence f, the court. (30 Stat. 556.)

Notes of Decisions

Contempts before referees.—It is the ourt alone that possesses the power f punishment for contempt, and it is rror to leave the question of comitment by way of punishment or as a eans of enforcing obedience, to the scretion of the referee. Smith v. Belord (1901) 106 Fed. 658, 45 C. C. A. 26, 5 Am. Bankr. Rep. 291; In re Iaring (D. C. 1912) 193 Fed. 168, 27 m. Bankr. Rep. 285.

If a party affected by an order of the eferee, requiring him to take certain ction forthwith, files a petition for reiew by the judge, but does not seure a supersedeas, the referee's order ontinues operative, and the failure to bey it is a contempt, which cannot e justified on the theory that it is not n offense to disobey the order until fter it has been confirmed by the court. n re Home Discount Co. (D. C. 1906) 47 Fed. 538, 17 Am. Bankr. Rep. 168. But see Brown v. Detroit Trust Co. 1912) 193 Fed. 622, 113 C. C. A. 490, olding that where a third person was rdered by the referee to surrender roperty of the bankrupt in his possesion within a limited time, and, before he expiration of such time, he took roceedings to review the order of the eferee, those proceedings suspended he operation of the referee's order, nd therefore a judgment imposing a ne on defendant for contempt in failng to comply with the order was eroneous.

Failure or refusal to obey an order ade by a referee in bankruptcy reuiring the bankrupt or some third peron to surrender money or property to he trustee in bankruptcy is punishable s a contempt. In re Graessler (1907) 54 Fed. 478, 83 C. C. A. 304, 18 Am. Bankr. Rep. 694; In re Home Discount Co. (D. C. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Soloway & Katz D. C. 1912) 195 Fed. 100, 20 Am. Bankr. Rep. 225. But where a trusee in bankruptcy, being ordered by the eferee to demand assets of the estate rom his attorney, obeys the order and nakes such demand, he is not guilty of ontempt though the attorney refuses o comply with the demand. In re Stemper (D. C. 1915) 222 Fed. 690.

Where referee orders private sale of roperty, inducing bidder to withdraw id in order that another may purchase t a lower price, held punishable as a ontempt. In re Boyd (D. C. 1915) 228 Fed. 1003.

A court of bankruptcy has no power o commit any person for a contempt ommitted before a referee, except strictly in accordance with the provisions of this section, which require that the proceedings shall be based on a certificate of the referee. In re Gitkin (D. C. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113.

The referee may certify contumacious behavior on the part of the bankrupt to the court for punishment as for contempt without notice to him, as he will have notice and an opportunity to be heard in the proceedings before the court. But where the referee does not act on his own motion, in contempt proceedings against a bankrupt, but on the motion or petition of some one else, the bankrupt should be accorded notice and a hearing before the referee. In re Magen (D. C. 1910) 179 Fed. 572, 24 Am. Bankr. Rep. 63.

In proceedings for contempt before a court of bankruptcy, the pleadings pro and con may be of a summary character, but while no pleading on the part of the respondent may be necessary, it is often advantageous to set out the defense in a definite manner, with a view to bringing the issues clearly before the appellate court. In re Goodrich (1910) 184 Fed. 5, 106 C. C. A. 207, 25 Am. Bankr. Rep. 787.

The statute does not invest courts of bankruptcy with broader powers in the matter of punishment for contempt than are possessed by other federal courts; and the mode of proceeding in such courts to determine whether a constructive contempt has been committed should conform to the established practice in like cases in other courts of the United States, as near as may be. Boyd v. Glucklich (1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393.

The classification of contempts and contempt proceedings into civil and criminal contempts is applicable to proceedings in bankruptcy. In re Kahn (C. C. A. 1913) 204 Fed. 581.

An order of commitment of a bankruptcy court is not invalid because it does not run in the name of the United States. Mueller v. Nugent (1902) 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

A person cannot be held in contempt for disobedience of an order made by a referee in bankruptcy unless the order was based upon a sufficient finding of the facts to inform the party affected, fully and completely, of the action which he is required to take. In re Rogowski (D. C. 1908) 166 Fed. 165, 21 Am. Bankr. Rep. 553.

The provision of this section, that the judge shall in a summary manner

hear the evidence as to the acts complained of, requires a hearing as to the facts, and by necessary implication excludes any inference that the alleged contemnor is to be purged merely by a denial upon oath. In re Boyd (D. C. 1915) 228 Fed. 1003.

Where a person is in contempt for failure to perform a duty imposed by the bankruptcy law, he should first be allowed to purge himself of the civil contempt by performing the duty, after which he may be fined or imprisoned for the criminal contempt, if not excused. In re Farkas (D. C. 1913) 204 Fed. 343.

A person charged with contempt committed before a referee will not be heard to allege in defense matters which were set up and contested in the proceedings before the referee, such contentions being res judicata. In re Home Discount Co. (D. C. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. In re Strobel (D. C. 1908) 163 280, 20 Am. Bankr. Rep. 754.

Intentional and willful disobe of an order clearly within the ju tion of the referee to make, persis continued, cannot be justified as been under the advice of counse re Home Discount Co. (D. C. 190 Fed. 538, 17 Am. Bankr. Rep. 1

In a proceeding to punish a rupt for failure or refusal to ob order of the referee requiring surrender to his trustee proper leged to be in his possession and t stitute assets of his estate in ban cy, the order of the referee is no clusive as to the existence of the which would justify it, or as t ability of the bankrupt to compl re Haring (D. C. 1912) 193 Fe 27 Am. Bankr. Rep. 285.

§ 9626. (Act July 1, 1898, c. 541, § 42.) Records of referees.

Records of Referees.—a The records of all proceedings in case before a referee shall be kept as nearly as may be in the manner as records are now kept in equity cases in circuit cou the United States.

b A record of the proceedings in each case shall be kept in a rate book or books, and shall, together with the papers or constitute the records of the case.

c The book or books containing a record of the proceedings when the case is concluded before the referee, be certified to by and, together with such papers as are on file before him, be t mitted to the court of bankruptcy and shall there remain as a of the records of the court. (30 Stat. 556, 557.)

The circuit courts were abolished and their jurisdiction transferred district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

Records and accounts of referees.—The provisions of the bankruptcy act do not constitute the referee the keeper of the records nor authorize him to certify records directly to a circuit court of appeals. Cook Inlet Coal Fields Co. v. Caldwell (1906) 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135.

A referee in bankruptcy is not required to furnish copies of the papers or proceedings before him; and the jurisdiction of a referee to proceed with a hearing on a reference made by the court is not affected by his refusal to furnish to a party, on demand, a copy of the petition on which the hearing is based and of the order of reference. In re Lewin (D. C. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632.

Original papers referred to bankrupt's deposition and a thereto cannot be withdrawn fr files at the option of the bankru the court may order a withdraw good reason shown by a party ested. In re McNair (D. C. 1 N. B. R. 343, Fed. Cas. No. 8,90

Exceptions to the referee's c against the estate in bankruptcy expenses therein will not be he the court, when the referee's a of such expenses has been dul and returned to the court unde with vouchers, as required by la approved by the court, and esp when distribution of the estate ready been made before such tions are presented. In re Tel C. 1900) 101 Fed. 419, 4 Am. Rep. 235.

§ 9627. (Act July 1, 1898, c. 541, § 43.) Referee's absence o ability.

Referee's Absence or Disability.—a Whenever the office referee is vacant, or its occupant is absent or disqualified t the judge may act, or may appoint another referee, or an

feree holding an appointment under the same court may, by order the judge, temporarily fill the vacancy. (30 Stat. 557.)

9628. (Act July 1, 1898, c. 541, § 44.) Appointment of trustees. Appointment of Trustees.—a The creditors of a bankrupt estate all, at their first meeting after the adjudication or after a vancy has occurred in the office of trustee, or after an estate has en reopened, or after a composition has been set aside or a disarge revoked, or if there is a vacancy in the office of trustee, apint one trustee or three trustees of such estate. If the creditors not appoint a trustee or trustees as herein provided, the court all do so. (30 Stat. 557.)

Notes of Decisions

Election of trustee.
— Conduct of election.
— Adjournment of meeting.
— Cases where no trustee appointed.
— Rights of creditors as voters.
— Secured and preferred creditors.
— Majority required and ascertainment thereof.
— Representation by agent or attorney.
— Corrupt practices and improper influences in election.
Confirmation or disapproval by court.
Appointment of trustee by court or referee.
— Number of trustees to be appointed.

1. **Election of trustee.**—There can be trust estate for administration, and nsequently no authority to choose a ustee, until after an adjudication in nkruptcy has been made. In re Back y Automobile Co. (D. C. 1907) 158 d. 679, 19 Am. Bankr. Rep. 835.

If the creditors elect two trustees, ere is a vacancy in the office of third ustee, which the creditors should fill a subsequent meeting to be called by e referee, but if they fail to do so, e referee himself may fill it. In re illiam F. Fisher & Co. (D. C. 1905) 5 Fed. 223, 14 Am. Bankr. Rep. 366.

2. —— **Conduct of election.**—The ection of a trustee by the creditors a bankrupt may be by ballot, or viva ce, or by calling the name of each editor, or by calling upon the persons presenting them to name their choice. re Lake Superior Ship Canal Co. (D. 1872) 7 N. B. R. 376, Fed. Cas. No. 997. There is no such thing known the law as an informal vote or balt in an election of this kind. In re earson (D. C. 1869) 2 N. B. R. 477, d. Cas. No. 10,878.

The meeting should be organized at e hour designated in the notice, and ould be kept open for a proper length time to enable all the creditors who sire to participate to come in and st their votes. In re Gilley (D. C. 873) Fed. Cas. No. 5,438; In re helps (D. C. 1868) 1 N. B. R. 525, d. Cas. No. 11,071.

A majority of those creditors who are esent at the meeting, and have had eir claims allowed, must concur in e selection of a trustee, as well as a ajority in value of the claims of such creditors. In re Henschel (D. C. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

3. —— **Adjournment of meeting.**—If no choice of a trustee is made at the first session of the creditors, the meeting may be adjourned to another day, and the trustee then chosen; it continues to be the "first meeting" notwithstanding such adjournment. In re Phelps (D. C. 1868) 1 N. B. R. 525, Fed. Cas. No. 11,071. The creditors present at a meeting do not exhaust their right to select a trustee by a single ineffectual vote, but they are entitled to a reasonable adjournment of such meeting in order that an agreement may be reached. In re Nice & Schreiber (D. C. 1903) 123 Fed. 987, 10 Am. Bankr. Rep. 639. If objections are raised to proxies offering to vote, and the referee decides that they are disqualified, he may adjourn the meeting, in order to enable the creditors affected to appear in person or by valid proxies, but he is not bound to do so, and if he directs the creditors present to proceed forthwith to an election, the result will not be set aside for that reason unless it is shown that he abused his discretion. In re McGill (1901) 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155. Where objections were filed to claims, and no person received the votes of an undisputed majority in number and amount for trustee, referee held authorized to postpone the election, and, having done so, the election should be treated as tentative. In re Knox (1915) 221 Fed. 36, 136 C. C. A. 562.

It is also sufficient cause for adjourning the meeting that the person chosen as trustee declines to act (although creditors should try to avoid this emergency by first obtaining the consent of the trustee whom they expect to elect), or that objections are presented against the person elected and are taken under advisement by the referee. In re Lewensohn (D. C. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299.

Where, at the first meeting, the bankrupt proposes to offer terms of composition to his creditors, the referee, in a proper case, should postpone the choice of a trustee, to give opportunity for the filing of the proposed composition, and

if it is filed, he should further postpone the selection of a trustee until the entry of an order refusing to confirm such agreement. In re Rung, 1 Nat. Bankr. News, 406.

4. —— Cases where no trustee appointed.—Under General Order in Bankruptcy No. 15, where the schedule of a voluntary bankrupt shows no other assets than such as are exempt by law, the court may direct that no trustee shall be appointed. Smalley v. Laugenour (1902) 30 Wash. 307, 70 Pac. 786. Even though some available assets may be disclosed, but no substantial amount, the appointment of a trustee is not indispensable, and no person elected to that office can be compelled to serve without compensation, so that, if creditors insist upon the appointment of a trustee, they must advance the statutory fees or otherwise arrange for his remuneration. In re Levy (D. C. 1900) 101 Fed. 247. But if assets afterwards come to light, a trustee must be appointed. This step is essential to divest the bankrupt of title to his property, and so make it available for administration in bankruptcy. Miller v. Barto (1910) 247 Ill. 104, 93 N. E. 140. But in the absence of proof to the contrary, it will be presumed that, after the institution of a bankruptcy proceeding, a trustee was appointed, thus divesting the bankrupt's title to real estate. Stern v. Bradner Smith & Co. (1907) 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151. If the referee, after ordering that no trustee should be appointed, for the causes set forth in the general order, shall learn that property of the bankrupt has been found which creditors can claim as assets of the estate, he should then take measures for the appointment of a trustee. In re Smith (D. C. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

5. —— Rights of creditors as voters.—The right of a creditor to participate in bankruptcy proceedings against his debtor does not depend on his being named as a creditor in the bankrupt's list or schedule. In re Evening Standard Pub. Co. (D. C. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156. But proof and allowance of his claim is necessary to entitle him to vote as a creditor in the election of a trustee, or to challenge the right of any other voter. In re Jones (D. C. 1868) 2 N. B. R. 59, Fed. Cas. No. 7,447; In re Hill (D. C. 1867) Fed. Cas. No. 6,481; In re Briscoe (D. C. 1869) 2 N. B. R. 226, Fed. Cas. No. 1,886.

Since the right to elect a trustee belongs to the proving creditors, the vote will not be postponed to allow other creditors to prove their claims, unless by consent of those who have already proved. In re Lake Superior Ship Canal Co. (D. C. 1872) 7 N. B. R. 376, Fed. Cas. No. 7,997. But it is not necessarily an abuse of discretion or an error of law for a referee to journ a creditors' meeting held the election of a trustee, in orde allow the filing and proof of c claims. In re Rosenfeld-Goldman (D. C. 1915) 228 Fed. 921.

If objection is made to the rece of the vote of any creditor, the c tion will be decided by the referee certified to the judge for review, i sired. It is the duty of the refere least to hear the objections suffic ly to determine whether they are i in good faith, and if so, and if they pear to be well founded, the c should not be allowed for voting poses. In re Malino (D. C. 1902) Fed. 368, 8 Am. Bankr. Rep. 205 re Kelly Dry Goods Co. (D. C. 1 102 Fed. 747, 4 Am. Bankr. Rep. Referee's decision as to whether would be disfranchised in electing tee upon filing of objections, or it lidity summarily determined, held to be set aside, unless an abuse of cretion. In re Rosenfeld-Goldman (D. C. 1915) 228 Fed. 921. If claim has not yet been proved o lowed, the referee may, on a good against it being made, postpone question of allowance until after vote for trustee. In re Noble (I 1869) 3 N. B. R. 96, Fed. Cas. No. 282; In re Northern Iron Co. (C 1876) 14 N. B. R. 356, Fed. Cas. 10,322. Creditors whose proofs claims have been thus postponed have the proceedings certified to court, and if the postponement is to have been erroneous, the ele may be set aside and a new vote t provided it appears that the r would be changed by allowing vot be cast on such claims. In re E (D. C. 1900) 99 Fed. 695, 3 Am. B Rep. 733; In re Lake Superior Canal Co. (D. C. 1872) 7 N. B. R. Fed. Cas. No. 7,997. Where on two disputed claims would have be voted at election of trustee as n affect result, referee held not c upon to pass upon such claim. I Rosenfeld-Goldman Co. (D. C. 1 228 Fed. 921. Mere oral unverifie jections to claims of creditors, not ported by any proof offered or pr ed, are not sufficient to require the eree to adjourn the meeting until objections can be tried before pro ing with the election. In re Syr Paper & Pulp Co. (D. C. 1908) 164 275, 21 Am. Bankr. Rep. 174.

If some of the creditors objec the votes offered to be cast by c creditors, on the ground that were procured by the influence o bankrupt and in collusion with hi that they are controlled by him meant to be cast in his interest. referee has power to hear and d the question thus raised, and to ex such votes from the election if he the facts to be as stated. In re

Gill (1901) 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155; In re Van De Mark (D. C. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760. See In re Noble (D. C. 1868) 3 N. B. R. 96, Fed. Cas. No. 10,282. But it is no reason for excluding a claim, unquestionably valid, from the right to vote, that it is due to the bankrupt's attorney or his clerk, and therefore may be voted in his interest. In re Ployd (D. C. 1910) 183 Fed. 791, 25 Am. Bankr. Rep. 194. Where, by want of proper advice, creditors have named as their agent and attorney a person who has acted for the bankrupt, and whom mere judicial policy discourages from acting for them, they should not for that reason be denied a voice in the selection of the trustee. In re Kaufman (D. C. 1910) 179 Fed. 552, 24 Am. Bankr. Rep. 117.

Where majority creditors of a bankrupt were represented by attorneys, who had previously represented the bankrupt, and who had solicited the claims, and for this reason were not allowed to vote in the election of a trustee, the referee should have granted a continuance, in order that they might secure other proper representation and participate and proceed to the election of a trustee by the majority, and it was error for him to refuse. In re E. A. Walker & Co. (D. C. 1913) 204 Fed. 132, 29 Am. Bankr. Rep. 499.

A creditor of a bankrupt who is also a debtor to the bankrupt's estate is not entitled to vote in the election of a trustee where he has not made his indebtedness good. In re Duryea Power Co. (D. C. 1908) 159 Fed. 783, 20 Am. Bankr. Rep. 219. But an unliquidated claim for damages which the bankrupt purposes to set off against the claim of a creditor must be wholly disregarded in the proceedings for the choice of a trustee. That is, the creditor is entitled to vote, and for the full amount of his claim, as it is not competent at this stage of the proceedings to consider the question of set-off. In re Orne (D. C. 1867) 1 N. B. R. 57, Fed. Cas. No. 10,581.

Where the creditor is a firm, either of the partners may vote the full amount of the claim; but if the debt is owned by joint creditors who are not partners, or by joint trustees, neither can vote or act without the authority or consent of the other. In re Purvis (D. C. 1867) 1 N. B. R. 163, Fed. Cas. No. 11,476.

The managing officers of a bankrupt corporation, when bona fide creditors of the company, have the same right to vote for the trustee as any other claimant. In re Northern Iron Co. (C. C. 1876) 14 N. B. R. 356, Fed. Cas. No. 10,322.

Claims which have been proved and then sold and assigned, before the election of a trustee, must be voted upon in such election by the actual owner at the time and not by the original creditor. In re Frank (D. C. 1871) Fed. Cas. No. 5,050.

A creditor may change his vote as often as he sees fit until he has signed the certificate of choice of trustee, but not after that has been done and the meeting has adjourned, at least where such a change would cause a failure to elect, but if a mistake has been made, he may present his objection to the judge. In re Pfromm (D. C. 1873) 8 N. B. R. 357, Fed. Cas. No. 11,061; In re Scheiffer (D. C. 1869) 2 N. B. R. 591, Fed. Cas. No. 12,445.

6. —— Secured and preferred creditors.—In the election of a trustee in bankruptcy, a secured creditor may surrender his security and vote as on an unsecured claim, but failing this, he will not be entitled to vote unless his claim exceeds the value of the security which he holds, and then only for such excess as shall be allowed by the court. In re Eagles (D. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733.

Where a referee in bankruptcy ascertained that the security held by a creditor would be insufficient to satisfy his claim, and no exception was taken to the method of liquidation, which was not favorable to the creditor, the referee did not err in permitting him to vote in the selection of a trustee, for the amount of the deficit, without surrendering the collateral. In re Milne, Turnbull & Co. (D. C. 1908) 159 Fed. 280, 20 Am. Bankr. Rep. 248.

A creditor holding a mortgage as security, who, in his proof of the debt, states upon information and belief that the mortgage is worth less than the amount of the debt, is not entitled to vote on the difference between its value as stated by him and the amount of his debt. In re Hanna (D. C. 1871) 7 N. B. R. 502, Fed. Cas. No. 6,027.

Where the foundation of a claim against a bankrupt is a judgment by confession based on notes of the bankrupt, the fact that the validity of some of the notes is contested by other creditors is not ground for refusing the creditor the right to vote for trustee at least to the extent of the part of his judgment which is undisputed. In re Wenatchee-Stratford Orchard Co. (D. C. 1913) 205 Fed. 964.

Where the security held by the creditor covers the entire debt, though it may be insufficient in amount, he cannot vote at a creditors' meeting unless his security has been valued in the manner prescribed by the act and the excess thus ascertained. But where a specific portion or amount of the debt is secured, so that the debt secured can be separated from the entire debt, at once and with certainty, the creditor may vote and act, as to the residue, as a general creditor. In re Parkes (D. C. 1874) 10 N. B. R. 82, Fed. Cas. No. 10,754.

A preferred creditor cannot partici-

pate in the choice of a trustee unless he has surrendered his preference, but he may do this at the first meeting and then vote for the trustee, when the preference is of such a nature as to be effectually destroyed by such surrender. In re Saunders (D. C. 1875) Fed. Cas. No. 12,371.

7. —— **Majority required and ascertainment thereof.**—If only a single creditor appears at the first meeting and proves his debt, he is entitled to name the trustee. Anonymous (D. C.) 1 N. B. R. 216, Fed. Cas. No. 458; In re Haynes (D. C. 1867) 2 N. B. R. 227, Fed. Cas. No. 6,269. And where, in the course of the proceedings, one creditor has become the sole creditor, he may apply for the appointment of a new trustee in place of the one acting, and such person will be appointed as he and the bankrupt may agree upon, or, if they do not agree, the matter may be referred to the referee. In re Sacchi (C. C. 1872) 6 N. B. R. 497, Fed. Cas. No. 12,200.

Where several creditors take part in the election, the majority required by the statute for the election of a trustee is not merely a majority of the votes cast, but a majority of all the creditors who are present and have had their claims allowed. In re Purvis (D. C. 1867) 1 N. B. R. 163, Fed. Cas. No. 11,476; In re Scheiffer (D. C. 1869) 2 N. B. R. 591, Fed. Cas. No. 12,445. See In re Portsmouth Savings Fund Soc. (D. C. 1874) Fed. Cas. No. 11,297.

Creditors are not to be counted as present merely because their claims have been allowed, but they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting. In re Kaufman (D. C. 1910) 179 Fed. 552, 24 Am. Bankr. Rep. 117; In re Mackellar (D. C. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; In re Henschel (1902) 113 Fed. 443, 51 C. C. A. 277, 7 Am. Bankr. Rep. 662. And even though the creditor may be present by a proxy, still if the latter's power of attorney is invalid because given under the influence or control of the bankrupt for the purpose of being voted for a trustee of his choice, the creditor will not be counted as present and necessary for a choice. In re McGill (1901) 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155.

Where a firm is the creditor, and the vote of the firm for the trustee is cast by one member thereof, in computing the number of votes such vote can be counted only as one; it would be incorrect to count each member of the creditor firm as a separate creditor who has voted. In re Purvis (D. C. 1867) 1 N. B. R. 163, Fed. Cas. No. 11,476.

Where creditors, before the institution of the bankruptcy proceedings, assigned their claims to a committee in trust for the purpose of purchasing the bankrupt's assets from the trustee and selling them for the benefit of su signors as distinguished from the rupt's general creditors, the com is entitled to only a single vote selection of a trustee, and not to for each of the claims so assign re E. T. Kenney Co. (D. C. 190 Fed. 451, 14 Am. Bankr. Rep. 6

8. —— **Representation by ag attorney.**—The vote of a credit be cast by an attorney in fact, c ducing a written authority fro creditor for that purpose, which s ity will be filed by the referee as of his record in the case. In re (D. C. 1900) 99 Fed. 695, 3 Am. Rep. 733. The power of attorne be actually produced and ex One claiming that such a paper v ecuted to him, but that it has be or mislaid, is properly exclude participating in the election. In r Ridge Packing Co. (D. C. 190 Fed. 619, 11 Am. Bankr. Rep. 36 one in this situation, or whose has been ruled invalid, has no i or standing which gives him a r object to the action of the refe behalf of his alleged principal. v. Reinhard (D. C. 1900) 104 Fe 4 Am. Bankr. Rep. 782. The le attorney must be acknowledged a competent officer, and it ha held that an acknowledgment b foreign consul may be sufficient. Sugenheimer (D. C. 1899) 91 Fe 1 Am. Bankr. Rep. 425.

An attorney at law, represen creditor, cannot cast his client in the election of a trustee me virtue of his retainer, but must constituted attorney in fact. In zoris (D. C. 1903) 120 Fed. 7 Am. Bankr. Rep. 31; In re Scu C. 1901) 108 Fed. 372, 5 Am. Rep. 716; In re Blankfein (D. C 97 Fed. 191, 3 Am. Bankr. Re In re Purvis (D. C. 1867) 1 N. 163, Fed. Cas. No. 11,476; In re ley (D. C. 1874) Fed. Cas. No.

If a power of attorney is give firm, and not to either member one alone is not authorized to vot it in the election of a trustee. Frank (D. C. 1871) Fed. Cas. 050. But one member of a partn on behalf of the firm, may exe power of attorney to a third pers thorizing him to cast the vote firm in such election. In re (D. C. 1869) Fed. Cas. No. 1,0 this special case, the rule requi letter of attorney to show that t son executing it is a member firm. But if a statement to tha is contained in the proof of d companying the letter, though from the letter itself, it is suffic entitle the attorney to represe creditor. In re Blue Ridge Co. (D. C. 1903) 125 Fed. 619, Bankr. Rep. 36.

Attorney, representing conflict terests of trustee in bankrupt

ssignee for creditors, held, upon removal of the trustee, not to be permitted to represent creditors in the election of a new trustee. In re Forestier (D. C. 1915) 222 Fed. 537.

9. —— Corrupt practices and improper influences in election.—The referee should not in any way attempt to influence the creditors in their choice of a trustee. If he endeavors to secure the election of a particular person, by urging and soliciting creditors to vote for him, it may be sufficient cause for taking the case out of his hands and sending it to another referee. In re Smith (D. C. 1868) Fed. Cas. No. 12,971.

Where it appears that the choice of the trustee has been influenced by the bankrupt himself, by bribery, soliciting votes, electioneering, packing the meeting with his own friends, or any other form of active interference with the free choice of the creditors, the court will not hesitate to disapprove or vacate the election. In re Ployd (D. C. 1910) 183 Fed. 791, 25 Am. Bankr. Rep. 194; In re L. W. Day & Co. (D. C. 1910) 178 Fed. 545, 101 C. C. A. 461, 24 Am. Bankr. Rep. 252; Falter v. Reinhard (D. C. 1900) 104 Fed. 292, 2 Am. Bankr. Rep. 782; In re Lloyd (D. C. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96; In re Hanson (D. C. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; In re Houghton (D. C. 1873) Fed. Cas. No. 6,729; In re Bliss (D. C. 1867) 1 N. B. R. 78, Fed. Cas. No. 1,543; In re Wetmore (D. C. 1877) 16 N. B. R. 514, Fed. Cas. No. 17,466; In re Pfromm (D. C. 1873) 8 N. B. R. 157, Fed. Cas. No. 11,061. In one case the court refused to conurm the election of a trustee who was the bankrupt's bookkeeper, when it appeared that a large number of the creditors could not be present at the meeting, though the election was almost unanimous. In re Wetmore (D. C. 1877) 16 N. B. R. 514, Fed. Cas. No. 17,466. Where the trustee chosen is a perfectly competent and trustworthy person, and is elected by a large majority of creditors apparently exercising their independent judgment in his election, and it does not appear that his administration would be in any way detrimental to the estate, it is no sufficient reason for setting him aside that the bankrupt urged his creditors to vote for him, giving reasons for his belief that he would be the best person to have charge of the estate. In re Eastback (D. C. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 529; In re Ketterer Mfg. Co. (D. C. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 225. And see In re Morton (D. C. 1902) 118 Fed. 908, 9 Am. Bankr. Rep. 508.

The bankrupt's attorney should not attempt to control or influence the election in the interest of his client, and if he does so, it will be ground for refusing to confirm the trustee chosen. In re Blue Ridge Packing Co. (D. C. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; In re Lamont, 2 Nat. Bankr. News, 291; In re Wink (D. C. 1913) 206 Fed. 348, 30 Am. Bankr. Rep. 298. Where an attorney's retainer for a bankrupt was limited to the filing of the bankrupt's petition, for which he received no fee, he is not disqualified to accept claims from creditors sent to him thereafter without his solicitation or the procurement of the bankrupt, and to vote such claims in the election of a trustee. In re Cooper (D. C. 1905) 135 Fed. 196, 14 Am. Bankr. Rep. 320.

It is not in accordance with good policy or the spirit of the law that an election of this kind should be determined by the desire of a particular person to be chosen as the trustee, and even if no corrupt practices are charged, nor any secret or improper influences brought to bear on the creditors, the mere fact that the trustee secured his election by the solicitation of votes will be sufficient reason why the judge should refuse to confirm it. In re Fisher (D. C. 1911) 193 Fed. 104, 26 Am. Bankr. Rep. 793; In re Mallory (D. C. 1870) 4 N. B. R. 153, Fed. Cas. No. 8,990; In re Doe (D. C. 1868) 2 N. B. R. 308, Fed. Cas. No. 3,957; In re Haas (D. C. 1876) 8 N. B. R. 189, Fed. Cas. No. 5,884. See In re Brown, 2 Nat. Bankr. News, 590. Especially where the same person appears as trustee in numerous bankruptcies, and makes it his business to seek out creditors and secure their votes, though he does not wield any sinister influence and seeks only the legitimate profits of the office. In re Doe (D. C. 1868) 2 N. B. R. 308, Fed. Cas. No. 3,957; In re Mallory (D. C. 1870) 4 N. B. R. 153, Fed. Cas. No. 8,990. It is not proper to disapprove an election made by the creditors on a mere suspicion that the appointment of the trustee was procured by improper considerations, based on the frequency with which the same person has been selected as trustee in bankruptcy under the influence of the same attorneys who have procured his appointment in the present case. In re Kreuger (D. C. 1911) 196 Fed. 705, 27 Am. Bankr. Rep. 440.

Where, in bankruptcy proceedings against a corporation, the attorney for petitioning creditors claimed that the president and certain other officers of the corporation were largely indebted to it for unpaid stock subscriptions, and that the president desired the election of a trust company as trustee which was identified with certain other interests represented by him, it was not improper for such attorney to obtain proxies for use in the election of a different trustee, by means of letters stating his claim as to the officers' liability, and that it would be for the interest of the unsecured creditors to select a trustee not identified with the

president's interest, which letters contained no materially false statements of fact. In re Duryea Power Co. (D. C. 1908) 159 Fed. 783, 20 Am. Bankr. Rep. 219.

A person appointed trustee in bankruptcy was a stockholder in and employé of a corporation which was a large creditor of the bankrupt. This creditor openly solicited other creditors to send their claims to it to be used in appointing the trustee, offering to handle the claims free of charge, and voted all such claims in favor of the person appointed. The creditor also held security for a part of its debt against the bankrupt's estate, and it was claimed that it would become the duty of the trustee to institute proceedings to set aside alleged unlawful preferences to such creditor. Held, that the person appointed was disqualified, and that his appointment should be set aside. In re Anson Mercantile Co. (D. C. 1911) 185 Fed. 993, 25 Am. Bankr. Rep. 429.

10. Confirmation or disapproval by court.—Under this section and General Order in Bankruptcy No. 13, the district judge and the referee have discretion to disapprove, for substantial reasons, the trustee selected by the creditors. In re Merritt Const. Co. (1914) 219 Fed. 555, 135 C. C. A. 323. One elected a trustee in bankruptcy does not become a trustee in fact, or have any power to act as such, until his selection is approved by the court. In re Kellar (1912) 192 Fed. 830, 113 C. C. A. 154; In re Scheiffer (D. C. 1869) 2 N. B. R. 591, Fed. Cas. No. 12,445. The decision of the referee approving the choice of creditors in the election of a trustee is subject to review by the judge. In re Hanson (D. C. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235. The proper method of reviewing the proceedings in the election of a trustee is by a petition for review of the order of the referee approving the appointment made by the creditors. In re Arti-Stain Co. (D. C. 1914) 216 Fed. 942. If the referee is satisfied that any reason exists why a trustee selected by the creditors should not be approved by the court, it is his duty to state such reasons fully in submitting to the judge the question of approval. In re Bliss (D. C. 1867) Fed. Cas. No. 1,543. The referee's decisions respecting conduct of election of trustees are not to be set aside, except for an unjust and injurious abuse of discretion, or a clear mistake of law. In re Grat (D. C. 1915) 228 Fed. 925.

The person who is chosen by the requisite majority of creditors is entitled to be confirmed in the office of trustee, unless it is satisfactorily shown that he is disqualified under the statute, or is an incompetent person, or that the election was determined by improper or corrupt influences. In re Margolies (D. C. 1911) 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re lack (D. C. 1906) 145 Fed. 68, 1 Bankr. Rep. 529; In re Blue Packing Co. (D. C. 1903) 125 619, 11 Am. Bankr. Rep. 36; Funkenstein (D. C. 1870) Fed. No. 5,157; In re Clairmont (1868) Fed. Cas. No. 2,781; Grant (D. C. 1868) 2 N. B. R. Fed. Cas. No. 5,692; In re We (D. C. 1877) 16 N. B. R. 514, Fed. No. 17,466.

Where the referee and judge c in disapproving the selection of a tee, made by the creditors, their will be sustained, unless an abu discretion is shown. M. C. Kise v. Georgia Cotton Oil Co. (1913 Fed. 548, 125 C. C. A. 550.

The bankrupt himself has a sta in court to object to the confirm of the person selected by the itors as trustee. In re McGlyn C. 1872) Fed. Cas. No. 8,804. bankrupt may move to set asid election of a trustee on the g that the persons whose votes e him were not creditors of the ban In re Stokes (D. C. 1868) 1 N. 489, Fed. Cas. No. 13,475.

The court will not take the st disapproving the choice of the cre when the objections presented f consideration would not have af the result if recognized at the tim re Jackson (D. C. 1876) Fed. Ca 7,123; In re Pfromm (D. C. 1873) B. R. 357, Fed. Cas. No. 11,061. not an abuse of discretion to ref request of objecting creditors to evidence of the unfitness of the t selected by the creditors where presented no objections not rais the creditors' meeting. In re M Const. Co. (1914) 219 Fed. 555 C. C. A. 323.

When the judge refuses to ap the appointment of the trustee se by the creditors, he may order a election to be held. In re Scheiffe C. 1869) 2 N. B. R. 591, Fed. Ca 12,445.

The action of a referee in appo a trustee in bankruptcy is subje review by the district court, bu not be disturbed unless a plain a jurious error of law or abuse o cretion is shown. In re Rose Goldman Co. (D. C. 1915) 228 921. But the appointment of a t in bankruptcy by a court having diction, though it may be erroneo not void, and therefore cannot b sailed collaterally. Raymond v. M son (1882) 59 Iowa, 371, 13 N. W

11. Appointment of trustee by or referee.—This section makes th pointment of a trustee in bankr by a referee proper. Referees ta same powers in certain matters a prescribed for judges, and may a trustees where creditors do not. C er v. U. S. (1913) 48 Ct. Cl. 383

re Knox (1915) 221 Fed. 36, 136 C. C. A. 562.

If no creditors appear and prove their claims at the time and place appointed for the first meeting, a trustee must usually be appointed by the court. In re Cogswell (D. C. 1867) Fed. Cas. No. 2,959. Whether a trustee should be appointed for a bankrupt's estate is for determination after an adjudication has been entered. Vulcan Sheet Metal Co. v. North Platte Valley Irr. Co. (C. C. A. 1915) 220 Fed. 106.

If creditors fail to agree upon a trustee, no person receiving the statutory majority of votes, and no adjournment for the purpose of a second election is asked or granted, or if, at an adjourned meeting of creditors, no election results, and it appears impossible to secure a majority vote for any one person, while there is immediate need of a trustee to take charge of the estate, it is proper for the referee to appoint a trustee of his own selection, not necessarily one of the candidates already voted for, though he may be properly influenced by the wishes of any considerable body of the creditors. In re Goldstein (D. C. 1912) 199 Fed. 365, 29 Am. Bankr. Rep. 301; In re Cohen (D. C. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; In re Machin (D. C. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449; In re Brooke (D. C. 1900) 100 Fed. 432, 4 Am. Bankr. Rep. 50; In re Kuffler (D. C. 1899) 97 Fed. 187, 3 Am. Bankr. Rep. 162; In re Richards (D. C. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; In re Jackson (D. C. 1876) 14 N. B. R. 449, Fed. Cas. No. 7,123; In re Portsmouth Savings Fund Soc. (D. C. 1874) Fed. Cas. No. 11,297. The appellate court will not set aside the appointment of a trustee by the district judge where the only error claimed is in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed. Woods v. Buckewell (C. C. 1872) 7 N. B. R. 405, Fed. Cas. No. 17,991. Where majority in amount of claims was disputed, causing considerable delay, a referee, in view of the necessity for a trustee, held empowered to appoint a disinterested person, under Bankruptcy Act, §§ 2(17), and 44. In re Knox (1915) 221 Fed. 36, 136 C. C. A. 562.

If the requisite majority of creditors concur in the election of a trustee, the referee has no authority to disregard their action and select a trustee and appoint him, merely because he disapproves of the choice made by the creditors. He may, in the exercise of a sound discretion and for cause, refuse to confirm their choice. But when this action is taken, it creates a vacancy in the office of trustee, and it is the right of the creditors to fill it, wherefore it becomes the duty of the referee to call a new election and give the creditors the opportunity of uniting upon a different candidate. In re Margolies (D. C. 1911) 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re Van De Mark (D. C. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760; In re Kaufman (D. C. 1910) 179 Fed. 552, 24 Am. Bankr. Rep. 117; In re Morris (D. C. 1907) 154 Fed. 211, 18 Am. Bankr. Rep. 828; In re Mangan (D. C. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; In re Mackellar (D. C. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; In re Hare (D. C. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; In re Lewensohn (D. C. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; In re Forestier (D. C. 1915) 222 Fed. 537. But if the creditors, at the second election, fail or refuse to make a second choice, then it is proper for the referee to appoint a trustee. In re Kellar (C. C. A. 1912) 192 Fed. 830.

12. —— Number of trustees to be appointed.—Upon a petition to the court of bankruptcy showing good grounds therefor, an additional trustee may be appointed to act in conjunction with the one previously appointed. In re Overton (D. C. 1871) 5 N. B. R. 366, Fed. Cas. No. 10,625.

In a case where a corporation holding property and carrying on business in three different states was adjudged bankrupt and assignees were appointed who were respectively citizens of two of the states in which the proceedings in bankruptcy were pending, but none was appointed in the third state, it was considered that it ought to have been so arranged that each of the districts could have an assignee within it a resident thereof. In re Boston, H. & E. R. Co. (D. C. 1871) 5 N. B. R. 233, Fed. Cas. No. 1,680.

§ 9629. (Act July 1, 1898, c. 541, § 45.) Qualifications of trustees.

Qualifications of Trustees.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. (30 Stat. 557.)

Notes of Decisions

Qualifications of trustees.—A person is not disqualified from acting as a trustee in bankruptcy because he is an alien, if he is competent to perform the duties of the office and resides or has an office in the district, and is duly

chosen by the creditors. In re Coe (D. C. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715.

A near relative of the bankrupt, if not absolutely disqualified, is not a suitable person to be appointed trustee of his estate. In re Powell (D. C. 1868) 2 N. B. R. 45, Fed. Cas. No. 11,-354; In re Zinn (D. C. 1871) 4 N. B. R. 370, Fed. Cas. No. 18,216; In re Bogert (D. C. 1870) 3 N. B. R. 651, Fed. Cas. No. 1,600; In re Zinn (D. C. 1871) 4 N. B. R. 436, Fed. Cas. No. 18,215.

A person is not disqualified to be a trustee in bankruptcy by the fact that he is a creditor of the bankrupt. In re Lazoris (D. C. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; In re Lewisohn (D. C. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; In re Clairmont (D. C. 1868) Fed. Cas. No. 2,781. That a trustee in bankruptcy, elected at a meeting of the creditors, was a stockholder in a corporation having a claim filed which amounted to nearly half the bankrupt's entire indebtedness, and that it might become the trustee's duty to move to have such claim expunged or reduced, did not render such trustee ineligible to act. In re Lazoris (D. C. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31.

It is no objection to the approval by the court of a trustee in bankruptcy elected by the creditors that he has incurred the violent hostility of the bankrupt. In re Mangan (D. C. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303.

There is nothing to prevent an attorney for one or more of the creditors from being chosen as trustee, and if he is duly elected by the creditors and is not otherwise objectionable, he will be confirmed. In re Margolies (D. C. 1911) 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re Lawson (D. C. 1868) 2 N. B. R. 113, Fed. Cas. No. 8,150; In re Barrett (D. C. 1869) 2 N. B. R. 533, Fed. Cas. No. 1,043; In re Clairmont (D. C. 1868) Fed. Cas. No. 2,781; Redick v. Woolworth (1885) 17 Neb. 260, 22 N. W. 693, 52 Am. Rep. 410. When an attorney accepts the office of trustee, he surrenders for the time his standing in the court of bankruptcy as an attorney for creditors. In re Evans (D. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

A trustee will not be approved or confirmed by the court, where it is evident that he has been elected under the influence or control of the bankrupt or in his interest. In re Van De Mark (D. C. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760. A bankrupt's former attorney should not be allowed to act as the bankrupt's trustee, unless there is at least some evidence that his election has been brought about by activities of others than himself and the bankrupt. In re Wink (D. C. 1913) 206 Fed. 348. One who has no apparent connection with the bankrupt's attorneys, other than having an office same building with them, may aside as unsuitable for the off trustee, when objected to by th nority creditors, and when the which elected him were cast under ers of attorney held by the bank attorneys. In re Sitting (D. C. 182 Fed. 917, 25 Am. Bankr. Rep In re Reckersdres (D. C. 1901 Fed. 206, 6 Am. Bankr. Rep. Compare In re Fisher (D. C. 191 Fed. 104, 26 Am. Bankr. Rep One who has acted as attorne the bankrupt, in matters not con with the bankruptcy, may be eligi trustee, but a person who has a interest adverse to that of the tors generally, or who is the at of such person, is disqualified. Clairmont (D. C. 1868) Fed. Ca 2,781; In re Dayville Woolen C C. 1902) 114 Fed. 674. 8 Am. Rep. 85; In re Wink (D. C. 191 Fed. 348, 30 Am. Bankr. Rep. 29

No debtor of the bankrupt sho appointed trustee, and hence the will disapprove the selection bankrupt's common-law assigne assignment being the act of bank relied on, and the assignee havi unsettled account and a claim services. In re Kellar (C. C. A. 192 Fed. 830. But the mere fac one who is chosen by the credit the trustee advised the volunta signment under the state law constituted the act of bankrupt not render him incompetent. Blue Ridge Packing Co. (D. C. 125 Fed. 619, 11 Am. Bankr. Re

A person who does not reside the district is absolutely disqu from being trustee, unless he fixed place of daily business with district. In re Havens (D. C. 1 N. B. R. 485, Fed. Cas. No. 6.23 re Clairmont (D. C. 1868) Fed No. 2,781; In re Loder (D. C. 2 N. B. R. 515, Fed. Cas. No. 8,45 one case, where the trustee elect not reside in the same city wit bankrupt, and certain creditors ed to him on this ground, the suggested that the parties should on some suitable person, living i city, to be associated with the trustee as co-trustee. In re J (D. C. 1874) Fed. Cas. No. 7,166 mere remoteness of the trustee's dence from the place where the property is to be administered instance, where he lives in a county) is no ground for disapp the election if he satisfies the re ments of the statute and is th choice of the creditors. In re K (D. C. 1911) 196 Fed. 705, 2 Bankr. Rep. 440; In re Jacobs & (D. C. 1907) 154 Fed. 988, 1 Bankr. Rep. 728.

A stockholder and officer of a rupt corporation is not, ipso fac competent to act as its trustee in

ptcy. In re Merritt Const. Co. (C. A. 1914) 219 Fed. 555, 133 C. C. A. 23. Where three trustees are elected r a bankrupt corporation, it is no ound of objection that one of them a director of the corporation, and in se it becomes the duty of the trustees bring an action against the direcrs, it may be done by the other two, aking their co-trustee a defendant as director. In re Syracuse Paper & Pulp Co. (D. C. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174.

A man who is himself a bankrupt and undischarged is not a proper person to be appointed trustee of the estate of another bankrupt, and the referee should not receive votes cast for such a person. In re Smith, 1 Nat. Bankr. News, 136.

9630. (Act July 1, 1898, c. 541, § 46.) Death or removal of trustees.

Death or Removal of Trustees.—a The death or removal of a trusee shall not abate any suit or proceeding which he is prosecuting r defending at the time of his death or removal, but the same may e proceeded with or defended by his joint trustee or successor n the same manner as though the same had been commenced or vas being defended by such joint trustee alone or by such successor. (30 Stat. 557.)

Notes of Decisions

1. Death of trustee.—Upon the death f a trustee in bankruptcy, the estate emaining undisposed of passes to the uccessor of the trustee, and not to s personal representatives. Howes v. arlisle (1899) 21 Ky. Law Rep. 613, 2 S. W. 936. And a state court has o authority to appoint a new trustee r to direct the execution of the trust nder its statutory equitable powers. loyd v. Davis (1899) 123 Cal. 348, 5 Pac. 1003. The court of bankruptcy, owever, has authority to appoint a ew trustee where evidence of the extence of unadministered assets is pronced after the death of the original rustee, even though his right to reover such assets may be doubtful, deending upon disputed questions of w and fact. In re Mahoney (D. C. 881) 5 Fed. 518. The settlement of n estate in bankruptcy by the trustee oes not divest the jurisdiction of the ederal district court which made the djudication in bankruptcy, and where e trustee dies, that court has power o take such steps as the circumstances ay require, so that a mistake as to e proper step to be taken does not arrant a collateral attack on its dgment. Lloyd v. Davis (1899) 123 al. 348, 55 Pac. 1003.

A cause of action against a trustee in ankruptcy, for wrongfully paying the ssets in his hands to other creditors han the plaintiff, in disregard of the atter's right of priority, does not tate by the death of the trustee. U. . v. Dewey (C. C. 1889) 39 Fed. 251.

2. Removal of trustee.—The power of emoving a trustee in bankruptcy can e exercised only by the judge; it is ot given to the referee. General Orler No. 13; In re Berree & Wolf (D. C. 1911) 185 Fed. 224. But it seems hat a referee may have a rule issued n a trustee to show cause why he hould not be removed. In re Price (D. C. 1871) 4 N. B. R. 406, Fed. Cas. No. 11,409; In re Stokes (D. C. 1868) 1 N. B. R. 489, Fed. Cas. No. 13,475.

Although the facts disclosed in a proceeding relative to the settlement of the bankrupt's estate may be such as would justify the removal of the trustee, this step cannot be taken except in pursuance of an application made in accordance with the forms prescribed. In re Schapter (D. C. 1874) 9 N. B. R. 324, Fed. Cas. No. 12,438.

The trustee is to have a "hearing," which means a full and fair opportunity to disprove the allegations against him. But the proceeding is summary, and the power of the court is similar to that exercised by courts of equity in the removal of receivers or trustees under a will. Bruns v. Stewart Mfg. Co. (N. Y. 1883) 31 Hun, 195. The referee may be directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause why the trustee should not be removed. In re Price (D. C. 1871) 4 N. B. R. 406, Fed. Cas. No. 11,409.

An order of the district court removing a trustee does not present such a case or question as can be reviewed by the appellate court, as it rests wholly in the discretion of the court of bankruptcy. In re Adler (C. C. 1874) Fed. Cas. No. 82.

3. —— Grounds for removal.—Mistakes or negligence on the part of a trustee in bankruptcy sufficient to justify his removal must be such as to show a want of honesty or of capacity to perform the duties of his office, or a lack of reasonable fidelity to the trust, and such as to endanger the trust property. Williams v. Nichol (1886) 47 Ark. 254, 1 S. W. 243; Matthews v. Murchison (C. C. 1883) 17 Fed. 760; Putnam v. Timothy Dry Goods Co. (C. C. 1897) 79 Fed. 454. Involving the estate in unnecessary litigation, if caused by erroneous legal advice, is not

ground for removing the trustee. In re Blodget (D. C. 1871) 5 N. B. R. 472, Fed. Cas. No. 1,552. The trustee will not be removed for unsuccessfully attacking mortgages given by the bankrupt, when it appears that such action was justifiable. In re Sacchi (D. C. 1872) Fed. Cas. No. 12,201. But a trustee who has embezzled the funds of the estate and absconded must be removed. Scofield v. U. S. (1909) 174 Fed. 1, 98 C. C. A. 39, 23 Am. Bankr. Rep. 259. And also one who is a fugitive from justice. Alexander v. Union Surety & Guaranty Co. (1903) 89 App. Div. 3, 85 N. Y. Supp. 282. And one who has mismanaged the estate and wholly failed to account. U. S. v. Union Surety & Guaranty Co. (D. C. 1902) 118 Fed. 482, 9 Am. Bankr. Rep. 114. A trustee may be removed for neglecting to take proper measures to secure the bankrupt's property and allowing it to be sold for taxes. In re Morse (D. C. 1872) 7 N. B. R. 56, Fed. Cas. No. 9,852. Ground for the removal of a trustee is also found in his dilatoriness in letting slip an opportunity to dispose of assets of the estate at great advantage, which resulted in protracted litigation and substantial injury to the interests of creditors. In re Prouty (C. C. 1885) 24 Fed. 554. So where the trustee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him. Ex parte Perkins (C. C. 1873) Fed. Cas. No. 10,982.

Where it appears that the though he ought to be removed, of his mismanagement of the has acted in entire good faith t out, he should not be charged v costs of the proceeding for his al. In re Mallory (D. C. 1870) R. 153, Fed. Cas. No. 8,990.

A trustee who, from long-co intemperance, has become unfit charge of the trust property removed. Bayles v. Staats (184 J. Eq. 513. And if the trustee l insolvent, or himself applies benefit of the bankruptcy act, t be good cause for removing hi office. Harris v. Harris, 29 Be

One who, at the time of his a ment, resided in the district a still maintains an office therein, not be removed merely because changed his legal residence to district, unless it is shown t change interferes with the perfo of his duties or renders it diffi interested parties to communica him or serve notices on him. In der (D. C. 1908) 163 Fed. 138, Bankr. Rep. 708.

As the trustee holds a fiduci lation to the creditors, he sho be interested in any scheme of c tion. And his joining with th rupt to effect a composition, to riment of the creditors, by m false representations as to the is ground, not only for setting a composition, but also for remov trustee from his office. In re A Wrisley Co. (1904) 133 Fed. C. C. A. 450, 13 Am. Bankr. R

§ 9631. (Act July 1, 1898, c. 541, § 47, as amended, Act F 1903, c. 487, § 10, and Act June 25, 1910, c. 412, § 8.) Du trustees.

Duties of Trustees.—a Trustees shall respectively (1) a for and pay over to the estates under their control all inter ceived by them on property of such estates; (2) collect and to money the property of the estates for which they are tr under the direction of the court, and close up the estate as e tiously as is compatible with the best interests of the parties in est; and such trustees, as to all property in the custody or into the custody of the bankruptcy court, shall be deemed veste all the rights, remedies, and powers of a creditor holding a l legal or equitable proceedings thereon; and also, as to all pr not in the custody of the bankruptcy court, shall be deemed with all the rights, remedies, and powers of a judgment cr holding an execution duly returned unsatisfied; (3) depo money received by them in one of the designated deposi (4) disburse money only by check or draft on the depos in which it has been deposited; (5) furnish such inforr concerning the estates of which they are trustees and the ministration as may be requested by parties in interest; (6) regular accounts showing all amounts received and from what s and all amounts expended and on what accounts; (7) lay befo final meeting of the creditors detailed statements of the ad tration of the estates; (8) make final reports and file final ac with the courts fifteen days before the days fixed for the final ings of the creditors; (9) pay dividends within ten days afte

are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. (30 Stat. 557. 32 Stat. 799. 36 Stat. 840.)

This section, as originally enacted, contained only two subdivisions, a and b.

It was amended by Act Feb. 5, 1903, c. 487, § 10, cited above, by adding thereto subdivision c, as set forth here.

In the section as originally enacted, in subdivision a thereof, clause 2 was as follows:

"(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;"

Said clause was amended by Act June 25, 1910, c. 412, § 8, last cited above, by adding thereto the provisions vesting trustees with the rights, etc., of creditors holding liens, etc., making said clause 2 read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

The title to property of the bankrupt was vested in the trustee by section 70 of this act, post, § 9654; and the rights of the trustee to avoid preferences and other transfers, etc., by the bankrupt, were defined by sections 60 and 70 of this act, post, §§ 9644, 9654.

Notes of Decisions

I. Powers and duties of trustees

1. Effect of appointment and qualification of trustee.
2. Trustee as representative of creditors.
3. Instructions of court or referee.
4. Inventory and appraisal of property.
5. Custody and care of property.
6. Carrying on bankrupt's business.
7. Collection of assets.
8. Redemption of property.
9. Performance of bankrupt's contracts or obligations.
10. Duties with reference to leased property.
11. Expenditures by trustee.
12. Employment and compensation of trustee's attorney.
13. —— Selection of attorney.
14. —— Services of trustee as attorney at law.
15. —— Nature of services and amount of compensation of attorney.
16. —— Claim and allowance of attorney's fees.
17. Deposit and disbursement of funds.
18. Responsibility for negligence or misconduct.
19. Authority of joint trustees.
20. Accounts and reports of trustees.
21. Duty to furnish information.
22. Discharge of trustee.
23. Closing and reopening estates.

II. Sales of property by trustees

24. Authority of trustee in general.
25. Order of court.
26. Sale of incumbered property.
27. Sale free from incumbrances.
28. What interests not divested.
29. Sale of perishable property.
30. Sale of land in another district or state.
31. Notice of sale.
32. Manner and conduct of sale.
33. Terms of sale.
34. Who may purchase.
35. Rights and liabilities of purchasers.
36. Nature and extent of title conveyed.
37. Approval or confirmation of sale.
38. Payment or recovery of purchase money.
39. Conveyance and delivery.
40. Application of proceeds.
41. —— Application to liens and incumbrances.
42. —— Adjudicating validity and rank of liens.
43. —— Distribution of surplus.
44. Vacating and setting aside sale.
45. —— Grounds for vacating.
46. —— Inadequacy of price.
47. Collateral impeachment of sale.

I. POWERS AND DUTIES OF TRUSTEES

1. Effect of appointment and qualification of trustee.—An adjudication in bankruptcy and the appointment of a trustee operate to divest the bankrupt of all title to his property and of the right to possess and dispose of it. Kempner v. Bauer (1907) 53 Misc. Rep. 109, 104 N. Y. Supp. 76. Thereafter all the property which was in the bankrupt's possession or control is regarded as in the custody of the law and in the actual or constructive possession of the court of bankruptcy. Crosby v. Spear (1904) 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424; Devendorf v. Dickinson (1861) 21 How. Prac. (N. Y.) 275; Rogers v. Voss (1873) 1 Wils. (Ind.) 376. Not only the right of possession, but the title to the bankrupt's property is vested by operation of law in the trustee upon his appointment, as of the date of the adjudication. In re Youngstrom (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; In re Walsh Bros. (D. C. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Rosenberg (D. C. 1869) 3 N. B. R. 130, Fed. Cas. No. 12,055. The title descends upon the trustee by operation of law, and no other act is necessary to vest it than the adjudication and the qualification of a duly elected or appointed trustee. Hough v. City of North Adams (1907) 196 Mass. 290, 82 N. E. 46.

The trustee in bankruptcy for some purposes stands in position of the creditors and for others of the bankrupt himself. Jones v. Dugan (1914) 92 A. 775, 124 Md. 346.

The trustee acts under the direction or control of the court of bankruptcy, and must obey its orders even though the particular subject-matter is in litigation in a state court. Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 550, 76 N. E. 258.

The 1910 amendment to the bankruptcy act, that "trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied," though not retroactive, applied to all future cases, and is consistent with the other provisions of the act, and is valid. In re Calhoun Supply Co. (D. C. 1911) 189 Fed. 537, 26 Am. Bankr. Rep. 528; In re Gartman (D. C. 1911) 186 Fed. 349.

2. Trustee as representative of creditors.—Although a trustee in bankruptcy succeeds to the title of the bankrupt, he does not for that reason act as the agent or representative of the bankrupt in the subsequent proceedings, only in the matter of setting a him the exemptions allowed b Aiken v. Edrington (C. C. 1876) B. R. 271, Fed. Cas. No. 111. other purposes and in all other r the trustee is the representat the creditors, and of them onl not in any sense of the bankru re Kessler (1911) 186 Fed. 127, C. A. 239; In re Kreuger (D. C. 196 Fed. 705, 27 Am. Bankr. Re In re Doran (D. C. 1906) 148 Fe 17 Am. Bankr. Rep. 799; Ai Edrington (C. C. 1876) 15 N. 271, Fed. Cas. No. 111; Car v. West (1911) 173 Ala. 198, 55 917. See Edwards v. Schillinger 245 Ill. 231, 91 N. E. 1048, 33 A. (N. S.) 895, 137 Am. St. Re But it has also been said that tee in bankruptcy occupies a fi capacity, and is to some extent a holder, with duties to the bankr well as the creditors. In re I (D. C. 1915) 225 Fed. 878.

Where the bankrupt is a corpo the trustee represents its cr only, and not its stockholders. V. & M. Lumber Co. (D. C. 191 Fed. 231.

The trustee is free to assert test claims and rights to pr maintain or defend proceedings, assets, and avoid preferences, cumstances where the bankrupt would not be at liberty to act, on the ground of estoppel or c lic policy. In re Kessler (191 Fed. 127, 108 C. C. A. 239; Gurney (C. C. 1877) 15 N. B. Fed. Cas. No. 5,873; In re St. Mill Co. (C. C. 1875 & D. C. 10 N. B. R. 414, Fed. Cas. No. In re Desnoyers Shoe Co. (D. C 210 Fed. 533.

The trustee represents only who were creditors at the time filing of the petition, because the become parties to the proceeding chelder & Lincoln Co. v. Wh (1903) 122 Fed. 355, 58 C. C. 10 Am. Bankr. Rep. 641. As to creditors, the trustee represents all equally and alike. He must vocate the cause of one against a or give to any creditor an adv which the law does not give, no himself to be controlled in his ac tration of the trust by any cred group or class of creditors. owes a like duty to all, he mus himself indifferent, and give to opportunities and absolutely im treatment. West v. Bank of L (1906) 16 Okl. 508, 86 Pac. 59; v. Security Life Ins. Co. (187 N. Y. 267; In re Sully (D. C. 142 Fed. 895, 15 Am. Bankr 304.

3. Instructions of court or ref The trustee, as an officer of the is subject to its orders and dir

t all times from his appointment to is discharge, and may be controlled n his administration of the property y orders made in summary proceedings. In re Cadenas & Coe (D. C. 910) 178 Fed. 158, 24 Am. Bankr. Rep. 135; In re Howard (D. C. 1904) 30 Fed. 1004, 12 Am. Bankr. Rep. 62. The trustee will be treated as in ontempt if he acts in contravention f the rulings and orders of the court. n re Smith (D. C. 1874) Fed. Cas. No. 12,978.

He may submit for the sanction or pproval of the court arrangements or greements made with adverse claimnts of property or other third persons. Mulford v. Fourth Street Nat. Bank (C. C. A. 1907) 157 Fed. 897, 19 Am. Bankr. Rep. 742. And where he aplies for the directions of the court, nd a reference is ordered to ascertain he necessary facts, but the trustee ails to attend the hearing and acts ndependently, he will be held to the trictest accountability. In re Schapter (D. C. 1874) 9 N. B. R. 324, Fed. Cas. No. 12,438.

The trustee may, in any proper emergency, apply to the court of bankruptcy for directions as to the course o be pursued. But neither the judge nor the referee is the general adviser of the trustee in his dealings with the property of the estate. In re Sturgeon (D. C. 1868) 1 N. B. R. 498, Fed. Cas. No. 13,564. And where the trustee's duty is plain, or where the question is simply one of expediency or of probable advantage or disadvantage to the estate, or where the proposed act is entirely within his own discretion and power, he cannot as a matter of right obtain the instructions of the court, but should act on his own responsibility, or, if he prefers to take no risk, he should submit the matter to the creditors and be governed by their vote. In re Franklin Sav. Fund Soc. (D. C. 1874) Fed. Cas. No. 5,058. As to the authority and duty of the court to disapprove an improvident bargain proposed to be made by the trustee, and officially to inform creditors of the jeopardy in which their interests are thereby placed, though not applied to for instructions, but only to grant a petition for the carrying out of the bargain, see Henry v. Harris (D. C. 1912) 191 Fed. 868. The trustee should exercise his own judgment and discretion in deciding whether it is necessary or desirable for him to retain an attorney. In re Abram (D. C. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 575. So also, in deciding whether he should file a petition to have the claim of a creditor expunged for fraud. In re Baber (D. C. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

4. Inventory and appraisal of property.—The object of the inventory and appraisement required by the statute is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, and for which in the first instance he is to be accountable. In re Gordon Supply & Mfg. Co. (D. C. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

Since it is the policy of the law that all steps in the administration of the estate should be taken by persons who are disinterested and will act for all the creditors, rather than for the benefit of any faction or clique, the referee should make the appointment of the appraisers in the exercise of his independent judgment, and their selection should not be submitted to a vote of the creditors, especially where there is a sharp conflict of views and interests between the creditors. In re Columbia Iron Works (D. C. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526. A person is not disqualified for appointment as appraiser of a bankrupt's property merely because some of the officers and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. Id. That one of the appraisers appointed to appraise the property of a bankrupt mining company was a lessee of a portion of the property, and was required to work the same on a royalty, did not disqualify him to act as an appraiser, he having no interest in the bankruptcy proceedings nor in the sale of the property. Clark Hardware Co. v. Sauve (C. C. A. 1915) 220 Fed. 102.

The appraisement should be general and not special, and should not go into the detail practiced by a merchant in taking an account of stock, only such particularity being indulged in as is sufficient for a reasonable identification of the property in character and quantity and to give a fair idea of its value. In re Gordon Supply & Mfg. Co. (D. C. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

The compensation of the appraisers is not fixed by the law, and rests in the discretion of the court. But in at least one district the rule has been established that, in any ordinary case, no more than $5 a day for three days' work will be allowed to each appraiser, the trustee being required to justify any greater allowance, and the court declares that "it must be an extraordinary case where over two or three days are necessary." In re E. I. Fidler & Son (D. C. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

5. Custody and care of property.—A trustee in bankruptcy has an insurable interest in the property of the estate in his hands, and may be allowed credit in his accounts for the premiums paid for a reasonable amount of insurance on it, even though he did

not first obtain the permission of the court or the consent of the creditors to insure it. In re Hamilton (D. C. 1900) 102 Fed. 683, 4 Am. Bankr. Rep. 543; Thompson v. Phenix Ins. Co. (1890) 136 U. S. 293, 10 Sup. Ct. 1019, 34 L. Ed. 408; Insurance Co. v. Chase (1866) 5 Wall. 509, 18 L. Ed. 524; In re Carow (D. C. 1871) 4 N. B. R. 543, Fed. Cas. No. 2,426; In re Fortune (D. C. 1869) 2 N. B. R. 662, Fed. Cas. No. 4,955. See Dortch v. Dortch (1874) 71 N. C. 224.

With the consent of all the creditors, the trustee may be authorized to withdraw the funds of the estate from the designated depository, and place them in a bank paying interest on deposits, taking a time certificate of deposit for them. Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349.

6. Carrying on bankrupt's business.—A trustee in bankruptcy who continues the business of the bankrupt will be personally liable unless he has obtained authority to do so from the court of bankruptcy. McCauley v. Jackson (1915) 165 App. Div. 846, 151 N. Y. Supp. 120. The authority of a trustee to continue the business under the order of the bankruptcy court may depend on his ability to raise money for that purpose on receiver's certificates. Roth v. Gotthold (1915) 90 Misc. Rep. 363, 153 N. Y. Supp. 187.

If the transactions involved in a proposed continuance of the bankrupt's business by the trustee are of magnitude, or involve the raising of money by means of trustees' certificates, the referee should not exercise the authority granted to "the court," but should refer the matter to the judge. Bray v. Johnson (1908) 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

The court will not pass on an application for modification of an order authorizing the receiver of a bankrupt corporation to borrow money and continue the business made by one claiming to be a bondholder, but whose ownership of any bonds is denied, until such question of ownership has been determined. In re Consumers' Albany Brewing Co. (D. C. 1914) 216 Fed. 988.

Where the assets of the bankrupt coming into the hands of the trustee include commodities in process of construction or preparation, such as unfinished machinery in the bankrupt's workshops, not so far completed as to be salable, but it is shown that they could be finished and made ready for the market in a short time and at a comparatively small cost, and would then command such a price as would result in substantial benefit to the estate, the court may authorize the trustee to finish such goods for sale and to defray the necessary cost thereof out of the funds of the estate. Foster v. Ames (C. C. 1869) Fed. Cas. No. 4,965. Such a course is also proper where the business must be cont in operation because it can on sold to good advantage as a going cern, as, for instance, in the case hotel. In re Bayley (D. C. 1909 Fed. 522, 22 Am. Bankr. Rep. Where a bankrupt orchard com having contracted to plant, cult and irrigate orchards pending pa of the price, had assigned all but such contracts before adjudicatio trustee was not entitled to continu tivation against the objection of a itor. In re Wenatchee Heights chard Co. (D. C. 1914) 212 Fed.

The trustee should be required t all bills properly and legitimately tracted by him in the conduct o bankrupt's business. In re Patte C. 1906) 143 Fed. 994, 16 Am. B Rep. 450. He should be requir pay the wages of skilled employés it is necessary to retain as bein only persons acquainted with the ness. J. I. Case Plow Works v wards (1898) 176 Ill. 34, 51 N. E

The trustee is not liable to an for damages for the negligence employé resulting in injury to a ger, where it is not shown that h himself out as conducting the bu in any other capacity than as an of the court, and where no pe negligence is imputable to him. C v. Barney (1875) 63 N. Y. 281, 2 Rep. 533.

7. Collection of assets.—If the tee in bankruptcy could learn c existence of available assets of t tate by proper inquiry, and fails so, he is chargeable with negli Avery v. Cleary (1890) 132 U. S 10 Sup. Ct. 220, 33 L. Ed. 469; hawk v. Yerkes (1891) 142 U. S. Sup. Ct. 104, 35 L. Ed. 915. A may be charged in his account wi value of assets which never cam his possession if he failed in his to recover them. In re Reinbot C. A. 1907) 157 Fed. 672, 19 Bankr. Rep. 15.

The trustee in bankruptcy, if h do so without a breach of the may take physical possession o property of the bankrupt, where may be found, and if money has converted into goods, they may be in the same manner, provided the be certainly identified. Brush v. B ard (1857) 19 Ill. 31. He may tain replevin for goods of the ban to which he is entitled as trustee. don v. Farrington (1881) 46 Mich 9 N. W. 456; Coats v. Farri (1881) 46 Mich. 422, 9 N. W. 45 may maintain ejectment for the ery of real property of the ban Kirkpatrick v. Clark (1890) 1 342, 24 N. E. 71, 8 L. R. A. 5 Am. St. Rep. 531. It may be th of the trustee to institute proce in bankruptcy against his bank insolvent debtor as the only av means of collecting any portion

bt. In re Jones (D. C. 1873) 7 N. B. 506, Fed. Cas. No. 7,450. The ustee may, in proper cases, advance e interests of the estate by a bargain compromise with an adverse claimt or other party. In re E. M. Newn & Co. (1907) 153 Fed. 841, 83 C. A. 23, 18 Am. Bankr. Rep. 567. ut such bargain or compromise must t be contrary to law or to morality public policy. In re Rosenblatt (D. 1907) 153 Fed. 335, 18 Am. Bankr. ep. 663.

The trustee in bankruptcy may sumarily apply for an order requiring the nkrupt to surrender to him any propty which the latter has in his possesn or under his control. In re Wright D. C. 1910) 177 Fed. 578, 24 Am. ankr. Rep. 437; In re E. I. Fidler & n (D. C. 1908) 163 Fed. 973, 21 n. Bankr. Rep. 101. He may likewise pply for an order for the surrender property in the hands of third pers which is claimed by him as assets the estate. Mueller v. Nugent (1902) 4 U. S. 1, 22 Sup. Ct. 269, 46 L. d. 405, 7 Am. Bankr. Rep. 224; In Gill (C. C. A. 1911) 190 Fed. 726, Am. Bankr. Rep. 883; In re Peack (C. C. 1910) 178 Fed. 851, 24 Am. ankr. Rep. 159; In re Holbrook Shoe Leather Co. (D. C. 1908) 165 Fed. 3, 21 Am. Bankr. Rep. 511; In re avis (D. C. 1903) 119 Fed. 950, 9 m. Bankr. Rep. 670; In re Mills (D. 1910) 179 Fed. 409, 25 Am. Bankr. ep. 278; In re Famous Clothing Co. D. C. 1910) 179 Fed. 1015, 24 Am. ankr. Rep. 780; In re Meier (C. C. 1910) 182 Fed. 799, 25 Am. Bankr. ep. 272; In re Friedman (C. C. A. 908) 161 Fed. 260, 20 Am. Bankr. ep. 37.

A person having the possession of roperty which belongs to the estate in ankruptcy may be enjoined from disosing of it or transferring it. In re ackson (D. C. 1899) 94 Fed. 797, 2 m. Bankr. Rep. 501. Or such person ay be ordered to withdraw an unlawl claim to it. In re Home Discount o. (D. C. 1906) 147 Fed. 538, 17 Am. ankr. Rep. 168.

If property claimed as assets of the state is in the hands of a receiver ppointed by a state court, the trusee's proper course is to apply to the ourt which appointed the receiver for n order for its surrender. Seligman . Ferst (1873) 57 Ga. 561.

The trustee in bankruptcy may sue to et aside fraudulent conveyances or ransfers and recover the property afected. Falls City Tinware Co.'s Trusee v. Levine (1907) 31 Ky. Law Rep. 103, 104 S. W. 716. And he may roceed against a creditor to recover oney received by him from the bankupt after the institution of the proeedings. Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355. The rustee may also proceed against directors of a bankrupt mercantile corporation, who were also its managing officers, having sole charge of its business and property, for an unexplained shortage in assets. Bynum v. Scott (D. C. 1914) 217 Fed. 122.

If the trustee is satisfied that property which comes into his hands did not belong to the bankrupt, he should at once return it to the true owner. In re Noakes (D. C. 1873) 1 N. B. R. 592, Fed. Cas. No. 10,281.

8. Redemption of property.—When a trustee finds that a bankrupt owns property subject to liens, he should petition the court for instructions as to the course which he should pursue. In re Cutler & John (D. C. 1916) 228 Fed. 771.

Under authority from the court of bankruptcy, the trustee may redeem land from a conveyance which, though absolute in form, was intended as a mortgage and was accompanied by a parol defeasance. Foraast v. Hyman (1891) 138 Ill. 423, 28 N. E. 800. And from a foreclosure sale under a decree rendered after the adjudication, if, by the law of the state, such a right of redemption remains in the bankrupt mortgagor. In re Novak (D. C. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27. And he may redeem property of the bankrupt which has been sold on execution to the judgment creditor, without paying the unsatisfied balance of the judgment or taking the property subject to the lien of the judgment. Lloyd v. Hoo Sue (D. C. 1878) Fed. Cas. No. 8,432.

9. Performance of bankrupt's contracts or obligations.—A trustee in bankruptcy is bound to carry out the bankrupt's valid contracts made in good faith and not in fraud of his creditors. In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529. And the trustee is estopped by the acts of the bankrupt, and bound by his conduct and agreements to the same extent that the bankrupt would be bound before the adjudication. Watson v. Proximity Mfg. Co. (1908) 147 N. C. 478, 61 S. E. 273. Rights of trustee in bankruptcy for bankrupt contractor are no greater than those of the contractor. Mankins v. Forward Movement Syndicate (Cal. App. 1915) 152 Pac. 313.

While a trustee in bankruptcy is not bound to accept property or take over contracts which are onerous and unprofitable, he is required to elect whether to assume an existing executory contract and to continue its performance and ultimately dispose of it for the benefit of the estate, or to renounce it, and leave the injured party to such legal remedies for the breach as the case affords. If he elects to assume a contract, and completes it, he is entitled to whatever the bankrupt would have received, but on the other hand he takes the contract cum onere, as the bankrupt held it, subject to all of its provisions and conditions. Dushane v.

Beall (1896) 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; United States Trust Co. v. Wabash Ry. (1893) 150 U. S. 289, 14 Sup. Ct. 86, 37 L. Ed. 1085; Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; American File Co. v. Garrett (1884) 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; In re Chambers, Calder & Co. (D. C. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; Atchison, T. & S. F. Ry. Co. v. Hurley (1907) 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Watson v. Merrill (1905) 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453; In re Nicholas (D. C. 1903) 122 Fed. 299, 10 Am. Bankr. Rep. 291; Wilkins v. Tourtellott (1882) 28 Kan. 825. This course is often proper with regard to property held by the bankrupt under a contract of conditional sale, where the assets of the estate will be increased by the completion of the conditions by the trustee and the consequent vesting of full title to the article in question. In re Grainger (1908) 160 Fed. 69, 87 C. C. A. 225, 20 Am. Bankr. Rep. 166; Hurley v. Allman Gas Engine & Machine Co. (1911) 144 App. Div. 300, 129 N. Y. Supp. 14; Tierney v. Butler (1909) 144 Iowa, 553, 123 N. W. 213. Where the bankrupt was a building contractor, and had an unfinished contract on hand at the time of his adjudication, the trustee may be directed by the court to complete the contract and collect the balance due under it. Davis v. Fidelity & Deposit Co. (1902) 75 App. Div. 518, 78 N. Y. Supp. 336; Ford v. State Board of Education (1911) 166 Mich. 658, 132 N. W. 467. Where the bankrupt corporation held property under a lease, which required it to erect an expensive building on the leased land, and had failed to perform the condition, and had received notice of a forfeiture of the lease for breach of such condition, all before its adjudication in bankruptcy, the court of bankruptcy, on petition of the lessor, decreed the enforcement of the forfeiture and directed the trustee to surrender possession, this being the only effective means of protecting the rights of the lessor. Lindeke v. Associates Realty Co. (1906) 146 Fed. 630, 77 C. C. A. 56, 17 Am. Bankr. Rep. 215.

10. Duties with reference to leased property.—Bankruptcy of a tenant does not terminate the lease, but the tenant remains liable, and its obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset. In re Sherwoods (C. C. A. 1913) 210 Fed. 754. The trustee is not bound to assume a lease made to the bankrupt unless he thinks it will be for the benefit of the creditors; he has an option either to accept it or to abandon it. In re Chambers, Calder & Co. (D. C. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; Summerville v. Kelliher (1904) 144 Cal. 155, 77 Pac. 889. The trustee cannot be charged v obligations of the lease withou affirmative act of acceptance part. In re Frazin (1910) 18 28, 105 C. C. A. 320, 24 Am. Rep. 903. While the trustee ma election decline to continue a l the bankrupt for the benefit of tate, and thus relieve himself estate from further liability t a referee has no power to or cancellation. In re J. Sapinsky (D. C. 1913) 206 Fed. 523, Bankr. Rep. 416. The trustee accorded a reasonable length after his appointment in which cide whether he will take over th or not. In re Rubel (D. C. 19 Fed. 131, 21 Am. Bankr. Rep. re Ells (D. C. 1900) 98 Fed. Am. Bankr. Rep. 564; In re (D. C. 1913) 205 Fed. 673. Wh bankrupt's landlord repeatedly i of the trustee as to when he wo render the possession, and wa to accept a surrender, having ne with a new tenant, but the trust him no information, but conti occupy the premises, held, th trustee was liable for the rents or not he had any funds in his h reimburse himself. In re Met traction & Refining Co. (C. C. 195 Fed. 226, 27 Am. Bankr. 1

If the trustee elects to assu lease, he may continue to occ premises to the end of the st term. In re Schwartzman (D. 167 Fed. 399, 21 Am. Bankr. R He will be liable for the stipulat Matter of Otis (1886) 101 N. 5 N. E. 571; Brooklyn Impr Co. v. Lewis (1910) 136 App. D 122 N. Y. Supp. 111. He will b for a share of the crops raised land, if that is among the condi the lease. Summerville v. (1904) 144 Cal. 155, 77 Pac. 88

The mere fact of the bankru a lessee does not sever the rel landlord and tenant, and the obligation to pay rent under h is not discharged as to the f his trustee abandons or does sume the lease. In re Roth & (C. C. A. 1910) 181 Fed. 667, Bankr. Rep. 588; In re Scru C. 1913) 205 Fed. 673.

If the rent was in arrear at t of the bankruptcy of the tena the landlord had not taken the sary steps to regain possession, not oust the trustee. In re Ada C. 1905) 134 Fed. 142, 14 Am. Rep. 23.

A court of bankruptcy has p restrain a landlord from int with the possession by the trus store occupied by the bankrup an unexpired lease, and which a valuable stock of goods, u trustee has had a reasonable dispose of the same, where they be removed without serious los estate, and on the giving of a

protect the landlord from loss. In re Schwartzman (D. C. 1909) 167 Fed. 399, 21 Am. Bankr. Rep. 885.

Where the trustee continues in the temporary occupation of leased premises, without assuming the lease, the landlord is entitled to reasonable compensation for the use of the premises while so occupied by the trustee, not necessarily the sum specified in the lease, which will be chargeable as a part of the expense of administering the estate. In re Sherwoods, Inc. (C. C. A. 1913) 210 Fed. 754; Bray v. Cobb (D. C. 1900) 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Luckenbill (D. C. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455; In re Jefferson (D. C. 1899) 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Secor (D. C. 1883) 18 Fed. 319. If the trustee and the landlord have not made any agreement as to the amount of such compensation, the latter is entitled to recover on a quantum meruit. In re Grignard Lithographic Co. (D. C. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 101; In re Adams Cloak, Suit & Fur House (D. C. 1912) 199 Fed. 337, 28 Am. Bankr. Rep. 923. If the trustee occupies only a part of the premises, the rest having been sublet by the bankrupt, the landlord can demand rent only for the portion actually occupied. In re J. Frank Stanton Co. (D. C. 1908) 162 Fed. 169, 20 Am. Bankr. Rep. 549. Where the trustee, with knowledge of the expiration of the lease, holds over for several days, notwithstanding a notice to quit, he becomes a trespasser and is personally liable for the damages sustained. In re Hunter (D. C. 1907) 151 Fed. 904, 18 Am. Bankr. Rep. 477.

II. Expenditures by trustee.—Expenditures by a trustee, to be allowed by the court, must have been actually made, reasonably necessary, and beneficial to the estate, having regard, on the one hand, to economy in the administration of the estate, and, on the other hand, to the necessity of realizing all that is possible for the creditors. In re Krause (D. C. 1907) 155 Fed. 702, 19 Am. Bankr. Rep. 93; In re Criblier (D. C. 1911) 184 Fed. 338, 25 Am. Bankr. Rep. 765; Akers v. Veal (1881) 66 Ga. 302.

The trustee is allowed to incur all necessary expenses for the care and custody of the bankrupt's property so long as it remains in his hands. Gardner v. Cook (D. C. 1872) 7 N. B. R. 346, Fed. Cas. No. 5,226. Where a part of the estate consists of horses or cattle, the trustee must pay the proper charges of an agistor with whom they were pastured. In re Mitchell (D. C. 1872) 8 N. B. R. 47, Fed. Cas. No. 9,657. He must also pay the charges of an officer who had the stock in his charge under a foreclosure or attachment which was dissolved by the bankruptcy proceedings. Zeiber v. Hill (D. C. 1870) Fed. Cas. No. 18,206; In re Davis (D. C. 1907) 155 Fed. 671, 19 Am. Bankr. Rep. 98.

The trustee may charge the estate with necessary office expenses of his administration, as for stationery and postage. In re Pegues (D. C. 1869) 3 N. B. R. 80, Fed. Cas. No. 10,907; In re Tulley (D. C. 1869) 3 N. B. R. 82, Fed. Cas. No. 14,235. And for the rent of an office and the wages of a bookkeeper, if shown to be necessary for the efficient administration of the estate. In re Barnes (D. C. 1883) 18 Fed. 158.

The rent of premises temporarily occupied by the trustee, under an unexpired lease to the bankrupt, for the purpose of storing the bankrupt's property or keeping it together until it can be sold, is chargeable as part of the expense of administration. In re Hunter (D. C. 1907) 151 Fed. 904, 18 Am. Bankr. Rep. 477.

It is the duty of a trustee in bankruptcy to pay all taxes assessed or becoming due on the property of the bankrupt while it remains in his hands for administration, and he will be allowed credit for such payments. Swarts v. Hammer (1903) 120 Fed. 256, 56 C. C. A. 92, 9 Am. Bankr. Rep. 691; In re William F. Fisher & Co. (D. C. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404; In re Mitchell (D. C. 1878) 16 N. B. R. 535, Fed. Cas. No. 9,658. And where he finds the bankrupt to be the owner of imported merchandise, he may and should pay the customs duties on it, in order to release it from bond, and so make it available as assets. J. I. Case Plow Works v. Edwards (1898) 176 Ill. 34, 51 N. E. 618.

The estate in bankruptcy must also bear the cost of actions or proceedings properly undertaken by the trustee for the purpose of recovering assets or contesting spurious claims, but he will not be allowed the costs of unfounded and unnecessary litigation. In re Josephson (D. C. 1903) 121 Fed. 146, 9 Am. Bankr. Rep. 608.

In regard to paying out the money of the estate for any other purpose than that of administration expenses, the trustee must have the warrant or order of the court, and without it he acts at his own peril, as, for example, where he pays to a lien creditor his distributive share of the estate without noticing an attorney's lien upon it for services in securing its allowance. In re Rude (D. C. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319. Claim of one employed by a corporation to investigate its operations, who after its bankruptcy reported thereon to its directors as instructed by them, held properly disallowed as a claim for compensation for services in the administration of the bankrupt estate. In re Union Dredging Co. (D. C. 1915) 225 Fed.

188. Settlement of the accounts of a trustee, with respect to a sum received by him and his counsel in settlement of a criminal prosecution and irregularly used outside the bankruptcy proceedings, approved. In re Di Cola (1914) 217 Fed. 743, 133 C. C. A. 437.

12. Employment and compensation of trustee's attorney.—Where the affairs of the estate committed to his charge are simple, and require no more than the application of intelligence and good business judgment, the trustee is not justified in charging the estate with fees for professional advice or assistance. In re Muldaur (D. C. 1875) 8 Ben. 65, Fed. Cas. No. 9,905; In re New York Mail S. S. Co. (C. C. 1869) 2 N. B. R. 423, Fed. Cas. No. 10,210; In re Noyes (D. C. 1872) 6 N. B. R. 277, Fed. Cas. No. 10,371. But where the situation of the estate is such that he really requires legal assistance, the trustee may employ counsel, and their fees for services properly and actually rendered to the trustee, to a reasonable amount, may be allowed as part of the cost of administering the estate. In re Stotts (D. C. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Davenport (D. C. 1869) 3 N. B. R. 77, Fed. Cas. No. 3,587; In re Comstock (D. C. 1875) 13 N. B. R. 193, Fed. Cas. No. 3,080. This is the case where the trustee believes that certain property belongs to the bankrupt, but cannot recover it without litigation, and needs advice as to the existence of a cause of action and the probable chances of success. In re McKenna (D. C. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Waterloo Organ Co. (C. C. A. 1907) 154 Fed. 657, 18 Am. Bankr. Rep. 752. And an attorney's bill is evidence of his services and their payment, but must be supported by proof of the occasion, necessity, and value thereof. In re Staff (D. C. 1872) Fed. Cas. No. 13,-273. The trustee (at least without authority from the court) cannot retain an attorney to conduct a suit for a contingent fee. In re Brinker (D. C. 1879) 19 N. B. R. 195, Fed. Cas. No. 1,882.

13. —— Selection of attorney.—As to the choice of an attorney for the trustee, it is the policy of the bankruptcy law to leave the selection entirely to the trustee himself, subject to the authority of the court to interfere if it appears that the attorney selected is acting under improper influences or for his own advantage. In re Champion Wagon Co. (D. C. 1912) 193 Fed. 1004, 28 Am. Bankr. Rep. 51. In some jurisdictions it has been the practice to allow the creditors, when assembled in their first meeting, to elect an attorney for the trustee. In re Little River Lumber Co. (D. C. 1900) 101 Fed. 558. But this is wrong, and referees should not allow it. The trustee should be left free to choose his own attorney and creditors ha right to dictate to him in the n In re Columbia Iron Works (1904) 142 Fed. 234, 14 Am. I Rep. 526; In re Rusch (D. C. 105 Fed. 607, 5 Am. Bankr. Rep

Where there are disagreement tween factions of creditors as t manner of administering the esta matters in controversy between ent classes of creditors, the truste not be authorized to retain as his sel one who also represents and tinues to act for any of the cre In re Rusch (D. C. 1900) 105 607, 5 Am. Bankr. Rep. 565; Columbia Iron Works (D. C. 1904 Fed. 234, 14 Am. Bankr. Rep. But see In re Smith (C. C. A. 203 Fed. 369, 29 Am. Bankr. Rep where it is said that the genera that a receiver may not employ t licitor of either party to the s which he is appointed is applica trustees in bankruptcy, but it is when the trustee is acting advers one of the parties that there is a propriety in his employing the c of the other; and that, in gene trustee or receiver in bankr should not employ an attorney wh resents the bankrupt, or an inter litigation having an interest adve that represented by the trustee the fact that attorneys represent itors of the bankrupt, whose int are not adverse to the estate gen does not so far disqualify them t for the trustee as to preclude a lowance for their services to the tee out of the estate.

The court may refuse to allo fee to an attorney representin trustee, when he has already bee lowed a fee as attorney for the tioning creditors, which covers services rendered to the trustee c estate. In re Carolina Cooperag (D. C. 1899) 96 Fed. 950, 3 Am. B Rep. 154. But while the fact th attorney had acted for the ban may affect the propriety of his em ment as counsel for the trustee, does not deprive him of the rig compensation for services actually dered. In re Dimm & Co. (D. C. 146 Fed. 402, 17 Am. Bankr. Rep

14. —— Services of trustee as ney at law.—Where the trustee is self an attorney at law, it has said that the court may, in its d tion, allow him additional compen for his services rendered in that c ity in the conduct of necessary l tion for the estate. In re Welge (1880) 1 Fed. 216. But the weig authority is the other way. The tee is not bound to place his p sional knowledge and skill at the ice of the estate, but if he does, h not have compensation therefor, cannot, in the character of a tr employ himself, in the character lawyer. In re McKenna (D. C.

137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Muldaur (D. C. 1875) Fed. Cas. No. 9,905; In re Drake (D. C. 1876) 14 N. B. R. 150, Fed. Cas. No. 4,058; In re Cook (D. C. 1883) 17 Fed. 328.

15. —— Nature of services and amount of compensation of attorney.—No compensation can be claimed by an attorney for services not rendered under the employment of the trustee, though they may have been beneficial to the estate. In re Hamburger (D. C. 1875) Fed. Cas. No. 5,974. Nor for services rendered prior to the appointment of the trustee. In re New York Mail S. S. Co. (C. C. 1869) 2 N. B. R. 423, Fed. Cas. No. 10,210. Nor for services rendered for the petitioning creditors in the bankruptcy proceedings. Holland v. McIlwaine (1915) 223 Fed. 777, 139 C. C. A. 597. Nor for assistance in the performance of the ordinary duties of a trustee, such as making up reports, statements, and accounts. In re Averill, 1 Nat. Bankr. News, 544. But a fee may be allowed where such reports or accounts cover so long a period, or involve transactions of such magnitude and complexity, as to require the services of a professional adviser. Lape's Adm'r v. Jones (Ky. 1891) 15 S. W. 658. An attorney should not be allowed a fee for conducting the examination of the bankrupt or a witness, from which no benefit to the estate has resulted, where he virtually acted for certain creditors who were his clients. In re Rozinsky (D. C. 1900) 101 Fed. 229, 3 Am. Bankr. Rep. 830.

Counsel for the trustee may be allowed a fee for trying an action to set aside an unlawful preference given by the bankrupt. In re Stearns Salt & Lumber Co. (1915) 225 Fed. 1, 140 C. C. A. 461. But not for assistance to the trustee in a preliminary search or investigation to ascertain whether a preference has been given or property fraudulently transferred. In re Cook (D. C. 1883) 17 Fed. 328. But the compensation of attorneys for a trustee in bankruptcy, in a contest between antecedent creditors suing to set aside a conveyance by their debtor, and subsequent creditors, is properly chargeable against the bankrupt estate. In re Atkins (D. C. 1915) 225 Fed. 639.

The trustee may retain counsel not only to prosecute actions which he brings, but also to defend suits brought against him by creditors or claimants. Gazin v. Norton (C. C. 1889) 38 Fed. 200. But he cannot charge the estate with attorneys' fees incurred in an unsuccessful attempt to retain particular property as against its equitable owner. Gillespie v. Piles (1910) 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502.

As to the amount to be allowed to the trustee's attorney, it will naturally vary with the circumstances of the particular case, the only general rule being that it must not exceed the reasonable value of his services, having regard to the nature of the work performed and also to the amount involved and the circumstances of the estate. In re Cook (D. C. 1883) 17 Fed. 328; In re Hoffman (D. C. 1909) 173 Fed. 234, 23 Am. Bankr. Rep. 19; In re McKenna (D. C. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Byerly (D. C. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186; In re Bignall (D. C. 1881) 9 Fed. 385; In re Drake (D. C. 1876) 14 N. B. R. 150, Fed. Cas. No. 4,058; In re Union Dredging Co. (D. C. 1915) 225 Fed. 188; In re Smith, 203 Fed. 369. The rule in bankruptcy that, where many contested suits in which amounts not extremely large are involved, attorneys for the trustees may be allowed 15 per cent. of the amounts recovered, does not necessarily apply where the very large sum is recovered, since the work done is the real thing to be paid for. In re J. M. Fiske & Co. (D. C. 1913) 209 Fed. 982. The court, in allowing compensation of attorneys, must fix the amount of compensation without reference to the fact that certain of the creditors consented to a specified allowance. In re Atkins (D. C. 1915) 225 Fed. 639. An allowance to counsel for bankrupt's trustee covering ordinary services held not to preclude an additional allowance for subsequent unexpected and extraordinary services, made necessary by the filing of a doubtful claim. In re Metallic Specialty Mfg. Co. (D. C. 1914) 215 Fed. 937.

16. —— Claim and allowance of attorney's fees.—The trustee's charges for the fees of his attorney must be included in his accounts and submitted to the meeting of the creditors. In re Hubbel (D. C. 1874) 9 N. B. R. 523, Fed. Cas. No. 6,820. They must be allowed or disallowed by the court of bankruptcy, which has jurisdiction to determine, in a summary manner, all questions as to the propriety of making the allowance and the amount. In re Brinker (D. C. 1879) 19 N. B. R. 195, Fed. Cas. No. 1,882; In re Noyes (D. C. 1872) 6 N. B. R. 277, Fed. Cas. No. 10,371. Fees payable to counsel for a bankrupt's trustee are subject to supervision by the court. In re Metallic Specialty Mfg. Co. (D. C. 1914) 215 Fed. 937. Attorney for trustee in successful action held not entitled to retain compensation from recovery, but bound to pay the entire recovery to the bankruptcy court, and submit to the court his claim for compensation. In re Stemper (D. C. 1915) 222 Fed. 690. A dismissal of the proceedings, though not opposed by the creditors, will not be ordered until payment of the reasonable and proper fees of the trustee's attorney. In re Salaberry (D. C. 1901) 107 Fed. 95, 5 Am. Bankr. Rep. 847.

17. Deposit and disbursement of funds.—The duty of a trustee in bank-

ruptcy to deposit the funds of the estate in a depository designated by the court is imperative, and his compliance with the law in this regard cannot be waived by the consent of the creditors and all parties in interest. In re Michel (D. C. 1880) 6 Fed. 706. Though he may himself have claims against the estate, as for disbursements in cash, he cannot simply retain the amount out of funds coming into his hands, but must first deposit such funds as required. In re Kyle (C. C. 1910) 181 Fed. 617. Besides exposing himself to animadversion and possible removal from office, a trustee who omits altogether to deposit the money of the estate may be charged with interest on it, at least if the proper depository would have paid interest. In re Newcomb (D. C. 1887) 32 Fed. 826; In re Burt (D. C. 1886) 27 Fed. 548; In re Thorp (D. C. 1846) Fed. Cas. No. 14,-002.

As to the manner of making the deposit, the statute makes no explicit provision, but it was probably the intention of the legislators that the funds of each estate in bankruptcy should be separately deposited to the credit of the trustee as such, designating the estate. In re Carr (D. C. 1902) 117 Fed. 572, 9 Am. Bankr. Rep. 58; Utica Ins. Co. v. Lynch, 11 Paige (N. Y. 1845) 520.

The requirement of General Order No. 29 (ante, § 9614), that funds shall not be withdrawn from the depository unless on check or warrant, signed by the clerk of the court or by a trustee, and countersigned by the judge or a referee, or, in some circumstances, by the clerk or his assistant, is imperative, and the disbursement of money in any other manner is irregular and may subject both the trustee and the depository to liability on their bonds, as well as to attachment for contempt of court. In re Cobb (D. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202. Even the court itself cannot violate this rule, and it has been held error for a court of bankruptcy to withdraw the proceeds of a sale of a bankrupt's property from the designated depository and have the money deposited in another bank, though it was done for the purpose of securing interest on the fund while it was tied up by litigation. Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349. For similar reasons, no state court can require a depository to pay a judgment against a trustee in bankruptcy out of the funds deposited by him. Havens v. National City Bank (1875) 4 Hun. (N. Y.) 131. But if there is apprehension that the money may be lost through the insolvency of the depository, the court may hear the suggestions of parties in interest with reference to removing it, or may do the same ex officio and without application. Ex parte Shipley (1853) 4 Md. 493.

Where an officer of a court of ruptcy deposits money in a desig depository, the same relation of or and creditor is created as i case of an ordinary bank depo that the court no longer has the jurisdiction over the money as over funds in the hands of a re or trustee, and hence it cannot marily order the payment of out of the depository after the i tion has passed into the hands superintendent of banks for liquid In re Bologh (D. C. 1911) 185 825, 25 Am. Bankr. Rep. 726. Pc the depository may be regarded officer of the court, and so liab misconduct in misappropriating funds, as in case of contempt, bu cannot be true of each of th ployés or servants of the bank. Southern Development Co. v. H & T. C. Ry. Co. (C. C. 1886) 2 344; In re Western Marine & Fi Co. (1865) 38 Ill. 289.

In regard to the duty of the r in countersigning checks, it is observed that this is a judicial tion and not a mere ministerial and the referee will be justified fusing his signature if he has ca believe that the amount of the is too great, or that the propose ment is fraudulent or for an i claim. In such circumstance should withhold his signature un has investigated the matter, a will not be constrained by mand In re Clark (D. C. 1874) 9 N. 67, Fed. Cas. No. 2,810; Peo Wood (1862) 35 Barb. (N. Y.) 6

18. Responsibility for negligen misconduct.—A trustee in bank is personally responsible, in an on his bond, for property of t tate converted to his own use. wold v. Watkins (1880) 20 Hun (114. In regard to the performa such duties of his office as are ministerial in character, and d involve the exercise of discretion, liable in damages to any person ed by his neglect or omission of Russell v. Phelps (1880) 42 Mic 4 N. W. 1. He is personally r sible where he allows money in the bankrupt has an interest to b out and dissipated by a bank an tain joint owners without obj when he could have prevented it. Kane (D. C. 1908) 161 Fed. 6 Am. Bankr. Rep. 616.

The trustee is not allowed w or recklessly to incur costs an penses in litigation, when the ex of ordinary prudence and for would have taught him that liti was unnecessary or would fai if he does, he is personally char with such costs, and cannot cast upon the estate. Kingsbury v. ers (1889) 131 Ill. 182, 22 N. E In re Preston (D. C. 1873) 6 N. 454, Fed. Cas. No. 11,394;

Brinkman (D. C. 1872) 6 N. B. R. 541, Fed. Cas. No. 1,883. But the estate of the bankrupt is not liable to third persons injured by the torts, negligence, or misconduct of the trustee. Adams v. Meyers (D. C. 1870) 8 N. B. R. 214, Fed. Cas. No. 62; King v. Deitz (1849) 12 Pa. 156.

19. Authority of joint trustees.—Under former bankruptcy acts it was held that where two of the three trustees of a bankrupt enter into an agreement, in the absence of the third, the contract is not binding upon the absent trustee, unless he had previously given authority to make it, or unless he subsequently recognizes and acknowledges it. Blight v. Ashley (C. C. 1808) Fed. Cas. No. 1,541. But this rule appears to be changed by the provision of the present statute that, when three trustees have been appointed, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate. Supra, this section, subdivision "b."

20. Accounts and reports of trustees.—It is in the power of the referee to make an order requiring the trustee to file an account, report, or statement which is due from him. In re Bellamy (D. C. 1867) Fed. Cas. No. 1,266. And his obedience to such order may be compelled by the court of bankruptcy by commitment as for contempt. O'Conor v. Sunseri (C. C. A. 1911) 184 Fed. 712, 26 Am. Bankr. Rep. 1.

Upon the final settlement of the trustee's accounts, a clear balance sheet should be presented, and proper vouchers should be filed, and the balance shown by such sheet must correspond with that shown by the statement of the designated depository. In re Carr (D. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

The final account of the trustee is to be submitted to the final meeting of the creditors, and it should be exhibited and read to them, though they may dispense with this by vote, when the account has been on file long enough for all to inform themselves of its terms. In re Merchants' Ins. Co. (D. C. 1874) Fed. Cas. No. 9,442. The referee must pass upon the accounts of the trustee, and it is his duty to examine and pass upon every item of the account, without regard to whether or not objections to particular items are raised by the creditors. In re Fullick (D. C. 1912) 201 Fed. 463; In re Sawyer (D. C. 1877) Fed. Cas. No. 12,396. The district judge has jurisdiction to investigate the condition of the trustee's accounts on petition of a creditor, to ascertain what dividends, if any, are due and payable. In re Sand (D. C. 1822) Fed. Cas. No. 12,302.

Any person who desires to object to the decision of the referee in allowing or disallowing a particular item, whether it be the trustee himself or a creditor, should promptly file exceptions to the account as passed, and bring the matter before the judge by petition for review of the referee's rulings. In re Reliance Storage & Warehouse Co. (D. C. 1900) 100 Fed. 619, 4 Am. Bankr. Rep. 49; In re Clark (D. C. 1874) 9 N. B. R. 67, Fed. Cas. No. 2,810. See In re Byerly (D. C. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186. But the exceptant must move promptly, or he will be deemed to have acquiesced. In re Scherr (D. C. 1905) 138 Fed. 695, 14 Am. Bankr. Rep. 794. The decision of the judge on such exceptions is also subject to review by the appellate court, but proceedings for its review must be taken in due season, and if not, the order of the court will become final and cannot be set aside or modified on motion. In re Hoyt & Mitchell (D. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784.

21. Duty to furnish information.—Failure of the trustee to inform creditors of their rights and of the condition of the estate, when the suppression of facts is in the interest of one class of creditors, is good cause for the removal of the trustee. Ex parte Perkins (C. C. 1873) Fed. Cas. No. 10,982.

The referee is one of those entitled to demand proper and necessary information from the trustee. In re Clark (D. C. 1871) 6 N. B. R. 194, Fed. Cas. No. 2,807. And so is the bankrupt. In re Blaisdell (D. C. 1871) Fed. Cas. No. 1,488. And so is any creditor of the bankrupt even though he has not formally proved his claim. In re Samuelsohn (D. C. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528. Or though he has instituted proceedings against the trustee for the reclamation of specific property. In re Saur (D. C. 1903) 122 Fed. 101, 10 Am. Bankr. Rep. 353.

22. Discharge of trustee.—The discharge of a trustee in bankruptcy may be effected by a written order made by the referee, but the judge has power to review and vacate such order. Brown v. Persons (1903) 122 Fed. 212, 58 C. C. A. 658, 10 Am. Bankr. Rep. 416.

Objections to the allowance of the account and the discharge of the trustee may be filed by any creditor who alleges fraud or embezzlement on the part of the trustee or any such mismanagement of the estate as would render him liable to be surcharged with losses or wasting of assets. In re Peabody (D. C. 1877) 16 N. B. R. 243, Fed. Cas. No. 10,866.

The court may set aside a discharge of the trustee which has inadvertently found its way into the files of the court, and may order him to proceed. Maybin v. Raymond (C. C. 1877) 15 N. B. R. 353, Fed. Cas. No. 9,338.

After receiving his discharge, and unless it is vacated, the trustee has no power to convey property which

came into his hands as assets of the estate, and the mere fact that his conveyance recites that it is executed to correct a former deed gives it no additional effect. Richards v. Northwestern Coal & Mining Co. (1909) 221 Mo. 149, 119 S. W. 953. But an order made by the referee authorizing a discharged trustee to sell subsequently acquired assets is equivalent to opening the discharge or reappointing the trustee. Geisreiter v. Sevier (1878) 33 Ark. 522.

23. Closing and reopening estates.— The referee to whom the case was originally referred has jurisdiction of a petition to reopen it and may make the necessary order. Bilafsky v. Abraham (1903) 183 Mass. 401, 67 N. E. 318. Where a bankrupt has concealed property which he should have surrendered, the title thereto does not revest in him upon his discharge so as to deprive the court of jurisdiction upon the reopening of the estate. Fowler v. Jenks (1903) 90 Minn. 74, 95 N. W. 887.

A petition to reopen an estate can be filed only by one who has an interest and will be benefited thereby. In re Meyer (D. C. 1910) 181 Fed. 904, 25 Am. Bankr. Rep. 44. This does not include a creditor who has not proved his claim within the time allowed. In re Paine (D. C. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351. But a petition to reopen may be filed by the original trustee in bankruptcy. In re Paine (D. C. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351. And the bankrupt himself in a voluntary case. In re Shaffer (D. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

As the statute provides no limitation of time within which closed estates may be reopened, the application must be made within a reasonable time, and the doctrine of laches applies if there has been unreasonable delay. Traub v. Marshall Field & Co. (C. C. A. 1910) 182 Fed. 622, 25 Am. Bankr. Rep. 410; In re Paine (D. C. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; Clark v. Pidcock (1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309. There are no terms of court in bankruptcy, within the rule that orders may be vacated at any time during the term at which they are made. In re Rochester Sanitarium & Baths Co. (1915) 222 Fed. 22, 137 C. C. A. 560.

The granting of such an application rests very much in the discretion of the court, and its decision will not be reversed unless an abuse of discretion is shown. In re Paine (D. C. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Goldman (1904) 129 Fed. 212, 63 C. C. A. 370, 11 Am. Bankr. Rep. 707. Generally the application is made on the ground of the discovery of unadministered assets, and if the sum is considerable, it will proper to reopen the case. In re I ton's Estate (D. C. 1906) 144 I 540, 16 Am. Bankr. Rep. 569. not if the assets in question are so considerable as not to justify trouble and expense. In re O'Con (1904) 137 Fed. 838, 70 C. C. A. 14 Am. Bankr. Rep. 237; In re N ton (1901) 107 Fed. 429, 46 C. C. 399, 6 Am. Bankr. Rep. 52. Wher does not appear that an estate in ba ruptcy was not fully administe when closed, the court had no juris tion to open the same that the ba rupt might include certain omi creditors in his schedules. In re Sa (D. C. 1914) 210 Fed. 397.

The vacating of an order closing estate and discharging the trustee d not reinstate the original trustee in office. In re Rochester Sanitarium Baths Co. (1915) 222 Fed. 22, 137 C. A. 560. But the first step to taken on the reopening of an estat to call a meeting of the creditors, they are thereupon to elect a tru as in the first instance. In re New (1901) 107 Fed. 429, 46 C. C. A. 6 Am. Bankr. Rep. 52; In re Pa (D. C. 1904) 127 Fed. 246, 11 Bankr. Rep. 351; In re Roche Sanitarium & Baths Co. (1915) Fed. 22, 137 C. C. A. 560. As thi a case of "vacancy" in the office trustee, it is not proper for the refe to make an appointment to that o until after the creditors have had opportunity to elect and have ei neglected to do so or failed to re an agreement. But if the referee p ceeds at once to appoint a trustee, title of the latter will not be consi ed invalid in any collateral proceed Fowler v. Jenks (1903) 90 Minn. 95 N. W. 887.

Where no creditors took the tro to prove their claims because bankrupt scheduled no assets, and was discharged and the estate clo but afterwards property was disco ed and the estate reopened, it was that the court might permit the fi of claims for a year from the dat the order for reopening the case, though the year after the adjudica had expired. In re Pierson (D. 1909) 174 Fed. 160, 23 Am. Ba Rep. 58. CONTRA, In re Meyer C. 1910) 181 Fed. 904, 25 Am. Ba Rep. 44.

The order reopening the estate d not of itself authorize the bringing a suit to recover the assets claime have been newly discovered in hands of a third person, but sin leaves the matter in the hands of referee to cause the election of a t tee and to authorize such suit, or as he shall deem proper under the cumstances shown. In re Ryburn C. 1906) 145 Fed. 662, 16 Am. Ba Rep. 514.

II. SALES OF PROPERTY BY TRUSTEES

24. Authority of trustee in general.—Before the appointment of a trustee in bankruptcy, the court has authority to order the sale of particular assets of the bankrupt if special circumstances render it necessary or desirable. In re Hitchings (D. C. 1870) 4 N. B. R. 384, Fed. Cas. No. 6,542; In re Vila (C. C. 1842) Fed. Cas. No. 16,941. But when a trustee is appointed he becomes invested by operation of law with title to all the nonexempt property of the bankrupt and is charged with the duty of reducing the same to money. This applies to all property in the possession of the bankrupt when the proceedings were instituted. In re Union Trust Co. (1903) 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767.

A trustee in bankruptcy has a transferable interest in real estate owned by the bankrupt and conveyed by him in fraud of creditors, and may sell such interest, together with the right to sue to set aside the fraudulent conveyance. If he is not able to prosecute such a suit himself because he has no funds of the estate in hand and creditors refuse to contribute to the expense, it is proper for the court to authorize him to sell his inferest in the property and assign his right to sue for the benefit of the estate. In re Downing (C. C. A. 1912) 201 Fed. 93, 29 Am. Bankr. Rep. 228; Id. (D. C. 1912) 192 Fed. 683, 27 Am. Bankr. Rep. 309. A trustee's right to recover property transferred by the bankrupt as a preference is not assignable. Lovell v. Latham & Co. (D. C. 1914) 211 Fed. 374. Where a bankrupt's trustee applied to sell all the interest of the bankrupt in the estate of his father, and the referee found that there was a purchaser who was willing to give a substantial sum for the proposed transfer, and it did not plainly appear that the bankrupt had no right in his father's estate which passed to his trustee, it was held proper to authorize the sale. In re Gutterson (D. C. 1905) 136 Fed. 698, 14 Am. Bankr. Rep. 495. The personal medical and surgical practice and good will of a bankrupt as a physician are not subject to sale by his trustee, although his property interest in a practice and good will purchased from another may be so sold. In re Myers (C. C. A. 1913) 208 Fed. 407. Where a note becomes the property of a bankrupt estate, the title thereto cannot pass except by sale, as provided by the United States Bankruptcy Act. Segen v. Fabacher (1915) 67 So. 369, 136 La. 568. Sale by a corporation's trustee in bankruptcy of the assets and property of its business, without its good will and trade-marks, destroyed both the good will and trade-marks as things of value, and precluded the trustee from thereafter selling them as property of the bankrupt. In re Jaysee Corset Co. (D. C. 1911) 201 Fed. 779.

If the trustee fails or refuses to sell available assets for the benefit of the creditors, he may be held personally responsible. In re Jackson (D. C. 1869) 2 N. B. R. 508, Fed. Cas. No. 7,127.

The power of the trustee to sell and convey the bankrupt's estate is wholly statutory, and a sale otherwise than as the statute directs will not be valid. Wisner v. Brown (1883) 50 Mich. 553, 15 N. W. 901.

When the trustee once sells particular property at public auction, he divests himself of all title to it and an attempted second sale thereafter is entirely void. Townshend v. Thomson (1892) 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870.

Where the bankrupt's assets include a stock of liquors, the trustee may sell them in bulk without being obliged to take out a license or pay a tax under either state or federal laws. In re Becker (D. C. 1900) 2 Nat. Bankr. News, 225.

25. Order of court.—Except in cases of private sales, or where the property to be sold is incumbered with valid liens, the trustee may and should proceed on his own responsibility, and no order of court is necessary to authorize the sale or enable him to give a good title. In re La France Copper Co. (D. C. 1913) 205 Fed. 207; Hallyburton v. Slagle (1902) 130 N. C. 482, 41 S. E. 877; In re White (D. C. 1868) 1 N. B. R. 218, Fed. Cas. No. 17,531; Curdy v. Stafford (1895) 88 Tex. 120, 30 S. W. 551. A court of bankruptcy may make a standing rule or order prescribing when and how trustees' sales are to be held, and in ordinary cases the trustee needs no further or specific authority or direction. Farmers' Loan & Trust Co. v. Eno (C. C. 1888) 35 Fed. 89. But when the trustee has never gained possession of the property in question, and the title is in litigation, if such property can be sold at all, it can only be done under an order of the court of bankruptcy, made on the trustee's petition and after notice to the parties claiming adversely. Shaw v. Lindsey (1877) 60 Ala. 344; In re Ludwigson (C. C. 1876) Fed. Cas. No. 8,601; Knight v. Cheney (C. C. 1871) 5 N. B. R. 305, Fed. Cas. No. 7,883; Stanley v. Sutherland (1876) 54 Ind. 339.

A special order of court for the sale of property by a trustee should fix the time and place of the sale, and it will be irregular and void for omitting these details. Osborn v. Baxter (1849) 4 Cush. (Mass.) 406. But it is not void because it does not fix an upset price for the property. Schuler v. Hassinger (1910) 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. An order for such sale is not to be relied

on as an adjudicaton that the property in question belonged to the bankrupt. Wilkins v. Tourtellott (1882) 28 Kan. 825. But a sale of personal property by a trustee in bankruptcy, acting under an order of sale issued by the court, is a "judicial sale." Carney v. Averill (1912) 110 Me. 172, 85 Atl. 494. For the purpose of making an order for the sale of property by the trustee, the referee is the court and may exercise its full powers. In re Sanborn (D. C. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Bank of North Carolina (D. C. 1879) 19 N. B. R. 164, Fed. Cas. No. 896; In re Styer (D. C. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424. But it is said (in the case last cited) that if the property is in the hands of a receiver at the time of the adjudication in bankruptcy, an order for its appraisement and sale can be made only by the judge sitting as the court of bankruptcy. An order for the sale of property of a bankrupt is none the less an order of court because signed by the judge. There is no practical distinction in a court of bankruptcy between an order of the judge and an order of the court, because the court in bankruptcy is always open, and whenever the judge acts, wherever he may be, the act is the act of the court. In re Mott (D. C. 1881) 6 Fed. 685. The trustee's petition for authority to sell should be filed with the referee and not with the clerk of the court. In the case of joint trustees, all should join in the petition. But in a case where the creditors irregularly elected two trustees instead of three, and the two so chosen presented a petition for authority to sell assets, and afterwards the creditors appointed a third trustee, it was held that the irregularity was cured by his joining in the petition. In re William F. Fisher & Co. (D. C. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

The pendency of composition proceedings may prevent a sale of the bankrupt's assets, if all has been done that is necessary to make the composition effective. In re William F. Fisher & Co. (D. C. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366. But the sale is not void merely because it does not follow immediately after the order authorizing it, nor even because so long a period as six years is allowed to elapse. Potter v. Martin (1899) 122 Mich. 542, 81 N. W. 424.

In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the bankruptcy court is without jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent and over his objection. In re Henderson (D. C. 1913) 206 Fed. 139.

26. Sale of incumbered property.—Where the real estate of a bankrupt is incumbered by valid liens, the t may either sell the equity of re tion subject to the liens or he take possession and sell the pr free from the liens. In re Cu John (D. C. 1916) 228 Fed. 771. in the latter case, he must, befor ing, obtain from the bankruptcy an order for that purpose; and sells the property without such he can only sell it subject to t cumbrances, and the purchase take no better title than the ba had; that is, he will take on bankrupt's equity of redemptio take the property subject to the See v. Rogers (1888) 31 W. Va 7 S. E. 436; Ray v. Norseworthy 23 Wall. 238, 23 L. Ed. 116; In bane (D. C. 1869) 3 N. B. R Fed. Cas. No. 9,380; In re A (D. C. 1874) Fed. Cas. No. 76; ware v. Hartsook's Adm'r (18 Va. 679, 3 S. E. 289; King v. B (1872) 24 La. Ann. 506; In r Clellan (D. C. 1868) 1 N. B. R Fed. Cas. No. 8,694; In re Stewa C. 1912) 193 Fed. 791, 27 Am. Rep. 529. One buying property bankruptcy sale, subject to the li mortgage thereon, does not there sume payment of the mortgage but he becomes the owner of the erty subject to the incumbrance. man v. Leeper (Mo. App. 1913) W. 984. Where property is thu subject to liens, by order of the of bankruptcy, it passes out of risdiction, and the state court then proceed to enforce the liens all v. Walker (1885) 26 W. Va And by ordering and confirming under a mortgage, the bankruptcy exhausts its jurisdiction, so as validate a subsequent sale un purported vendor's lien. J. M. Lumber Co. v. Lyon (1909) 5 Civ. App. 648, 116 S. W. 652.

If the trustee obtains an ord the sale of the property, but t der does not mention liens, it construed as only authorizing subject to existing valid liens. Platteville Foundry & Machine C C. 1906) 147 Fed. 828, 17 Am. Rep. 291; Ex parte City of An (1909) 82 S. C. 131, 63 S. E.

If the trustee obtains an ord the sale of the property subjec certain specified lien, or if the directs it to be made free from ified lien, in either case the sa not divest a superior lien not tioned in the order and the ho which was not made a party proceeding. In re McGilton 1872) 7 N. B. R. 294, Fed. Ca 8,798; Cain v. Sheets (1884) 7 492; Bassett v. Thackara (19 N. J. Law, 81, 60 Atl. 39. In ceeding by a trustee for an ord thorizing the sale of real estate possession, the bankruptcy cou

not have jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent or over his objection. In re Henderson (D. C. 1913) 206 Fed. 139. But if there is a direction to sell free from first or superior liens, the fact that inferior liens are not mentioned will not prevent their being divested in accordance with the ordinary rule governing judicial sales. McKay v. Hamill (C. C. A. 1911) 185 Fed. 11, 26 Am. Bankr. Rep. 164. The right of a mortgagor to redeem under Code Ala. 1907, § 5746, from foreclosure within two years does not pass to a purchaser from the mortgagor's trustee in bankruptcy. Leith v. Galloway Coal Co. (Ala. 1914) 66 So. 149.

Where other courts have taken full jurisdiction of property on which liens are asserted, the court of bankruptcy will not ordinarily interfere. In re Taliafero (C. C. 1874) Fed. Cas. No. 13,736. And where it is reasonably certain that the market value of the property does not exceed the amount of the valid liens upon it, it is not the duty of the trustee to petition for its sale, nor is it a proper exercise of the court's discretion to order it sold. In re Rose (D. C. 1911) 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Foster (D. C. 1910) 181 Fed. 703, 25 Am. Bankr. Rep. 96; In re Union Trust Co. (1903) 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; In re Mebane (D. C. 1869) 3 N. B. R. 347, Fed. Cas. No. 9,380; In re Ludwigson (C. C. 1876) Fed. Cas. No. 8,601; In re Dillard (C. C. 1873) 9 N. B. R. 8, Fed. Cas. No. 3,912; In re Hahnlen (D. C. 1842) Fed. Cas. No. 5,901; In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728. For such a course would result in no benefit to the general creditors, and would amount merely to putting through a sale for the benefit of the lien-holder, saving him the cost of foreclosure and making the expense fall unjustifiably upon the general estate. In re Cogley (D. C. 1901) 107 Fed. 73, 5 Am. Bankr. Rep. 731. In such a case, it is entirely proper for the court to order the surrender of the property to the lien creditor, if he will take it in satisfaction of his claim; if not, he should be allowed to foreclose on his own account. Equitable Loan & Security Co. v. R. L. Moss & Co. (1903) 125 Fed. 609, 60 C. C. A. 345, 11 Am. Bankr. Rep. 111; In re Rose (D. C. 1911) 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Lausman (D. C. 1910) 183 Fed. 647, 25 Am. Bankr. Rep. 186.

27. Sale free from incumbrances.—The court of bankruptcy has power and authority to order the sale of any property of the bankrupt free and clear of all liens or incumbrances then resting upon it, transferring the liens to the fund realized by the sale, or rather, transforming the lien creditors' contractual right into an equity to claim satisfaction out of the proceeds of the sale. Ray v. Norseworthy (1874) 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co. (1910) 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Loveland (1907) 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18; Sturgiss v. Corbin (1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; In re Roger Brown & Co. (C. C. 1912) 196 Fed. 758, 28 Am. Bankr. Rep. 336; In re Trayna & Cohn (C. C. A. 1912) 195 Fed. 486, 27 Am. Bankr. Rep. 594; In re Shoe & Leather Reporter (1904) 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248; In re Torchia (D. C. 1911) 185 Fed. 576, 26 Am. Bankr. Rep. 188; In re United States Graphite Co. (D. C. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; In re Keet (D. C. 1903) 128 Fed. 651, 11 Am. Bankr. Rep. 117; In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Union Trust Co. (1903) 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Pittelkow (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; In re Worland (D. C. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450; In re Mead (D. C. 1893) 58 Fed. 312; In re Kahley (D. C. 1870) 4 N. B. R. 378, Fed. Cas. No. 7,593; In re Kirtland (C. C. 1873) Fed. Cas. No. 7,851; Sutherland v. Lake Superior Ship Canal, R. & I. Co. (C. C. 1874) 9 N. B. R. 298, Fed. Cas. No. 13,643; In re Rhodes (C. C. 1872) Fed. Cas. No. 11,746; Giveen v. Smith (C. C. 1871) Fed. Cas. No. 5,467; In re Barrow (D. C. 1868) 1 N. B. R. 481, Fed. Cas. No. 1,057; Foster v. Ames (C. C. 1869) 2 N. B. R. 455, Fed Cas. No. 4,965; In re Columbian Metal Works (D. C. 1861) 3 N. B. R. 75, Fed. Cas. No. 3,039; Meeks v. Whatley (1873) 48 Miss. 337, 10 N. B. R. 498; Blair v. Carter's Adm'r (1884) 78 Va. 621. But in order to do this, it is absolutely essential that each lien creditor whose rights may be affected should have personal notice of the trustee's application for an order directing the sale to be made in this manner, and be accorded an opportunity to present any objections he may have. Factors' & Traders' Ins. Co. v. Murphy (1884) 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ray v. Norseworthy (1874) 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co. (1910) 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Saxton Furnace Co. (D. C. 1905) 136 Fed. 697, 14 Am. Bankr. Rep. 483; In re Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; Anon-

ymous (D. C. 1872) Fed. Cas. No. 456; Ex parte Drewry (D. C. 1875) Fed. Cas. No. 4,081; In re Taliafero (C. C. 1874) Fed. Cas. No. 13,736; In re Major (D. C. 1877) Fed. Cas. No. 8,981; In re Rowland (C. C. 1875) Fed. Cas. No. 12,096; Murphy v. Factors' & Traders' Ins. Co. (1881) 33 La. Ann. 454; Meeks v. Whatley (1873) 48 Miss. 337, 10 N. B. R. 498. Unless his conduct at or after the sale may be taken as a waiver of notice or acquiescence in the order of the court, as, where he was present at the sale and raised no objections. Giveen v. Smith (C. C. 1871) Fed. Cas. No. 5,467. Or where he brings trover against the trustee for the conversion of the property sold. In re Platteville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

The actual consent of the lien creditor to a sale of the property free of liens will obviate any possible question as to the jurisdiction and power of the court. Chauncey v. Dyke Bros. (1902) 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; In re Caldwell (D. C. 1910) 178 Fed. 377, 24 Am. Bankr. Rep. 495. But jurisdiction is based upon the court's control over the estate in bankruptcy, and the consent of a creditor is not essential to the authority of the court to decide how the property shall be sold. In re Kronrot (D. C. 1910) 183 Fed. 653, 25 Am. Bankr. Rep. 738. The referee in bankruptcy has authority, in the exercise of a judicial discretion, to order the sale of property free from liens, transferring the claims of lien creditors to the proceeds of sale, and to confirm the sale when made. In re Miners' Brewing Co. (D. C. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Sanborn (D. C. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Waterloo Organ Co. (D. C. 1902) 118 Fed. 904, 9 Am. Bankr. Rep. 427. An order to sell a bankrupt's property free of liens, being within the jurisdiction of the court, cannot be collaterally attacked. Equitable Trust Co. of New York v. Vanderbilt Realty Improvement Co. (1913) 140 N. Y. S. 1008, 155 App. Div. 723.

The mortgagee or other lienor must have notice and a hearing, but he may be brought in by a rule to show cause. In re E. A. Kinsey Co. (1911) 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651.

The mere fact that a lien creditor objects is not enough to prevent the court from ordering a sale free of incumbrances, if that course shall appear best for the general interests of the estate. In re E. A. Kinsey Co. (1911) 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651; In re Howard (D. C. 1913) 207 Fed. 402.

Where claimant sold certain chattels to the S. company subject to a purchase-money mortgage and the pany sold the chattels to the b subject to the mortgage, claim the absence of novation or assu of the debt, could not become itor of the bankrupt so as to o an order for a sale of the p free from liens. In re Pittsb Muddy Coal Co. (C. C. A. 191 Fed. 703.

Mortgaged chattels may be sold free of liens notwithstand fact that the mortgagee has, contract, a right to the immedis session of the goods and des avail himself of that right. F Ames (C. C. 1869) Fed. Cas. 963.

When a sale is made free of brances under order of the c bankruptcy, the purchaser wi an entirely free and unincumber Ray v. Norseworthy (1874) 2 128, 23 L. Ed. 116. And it is i rial that the proceeds of the s not be sufficient to discharge rious liens on the property or e senior lien alone. Houston Bank of New Orleans (1848) 486, 12 L. Ed. 526; In re Sanb C. 1899) 96 Fed. 551, 3 Am. Rep. 54.

If a third person becomes t chaser, the rights of the mortg other lienor are transferred to t arising from the sale, and as is extinguished, it is not necess him to take any further steps way of continuing or renewing it an v. Schnugg (D. C. 1874) F No. 9,786; Shinn v. Kemp & (1913) 73 Wash. 254, 131 Pac.

The court of bankruptcy v order the trustee to sell proper of liens, unless satisfied that terests of the general creditors advanced thereby, by the produ a fund available for their clai and above the liens, and that terests of creditors holding li not be injuriously affected. In etteville Wagon-Wood & Lum (D. C. 1912) 197 Fed. 180, Bankr. Rep. 307; In re Shaef C. 1900) 105 Fed. 352, 5 Am. Rep. 248; In re Styer (D. C. 1 Fed. 290, 3 Am. Bankr. Rep. re Pittelkow (D. C. 1899) 92 F 1 Am. Bankr. Rep. 472. See ble Trust Co. v. Vanderbilt Rea provement Co. (1913) 155 Ap 723, 140 N. Y. Supp. 1008. Th er inquiry for both the trustee court is: On what terms will th erty bring most for the creditor ject to or discharged from the brances upon it? In re Nation Co. (D. C. 1873) 8 N. B. R. 42 Cas. No. 10,045. Foreclosure o gage on bankrupt's property h to be delayed, unless sale by free from incumbrances, within able time, will produce enough bondholders in full. In re Pro

'all Paper Corporation (D. C. 1915) 22 Fed. 87.

Where a portion of the bankrupt's roperty was subject to a valid attachent lien, and it appeared that the le of the attached property by the heriff would dismember the property nd result in destroying its value, while sale of the whole property by the nkrupt's trustee would enable the reditors to obtain a better price, held roper to order the sale free from ens. In re United States Graphite o. (D. C. 1908) 161 Fed. 583, 20 Am. ankr. Rep. 573.

Where, by a prompt sale of the bankupt's assets, interest accruing on ens thereon and taxes would be savd, and the sale could be made by the rustee with less expense than by the heriff on foreclosure of the liens, and sale by the trustee would enable the state to be settled promptly, without waiting the outcome of an action by en creditors to enforce their liens, nd the bankrupt's wife had quitclaimed er dower in the property to the trusee, these facts were held sufficient to ove the court to exercise its discreion to order an immediate sale of the ssets free from the liens. In re Keet D. C. 1903) 128 Fed. 651, 11 Am. Bankr. Rep. 117.

Where claimants had liens on seprate portions of the property, all of hich was sold as a whole for a lump um, the referee, in proportioning the roceeds as between such liens, properly fixed the value of the various porions in accordance with a previous id for the property when offered seprately. In re Benz (1914) 218 Fed. 50, 134 C. C. A. 26.

28. What interests not divested.—Since a trustee in bankruptcy can sell o more than the bankrupt himself wned, a sale of real estate by the rustee does not bar or extinguish an nchoate right of dower therein existng in the bankrupt's wife. Porter v. Lazear (1883) 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; In re Shaeffer (D. C. 1900) 105 Fed. 352, 5 Am. Bankr. Rep. 248; In re Hays (C. C. A. 1910) 181 Fed. 674, 24 Am. Bankr. Rep. 669; In re Angier (D. C. 1871) 4 N. B. R. 619, Fed. Cas. No. 388; Dwyer v. Garlough (1877) 31 Ohio St. 158; Kelso's Appeal (1882) 102 Pa. 7; Lazear v. Porter (1879) 87 Pa. 513, 30 Am. Rep. 380; Worcester v. Clark (1853) 2 Grant (Pa.) 84; Cooper v. Tabor (1880) 8 Wkly. Notes Cas. (Pa.) 341. See Baird v. Winstead, 123 N. C. 181, 31 S. E. 390. But as it is highly desirable to make the sale free from such dower right, as the property will ordinarily bring a much better price, the wife's consent to release her dower should be obtained if possible, and in that case she may be compensated by a fair allowance out of the proceeds of the sale. Savage v. Savage (1905) 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599. Since in Pennsylvania a widow has dower only in the surplus of her husband's estate after payment of debts, an order directing a sale of a bankrupt's Pennsylvania real property free from liens contemplated a sale free from the inchoate right of dower of his widow, under this section, giving the trustee the rights of a lien creditor. In re Codori (D. C. 1912) 207 Fed. 784. Under the law of Pennsylvania, by which dower is an estate of the wife and not of the husband, a sale of real estate by a trustee in bankruptcy under order of the bankruptcy court, free and discharged of all liens, does not divest the property of the inchoate dower interest of the bankrupt's wife. In re Chotiner (D. C. 1914) 216 Fed. 916.

The liens of state and municipal taxes are not divested by a bankruptcy sale, even though ordered to be made free of all incumbrances. In re Gerry (D. C. 1902) 112 Fed. 958, 7 Am. Bankr. Rep. 459; In re Keller (D. C. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 351; Stokes v. State (1872) 46 Ga. 412, 9 N. B. R. 191, 12 Am. Rep. 588. But it seems that they may be so divested if the revenue officer or other proper representative of the state is made a party to the trustee's application for an order of sale. Meeks v. Whatley (1873) 48 Miss. 337. The purchaser at a bankruptcy sale of property on which a city had a lien for taxes takes it subject to the lien; the sale not having been free of tax liens, and the city not having had notice of the bankruptcy proceedings, or that its claim was therein adjudicated. Citizens' Savings Bank of Paducah v. City of Paducah (1914) 167 S. W. 870, 159 Ky. 583. Property of a bankrupt, sold free from all liens and incumbrances, held to have been sold free from taxes. In re New York & Philadelphia Package Co. (D. C. 1915) 225 Fed. 219.

Where the court of bankruptcy ordered the sale of real estate subject only to a first mortgage thereon, it was held that all other liens were divested, including a lien for taxes, and this, although a statute of the state provided that taxes should be a continuing lien on property notwithstanding a judicial sale of it, unless the proceeds of the sale were sufficient to pay them, where it further appeared that this statute was not enacted until after the creation of the first mortgage and that it was not retroactive In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675.

A person holding the legal title to lands, but bound under a deed of trust to account to third persons for specific interests therein, conveyed the same to his trustee in bankruptcy. No issues were framed or determined in the court of bankruptcy as between the trustee and such third persons, and at the trustee's sale, the bankrupt repurchased the lands. Held, that the sale did not di-

vest the interests of the third persons, and that the bankrupt took the lands still burdened with the trust. Roby v. Colehour (1892) 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922.

Where certain realty was conveyed by an alleged fraudulent conveyance from husband to wife, and subsequently they jointly executed a mortgage thereon to a third party, held, that the subsequent private sale in bankruptcy of the realty in question as the property of the husband could not discharge the land from the lien of the mortgage, since the mortgage was good under the wife's title, which would remain perfect until directly impeached by the husband's creditors. Schwartz v. Kleber (Pa. 1886) 7 Atl. 209.

29. Sale of perishable property.—Where property of a bankrupt is of a perishable nature and must be disposed of immediately in order to prevent its dissipation or loss, it may be ordered sold at any time after the filing of the petition in bankruptcy, even before the adjudication, or before the appointment of a trustee. In re Kelly Dry-Goods Co. (D. C. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

When the trustee has sold property as perishable, and his action is confirmed by the court on his petition, it is not necessary to state the grounds on which the property, taken as a whole, was considered to be in the nature of perishable property. Rogers v. Abbot (1910) 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

But the court has no power to order the sale of such property unless it is in the possession of the bankrupt or the trustee or of some officer of the court appointed to take charge of it, such as the marshal or a receiver. In re Metzler (D. C. 1867) Fed. Cas. No. 9,512.

An order authorizing the receiver of a bankrupt to sell perishable property consisting of produce in storage, "at public or private sale within his discretion, at current rates, without notice," will justify a sale in bulk of all the property in the hands of a warehouseman, after it has been offered in car load lots. In re Roberts (1908) 166 Fed. 96, 92 C. C. A. 80, 21 Am. Bankr. Rep. 573.

30. Sale of land in another district or state.—A state statute providing that lands taken in execution shall be sold in the county where the property is situated has no application to a proceeding in bankruptcy in a federal court, and a trustee in bankruptcy may conduct a sale of land in a county other than that in which the land lies. James v. Koy (Tex. Civ. App. 1900) 59 S. W. 295. And the Act of Congress of March 3, 1893, requiring sales of land to be made on the property or at the courthouse in the county where the land lies, does not apply to sales in bankruptcy proceedings. In re Brittania Mining Co. (C. C. A. 1913) 203 Fed. 450, 29 Am. Bankr. Rep. 4
re La France Copper Co. (D. C
205 Fed. 207, 30 Am. Bankr. Re
Robertson v. Howard (1913) 22
254, 33 Sup. Ct. 854, 57 L. Ed.

So the fact that land of a b
may be situated in a state bey
federal district where the proc
are pending is no obstacle to c
ing it into cash for the benefit
estate. If the trustee has tak
session, it is within the custody
court of bankruptcy, and the
has jurisdiction to order its s
from liens. In re Wilka (D. C
131 Fed. 1004, 12 Am. Bank
727; Robertson v. Howard (19
U. S. 254, 33 Sup. Ct. 854, 57
1174, 30 Am. Bankr. Rep. 611;
Wells & Co. v. Sharp (1913) 2
393, 125 C. C. A. 609; Brown v
(1913) 153 Ky. 452, 156 S.
The court of bankruptcy has j
tion in proceedings pending
court to order the trustee to s
tificates of purchase of schoo
owned by the bankrupt, though
is situated in another state. Ro
v. Howard (1913) 33 S. Ct. 8
U. S. 254, 57 L. Ed. 1174, re
judgments (1910) 109 P. 696,
588; 112 P. 162, 83 Kan. 453.

As to the place where the sale
be conducted, in the case of lan
other state, it has been held t
trustee may hold the sale at th
where he would sell any chatt
is, where the estate is being s
tered. Oakey v. Corry (1855)
Ann. 502. And see In re B
Mining Co. (D. C. 1912) 197 F
28 Am. Bankr. Rep. 651.

It is not necessary for the tru
go in person to the place of
order to be present and superin
but he may employ an auctio
conduct the sale. It was so he
case where the land to be so
situated in Arizona, but the es
bankruptcy was being administ
Massachusetts. In re National
Exploration Co. (D. C. 1911) 1
232, 27 Am. Bankr. Rep. 92.

31. Notice of sale.—The requ
of notice to creditors of a p
sale of the bankrupt's propert
give them an opportunity to app
show cause against the sale, or
the time, place, or terms of sa
re Vila (C. C. 1842) Fed. C
16,941.

The only requirements as to
of bankruptcy sales which the
are bound to regard are to be f
the bankruptcy act itself, and
fore the act of March 3, 1893,
ing publication of notice of
sales once a week for four weel
not apply. Robertson v. 1
(1913) 229 U. S. 254, 33 Sup. C
57 L. Ed. 1174, 30 Am. Bank
611; In re Edes (D. C. 1905) 1
595, 14 Am. Bankr. Rep. 382;
National Mining Exploration C

. 1911) 193 Fed. 232, 27 Am. Bankr. ep. 92. But see, CONTRA, In re rittania Mining Co. (D. C. 1912) 197 'ed. 459, 28 Am. Bankr. Rep. 651.

When the time fixed by order for the ale has expired without the sale being eld, notice to creditors and others in-erested must be given de novo before new order of sale is made. Allgair . William F. Fisher & Co. (1906) 143 'ed. 962, 75 C. C. A. 148, 16 Am. Bankr. Rep. 278.

In addition to this, all holders of liens n the property and claimants of in-erests therein must be served with otice or process, which must affirma-ively appear by the record, or the sale vill be ineffectual to divest their liens r interests. In re Reading Hat Mfg. Co. (D. C. 1915) 224 Fed. 786; Fac-ors' & Traders' Ins. Co. v. Murphy 1884) 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ex parte Bryan (D. C. 1876) 14 N. B. R. 71, Fed. Cas. No. 2,061; Moorman v. Arthur (1894) 90 Va. 455, 18 S. E. 869; In re Platte-ville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291. Notice to the trustee in a mortgage is enough to give jurisdic-tion over holders of the bonds secured. Equitable Trust Co. v. Vanderbilt Real-ty Improvement Co. (1913) 155 App. Div. 723, 140 N. Y. Supp. 1008. Stock-holders of a bankrupt corporation are not entitled to this notice. In re With-erbee (C. C. A. 1913) 202 Fed. 896, 30 Am. Bankr. Rep. 314. An adverse claimant or lien holder may waive the objection of a want of notice, and he will be held to have done so where he is personally present at the sale and interposes no objection. Keyser v. Wessell (1904) 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126; In re Caldwell (D. C. 1910) 178 Fed. 377, 24 Am. Bankr. Rep. 495.

A notice in bankruptcy, serving in a double capacity, as a notice to creditors that application for a sale of property will be made, and as notice to bidders that they may attend and offer bids, though irregular, will not vitiate the sale, if it is shown that the notice was freely advertised, and it does not ap-pear that further publicity would have produced a better bid. In re Nevada-Utah Mines & Smelters Corp. (D. C. 1912) 198 Fed. 497, 28 Am. Bankr. Rep. 409.

While the statute requires notice to be given to creditors of sales by trus-tees, it does not require notice to be given of sales by pledgees, and hence a trustee, while acting as receiver, is not chargeable for a sale of pledged collaterals under an order authorizing a public or private sale thereof, with-out notice to creditors. In re James Carothers & Co. (D. C. 1911) 193 Fed. 687, 27 Am. Bankr. Rep. 921.

32. Manner and conduct of sale.—The court of bankruptcy or the referee has discretionary power to order a private sale of the bankrupt's property, with or without notice. In re Knox Automobile Co. (D. C. 1913) 210 Fed. 569; In re Hawkins (D. C. 1903) 125 Fed. 633, 11 Am. Bankr. Rep. 49; In re Edes (D. C. 1905) 135 Fed. 595, 14 Am. Bankr. Rep. 382; In re Gut-terson (D. C. 1905) 136 Fed. 698, 14 Am. Bankr. Rep. 495. But authoriza-tion from the court or referee is strict-ly necessary, and a private sale made by the trustee without an order of the court allowing him so to sell is void. Reid v. Robrecht (1894) 102 Cal. 520, 36 Pac. 875. Compare Curdy v. Staf-ford (1895) 88 Tex. 120, 30 S. W. 551.

There is a "public" sale in bankrupt-cy, where all persons are permitted to bid, where bids are not held open ex-cept with the bidders' consent, and where notice inviting bids is publicly given, though the sale is not made by auction, and is combined with a meet-ing of the creditors of the bankrupt held for the purpose of enabling such creditors to vote on the acceptance of the bid or bids made. In re Nevada-Utah Mines & Smelters Corp. (D. C. 1912) 198 Fed. 497, 28 Am. Bankr. Rep. 409. On appeal in this case ([C. C. A. 1913] 202 Fed. 126, 29 Am. Bankr. Rep. 754), it was held that a sale made under an order passed at a meeting of creditors, according to a notice addressed to "creditors, stock-holders, and other parties in interest," but not inviting the public to attend and bid, was a private sale, but was justified in the circumstances of the case. It is also a permissible method of conducting a sale in bankruptcy for the trustee, under an order of court, to invite sealed bids for specified prop-erty, to be accompanied by certified checks for a certain amount, such bids to be opened in the presence of the referee on a day and at an hour named, and the property to be awarded to the highest bidder, subject to confirmation by the court, upon the hearing and determination of objections, which are directed to be filed by a certain day and appointed to be heard on a designated other day. In re Chandler (C. C. A. 1912) 194 Fed. 944, 28 Am. Bankr. Rep. 89. Proposals to purchase cer-tain assets of a bankrupt made to the trustee held not mere offers which pe-titioner could withdraw at any time be-fore acceptance by the trustee but con-stituted a binding contract on the trus-tee having approved the proposals and taken steps looking to a confirmation of the sale by the court. In re Lane Lumber Co. (C. C. A. 1913) 207 Fed. 762.

Section 1640, ante, requiring sales of land to be made on the property or at the courthouse in the county where the land lies, does not apply to bankruptcy proceedings. In re Britannia Mining Co. (1913) 203 Fed. 450, 121 C. C. A. 395, reversing order (D. C. 1912) 197 Fed. 459. The provision requiring ju-

dicial sales of land to be made on the property or at the courthouse in the county where it lies, does not apply to sales by trustees in bankruptcy. In re La France Copper Co. (D. C. 1913) 205 Fed. 207. A court of bankruptcy, when selling bankrupt's equitable interest in land in another state represented by certificates of purchase of school lands, is not governed by section 1640 et seq., ante, regulating generally the sale of real estate by federal courts. Robertson v. Howard (1913) 33 Sup. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174, reversing judgments (1910) 109 Pac. 696, 82 Kan. 588; 112 Pac. 162, 83 Kan. 453.

A petition by the trustee to the bankruptcy court for an order authorizing a meeting of creditors, the object of the meeting being to enable the creditors to act upon any bid for certain property of the bankrupt which may be submitted at the meeting, is irregular, but yet is sufficient to authorize the referee to act upon it, and is sufficient notice that a sale is proposed. In re Nevada-Utah Mines & Smelters Corp. (D. C. 1912) 198 Fed. 497, 28 Am. Bankr. Rep. 409.

There is no specific requirement in the bankruptcy act that sales shall be made personally by the trustee, and therefore it is held to be within the power and discretion of the court of bankruptcy to appoint commissioners to make a given sale. Sturgiss v. Corbin (1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543. Or the court may appoint an auctioneer to sell property of a bankrupt's estate in advance of any particular occasion therefor. In re Benjamin (1905) 136 Fed. 175, 69 C. C. A. 191, 14 Am. Bankr. Rep. 481. The trustee may also employ an auctioneer to cry the sale, but only under the authority of the court. In re National Mining Exploration Co. (D. C. 1911) 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Pegues (D. C. 1869) 3 N. B. R. 80, Fed. Cas. No. 10,907.

It is the duty of the trustee to sell the bankrupt's property with all reasonable promptness, unless all the creditors will consent to a delay. Hart v. Crane (1837) 7 Paige (N. Y.) 37. A mistake in judgment as to the proper place for the sale will not invalidate it in the absence of fraud or collusion. Hills v. Alden (D. C. 1878) Fed. Cas. No. 6,507.

In pursuance of his duty to realize as much as possible for the creditors, it is incumbent upon the trustee not to sell in bulk, but to divide the property into portions, if susceptible of division, and if it will thus command a higher price; if his failure to do this results in a sacrifice of the property, the sale will be set aside. In re Lloyd (D. C. 1882) 11 Fed. 586; Chesley v. Chesley (1872) 49 Mo. 540; Smith v. Scholtz (1877) 68 N. Y. 41. A sale of a bankrupt's assets en masse for a larger sum than was bid for the property cels, under the court's order held valid. In re Haywood Wa (1914) 219 Fed. 655, 135 C. 391.

Anything like collusion or an to stifle competition will of co validate the sale but this resu not follow because of a private ment between the attorney for chaser and the auctioneer that of any other person should b $50 each time until a sign to s given. In re Ketterer Mfg. Co 1907) 156 Fed. 719, 19 Am. Rep. 638.

The property should be sold highest bidder, and a "bid" m offer by a purchaser to pay so to the trustee for the proper chased which the trustee may di among creditors. In re J. B. Cornell Co. (D. C. 1911) 186 F 26 Am. Bankr. Rep. 252. The est bidder" is the one who ma highest bid in good faith. For tee is not bound to accept ev and the court will always sust in refusing bids which would ma frustrate the very object and of the sale. Gray v. Veirs (1 Md. 18. And a bid which was cepted will not give the bidd standing to complain either of jection or of a sale to anoth higher price. In re Chandler A. 1912) 194 Fed. 944, 28 Am. Rep. 89. But see In re V (1912) 197 Fed. 1, 116 C. C. 28 Am. Bankr. Rep. 258.

Generally speaking, the tru bound to obtain the best possibl under the conditions attending t and will be held responsible negligence in failing to do so. Ryan (D. C. 1872) 6 N. B. R. 2 Cas. No. 12,182; In re Knott 1874) Fed. Cas. No. 7,893; I v. Alston (1845) 4 Ired. Eq. (39 137.

33. Terms of sale.—There is in the bankruptcy act which spe forbids the sale of a bankrupt's ty by the trustee on credit. An the act of 1867, it was held tha so made was not necessarily inv that reason alone. Traer v. (1885) 115 U. S. 528, 6 Sup. 29 L. Ed. 467.

If the trustee, without the of the court, sells the effects of tate on credit, taking the pur notes for the price, and then is atory or negligent in his efforts lect the notes that he suffers t become outlawed, he is person sponsible for the loss, wheth makers of the notes were or responsible or not. In re Newco C. 1887) 32 Fed. 826.

34. Who may purchase.—On has been employed in appraisi property cannot buy it at the tr

sale in bankruptcy, either directly or through the agency of an attorney. In re Frazin & Oppenheim (C. C. A. 1910) 181 Fed. 307, 24 Am. Bankr. Rep. 598. The trustee in bankruptcy cannot become the purchaser at his own sale. Citizens' Bank v. Ober (C. C. 1870) Fed. Cas. No. 2,731. Such a sale will be set aside; and though the trustee may not be required to lose the value of improvements made by him on the property after the sale, yet it is not enough to prevent a resale that he accounts for the value of the property at the time of the sale, if it largely appreciated thereafter. In re Hawley (D. C. 1902) 117 Fed. 364, 9 Am. Bankr. Rep. 61. But where real estate came to the trustee incumbered with liens exceeding its value, the trustee himself being one of the judgment creditors, it was held competent for the court to grant him leave to proceed in a state court to sell the property on his judgment, and to bid in his individual right at the sheriff's sale. In re Carrier (D. C. 1889) 39 Fed. 193. A sale in bankruptcy is not voidable because one of the three trustees of the bankrupt was a stockholder and officer of a new corporation organized for the purpose of purchasing the bankrupt's property, when the creditors appointed him with full knowledge of this fact, and the new company was promoted by a reorganization committee of the bankrupt's creditors for the purchase of the property, and all the stockholders of the bankrupt corporation were given full opportunity to participate. In re National Mining Exploration Co. (D. C. 1911) 193 Fed. 232, 27 Am. Bankr. Rep. 92.

There is nothing to prevent the bankrupt himself from buying any portion of his former assets when offered for sale by his trustee, if he can pay the price either out of his exempt property or out of property acquired after the adjudication; and if he does so purchase, he will take a new title, embracing all the interest which the trustee had to convey. Hallyburton v. Slagle (1902) 130 N. C. 482, 41 S. E. 877; Gates v. Fraser (1882) 9 Ill. App. 624; Udall v. School District No. 4 (1876) 48 Vt. 588; Arnold v. Leonard (1849) 12 Smedes & M. (Miss.) 258. The bankrupt may make such purchase through an attorney. Beall v. Chatham (1907) 100 Tex. 371, 99 S. W. 1116. And it does not invalidate the sale that the successful bid was made by an attorney employed by the purchaser for that purpose and that the attorney had acted as counsel for the bankrupt and also for the trustee in rendering certain legal services required locally, where he had no connection with the bankruptcy proceedings. In re National Mining Exploration Co. (D. C. 1911) 193 Fed. 232, 27 Am. Bankr. Rep. 92.

Any collusive or fraudulent combination among creditors or other bidders will be ground for setting aside the sale. In re Troy Woolen Co. (C. C. 1871) Fed. Cas. No. 14,201. But when the property of a bankrupt corporation is for sale, it is perfectly proper for the bondholders, stockholders, or officers to form a syndicate or a reorganization committee or a new corporation, for the purpose of bidding on the property and acquiring it if they can fairly, and if they make no attempt to stifle or exclude independent competition. In re Pittsburgh Dick Creek Min. Co. (D. C. 1912) 197 Fed. 106, 28 Am. Bankr. Rep. 613; Schuler v. Hassinger (1910) 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184.

35. Rights and liabilities of purchasers.—The powers of a trustee in bankruptcy are in no sense judicial, and his acts bind only those whom he represents. In the sale of the bankrupt's estate, he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else. Second Nat. Bank v. National State Bank (1873) 10 Bush (Ky.) 367. A purchaser at a bankruptcy sale must take notice that nothing is sold except the bankrupt's interest. Asheville Supply & Foundry Co. v. Machin (1909) 150 N. C. 738, 64 S. E. 887. And see Whitman v. Cammack (1844) 7 Rob. (La.) 361; Shesler v. Patton (1906) 114 App. Div. 846, 100 N. Y. Supp. 286; Osborn v. Mills (Cal. App. 1913) 128 Pac. 1009. Where a bankrupt constructed an addition to a leased building on leased ground, the question whether such building constituted a fixture, or whether it was removable, as against the landlord, by a purchaser at a sale of the bankrupt's assets, could not be determined in advance of a sale and an attempt to sever. In re Gorwood (D. C. 1905) 138 Fed. 844, 15 Am. Bankr. Rep. 107. Where the trustee sells land, the title to which was acquired by the bankrupt after the filing of the petition in bankruptcy, the burden is on him and those who claim under him to show that the land equitably belonged to the bankrupt when the petition was filed. Wilkins v. Tourtellot (1882) 28 Kan. 825.

Although a sale is ordered and confirmed by the court, this is not an adjudication that the property sold belonged to the estate of the bankrupt, but only that whatever title the bankrupt had to the property legally passed to the purchaser at the sale. Chellis v. Coble (1887) 37 Kan. 558, 15 Pac. 505. That, as recited in the deed of an assignee in bankruptcy, there was an assignment to him of the property, and an order of sale, may 40 years after the discharge of the bankrupt be presumed, though there has been no actual possession of the land. Lacey v. Southern Mineral Land Co. (Ala. 1912) 60 So. 283.

A court of equity, in pursuance of justice, may set aside a sale made by

a trustee in bankruptcy where it is shown that the purchaser has been innocently misled by the advertised notice of the sale. Searcy v. McChord (D. C. 1880) 1 Fed. 261; In re Mott (D. C. 1873) 1 N. B. R. 223, Fed. Cas. No. 9,879; Carney v. Averill (1912) 110 Me. 172, 85 Atl. 494. But where the purchaser was expressly informed that the trustee was selling only such title as he possessed, and knew that such title was in litigation, and that the trustee assumed no personal responsibility and did not warrant the title or salability of the property, the purchaser cannot recover the money paid therefor, when it is subsequently determined that the trustee had no interest which he could convey. In re Frasin (C. C. A. 1912) 201 Fed. 343, 29 Am. Bankr. Rep. 212. It is the duty of an intending purchaser at such a sale to make an independent investigation of the nature and validity of the bankrupt's title, and to follow up all inquiries which are suggested by his discovery of doubtful or suspicious circumstances, otherwise he is in no position to ask aid or relief from the court. Webber v. Clark (1891) 136 Ill. 256, 26 N. E. 360. But he is entitled to rely on an absolute compliance with the terms of the sale, and on the absolute fairness of an auction conducted under the order of the court. In re Kronrot (D. C. 1910) 183 Fed. 653, 25 Am. Bankr. Rep. 738. He is not bound to see that every particular in the appointment and qualification of the trustee has been complied with. Zeigler v. Shomo (1875) 78 Pa. 357.

The purchaser becomes so far a party to the proceedings as to give the court of bankruptcy jurisdiction to make any and all orders necessary to compel him to complete his purchase. And if he abandons his purchase, without any attempt to secure the property (transferable only on certain conditions) he will be liable for the loss on a resale. Snyder v. Bougher (1906) 214 Pa. 453, 63 Atl. 893; In re Myers-Wolf Mfg. Co. (C. C. A. 1913) 205 Fed. 289, 30 Am. Bankr. Rep. 572. So long as the proceedings are pending in the court of bankruptcy, as, on application to have the sale confirmed, the property is still within the control of that court, and it may give the purchaser what aid he may need. Potter v. Martin (1899) 122 Mich. 542, 81 N. W. 424. Damage to bankrupt's property after sale, but before confirmation, cannot be visited upon the purchaser. In re Finks (1915) 224 Fed. 92, 139 C. C. A. 648. But when the sale has been made, the proceeds received by the trustee, and the sale ratified by the court, it has no further jurisdiction over the property, and cannot interfere, by injunction or otherwise, to protect the purchaser against the assertion of adverse claims. He is thereafter left to himself, and must protect his own interests in any appropriate court, but cannot treat the bankruptcy cou general warrantor of title. A Crittenden (C. C. 1881) 17 F Briggs v. Stephens (D. C. 184 Cas. No. 1,873; Henrie v. He (1906) 145 Fed. 316, 76 C. C. 16 Am. Bankr. Rep. 617. Th does not follow the property of tates of bankrupts into the h purchasers, but only to the h purchasers. After they have o the property, they must take it and of the possession of it. Hale (D. C. 1879) 19 N. B. Fed. Cas. No. 5,912. Assets of rupt corporation having been s reorganization committee, a cou bankruptcy proceeding has no j tion to control the rights to be g such committee to stockholders old company in the reorganizati re Witherbee (C. C. A. 1913) 2 896, 30 Am. Bankr. Rep. 314.

Where the property sold is in action, the purchaser may su and it is sufficient evidence of thority of the trustee in ban that he acted as such, without evidence thereof. Arnold v. (1849) 12 Smedes & M. (Miss See Breakstone v. Buffalo Fou Machine Co. (1913) 79 Misc. R 141 N. Y. Supp. 159. A sale by tee in bankruptcy under order court of a stock subscription not es the legal title to the purchas may sue thereon with all the rig trustee had. Bailey v. Anders 1914) 82 S. E. 290. And where due to the bankrupt from a thi son is sold, it cannot be offse debt due from the bankrupt third person which was acquire the bankruptcy. Judson v. (1851) 6 La. Ann. 587.

Where an equity of redemption and a valid conveyance made, t chaser may maintain a suit to Davis v. Ives (1903) 75 Conn. Atl. 922.

The special short statute of tions contained in the bankrup does not apply to actions by pur to recover property or collec bought by them. Judson v. (1851) 6 La. Ann. 587.

36. Nature and extent of ti veyed.—A purchaser at a truste of the property of a bankrupt a no higher title or greater righ the bankrupt himself had in the ty sold. McKiernan v. Fletcher 2 La. Ann. 438; Wallace v. (1911) 99 Ark. 350, 138 S. W Watson v. Conrad (1893) 38 536, 18 S. E. 744; Winter, Loeb v. Montgomery Cooperage Co. 169 Ala. 628, 53 South. 905; N Willard (C. C. 1871) Fed. Ca 10,374; Converse v. Sorley (18 Tex. 515; Roberts v. W. H. Co. (1912) 86 Vt. 76, 83 Atl. 80 born v. Mills (1913) 20 Cal. Ap 128 Pac. 1009. A deed of land g

uch a sale conveys only an interest in he surface of the land, where the bankrupt had previously conveyed by a recorded deed the coal and other minerals underlying it. Catlin Coal Co. v. Lloyd (1899) 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216. Where the tenant of a building places fixtures therein, the purchaser of the same from his trustee in bankruptcy acquires only such right to remove the fixtures as the tenant may have had. Jacob v. Kellogg (1907) 56 Misc. Rep. 661, 107 N. Y. Supp. 713. See Sacred Heart Roman Catholic Church v. Vedder (1913) 80 Misc. Rep. 541, 142 N. Y. Supp. 870. Conveyance by the trustee of a bankrupt in which the only property described was real estate held not to convey a band house on the property which to the knowledge of the grantee belonged to another. Sacred Heart Roman Catholic Church v. Vedder (1913) 142 N. Y. S. 870, 80 Misc. Rep. 541. Evidence held insufficient to show that a sale of a corporation's property by its trustee in bankruptcy included a certain warehouse and its equipment, or that the buyer had any reasonable cause to suppose they had bought it. Union Trading Co. v. Drach (Colo. 1915) 146 P. 767.

One who buys land from a trustee in bankruptcy knowing that the bankrupt held the land in trust for another, though by a deed absolute in form, acquires no title on which he can maintain a writ of entry. Faxon v. Folvey (1872) 110 Mass. 392.

One who buys the bankrupt's interest in a contract for the conveyance of land to him has all the rights therein which the bankrupt would have had but for the bankruptcy. Harriman v. Tyndale (1904) 184 Mass. 534, 69 N. E. 353. And a sale by the trustee of land held in trust by the bankrupt to secure debts due to himself passes to the purchaser the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid. Green v. Green (1878) 79 N. C. 343.

The purchaser acquires whatever title the bankrupt had in the land at the time of the sale, and if the bankrupt acquired any better or different title from the time of the adjudication in bankruptcy to the time the sale was made, that title inures to the benefit of the purchaser. McAlpine v. Tourtelotte (C. C. 1885) 24 Fed. 69. Under Revisal N. C. 1905, § 983, and this section, a sale by trustee in bankruptcy of property bought by the bankrupt under an unrecorded conditional sale contract passes title as against seller. Hinton v. Williams (N. C. 1915) 86 S. E. 994. But it is otherwise as to a title vesting in the bankrupt by devise after the sale. Wilson v. Dresser (1894) 152 Ill. 387, 38 N. E. 888.

A purchaser of property at a bankruptcy sale takes it subject to all the equities with which it was chargeable in the hands of the bankrupt. Renick v. Dawson (1881) 55 Tex. 102; Baker v. Vining (1849) 30 Me. 121, 50 Am. Dec. 617; Anderson v. Miller (1846) 7 Smedes & M. (Miss.) 586; Steadman v. Taylor (1877) 77 N. C. 134. Where, pending suit to subject to the rights of creditors a bankrupt's interest in his mother's estate, such interest was purchased by defendants from the bankrupt's trustee, the purchase was subject and not superior to the rights of such creditors. Collier v. Seward & Roper (Va. 1914) 82 S. E. 100.

Unless the court of bankruptcy orders the property sold free of incumbrances, the purchaser will take it subject to all valid and recorded liens, that is, he will take only the equity of redemption, and the holder of a mortgage or other lien may proceed to enforce it against such purchaser. In re Reading Hat Mfg. Co. (D. C. 1915) 224 Fed. 786; In re Wylie (1907) 153 Fed. 281, 82 C. C. A. 411, 18 Am. Bankr. Rep. 503; In re Allin (D. C. 1882) 12 Fed. 433; Bucknam v. Dunn (D. C. 1877) 16 N. B. R. 470, Fed. Cas. No. 2.096; In re Cooper (D. C. 1877) 16 N. B. R. 178, Fed. Cas. No. 3,190; Horkan v. Eason (1912) 10 Ga. App. 236, 73 S. E. 352; Owen v. Potter (1898) 115 Mich. 556, 73 N. W. 977. One by buying property at the sale of a trustee in bankruptcy, subject to the lien of a mortgage thereon, does not assume payment of the mortgage debt, but becomes owner of the property subject to the incumbrance. Kerman v. Leeper (1913) 157 S. W. 984, 172 Mo. App. 286. The purchaser will have the right to redeem from a mortgage or other lien or from a sale on foreclosure thereof. Greene v. Taylor (1889) 132 U. S. 415, 10 Sup. Ct. 138, 33 L. Ed. 411. Since the trustee in bankruptcy takes the property of the bankrupt with all the equities impressed on it by the bankrupt and with the equities in the bankrupt's favor, a purchaser from the bankrupt assumes no obligation not enforceable against the bankrupt. Consolidated Arizona Smelting Co. v. Hinchman (1914) 212 Fed. 813, 129 C. C. A. 267, reversing decree Hinchman v. Consolidated Arizona Smelting Co. (D. C. 1912) 198 Fed. 907.

The purchaser will be protected against a prior unrecorded deed of the bankrupt if he has no notice of it and is not chargeable with knowledge of facts sufficient to put him on inquiry. Webber v. Clark (1891) 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Holbrook v. Dickenson (1870) 56 Ill. 497. But see Hinchman v. Consolidated Arizona Smelting Co. (D. C. 1912) 198 Fed. 907, 29 Am. Bankr. Rep. 893. But an announcement made at the sale, concerning the existence of an unrecorded mortgage or deed, will charge the purchaser with notice. Roberts v. W. H. Hughes Co. (1912) 86 Vt. 76, 83 Atl. 807. And where the order of court directing the sale authorizes the trustee

to sell only the right, title, and interest of the bankrupt in the property and to convey by a quitclaim deed, a purchaser who has actual notice of an agreement made by the bankrupt and binding him to pay certain royalties on mining operations conducted on the land to the former owner, the same constituting a covenant running with the land, will take subject to the same and not free from it. Hinchman v. Consolidated Arizona Smelting Co. (D. C. 1912) 198 Fed. 907, 29 Am. Bankr. Rep. 893. But if a previous conveyance, transfer, or assignment of the property in question, made by the bankrupt, is voidable under the bankruptcy law as having been preferential or as made in fraud of creditors, the purchaser of the property at the trustee's sale of it will succeed to the trustee's right to vacate or annul such transfer or assignment, and may maintain an appropriate action to do so. In re Downing (C. C. A. 1912) 201 Fed. 93, 29 Am. Bankr. Rep. 228; Bryan v. Madden (1903) 79 App. Div. 636, 80 N. Y. Supp. 1131; s. c. (1905) 109 App. Div. 876, 96 N. Y. Supp. 465; Dwinel v. Perley (1850) 32 Me. 197; Bartles v. Gibson (C. C. 1883) 17 Fed. 293. But see Annis v. Butterfield (1904) 99 Me. 181, 58 Atl. 898; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

Whatever title the purchaser takes, it is understood to be absolute and final, and not provisional or defeasible. The court has no power to deprive him of whatever rights he may acquire by his purchase, and therefore cannot grant leave to a creditor of the estate, or to any one else, to redeem from the sale on reimbursing the purchaser. In re Novak (D. C. 1901) 111 Fed. 978, 7 Am. Bankr. Rep. 267.

The purchaser will be entitled to the rents and profits of real property purchased from the day of the sale, and not merely from the date of its confirmation. Hall v. Scovel (D. C. 1874) 10 N. B. R. 295, Fed. Cas. No. 5,945. A bankrupt corporation was the owner of a valuable lease on the property which it occupied, subject to a mortgage on the fee given by the lessor. The lease contained a provision giving the lessee the right to apply the rent in payment of the taxes on the property and the interest and principal of the mortgage, and so far as the rent had been paid it had been so applied. The trustee sold the leasehold, there being at the time a certain amount of rent due, in part accruing before the bankruptcy and in part from the trustee during his occupancy. Held, that such provision of the lease was for the protection of the bankrupt's leasehold interest, and that the purchaser took such leasehold with respect to the mortgage in the condition it stood at the time of the sale, and could not insist on the application of the unpaid rent on the mortgage as against the lessor, who had duly proved h therefor. In re Ketterer Mfg. C. 1908) 162 Fed. 583, 20 Am. Rep. 694. The purchaser cann the bankrupt's right to any po the crops growing on the la stipulated to be paid to him by rent. In re Bledsoe (D. C. 1 N. B. R. 402, Fed. Cas. No. 1,

Where the property sold con a going business, the purcha take it with the good will, if t meant to be included in th James Van Dyk Co. v. F. V. R (1911) 73 Misc. Rep. 87, 130 Supp. 755. The sale by a corpo trustee in bankruptcy of the as property of its business, with good will and trade marks, both the good will and trade m things of value, and will precl trustee from thereafter selling property of the bankrupt, and i tempts to do so, he may be res In re Jaysee Corset Co. (D. C 201 Fed. 779, 29 Am. Bankr. R The purchaser of a going busin quiring also the good will, m tinue the business in the name former owner, when it was a c tion. S. F. Myers Co. v. Tuttle 1911) 188 Fed. 532, 26 Am. Rep. 541. Where a business of ing remedies for the hair and made valuable by advertising be conducted by clerks filling o supplying labeled packages of size and shape, it is a busine commercial and nonprofessiona acter; and on a sale of the and good will by a trustee in ba cy, an incorporation of a compa ing the name of the bankrupt, addition of the word "compa take over the purchase, cannot joined by the bankrupt. Austin (1912) 171 Ill. App. 327. The p er will at least have the right vertise himself, by store signs erwise, as the successor of th rupt in the business. Freeman man (1903) 86 App. Div. 110 Y. Supp. 478. While, upon the the assets of bankrupt corporat good will may be assigned to t chaser, the trustee cannot con right to so use the bankrupt's to convey to the public an imp that the assignee and the bankr the same person. Hotel Claridg George Rector, Inc. (1914) 14 S. 748, 164 App. Div. 185.

Taxes due on the property time of the sale will be taken count in fixing the price. But ta sessed after the sale, though be payment of the balance of the p price and delivery of the deed paid by the purchaser, and he claim reimbursement out of th of the estate, and this although was made free of liens and brances, since this applies only liens as existed at the date of t

n re Crowell (D. C. 1912) 199 Fed. 59, 29 Am. Bankr. Rep. 478. The liability of a purchaser of a bankrupt's real estate for taxes thereon, constituting under the law of the state a lien, depends on the terms of sale. In re Reading Hat Mfg. Co. (D. C. 1915) 224 Fed. 786.

37. Approval on confirmation of sale. Under the requirement of section 9654, post, any sale for which it is practicable to obtain the approval of the court of bankruptcy must be approved or confirmed, and the sale passes no title until approved or confirmed, either expressly or impliedly. In re Shea (1903) 126 Fed. 153, 61 C. C. A. 219, 1 Am. Bankr. Rep. 207; Everett v. Belden & Wright (1910) 127 La. 573, 53 South. 867. If the matter is drawn in question, a purchaser under a trustee's sale which was not approved by the court has the burden of proving that it was impracticable to make the sale subject to such approval. Davis v. Ives (1903) 75 Conn. 611, 54 Atl. 922. The authority of the court in this respect may be exercised by the referee. Idem.

Where, after an alleged unauthorized sale of the bankrupt's assets, the trustee applied for an order directing that the proceeds be delivered to him, which was duly entered by the court, this was held to constitute an affirmance of the sale. Mason v. Wolkowich (1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709. But where the trustee makes a sale under order of the court and reports it for confirmation, the general rules governing judicial sales apply, and the validity of the title acquired depends upon the validity of the order of confirmation. J. M. West Lumber Co. v. Lyon (1909) 53 Tex. Civ. App. 648, 116 S. W. 652.

The creditors of the estate are not entitled to notice of an application for the confirmation of a sale. In re Nevada-Utah Mines & Smelters Corp. (D. C. 1912) 198 Fed. 497, 28 Am. Bankr. Rep. 409.

As to the matters to be considered on such an application, the approval or disapproval of the sale rests very much in the discretion of the court. In re Sanborn (D. C. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54. And it may withhold its approval on account of mere inadequacy of price, without more; it is not necessary that there should be fraud shown, or such gross inadequacy of price as to be proof of fraud. In re Groves, 2 Nat. Bankr. News, 30; In re O'Fallon (C. C. 1873) Fed. Cas. No. 10,445. See In re Thompson, 1 Nat. Bankr. News, 355. The court, in deciding whether or not to confirm or approve a sale, where the only question is whether the price offered is the best that could be obtained, should consider what is for the benefit of the creditors in general, and may properly be influenced by their wishes, if a large majority concur in their views. See In re Peerless Finishing Co. (D. C. 1912) 199 Fed. 350, 28 Am. Bankr. Rep. 429.

The highest bidder at the trustee's sale, provided he is able and willing to comply with the terms of sale, is entitled to have his bid accepted and reported for confirmation, and to have the sale to him confirmed, if the sale was made on sufficient notice and for a fair price, and there appears to have been a compliance with all necessary and proper requirements for holding the sale, and honesty and fair dealing in the sale itself. In re Williams (C. C. A. 1912) 197 Fed. 1, 28 Am. Bankr. Rep. 258; In re National Mining Exploration Co. (D. C. 1911) 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Throckmorton (1906) 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; In re Ewing (C. C. 1883) 16 Fed. 753; In re Kronrot (D. C. 1910) 183 Fed. 653, 25 Am. Bankr. Rep. 738. Trustees in bankruptcy petitioned for and were granted by the referee authority to offer real estate at auction, adjudications to be made at such prices as they might determine, not less than three-fourths of the appraised value. The advertisement of sale referred to the order and stated that the sale was subject to confirmation by the referee, and the auctioneer read the advertisement including such provision before offering the property. A bid of more than three-fourths of the appraised value, but less than the amount which the trustees had told the auctioneer they would accept, was made, and the auctioneer made no adjudication, and refused to accept a deposit, but had the bidder sign an agreement to make such deposit, in order that he might be held if the trustees decided to accept the bid. They, however, declined to do so. Held, that the bidder acquired no legal rights in the bid, as no adjudication was made, and the trustees were vested with ample discretion to reject the bid as a private offer, and hence the referee acted within his authority and discretion in declining to compel a transfer of the property. Untereiner v. Camors (C. C. A. 1916) 228 Fed. 890.

The court may impose equitable terms or conditions upon the purchaser, as, for instance, by requiring him to give security for the payment of future rent on the sale of a leasehold interest. In re Varley & Bauman Clothing Co. (D. C. 1911) 188 Fed. 761, 26 Am. Bankr. Rep. 104.

An order of confirmation has the effect of a judgment and may raise an estoppel against parties whose rights were before the court. Blood v. Munn (1909) 155 Cal. 228, 100 Pac. 694. But it is not a ratification of any act of the trustee done in excess of his authority, where it does not appear that the excess of power exercised

was brought to the knowledge of the court. In re McGilton (C. C. 1872) Fed. Cas. No. 8,798. The order of confirmation relates back to the date of the sale, so as to invest the purchaser with the character of an owner from the day of his purchase. Lathrop v. Nelson (C. C. 1877) Fed. Cas. No. 8,111. Order confirming sale of bankrupt's property held not to be treated as made nunc pro tunc as of date of sale, though referee told trustee it would be confirmed; the property having been damaged in the meantime. In re Finks (1915) 224 Fed. 92, 139 C. C. A. 648.

38. Payment or recovery of purchase money.—The court of bankruptcy has jurisdiction and power to enforce in a summary manner the completion of the contract of sale, and to compel the purchaser to pay the stipulated price, which may also include interest if there has been unreasonable delay. Mason v. Wolkowich (1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709. On the other hand, the purchaser may be entitled to a deduction or refund of part of the purchase money on account of a shortage in the quantity of the property sold. In re Drumgoole (D. C. 1905) 140 Fed. 208, 15 Am. Bankr. Rep. 261. See Owens v. Bruce (1901) 109 Fed. 72, 48 C. C. A. 239, 6 Am. Bankr. Rep. 322. And he may be entitled to be excused from paying any part of the price, or to a restoration of what he may have paid, when it proves impossible for the trustee to make a title. In re Caponigri (C. C. A. 1914) 210 Fed. 897. A bankrupt's trustee became vested with the bankrupt's title to patents and applications therefor, so that a sale thereof by the bankrupt's receiver, concurred in by the trustee, and confirmed by the referee, vested all the bankrupt's rights in the purchaser, who would therefore be compelled to complete the purchase. In re Myers-Wolf Mfg. Co. (1913) 205 Fed. 289, 123 C. C. A. 441.

When the property sold is a license for the sale of liquors, having a market value, but transferable only by the consent and approval of the licensing authority, if the transfer of the license to the trustee's vendee is refused by the licensing authority, without any reason being assigned, or for reasons not personal to the purchaser, the latter is entitled to a refund of his earnest money. In re Miller (D. C. 1909) 171 Fed. 263, 22 Am. Bankr. Rep. 560. But not so if the transfer is refused on the specific ground that the purchaser is not a proper person to hold the license. In re Comer & Co. (D. C. 1909) 171 Fed. 261, 22 Am. Bankr. Rep. 558.

An order for the sale of a bankrupt's property properly provided that in case of a purchase by a lien creditor he could have credit on the price fo portion thereof as would otherwi crue to him by reason of his Clark Hardware Co. v. Sauve (A. 1915) 220 Fed. 102. Where erty incumbered by a mortgage ing an issue of bonds is sold in ruptcy, the holders of bonds, i become the purchasers, must b mitted to use their bonds in the purchase price. In re Fayet Wagon-Wood & Lumber Co. (1912) 197 Fed. 180, 28 Am. Rep. 307; In re Saxton Furna (D. C. 1905) 136 Fed. 697, 1 Bankr. Rep. 483; In re Waterl gan Co. (D. C. 1902) 118 Fed. Am. Bankr. Rep. 427; Schuler v. singer (1910) 177 Fed. 119, 1 C. A. 539, 24 Am. Bankr. Rep But this rule does not apply whe bonds are void under the const of the state. In re Wyoming Ice Co. (D. C. 1907) 153 Fed And the court will not ratify where the bondholders of the ba corporation, who do not include its creditors, propose to take o property and assets, by transfe new corporation, and to pay th included creditors only a percent their claims or else give them tions of the new corporation, f court has no power thus arbi to preclude the claims of the n senting creditors. In re J. B. & Cornell Co. (D. C. 1911) 18 859, 26 Am. Bankr. Rep. 252.

39. Conveyance and delivery.— there is a valid sale, under whi price has been paid, the mere to deliver a deed will not autho resale. In re King (D. C. 18 Fed. 839.

The deed of a trustee in bank should be made in exact acco with the directions of the cou an error in this respect will be by an order confirming the deed. man v. Stearns (1897) 95 Va. S. E. 601. It should be execu the trustee in his official capaci by describing himself as "trus bankruptcy." Coryell v. Klehm 157 Ill. 462, 41 N. E. 864. An i ual deed by a trustee in bankru property held in his official ca after the title had revested in the rupt, is ineffective for any p Calligan v. Calligan (1913) 2 52, 102 N. E. 247. Where a dee trustee in bankruptcy is relied o action against strangers, preli proof of the trustee's title and thority to make the sale is nec Brown v. White (1913) 153 K 156 S. W. 96. The trustee's dee not contain a recital of the order court of bankruptcy authorizi sale to be private. Ryder v. (1882) 102 Ill. 338. It will b cient to pass title though not seal. Westfeldt v. Adams (190

N. C. 379, 42 S. E. 823. The deed should be acknowledged before a competent officer. Harris v. Pratt (1887) 37 Kan. 316, 15 Pac. 216. It should contain a sufficient description of the property to identify it with reasonable certainty. James v. Koy (Tex. Civ. App. 1900) 59 S. W. 295. It should run to the purchaser at the sale, unless he directs it to be made out in the name of some other person. Wilson v. Winslow (1887) 145 Mass. 339, 14 N. E. 103. A state court has no jurisdiction to enjoin the execution of a deed to the purchaser, on a bill filed by one claiming to be jointly interested with him in the purchase of the property. Henderson v. Henrie (1907) 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.

In the absence of specific covenants of title, they are not to be read into a trustee's deed by implication. Clark v. Post (1889) 113 N. Y. 17, 20 N. E. 573.

A bankrupt in possession of realty at the time of its sale by his trustee, who thereafter agrees with the purchaser to vacate on a certain day, holds as a tenant under the purchaser, and a petition will not lie by the trustee in bankruptcy for delivery of possession. In re Hale (D. C. 1879) 19 N. B. R. 330, Fed. Cas. No. 5,912.

In case of the sale of personal property, the duty of the trustee is to deliver it to the purchaser. But authority as trustee ceases when he has sold the property, and his subsequent failure to make delivery is a personal, and not an official, breach of duty. Sheldon v. Rounds (1879) 40 Mich. 425. On his refusal to deliver, the purchaser may maintain trover against him in a state court, to which action, however, an order of the court of bankruptcy setting aside the sale would be a complete defense. Ives v. Tregent (1874) 29 Mich. 390.

In the case of intangible property or choses in action, delivery to the purchaser will include whatever is necessary to make his title clear and his ownership effective, as, for instance, a written assignment of a mortgage which was the subject of the sale. In re Franklin Sav. Fund Soc. (D. C. 1874) Fed. Cas. No. 5,059. But on the sale of a negotiable note by a trustee in bankruptcy, after its indorsement by the payee, or where it was payable to bearer, it is not necessary in order to pass title that the trustee should indorse the note, mere delivery being sufficient. Wade v. Elliott (1912) 11 Ga. App. 646, 75 S. E. 989; Arnold v. Leonard (1849) 12 Smedes & M. (Miss.) 258. An assignment by a trustee in bankruptcy in pursuance of an order of sale of the bankrupt's bills receivable includes a debt due to the bankrupt for goods sold, although the debt, without the knowledge of the trustee or the purchaser, had been previously reduced to judgment. Rogers v. Abbot (1910) 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

40. Application of proceeds.—Out of the proceeds of a trustee's sale in bankruptcy are to be paid first the costs and expenses of the sale. In re Utt (1901) 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; Arnold v. Greene Gold-Silver Co. (1910) 68 Misc. Rep. 449, 125 N. Y. Supp. 29; In re Johnston (D. C. 1878) Fed. Cas. No. 7,424; In re Whitehead (D. C. 1869) 2 N. B. R. 599, Fed. Cas. No. 17,562. On sale of incumbered real property constituting all of a bankrupt's estate, where both the trustee and the lienors had made untenable claims and were more or less in the wrong, held, that there would be allowed out of the proceeds the necessary expenses of various sales but not the expenses of administration in the bankruptcy court. In re Howard (D. C. 1913) 207 Fed. 402.

Proper expenses incurred in caring for the property or putting it in condition to be sold, including payments for insurance, are to be paid out of the proceeds of sale next after the costs of the sale. In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675. Also the value of improvements put upon the property by a purchaser at a former sale which was set aside. In re William F. Fisher & Co. (D. C. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404.

Where the property is incumbered by a valid mortgage or other lien, it is wrong practice to charge the mortgagee with a proportionate part of the costs and expenses of the sale, but these should first be paid out of the proceeds, and then the mortgage creditor should be paid in full if the fund is sufficient for that purpose. In re Sanderlin (D. C. 1901) 109 Fed. 857, 6 Am. Bankr. Rep. 384; McNair v. McIntyre (1902) 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638. But see In re Howard (D. C. 1913) 207 Fed. 402. Only those fees, charges, and expenses necessary for the preservation of the property and the foreclosure of the lien may be charged against the fund realized from the sale without the consent of a lienholder of a bankrupt's property subject to the lien, made free from liens. In re New York & Philadelphia Package Co. (D. C. 1915) 225 Fed. 219. The bankruptcy court cannot sell mortgaged premises free of the lien and use the proceeds in paying the expenses of administering the estate but may ascertain the amount actually due and make proper allowances for the necessary expenses of so doing. In re Howard (D. C. 1913) 207 Fed. 402. Chattel mortgagee petitioning for proceeds of sale by trustee in bankruptcy held liable for expense of sale, including rent

bankruptcy. In re International Mineral Co. (D. C. 1915) 222 Fed. 415.

A creditor desiring to move for the vacation of a bankruptcy sale must be reasonably prompt, and one who, with full knowledge of the circumstances of the sale, accepts a dividend from the proceeds and allows the purchaser to sell the property, cannot avoid the sale even for fraud and collusion. Hills v. Alden (D. C. 1878) Fed. Cas. No. 6,-507.

Though a single creditor may complain of a sale of the bankrupt's assets, that all of the secured and most of the unsecured creditors were satisfied with the sale is some evidence that the good faith of the trustee should not be impugned. In re Haywood Wagon Co. (1914) 219 Fed. 655, 135 C. C. A. 391.

The sale will not be vacated at the instance of one who is an entire stranger to the proceedings and whose rights, if any, in the property could not be prejudiced by the sale. In re Muhlhauser (1903) 121 Fed. 669, 57 C. C. A. 423, 10 Am. Bankr. Rep. 236. A stockholder of a bankrupt corporation, as such, has no standing in the bankruptcy case to require the trustee to answer his petition to set aside a sale of the bankrupt's assets to a reorganization committee. In re Witherbee (C. C. A. 1913) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

The special short statute of limitations contained in the bankruptcy act does not apply to proceedings to vacate a sale. Clark v. Clark (1854) 17 How. 315, 15 L. Ed. 77.

When an order vacating a sale is made, based on causes for which the purchaser was not in any way responsible, he will be entitled to have his money refunded, and also such expenses as he has reasonably and properly incurred in the preservation of the property. In re Troy Woolen Co. (C. C. 1871) Fed. Cas. No. 14,201.

45. —— **Grounds for vacating.**—A trustee's sale in bankruptcy should not be set aside except for cause sufficient to move the conscience of the court. In re Metallic Specialty Mfg. Co. (D. C. 1912) 193 Fed. 300, 27 Am. Bankr. Rep. 408. Or where it would be a gross discredit to the administration of justice if the sale should be permitted to stand. In re Troy Woolen Co. (C. C. 1871) Fed. Cas. No. 14,201.

Any manipulation of the sale which tends to prevent the attendance of bidders, or to stifle competition among them, will be sufficient ground for vacating it. In re Shea (1903) 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207; In re Ethier (D. C. 1902) 118 Fed. 107, 9 Am. Bankr. Rep. 160. But see In re Pittsburgh Dick Creek Mining Co. (D. C. 1912) 197 Fed. 106, 28 Am. Bankr. Rep. 613, where it was held that a sale otherwise satisfactory will not be set aside at the instance of a creditor who alleges that there was a conspiracy to keep him away the sale and otherwise to defrau of his just rights, since, if suc really the case, he has a remedy for damages. And see In re K (D. C. 1910) 183 Fed. 653, 2 Bankr. Rep. 738.

That the only other bidder was fer employed to run up bids he ground for releasing person fro at sale of bankrupt's property, absence of any assurance to the or belief that he would not be he ble. Williams v. Hogue (1914 Fed. 182, 134 C. C. A. 556.

46. —— **Inadequacy of price.**— quacy of price will be ground fo ting aside a sale in bankruptc only in case it is unconscionable gross as fairly to raise a presu of fraud. In re National Minin ploration Co. (D. C. 1911) 193 Fe 27 Am. Bankr. Rep. 92; In re M Specialty Mfg. Co. (D. C. 1912 Fed. 300, 27 Am. Bankr. Rep In re Shapiro (D. C. 1907) 15 673, 19 Am. Bankr. Rep. 125; Throckmorton (1906) 149 Fed. 1 C. C. A. 15, 17 Am. Bankr. Re In re Bousfield (D. C. 1877) 16 R. 481, Fed. Cas. No. 1,702. A Ballentyne v. Smith (1907) 205 285, 27 Sup. Ct. 527, 51 L. Ed. 8

The appraisal fixes the value bankrupt's property, in the abse reliable evidence impeaching it, sale for more than the appraised confirmed by the court, will not aside by an appellate court ground of inadequacy of price. S v. Hassinger (1910) 177 Fed. 11 C. C. A. 539, 24 Am. Bankr. Re

The fact that the property h creased in value since the sale, it is discovered to possess a greater than was then suppose not warrant annulling the sale. v. McDonald (1876) 2 MacArth C.) 375; Tyson v. Mickle (1844) (Md.) 376. The difference betwe 250, for which property was fir by a trustee in bankruptcy, and which it brought on a resale, he to show such a gross inadequ price as to justify the vacation confirmation and the setting as the first sale. In re Burr Mfg. & ply Co. (1914) 217 Fed. 16, 133 A. 126, reversing order (D. C. 209 Fed. 138. A bankruptcy should not be set aside merely b a third person offers to pay a price than was realized at the sa re Ethier (D. C. 1902) 118 Fe 9 Am. Bankr. Rep. 160; In re (D. C. 1903) 120 Fed. 524, Bankr. Rep. 679. But an offer advanced price, made by a genui responsible bidder, is strong ev that the price given at the sale adequate, and if the court is way satisfied that there was a discrepancy between the actual of the property and the price ob

nay properly vacate the sale and or- a resale. In re Palmer (D. C. 2) 13 Fed. 870; In re Collins (D. C. 5) Fed. Cas. No. 3,005. But the ance so offered must be substantial, not a mere trifle. Sturgiss v. Cor- (1905) 141 Fed. 1, 72 C. C. A. 179, Am. Bankr. Rep. 543. And the in- ding purchaser may be required to er into an agreement with the court, to give security, that he will attend resale and bid at least as much as has offered. In re Shea (1903) 126 l. 153, 61 C. C. A. 219, 11 Am. kr. Rep. 207.

'. Collateral impeachment of sale.— validity of a trustee's sale in bank- tcy is not open to inquiry or im- chment in any collateral proceed- either in a state or federal court. kler's Adm'r v. Rogers (1900) 54 W. 848, 21 Ky. Law Rep. 1265; mbo v. Fulk (1904) 103 Va. 73, 48 E. 525; Keller v. Faickney (1906) Tex. Civ. App. 483, 94 S. W. 103; lton v. Metcalf (1911) 234 Mo. 27, S. W. 701; Mims v. Swartz (1873) Tex. 13; Steele v. Moody (1875) Ala. 418, 16 N. B. R. 558; Equitable st Co. v. Vanderbilt Realty Im- vement Co. (1913) 155 App. Div. , 140 N. Y. Supp. 1008. This rule lies especially after the lapse of a siderable period of time, during which all parties in interest have acquiesced in the sale. Buckler's Adm'r v. Rogers (1900) 21 Ky. Law Rep. 1265, 54 S. W. 848. Or where the attack upon the sale is based on mere irregularities. Robertson v. Howard (1913) 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; James v. Koy (Tex. Civ. App. 1900) 59 S. W. 295; Herbst v. Bates, 13 Wkly. Law Bul. (Ohio) 565; Smith v. Long (1881) 9 Daly (N. Y.) 429. An order of the referee in bankruptcy, made under the discretionary power conferred by § 70b, post, § 9654, confirming a trustee's sale of the bankrupt's interest in real estate, validates the sale as against collateral attack for alleged lack of appraisement and error in description. Robertson v. Howard (1913) 33 Sup. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174, reversing judgments (1910) 109 P. 696, 82 Kan. 588, 112 P. 162, 83 Kan. 453.

Where a bankrupt's liquor license was sold subject to the condition that its transfer to the purchaser must be authorized by the local court having jurisdiction, an inquiry by the court of bankruptcy to ascertain the grounds on which the local court refused to approve the transfer, is not a collateral attack on its order. In re Miller (D. C. 1909) 171 Fed. 263, 22 Am. Bankr. Rep. 560.

9632. (Act July 1, 1898, c. 541, § 48, as amended, Act Feb. 5, 1903, c. 487, § 11, and Act June 25, 1910, c. 412, § 9.) Compensation of trustees, receivers, and marshals.

Compensation of Trustees, Receivers and Marshals:—(a) Trus- s shall receive for their services, payable after they are rendered, ee of five dollars deposited with the clerk at the time the peti- n is filed in each case, except when a fee is not required from voluntary bankrupt, and such commissions on all moneys disbursed turned over to any person, including lien holders, by them, as may allowed by the courts, not to exceed six per centum on the first e hundred dollars or less, four per centum on moneys in excess five hundred dollars and less than fifteen hundred dollars, two r centum on moneys in excess of fifteen hundred dollars and less an ten thousand dollars, and one per centum on moneys in excess ten thousand dollars. And in case of the confirmation of a compo- ion after the trustee has qualified the court may allow him, as com- nsation, not to exceed one-half of one per centum of the amount be paid the creditors on such composition.

(b) In the event of an estate being administered by three trustees tead of one trustee or by successive trustees, the court shall ap- rtion the fees and commissions between them according to the vices actually rendered, so that there shall not be paid to trustees the administering of any estate a greater amount than one trus- would be entitled to.

(c) The court may, in its discretion, withhold all compensation from y trustee who has been removed for cause.

(d) Receivers or marshals appointed pursuant to section two, sub- vision three, of this Act shall receive for their services, payable er they are rendered, compensation by way of commissions upon e moneys disbursed or turned over to any person, including lien lders, by them, and also upon the moneys turned over by them or

afterwards realized by the trustees from property turned o
kind by them to the trustees, as the court may allow, not to
six per centum on the first five hundred dollars or less, four per c
on moneys in excess of five hundred dollars and less than one
sand five hundred dollars, two per centum on moneys in exc
one thousand five hundred dollars and less than ten thousand d
and one per centum on moneys in excess of ten thousand d
Provided, That in case of the confirmation of a compositio
commissions shall not exceed one-half of one per centum
amount to be paid creditors on such compositions: Provided f
That when the receiver or marshal acts as a mere custodian an
not carry on the business of the bankrupt as provided in clau
of section two of this Act, he shall not receive nor be allowed
form or guise more than two per centum on the first thousand
or less, and one-half of one per centum on all above one th
dollars on moneys disbursed by him or turned over by him
trustee and on moneys subsequently realized from property
over by him in kind to the trustee: Provided further, That bef
allowance of compensation notice of application therefor, spe
the amount asked, shall be given to creditors in the manner in
in section fifty-eight of this Act.

(e) Where the business is conducted by trustees, marsh
receivers, as provided in clause five of section two of this A
court may allow such officers additional compensation for suc
ices by way of commissions upon the moneys disbursed or
over to any person, including lien holders, by them, and, in c
receivers or marshals, also upon the moneys turned over by t
afterwards realized by the trustees from property turned o
kind by them to the trustees; such commissions not to exce
per centum on the first five hundred dollars or less, four per c
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sand five hundred dollars, two per centum on moneys in exc
one thousand five hundred dollars and less than ten thousand d
and one per centum on moneys in excess of ten thousand d
Provided, That in case of the confirmation of a compositio
commissions shall not exceed one-half of one per centum
amount to be paid creditors on such composition: Provided f
That before the allowance of compensation notice of appl
therefor, specifying the amount asked, shall be given to credit
the manner indicated in section fifty-eight of this Act. (30
557. 32 Stat. 799. 36 Stat. 840.)

In this section, as originally enacted, subdivision a thereof was as
"a Trustees shall receive, as full compensation for their services,
after they are rendered, a fee of five dollars deposited with the clerk
time the petition is filed in each case, except when a fee is not requir
a voluntary bankrupt, and from estates which they have administere
commissions on sums to be paid as dividends and commissions as ma
lowed by the courts, not to exceed three per centum on the first five t
dollars or less, two per centum on the second five thousand dollars
thereof, and one per centum on such sums in excess of ten thousand
Said subdivision a was amended by Act Feb. 5, 1903, c. 487, § 1
above, to read as follows:
"a Trustees shall receive for their services, payable after they are r
a fee of five dollars deposited with the clerk at the time the petition
in each case, except when a fee is not required from a voluntary bankr
from estates which they have administered such commissions on all
disbursed by them as may be allowed by the courts, not to exceed six
tum on the first five hundred dollars or less, four per centum on mo
excess of five hundred dollars and less than fifteen hundred dollars,
centum on moneys in excess of fifteen hundred dollars and less than te
sand dollars, and one per centum on moneys in excess of ten thousa
lars. And in case of the confirmation of a composition after the trus

qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."

The section was further amended by Act June 25, 1910, c. 412, § 9, last cited above, by changing said subdivision a, as so previously amended, and by adding, after subdivisions b and c, two further subdivisions d and e, making the section read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Trustees, receivers, and marshals were prohibited from receiving any compensation other than that allowed by the act, by section 72, added thereto by amendment by Act Feb. 5, 1903, c. 487, § 18, post, § 9656.

Notes of Decisions

1. **Compensation of trustees.**—This ection and § 9624, ante, when read in onnection with § 9656, post, provide or compensation for trustees based on ommissions on moneys disbursed. merican Surety Co. v. Freed (1915) 24 Fed. 333, 140 C. C. A. 19, reversg decree In re Breakwater Co. (D. . 1915) 220 Fed. 226.

Where a partnership and its members re adjudged bankrupt on a single petion, there is but one case for the urpose of computing the trustee's ees and commissions. The word case," as used in the bankruptcy act, used in its ordinary meaning as a omprehensive term, embracing the agregate in respect to that which is rought and prosecuted in the form of single proceeding. In re Rider (D. . 1915) 220 Fed. 193.

The provision of the statute with refrence to the compensation of trustees mandatory and must be followed, nd the court has no authority to alow to a trustee a lump sum in lieu of ommissions calculated as the act diects. In re Carolina Cooperage Co. D. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154. The commission must be alculated, as the statute prescribes, n the amount of money disbursed or urned over, and not on the gross mount collected. In re Smith (D. C. 901) 108 Fed. 39, 5 Am. Bankr. Rep. 59.

Under § 9644, ante, § 9656, post, and his section prior to the amendment of 910, where pledged securities having market value about equal to the sered loans were sold in bankruptcy, ealizing a small surplus, trustee held ntitled to commissions only on the urplus. In re Meadows (C. C. A. 914) 211 Fed. 948, affirming order (D. . 1912) 199 Fed. 304. Under this ection, held, that commissions are alowable to trustees on moneys receivd and disbursed, which were derived rom the sale of mortgaged property, nd which were covered by and proprly applicable to the payment of the en, especially in view of the amendent of Act June 25, 1910, § 9. In re Howard (D. C. 1913) 207 Fed. 402. The trustee in bankruptcy held entitled to fees upon the total amount of the assets transferred to a new corporation, not upon the amount actually received at the sale of the assets subject to existing liens. In re Breakwater Co. (D. C. 1915) 220 Fed. 226, decree reversed American Surety Co. v. Freed (1915) 224 Fed. 333, 140 C. C. A. 19. Where, to preserve assets of a bankrupt, they were transferred to a corporation for a small sum, and secured and unsecured creditors received stock, the commissions to trustee must be based on the cash, within Bankr. Act, §§ 40a, 48a, as amended. American Surety Co. v. Freed (1915) 224 Fed. 333, 140 C. C. A. 19, reversing decree In re Breakwater Co. (D. C. 1915) 220 Fed. 226.

Money is disbursed or turned over by the trustee when it is paid into the hands of a receiver appointed by a state court in a suit between the bankrupt and a creditor, the former claiming it as exempt and the latter denying the contention. In re Castleberry (D. C. 1906) 143 Fed. 1021, 16 Am. Bankr. Rep. 430.

Under § 9656, post, the court has no authority to make any extra allowance to a trustee in bankruptcy for unusual or highly beneficial services to the estate or for particularly onerous or inconvenient duties. In re Coventry Evans Furniture Co. (D. C. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623; In re Screws (D. C. 1906) 147 Fed. 989, 17 Am. Bankr. Rep. 269; In re Carolina Cooperage Co. (D. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Epstein (D. C. 1901) 109 Fed. 878, 6 Am. Bankr. Rep. 191. CONTRA, In re Dimm & Co. (D. C. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119; In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651.

If the trustee is himself a lawyer, he is not bound to perform legal services for the estate, and if he does, he cannot have a fee therefor from the estate. In re George Halbert Co. (1904) 134 Fed. 236, 67 C. C. A. 18, 13 Am. Bankr. Rep. 399; In re Mc-

Kenna (D. C. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Felson (D. C. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185; In re Van Denburg (D. C. 1914) 221 Fed. 475.

Even where a creditor, desiring to secure the services of a particular person as trustee, promises him a sum in excess of the commissions which he will receive, the bargain is void and cannot be enforced in the face of the express prohibition contained in the statute. Devries v. Orem (1906) 104 Md. 648, 65 Atl. 430; Cowing v. Altman (N. Y. 1875) 5 Hun, 556.

If the business of the bankrupt is carried on for a limited time by the trustee, under authority of the court, he may be allowed additional compensation for his services in such business. The amount of it rests very much in the discretion of the court, having regard to the nature of the services rendered and their benefit to the estate, provided that it shall not exceed the percentages specified in the act. In re George W. Shiebler & Co. (1909) 174 Fed. 336, 98 C. C. A. 208, 23 Am. Bankr. Rep. 162. But the court has no authority to fix the compensation of a trustee in advance for such services to be rendered in the future. In re Willis W. Russell Card Co. (D. C. 1909) 174 Fed. 202, 23 Am. Bankr. Rep. 300.

The provision of this section allowing the court, in its discretion, to withhold all compensation from a trustee who has been removed for cause is applicable to a case where there was sufficient ground for the removal of a trustee, but, to avoid the odium of such a course, he was allowed to resign. In re E. I. Fidler & Son (D. C. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16. And since, within the limits fixed by law, the amount to be allowed as commissions to a trustee is subject to the sound judicial discretion of the court, it is held that, where a trustee has been negligent in the performance of his duty, the court may in a proper case, and even without the filing of any exceptions, deny him any commissions. In re Schoenfeld (1910) 183 Fed. 219, 105 C. C. A. 481, 25 Am. Bankr. Rep. 748.

2. Fees and expenses of marshals and receivers.—Prior to the amendatory act of 1910, a receiver might be allowed the maximum commission which would be awarded to a trustee in similar cases, but could claim nothing extra for carrying on the bankrupt's business. In re Cambridge Lumber Co. (D. C. 1905) 136 Fed. 983, 14 Am. Bankr. Rep. 168; In re Richards (D. C. 1903) 127 Fed. 772, 11 Am. Bankr. Rep. 581. The general rule was that the court had authority to allow the receiver a just and reasonable compensation for his personal services, the amount of which rested in the sound discretion of the court and should depend upon all the circumstances of the pa case. In re Scott (D. C. 1900) 404, 3 Am. Bankr. Rep. 625; Hardware Co. v. Huddleston (1909) 167 Fed. 433, 21 Am. Rep. 731; In re Huddleston 1908) 167 Fed. 428, 21 Am. Ban 669; In re Scott (D. C. 1900) 404, 3 Am. Bankr. Rep. 625; Sully (D. C. 1904) 133 Fed. Am. Bankr. Rep. 783; In re Sartorial Art Co. (D. C. 1900) 1 215, 4 Am. Bankr. Rep. 107.

The court has power in the stance to direct that the exper the compensation of the receiv be paid out of the property in hi although the proceedings are wards dismissed, as it is no par receiver's duty to move to recov expenses and compensation aga petitioning creditors. In re T. Co. (1907) 159 Fed. 73; 86 C 263, 20 Am. Bankr. Rep. 73.

Where, after the appointme receiver, a second petition is another district, where an adju is made, and to which the pro are transferred, as being the of the bankrupt's domicile, th in the latter district has jurisdi fix the compensation of the r although payment can only be r order of the court having the of the estate. In re Isaacson 174 Fed. 406, 98 C. C. A. 614, Bankr. Rep. 98.

Where the receiver is afterwa pointed trustee, the settlement fees should be determined in tion with the claim for com and fees for services rendered estate as a whole. In re Jam others & Co. (D. C. 1910) 1 501.

In regard to the additional co tion to be allowed to the receiv he carries on the business of th rupt, it has been held that a who takes possession of the ba store, advertises a sale, and ke store open, for the purpose o sale, only for the remainder of on which he takes possession a closes the store and sells the r bulk, is not a mere custodian, the other hand, he does not "c the business" of the bankrupt r entitle himself to the extra co tion. In re Charles Knosher (1912) 197 Fed. 136, 116 C. C. 28 Am. Bankr. Rep. 747. Wh receiver inventories the ba stock, has it appraised, and sel is more than a mere custodian, he does not carry on the busin he is entitled to such compens the court may allow for his services, within the general pr of the section. In re Ginsburg 1913) 208 Fed. 160. Receiver rupts, for a sale of their propert having it in possession not mo six days, during which time th

was closed, held entitled to fee not exceeding 2 per cent. on the first $1,000 and one half of 1 per cent. on the balance. In re Griesheimer (D. C. 1913) 209 Fed. 134. Under this section and § 9586, subd. 5, ante, where a bankrupt's receiver turned over to the trustee $1,739.92, together with the bankrupt's stock, fixtures, and uncollected book accounts, the receiver was only entitled at that time to an allowance of $148.56 for his services, and was not entitled to an allowance on the property turned over in kind until the trustee had realized thereon. In re Falkenberg (D. C. 1913) 206 Fed. 835.

The requirement of notice to creditors of the receiver's application for compensation is imperative, and no allowance of fees can rightfully be made until after such notice. In re Falkenberg (D. C. 1913) 206 Fed. 835, 30 Am. Bankr. Rep. 718. A notice of hearing of an application for an allowance of fees to a bankrupt's receiver and his counsel, specifying the amount asked in dollars and cents, was not objectionable for failure to ask for an additional allowance. In re Cash-Papworth, Grow-Sir (1913) 210 Fed. 24, 126 C. C. A. 604. Creditors desiring to object should promptly file exceptions with the referee, and may bring the matter before the court by petition for review of the decision of the referee on the questions thus raised. In re Reliance Storage & W. Co. (D. C. 1900) 100 Fed. 619, 4 Am. Bankr. Rep. 49.

If the receivership was obtained by fraud or imposition practiced upon the court, and was in no way beneficial to the estate, the court will be justified in refusing to make any allowance for the services of the receiver. In re Desrochers (D. C. 1911) 183 Fed. 991, 25 Am. Bankr. Rep. 703.

Where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services under such order, in addition to the costs and expenses incurred. In re Adams Sartorial Art Co. (D. C. 1900) 101 Fed. 215, 4 Am. Bankr. Rep. 107. A marshal, placed in charge of the property of the bankrupt, may hire a competent watchman or store-keeper, if he considers it necessary for the preservation of the property, and the reasonable pay of such a keeper will be allowed out of the estate. In re Scott (D. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Lowenstein (D. C. 1869) 3 N. B. R. 268, Fed. Cas. No. 8,572; In re Comstock (D. C. 1874) 9 N. B. R. 88, Fed. Cas. No. 3,075; In re Pace (D. C. 1878) Fed. Cas. No. 10,640; In re Johnston (D. C. 1875) 12 N. B. R. 345, Fed. Cas. No. 7,421.

The expenses incurred by a receiver, in counsel and witness fees, in resisting a motion for his removal, will be allowed as a charge upon the fund or estate, where it appears that, although there were apparent grounds for the motion, yet the receiver had acted in good faith and with integrity of purpose. Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293.

§ 9633. (Act July 1, 1898, c. 541, § 49.) Accounts and papers of trustees.

Accounts and Papers of Trustees.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest. (30 Stat. 558.)

§ 9634. (Act July 1, 1898, c. 541, § 50.) Bonds of referees and trustees.

Bonds of Referees and Trustees.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at

any time increase the amount of the bond. If the creditors do not the amount of the bond of the trustee as herein provided the cou shall do so.

d The court shall require evidence as to the actual value of th property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and abov their liabilities and exemptions, on each bond shall equal at least th amount of such bond.

g Corporations organized for the purpose of becoming suretie upon bonds, or authorized by law to do so, may be accepted sureties upon the bonds of referees and trustees whenever t courts are satisfied that the rights of all parties in interest will thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall filed of record in the office of the clerk of the court and may sued upon in the name of the United States for the use of person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to United States, for any penalties or forfeitures incurred by the b rupts under this Act, of whose estates they are respectively trus

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein vided and within the time limited, he shall be deemed to declined his appointment, and such failure shall create a vacanc his office.

l Suits upon referees' bonds shall not be brought subsequent to years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequen two years after the estate has been closed. (30 Stat. 558.)

Notes of Decisions

Bonds of trustees in bankruptcy.— A trustee in bankruptcy must give a separate and distinct bond in each case in which he may be appointed trustee; a general bond conditioned for the performance of his duties in all cases in which he may be appointed is not sufficient. In re McFaden (D. C. 1869) 3 N. B. R. 104, Fed. Cas. No. 8,785.

The mere fact that the sureties are not residents of the district is not a sufficient reason for rejecting a bond which is in all other respects unobjectionable. Ex parte Milwaukee R. Co. (1866) 5 Wall. 188, 18 L. Ed. 676. And where the principal becomes liable for the full amount, and the bond is executed by several sureties, who become liable in smaller sums aggregating the whole amount of the bond, this is a good and sufficient bond. Bradley Fertilizer Co. v. Pace (1897) 80 Fed. 862, 26 C. C. A. 198. But the wife of the trustee should not be accepted as a surety on his bond, if the law of the particular state is such that a married woman cannot bind herself or her separate property as a surety on a bond. In re McFaden (D. C. 1869) 3 N. B. R. 104, Fed. Cas. No. 8,785.

The condition of such an obligation is construed with some strictness, and it is held that if a trustee in bankruptcy makes payments of money in his hands without an order of the court, and in violation of the rules, a liab on his bond will accrue, notwithstan the fact that the payments were s as the court might have authorize it had been applied to. In re Hoy Mitchell (D. C. 1904) 127 Fed. 968 Am. Bankr. Rep. 784.

Generally speaking, an accounting the trustee, under an order in that half, is a necessary prerequisitie to action on his bond, as fixing the me ure of his responsibility. U. S. v. Si heim (D. C. 1910) 188 Fed. 378. this does not apply where the trus has absconded and cannot be located where he is a fugitive from just Schofield v. U. S. (1909) 174 Fed 98 C. C. A. 39, 23 Am. Bankr. 259. In the latter case, he is not a necessary party to the action on bond. Alexander v. Union Surety Guaranty Co. (1903) 89 App. Div 85 N. Y. Supp. 282.

The bond may be sued on in the n of the United States for the use of person injured by the breach of condition, and it is not necessary the party so injured to obtain leav court to sue. Alexander v. Un Surety & Guaranty Co. (1903) 89 A Div. 3, 85 N. Y. Supp. 282. Wher trustee in bankruptcy has been remo from his office for mismanagement default, and a new trustee appoin the latter may be considered as a "p

on injured" by the breach of condition of the bond of the former trustee and may sue thereon, and a district court of the United States has jurisdiction of the action. U. S. v. Union Surety & Guaranty Co. (D. C. 1902) 118 Fed. 482, 9 Am. Bankr. Rep. 114. But see CONTRA, Alexander v. Union Surety & Guaranty Co. (1903) 89 App. Div. 3, 85 N. Y. Supp. 282. But a state court of general original jurisdiction will also have jurisdiction of an action on the bond of a trustee in bankruptcy. Alexander v. Union Surety & Guaranty Co. (1903) 89 App. Div. 3, 85 N. Y. Supp. 282.

§ 9635. (Act July 1, 1898, c. 541, § 51.) Duties of clerks.

Duties of Clerks.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition. (30 Stat. 558, 559.)

Notes of Decisions

1. Deposit of filing fees.—The deposit with the clerk of the fees prescribed by this section on the part of a voluntary bankrupt not excused on the ground of poverty is a condition precedent to the filing of the petition; but if the petition is placed on file and an adjudication made without payment of the fees, the objection may be raised on the bankrupt's application for discharge, and action on such application will be stayed until the filing fees are paid. In re Barden (D. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31.

When the petition of a proposed voluntary bankrupt is accompanied by an affidavit stating that he has not and cannot obtain the money with which to pay the filing fees, the clerk will file the petition and docket the case without exacting the deposit of such fees. In re Fees Payable by Voluntary Bankrupts (D. C. 1899) 95 Fed. 120.

An affidavit by a voluntary bankrupt that he is without, and cannot obtain, the money with which to pay the filing fees is prima facie evidence of the facts stated. In re Levy (D. C. 1900) 101 Fed. 247. But it is not conclusive, and if circumstances appear casting doubts on the truth of the affidavit, the case may be sent to the referee to investigate and report the facts. In re Collier (D. C. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182. And the petitioner must then support his allegation of poverty by convincing evidence. In re Williams, 2 Nat. Bankr. News, 206. As to the fact of his actual inability to procure the money with which to pay the fees, he is not required to solicit gifts or loans from his friends for that purpose, and he is not guilty of a false oath in making affidavit that he "cannot obtain" the requisite sum, although it appears that friends would have advanced him the amount if requested. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; In re Mason (D. C. 1910) 181 Fed. 899, 25 Am. Bankr. Rep. 73. But compare In re Hines (D. C. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27. But he cannot hold out property which is exempt under the laws of the state and still make the poverty affidavit. The provision of the bankruptcy act giving bankrupts the benefit of exemptions allowed by state law was not intended to exonerate them from payment of the filing fees on their voluntary petitions. Such a bankrupt is excused from payment of the fees only in case of absolute inability to pay them; and such inability does not exist so long as he has money or property sufficient for the purpose, although it is exempt. In re Mason (D. C. 1910) 181 Fed. 899, 25 Am. Bankr. Rep. 73; In re Hines (D. C. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27; In re Bean (D. C. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; In re Collier (D. C. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182. CONTRA, see Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. A voluntary bankrupt whose petition is accompanied by a poverty affidavit cannot subsequently be required to pay the filing fees out of money earned by him after the filing of the petition. Sellers v. Bell (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. Under General Order No.

35 (§ 9614, ante), an order for the payment out of the estate of the filing fees, or an order to the bankrupt to pay them, can be made only by the judge, not by the referee. In re Plimpton (D. C. 1900) 103 Fed. 775, 4 Am. Bankr. Rep. 614.

General Order No. 10 (§ 9614, ante), providing that clerks and other officers, before incurring expenses of certain kinds, may require the bankrupt or other person in whose behalf the duty is to be performed to furnish indemnity for such expenses, and that money advanced by the bankrupt or other person for this purpose shall be repaid him out of the estate, does not apply to the filing fees prescribed by this section, and such fees, paid by a voluntary bankrupt on the filing of his petition, are not to be repaid to him. In re Matthews (D. C. 1899) 97 Fed. 772, 3 Am. Bankr. Rep. 265.

2. —— In partnership cases.—Upon the voluntary application of a partnership for the benefit of the act, only one petition need be filed, and all that is done thereupon constitutes one proceeding, although it involves granting a discharge to each of the partners, and only one deposit of the filing fee is required; it cannot be demanded of the partners, as a prerequisite to discharging them, that they should each separately deposit a like fee. In re Langslow (D. C. 1899) 98 Fed. 869, 1 Am. Bankr. Rep. 258; In re Gay (D. C. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529. But compare In re Farley (D. C. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266. But where a partnership files a voluntary petition for the adjudication in bankruptcy of the firm as suc also separate petitions for the adj tion of the several partners, eac tion, with the accompanying sche constitutes a separate and d "case," within the meaning of the ute, and a deposit of the sta filing fees must be made, not on the partnership, but also for each ber of the firm who seeks an adj tion. In re Barden (D. C. 1900 Fed. 553, 4 Am. Bankr. Rep. 31.

3. —— By petitioning credit When the filing fees are deposit the petitioning creditors in an in tary case, or by their attorney them, they are entitled to hav amount refunded to them out estate in bankruptcy. In re Silv (D. C. 1899) 97 Fed. 325, 3 Am. Rep. 227; In re J. W. Harrison cantile Co. (D. C. 1899) 95 Fed 2 Am. Bankr. Rep. 419.

4. Clerk's docket.—The clerk's d required to be kept by General No. 1 (§ 9614, ante), should sho only the fact and the date of the of each petition in bankruptcy also that it was filed in duplica required by the statute, if thi done. In re Stevenson (D. C. 189 Fed. 110, 2 Am. Bankr. Rep. 6 re Dupree (D. C. 1899) 97 Fed. 2

As a court of bankruptcy is a open for the transaction of bu and has no regular terms, it i necessary for the clerk to ma entry showing the opening and of the court on days when he proceedings in bankruptcy cases. ley v. U. S. (1909) 45 Ct. Cl. 36

§ 9636. (Act July 1, 1898, c. 541, § 52.) Compensation of c and marshals.

Compensation of Clerks and Marshals.—a Clerks shall re tively receive as full compensation for their service to each es a filing fee of ten dollars, except when a fee is not required a voluntary bankrupt.

b Marshals shall respectively receive from the estate wher adjudication in bankruptcy is made, except as herein otherwise vided, for the performance of their services in proceedings in b ruptcy, the same fees, and account for them in the same way, as are entitled to receive for the performance of the same or si services in other cases in accordance with laws now in force, or as may be hereafter enacted, fixing the compensation of mars (30 Stat. 559.)

Notes of Decisions

1. Fees of clerks.—Where the local rule of court provides that the notice of final meeting shall be issued by the clerk in accordance with Official Form No. 57 (§ 9614, ante), which includes the petition for the bankrupt's discharge, the order of notice, jurat, etc., it is held that the clerk is not entitled to charge a fee of 25 cents for each notice sent to creditors, on petition for discharge, but is only entitled to the actual items of expense thereon for postage, stationery, and clerical a ance. In re Dunn Hardware & I ture Co. (D. C. 1905) 134 Fed. 9 Am. Bankr. Rep. 186.

Sections 1383, 1405, ante, hel to entitle clerks of federal cou Washington to fees for sending ou ies of the petition and notice of a plication for a bankrupt's discl he being entitled only to charge sary expense therefor under s 9642, post, and General Bankrupt

der 35 (ante, § 9614). In re Loughney (D. C. 1914) 218 Fed. 980.

A clerk of a federal district and circuit court is entitled to his statutory per diem compensation for days on which he refers to the referee in bankruptcy voluntary petitions in bankruptcy filed during the absence of the judge from the district, though without written orders to open the court for that or any other purpose. U. S. v. Marvin (1909) 29 Sup. Ct. 297, 298, 212 U. S. 275, 53 L. Ed. 510.

If a per diem can be allowed a clerk in equity and admiralty cases when a judge is not present, it should likewise be allowed in a bankruptcy court. Owen v. U. S. (1906) 41 Ct. Cl. 69.

Section 1657, ante, which abolishes the clerk's supervision fee where it is sought to review a final order or decree on writ of error or appeal, held to apply to a petition to revise in bankruptcy proceedings. In re Burr Mfg. Co. (C. C. A. 1914) 215 Fed. 898.

2. Accounts and claims of marshals.—Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of such vouchers. In re Comstock (D. C. 1874) 9 N. B. R. 88, Fed. Cas. No. 3,075. The claim of the marshal for expenditures must be supported by his own oath as to their amount and the necessity for them. In re Hellmar (D. C. 1877) Fed. Cas. No. 6,342. Such affidavit is not conclusive so as to preclude any further inquiry into the items charged. In re Pace (D. C. 1878) Fed. Cas. No. 10,640.

§ 9637. (Act July 1, 1898, c. 541, § 53.) Duties of Attorney-General.

Duties of Attorney-General.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important. (30 Stat. 559.)

§ 9638. (Act July 1, 1898, c. 541, § 54.) Statistics of bankruptcy proceedings.

Statistics of Bankruptcy Proceedings.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so. (30 Stat. 559.)

CHAPTER SIX

Creditors

Sec.
9639. Meetings of creditors.
9640. Voters at meetings of creditors.
9641. Proof and allowance of claims.
9642. Notices to creditors.
9643. Who may file and dismiss petitions.
9644. Preferred creditors.

§ 9639. (Act July 1, 1898, c. 541, § 55.) Meetings of creditors.

Meetings of Creditors.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow

the claims of creditors there presented, and may publicly examin bankrupt or cause him to be examined at the instance of any itor.

c The creditors shall at each meeting take such steps as may be tinent and necessary for the promotion of the best interests o estate and the enforcement of this Act.

d A meeting of creditors, subsequent to the first one, may be at any time and place when all of the creditors who have secure allowance of their claims sign a written consent to hold a meeti such time and place.

e The court shall call a meeting of creditors whenever one-four more in number of those who have proven their claims shall written request to that effect; if such request is signed by a maj of such creditors, which number represents a majority in amou such claims, and contains a request for such meeting to be held designated place, the court shall call such meeting at such within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a meeting of creditors shall be ordered. (30 Stat. 559, 560.)

Notes of Decisions

1. Meetings of creditors.—A creditors' meeting should not be held on a public holiday, but the fact that it was so held will not be cause for setting aside the proceedings taken at that meeting where it appears that no one was injured thereby. In re McGlynn (D. C. 1872) Fed. Cas. No. 8,804.

In the absence of any specific provisions of law, the conduct of a creditors' meeting is properly guided by the rules and usages of parliamentary bodies. In re Merchants' Ins. Co. (D. C. 1874) Fed. Cas. No. 9,442.

Where objections to a claim are filed on the ground that the claimant has received a preference, he should not be permitted to take any part in the creditors' meeting until the matter has been heard and determined. In re Columbia Iron Works (D. C. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

If there were irregularities in the calling of the first meeting or in the notices to creditors, or if, for any other cause affecting the common interest of all in the estate, it seems to the referee proper to adjourn the meeting to a future fixed day, he has power to do so. In re Cheney (D. C. 1879) 19 N. B. R. 16, Fed. Cas. No. 2,637; In re Devlin (D. C. 1867) Fed. Cas. No. 3,841. But in order to take this action, the referee must himself be present at the meeting. If he is prevented from attending, he cannot adjourn the meeting by letter. In that case, the meeting wholly fails and a new meeting must be called. In re Dickinson (D. C. 1878) 18 N. B. R. 514, Fed. Cas. No. 3,895.

2. Representation by attorney or proxy.—Where a letter of attorney, to represent and act for the principal at a creditors' meeting in bankruptcy, is given to two or more persons jointly, its authority cannot be exercised by one of the attorneys alone. In re Phelps (D. C. 1868) 1 N. B. R Fed. Cas. No. 11,071. If one joint proxies is disqualified, becau is the bankrupt's attorney, neit them can vote under the power torney at a creditors' meeting. Columbia Iron Works (D. C. 190 Fed. 234, 14 Am. Bankr. Rep. 5

A letter of attorney merely e ering the agent to attend and v meetings of creditors will not a ize him to file opposition to the rupt's application for discharge. itors v. Williams (C. C. 1870) 4 R. 579, Fed. Cas. No. 3,379.

Where an attorney sought to sent certain creditors upon an ap ment by their general attorney was himself constituted and ap prior to the passage of the bank law, by a power of attorney au ing him to sign the creditors' to any paper writing, proper or sary to collect or receive debt with power of substitution, held the authority of the special at was sufficient. In re Knoepfel 1867) Fed. Cas. No. 7,892.

An attorney at law, who is a ber of the bar of the particular need not produce a written a knowledged authority in order to sent his client at creditors' meeti bankruptcy, in respect to such a fall within the ordinary scope of torney's duties and employment. Scott (D. C. 1876) 15 N. B. R. 7 Cas. No. 12,519; In re Hill 1867) Fed. Cas. No. 6,481.

3. Participation of creditors i ceedings.—The rights of credito parties to the proceeding in bankr arise and accrue only upon pr their claims. In re Jones (D. C. 2 N. B. R. 59, Fed. Cas. No. 7,4 re Brisco (D. C. 1869) 2 N. B. Fed. Cas. No. 1,886.

A nonresident creditor subject

self to the jurisdiction of the court by proving his debt, and is thereafter bound to obey all the orders of the court touching his claim, and the court can, in case he disobeys its orders, deprive him of all the benefit of the act, and can reject and expunge his claim. In re Kyler (D. C. 1868) Fed. Cas. No. 7,956.

If no trustee has yet been appointed, any creditor may petition the court to enjoin another creditor from proceeding with a pending suit, or enforcing a voidable lien or attachment against the bankrupt, and injunction may issue on such petition. In re Carrier (D. C. 1892) 51 Fed. 900.

Any creditor may object to the allowance of another creditor's claim, and if it is allowed, the objecting creditor may move the court to direct the trustee to appeal, or to allow him to appeal in the name of the trustee. Chatfield v. O'Dwyer (C. C. A. 1900) 101 Fed. 797, 4 Am. Bankr. Rep. 313.

If the trustee sells property of the bankrupt for a grossly inadequate price, himself discouraging competition, and refuses to have the sale set aside, a dissatisfied creditor may take action in that behalf. In re Groves (1900) 2 Nat. Bankr. News, 466.

While the trustee is the one in whom the title to the bankrupt's property is vested, and therefore the proper person to bring all necessary actions for its recovery, yet the creditors are interested in having the assets brought in and realized upon, and the trustee cannot complain of the institution by creditors of suits to recover assets which he, the trustee, might intentionally or unintentionally permit to escape. Davis v. W. F. Vandiver & Co. (1905) 143 Ala. 202, 38 South. 850.

4. Furnishing indemnity for expenses.—Where creditors of an estate desire the trustee to bring suit to set aside alleged preferences or fraudulent conveyances, or otherwise to recover property alleged to belong to the bankrupt, they may be required to guaranty to the trustee all the probable costs and expenses likely to be incurred in the prosecution of such suit, if there are no funds of the estate to pay such expenses, or if the money in hand is not more than enough for the creditors having priority, or if the wish of those creditors is opposed by the trustee himself or by a considerable body of other creditors. In re Barrett (D. C. 1904) 132 Fed. 362, 12 Am. Bankr. Rep. 626; In re Barnes (D. C. 1883) 18 Fed. 158; In re Griffith, 1 Nat. Bankr. News, 546; In re Hughes (D. C. 1868) 1 N. B. R. 226, Fed. Cas. No. 6,841; In re Sawyer (D. C. 1877) 16 N. B. R. 460, Fed. Cas. No. 12,396; In re McNamara (1900) 2 Nat. Bankr. News, 341. But though a trustee in bankruptcy is not required to litigate every question called to his notice by creditors, however frivolous or apparently lacking in support, yet he cannot, by requiring indemnity in every instance against costs and expenses, cast the risk of a controversy respecting alleged preferences, etc., on the particular creditor requesting him to undertake it. In re Baird (D. C. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 448.

§ 9640. (Act July 1, 1898, c. 541, § 56.) Voters at meetings of creditors.

Voters at Meetings of Creditors.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess. (30 Stat. 560.)

Notes of Decisions

I. General Creditors

1. Right to vote in general.
2. Representation by attorney.
3. Controlling actions of trustee.

II. Secured Creditors

4. Who are secured creditors.
5. Mortgagees.
6. Judgment creditors.
7. Pledgees, assignees, and holders of collateral.
8. Holders of notes.
9. Effect of additional security or claim against third person.
10. Voting at creditors' meetings.

I. GENERAL CREDITORS

1. Right to vote in general.—A creditor who holds a voidable preference has a provable claim, in the sense that formal written proof of it may be made and filed, but it is a claim on which he cannot be allowed to vote until he has surrendered his preference. Stevens v. Nave-McCord Mercantile Co. (C. C. A. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

Where, after a decision by the referee between two parties as to the right to vote upon a claim, the person aggrieved

allows the vote to be taken without further objection, he cannot again reopen the question. In re Spencer (C. C. 1878) 18 N. B. R. 199, Fed. Cas. No. 13,220.

Claims which have been proved, and then sold and assigned before the election of a trustee, must be voted upon in such election by the actual owner at the time and not by the original creditor. In re Frank (D. C. 1871) Fed. Cas. No. 5,050.

2. Representation by attorney.—An attorney at law, retained generally to represent a creditor in bankruptcy proceedings, cannot cast the vote of such creditor in the election of a trustee at a creditors' meeting, without showing an express authorization thereto as attorney in fact. In re Blankfein (D. C. 1899) 97 Fed. 191, 3 Am. Bankr. Rep. 165; In re Christley (D. C. 1874) Fed. Cas. No. 2,702.

3. Controlling actions of trustee.—The provision of this section that "creditors shall pass upon matters submitted to them at meetings by a majority vote" does not vest such majority at a special meeting with authority to direct the trustee to compromise and discontinue a pending suit. In re Meadows, Williams & Co. (D. C. 1910) 181 Fed. 911, 25 Am. Bankr. Rep. 100.

While it is not necessarily the duty of a trustee in bankruptcy to follow the wishes of a majority in number and amount of the creditors in prosecuting or defending suits, yet when his judgment concurs with that of a great majority of the creditors who speak, all having the opportunity to speak, that it would be inadvisable to defend a pending suit against the bankrupt, and not for the best interest of the estate, he is justified in refusing to defend, and it is not error for the referee, on application of the minority, to refuse to direct him to do so, unless such creditors will assume responsibility for the expense. In re Kearney (D. C. 1910) 184 Fed. 190, 25 Am. Bankr. Rep. 757.

II. SECURED CREDITORS

4. Who are secured creditors.—Under § 9585, cl. 23, ante, defining a secured creditor as one "who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets," the creditor must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security. Gorman v. Wright (1905) 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135. Under the former bankruptcy law it was held that a creditor was not to be treated as "secured" because a surety or guarantor of the debt was protected by a lien on the bankrupt's property. In re (D. C. 1877) 15 N. B. R. 257, Fe No. 8,429.

To constitute a lien or security in the meaning of the act, there be a security additional to the pe obligation of the debtor. Shoem National Mechanics' Bank (C. C. Fed. Cas. No. 12,801.

A banker has no lien upon the eys of a depositor for any se debt which the depositor may c him, and the mere fact that he such moneys on deposit at the t the bankruptcy does not make secured creditor. In re Warne C. 1871) 5 N. B. R. 414, Fed No. 17,177; In re Weeks (D. C. Fed. Cas. No. 17,349.

Where a firm is dissolved and the partners assumes payment the debts, this makes him a pri debtor and the other partner a s but it does not follow that a cr of the partnership becomes a s creditor. Schmitt v. Greenberg 58 Misc. Rep. 570, 109 N. Y. 881.

Where the bankrupt had b goods on credit, and payment guaranteed to the seller by a thir son, the creditor is not "secured less the guarantor has taken se from the bankrupt. In re Anc (D. C. 1876) Fed. Cas. No. 350.

A mere promise by a subse purchaser of property subject to chanic's lien, in consideration o bearance, to pay the demand se by the lien, is not "collateral s ty" and does not discharge the Mervin v. Sherman (1859) 9 Iowa

It is necessary that the se should attach to the bankrupt's " erty" or "assets"; that is, there be a lien upon property which otherwise go into the general fu be available for the claims of g al creditors. In re Spades (D. C. Fed. Cas. No. 13,196. And a cr holding security on property never belonged to the bankrupt prove his whole debt without firs posing of the security. In re Du son (D. C. 1868) 12 N. B. R. Fed. Cas. No. 4,157. A bank h the note of a third person, secur a pledge of stock which does no long to the bankrupt, the latter liable thereon as an indorser, prove its claim against the bank estate without surrendering the In re Thompson (D. C. 1913) 208 207.

The term "security," as used i bankruptcy act, will include ever terest or right attached to or whi a charge upon specific property which entitles the owner thereof paid out of specific property, wh legal or equitable, absolute or co gent. Storm v. Waddell (N. Y. 1 2 Sandf. Ch. 494. Where the by

of a corporation provide that it shall have a lien on the stock of any shareholder for his indebtedness to the corporation, and an indebted stockholder becomes bankrupt, the corporation is a secured creditor. In re Morrison (D. C. 1873) 10 N. B. R. 105, Fed. Cas. No. 9,839. Taxes, particularly those assessed by municipalities, may or may not attach to real property as liens, according to the local law, and upon this will depend the position of the state or municipality as a secured or unsecured creditor. In re Harvey (D. C. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567.

When property or securities are delivered to a creditor, it may be the intention and understanding of the parties that a payment and discharge of the debt shall be effected, rather than the creation of a lien, and in the former case, the creditor cannot present himself in the guise of a secured creditor, though he may have been disappointed in the value of the property turned over to him. In re Black Diamond Copper Min. Co. (1908) 11 Ariz. 415, 95 Pac. 117.

It is not permissible for the bankrupt himself, after receiving his discharge, to purchase and take an assignment to himself of debts against his own estate in bankruptcy secured by liens, and collect the same for his own use out of assets in the hands of his trustee, to the exclusion of subsequent lien holders. His purchase of his own debt operates to extinguish the debt, and this rule is not affected by the fact of his having been discharged, because the discharge does not destroy or extinguish the debt, though it bars the remedy for its recovery. In re Burton (D. C. 1886) 29 Fed. 637.

5. **Mortgagees.**—The holder of a mortgage on real or personal property of a bankrupt is a secured creditor within the meaning of this section. Krugmeier v. Hackett (1907) 134 Wis. 57, 113 N. W. 1103. Bondholders of a bankrupt corporation are not precluded from proving their debts as secured because of their omission to record the deed of trust securing the bonds. In re Charles Town Light & Power Co. (D. C. 1912) 199 Fed. 846, 29 Am. Bankr. Rep. 721. The holder of a mortgage on the bankrupt's property is a secured creditor although the mortgage was not made by the bankrupt himself, but by his predecessor in the title. McKay v. Hamill (C. C. A. 1911) 185 Fed. 11, 26 Am. Bankr. Rep. 164. See In re Altenheim (D. C. 1867) 1 N. B. R. 85, Fed. Cas. No. 268. It is immaterial that the mortgage covers after-acquired property as well as that in possession at the time. Barnard v. Norwich & W. R. Co. (C. C. 1876) 14 N. B. R. 469, Fed. Cas. No. 1,007. See In re Baker (D. C. 1875) Fed. Cas. No. 762. The joint note of a husband and wife secured by a deed of trust on the wife's property should be allowed as a secured claim against the estate of the husband in bankruptcy, although the wife may have died leaving heirs. In re Hartel (D. C. 1873) 7 N. B. R. 559, Fed. Cas. No. 6,157.

A creditor holding a mortgage on exempt property of the bankrupt is not entitled to receive a dividend on his entire claim, and resort to the security only to satisfy an unpaid balance. In re Lantzenheimer (D. C. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720. One holding a mortgage on the exempt homestead of the bankrupt is a secured creditor. Fenley v. Poor (1903) 121 Fed. 739, 58 C. C. A. 21, 10 Am. Bankr. Rep. 377. CONTRA, In re Bailey (D. C. 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201.

An equitable lien on land, in the nature of a mortgage, is a security within the meaning of the act. In re Peasley (D. C. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496. Where money is loaned or advanced under an agreement that it is to be used to discharge an incumbrance on the borrower's property, and the lender is to have a first lien to secure its repayment, and the money is so used, the lender may be subrogated to the rights of the incumbrancer whose debt was paid, against the borrower's trustee in bankruptcy. In re Lee (C. C. A. 1910) 182 Fed. 579, 25 Am. Bankr. Rep. 436; Dewey v. Kelton (D. C. 1878) 18 N. B. R. 217, Fed. Cas. No. 3,850.

6. **Judgment creditors.**—Ownership of a judgment against the bankrupt will constitute the creditor a "secured creditor," within the meaning of the act, provided there is property of the bankrupt upon which the judgment may attach, or has attached, as a lien. In re Cale (D. C. 1910) 182 Fed. 439, 25 Am. Bankr. Rep. 367; Guardians of Poor v. Ovens, L. R. 8 Ex. 37. See American Woolen Co. v. Maaget (1912) 86 Conn. 234, 85 Atl. 583. But not so if the law of the state confines the lien of judgments to real property and the estate of the particular bankrupt consists wholly of personalty. In re Erwin (D. C. 1870) 3 N. B. R. 580, Fed. Cas. No. 4,524.

Where the creditor claims the rights of a secured creditor by virtue of an alleged judgment lien on the property of the estate, the burden is on him to show that he has done everything required by statute to make his judgment attach as a lien. In re Wood (D. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695. Where, by the local law, a lien is acquired on property only by the levy of an execution upon it, the fact that a creditor has procured and docketed a judgment against the bankrupt, or has caused a writ to be issued, thereon, will not make him a secured

creditor within the meaning of the bankruptcy law. In re McIntosh (D. C. 1869) 2 N. B. R. 506, Fed. Cas. No. 8,826. Where a judgment recovered before a justice of the peace is not a lien on land until docketed in the superior court, this step must have been taken before the bankruptcy, or the judgment will not constitute a security within the meaning of the act. In re Wood (D. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695. And the same is true of a judgment which has been allowed to become dormant, unless the statute of limitations is applicable only in favor of subsequent purchasers and judgment creditors, in which case, not being available in favor of the judgment debtor, it cannot be set up in favor of his trustee in bankruptcy. In re Huddell (C. C. 1891) 47 Fed. 207. It is otherwise if the dormant judgment has been duly revived. Appeal of Bucknor (Pa. 1886) 4 Atl. 738.

A judgment creditor does not acquire a lien, such as to make him a secured creditor, by the mere commencement of proceedings supplementary to execution, for, until the appointment of a receiver, his right is not a lien. In re Wheeler (D. C. 1878) 18 N. B. R. 385, Fed. Cas. No. 17,490. A judgment creditor who attacks an alleged fraudulent conveyance, but does not procure a decree setting it aside until after the bankruptcy of the debtor, is not a secured creditor within this section. In re Estes (C. C. 1880) 5 Fed. 60.

7. Pledgees, assignees, and holders of collateral.—One holding specific personal property in pledge, as a means of enforcing the payment of a debt, is a secured creditor within this section. In re Peebles (D. C. 1875) Fed. Cas. No. 10,902. One is also a secured creditor whose claim is secured by the pledge of bonds, stocks, mortgages, or other collateral security. In re McVay (D. C. 1882) 13 Fed. 443; Dayton Nat. Bank v. Merchants' Nat. Bank (1881) 37 Ohio St. 208; Mitchell v. Roberts (C. C. 1883) 17 Fed. 776; Dumont v. Fry (C. C. 1882) 14 Fed. 293. One who holds a policy of insurance on the life of his debtor as collateral security for the debt, is a secured creditor. Burlingham v. Crouse (C. C. A. 1910) 181 Fed. 479, 24 Am. Bankr. Rep. 632; In re Mertens (D. C. 1905) 134 Fed. 101, 14 Am. Bankr. Rep. 226; In re Newland (D. C. 1873) 7 N. B. R. 477, Fed. Cas. No. 10,170; In re Shoenberger (D. C. 1879) Fed. Cas. No. 12,-802. An assignment of a lease running to the debtor will constitute the creditor a secured creditor. Fitch v. Richardson (1906) 147 Fed. 197, 77 C. C. A. 423, 16 Am. Bankr. Rep. 835. And so of the transfer of an order drawn on a third person. In re Hines (D. C. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 495. Or an assignment of money to become due under a contract. In re De Long Furniture Co. (1 1911) 188 Fed. 686, 26 Am. B Rep. 469. But the holder of a houseman's receipt which is att to a note executed to the wareh man, as collateral security, is not cured creditor in the bankruptcy o warehouseman. State v. Federal ion Surety Co. (1911) 156 Mo. 603, 137 S. W. 613.

The holder of a protested drawn by a bankrupt bank, is no titled to preference over other cred of the bank, in the character of cured creditor, merely because drawee, which was another bank, funds of the drawer in its hands a time it refused to accept the Bank of Commerce v. Russell (C 1873) Fed. Cas. No. 884.

8. Holders of notes.—A promis note is not a security for the pay of a debt, within the meaning of section. United States Trust C Brady (N. Y. 1855) 20 Barb. 119. indorsement of the bankrupt's not a third person does not make the er a secured creditor, unless the in er has security on property of bankrupt. In re Broich (D. C. 1 Fed. Cas. No. 1,921.

A creditor of a bankrupt who ho note containing a waiver of exemp is in the position of a secured cre the exempt property being in effe security for his debt. In re Mer (D. C. 1906) 144 Fed. 230, 16 Bankr. Rep. 331.

9. Effect of additional security claim against third person.—If a itor of the bankrupt holds securi the form of an obligation of a person, but the third person does hold counter security, the creditor prove his debt in the bankruptcy out surrendering the security, and notwithstanding such proof, proce enforce his security against such person, provided, however, that he not take, under the bankruptcy the security, more than the full am of his debt. In re Babcock (C 1844) Fed. Cas. No. 696; In re Th as (D. C. 1878) 17 N. B. R. 54, Cas. No. 13,886; In re Beaver Knit Mills (1907) 154 Fed. 320, 83 C. C 240, 18 Am. Bankr. Rep. 528; I Otto F. Lange Co. (D. C. 1909) Fed. 114, 22 Am. Bankr. Rep. 414 re Kinne (D. C. 1880) 5 Fed. 59 re Sauthoff (D. C. 1876) 14 N. B 364, Fed. Cas. No. 12,379; In re M (1907) 14 N. Mex. 246, 89 Pac. The enforcement of the security in case does not diminish the estate o bankrupt to which the general or secured creditors must look for s faction, and moreover, the court bankruptcy would have no authorit interfere between the creditor and third person, the latter being a st ger to the bankruptcy proceedings. re Thomas (D. C. 1878) Fed. Cas.

13,886. So, if a judgment is recovered against two codefendants, and execution thereon is levied on the property of one of them, and the other is adjudged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured. In re Headley (D. C. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272. And a creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners, upon his claim against the partnership estate. In re Mertens (1906) 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362. The rule is the same where the creditor is additionally secured by the undertaking of a third person to guaranty the performance of the bankrupt's contract or to be surety for him. The creditor loses none of his rights or remedies against the surety by proving his debt in the bankruptcy proceedings and participating in the distribution of the estate. In re Levy (D. C. 1868) 1 N. B. R. 327, Fed. Cas. No. 8,297; Gorman v. Wright (1905) 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135; Vette v. J. S. Merrell Drug Co. (1909) 137 Mo. App. 229, 117 S. W. 666. And the surety upon a promissory note is liable in an action on the note, although the principal has been adjudged a bankrupt and the note has been filed by the payee in the bankruptcy proceedings. Gregg v. Wilson (1875) 50 Ind. 490, 15 N. B. R. 142.

Where the bankrupt was indorser on a note, and his liability has become fixed and absolute, the creditor holding the note may prove its full amount against him, notwithstanding the primary liability of the maker of the note, and even though he holds a mortgage on the latter's property, to secure it, which has not been foreclosed and which he does not surrender. In re Cram (D. C. 1867) Fed. Cas. No. 3,343; Gorman v. Wright (1905) 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135. And where both the maker and indorser of a note are in bankruptcy, the holder may prove the amount of the note as a claim against each, and receive dividends from both estates, up to the full amount of his debt. National Mt. Wollaston Bank v. Porter (1877) 122 Mass. 308. But a creditor holding a note of the bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him. First Nat. Bank v. Eason (1906) 149 Fed. 204, 79 C. C. A. 162, 17 Am. Bankr. Rep. 593.

Where a mortgage was made by the bankrupt to secure the mortgagee as a surety for him, it was held that the mortgagee was not entitled to be paid personally the amounts of the debts for which he was surety out of the bankrupt's estate, but was entitled to have such debts paid to the creditors out of the proceeds of the mortgaged property, and to be released from his liability as surety. In re Randolph (D. C. 1911) 187 Fed. 186, 26 Am. Bankr. Rep. 623.

10. Voting at creditors' meetings.—Where a partnership creditor holds securities on both the property of the partnership and the individual property of one of the partners (the firm and all its members being in bankruptcy together), the value of the security on the individual property of the partner need not be deducted in ascertaining the voting power of the creditor, but only the value of the security on the firm property. In re Coe, Powers & Co., 1 Nat. Bankr. News, 294. But a mortgage creditor who, after the adjudication, sells the mortgaged premises, and himself becomes the purchaser, cannot vote on the deficiency as an unsecured creditor. In re Hunt (D. C. 1878) 17 N. B. R. 205, Fed. Cas. No. 6,884.

§ 9641. (Act July 1, 1898, c. 541, § 57, as amended, Act Feb. 5, 1903, c. 487, § 12.) Proof and allowance of claims.

Proof and Allowance of Claims.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upo ceipt by or upon presentation to the court, unless objection to allowance shall be made by parties in interest, or their consider be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority ma allowed to enable such creditors to participate in the proceedin creditors' meetings held prior to the determination of the valu their securities or priorities, but shall be allowed for such only as to the courts seem to be owing over and above the val their securities or priorities.

f Objections to claims shall be heard and determined as soon a convenience of the court and the best interests of the estates an claimants will permit.

g The claims of creditors who have received preferences, able under section sixty, subdivision b, or to whom conveyances, t fers, assignments, or incumbrances, void or voidable under se sixty-seven, subdivision e, have been made or given, shall not b lowed unless such creditors shall surrender such preferences, veyances, transfers, assignments, or incumbrances.

h The value of securities held by secured creditors shall be d mined by converting the same into money according to the ter the agreement pursuant to which such securities were deliver such creditors or by such creditors and the trustee, by agree arbitration, compromise, or litigation, as the court may direct the amount of such value shall be credited upon such claims, a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt est secured by the individual undertaking of any person, fails to p such claim, such person may do so in the creditor's name, and discharge such undertaking in whole or in part he shall be subro to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a distri a municipality as a penalty or forfeiture shall not be allowed, e for the amount of the pecuniary loss sustained by the act, transa or proceeding out of which the penalty or forfeiture arose, reasonable and actual costs occasioned thereby and such intere may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for and reallowed or rejected in whole or in part, according to the ties of the case, before but not after the estate has been closed

l Whenever a claim shall have been reconsidered and rejecte whole or in part, upon which a dividend has been paid, the tr may recover from the creditor the amount of the dividend rec upon the claim if rejected in whole, or the proportional part th if rejected only in part.

m The claim of any estate which is being administered in b ruptcy against any like estate may be proved by the trustee ar lowed by the court in the same manner and upon like terms a claims of other creditors.

n Claims shall not be proved against a bankrupt estate subse to one year after the adjudication; or if they are liquidate litigation and the final judgment therein is rendered within t days before or after the expiration of such time, then within days after the rendition of such judgment: Provided, That the of infants and insane persons without guardians, without noti the proceedings, may continue six months longer. (30 Stat. 32 Stat. 799.)

In this section, as originally enacted, subdivision g thereof was as fo "g The claims of creditors who have received preferences shall not be a unless such creditors shall surrender their preferences."

Said subdivision g was amended by Act Feb. 5, 1903, c. 487, § 12, cited above, to read as set forth here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Notes of Decisions

1. Necessity of proof of claims.
2. Effect of proof.
3. —— Rights of action.
4. Time of making proof.
5. —— Claims liquidated by litigation.
6. —— Allowance of proof after expiration of year.
7. —— Proof after declaration of dividend.
8. Persons authorized to prove.
9. Proof by agent or attorney.
10. Proof by assignee of claim.
11. Proof by secured creditors.
12. —— Waiver of security and proof of debt.
13. —— Amendment of proof to claim security.
14. —— Settling value of security.
15. —— Claim for deficiency.
16. —— Claim for interest and costs.
17. —— Right to rely on security and disregard bankruptcy proceedings.
18. Form and sufficiency of deposition.
19. —— Claims founded on written instruments.
20. Acknowledgment of deposition.
21. Receiving and filing proofs.
22. Allowance of proved claims.
23. —— Allowance as adjudication.
24. Postponement of proofs.
25. Objections to claims.
26. —— Manner and form of objections.
27. —— Grounds of objection.
28. —— Contest and determination.
29. —— Burden of proof and evidence.
30. Amendment of proofs.
31. —— After expiration of year.
32. —— By secured creditors.
33. Withdrawal of proofs.
34. Re-examination of claims and expunging.
35. —— Parties who may apply.
36. —— Grounds for expunging claim.
37. —— Proceedings and evidence.
38. Review of referee's proceedings by judge.

1. Necessity of proof of claims.—In general, a creditor is not compelled to present his claim, and his failure to do so may merely deprive him of the right to share in the distribution and bar any further relief against the bankrupt. In re Kligerman (D. C. 1915) 219 Fed. 758. Where property of a bankrupt, on which is a mortgage given by him, is sold in the bankruptcy proceedings free of the incumbrance, the mortgagee, who intervenes merely to subject the proceeds to part payment of his debt, is not bound to prove his claim. In re Goldsmith (D. C. 1902) 118 Fed. 763, 9 Am. Bankr. Rep. 419. And a creditor may procure an order for the examination of the bankrupt, without first proving his claim, when he desires by this means to ascertain whether it will be worth while to prove his claim. In re Jehu (D. C. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re Walker (D. C. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35. But if he wishes to participate in the distribution of the bankrupt's estate, through and by means of the bankruptcy proceedings, it is necessary for him to establish his status and the validity and amount of his claim by proving it as the law directs. In re Dunn Hardware & Furniture Co. (D. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147. Where all things necessary to bring a proposed composition before the court for confirmation have been done, the court cannot as a matter of law refuse confirmation on the objection of creditors whose claims, though mentioned in the schedules, have not been proved or allowed. In re French (D. C. 1909) 181 Fed. 583.

Since taxes assessed against the property of a bankrupt during the administration of his estate are matters of public record, they need not be proved as a claim against the bankrupt's estate in order to be allowed. In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675. Where a city has a lien for municipal taxes only on the property assessed, it has no right to share in the general assets of a delinquent taxpayer who is a bankrupt, and need not prove its claim in order to preserve its lien. In re Harvey (D. C. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567.

The United States is not bound to prove a debt or claim in bankruptcy, as a condition to the priority of payment accorded to it by the statute. In re Stoever (D. C. 1904) 127 Fed. 394; U. S. v. Lewis (C. C. 1875) Fed. Cas. No. 15,595; In re Bousfield & Poole Mfg. Co. (D. C. 1878) Fed. Cas. No. 1,704.

A landlord, having a lien or charge for the rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which has not been adjudicated, must, in order to preserve his priority, establish his claim by proof, the same as other creditors. In re Hayward (D. C. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 264.

The lien of a judgment is not lost by failure to prove the claim in bankruptcy. Cottrell v. Pierson (C. C. 1881) 12 Fed. 805. But the judgment creditor cannot share in the distribution of the estate without proving his claim. In re Rosenberg (D. C. 1906) 144 Fed. 442, 16 Am. Bankr. Rep. 465. Where the defendant in a judgment is adjudicated a bankrupt, and the plaintiff with knowledge of the bankruptcy proceedings fails to schedule his judgment in such proceedings, he cannot thereafter set off his judgment against a judgment of the bankrupt recovered against him prior to the bankruptcy proceedings.

Shoemaker v. Hurwitz (1914) 56 Pa. Super. Ct. 632.

The finding, in a decree of adjudication in involuntary bankruptcy, that the petitioning creditor has a valid and provable claim to a certain amount, is not conclusive upon the trustee and creditors, so as to dispense with proof of the debt of that creditor, or to preclude questioning his right to participate in the distribution of the estate. In re Harper (D. C. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Cleveland Ins. Co. (C. C. 1884) 22 Fed. 200. And a voluntary litigation against the trustee of a claim against the estate, resulting in a judgment against the trustee, does not create a preferred debt which can be enforced directly against the estate, but its only effect is to liquidate the claim, and the judgment must be proved. In re Havens (D. C. 1910) 182 Fed. 367, 25 Am. Bankr. Rep. 116. The statement of a debt in the schedule of the bankrupt is not a proof of it; it may be stated in fraud and may not exist, or the bankrupt may have made payments upon it or have counterclaims against it. The debt must be proved by the oath of the creditor as the law directs. In re Davis (D. C. 1874) 2 N. B. R. 391, Fed. Cas. No. 3,618.

A creditor who proves his debt in bankruptcy must do so absolutely and according to the directions of the statute and the rules of the court, and will not be allowed to interpose any protest, qualification, or reservation. Dutton v. Freeman (C. C. 1842) Fed. Cas. No. 4,210.

The ordinary proceedings upon the proof and allowance of the demands presented by creditors are part of the entire proceeding in bankruptcy, and are not to be regarded as so many separate suits at law or in equity. Wiswall v. Campbell (1876) 93 U. S. 347, 23 L. Ed. 923.

2. Effect of proof.—A creditor who proves his claim against the bankrupt's estate and participates in the subsequent proceedings cannot afterwards deny the court's jurisdiction to make the adjudication of bankruptcy. Sabin v. Larkin-Green Logging Co. (D. C. 1914) 218 Fed. 984. If the creditor is a nonresident, his proving his claim amounts to an acceptance of the jurisdiction of the court over him, and his obedience to its orders in the bankruptcy proceeding may be enforced by the power of striking out his claim. In re Kyler (D. C. 1868) Fed. Cas. No. 7,956. If an alien creditor voluntarily appears and proves his claim and receives a dividend thereon, he waives his exterritorial immunity from the operation of the bankruptcy law, which otherwise would have saved his claim from the effect of the bankrupt's discharge. Clay v. Smith (1830) 3 Pet. 411, 7 L. Ed. 723.

Proof of claim establishes the status of the claimant as a creditor o bankrupt, connects him with the ceedings, and gives him the rig participate therein to the fullest e allowed to creditors. In re Smit C. 1868) Fed. Cas. No. 12,971; Baldwin (D. C. 1872) Fed. Cas 795. He may join in a call for a ing of creditors. In re Back Ba tomobile Co. (D. C. 1907) 158 Fed 19 Am. Bankr. Rep. 835. He ma charges against the trustee and as his removal. In re Roanoke Fu Co. (D. C. 1907) 152 Fed. 846, 18 Bankr. Rep. 661. The proof establ the validity and provable charact the claim and its amount, and, u an appeal or proceeding for re-e nation is successfully prosecuted, matters are res judicata in the s quent proceedings in bankruptcy the creditor's subsequent action. ford Bros. Dry Goods Co. v. (1913) 37 Okl. 616, 133 Pac. 193; Merrick (D. C. 1873) 7 N. B. R. Fed. Cas. No. 9,463.

3. —— Rights of action.—Proc claim by a creditor is not a waiv his right of action on it in an court, unless his suit is stayed o joined by the court of bankruptcy re Buchan's Soap Corp. (D. C. 169 Fed. 1017, 22 Am. Bankr. Rep. Ringenoldus v. Abresch (1903) 119 410, 96 N. W. 817. See In re Havens & Co. (D. C. 1911) 186 583; Graves v. Neosho Falls (1913) 89 Kan. 179, 131 Pac. 146. ing a claim in bankruptcy again agent, without knowledge of an u closed principal, does not preclu action against the latter. Sween Douglas Copper Co. (1912) 149 Div. 568, 134 N. Y. Supp. 247. of his claim does not preclude the itor from proceeding independ against any other person who m separately liable on the same de such as a surety. U. S. v. Schofiel (C. C. 1910) 182 Fed. 240. Or an partner in the same firm who is bankruptcy. Robinson v. First Bank (1904) 98 Tex. 184, 82 S. W And it does not waive his right t sert and enforce a lien on part property. Coles County v. Hayn Lyons (1907) 134 Ill. App. 320; ler v. Paducah Distilleries Co. (A. 1909) 168 Fed. 44, 21 Am. B Rep. 723. But see Brown v. City Bank (1911) 72 Misc. Rep. 201 N. Y. Supp. 92. Or to claim secu held as collateral. Thomas v. gart (1908) 209 U. S. 385, 28 Su 519, 52 L. Ed. 845. Or to purs independent remedy given by the law, such as the arrest of the d in case of a debt fraudulently con ed. In re Lewensohn (1900) 104 1006, 44 C. C. A. 309.

If the creditor holds a note co ing a waiver of exemptions, his pr the note as an unsecured debt i bankruptcy proceedings will not

im from proceeding in a competent ourt to subject the exempt property to he satisfaction of the demand. In re Loden (D. C. 1910) 184 Fed. 965, 25 Am. Bankr. Rep. 917; In re Meredith (D. C. 1906) 144 Fed. 230, 16 Am. Bankr. Rep. 331. See In re Strickland (D. C. 1909) 167 Fed. 867, 21 Am. Bankr. Rep. 734.

Where the claim is for goods obtained by false representations and not paid for, the creditor does not waive his right of action for damages, or for the balance of the account, by proving his debt in the bankruptcy proceedings. J. K. Orr Shoe Co. v. Upshaw & Powedge (Ga. App. 1913) 79 S. E. 362; Maxwell v. Martin (1909) 130 App. Div. 80, 114 N. Y. Supp. 349; Standard Sewing Machine Co. v. Alexander (1904) 68 S. C. 506, 47 S. E. 711. But, so far as the bankruptcy proceedings are concerned, he is put to his election either to confirm the sale and assume the position of a creditor for the price or to repudiate the sale and recover the goods; and having made his election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot afterwards withdraw his claim and demand the goods. Standard Varnish Works v. Haydock (1906) 143 Fed. 318, 74 C. C. A. 456, 16 Am. Bankr. Rep. 286; Lynch v. Bronson (D. C. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409. Proof of a claim in bankruptcy as upon a contract, and participation in composition proceedings, is not a bar to action for deceit in obtaining credit by false reports to a commercial agency. Friend v. Talcott (1913) 33 S. Ct. 505, 228 U. S. 27, 57 L. Ed. 718, affirming judgment Talcott v. Friend (1910) 179 Fed. 676, 103 C. C. A. 80.

If the bankrupt does not succeed in his application for a discharge, then a creditor who has proved his claim is remitted, as to any unpaid balance, to his former rights and remedies, and will not be estopped from pursuing any such remedy by the mere fact that he proved his claim and received a dividend in the bankruptcy proceedings. Frey v. Torrey (1903) 175 N. Y. 501, 67 N. E. 1082; Dingee v. Becker (D. C. 1874) 9 N. B. R. 508, Fed. Cas. No. 3,919; Ansonia Brass & Copper Co. v. New Lamp Chimney Co. (1873) 53 N. Y. 123, 13 Am. Rep. 476, 10 N. B. R. 355; Hoyt v. Freel (1869) 8 Abb. Prac. N. S. (N. Y.) 220, 4 N. B. R. 131. But one whose claim has been proved against the estate of a bankrupt, and afterwards expunged, cannot thereafter prosecute it in a state court. Pease v. Bennett (1845) 17 N. H. 124.

Proof of a claim against a corporation in bankruptcy is not a bar to an action thereon against the stockholders. Chamberlin v. Huguenot Mfg. Co. (1875) 118 Mass. 532; Shellington v. Howland (1873) 53 N. Y. 371. But where a creditor filed its claim against a bankrupt corporation, and accepted dividends, it was estopped from subsequently suing on the same debt the stockholders as partners, even though it could have maintained such suit before filing its claim. Swofford Bros. Dry Goods Co. v. Owen (1913) 37 Okl. 616, 133 Pac. 193.

4. Time of making proof.—Under the provisions of this section and General Order No. 21 (§ 9614, ante), claims must be proved within a year after the adjudication. In re McCarthy Portable Elevator Co. (D. C. 1913) 205 Fed. 986. But creditors have a year in which to file their claims, and the court cannot prescribe a shorter time than this for the proof of claims of general creditors. In re Lathrop, Hoskins & Co. (1915) 223 Fed. 912, 139 C. C. A. 392. A creditor of a bankrupt is not chargeable with laches in proving his claim, where it is presented within the year allowed by the statute, unless the rights of others have been prejudiced by the delay. In re Dunlap Carpet Co. (D. C. 1913) 206 Fed. 726.

In the provision limiting proof of claims to one year after the "adjudication," this term means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, the date when such decree is finally confirmed, and this includes not only the case where an appeal from an adjudication is affirmed, but also where such appeal is dismissed. In re Lee (D. C. 1909) 171 Fed. 266, 22 Am. Bankr. Rep. 820.

The limitation of time for proving claims is not binding on the United States as a creditor. In re Stoever (D. C. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345.

The limitation of time prescribed by this section does not apply to a claim of ownership of property adverse to the bankrupt and to his estate. Nauman Co. v. Bradshaw (1912) 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565.

As to specific claims to funds or property in the possession of the trustee, the court of bankruptcy may limit the time for claimants to prove their titles to less than a year, provided notice is given them and a reasonable length of time accorded. In re T. A. McIntyre & Co. (1910) 176 Fed. 552, 100 C. C. A. 140, 24 Am. Bankr. Rep. 4; In re Lathrop, Hoskins & Co. (1915) 223 Fed. 912, 139 C. C. A. 392.

Creditors may prove their claims before the day of the first meeting of creditors, so as to make themselves parties to the proceeding and be entitled to an order for the examination of the bankrupt. In re Patterson (D. C. 1867) Fed. Cas. No. 10,814.

The presentation and delivery of a proof of claim to the trustee in bankruptcy, within the limited time, is a sufficient filing of it. J. B. Orcutt Co.

v. Green (1907) 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390. Where a creditor prosecutes a suit or petition against the trustee, and recovers judgment, his claim is so far before the court that it may be considered as "proved" for the purpose of saving the bar of the statute. Buckingham v. Estes (1904) 128 Fed. 584, 63 C. C. A. 20; In re Strobel (D. C. 1908) 163 Fed. 787, 20 Am. Bankr. Rep. 884. So, a claim duly proved within the year may be increased after that time where it is made necessary by a requirement that the creditor shall return preferences received as a condition to its allowance. In re Shiebler (D. C. 1908) 165 Fed. 363, 21 Am. Bankr. Rep. 309.

5. —— **Claims liquidated by litigation.**—In the special provision of subdivision "n" of this section, relating to the time for proving claims which have been "liquidated by litigation," it is held that the term "litigation" is not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but includes as well proceedings to ascertain the kind and character or validity of the claim. In re Standard Telephone & Electric Co. (D. C. 1911) 186 Fed. 586, 26 Am. Bankr. Rep. 601. Hence it applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated, and thereafter attempts to prove as a general creditor. In re Salvator Brewing Co. (D. C. 1911) 188 Fed. 522, 26 Am. Bankr. Rep. 21. In any case where the creditor has a suit pending which will determine the validity, nature, and amount of his claim, he has the right to wait until the end of the litigation and then prove his claim, though more than a year from the date of the adjudication may then have elapsed. In re Baird (D. C. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 655; In re Keyes (D. C. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183; Powell v. Leavitt (1907) 150 Fed. 89, 80 C. C. A. 43; In re Salvator Brewing Co. (1912) 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Venstrom (D. C. 1913) 205 Fed. 325, 30 Am. Bankr. Rep. 569; Platt v. Ives (1913) 86 Conn. 690, 86 Atl. 579.

An agreement between a trustee and a secured creditor as to the value of the latter's security, made while both were parties to a suit in which the question was involved, held a liquidation by litigation, which entitled the creditor to prove the unsecured part of the claim within 60 days. First Nat. Bank v. Cameron (1913) 209 Fed. 611, 126 C. C. A. 433.

Where the claim of an accommodation indorser of notes of a bankrupt corporation was not liquidated until the termination of litigation between the bankrupt's trustee and the indorser more than a year after adjudication, the expiration of that time did not bar the indorser's right to file her claim against the estate. Platt v. Ives (
86 A. 579, 86 Conn. 690.

For decisions on the meaning c
phrase "liquidated by litigation,"
In re Clover Creamery Ass'n (
176 Fed. 907, 100 C. C. A. 37
Am. Bankr. Rep. 884; Powell v. L
(1907) 150 Fed. 89, 80 C. C. A
In re Lyons Beet Sugar Refinin
(D. C. 1911) 192 Fed. 445, 27
Bankr. Rep. 610; In re Clark (
1910) 176 Fed. 955, 24 Am. B
Rep. 388; In re Coventry Evans
niture Co. (D. C. 1909) 171 Fed
22 Am. Bankr. Rep. 623; In re
(D. C. 1905) 140 Fed. 758, 15
Bankr. Rep. 520; In re E. O. Th
son's Sons (D. C. 1903) 123 Fed
10 Am. Bankr. Rep. 581; In re
(D. C. 1907) 156 Fed. 318, 19
Bankr. Rep. 420.

6. —— **Allowance of proof afte piration of year.**—The bar of the ute, as to the time for proving c is absolute and prohibitive; a cr cannot be permitted under any ci stances whatever to come in fo purpose of making proof after th of the year (except as specially in the statute), but forfeits all ri that behalf by delay; and the cou no discretionary power to perm filing of proofs after the end o year, either nunc pro tunc or wise. In re Ingalls Bros. (1905 Fed. 517, 70 C. C. A. 101, 13 Bankr. Rep. 512; In re Blond (1910) 188 Fed. 452; In re Pec C. A. 1909) 168 Fed. 48, 21 Am. B Rep. 707; In re Hawk (1902) 114 916, 52 C. C. A. 536, 8 Am. B Rep. 71; Bray v. Cobb (D. C. 100 Fed. 270, 3 Am. Bankr. Rep In re Co-Operative Knitting Mill C. 1913) 202 Fed. 1016, 30 Am. B Rep. 181; In re Knosco (D. C. 208 Fed. 201; In re Trion Mf (D. C. 1915) 224 Fed. 521.

This rule is applied so strictly it is held to make no differenc the particular claim was not sch and that the creditor had no not the proceedings. Santa Rosa Ba White (1903) 139 Cal. 703, 73 577; In re Muskoka Lumber Co C. 1904) 127 Fed. 886, 11 Am. B Rep. 761. Or that, during the sta year, the creditor was assertin litigating the validity of a prefe and was thereby prevented from ing his proof. In re Leibowit C. 1901) 108 Fed. 617, 6 Am. B Rep. 268; In re Kemper (D. C. 142 Fed. 210, 15 Am. Bankr. Rep In re Rhodes (D. C. 1900) 105 231, 5 Am. Bankr. Rep. 197. O a composition had been effected re Brown (D. C. 1903) 123 Fed 10 Am. Bankr. Rep. 588. Or th failure to make proof in due tim caused solely by accident and mi In re Sanderson (D. C. 1908) 16 278, 20 Am. Bankr. Rep. 396. because the creditor was misle omitted to prove his claim in

quence of the fraudulent concealment of assets by the bankrupt, who listed no property. In re Meyer (D. C. 1910) 181 Fed. 904, 25 Am. Bankr. Rep 44; In re Peck (D. C. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629.

A claim cannot be allowed, after the end of the year under the guise of an amendment or substitute for a prior claim filed in due time but afterwards withdrawn. In re E. O. Thompson's Sons (D. C. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581. But where a claim against a bankrupt's estate was originally filed within the year, but was disallowed, and subsequent proceedings showed that it should have been filed for a larger amount, the amendment filed after the year had expired was not barred by the one-year limitation. In re Hamilton Automobile Co. (1913) 209 Fed. 596, 126 C. C. A. 418.

Where a claim against a bankrupt estate was seasonably delivered to the referee, but lacked a statement of the official character of the officer signing the jurat, and the referee therefore returned it to the creditor's attorney for correction, and it was not redelivered to the referee for about two years, the claim was properly allowed, as it was sufficient as originally filed to form the foundation for a good proof of claim by perfecting amendments, and the referee had no right to refuse to receive and file it when first tendered. In re Haskell (D. C. 1915) 228 Fed. 819.

The statute should not be so construed as to prevent proof of a valid claim after the expiration of the year, where objection is not made by any other creditor or by the trustee, but by the bankrupt alone, and the delay was caused by the latter's own fraud. In re Towne (D. C. 1903) 122 Fed. 313, 10 Am. Bankr. Rep. 284. So where the peculiar circumstances of the case rendered it impossible to file the claim for proof within the limited time. In re Fagan (D. C. 1905) 140 Fed. 758, 15 Am. Bankr. Rep. 520. Where a preferred creditor is compelled to surrender a voidable preference, he should thereafter be allowed to prove his claim before the estate is finally settled, though more than a year after the adjudication. In re Otto F. Lange Co. (D. C. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414. And in a case where the bankruptcy court ordered a sale of the bankrupt's estate, on condition that the purchaser should pay to each unsecured creditor a specified per cent. of his claim, and the purchaser paid the money to the receiver, who turned it over to the trustee, who declared a dividend to the unsecured creditors, but excluding one creditor on the ground that he had failed to prove his claim within the statutory time, it was held that the court must permit the filing nunc pro tunc of an amended formal proof of the claim. In re Basha (C. C. A. 1912) 200 Fed. 951, 29 Am. Bankr. Rep. 225.

7. —— **Proof after declaration of dividend.**—The fact that a creditor did not present his claim for proof and allowance until after a partial dividend had been paid does not affect his rights where the delay was not great, and sufficient funds remain to pay the claim, and it does not appear that other creditors will be prejudiced thereby. William Openhym & Sons v. Blake (C. C. A. 1907) 157 Fed. 536, 19 Am. Bankr. Rep. 639.

While claims may be proved within a year after the adjudication, final dividend may be declared at any time after four months from the adjudication, with the effect that one thereafter, though within the year, proving his claim, is barred from participation in the distribution. In re Coulter (D. C. 1913) 206 Fed. 906.

8. **Persons authorized to prove.**—Any person being the lawful owner of a claim against the bankrupt may prove it against his estate, and the fact that another has previously filed a claim as a creditor on the same account does not prejudice his right to offer proof of it. In re James Dunlap Carpet Co. (D. C. 1909) 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Dunlap Carpet Co. (D. C. 1913) 206 Fed. 726, 30 Am. Bankr. Rep. 664. A bank which furnished the credit with which imported goods were purchased, taking the bills of lading in its own name and the usual trust receipt when the goods were sold by the importers, held the legal owner of the account against the purchaser and entitled to prove the same on its bankruptcy. In re Dunlap Carpet Co. (D. C. 1913) 206 Fed. 726.

Where various claims of the same general order have been pooled or placed in the hands of a committee or a trustee, they may be proved by such representative. In re Salvator Brewing Co. (D. C. 1911) 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re E. T. Kenney Co. (D. C. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611. But the fact that a series of bonds issued by the bankrupt corporation are secured by a mortgage to a trustee does not exclude the right of individual bondholders to prove their several claims. Mackay v. Randolph Macon Coal Co. (1910) 178 Fed. 881, 102 C. C. A. 115, 24 Am. Bankr. Rep. 719.

Where joint indorsers of the bankrupt's note have taken it up, each advancing half the necessary funds, they may join in making proof of the claim. In re Farmers' Supply Co. (D. C. 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460.

A creditor whose claim is for unliquidated damages, should first apply to the court to direct the manner in which it shall be liquidated, and when that is done, he may file and prove his claim. In re Silverman (D. C. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83.

Any person who is authorized to give an acquittance of a debt may prove it

in bankruptcy, and a receiver appointed to take charge of a corporation on its dissolution, or upon proceedings in bankruptcy or insolvency against it, may make proof of a debt due to such corporation from a bankrupt debtor. Ex parte Norwood (D. C. 1873) Fed. Cas. No. 10,364; In re Republic Ins. Co. (D. C. 1873) 8 N. B. R. 197, Fed. Cas. No. 11,705; In re Baxter (D. C. 1878) 18 N. B. R. 560, Fed. Cas. No. 1,121; Dight v. Chapman (1904) 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

The fact that the president of a corporation has ceased to be a stockholder cannot be raised as an objection to proof of a claim by him in favor of the corporation against his estate in bankruptcy. In re Morgan (D. C. 1875) Fed. Cas. No. 9,797.

A county or municipal corporation may file and prove a claim against an estate in bankruptcy. In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

If the claim to be proved is due to a state, the proof should be made by the state treasurer, or by some officer holding a relation to the state government similar to that which a treasurer or cashier bears to a business corporation of which he is such officer. In re Corn Exchange Bank (D. C. 1877) 15 N. B. R. 216, Fed. Cas. No. 3,243.

9. Proof by agent or attorney.—Where the creditor himself has no personal knowledge of the facts respecting the debt, proof may be made by an agent who has had exclusive charge and control of the same, and who has personal knowledge of all the facts required to be sworn to in making the proof. In re Watrous (D. C. 1876) 14 N. B. R. 258, Fed. Cas. No. 17,270.

If a creditor, at the time of executing a power of attorney to prove his claim in bankruptcy, is in a foreign country, the instrument may be acknowledged before a United States consul in such country. In re Sugenheimer (D. C. 1899) 91 Fed. 744, 1 Am. Bankr. Rep. 425.

A power of attorney duly executed to either of three persons as substitutes, but acknowledged before one of them, though void as to that one, may lawfully be executed by either of the other two. Id.

Guardians, executors, administrators, and all other persons acting in a representative capacity, may make proof in bankruptcy of the claims of the persons or estates represented by them. In re Republic Ins. Co. (D. C. 1873) 8 N. B. R. 197, Fed. Cas. No. 11,705.

Proof of claim for labor by minor held properly made by the minor's father. In re Haskell (D. C. 1915) 228 Fed. 819.

The bankrupt himself cannot act as the trustee or representative of a creditor in proving the latter's claim against his own estate and securing its allowance. In re Mitteldorfer (C. C. 1869) Fed. Cas. No. 9,674. But while th torney for the bankrupt should n permitted to appear in the proceed as attorney for a creditor also, y the absence of a rule of court o subject, a claim duly proved again bankrupt's estate should not b jected merely because filed fo creditor by the bankrupt's attorn being apparent that the attorney in entire good faith. In re Kimba C. 1899) 100 Fed. 777, 4 Am. B Rep. 144.

10. Proof by assignee of claim. assignee of a nonnegotiable cho action may prove it against the of the debtor in bankruptcy upo own deposition, and it is not nece to the sufficiency of the proof tha deposition of the assignor shou added, if the assignment was before the commencement of the ceedings in bankruptcy, althoug that case, the deposition should the name of the original creditor re McCarthy Portable Elevator Co C. 1913) 205 Fed. 986, 30 Am. B Rep. 247; Ex parte Davenport (1869) 3 N. B. R. 312, Fed. Cas 3,586. The fact that certain cre have made a champertous agree with a third party for the collecti their debts from the bankrupt furn no ground for the disallowance of claims, on petition of a creditor re Lathrop (D. C. 1869) 3 N. 410, Fed. Cas. No. 8,103.

Negotiable paper, acquired in faith before maturity, may be p against the estate of the maker in ruptcy by an indorsee upon show valid consideration paid by him; such showing, in such a case, w held to be a compliance with th quirement of the statute, and it wi be required of the holder to show as between the maker of the pape its original payee, there was a goo valid consideration, or what that sideration was. In re Lake Sup Ship-Canal, R. & I. Co. (D. C. 10 N. B. R. 76, Fed. Cas. No. 7,99

Where, after the filing of a pe in bankruptcy by or against the d a creditor transfers or assigns his to another, the debt is to be prov the person who is the owner of the time of making proof. In re dock (D. C. 1869) 3 N. B. R. 146 Cas. No. 9,939. And see In re Swe (D. C. 1904) 131 Fed. 567.

The receiver of the property creditor is an "assignee" of the due to such creditor, and may prov debt in bankruptcy in the manner templated for proof by a conven assignee. In re Mills (C. C. 187 N. B. R. 472, Fed. Cas. No. But a mere agent holding nego paper, not as owner or indorsee simply for his principal, cannot it except in the name and for the fit of the real owner, and not when the owner is in a situati

make the proof for himself. In re Saunders (D. C. 1875) Fed. Cas. No. 12,371.

11. Proof by secured creditors.—If a secured creditor wishes to participate in the bankruptcy proceedings, he must make himself a party by filing a proof of his claim, disclosing the particular nature of the security which he holds. In re Bridgman (D. C. 1868) 1 N. B. R. 312, Fed. Cas. No. 1,866. A secured creditor, who retained his security, held not entitled to prove a claim against the estate after the year for proving claims had expired. In re Thompson (C. C. A. 1915) 227 Fed. 981. A creditor, holding bankrupt's indorsed note for part of claim, held entitled to dividend on the full claim, though indorser paid the note after proofs of claim were filed; it not being a "secured creditor," under § 9585, ante, and this section. Young v. Gordon (1914) 219 Fed. 168, 135 C. C. A. 66.

When a creditor holds a mortgage or other security on property belonging to a third person, the latter not having counter security, he is not bound to disclose or mention it in his proof of debt. Merchants' & Farmers' State Bank v. Sheridan (1910) 156 Ill. App. 25.

When a creditor proves his debt as secured, he does not waive, abandon, or surrender the security, or in any way relinquish or prejudice his rights under it. In re Medina Quarry Co. (D. C. 1910) 179 Fed. 929, 24 Am. Bankr. Rep. 769; Bucknam v. Dunn (D. C. 1877) 16 N. B. R. 470, Fed. Cas. No. 2,096; In re Bolton (D. C. 1868) 1 N. B. R. 370, Fed. Cas. No. 1,614; Kohout v. Chaloupka (1903) 69 Neb. 677, 96 N. W. 173; Bassett v. Thackara (1905) 72 N. J. Law, 81, 60 Atl. 39; In re Grinnell (D. C. 1873) 9 N. B. R. 29, Fed. Cas. No. 5,830.

As an adjudication of bankruptcy brings the assets of the bankrupt into the custody of the court of bankruptcy for administration, a creditor of the bankrupt having a lien on such property, at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the bankruptcy law directs. In re Falls City Shirt Mfg. Co. (D. C. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437.

If any other creditor is interested in objecting to the claim of the proving creditor to an alleged security, or avers that the lien claimed is invalid under the laws of the state, or is a voidable preference, or otherwise should not be allowed, it is within the jurisdiction of the court of bankruptcy or the referee (and it is the proper practice) to determine whether the claim is a secured or an unsecured claim, so far as concerns its allowance as such, though such a determination will not have the effect to deprive the creditor of his lien, if he has one, for that question can be decided only in a proper action or proceeding brought by the trustee in bankruptcy, and not on a summary hearing. In re Quinn (C. C. A. 1908) 165 Fed. 144, 21 Am. Bankr. Rep. 264; In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Braselton (D. C. 1909) 169 Fed. 960, 22 Am. Bankr. Rep. 419; In re Harrison (D. C. 1900) 2 Nat. Bankr. News, 541.

The claim of a broader lien than the facts warrant will not affect the actual lien of the creditor. McKinsey v. Harding (D. C. 1869) 4 N. B. R. 38, Fed. Cas. No. 8,866.

Where a mortgage is made in good faith, prior to the commencement of the proceedings against the mortgagor, a mistake in the description of the premises in such mortgage may be corrected as against the trustee in bankruptcy to the same extent as would have been allowed against the mortgagor. Schulze v. Bolting (D. C. 1878) Fed. Cas. No. 12,489. But where a mortgage given by the bankrupt secures a certain note only, and not an open account, an agreement that the account should also be covered by the mortgage cannot be implied. In re Johnson (D. C. 1903) 125 Fed. 838, 11 Am. Bankr. Rep. 138. Mortgagees who prove their debts in the bankruptcy proceedings become creditors of the mortgagor's general estate only for the balance of the debt remaining after deducting the value of the mortgaged property. McHenry v. Société Française (1877) 95 U. S. 58, 24 L. Ed. 370; In re Little (D. C. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681.

Creditor of a bankrupt corporation, secured by a pledge of its mortgage bonds, held entitled to prove for the balance due on its claim after exhausting the mortgaged property. In re Progressive Wall Paper Corporation (D. C. 1915) 224 Fed. 143. Where all of the mortgage bonds of a bankrupt corporation were proved by the owners and allowed, no foreclosure suit having been instituted, and the property was sold by the trustee in bankruptcy, the court held to have properly rejected the claim of the mortgage trustee, which sought to prove the entire debt in its own name. United States Trust Co. v. Gordon (1914) 216 Fed. 929, 133 C. C. A. 117. Officers who paid an obligation of the bankrupt corporation and received the bonds given as collateral security therefor can claim on the bonds only the amount paid by them. Sauve v. Fleschutz (1915) 219 Fed. 542, 135 C. C. A. 310.

One whose judgment is a lien on property which had been sold and conveyed by the bankrupt in good faith before the bankruptcy may claim and

court, but without leave of the bankruptcy court and without joining the trustee, and the proceeding was held invalid, attorneys' commissions and costs stipulated to be paid on foreclosure should not be allowed. In re Devore (D. C. 1877) 16 N. B. R. 56, Fed. Cas. No. 3,847. But a mortgagee in possession is not chargeable with any part of the costs in bankruptcy, nor with the expenses of the sale of any of the property other than that on which his mortgage was a valid lien. In re Eldridge (C. C. 1870) Fed. Cas. No. 4,330.

15. —— **Claim for deficiency.**—If the security held by a lien creditor is valued by agreement between himself and the trustee, or under the direction of the court, but the valuation is less than the amount of his debt or claim—or if the lien is foreclosed or the security otherwise realized, and results in a deficiency—the creditor, in either case, will be entitled to prove a claim in the bankruptcy procedings for such deficiency or unsatisfied balance. McHenry v. Société Française (1877) 95 U. S. 58, 24 L. Ed. 370; In re Rudd (D. C. 1910) 180 Fed. 312, 25 Am. Bankr. Rep. 35; In re Ball (D. C. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564; In re Linforth (D. C. 1898) 87 Fed. 386; In re Letchworth (D. C. 1883) 18 Fed. 822; In re Winn (D. C. 1867) 1 N. B. R. 499, Fed. Cas. No. 17,876; In re Bolton (D. C. 1868) 1 N. B. R. 370, Fed. Cas. No. 1,614; In re Grant (C. C. 1843) Fed. Cas. No. 5,690; Ex parte Dalby (D. C. 1870) 3 N. B. R. 731, Fed. Cas. No. 3,540; In re Ruehle (D. C. 1869) 2 N. B. R. 577, Fed. Cas. No. 12,113; Watkins v. Worthington (1827) 2 Bland (Md.) 509. See In re J. H. Alison Lumber Co. (D. C. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78. As to such deficiency, he will not be entitled to any preference or advantage over other creditors, but simply to take his proportionate share out of the bankrupt's general assets. In re Snedaker, 4 N. B. R. 168. If a mortgagee forecloses within a year after the adjudication in bankruptcy, he cannot prove his claim for a deficiency after the expiration of such year, as he had the right to prove it in the first instance as a secured claim. In re Sampter (1909) 170 Fed. 938, 96 C. C. A. 98, 22 Am. Bankr. Rep. 357. And as to his right to obtain and enforce a deficiency decree in the foreclosure proceeding, that right will be suspended pending the bankrupt's application for a discharge, and will be lost if the discharge is granted. Scott v. Ellery (1892) 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050.

If the property is sold on foreclosure proceedings and is bid in by the lien creditor for a merely nominal sum, with no competing bid against him, or, if his successful bid is less than the amount due, the actual value of the property may be inquired and he will be allowed to pr claim, as on a deficiency, only f difference between the amount original debt and the value so tained. In re Dix (D. C. 1910 Fed. 582, 23 Am. Bankr. Rep. In re Graves (D. C. 1910) 182 443, 25 Am. Bankr. Rep. 372; Woods (D. C. 1881) 7 Fed. 66 the case last cited, it was said th amount of the proceeds of a subs sale of the property by the cred no test of the actual value of the erty, and should not be credit such to the bankrupt, in the abse an agreement between the partie the creditor should sell the pr and apply the proceeds toward satisfaction of the debt. A mor cannot be permitted to come up estate for any deficiency where h ceeded to foreclose in a state without obtaining leave of the ruptcy court and without makin trustee a party, as this amounts election to rely wholly on his se and stay out of the bankruptcy. Miller (D. C. 1879) 19 N. B. Fed. Cas. No. 9,555; In re H (D. C. 1878) 17 N. B. R. 335, Cas. No. 6,421. CONTRA, In re ler (C. C. 1877) Fed. Cas. No.

Where a mortgage creditor ob permission of the bankruptcy co foreclose his mortgage in a state but upon condition of waiving an sonal claim for deficiency, but the itor, for good reasons and w laches, failed to prosecute his s judgment, it was held that he w bound, as by an election, to rely ly on the mortgaged property, might be subsequently admitted creditor against the estate on a of the same debt. In re Linfor C. 1898) 87 Fed. 386.

16. —— **Claims for interest and** —The mortgagee of property bankrupt is equitably entitled to the rents and profits of the pro collected by the trustee in bankr applied on the interest on his d the security itself is insufficien re Industrial Cold Storage & I (D. C. 1908) 163 Fed. 390, 2 Bankr. Rep. 904; In re Bennett 1877) Fed. Cas. No. 1,313. T particularly the case if he has s an equitable lien on the rents by in equity and the appointment receiver after default. In re Sne 4 N. B. R. 168. But some case that the mortgagee in such a c not entitled to the rents unless, dition to showing the insufficien his security, he actually intercep receives them. Foster v. Rhode C. 1874) 10 N. B. R. 523, Fed No. 4,981; In re Hollenfeltz (1899) 94 Fed. 629, 2 Am. Bankr 499.

A secured creditor who sells the property on which he has a lien, after the filing of the petition in bankruptcy, and finds the proceeds insufficient to pay the whole amount of his claim, is not entitled to apply such proceeds first to interest accrued since the filing of the petition, and then to the principal debt, and then prove a claim for the balance. Sexton v. Dreyfus (1911) 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363, reversing In re Kessler (1910) 180 Fed. 979, 103 C. C. A. 582, 24 Am. Bankr. Rep. 287, which affirmed In re Kessler & Co. (D. C. 1909) 171 Fed. 751, 22 Am. Bankr. Rep. 606.

Where an estate in bankruptcy is amply sufficient for the purpose, a mortgagee may be allowed interest on his debt after, as well as before, the filing of the petition in bankruptcy. Coder v. Arts (1909) 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772.

As to costs and fees, where these are stipulated in the mortgage to be paid in case of foreclosure by proceedings in court, they may be allowed when the security is realized on in the manner specified, but not where the property covered is sold by the trustee in bankruptcy at private sale under order of the court. In re Roche (C. C. A. 1900) 101 Fed. 956, 4 Am. Bankr. Rep. 369.

17. —— Right to rely on security and disregard bankruptcy proceedings. — One holding a secured claim against a bankrupt is not bound to file formal proof of the claim, or to come in to the bankruptcy proceeding at all, but he may rely on his security and enforce it otherwise. Courtney v. Fidelity Trust Co. (1914) 219 Fed. 57, 134 C. C. A. 595; Yeatman v. New Orleans Sav. Inst. (1877) 95 U. S. 764, 24 L. Ed. 589; Ward v. First Nat. Bank (C. C. A. 1913) 202 Fed. 609, 29 Am. Bankr. Rep. 312; In re Barber (D. C. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; In re Haake (D. C. 1872) 7 N. B. R. 61, Fed. Cas. No. 5,883; Jones v. Lellyet (1869) 39 Ga. 64; Spilman v. Johnson (1876) 27 Grat. (Va.) 33, 16 N. B. R. 145; Selfridge v. Gill (1808) 4 Mass. 95. CONTRA, Davis v. Anderson (D. C. 1872) 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Davis (D. C. 1874) 2 N. B. R. 391, Fed. Cas. No. 3,618. A creditor of a bankrupt corporation whose debt is secured by a valid pledge of its mortgage bonds, is not required to prove his claim as a general creditor to entitle him to have his bonds participate in the mortgage fund. Butterfield v. Woodman (1915) 223 Fed. 956, 139 C. C. A. 436, modifying decree In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208. If a secured creditor has no occasion to apply to the court of bankruptcy for aid in the enforcement of his lien, he may rely upon his security and omit to prove his claim, and by so doing he will lose nothing but his right to participate in the distribution of the general estate of the bankrupt. Cottrell v. Pierson (C. C. 1881) 12 Fed. 805; Wicks v. Perkins (C. C. 1871) . Fed. Cas. No. 17,615.

If the creditor is in physical possession of personal property or collaterals pledged to him by the bankrupt, or chattels covered by a chattel mortgage, he cannot be compelled to surrender the possession to the trustee in bankruptcy without satisfaction of his debt. Yeatman v. New Orleans Sav. Inst. (1877) 95 U. S. 764, 24 L. Ed. 589; Cadmus v. Beman (D. C. 1851) Fed. Cas. No. 2,281; In re Buntrock Clothing Co. (D. C. 1899) 92 Fed. 886, 1 Am. Bankr. Rep. 454; Dallas v. Flues (C. C. 1871) Fed. Cas. No. 3,544. CONTRA, In re Cobb (D. C. 1899, 96 Fed. 821, 3 Am. Bankr. Rep. 129.

The court of bankruptcy has jurisdiction, if the interests of the creditors at large are involved, to determine questions of liens on the property of the bankrupt or their validity or amount, and this jurisdiction may be invoked by the secured creditor himself, though he has not proved his debt. In re High (D. C. 1869) 3 N. B. R. 191, Fed. Cas. No. 6,473.

If a secured creditor brings a suit in a state court, after the commencement of the bankruptcy proceedings, to foreclose a mortgage or enforce any other lien, not having proved his debt or otherwise participated in the proceedings in bankruptcy, he may be enjoined from proceeding further with his suit, and such injunction may issue in a case where the trustee alleges that the mortgage or other security was fraudulent and void. Markson v. Heaney (C. C. 1871) 4 N. B. R. 510, Fed. Cas. No. 9,098; In re Snedaker (Utah) 3 N. B. R. 629; In re Brooks (D. C. 1898) 91 Fed. 508, 1 Am. Bankr. Rep. 531; In re Grinnell (D. C. 1873) 9 N. B. R. 29, Fed. Cas. No. 5,830. See Barstow v. Peckham (D. C. 1873) 5 N. B. R. 72, Fed. Cas. No. 1,064. If a secured creditor sues in a state court and enforces his lien, and it does not appear that other creditors were injured, it is in the authority and discretion of the court of bankruptcy to ratify and confirm a sale made under such proceedings, as if leave to make it had first been obtained. Bradley v. Adams Express Co. (C. C. 1880) 3 Fed. 895.

Since the statute vests the trustee in bankruptcy with title to the bankrupt's property "as of the date when he was adjudged a bankrupt," it is held that, until that date, a lienor or pledgee is at liberty to make any disposition of or perfect any title to the property which the nature of the lien permits, and where he has converted the securi-

ty into money pursuant to his contract rights, he may prove the unsatisfied balance of his claim. In re Mertens (1906) 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

If the creditor relies on his security and omits to prove his claim in the bankruptcy, a discharge granted to the bankrupt will not be a bar or defense to any proceedings to enforce the lien, but will preclude the creditor from setting up any claim for a deficiency. Dixon v. Barnum (D. C. 1878) Fed. Cas. No. 3,928; Pease v. Ritchie (1890) 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566; Cohn v. Colby (1879) 57 How. Prac. (N. Y.) 168; Barnett v. Salyers (Ky. 1889) 12 S. W. 303; Kinloch v. Savage (1844) Speer, Eq. (S. C.) 464.

18. Form and sufficiency of deposition.—Depositions to prove claims in bankruptcy must contain the averments and the particular details required by the statute, and must be made by the party authorized, and conform substantially to the official forms. In re Port Huron Dry Dock Co. (D. C. 1876) 14 N. B. R. 253, Fed. Cas. No. 11,293. Though a proof of debt fails to state one of the essential facts required by good pleading, yet if it complies apparently with the forms in bankruptcy and the orders and the statute itself, it is the duty of the referee to allow it. In re Ankeny, 1 Nat. Bankr. News, 511. The fact that, at the head of a proof of claim, the title of the court is not given as required by the general order and form, is not sufficient to vitiate the proof so far as to prevent the creditor from participating in the creditors' meeting. In re Blue Ridge Packing Co. (D. C. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36. A proof of claim need not observe all the formalities required in ordinary pleadings. Kelsey v. Munson (1912) 198 Fed. 841, 117 C. C. A. 483, 28 Am. Bankr. Rep. 520. A claim against the estate of a bankrupt firm held sufficient in form to justify its allowance against the bankrupt estate of an individual partner who was liable as indorser on a note evidencing the indebtedness. In re Collins (D. C. 1914) 215 Fed. 247.

A claim is not duly proved unless it appears from the deposition that a debt exists which the creditor has a present right to have paid out of the bankrupt's estate. In re Walton (D. C. 1868) Fed. Cas. No. 17,129.

The referee has power to require a creditor to file a bill of particulars as to any certain item of his claim, whether the claim is liquidated or unliquidated, and, having such power, the matter is within the judicial discretion of the referee. In re Henry Siegel Co. (D. C. 1914) 223 Fed. 368.

An allegation on information and belief on a vital point in a proof of claim in bankruptcy is not sufficient as of such allegation. In re United less Telegraph Co. (D. C. 1912 Fed. 445.

The absence of a date to the tor's proof of claim is a fatal In re Blue Ridge Packing Co. (1903) 125 Fed. 619, 11 Am. Rep. 36.

It is imperatively necessary th proof of claim should state wheth claim is secured or unsecured, and creditor has a lien on property cure it, he must disclose its part character, so that it can be ider and, if necessary, liquidated b trustee. Cunningham v. Cady (1876) 13 N. B. R. 525, Fed. Ca 3,480; In re Bridgman (D. C. 18 N. B. R. 312, Fed. Cas. No. 1,866.

It is necessary to set forth th and the particulars of any partia ments which may have been made the claim. In re Girvin (D. C. 160 Fed. 197, 20 Am. Bankr. Rep

It is necessary that the conside for the claim, and the particula the consideration, should be dul adequately stated in the depositio re Elder (D. C. 1870) Fed. Cas. N 326. The statements in regard consideration must be sufficientl and specific to enable other cre to pursue proper and legitima quiries as to the fairness and l of the claim; if too meagre or g to serve this purpose, they will b inadequate, and the proof of deb be expunged, unless leave is giv amend. In re United Wireless graph Co. (D. C. 1912) 201 Fed 29 Am. Bankr. Rep. 848; In re Boat Co. (D. C. 1911) 190 Fed. Am. Bankr. Rep. 48; In re Griffi C. 1910) 188 Fed. 389; In re V town Paper Co. (1909) 169 Fed 94 C. C. A. 528, 22 Am. Bankr. 190; In re Coventry Evans Fur Co. (D. C. 1909) 166 Fed. 51 Am. Bankr. Rep. 272; In re Morr C. 1907) 154 Fed. 211, 18 Am. B Rep. 828; In re Blue Ridge Pa Co. (D. C. 1903) 125 Fed. 619, 1 Bankr. Rep. 36; In re Stevens (1901) 107 Fed. 243, 5 Am. Bankr 806; In re Scott (D. C. 1899) 93 418, 1 Am. Bankr. Rep. 553. A of debt on a promissory note i sufficient although it sets out the in full, unless it also states wha the consideration and whether an ments have been made thereon. Loder (D. C. 1870) Fed. Cas. N 456. A proof of claim for legal se rendered held insufficient, not sh the nature of the services, their or the time consumed. In re H Porcelain Co. (D. C. 1915) 225 325. But this rule does not appl debt which has been reduced to ment; that is to say, it is not sary in proving on the judgment cite or describe the consideration

original debt, as that is now merged in the judgment. In re Mott (D. C. 1842) Fed. Cas. No. 9,878b.

A manufacturing company agreed with a board of commerce which furnished it a factory site and defrayed the cost of moving its plant to maintain an annual pay roll in specified amounts for seven years, except and contingent upon strikes, labor difficulties, fire, acts of elements, panics, and other causes beyond the control of the company. The company became bankrupt, having previously complied with its contract, and the board filed sworn proof of its claim for the breach of contract, alleging that the breach was not brought about by strikes, etc. Held, that the proof of claim was prima facie proof that the breach of contract was not so caused, and, in the absence of any evidence on the subject by the trustee, sufficiently proved the claim. Board of Commerce of Ann Arbor, Mich., v. Security Trust Co. (1915) 225 Fed. 454, 140 C. C. A. 486.

19. —— Claims founded on written instruments.—All the formalities required in ordinary pleadings do not apply to proofs in bankruptcy, and a failure to file a written instrument upon which a claim is founded does not raise a presumption against the existence of the writing. Kelsey v. Munson (C. C. A. 1912) 198 Fed. 841, 28 Am. Bankr. Rep. 520.

When the creditor held a promissory note made by the bankrupt and has already recovered a judgment upon it, if he proves his claim on the note, it must be filed with the deposition, but if he proves a claim on the judgment, instead of the note, the note need not be produced, because it is merged in the judgment as a debt of a higher order, and the judgment need not be set out in full in the deposition, nor accompany it, because it is not an "instrument of writing." In re Knoepfel (D. C. 1867) 1 N. B. R. 70, Fed. Cas. No. 7,892. See In re Jaycox (D. C. 1872) 7 N. B. R. 303, Fed. Cas. No. 7,240.

Where proof of claim on judgment incorporated copy of judgment, what further particularity should be required held largely for the referee, who did not exceed his powers in treating proof as adequate. In re Haskell (D. C. 1915) 228 Fed. 819.

If a promissory note of the bankrupt was made payable in coin, the holder, in proving his debt in the bankruptcy, should set forth that fact in his deposition, and the demand should be entered upon the books of the trustee as payable in the stipulated currency. In re Elder (D. C. 1870) Fed. Cas. No. 4,326.

In proving a claim founded on a note in which only the initials of the Christian names are given, the full names must appear. In re Valentine (D. C. 1869) Fed. Cas. No. 16,812.

20. Acknowledgment of deposition.—A notary public is authorized to administer the oath to a proof of claim, and such oath is sufficiently authenticated, prima facie, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of either state. In re Pancoast (D. C. 1904) 129 Fed. 643, 12 Am. Bankr. Rep. 275. See In re Nebe (D. C. 1875) 11 N. B. R. 289, Fed. Cas. No. 10,073; In re McKibben (D. C. 1875) 12 N. B. R. 97, Fed. Cas. No. 8,859.

It is not a valid objection to the proof of a claim that the officer taking the acknowledgment was the creditor's own attorney. In re Kimball (D. C. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144. Compare In re Nebe (D. C. 1875) 11 N. B. R. 289, Fed. Cas. No. 10,073; In re Keyser (D. C. 1877) Fed. Cas. No. 7,748.

21. Receiving and filing proofs.—The mere execution and acknowledgment of a proof of claim is not sufficient to establish the status of the creditor, but it is necessary that the claim thus proved should be filed or presented in the bankruptcy proceeding. In re French (D. C. 1909) 181 Fed. 583, 25 Am. Bankr. Rep. 77.

The fact that the bankrupt's attorney filed a claim for a creditor will not be sufficient to justify its rejection if the claim was duly proved and it appears that he acted in entire good faith. In re Kimball (D. C. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144. A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee. J. B. Orcutt Co. v. Green (1907) 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390. The handing of a verified claim to an employé of the trustee in the latter's office does not constitute a filing of the claim where it was not in fact filed and it does not appear in what capacity the person with whom it was left was employed by the trustee. In re Lathrop, Haskins & Co. (1912) 197 Fed. 164, 116 C. C. A. 601, 28 Am. Bankr. Rep. 756.

The referee will not refuse to receive a proof of debt which appears on its face to have been taken before a proper officer and to be correct in form and substance. In re Merrick (D. C. 1873) 7 N. B. R. 459, Fed. Cas. No. 9,463. A creditor who, after making a deposition to prove his debt, retains possession of the deposition, and does not allow it to go upon the files, cannot be considered as a creditor who has proved his debt. In re Shepard (D. C. 1868) 1 N. B. R. 439, Fed. Cas. No. 12,753. A creditor cannot be prejudiced by the loss from the files of his

proof of debt; he will still be entitled to receive the notices provided for by the act. In re Friedlob (D. C. 1879) 19 N. B. R. 122, Fed. Cas. No. 5,118.

22. **Allowance of proved claims.**—Under the provision of § 9639, ante, that the judge or referee shall preside at the first meeting of creditors, "and may allow or disallow the claims of creditors there presented," claims cannot be allowed without a meeting of the creditors. In re Back Bay Automobile Co. (D. C. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

The "proof" and the "allowance" of claims are separate and distinct steps, so that, if a claim is duly proved and filed within the year granted for that purpose, it is enough to take it out of the statutory limitation, and its allowance or disallowance may come later. In re J. M. Mertens & Co. (1906) 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825. A distinction is to be drawn between proving a claim and its allowance in bankruptcy proceedings, which results in the right of a creditor to prove a secured claim, when the ultimate necessity for its allowance appears reasonable, even though it may turn out to be unnecessary because the security is adequate to pay it. Emerine v. Tarrault (1915) 219 Fed. 68, 134 C. C. A. 606. The filing of a proved claim does not necessarily constitute an allowance thereof, since, until a direct or indirect order of allowance is made, objections may properly be filed. In re Two Rivers Woodenware Co. (1912) 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518.

A proof of debt, made in the mode required by the statute, and conforming on its face to all the requirements of the act and the general orders, makes a prima facie case, though it is subject to objection and counter proof, and will entitle the creditor to have his debt allowed as an established claim against the estate, unless objections are interposed. In re J. M. Mertens & Co. (1906) 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825; In re Saunders (D. C. 1875) 13 N. B. R. 164, Fed. Cas. No. 12,371; In re Colman (D. C. 1869) 2 N. B. R. 562, Fed. Cas. No. 3,021; In re Ankeny, 1 Nat. Bankr. News, 511. In the latter case, the jurisdiction of the court to hear and determine the claim and objections is undoubted, as the voluntary appearance of the creditor for the purpose of filing his claim places it within the control of the court. In re Jackson Brick & Tile Co. (D. C. 1911) 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re L'Hommedieu (1906) 146 Fed. 708, 77 C. C. A. 134, 16 Am. Bankr. Rep. 850. But if the claim is rejected, on the ground that the creditor holds security for it, the court has then no jurisdiction to value the security and enter a decree against the creditor for the excess of its value over the debt. Fitch v. Richardson (1906) 147 Fed. 197, 77 C. C. A. 16 Am. Bankr. Rep. 835.

There is nothing in the act makes a proof of claim an e which the court must either ac full or reject altogether. If the claim is found to be valid, a must be rejected for want of proof or other reasons, the refer allow the claim to the extent th valid, and it is not necessary t it to be amended and resworn. Goldstein (D. C. 1912) 199 Fe 29 Am. Bankr. Rep. 301; Stre Lowe (1911) 184 Fed. 263, 106 A. 405, 25 Am. Bankr. Rep. 7 re T. L. Kelly Dry-Goods Co. 1900) 102 Fed. 747, 4 Am. Bank 528. Referee's disposition of cl contract for sale of automobile ers, which never got beyond exp tal stage, by treating contract a doned and allowing for expense periments, held to constitute s tial justice. In re Louis J. B Motor Co. (D. C. 1916) 229 Fe

Where one of the three equal holders of a bankrupt corporat its organization, transferred to t poration a stock of merchandis agreed valuation, a part of the p ing applied in payment for his and the remainder standing as debtedness of the corporation, o of his claim therefor against th rupt estate, the valuation fixed parties is not conclusive, but t market value of the property determined as a basis for the all of his claim. In re Peerless S (D. C. 1915) 226 Fed. 1020.

23. —— **Allowance as adjudic** The allowance of a claim in ban is an adjudication of all the properly before the court for its mination, and therefore cannot peached or questioned colla Carr v. Barnes (1909) 138 M 264, 120 S. W. 705. See Ski Coddington (1905) 105 App. D 93 N. Y. Supp. 460. The actio referee in bankruptcy, allowing allowing a claim, is a final judgn the absence of review. Stearns Lumber Co. v. Hammond (191 Fed. 559, 133 C. C. A. 411. A in bankruptcy allowing a clai contract is binding on both the tor and the bankrupt, and in a quent action to enforce the con reply setting up such decree is plete answer to a plea that t tract was ultra vires. Elmore, & Co. v. Henderson-Mizell Me Co. (Ala. 1913) 60 So. 820. Th lowance of a claim in bankrup usury held available to a prior p er as res judicata of the claim holder of a mortgage antedatin purchase and given to secure the ous debt. De Watteville v. Sim 1915) 146 P. 224. The presenta a claim against a bankrupt to th tee in bankruptcy does not prev

action thereon against the bankrupt, where the claim was stricken out. Graves v. Neosho Falls Bank (1913) 131 P. 146, 89 Kan. 179.

The order of allowance, in so far as concerns its binding effect on the trustee and the other creditors, does not amount to an adjudication that the particular creditor has not previously received an illegal or voidable preference, that question not being necessarily involved in it. Stearns Salt & Lumber Co. v. Hammond (1914) 217 Fed. 559, 133 C. C. A. 411; Buder v. Columbia Distilling Co. (1902) 96 Mo. App. 558, 70 S. W. 508; Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800. Compare Clendening v. Red River Valley Nat. Bank (1903) 12 N. D. 51, 94 N. W. 901.

24. Postponement of proofs.—If objection to a claim is interposed, or if the court is not satisfied with the prima facie case made out by the claimant's sworn statement, the claim will not be accepted as proved until the objection has been disposed of, or until the court is convinced, by testimony or otherwise, of the validity of the claim. In re Sumner (D. C. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Dreeben (D. C. 1900) 101 Fed. 110, 4 Am. Bankr. Rep. 146. When a review by the judge of the action of the referee in such cases is sought, the better practice on behalf of the creditors who object to such postponement of their claims is to have the objection noted, obtain a stay of proceedings, and have the case certified, before any further action is taken before the referee, for if no objection is made at the time, and the trustee is appointed and enters upon his duties, the court will not interfere. In re Jackson (D. C. 1876) Fed. Cas. No. 7,123. When the claim of a creditor, at the first meeting, is postponed by the referee, and again presented after the election of a trustee, the proof of claim must be treated in all respects as if it had not been before tendered; that is, such action does not cast upon the creditor the necessity of producing evidence in support of its validity, or of taking any other affirmative action not required in ordinary cases for the proof of a debt. In re Herrman (D. C. 1870) Fed. Cas. No. 6,425.

25. Objections to claims.—The words "parties in interest," who are authorized to object to the allowance of claims in bankruptcy, mean parties who have an interest in the res to be administered, and hence include stockholders of the bankrupt, who were the only persons who would be injuriously affected by the allowance of a claim objected to. Rosenbaum v. Dutton (1913) 203 Fed. 838, 122 C. C. A. 156, 30 Am. Bankr. Rep. 155.

The trustee in bankruptcy, as the representative of all the creditors, is authorized to contest the allowance of any claim filed against the estate. Atkins v. Wilcox (1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Two Rivers Woodenware Co. (1912) 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 439. But where the validity of a claim is conceded, and the only dispute is between two persons about the ownership of it, the controversy concerns them alone, and the trustee, as the representative of the other creditors, has no interest. In re Dunlap Carpet Co. (D. C. 1913) 206 Fed. 726, 30 Am. Bankr. Rep. 664.

If the trustee neglects or refuses to oppose the allowance of a claim alleged to be false, fraudulent, or exaggerated, creditors who have proved their debts may proceed in his name, by order of the referee, to contest the claim. In re Knox Automobile Co. (D. C. 1915) 229 Fed. 241; First Nat. Bank v. Cooper (1873) 20 Wall. 171, 22 L. Ed. 273.

Any creditor may proceed on his own initiative to object to the allowance of a claim offered by another, and is not required to present his objections through the trustee, or to show that the latter has refused to act. In re Canton Iron & Steel Co. (D. C. 1912) 197 Fed. 767, 28 Am. Bankr. Rep. 791; In re Hatem (D. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; In re Wyoming Valley Ice Co. (D. C. 1907) 153 Fed. 787; In re Joseph (C. C. 1875) Fed. Cas. No. 7,532; In re Overton (D. C. 1871) 5 N. B. R. 366, Fed. Cas. No. 10,625. Compare In re Randall (D. C. 1870) Fed. Cas. No. 11,552. But the contesting creditor must first have proved his own claim and secured its allowance. Dressel v. North State Lumber Co. (D. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; First Nat. Bank v. Cooper (1873) 20 Wall. 171, 22 L. Ed. 273. An objecting creditor cannot further contest the claim of another creditor after a decision on its validity by the court. Proceedings to review such decision must be taken by the trustee by appeal. In re Troy Woolen Co. (C. C. 1871) Fed. Cas. No. 14,202. The creditor at whose instance the trustee contests the claim of another creditor is liable to the latter for costs where the claim is allowed. Id. (D. C. 1873) 8 N. B. R. 412, Fed. Cas. No. 14,203.

The right to contest claims does not belong to those who are merely debtors or alleged debtors of the bankrupt. In re Sully (1907) 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

26. —— Manner and form of objections.—Objections to the proof of a claim should be in writing, and the allegations should be sufficiently explicit to indicate to the claimant the nature and character of the objections. Spencer v. Lowe (1912) 198 Fed. 961, 117

C. C. A. 497, 29 Am. Bankr. Rep. 876; In re Royce Dry Goods Co. (D. C. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257. It is not necessary that objections should be cast in the shape of a formal pleading. Orr v. Park (1910) 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544; In re Carter (D. C. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126. The statement of objections is not required to be under oath. In re Wooten (D. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247. It is within the discretion of the referee to permit a merely oral statement on the part of the objecting creditor, provided it is definite and to the point. In re Cannon (D. C. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114; Embry v. Bennett (C. C. A. 1908) 162 Fed. 139, 20 Am. Bankr. Rep. 651.

Creditors who desire to contest the allowance of a claim must make their objections on their own behalf, and they cannot become parties to the issue merely by formally adopting objections filed by the bankrupt, nor have they any standing to contest such claim on an appeal taken from the decision of the court by the trustee, in which they did not join. Ayres v. Cone (1905) 138 Fed. 778, 71 C. C. A. 144, 14 Am. Bankr. Rep. 739.

27. —— Grounds of objection.—The allowance of a claim in bankruptcy may be contested for fraud or illegality. In re Fenn (D. C. 1909) 172 Fed. 620, 22 Am. Bankr. Rep. 833. Or because it is barred by the statute of limitations. In re John J. Lafferty & Bro. (D. C. 1903) 122 Fed. 558, 10 Am. Bankr. Rep. 290; Pace's Trustee v. Pace (1915) 162 Ky. 457, 172 S. W. 925. Or because the proving creditor has received a preference which he has not surrendered. Stern v. Louisville Trust Co. (1901) 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305; McCulloch v. Davenport Savings Bank (D. C. 1915) 226 Fed. 309. The fact that one presenting a claim against the bankrupt is closely related to him, while it will justify a rigid scrutiny of the claim, will not alone warrant its rejection. Ohio Valley Bank Co. v. Mack (1906) 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40.

Informality in the proof will not cause the rejection of the claim when the creditor, under examination, has testified positively to facts which establish its validity. McKinsey v. Harding (D. C. 1869) 4 N. B. R. 38, Fed. Cas. No. 8,866.

When a judgment debt is offered for proof, the petition of the bankrupt having been filed after the rendition of the judgment, it may be objected to by the trustee or by other creditors on the ground of fraud or irregularity, including fraudulent preference; for they, not being parties or privies to the judgment, are not precluded from attacking it collaterally. Chandler v. Thompson (1902) 120 Fed. 940, 57 C. C. A. Ex parte O'Neil (D. C. 1867) 1 R. 677, Fed. Cas. No. 10,527; B v. Maybin (C. C. 1877) Fed. Ca 1,700. Compare Stillwell v. W (C. C. 1878) 17 N. B. R. 569, Cas. No. 13,451. For similar re the trustee is not bound by a settlement or accounting, not fol by payment or transfer of pro between the bankrupt and a cre but he may show that it was erro or fraudulent. In re Comstock (1875) Fed. Cas. No. 3,079.

The trustee may set up usury defense to the claim of a cre In re Stern (1906) 144 Fed. 956, C. A. 10, 16 Am. Bankr. Rep. 51 versing In re Worth [D. C. 1904 Fed. 927, 12 Am. Bankr. Rep. In re Moore (C. C. 1878) Fed. No. 9,752; Bromley v. Smith (1871) 5 N. B. R. 152, Fed. Ca 1,922.

As against a negotiable note ma the bankrupt, the trustee can himself only of such defenses as available to the maker, not inc collateral issues between the ind subsequent to delivery. In re Sc (D. C. 1912) 200 Fed. 309, 29 Bankr. Rep. 700.

28. —— Contest and determinat Proceedings to establish claims a the estate of a bankrupt are p the suit in bankruptcy, and not pendent suits at law or in e Maryman v. S. G. Dreyfus Co. 1915) 174 S. W. 549.

If objection is made to the ance of a claim presented at a m of the creditors, the question of lowance should be heard as so feasible, and if the court is not fied with the weight of the evidenc hearing may be adjourned to a time. In re Eagles (D. C. 190 Fed. 695, 3 Am. Bankr. Rep. 7

A creditor presenting his clai proof and allowance against the of a bankrupt, which is contested trustee, is not entitled to dem trial by jury. In re Christense C. 1900) 101 Fed. 243, 4 Am. Rep. 99.

Contests over the allowance of in bankruptcy are intended to be and determined by the referee, a has full jurisdiction over them. Schwarz (D. C. 1912) 200 Fed. 3 Am. Bankr. Rep. 700. It is not sary that the referee should adh any prescribed order of proof. Montgomery (D. C. 1911) 185 955, 25 Am. Bankr. Rep. 431.

Where a claim was allowed aga bankrupt firm and the bankrupt of an individual partner, the t was estopped after four years ject that the claim was insuffici form to justify its allowance a the partner's estate. In re Colli C. 1914) 215 Fed. 247.

29. —— Burden of proof and evidence.—The burden of proof is on one claiming to be a creditor of the bankrupt and presenting a demand against his estate. In re Graves (D. C. 1910) 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Hopper-Morgan Co. (D. C. 1907) 156 Fed. 533, 19 Am. Bankr. Rep. 539. The fact that an alleged creditor of a bankrupt is his wife does not bar her assertion of her rights as a creditor, but, if her claim is disputed, the burden is on her to establish it by proof. In re Crumling (D. C. 1914) 214 Fed. 503.

The creditor sustains the burden of proof in the first instance, and makes out a prima facie case, when he files a proof of his claim, sufficient in form and substance, and duly verified by his affidavit, as required by the statute, as such proof is regarded rather as a deposition than as a pleading. Whitney v. Dresser (1906) 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, 15 Am. Bankr. Rep. 326; In re United Wireless Telegraph Co. (D. C. 1912) 201 Fed. 445, 29 Am. Bankr. Rep. 848; In re Schwarz (D. C. 1912) 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery (D. C. 1911) 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Baumhauer (D. C. 1910) 179 Fed. 966, 24 Am. Bankr. Rep. 750; In re James Dunlap Carpet Co. (D. C. 1909) 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Jones (D. C. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; In re Castle Braid Co. (D. C. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; In re Carter (D. C. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Dresser (1905) 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747; In re Wooten (D. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Shaw (D. C. 1901) 109 Fed. 780, 6 Am. Bankr. Rep. 499; In re Sumner (D. C. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; Moore v. Crandall (C. C. A. 1913) 205 Fed. 689, 30 Am. Bankr. Rep. 517.

When the creditor has made out a prima facie case by filing proof of his claim, the burden is shifted to the objecting creditor or creditors, or the trustee as the representative of all the creditors, and they are required to rebut the claimant's prima facie case by evidence having a probative value at least equal to his affidavit. In re Hull (D. C. 1915) 224 Fed. 796; In re Harper (D. C. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Carter (D. C. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Sanger (D. C. 1909) 169 Fed. 722, 22 Am. Bankr. Rep. 145; In re Pfaffinger (D. C. 1906) 154 Fed. 523, 18 Am. Bankr. Rep. 807; In re Coventry Evans Furniture Co. (D. C. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; West v. W. A. McLaughlin & Co.'s Trustee (C. C. A. 1908) 162 Fed. 124, 20 Am. Bankr. Rep. 654; In re Canton Iron & Steel Co. (D. C. 1912) 197 Fed. 767, 28 Am. Bankr. Rep. 791. Compare Mason v. St. Albans Furniture Co. (D. C. 1906) 149 Fed. 898, 17 Am. Bankr. Rep. 868.

Where the claim is for damages for breach of a contract, and the claimant has sufficiently established the elements of his case, the burden is on objecting creditors to show any circumstances in reduction or mitigation of damages. In re Duquesne Incandescent Light Co. (D. C. 1910) 176 Fed. 785, 24 Am. Bankr. Rep. 419.

In order to support the claimant's demand and warrant its allowance, the proof of claim must conform to the requirements of the law and be fair on its face. It is not self-proving if insufficient in form, or if its recitals are contradictory and irreconcilable, or if the facts alleged are improbable and suspicious. In re Hudson Porcelain Co. (D. C. 1915) 225 Fed. 325; In re Goble Boat Co. (D. C. 1911) 190 Fed. 92, 27 Am. Bankr. Rep. 48; Orr v. Park (1910) 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544; In re Shaw (D. C. 1902) 112 Fed. 947, 7 Am. Bankr. Rep. 458. Failure to file a written instrument which is the basis of a claim against the bankrupt's estate, as required by the statute, does not raise a presumption against the existence of the writing. In re Dresser (1905) 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747.

If the claimant does not choose to rely on the presumption of correctness of his claim raised by the formal proof of it, but elects to offer additional evidence, and such evidence is insufficient to establish his case or contradicts the allegations of his petition, he must abide by the result, and be taken to have waived the advantage of the position which he originally occupied. In re Greenfield (D. C. 1912) 193 Fed. 98, 27 Am. Bankr. Rep. 427; In re T. A. McIntyre & Co. (1909) 174 Fed. 627, 98 C. C. A. 381, 24 Am. Bankr. Rep. 1.

When objection is made to a proof of claim, the proving creditor may be summoned as a witness and be questioned (in the nature of cross-examination) by the trustee or the objecting creditors, concerning his claim and its particulars; and if he fails to appear and submit to such examination, he will be taken to have admitted the objections to his claim, and the same will be rejected. Baumhauer v. Austin (1911) 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep. 385; In re Sumner (D. C. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Lount (D. C. 1875) 11 N. B. R. 315, Fed. Cas. No. 8,543. But testimony of the bankrupt or other witnesses taken before the referee in other issues in the bankruptcy proceedings, to which the claimant was not a party and when he was not present, cannot be used against him. In re Keller (D. C. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hersey

(D. C. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863. The testimony of an officer of a bankrupt corporation, taken on his general examination, but not directed to any particular issue, is not admissible on the hearing of a contested claim before the referee. In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208.

The proving creditor is a competent witness in his own behalf to prove the contract out of which his claim arose, though the bankrupt is dead, as the rules of evidence in such cases are governed by the laws of the United States, and not of the state, and § 1464, ante, does not apply to proceedings in bankruptcy. In re Merrill (D. C. 1877) 16 N. B. R. 35, Fed. Cas. No. 9,466. Conversely, the bankrupt is a competent witness where a claim against his estate is contested, though the creditor is dead and the claim is presented by his executor. In re Moore (C. C. 1878) Fed. Cas. No. 9,752. On similar principles, where a contest is made as to a claim offered to be proved against the estate of a bankrupt by his wife, she is a competent witness in her own behalf. In re Richards (D. C. 1878) 17 N. B. R. 562, Fed. Cas. No. 11,770; In re Bean (D. C. 1875) 14 N. B. R. 182, Fed. Cas. No. 1,166. Compare In re Bechtel (D. C. 1872) Fed. Cas. No. 1,204.

A judgment recovered by the creditor in a state court is not conclusive evidence either of the existence or the amount of his claim, when he seeks to prove it in the bankruptcy proceedings, at least where the trustee was not a party to the suit. In re Freeman (D. C. 1902) 117 Fed. 680, 9 Am. Bankr. Rep. 68; Bourne v. Maybin (C. C. 1877) Fed. Cas. No. 1,700.

The general rule of law that a party can only recover on the cause of action alleged in his pleading applies to claims presented in bankruptcy, and a claimant who has filed a statement of his demand under oath, as required by the statute, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated. In re Lansaw (D. C. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; Orr v. Park (1910) 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544.

As in other cases, the evidence may be circumstantial on questions of motive, intent, good faith, and the like. In re Friedman (D. C. 1908) 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Herman (D. C. 1913) 207 Fed. 594. And the claimant, if put to his defense, must show all the elements of a valid and enforceable demand, just as on the trial of an issue in a plenary suit. In re Rosenthal & Lehman (D. C. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; In re Banks (D. C. 1913) 207 Fed. 662. Where a bankrupt, on full consideration paid before bankruptcy, contracted to absolutely pay the claimant $3 per day during the remainder of his life, the mortality tables might be u determine the claimant's life. Miller (D. C. 1915) 225 Fed. 3 the creditor and the bankrupt a only witnesses and they squarel tradict each other, circumstance ing to corroborate the one or th will turn the scale. In re Kald (D. C. 1900) 105 Fed. 232, Bankr. Rep. 6. The referee sh his own motion consider the cre of the witnesses and of their test and that he is not obliged to all claim even if the evidence in it port is uncontradicted. In re ((D. C. 1904) 133 Fed. 837, 1 Bankr. Rep. 114.

Decisions on weight and sufficie evidence on contested claims, see worth v. Union Trust & Depo (C. C. A. 1914) 211 Fed. 912; Cordova Shop (D. C. 1914) 21 818; In re Kanter (D. C. 191 Fed. 276; In re Hawks (D. C. 204 Fed. 309; In re House of F (1913) 203 Fed. 471, 121 C. C. A In re Utica Pipe Foundry Co. 1915) 221 Fed. 787.

30. Amendment of proofs.—Pr debt may always be amended, if a tion is made in proper time, in to the correction of clerical erro supplying of omissions, or to technical defects in the proofs i ters of form, and when the p amended so as to comply with t it will relate back to the origina unless the rights of others have mean time intervened. In re (D. C. 1900) 99 Fed. 691, 3 Am. Rep. 760; In re Salvator Brewi (1912) 193 Fed. 989, 113 C. C. A 28 Am. Bankr. Rep. 56; In re Quarry Co. (D. C. 1910) 179 Fe 24 Am. Bankr. Rep. 769; In re S (D. C. 1901) 107 Fed. 243, Bankr. Rep. 806; In re Maybin 1876) 15 N. B. R. 468, Fed. Ca 9,337; In re Myrick (D. C. 1 N. B. R. 156, Fed. Cas. No. In re Montgomery (D. C. 1869 B. R. 423, Fed. Cas. No. 9,729; Lowerre (D. C. 1867) 1 N. B. Fed. Cas. No. 8,577; In re Bas C. A. 1912) 200 Fed. 951, 2 Bankr. Rep. 225.

If a creditor, in proving his has illegally increased the amo it, or if a portion of the conside is good and a portion illegal, he w be allowed, on the detection fraud, to separate the good fro bad and amend his proof, or t it allowed for the valid portion for his fraud taints the whole. Elder (D. C. 1870) Fed. Cas. 326. So, where a claim of lien a mortgage has been declared f lent, the claimant is not entit amend so as to prove his clain general claim against the estate. Vogt (D. C. 1911) 188 Fed. 764. ther is it permissible, under the g an amendment, to introduce a

new and different claim against the bankrupt. In re Miners' Brewing Co. (D. C. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Montgomery (D. C. 1869) 3 N. B. R. 430, Fed. Cas. No. 9,731.

31. —— **After expiration of year.**—An amended proof of claim against a bankrupt's estate, filed more than a year after the adjudication, may be substituted for the original proof when the latter was defective, irregular, or otherwise insufficient, notwithstanding the provision of the act limiting the time for original filing of proofs. Hutchinson v. Otis, Wilcox & Co. (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135; In re Roeber (1903) 127 Fed. 122, 62 C. C. A. 122, 11 Am. Bankr. Rep. 464; Hutchinson v. Otis (1902) 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382; In re Salvator Brewing Co. (D. C. 1911) 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re Standard Telephone & Electric Co. (D. C. 1911) 186 Fed. 586, 26 Am. Bankr. Rep. 601; In re Kessler (C. C. A. 1910) 184 Fed. 51, 25 Am. Bankr. Rep. 512; In re Fisk & Robinson (D. C. 1911) 185 Fed. 974; In re McCarthy Portable Elevator Co. (D. C. 1913) 205 Fed. 986, 30 Am. Bankr. Rep. 247. Compare In re Moebius (D. C. 1902) 116 Fed. 47, 8 Am. Bankr. Rep. 590. A claim against a bankrupt's estate having been filed within the year, and having stated the true nature of the consideration, the fact that it was defective for failure, in that the proof was not made by the owner, but by his agent, without stating why it was not made by the owner, etc., did not prevent its amendment after the year had expired so as to comply with the law. In re McCarthy Portable Elevator Co. (D. C. 1913) 205 Fed. 986.

An amendment cannot be allowed after the expiration of a year from the adjudication for the purpose of enabling the creditor to set up an entirely new and separate claim. In re McCallum & McCallum (D. C. 1904) 127 Fed. 768, 11 Am. Bankr. Rep. 447; In re Stevens (D. C. 1901) 107 Fed. 243, 5 Am. Bankr. Rep. 806.

Where a creditor filed a claim in the form of a book account, an amended claim, based on promissory notes of the bankrupt, may be treated as an amendment of the original claim, and the court may permit it to be filed after the expiration of the year, where it is shown that the notes were given in settlement of the account, but were not shown by the creditor's books, and that the original claim was based on the account, rather than the notes, through mere inattention or because the creditor did not realize that it would make any difference as to the form of proof. Brown v. O'Connell (1912) 200 Fed. 229, 118 C. C. A. 415, 29 Am. Bankr. Rep. 653. So, where the creditor originally filed on a note and the claim was disallowed because it carried usurious interest, he was allowed to amend his proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use. In re Robinson (D. C. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626. Where, after labor claims were returned by a referee in bankruptcy for insufficiency, claimants' attorney sought unsuccessfully to cure the defects by his own affidavit and, this being returned, nothing further was done for more than a year, the claimants' right then to amend and refile the claims was barred. In re Booth (D. C. 1914) 216 Fed. 575. Though a claim was not formally filed within the year, but an assignment of it was executed and filed with the referee, it was held that this might be treated as sufficiently presenting the claim to permit an amendment after the year. Bennett v. American Credit Indemnity Co. (1908) 159 Fed. 624, 86 C. C. A. 614, 20 Am. Bankr. Rep. 258. So a paper filed by a creditor, denominated "an application for the sale of collateral," and containing all the statements essential to a formal proof of claim, may be used as the foundation for an amendment after the expiration of the year. In re Faulkner (C. C. A. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542. Compare In re Basha (D. C. 1912) 193 Fed. 151, 27 Am. Bankr. Rep. 435. Where the trustee circulated a paper among the creditors for their signatures, containing a proposal for a settlement, each creditor to state on it the amount of his claim, and it was signed by all and returned and filed with the referee within a year after the adjudication, it was held to constitute a sufficient claim to be amendable, after the end of the year, by a creditor who signed it in the belief that a proof of his claim was not required, but without whose assent the settlement could not have been effected. In re Fairlamb (D. C. 1912) 199 Fed. 278, 28 Am. Bankr. Rep. 515. A letter written by a creditor to attorneys for a receiver after filing of the petition, but before adjudication, held not to constitute an informal proof of claim, which could be amended after the lapse of three years. In re Thompson (C. C. A. 1915) 227 Fed. 981.

A court of bankruptcy may allow an amended proof, filed with the trustee's consent, to be substituted for the defective original proof, although the trustee has an appeal pending from the decree of the court permitting the creditor to prove his claim. Hutchinson v. Otis (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

32. —— **By secured creditors.**—The power of allowing amendments is not infrequently appealed to in behalf of secured creditors; and it is well settled

that where a creditor of this class has proved his claim as unsecured, but this has been done through inadvertence or mistake or ignorance of his rights, it is in the discretion of the court to allow him to amend his proof so as to state the facts correctly, even after the lapse of a year from the adjudication, provided this will not operate to the prejudice of any other creditor, or provided all parties can be restored to their original positions. Maxwell v. McDaniels (C. C. A. 1912) 195 Fed. 426, 27 Am. Bankr. Rep. 692; In re James Carothers & Co. (D. C. 1910) 182 Fed. 501; In re Wilder (D. C. 1900) 101 Fed. 104; In re Falls City Shirt Mfg. Co. (D. C. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Clark (D. C. 1871) 5 N. B. R. 255, Fed. Cas. No. 2,806; In re Parkes (D. C. 1874) 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Hubbard (D. C. 1867) 1 N. B. R. 679, Fed. Cas. No. 6,813; In re Jaycox (D. C. 1873) 8 N. B. R. 241, Fed. Cas. No. 7,242; Ex parte Harwood (D. C. 1842) Fed. Cas. No. 6,185; Ex parte Lapsley (D. C. 1842) Fed. Cas. No. 8,083; In re Hope Min. Co. (D. C. 1871) Fed. Cas. No. 6,681; In re Baxter (D. C. 1882) 12 Fed. 72. But see In re E. B. Havens & Co. (D. C. 1911) 186 Fed. 583. And it is not an insuperable objection to the allowance of such an amendment that the creditor has already received a dividend on his claim as unsecured, for it can be made a condition of the leave granted to him to amend that he shall refund to the trustee the sum so received as a dividend. In re Parkes (D. C. 1874) 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Baxter (D. C. 1882) 12 Fed. 72. On similar principles, where a bankrupt had money on deposit in a bank and was indebted to the bank on promissory notes for a larger sum, and the cashier of the bank made proof against the bankrupt's estate for the entire sum of the notes, omitting, through mistake or forgetfulness, to offset the amount of the deposit, it was held that the bank should be permitted to amend its proof so as to retain the amount of the deposit, credit the same on the notes, and prove a claim for the balance. In re Myers (D. C. 1900) 99 Fed. 691, 3 Am. Bankr. Rep. 760. Claimant, who loaned money to bankrupt immediately prior to proceedings, taking a note and mortgages, knowing of bankrupt's intention to pay certain creditors, effecting a preference, could amend his proof of claim to stand as for an unsecured debt. Seligman v. Gray (C. C. A. 1915) 227 Fed. 417.

33. Withdrawal of proofs.—A creditor of a bankrupt will not be allowed to withdraw his proof of debt, so as to place himself outside the bankruptcy proceedings, after the claim has been filed in the case and allowed. In re McIntosh (D. C. 1869) 2 N. B
Fed. Cas. No. 8,826; In re
(D. C. 1869) 2 N. B. R. 595,
No. 4,459; In re Lowerre (D.
1 N. B. R. 74, Fed. Cas No. 8,5
a creditor who has proved a cl
note may withdraw the note, by
mission of the court, on leavin
on file. In re Loden (D. C. 1
Fed. 965, 25 Am. Bankr. R
Withdrawal of a claim will n
lowed after leave has been gr
the creditor to amend his pr
re Hallie (D. C. 1874) Fed.
5,960. But a creditor who ha
his claim may be permitted to
it if it was made under a mi
fact or law, provided neither t
rupt nor th other creditors
proved will be injured thereby
Hubbard (D. C. 1867, Fed.
6,813.

A creditor who was in fact
of his property through the fr
acts of the bankrupt, of w
creditor was ignorant and which
discovers on the examination
bankrupt, after he has proved
as a general creditor, is not the
ped to withdraw his claim and
the return of his property. In
art (D. C. 1910) 178 Fed. 463,
Bankr. Rep. 474.

But the court will not gra
to withdraw a proof merely
purpose of allowing the cre
continue an arrest of the
which was made before the co
ment of the proceedings in ban
In re Wiener (D. C. 1876) 14
218, Fed. Cas. No. 17,620.

34. Re-examination of claims punging.—The provision of this
with reference to the reconsi
of claims which have been
does not apply to claims agai
estate for expenses of adminis
such as the charges and e
shown on the account of a rece
pointed to take charge of the ba
estate. In re Reliance Sto
Warehouse Co. (D. C. 1900) 1
619, 4 Am. Bankr. Rep. 49. N
it apply to fixed liens on the
tate of the bankrupt. Hawth
Hendrie & Bolthoff Mfg. & Su
(1911) 50 Colo. 342, 116 Pac.

In bankruptcy proceedings, the
power to reconsider and revise
ders and decrees does not exp
the term at which they were m
re Keyes (D. C. 1907) 160 Fed.
Am. Bankr. Rep. 183. But pa
interest may lose their right t
for the expunging of an allowe
when they have acquiesced in
such a length of time as to b
chargeable with laches. In re P
Lead & Zinc Co. (D. C. 1912) 1
316, 28 Am. Bankr. Rep. 880;
Hinckel Brewing Co. (D. C.
123 Fed. 942, 10 Am. Bankr. R
In re Hamilton Furniture Co.

1902) 116 Fed. 115, 8 Am. Bankr. Rep. 588; In re Effinger (D. C. 1910) 184 Fed. 724. 25 Am. Bankr. Rep. 924; In re Merwin & Willoughby Co. (D. C. 1913) 208 Fed. 293; In re Williams (D. C. 1915) 224 Fed. 984. But a delay of a year or even more, no other facts appearing, and where no dividend has been declared, cannot be said to constitute by itself such laches as to bar the re-examination of a claim. In re Globe Laundry (D. C. 1912) 198 Fed. 365, 28 Am. Bankr. Rep. 831.

While it would be an abuse of discretion for the court to set aside an order allowing a claim and to grant a rehearing, for the sole purpose of extending the time within which an appeal may be taken, yet such an order, like all others, is within the control of the court, and may, in its sound discretion, be set aside for good cause shown, even after the expiration of the time allowed for appeal. West v. W. A. McLaughlin & Co.'s Trustee (C. C. A. 1908) 162 Fed. 124, 20 Am. Bankr. Rep. 654.

The court has power to investigate a claim at any stage of the proceedings, before the final closing of the estate, and to make any correction that equity and justice demand—not only to reduce the amount of the claim if it is found to have been allowed for too large a sum, but also to increase it if, through inadvertence or mistake, it is less than by right it should be, or to allow the proofs to stand for any sum which, upon examination, is found to be actually due. In re W. A. Paterson Co. (1911) 186 Fed. 629, 108 C. C. A. 493, 34 L. R. A. (N. S.) 31, 25 Am. Bankr. Rep. 855; In re Montgomery (D. C. 1869) 3 N. B. R. 426, Fed. Cas. No. 9,730; In re New Brunswick Carpet Co. (D. C. 1880) 4 Fed. 514. But on motion to expunge a proof of debt and establish a set-off, a personal judgment cannot be rendered against the creditor for money in his hands. In re Forbes (D. C. 1874) Fed. Cas. No. 4,922; In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159. Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required was sustained on a petition for review, and shortly afterwards the Circuit Court of Appeals in another case so construed the bankruptcy act that such claims would not have been barred, the claimants were held entitled to a rehearing, although no appeal was claimed. In re Keyes (D. C. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183. Allowance of a secured claim in part may be annulled, on its appearing that the security is sufficient to pay it, or, if allowed for too great an amount, the allowance may be reduced, instead of annulling the claim. Courtney v. Fidelity Trust Co. (1914) 219 Fed. 57, 134 C. C. A. 595.

When a trustee in bankruptcy is not satisfied of the legality or correctness of any claim which has been proved and allowed against the estate, or desires to contest such claim in respect either to its validity or amount, the proper practice is for him to move to have it re-examined, under the provisions of the general order, and proceed as therein directed. In re Firemen's Ins. Co. (D. C. 1873) Fed. Cas. No. 4,796.

35. —— **Parties who may apply.**— Where no trustee has been appointed for the estate of a bankrupt, a motion for the re-examination and expunction of a claim proved and allowed against his estate may be made by the bankrupt himself. In re Ankeny (D. C. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72. Compare In re Columbia Iron Works (D. C. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526. If the bankrupt can be estopped from disputing the validity of a claim against his estate, or from applying to have it expunged after it has been proved, by reason of his having included it in his sworn schedule of debts, no such estoppel can be claimed in favor of a purchaser of the claim who was informed by the bankrupt, before purchasing, that the seller of the claim had no valid claim against the estate. In re Pease (D. C. 1887) 29 Fed. 593.

As between the trustee and the general creditors of the estate, it has been held that the trustee alone is vested with the right to move for the reconsideration of a claim which has been allowed, that the provision authorizing "any creditor" to do so is meant to apply only to the case where a trustee has not yet been appointed, and that, after the appointment of a trustee, such a proceeding may not be instituted by a creditor without the concurrence of the trustee. In re Sully (D. C. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; In re Lewensohn (1903) 121 Fed. 538, 57 C. C. A. 600, 9 Am. Bankr. Rep. 368. If any creditor is dissatisfied with the allowance of another, creditor's claim, his proper course is to demand of the trustee that the latter shall move for its reconsideration. But if the trustee refuses to do so, then the creditor may apply to the court for an order requiring the trustee so to move, or for permission for the objecting creditor to move in his own name. In re Mexico Hardware Co. (D. C. 1912) 197 Fed. 650, 28 Am. Bankr. Rep. 736; In re Stern (1906) 144 Fed. 956, 76 C. C. A. 10, 16 Am. Bankr. Rep. 510. And where it appears that a claim has been properly disallowed on objections made and conducted by the creditors in their own names, who voluntarily assumed liability for costs and expenses, the order of disallowance will not be disturbed on the theory that the trustee was the only proper person to attack

the claim. In re Canton Iron & Steel Co. (D. C. 1912) 197 Fed. 767, 28 Am. Bankr. Rep. 791. And the right to have a claim re-examined should not be denied to creditors who clearly have an interest therein because they seek such re-examination chiefly or solely in the interest of a third party. In re Sully (1907) 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

36. —— **Grounds for expunging claim.** —If the claim as made by the creditor is wholly disproved in form and substance upon a re-examination, it should be entirely expunged. In re Mead (D. C. 1882) 14 Fed. 287. A claim may be stricken out on proof that the creditor had received a fraudulent preference which has not been surrendered, whereby he is disabled from proving any part of his debt. In re Headley (D. C. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272; In re Leland (C. C. 1877) Fed. Cas. No. 8,235. A claim may be expunged on account of a purpose, which was accomplished, of hindering and defrauding other creditors. In re Headley (D. C. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272. Or because, after the proof and allowance of a debt founded on a judgment, the court in which the judgment was rendered has set it aside. In re Bruce (D. C. 1873) Fed. Cas. No. 2,044. Or because the claim is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed. In re Lipman (D. C. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46.

37. —— **Proceedings and evidence.**— A proceeding for the re-examination of a proved claim should be begun by the filing of a petition, which should be distinct and specific, but it is not necessary to allege facts which, if proved, would defeat the claim, but only facts which constitute a sufficient cause for the re-examination of it which is demanded. In re George Watkinson & Co. (D. C. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Ankeny (D. C. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72. If the petition is faulty in this respect, the proper method of objecting to it is by motion for a more specific statement, not by motion to strike out parts of the petition. In re Ankeny (D. C. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72. If the creditor whose claim is in contest does not file an answer, or obtain an extension of time for answering, it is proper to enter a decree against him pro confesso, carrying the ordinary incidents and consequences of such a decree. In re Docker-Foster Co. (D. C. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584; In re Lewis, Eck & Co. (D. C. 1907) 153 Fed. 495, 18 Am. Bankr. Rep. 657.

The burden of showing that a creditor's claim, duly proven according to the provisions of the statute, is not a valid claim against the estate, re on the trustee or the creditor mo have it expunged. In re Frazin A. 1912) 201 Fed. 86, 29 Am. Rep. 214; In re Pittsburg Lead Co. (D. C. 1912) 198 Fed. 316, 2 Bankr. Rep. 880; In re Howard 1900) 100 Fed. 630, 4 Am. Bank 69; In re Felter (D. C. 1881) 904; In re Robinson (D. C. 18 N. B. R. 130, Fed. Cas. No. 1 Canby v. McLear (D. C. 1876) B. R. 22, Fed. Cas. No. 2,378. examination of a claim filed ag bankrupt's estate, the proofs filed constitute a prima facie ca are sufficient unless overcome b tive testimony when the claims supported by other evidence. Elk Valley Coal Min. Co. (D. C. 210 Fed. 386. On the petitio trustee in bankruptcy to exp creditor's claim on the ground o erence, the burden is on the tru proving that the preferential p was received after information insolvency of the bankrupt. In r zin (1912) 201 Fed. 86, 119 C. 424. Where a trustee's petition punge certain claims was based e on the allegation that they were by limitations and no offer to was made, evidence of an unc payment on one of the claims w error. In re Banks (D. C. 191 Fed. 662.

The creditor whose claim is un examination may be ordered to for examination concerning it, an refuses or fails to do so, the clai be expunged. In re George Wat & Co. (D. C. 1904) 130 Fed. 2 Am. Bankr. Rep. 370; Laffoon (1908) 159 Fed. 861, 87 C. C. A. Am. Bankr. Rep. 174; In re Kyl C. 1868) 2 N. B. R. 649, Fed. C 7,956. Where proceedings are in ed for re-examination of certain claims against a bankrupt's esta referee is not authorized by Or (ante, § 9614), to require of th tioner a deposit of money to ind the claimants for traveling ex and hotel bills while attending the ing. In re Elk Valley Coal Mini (D. C. 1914) 210 Fed. 386. If t timony of the bankrupt is desire motion to expunge a proved cl may be obtained by summoning hi witness. Canby v. McLear (1876) 13 N. B. R. 22, Fed. Cas. 378.

The referee must give due no the creditor whose claim is cha of the time fixed for hearing th tion. In re Stoever (D. C. 190 Fed. 355, 5 Am. Bankr. Rep. 250 he is not required to give not his findings and decision on the p as these become matter of rec which a creditor who has proved is bound to take notice. In re (D. C. 1887) 29 Fed. 593.

38. Review of referee's proceedings by judge.—The referee in bankruptcy has jurisdiction in the first instance to hear objections to the proof of claims, and to pass upon the question of allowing or rejecting them, and also to entertain and decide motions for their reconsideration or expunction; and the remedy to obtain a review of his decision on such a motion lies in the court of bankruptcy. Clendening v. Red River Valley Nat. Bank (1903) 12 N. D. 51, 94 N. W. 901. As to procedure on finding referee's decision wrong, and remand of case for rehearing, see Moore v. Crandall (C. C. A. 1913) 205 Fed. 689, 30 Am. Bankr. Rep. 517. A person dissatisfied with the referee's decision must file a petition for a review of his order. In re Russell (D. C. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566. Compare In re John A. Baker Notion Co. (D. C. 1910) 180 Fed. 922, 24 Am. Bankr. Rep. 808. Ordinarily a general creditor may not prosecute before the bankruptcy court a petition for review of the allowance of the claim of another creditor; only the trustee may do so. In re Mexico Hardware Co. (D. C. 1912) 197 Fed. 650, 28 Am. Bankr. Rep. 736. The matter cannot be brought into the district court for review by filing exceptions in that court. In re Hawley (D. C. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632. Where a petition for discharge was denied, the refusal of the referee to allow a claim against the bankrupt, filed by him as guardian of his infant children, was not reviewable on his application, as it was immaterial to him whether the claim was allowed or not. In re Roberts (D. C. 1914) 213 Fed. 905. Where a bankrupt filed three separate claims against his trustee for services rendered to the estate, two of which were disallowed and the third allowed in part, his acceptance of such allowance did not estop him from the right to review the referee's decision as to the other claims. Peck v. Richter (1914) 217 Fed. 880, 133 C. C. A. 590.

A person desiring a review of the referee's decision on the allowance or expunction of a claim must present his petition within the time limited therefor by any rule of the court. In re T. M. Lesher & Son (D. C. 1910) 176 Fed. 650, 25 Am. Bankr. Rep. 218. If no such rule applies, he must act with reasonable promptness, or he will be chargeable with laches, and may, for that reason, be denied all relief. In re Nichols (D. C. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

It was within the discretion of the district judge to permit a claimant in bankruptcy to amend the specifications of its claim, after a recommendation by the referee that a composition be accepted, where the referee disallowed such amendments because of a doubt as to his power. In re Soloway & Katz (C. C. A. 1914) 211 Fed. 333.

On such a petition for review, the burden of proof is on those who object to the referee's decision and desire its reversal. In re Williams (D. C. 1903) 120 Fed. 542, 9 Am. Bankr. Rep. 731; In re Pittsburgh Lead & Zinc Co. (D. C. 1912) 198 Fed. 316, 28 Am. Bankr. Rep. 880. The referee is vested with a large measure of discretion and his decision on any matter of fact or evidence will be entitled to at least the weight accorded to the verdict of a jury, and will not be reversed by the court unless plainly unsupported by the evidence or otherwise palpably erroneous. In re New York & Philadelphia Package Co. (D. C. 1915) 225 Fed. 219; In re Miller (D. C. 1915) 225 Fed. 331; In re Charles R. Partridge Lumber Co. (D. C. 1914) 215 Fed. 973; Baumhauer v. Austin (1911) 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep. 385; In re Schwarz (D. C. 1912) 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery (D. C. 1911) 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Levin (D. C. 1909) 173 Fed. 119, 21 Am. Bankr. Rep. 665; In re Carter (D. C. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Grant (D. C. 1902) 118 Fed. 73, 9 Am. Bankr. Rep. 93; In re Stout (D. C. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; In re Rider (D. C. 1899) 96 Fed. 811, 3 Am. Bankr. Rep. 192.

Where a referee, in rejecting a claim, erroneously ignored material legal evidence, it was improper for the district court to allow the claim, in addition to reversing the determination of the referee; the proper procedure being to remand the claim to the referee for rehearing. Moore v. Crandall (1913) 205 Fed. 689, 124 C. C. A. 11.

§ 9642. (Act July 1, 1898, c. 541, § 58, as amended, Act June 25, 1910, c. 412, § 9½.) Notices to creditors.

Notices to Creditors.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any con-

troversy; (8) the proposed dismissal of the proceedings, and there shall be thirty days' notice of all applications for the discha of bankrupts.

b Notice to creditors of the first meeting shall be published at l once and may be published such number of additional times as court may direct; the last publication shall be at least one w prior to the date fixed for the meeting. Other notices may be p lished as the court shall direct.

c All notices shall be given by the referee, unless otherwise ord by the judge. (30 Stat. 561. 36 Stat. 841.)

In this section, as originally enacted, subdivision a thereof was as foll "a Creditors shall have at least ten days' notice by mail, to their respe addresses as they appear in the list of creditors of the bankrupt, or as a wards filed with the papers in the case by the creditors, unless they w notice in writing, of (1) all examinations of the bankrupt; (2) all hea upon applications for the confirmation of compositions or the dischar bankrupts; (3) all meetings of creditors; (4) all proposed sales of erty; (5) the declaration and time of payment of dividends; (6) the of the final accounts of the trustee, and the time when and the place w they will be examined and passed upon; (7) the proposed compromise o controversy, and (8) the proposed dismissal of the proceedings."

It was amended by Act June 25, 1910, c. 412, § 9½, last cited abov changing the time of notice of applications for discharge of bankrupts, m said subdivision a read as set forth here.

Section 14 of said amendatory Act June 25, 1910, c. 412, 36 Stat. 842, vided that the act should not apply to bankruptcy cases pending when it effect, but that such cases should be adjudicated and disposed of confor to the provisions of the original act as previously amended.

Notes of Decisions

Notices to creditors.—The requirement of this section that notice shall be given to the creditors of the various steps in the proceeding is mandatory, in such sense that the failure to give notice of any particular meeting or other matter enumerated in the statute as requiring notice may be cause for setting aside the proceedings taken therein, or in such sense that the creditors who should have been notified, and were not, may not be bound by anything done at the meeting or in relation to the matter in hand. In re Gilbert (D. C. 1900) 2 Nat. Bankr. News, 378; In re Hall (D. C. 1868) 2 N. B. R. 192, Fed. Cas. No. 5,922; Anonymous (D. C. 1867) 1 N. B. R. 122, Fed. Cas. No. 457. In an action against an assignee in bankruptcy for willful neglect to give notice of creditors' meetings, it is sufficient for him to show that he placed the notice in the mail, and it is not material to show that it was received. Russell v. Phelps (1880) 42 Mich. 377, 4 N. W. 1. But the jurisdiction of the court, either over the proceedings in general or over the bankrupt's application for discharge, is not made dependent upon the correctness of the bankrupt's list of creditors or upon the actual receipt of notice by the creditors. Jurisdiction is acquired by the petition and adjudication, and if the notices required by the act were duly and regularly published and served, the regularity of the proceedings, or the jurisdiction of the court to proceed with the case, is not affected by the failure of any creditor, or any number of creditors, to receive the notice. In re Archenbrown (D. C. 1875) 1 B. R. 149, Fed. Cas. No. 504; I Stetson (D. C. 1870) 3 N. B. R. Fed. Cas. No. 13,381. See In re S ler (D. C. 1899) 96 Fed. 400, 2 Bankr. Rep. 704.

Written notice by mail, as req by this section, must be sent to fo creditors, as well as to those wh side within the United States. I Heys (D. C. 1867) Fed. Cas. No. 6

Notices of meetings of creditors sequent to the first should be se all the known creditors, whether have proved their claims or not. Mills (D. C. 1874) Fed. Cas. No. 9 Russell v. Phelps (1880) 42 Mich. 4 N. W. 1.

If the name of a given creditor pears in the bankrupt's list, wi statement that his residence is known, the failure to give him n will not vitiate the proceedings. Pulver (D. C. 1867) Fed. Cas. 11,466.

Clerical errors or minor inaccur in notices to creditors will not v the proceedings, provided they ar such as to mislead or deceive cred In re Hill (D. C. 1867) Fed. Cas 6,481.

Where an assignee in bankr sought to renounce his trust by m an application for his discharge, on his own affidavit, alleging th tangible assets had come to his and that he had no information o property belonging to the ban other than a chose in action in of the estate, it was held that noti creditors of such application was

essary. In re Savage (D. C. 1882) 12 Fed. 719.

A judgment creditor's denial that he received notice, or had knowledge of bankruptcy proceedings, is not conclusive in face of a record of the bankruptcy court that the statutory notice was given. Claflin v. Wolff (N. J. 1915) 96 A. 73.

§ 9643. (Act July 1, 1898, c. 541, § 59, as amended, Act June 25, 1910, c. 412, § 10.) Who may file and dismiss petitions.

Who may File and Dismiss Petitions.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. (30 Stat. 561. 36 Stat. 841.)

In this section, as originally enacted, subdivision g thereof was as follows: "g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors."

It was amended by Act June 25, 1910, c. 412, § 10, cited above, by adding to the subdivision, at the end thereof, the further provisions beginning with the words "and to that end the court," etc., making said subdivision read as set forth here.

Section 14 of said amendatory Act June 25, 1910, c. 412, 36 Stat. 842, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Notes of Decisions

1. Voluntary petition and adjudication.
2. —— Opposition by creditors.
3. Creditors entitled to file involuntary petition.

4. —— Nature of claims.
5. —— Time of accrual of claims.
6. —— Corporation and partnership creditors.
7. —— Secured creditors.
8. —— Preferred creditors.
9. —— Creditors estopped to petition.
10. —— Requisites as to number and amount.
11. —— Solicitation, procurement, or purchase of claims.
12. —— Withdrawal of petitioners.

1. Voluntary petition and adjudication.—A bankrupt in a voluntary petition need only aver that he owes debts which he is unable to pay, and desires to take the benefit of the act. In re Lachenmaier (1913) 203 Fed. 32, 121 C. C. A. 368.

There is no legal obligation on an insolvent debtor to file a voluntary petition in bankruptcy. Richmond Standard Steel Spike & Iron Co. v. Allen (1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; Summers v. Abbott (1903) 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254.

A voluntary petition may be withdrawn and all further proceedings stayed on the application of the petitioner, before an adjudication has been made, upon proper cause shown and the payment of costs. Ex parte Randall (C. C. 1842) Fed. Cas. No. 11,550. But this cannot be done if it is opposed by the creditors, except upon showing very substantial grounds. Ex parte Harris (D. C. 1845) Fed. Cas. No. 6,110. But where, upon the institution of proceedings in composition, it appeared that no adjudication had yet been made upon the bankruptcy petition, which was voluntary, it was held that an adjudication ought not to be made merely because certain creditors asked it, if the debtor did not desire it. In re Alsberg (D. C. 1877) Fed. Cas. No. 260.

After an adjudication of bankruptcy has been made, it is not open to the bankrupt to withdraw and obtain a dismissal of the proceedings without the concurrence of all whose interest may be affected. In re Gile (D. C. 1842) Fed. Cas. No. 5,423.

Where a petition in involuntary bankruptcy is filed, the default of the defendant, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy. In re Taylor (1900) 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

A voluntary petition for adjudication of a corporation as a bankrupt filed pursuant to the authority of the board of directors is, in the absence of any restriction by statute or charter and by-laws as to the powers of the board, sufficient. In re Guanacevi Tunnel Co. (1912) 201 Fed. 316, 119 C. C. A. 554.

If proceedings in involuntary bankruptcy are begun against a corporation, and it adopts a resolution consenting to an adjudication being made, the proceeding substantially becomes voluntary, though compulsory in
re New Amsterdam Motor C
1910) 180 Fed. 943, 24 A
Rep. 757.

Where a petition is filed by
ber of a firm against the fir
partners, it is involuntary in
it affects the partners who
sent, and hence they cannot
ed bankrupt except upon pr
commission of an act of b
within the statutory time. I
Ceballos & Co. (D. C. 1908)
445, 20 Am. Bankr. Rep. 459

Whether a court of b
should proceed under a volun
tion of a debtor, or a pendin
tary petition against him is n
tion of jurisdiction or of ri
parties, but one of practice;
adjudication should be mad
proceeding in which, under a
cumstances, it appears to b
best interests of the entire e
a general rule, it should be m
voluntary case, with proper
to the rights of prior petition
tors, because quicker, less
and less likely to lead to co
tion; and the court is not
from acting under this gener
the fact that the debtor may
peared and participated in th
tary proceeding under suc
stances as might ordinarily
estoppel if his own interests a
involved. In re New Chattano
ware Co. (D. C. 1911) 190
27 Am. Bankr. Rep. 77. A
re Stegar (D. C. 1902) 113
7 Am. Bankr. Rep. 665; In r
(D. C. 1842) Fed. Cas. No.
re Flanagan (D. C. 1878) 18
439, Fed. Cas. No. 4,850. C
re Stewart (D. C. 1869) 3 N.
Fed. Cas. No. 13,419; In r
maier (C. C. A. 1913) 203 F
Am. Bankr. Rep. 325.

2. —— Opposition by credit
act does not authorize credi
proposed voluntary bankrupt
swers in opposition to his pe
adjudication. In re Jehu (D.
94 Fed. 638, 2 Am. Bankr.
In re R. H. Pennington & C
1915) 228 Fed. 388.

Creditors will not be heard
that a debtor filing a petition
tary bankruptcy is not in rea
vent and therefore not entitl
benefits of the act. In re Ca
C. 1902) 115 Fed. 246, 8 A
Rep. 270; In re Fowler (D.
Fed. Cas. No. 4,998. A cre
not complain of an adjudicatio
ruptcy of a corporation in a
proceeding on the ground tha
untary petition was filed wi
thority. In re Guanacevi T
(1912) 201 Fed. 316, 119 C.
The giving of preferences,
transfers of property, conce
assets, or other acts in con
of the statute, are not groun

jection to an adjudication in voluntary bankruptcy. In re Houghton (D. C. 1842) Fed. Cas. No. 6,727; Ex parte Paget (D. C. 1842) Fed. Cas. No. 10,-670. Compare In re Bailey (D. C. 1842) Fed. Cas. No. 726. Mere pendency of an involuntary bankruptcy petition does not deprive the court of jurisdiction to receive and consider a voluntary petition. In re Lachenmaier (1913) 203 Fed. 32, 121 C. C. A. 368, following In re Stegar (D. C. 1902) 113 Fed. 978.

The objection that the district court for a district was without jurisdiction to adjudicate a corporation a bankrupt, on the ground that it had not maintained its principal place of business in the district for the greater part of six months before the filing of the petition as required by § 2 (1), ante, § 9586 (1), is jurisdictional, and may be made by a creditor. In re Guanacevi Tunnel Co. (1912) 201 Fed. 316, 119 C. C. A. 554; In re Waxelbaum (D. C. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

Where a petition in voluntary bankruptcy, on which an adjudication is made, does not correctly allege the residence, domicile, and principal place of business of the debtor, the adjudication may be vacated for want of jurisdiction on the petition of creditors, or of a receiver appointed by a state court. In re San Antonio Land & Irrigation Co. (D. C. 1916) 228 Fed. 984. But creditors who prove their debts, choose a trustee, and otherwise participate in the proceedings so as to recognize their validity, will be considered as having waived the objection of a want of jurisdiction, and cannot first set it up in opposition to the bankrupt's application for discharge. Allen v. Thompson (D. C. 1882) 10 Fed. 116; In re Mason (D. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599.

3. Creditors entitled to file involuntary petition.—Each creditor joining in a petition in involuntary bankruptcy must be the owner of a demand or claim provable against the bankrupt. In re Howell (1914) 215 Fed. 1, 131 C. C. A. 309; In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449, Bankruptcy Act 1898, §§ 59b, 63. Persons related to the alleged bankrupt within the third degree of consanguinity may bring a petition in involuntary bankruptcy against him, although it is provided that they are not to be included in computing the total number of his creditors for the purpose of ascertaining whether a sufficient proportion have joined in the petition. Perkins v. Dorman (D. C. 1913) 206 Fed. 858. A corporation of another state may be a petitioning creditor, and it is not necessary to allege that it has obtained the right to do business in the state where the proceeding is brought. In re R. L. Radke Co. (D. C. 1911) 193 Fed. 735, 27 Am. Bankr. Rep. 950. But persons who extended credit to a corporation, in violation of the express provisions of the statute under which it was organized that it should neither give nor receive credit, have no claims which could be proved in bankruptcy against it, and cannot maintain a petition to have it adjudged an involuntary bankrupt. In re Wyoming Valley Co-op. Ass'n (D. C. 1912) 198 Fed. 436, 28 Am. Bankr. Rep. 462.

A creditor who has sold and assigned his claim has no standing to bring or join in the petition. In re Burlington Malting Co. (D. C. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369. This applies to one who was qualified at the time the original petition was filed, but ceased to be a creditor before the filing of an amended petition, the first having been dismissed for insufficiency. In re Western Savings & T. Co. (D. C. 1877) Fed. Cas. No. 17,442. It is immaterial that a creditor has contracted to sell his claim, agreeing, as a condition, first to join in a petition in bankruptcy against the debtor, if the transfer is not made until after the petition is filed. Lowenstein v. Henry McShane Mfg. Co. (D. C. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601. The bankruptcy proceeding is not defeated by the fact that one of the petitioning creditors has received payment of his claim from the debtor after the filing of the petition. In re Lutfy (D. C. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614.

A creditor of a bankrupt may not split up his claim and assign some of the parts to other persons for the purpose of qualifying them as joint petitioners in a proceeding in involuntary bankruptcy. In re Halsey Electric Generator Co. (D. C. 1908) 163 Fed. 118, 20 Am. Bankr. Rep. 738. One is not qualified as a petitioner to whom a claim has been transferred without consideration and as a mere subterfuge to avoid a possible set-off or counterclaim. In re Pangborn (D. C. 1910) 185 Fed. 673, 26 Am. Bankr. Rep. 40. Where separate creditors of a bankrupt assigned their claims to assignees, who had no financial interest in the claims, but held the same merely as trustees for their respective assignors, they were nevertheless entitled to the rights of creditors. In re Halsey Electric Generator Co. (D. C. 1908) 163 Fed. 118, 20 Am. Bankr. Rep. 738.

A state may be a petitioner in involuntary bankruptcy against its debtor. In re Chamberlin (D. C. 1877) Fed. Cas. No. 2,580.

A married woman may file a petition against her own husband, if the law of the state permits the creation of enforceable debts as between man and wife, and she is an actual creditor of her husband in good faith, having a provable claim. In re Novak (D. C. 1900) 101 Fed. 800, 4 Am. Bankr. Rep. 311.

4. —— Nature of claims.—A debt payable in the future, but upon which

the debtor's liability is fixed and not contingent, will support a petition in bankruptcy, as in the case of a promissory note not yet due. In re Rothenberg (D. C. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485; Linn v. Smith (C. C. 1870) 4 N. B. R. 46, Fed. Cas. No. 8,375; In re Alexander (D. C. 1870) 4 N. B. R. 178, Fed. Cas. No. 161; Phelps v. Clasen (C. C. 1868) Fed. Cas. No. 11,074; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Ouimette (D. C. 1870) Fed. Cas. No. 10,622; Barton v. Tower (D. C. 1842) Fed. Cas. No. 1,085; In re King (D. C. 1842) Fed. Cas. No. 7,785. Compare In re Morse (C. C. 1879) Fed. Cas. No. 9,851.

A surety who has not paid the debt is not a creditor in such sense as to be entitled to file a petition in bankruptcy against the principal debtor. Phillips v. Dreher Shoe Co. (D. C. 1902) 112 Fed. 404, 7 Am. Bankr. Rep. 326. See Boyce v. United States Fidelity & Guaranty Co. (1901) 111 Fed. 138, 49 C. C. A. 276, 7 Am. Bankr. Rep. 6. Nor a subcontractor whose claim against the contractor was not to become fixed until the latter should have been paid by the owner, the latter event not having occurred at the time of filing the petition. In re Ellis (1906) 143 Fed. 103, 74 C. C. A. 297, 16 Am. Bankr. Rep. 221.

Where the law of the state provides that a tax collector may sue for the recovery of delinquent taxes only after they have remained unpaid for three months, he cannot maintain a petition in bankruptcy against the taxpayer without showing that the prescribed time has elapsed. In re Corwin Mfg. Co. (D. C. 1910) 185 Fed. 976, 26 Am. Bankr. Rep. 269.

The claim of a creditor entitling him to file or join in a petition in bankruptcy may be an equitable demand. Sigsby v. Willis (D. C. 1869) Fed. Cas. No. 12,849. Or the liability of a stockholder in a corporation to pay the debts of the corporation to the extent of the unpaid balance on his stock. In re Putnam (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; Walker v. Woodside (C. C. A. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132. Or a liability of directors to creditors of a corporation growing out of the embezzlement or misappropriation of its funds by its officers. In re Brown (C. C. A. 1908) 164 Fed. 673, 21 Am. Bankr. Rep. 123. Or where the claim is a fixed liability, though the amount of damages remains to be determined and liquidated. In re Frederick L. Grant Shoe Co. (D. C. 1903) 125 Fed. 576, 11 Am. Bankr. Rep. 48. But otherwise as to an unliquidated claim, the validity of which is not admitted but is disputed. In re Big Meadows Gas Co. (D. C. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697. A creditor is entitled to file or join in the petition who holds a claim for breach executory contract. In re Stern 116 Fed. 604, 54 C. C. A. 60, Bankr. Rep. 569. Or a cla damages arising out of a bre warranty on the sale of persons erty. Frederick L. Grant Sh v. W. M. Laird Co. (1909) 212 445, 29 Sup. Ct. 332, 53 L. E 21 Am. Bankr. Rep. 484. Com re Morales (D. C. 1901) 105 F 5 Am. Bankr. Rep. 425. B whose claim is for unliquidate ages growing out of an alleged not qualified as a petitioning c In re Brinckman (D. C. 1900) 1 65, 4 Am. Bankr. Rep. 551, Beers v. Hanlin (D. C. 1900) 695, 3 Am. Bankr. Rep. 745; E Charles, 14 East, 197, 16 Ve But otherwise when a claim fo ages has been reduced to judgme re Putman (D. C. 1911) 193 F 27 Am. Bankr. Rep. 923.

A creditor cannot maintain tion in involuntary bankruptcy debt which is outlawed by the of limitations. In re Putman 1911) 193 Fed. 464, 27 Am. Rep. 923; In re Lipman (D. C 94 Fed. 353, 2 Am. Bankr. R In re Resler (D. C. 1899) 95 F 2 Am. Bankr. Rep. 602; In re wall (C. C. 1871) 6 N. B. R. 30 Cas. No. 3,250. Nor a debt wh operation of law, would be extin by the adjudication in bankrupt re Windt (D. C. 1910) 177 Fe 24 Am. Bankr. Rep. 536. Nor against which there exists a c claim, of a nature to be prov bankruptcy, sufficient to redu creditor's claim below the juris al amount. In re Osage Valle K. R. Co. (D. C. 1873) 9 N. B. Fed. Cas. No. 10,592.

Creditors who have proved claims in bankruptcy are not while the estate is still in pro administration, though after th rupt has been refused a dischs maintain proceedings to have judged a bankrupt a second t account of the same debts, ground that he has acquired p after the first adjudication whic alleged to have conveyed in fr his creditors. In re Barton's (D. C. 1906) 144 Fed. 540, Bankr. Rep. 569.

5. —— Time of accrual of c A debt contracted before the of the bankruptcy law is wit operation and will support a p and it is no objection that the is thus made to retroact by giv creditor a remedy which was no able to him when the claim a Ex parte Hull (D. C. 1842) Fe No. 6,856.

Some of the decisions hold th those creditors can bring or joi petition who had provable

against the bankrupt at the time of the commission of the alleged act of bankruptcy. Brake v. Callison (1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797; In re Callison (D. C. 1903) 130 Fed. 987, 12 Am. Bankr. Rep. 344; In re Brinkman (D. C. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; Beers v. Hanlin (D. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912. But others hold that it is only necessary that the petitioning creditors should have provable claims at the time they sign the petition. In re Hanyan (D. C. 1910) 180 Fed. 498, 24 Am. Bankr. Rep. 72, affirmed without opinion in (C. C. A. 1910) 181 Fed. 1021, 24 Am. Bankr. Rep. 954; In re Lewis F. Perry & Whitney Co. (D. C. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; Ex parte Shouse (D. C. 1847) Fed. Cas. No. 12,815.

6. —— **Corporation and partnership creditors.**—Creditors of a corporation who are also stockholders and directors of the company are not precluded, by reason of that relation, from commencing proceedings in involuntary bankruptcy against the corporation. In re Rollins Gold & Silver Min. Co. (D. C. 1900) 102 Fed. 982, 4 Am. Bankr. Rep. 327; Home Powder Co. v. Geis (C. C. A. 1913) 204 Fed. 568, 29 Am. Bankr. Rep. 580.

One is not a creditor of a corporation, within the meaning of the law, merely because goods furnished by him were shipped to and used by the company, where they were billed and charged to another corporation, though the latter owns the stock and controls the business of the former company. In re Hudson River Electric Power Co. (D. C. 1909) 173 Fed. 934, 23 Am. Bankr. Rep. 191.

A creditor of a partnership is also a creditor of each member of the firm, and is entitled as such to join in a petition in bankruptcy against one of the partners individually. In re Mercur (D. C. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626. One partner may file a petition against the firm and his copartners. In re J. M. Ceballos & Co. (D. C. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459. But not where his only claim is for a share in the assets of the firm, growing out of unsettled partnership transactions, since in that case he could not compete with firm creditors, his right being subordinate to their claim to full satisfaction out of firm property. Sigsby v. Willis (D. C. 1869) Fed. Cas. No. 12,849; In re Schenkein (D. C. 1902) 113 Fed. 421.

7. —— **Secured creditors.**—Secured creditors, as well as those who are unsecured, may file a petition in involuntary bankruptcy, although, in making up the requisite amount of debts, their claims are to be counted only to the extent to which they may exceed the value of the securities. Emerine v. Tarault (1915) 219 Fed. 68, 134 C. C. A. 606; In re Bloss (C. C. 1870) 4 N. B. R. 147, Fed. Cas. No. 1,562; In re Stansell (C. C. 1872) 6 N. B. R. 183, Fed. Cas. No. 13,293; In re Alexander (D. C. 1870) 4 N. B. R. 178, Fed. Cas. No. 161; In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315. See In re Hazens (C. C. 1877) Fed. Cas. No. 6,285.

8. —— **Preferred creditors.**—Numerous authorities maintain that a creditor who has received a preference is not thereby disqualified from bringing a petition in involuntary bankruptcy against his debtor. In re Hornstein (D. C. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; In re Herzikopf (D. C. 1902) 118 Fed. 101, 9 Am. Bankr. Rep. 90; In re Norcross, 1 Nat. Bankr. News, 257, 1 Am. Bankr. Rep. 644; In re Cain, 1 Nat. Bankr. News, 389, 2 Am. Bankr. Rep. 378; In re Bloss (C. C. 1870) Fed. Cas. No. 1,562; In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315; In re Stansell (C. C. 1872) 6 N. B. R. 183, Fed. Cas. No. 13,293; Rankin v. Florida, A. & G. C. Ry. Co. (D. C. 1868) 1 N. B. R. 647, Fed. Cas. No. 11,567; Coxe v. Hale (C. C. 1872) 8 N. B. R. 562, Fed. Cas. No. 3,310.

The majority of the decisions hold that a creditor having a preference, which he does not surrender or disclaim, is not entitled to join in the petition, and that if his elimination reduces the number of creditors (or the amount of their claims) below what the statute requires, the defect is jurisdictional and the petition must be dismissed. In re Fishblate Clothing Co. (D. C. 1903) 125 Fed. 986, 11 Am. Bankr. Rep. 204; In re Schenkein (D. C. 1902) 113 Fed. 421; In re Burlington Malting Co. (D. C. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; In re Rogers Milling Co. (D. C. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Gillette (D. C. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; Buckingham v. Schuylkill Plush & Silk Co. (1902) 38 Misc. Rep. 305, 77 N. Y. Supp. 857; In re Hunt (D. C. 1871) 5 N. B. R. 433, Fed. Cas. No. 6,882; In re Rado (D. C. 1872) Fed. Cas. No. 11,522; Ecker v. McAllister (1876) 45 Md. 290. But a creditor will not be considered as preferred because he holds as security for his debt a life insurance policy having no surrender value. In re Blount (D. C. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97.

Where a preferred creditor based his petition on a separate and distinct debt, as to which he had received no preference, held, that he was not qualified to join in the petition. In re Rogers Milling Co. (D. C. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540.

A preferred creditor cannot proceed

for adjudication against his debtor when he alleges as the act of bankruptcy on which his petition is founded the very act of preference to which he was a party, as he is estopped on every principle of equity, and the law should discourage a course of procedure which would amount to laying a trap for an embarrassed and unwary debtor. In re Currier (D. C. 1875) 13 N. B. R. 68, Fed. Cas. No. 3,492; In re Williams (D. C. 1876) 14 N. B. R. 132, Fed. Cas. No. 17,706.

If the preferred creditor, in his petition, disclaims or abjures the preference which he has received, or offers to surrender or vacate it, or to bring the money into court, if it was a payment in money, or if he will otherwise, according to its nature, renounce all benefit or advantage from it, then he may join in the petition as an ordinary creditor. In re Murphy (D. C. 1915) 225 Fed. 392; In re Vastbinder (D. C. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; Stevens v. Nave-McCord Mercantile Co. (C. C. A. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; In re Marcer (D. C. 1872) 6 N. B. R. 351, Fed. Cas. No. 9,060.

A creditor is not disqualified from petitioning, because of the receipt of a payment more than four months previously, which, if made within that time, would have been preferential, but under the actual circumstances is not. In re Girard Glazed Kid Co. (D. C. 1904) 129 Fed. 841, 12 Am. Bankr. Rep. 295.

9. —— Creditors estopped to petition.—Where the act of bankruptcy relied on in an involuntary petition is the making of a general assignment for the benefit of creditors, no creditors will be entitled to join in the petition who have recognized and assented to the assignment and participated in the proceedings under it, so as to make themselves parties to it, being estopped by the election between their rights under the assignment and those under the bankruptcy law. Despres v. Galbraith (1914) 213 Fed. 190, 129 C. C. A. 534; Utz & Dunn Co. v. Regulator Co. (1914) 213 Fed. 315, 130 C. C. A. 17; In re Lewis F. Perry & Whitney Co. (D. C. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; Moulton v. Coburn (1904) 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553; In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; Durham Paper Co. v. Seaboard Knitting Mills (D. C. 1903) 121 Fed. 179, 10 Am. Bankr. Rep. 29; In re Kraft (D. C. 1880) 3 Fed. 892.

This rule is applied as against creditors who have received and accepted dividends on their claims under the assignment. In re Brokaw (D. C. 1882) 11 Fed. 704. Or who have filed their claims and permitted the assignee to sell the property and collect the proceeds, involving delay and expense. Simonson v. Sinsheimer (1899) 95 Fed. 948, 37 C. C. A. 337. Or who have simply allowed four months to (without attempting to institute o in bankruptcy proceedings. In re is F. Perry & Whitney Co. (1909) 172 Fed. 752, 22 Am. I Rep. 780.

The rule does not apply to a cr who merely offered to assent to t signment if the assignee shou changed, which was not done. v. Ward (D. C. 1870) 3 N. B. R Fed. Cas. No. 13,241. Or who a to the state court to have the bo the assignee increased. Perry v. ley (D. C. 1868) 1 N. B. R. 559 Cas. No. 11,006. Or who merel his claim in the assignment pr ings but derived no benefit from i re Curtis (D. C. 1899) 91 Fed. Am. Bankr. Rep. 440. Or wh his claim in ignorance of facts t to show that the assignment was ulent and that the debtor had di of property in fraud of his cre In re Curtis (1899) 94 Fed. 630, C. A. 430, 2 Am. Bankr. Rep. 2

Creditors were not estopped to tain a petition in involuntary ban cy on any or all of the foll grounds: (1) that, having kno of the assignment and of the acts assignee thereunder in conductin business and selling the stock on they delayed instituting proceedin two months; (2) that, pending a sition for compromise, they s such assignee for cash small b goods to replenish the stock and it more salable; (3) that they s ted to the assignee, at his reque verified statements of their clain the specific purpose of comparin same with the entries in the insol books; (4) that an order made state court for the sale of the a or's goods was submitted to the neys for the said creditors and b indorsed "seen." Sinsheimer v. S son (D. C. 1899) 96 Fed. 579, a Simonson v. Sinsheimer (1900 Fed. 426, 40 C. C. A. 474, 3 Am. Rep. 824.

Where the secretary and treasu a corporation, which was a credi the bankrupt, agreed to act a bankrupt's assignee in his capac an individual only, this did not the corporation from joining i bankruptcy petition. In re Winst C. 1903) 122 Fed. 187, 10 Am. Rep. 171.

A creditor should not be held ped who went into the state cour for the purpose of attacking cert leged preferences as fraudulent. the purpose of preventing a di tion of the assets until proceedi bankruptcy could be begun. Carriage Co. v. Stengel (1899) 9 637, 37 C. C. A. 210, 2 Am. Bank 383.

The rule does not apply to cr who were induced to assent to t signment by the debtor's fraud o

representation. Canner v. Webster Tapper Co. (C. C. A. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872. There is no estoppel where the act of bankruptcy relied on is a conveyance of property not included in the assignment nor drawn into the proceedings in the state court thereunder. In re Salmon & Salmon (D. C. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122. Where a creditor would be thus estopped with respect to a particular debt or claim, it will not preclude him from joining in the petition in bankruptcy in respect to a different claim. Hays v. Wagner (1907) 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163; Johnson v. Rogers (D. C. 1876) 15 N. B. R. 1, Fed. Cas. No. 7,408.

The rule of estoppel does not apply where the state court in which the proceedings were had was entirely without jurisdiction, because operating under a statute annulled or suspended by the bankruptcy law. In re Weedman Stave Co. (D. C. 1912) 199 Fed. 948, 29 Am. Bankr. Rep. 460.

An arrangement effected between an insolvent debtor and his creditors for the conversion of his stock in trade and accounts into cash, through the agency of a trustee, and the proportional distribution of the proceeds among the creditors, to be accepted by them in full payment, will estop creditors who participated in the agreement from petitioning in bankruptcy, when the plan has been so far carried out that a sale of the property has been accomplished. Clark v. Henne & Meyer (1904) 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583. But otherwise where, after such a transfer and sale, the proceeds were diverted by the debtor to other purposes than that proposed. In re Gillette (D. C. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119.

Creditors of a corporation who intervened in a suit against it in a state court and assisted in having receivers appointed are estopped to petition against it in bankruptcy. Lowenstein v. Henry McShane Mfg. Co. (D. C. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; In re Gold Run Mining & Tunnel Co. (D. C. 1912) 200 Fed. 162, 29 Am. Bankr. Rep. 563.

Where an agreement of the creditors of an embarrassed debtor to grant him an extension of time for payment is not to be binding unless all the creditors will unite in it, an unequivocal dissent by any creditor will release others who had already signed, and remove any impediment to their petitioning in bankruptcy. Ex parte Potts (D. C. 1842) Fed. Cas. No. 11,344.

It should probably be a defense to such a petition that the creditor maintaining it had previously agreed to compromise with his debtor on receiving a certain proportion of his claim; but not where the composition was not carried into effect, and it is not shown that such an agreement on the part of one creditor was made the basis for a similar agreement by another. Simonson v. Sinsheimer (1899) 95 Fed. 948, 37 C. C. A. 337; In re Simonson (D. C. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197.

A release of his debt would put the creditor in a position where he would no longer be entitled to petition in bankruptcy; but a release obtained by fraud and deceit may be repudiated. Michaels v. Post (1874) 21 Wall. 398, 22 L. Ed. 520.

An estoppel against a creditor may be based on his having consented to the giving of a preference to another creditor, at least so far as to preclude him from alleging that preference as an act of bankruptcy. In re Massachusetts Brick Co. (D. C. 1871) Fed. Cas. No. 9,259.

Obtaining the consent of an insolvent corporation to be thrown into bankruptcy (by a resolution declaring its inability to pay its debts and its willingness to be adjudged bankrupt) is not necessarily collusion such as to defeat the petition, where the object of the creditor was not to obtain an advantage for himself, but to secure the equal distribution of its property among all the creditors. In re C. Moench & Sons Co. (D. C. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 656, affirmed (1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

Where the president and secretary of a corporation assigned a claim against it to another for the express purpose of creating a record condition which would sustain an involuntary bankruptcy petition against the corporation, such officer held estopped to file the petition and procure the adjudication. In re Taylor House Ass'n (D. C. 1913) 209 Fed. 924.

Since a proceeding in involuntary bankruptcy is not one for the recovery of a debt, but to secure an equitable division of the debtor's property, the fact that a particular creditor has brought suit for the recovery of his debt, or the pendency of such an action, is not a bar to his filing a petition in bankruptcy against the debtor. In re Henderson (D. C. 1881) 9 Fed. 196. At least where he bases the bankruptcy petition on a distinct and independent demand. Everett v. Derby (D. C. 1842) Fed. Cas. No. 4,576. A creditor is not estopped from filing a petition in bankruptcy by the fact of his having levied execution on sufficient property to satisfy the debt, or of his having collected a portion of it by means of execution, if he will surrender the preference thus obtained, by releasing the levy or bringing into court the sum already realized. In re Sheehan (D. C. 1873) 8 N. B. R. 345, Fed. Cas. No. 12,737; In re Miller (D. C. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140.

10. —— Requisites as to number and amount.—A petition in involuntary bankruptcy may be filed by a person

who is the only creditor of the alleged bankrupt, if his claim amounts to the required sum. In re Alexander (D. C. 1870) Fed. Cas. No. 161. But a petition presented by a single creditor who has ample security for his claim is not within the purpose of the statute and should not be entertained. Avery v. Johann (D. C. 1869) 3 N. B. R. 144, Fed. Cas. No. 675; In re Johann (D. C. 1869) 4 N. B. R. 434, Fed Cas. No. 7,331; In re Scammon (D. C. 1874) Fed. Cas. No. 12,428. A single intervening creditor may carry on an involuntary petition in bankruptcy good on its face. In re Culgin-Pace Contracting Co. (D. C. 1915) 224 Fed. 245.

In computing the number of creditors, to determine whether enough have joined in the petition, or whether the total number is greater or less than twelve, the time to be taken is the date of the filing of the petition. Moulton v. Coburn (1904) 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553; Stroheim v. Lewis F. Perry & Whitney Co. (C. C. A. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695; In re Coburn (D. C. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212. CONTRA, see In re Plymouth Cordage Co. (1905) 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665.

Creditors holding fraudulent or voidable preferences are not to be counted in computing the number of creditors. Stevens v. Nave-McCord Mercantile Co. (C. C. A. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; Clinton v. Mayo (D. C. 1875) 12 N. B. R. 39, Fed. Cas. No. 2,899; In re Currier (D. C. 1875) 13 N. B. R. 68, Fed. Cas. No. 3,492; In re Israel (C. C. 1875) 12 N. B. R. 204, Fed. Cas. No. 7,111; In re Jewett (D. C. 1876) Fed. Cas. No. 7,305; In re Scrafford (C. C. 1877) Fed. Cas. No. 12,556. Nor secured creditors unless their claims severally exceed the value of the securities which they hold. In re Blount (D. C. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; In re Crossette (D. C. 1878) 17 N. B. R. 208, Fed. Cas. No. 3,435; In re Bouton (D. C. 1879) Fed. Cas. No. 1,706. Nor should any creditors be included who would be estopped to join in the petition, as, by having assented to a general assignment by the debtor. In re Miner (D. C. 1900) 104 Fed. 520, 4 Am. Bankr. Rep. 710. But see In re Coburn (D. C. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212.

Relatives of the bankrupt, within the third degree, as well as others, may bring a proceeding in involuntary bankruptcy. Perkins v. Dorman (D. C. 1913) 206 Fed. 858.

All creditors must be counted, in making the computation as to the necessary number or proportion, even those whose claims are for merely nominal sums. In re Brown (C. C. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102. CONTRA, Gage v. Bell (D. C. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696. And see In re Blount (D. C. 1906) Fed. 263, 16 Am. Bankr. Rep. 97.

In estimating the number and am of claims on a petition against a ner, the partnership debts and itors must be considered. In re I (D. C. 1877) 15 N. B. R. 257, Cas. No. 8,429.

An insolvent debtor having more twelve creditors cannot defeat ruptcy proceedings against him transferring his property for the fit of some of his creditors, leaving than three unprovided for, but a same time leaving the preferred itors actually unpaid for the purpo requiring them to be counted, so those remaining will be insufficie number to maintain the petition. re Blount (D. C. 1906) 142 Fed. 16 Am. Bankr. Rep. 97. But see L ton v. Kennedy (1904) 129 Fed. 64 C. C. A. 265, 12 Am. Bankr. 229.

Payments made by the bankru some of the petitioning creditors, the filing of the petition, so as to inate them from the count or r the aggregate amount of the petiti creditors' claims below the stat limit, will not defeat the jurisdicti the court, at least where enough creditors afterwards come in to the amount above the jurisdictiona it. In re Ryan (D. C. 1902) 114 373, 7 Am. Bankr. Rep. 562; V Gage & Co. v. Bell (D. C. 1903) Fed 371, 10 Am. Bankr. Rep. 696.

It is not necessary that the an due to the petitioning creditors s be exactly determined, if it clearl pears that it will amount to more $500. In re Hughes (D. C. 1910 Fed. 872, 25 Am. Bankr. Rep. 556 re Stern (1902) 116 Fed. 604, 54 A. 60, 8 Am. Bankr. Rep. 569; Manhattan Ice Co. (D. C. 1901) Fed. 399, 7 Am. Bankr. Rep. 408.

It is not necessary that the pri sum of the debts should equal the dictional amount, but accrued int evidently due on the face of the tion, may be added for this pur Sloan v. Lewis (1874) 22 Wall. 15 L. Ed. 832. But costs incurred paid by the petitioning creditors c be added. In re Skelley (D. C. Fed. Cas. No. 12,921. When a cre has received a conditional payment effect of which is to reduce his below the amount entitling him to tain a petition, he cannot bring pro ings in bankruptcy unless the con has failed, so as to make the pay nugatory. In re Ouimette (D. C. Fed. Cas. No. 10,622.

The petition should affirmatively that it is subscribed by the req number and amount of creditors. re Keeler (D. C. 1874) 10 N. B 419, Fed. Cas. No. 7,638; In re fornia Pac. R. Co. (D. C. 1874) Cas. No. 2,315.

A merchant who has refused, o demand of creditors, to give the

formation about his affairs sufficient to enable them to know the number and amount of his debts, will not be heard to object that a sufficient number of his creditors did not join in the petition, at least if enough have come in before the trial. Perin & Gaff Mfg. Co. v. Peale (D. C. 1878) 17 N. B. R. 377, Fed. Cas. No. 10,981.

Petitioning creditors must be held to good faith in the matter of alleging and showing that they constitute the requisite quorum of creditors. They cannot "recklessly file a petition for the purpose of making the respondent file a statement of his creditors. It would be intolerable if any one or two creditors, upon either a real or pretended claim, could by a simple allegation in the words of the act compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act." In re Scammon (D. C. 1874) Fed. Cas. No. 12,429.

The petition will be dismissed on motion, without requiring the debtor to file a schedule, where it appears that the petitioning creditors knew that they did not constitute the requisite number. Id.

If the debtor wishes to contest the allegation that there are less than twelve creditors in all, he must do so by an answer accompanied by a sworn list of all his creditors with their addresses. Lastrapes v. Blanc (C. C. 1878) Fed. Cas. No. 8,100; In re Steinman (D. C. 1874) Fed. Cas. No. 13,357; In re Hymes (D. C. 1874) Fed. Cas. No. 6,986. A creditor desiring to oppose the adjudication may suggest the insufficiency of the number of creditors or amount of claims joining in the petition, and require the bankrupt to file the list of creditors. Clinton v. Mayo (D. C. 1875) 12 N. B. R. 39, Fed. Cas. No. 2,899. Such opposing creditor may himself file the answer contemplated by the statute. Anonymous (D. C. 1879) Fed. Cas. No. 441.

The petitioning creditors must be accorded a reasonable length of time to secure the concurrence of a sufficient number of other creditors to make up the jurisdictional quorum. In re California Pac. R. Co. (D. C. 1874) 11 N. B. R. 193, Fed. Cas. No. 2,315; In re Rebmeister (C. C. 1879) Fed. Cas. No. 11,623; In re Bedingfield (D. C. 1899) 96 Fed. 190, 2 Am. Bankr. Rep. 355.

The joinder of the specified proportion of creditors, in number and amount, in a petition in involuntary bankruptcy is not a jurisdictional prerequisite. In re Plymouth Cordage Co. (1905) 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Haff (1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; In re Henderson (D. C. 1881) 9 Fed. 196; Ex parte Jewett (D. C. 1875) 11 N. B. R. 443, Fed. Cas. No. 7,303; In re Duncan (D. C. 1876) 14 N. B. R. 18, Fed. Cas. No. 4,131. CONTRA, In re Scammon (D. C. 1874) Fed. Cas. No. 12,427; In re Rosenfields (D. C. 1871) 11 N. B. R. 86, Fed. Cas. No. 12,061; Buckingham v. Schuylkill Plush & Silk Co. (1902) 38 Misc. Rep. 305, 77 N. Y. Supp. 857. If the petition does not appear to have been presented by the requisite number or proportion of creditors, it is an irregularity which the bankrupt may waive, by consenting to an adjudication. In re Williams (C. C. 1874) Fed. Cas. No. 17,700. The judgment of the court of bankruptcy that the required number and amount of creditors have joined in the petition is final, and the question so adjudged is not thereafter re-examinable, except it may be in cases of fraud or imposition practised on the court. In re Duncan (D. C. 1876) 14 N. B. R. 18, Fed. Cas. No. 4,131; In re Funkenstein (D. C. 1876) 14 N. B. R. 213, Fed. Cas. No. 5,158; In re Lloyd (C. C. 1878) Fed. Cas. No. 8,431.

11. —— Solicitation, procurement, or purchase of claims.—There is no legal fraud in an insolvent debtor's requesting his creditors to petition against him, or soliciting a sufficient number of creditors to join in the petition, when the court otherwise has jurisdiction and he has committed an act of bankruptcy. In re Ordway (D. C. 1879) 19 N. B. R. 171, Fed. Cas. No. 10,552; In re Duncan (D. C. 1876) 14 N. B. R. 18, Fed. Cas. No. 4,131; In re Bouton (D. C. 1879) Fed. Cas. No. 1,706; In re Matot (D. C. 1877) 16 N. B. R. 485, Fed. Cas. No. 9,282. The fact that proceedings in involuntary bankruptcy were instigated by a promise on the part of the debtor that the petitioning creditor should be paid in full, while it would affect the right to a discharge, will not invalidate the proceedings in bankruptcy so as to make void a sale made by the bankrupt's assignee. Wallace v. Loomis (1877) 97 U. S. 146, 24 L. Ed. 895. But a bankrupt who procures a fraudulent petition to be filed by his creditors, with intent to procure a discharge, which he could not obtain by voluntary proceedings, is in contempt of court. In re Lalor (D. C. 1879) 19 N. B. R. 253, Fed. Cas. No. 8,001.

An agreement of a debtor to withdraw opposition to a proceeding in involuntary bankruptcy against him, and to consent and submit to an adjudication of bankruptcy, is not in fraud of the act. Sanford v. Huxford (1875) 32 Mich. 313, 20 Am. Rep. 647.

A creditor desiring to institute bankruptcy proceedings against his debtor may seek out other creditors of the common debtor and ask them to join in the petition, or to come in after the filing of the petition and join in it, when such intervention becomes necessary to save the proceeding. In re Smith (D.

C. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

If other creditors than the one chiefly moving in the matter are unwilling to sign the petition, it is perfectly proper for other persons to purchase their claims, in order to be qualified to join, and so to make up the requisite number of petitioning creditors. In re Bevins (1908) 165 Fed. 434, 91 C. C. A. 302, 21 Am. Bankr. Rep. 344; In re Woodford (D. C. 1876) 13 N. B. R. 575, Fed. Cas. No. 17,972. CONTRA, Emerine v. Tarault (1915) 219 Fed. 68, 134 C. C. A. 606. If such a sale of a claim is void for fraud or want of consideration, the claim is to be considered as still belonging to the assignor, and it will be so treated in counting the number of creditors. In re Woodford (D. C. 1876) 13 N. B. R. 575, Fed. Cas. No. 17,972.

A creditor of a bankrupt may not split up his claim into portions and assign some of the parts to third persons for the purpose of qualifying them as joint petitioners in a proceeding in involuntary bankruptcy. In re Halsey Electric Generator Co. (D. C. 1908) 163 Fed. 118, 20 Am. Bankr. Rep. 738; Stroheim v. Lewis F. Perry & Whitney Co. (C. C. A. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695; In re Tribelhorn (1905) 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491; In re Independent Thread Co. (D. C. 1902) 113 Fed. 998, 7 Am. Bankr. Rep. 704; In re Lewis F. Perry & Whitney Co. (D. C. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772.

An agreement between creditors who have received preferences to contribute proportionally such sum as may be necessary to induce the other creditors to forbear to put the debtor into bankruptcy is not invalid. Perryman v. Allen (1874) 50 Ala. 573.

12. —— Withdrawal of petitioners.—A creditor who has joined in a petition in bankruptcy will not be permitted to withdraw his name from the proceedings, against the protest of the others, merely because he repents of his action or has obtained a settlement of his claim, when his withdraw reduce the number of creditor amount of debts below the juri minimum, and so require the of the petition. In re Beding C. 1899) 96 Fed. 190, 2 Am Rep. 355; In re Quincy Grani ries Co. (D. C. 1904) 147 Fed Am. Bankr. Rep. 823; In re C C. 1899) 98 Fed. 584, 3 Am. Ba 552; In re Vogel (D. C. 187 B. R. 165, Fed. Cas. No. 16 re Heffron (D. C. 1874) 10 213, Fed. Cas. No. 6,321; In enfields (D. C. 1871) 11 N. I Fed. Cas. No. 12,061; In re phia Axle Works (D. C. 1874) Notes Cas. 126, Fed. Cas. No In re Black Diamond Copper (1906) 10 Ariz. 42, 85 Pac.

But a creditor whose name w with others in the petition wi knowledge or consent may the proceeding, and if he doe petition will be dismissed as even though the result is to quorum. In re Rosenfields (D. 11 N. B. R. 86, Fed. Cas. N And it is in the discretion of to permit the withdrawal, at before an adjudication, of a who was induced to join by sentation or misunderstanding Sargent (D. C. 1875) 13 N. B Fed. Cas. No. 12,361. Or one so under a mistake of fact having previously assented to or's general assignment for th of creditors. In re Coburn (D. 126 Fed. 218, 11 Am. Ban 212. Or one whose qualific become a petitioning creditor to doubt or challenge. Moult burn (1904) 131 Fed. 201, 66 90, 12 Am. Bankr. Rep. 553.

Where two of the three p creditors brought about the pa a judgment on the claim of one and the latter's withdrawal a tioning creditor, it was held were estopped to complain of creditor's withdrawal from the ing. Cummins Grocer Co. (1911) 187 Fed. 507, 109 C. C 26 Am. Bankr. Rep. 484.

§ 9644. (Act July 1, 1898, c. 541, § 60, as amended, Act 1903, c. 487, § 13, and Act June 25, 1910, c. 412, § 11.) ferred creditors.

Preferred Creditors.—a A person shall be deemed to hav a preference if, being insolvent, he has, within four months the filing of the petition, or after the filing of the petition fore the adjudication, procured or suffered a judgment to tered against himself in favor of any person, or made a tran any of his property, and the effect of the enforcement of suc ment or transfer will be to enable any one of his creditors to a greater percentage of his debt than any other of such cred the same class. Where the preference consists in a transfe period of four months shall not expire until four months a

date of the recording or registering of the transfer, if by law such recording or registering is required.

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. (30 Stat. 562. 32 Stat. 799. 36 Stat. 842.)

In this section, as originally enacted, subdivisions a and b were as follows:

"a A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

They were amended by Act Feb. 5, 1903, c. 487, § 13, cited above, so as to make subdivision a read as set forth here, and subdivision b read as follows:

"b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Said subdivision b was further amended by Act June 25, 1910, c. 412, § 11, last cited above, to read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat.

842, also provided that the act should not apply to bankruptcy cases p when it took effect, but that such cases should be adjudicated and di of conformably to the provisions of the original act as previously amende

Notes of Decisions

1. Preferences in general.
2. Essentials of a voidable preference.
3. Transferee as creditor or person benefited.
4. —— Preference over other creditors of same class.
5. —— Guarantors, sureties, and indorsers.
6. Nature and form of transaction.
7. Procuring or suffering judgment.
8. —— Judgment by confession or consent.
9. Transfers of property.
10. —— Transfer of property in substitution or satisfaction of lien.
11. Restoration of specific property or funds.
12. —— Trust funds and money converted or embezzled.
13. Giving present consideration—Security for present loan or future advances.
14. Prior agreement to give security or make transfer.
15. Exchange or substitution of securities.
16. Payments by debtor.
17. Payment or transfer by third person.
18. Payments to attorneys for past or future services.
19. Set-off or adjustment of mutual accounts.
20. Partial payments on running accounts.
21. Time of giving preference.
22. —— Time of filing petition.
23. —— Time of recording or filing lien.
24. Insolvency of debtor.
25. Intention of debtor.
26. Creditor's knowledge or cause of belief.
27. —— Grounds of suspicion or doubt.
28. —— Facts putting on inquiry—Duty to investigate.
29. —— Circumstances constituting ground for belief.
30. —— Imputed knowledge of agent or attorney.
31. Solicitation, coercion, or threats by creditor.
32. Preference of partnership or individual creditors.
33. Rights of preferred creditors as to proving claims.
34. —— Creditor's knowledge of intent to prefer.
35. —— Surrender of preference.
36. —— Separate or independent claims.
37. Proceedings to recover preference—Jurisdiction.
38. —— Right of action.
39. —— Form of action or proceeding.
40. —— Pleading.
41. —— Defenses.
42. —— Set-off of amount of new credit.
43. —— Burden of proof and evidence.
44. —— Trial.
45. —— Measure of damages or recovery.

1. Preferences in general.—Where a mortgage was executed by the bankrupt to a creditor subsequent to June 25, 1910, the question whether it was a voidable preference is governed by this section as amended on that date. Ogden v. Reddish (D. C. 1912) 200 Fed. 977, 29 Am. Bankr. Rep. 931. Whether a transfer is a voidable preference must be determined by the evidence in each case. Cauthorn v. Burley State Bank (1914) 26 Idaho, 532, 14 1108.

The bankruptcy act does no hibit or annul all transfers of pr by an insolvent debtor, but only made under the special circums and conditions which it sets forth drews v. Kellogg (1907) 41 Co 92 Pac. 222; Godwin v. Murchiso Bank (1907) 145 N. C. 320, 59 154, 17 L. R. A. (N. S.) 935. veyance or security given to a cr made and operating as a pref may constitute an act of bank and yet be valid to the extent th property or security transferred be recovered from the creditor trustee in bankruptcy. Ashby v. (C. C. 1846) Fed. Cas. No. 576. an assignment of a cause of acti stitutes an unlawful preference i ruptcy, the assignment is voidabl Leonard v. Springer (1912) 1 App. 516. But a creditor recei preferential transfer has no title he can hold against the trustee i ruptcy subsequently appointed. Wolff Mfg. Co. v. Battreal Sh (Mo. App. 1915) 180 S. W. 396.

If a given transfer of propert not fraudulent in fact, the q whether it is voidable as a pref must be determined in accordanc the express provisions of the s In re Armstrong (D. C. 1906) 14 202, 16 Am. Bankr. Rep. 583. trustee in bankruptcy sues to se a transfer, alleging it to have be en as an illegal preference, he recover on showing that the c ance was void at common law o the law of the state. Cragin v. chael (C. C. 1873) Fed. Cas. 319. On the other hand, where tel mortgage was attacked as a v preference, it was no answer t that it was otherwise valid whet or off the record, whether agains parties or between the original thereto. Williams v. German-An Trust Co. (1915) 219 Fed. 50 C. C. A. 257.

2. Essentials of a voidable pref—The essentials of a voidable ence are insolvency of the debt giving of the preference withi months of bankruptcy, the secu the creditor of a greater percent his debt than others, and knowle the preferred creditor that he w ting a preference. Newman v. Campbell Dry Goods Co. (Mo 1913) 160 S. W. 825; Mayes v. (C. C. A. 1913) 208 Fed. 97; Wolff Mfg. Co. v. Battreal Sh (Mo. App. 1915) 180 S. W. 396; v. Blackwell Lumber Co. (191 Idaho, 642, 135 Pac. 742; Soule

Nat. Bank of Ashton (Idaho, 1914) 140 Pac. 1098.

All of the various elements necessary to constitute a voidable preference must be present or concur in order to give the trustee in bankruptcy a right to recover the payment or property or avoid the transfer as a preference. Clarion Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542; In re Starkweather & Albert (D. C. 1913) 206 Fed. 797, 30 Am. Bankr. Rep. 743; Sparks v. Marsh (D. C. 1910) 177 Fed. 739, 24 Am. Bankr. Rep. 280; In re Gesas (1906) 146 Fed. 734, 77 C. C. A. 291, 16 Am. Bankr. Rep. 872; Morgan v. First Nat. Bank (1906) 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; Foster v. Hackley (C. C. 1869) 2 N. B. R. 406, Fed. Cas. No. 4,971; In re Palmer (D. C. 1869) 3 N. B. R. 283, Fed. Cas. No. 10,681; Woodsum v. Bray (D. C. 1878) Fed. Cas. No. 17,-998; In re George (D. C. 1869) Fed. Cas. No. 5,325; Baden v. Bertenshaw (1903) 68 Kan. 32, 74 Pac. 639; Summerville v. Stockton Milling Co. (1904) 142 Cal. 529, 76 Pac. 243; Whitwell v. Wright (1909) 115 N. Y. Supp. 48; Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; M. Kahn & Bro. v. Bledsoe (1908) 22 Okl. 666, 98 Pac. 921; Stewart v. Hoffman (1904) 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Locke v. Winning (1807) 3 Mass. 325.

There must be an actual transaction, and a mere intent to give or to gain a preference amounts to nothing under the bankruptcy law if not accomplished by the execution of the purpose. In re Bousfield & Poole Mfg. Co. (D. C. 1877) 16 N. B. R. 489, Fed. Cas. No. 1,703. Although the bankrupt may have made a transfer of property intending that the creditor should receive it and thereby be preferred, this is not enough if the creditor does not receive the property. Aiello v. Crampton (C. C. A. 1912) 201 Fed. 891, 29 Am. Bankr. Rep. 1; Engel v. Union Square Bank (1905) 182 N. Y. 544, 75 N. E. 1129. A creditor who has never accepted a deed of trust or mortgage which would give him a preference may disclaim all interest in it and prove his debt as unsecured. In re Saunders (D. C. 1875) Fed. Cas. No. 12,371. A preference cannot be created by an attempted conveyance which was originally and remains a mere nullity. Rosenbluth v. De Forest & Hotchkiss Co. (1911) 85 Conn. 40, 81 Atl. 955.

Where a bank purchased with its own funds silk for certain bankrupts, taking title in its own name, and delivered the silk to the bankrupts under a trust receipt binding the latter to hold the goods or their proceeds for the bank until the price was paid, the title never passed to the bankrupts; and their agreement while insolvent to return the goods to the bank was not a preference. In re Killian Mfg. Co. (D. C. 1913) 209 Fed. 498, order affirmed (C. C. A. 1914) 215 Fed. 82. The act of one who simply retakes the possession of property of his own which is in the possession of the bankrupt does not make him a preferred creditor. In re Wright-Dana Hardware Co. (D. C. 1913) 205 Fed. 335, 30 Am. Bankr. Rep. 582. A contract for the consignment of goods for sale is not a preference to the consignor, which is avoided by the bankruptcy of the consignee less than four months thereafter. Ellet-Kendall Shoe Co. v. Martin (1915) 222 Fed. 851, 138 C. C. A. 277. A preference is not effected by the reclamation of property originally placed in the bankrupt's hands under a contract of conditional sale reserving title in the seller until payment. In re Farmers' Co-operative Co. (D. C. 1913) 202 Fed. 1005, 30 Am. Bankr. Rep. 187; In re Anson Mercantile Co. (D. C. 1911) 203 Fed. 871; In re Levin (D. C. 1909) 173 Fed. 119, 21 Am. Bankr. Rep. 665; John Deere Plow Co. v. Edgar Farmer Store Co. (Wis. 1913) 143 N. W. 194. An unpaid vendor of goods who exercises the right of stoppage in transitu does not thereby gain a preference, though it be with the consent of the debtor, for the latter cannot be considered as active in the creation of a preference merely because he assents to what he could not lawfully prevent. In re Foot (C. C. 1874) 11 N. B. R. 153, Fed. Cas. No. 4,907.

It is essential to constitute a preferential transfer that the bankrupt should have turned over to the creditor some portion of his own property. Mason v. National Herkimer County Bank (C. C. A. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733. The property transferred must have been of such a nature that his creditors would have the right to subject it to the satisfaction of their claims. In re Leech (1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599. Hence the transfer of an exempt homestead does not come within the denunciation of the act though every other element of a preference be present, except in so far as its value may exceed the statutory limit of the exemption. First Nat. Bank v. Lanz (C. C. A. 1913) 202 Fed. 117, 29 Am. Bankr. Rep. 247. And an assignment (as security for a loan) of something which does not constitute legal "property" but is no more than a mere revocable license or privilege, as, a newspaper agency or route, does not constitute a preference. In re Martin (C. C. A. 1912) 200 Fed. 940, 29 Am. Bankr. Rep. 623. And mere fictitious book entries, though made through collusion between the creditor and the bankrupt, for the purpose of deceiving others, but which do not succeed in such purpose and do not affect the rights of other creditors, do not constitute a preference. In re Steam Vehicle Co. (D. C. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385. And so of the mere giving of an indorsed note by the bankrupt, as the advantage secured by the creditor

is not out of the bankrupt's estate. Dalrymple v. Hillenbrand (1875) 62 N. Y. 5.

It is immaterial to whom the transfer is made, if it is meant to pay the claim of one creditor in preference to others. Bank of Wayne v. Gold (1911) 146 App. Div. 296, 130 N. Y. Supp. 942. And a transfer by a bankrupt indirectly or through a third person may constitute a preference, if made with this purpose and intent. In re Harrison Bros. (D. C. 1912) 202 Fed. 244; Wickwire v. Webster City Sav. Bank (1911) 153 Iowa, 225, 133 N. W. 100.

The making of the preference and incurring its penalty are independent of any actual fraud. Wright v. Cotten (1905) 140 N. C. 1, 52 S. E. 141. And the result is the same whether or not the transfer is fraudulent at common law, or under the statute of fraudulent conveyances, or otherwise. Webb's Trustee v. Lynchburg Shoe Co. (1908) 107 Va. 807, 60 S. E. 130.

The mere failure to record a deed or mortgage given as security until after the bankruptcy of the grantor does not constitute the same an unlawful preference. In re McIntosh (1907) 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; In re Watson (D. C. 1912) 201 Fed. 962.

A transfer by an insolvent person, to be a voidable preference in bankruptcy, must be on account of a pre-existing debt. Ernst v. Mechanics' & Metals Nat. Bank (1912) 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289; In re Watson (D. C. 1912) 201 Fed. 962. A contract between a bank making loans from day to day to a stockbroker and the broker, which stipulates that the day loans shall be used specifically for the release of the broker's pledged securities, that their proceeds or the proceeds of substituted securities shall be immediately deposited in the bank in repayment of the loan, and that the broker shall actually take up the pledged securities and deliver them to purchasers against payment of the price, does not create a voidable preference by the broker. Ernst v. Mechanics' & Metals Nat. Bank (1912) 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289.

It is essential that the effect of the preference should enable the creditor to obtain a larger proportion of his total claim than goes to other creditors of the same class. John S. Brittain Dry Goods Co. v. Bertenshaw (1904) 68 Kan. 734, 75 Pac. 1027; Sellers v. Hayes (1904) 163 Ind. 422, 72 N. E. 119. Hence there is no preference if the creditor accepts only that part of his debt to which he would be entitled if all the property liable to the debtor's debts should be apportioned among his creditors. Herzberg v. Riddle (1911) 171 Ala. 368, 54 South. 635. But the test is this actual receiving of a larger percentage than other creditors; it is not whether or not, in view of the obligation of sureties to pay the c the payment actually benefited the ferred creditor. Swarts v. Fourth Bank (1902) 117 Fed. 1, 54 C. 387, 8 Am. Bankr. Rep. 673. A payment is none the less a prefe because some other creditors have obtained larger payments on claims than they would have bee titled to in the bankruptcy proceed In re Mayo Contracting Co. (I 1907) 157 Fed. 469, 19 Am. B Rep. 551.

If all the creditors consented discrimination in the payment of cl no one can object that an unl preference was created, though creditor obtains more than his s Curran v. Munger (C. C. 1871) 6 R. 33, Fed. Cas. No. 3,487. An same is true where all the cre joined in the arrangement by whic transfer was made. Judson v. Co Co. (D. C. 1881) 8 Fed. 422.

If there is a surplus of the e after paying all the other creditor preferred creditor is entitled to he has secured, for as betwee bankrupt and himself the prefere not voidable. In re McGuire (1 1876) Fed. Cas. No. 8,813.

3. Transferee as creditor or p benefited.—To constitute a prefe the payment or transfer must have made to a "creditor" or "perso be benefited thereby," and nothi within the purview of this pro except with reference to debts may be proved for a dividend, but thing which may be so proved is in its purview. Clarke v. R (1910) 183 Fed. 518, 106 C. C. 26 Am. Bankr. Rep. 413. It i necessary that the creditor's should be presently due, but it is cient if it exists as a fixed lia Moody v. Chicago Title & Trus (1907) 138 Ill. App. 233; Burp First Nat. Bank (C. C. 1873) B. R. 314, Fed. Cas. No. 2,185; v. Brookmire (C. C. 1870) 4 N. 196, Fed. Cas. No. 1,168. And a itor who receives property in s ment of a claim not yet matured be chargeable with accepting a p ence. Mathews v. Riggs (1888) 8 107, 13 Atl. 48. It is immaterial the creditor may be an officer o bankrupt corporation. Cooper v. (C. C. A. 1913) 203 Fed. 383, 30 Bankr. Rep. 194; Arnold v. Knapp Va. 1915) 84 S. E. 895. A ban who pays money to the creditors wife does not give a preference, t the effect is to reduce the perce which would otherwise be paid t own creditors. In re Kayser (177 Fed. 383, 100 C. C. A. 615, 24 Bankr. Rep. 174. A person wh contracted to purchase property the bankrupt and has made an ad payment thereon is not a "cre in any proper sense, and the ded of the amount of such advance fro

price when payment was made on delivery is not the receiving of a preference. Templeton v. Kehler (D. C. 1909) 173 Fed. 575, 23 Am. Bankr. Rep. 41. The same is true of persons who may have a cause of action to charge the debtor with a statutory liability for the debts of a corporation. Cookingham v. Ferguson (C. C. 1871) Fed. Cas. No. 3,182. And where one partner sells to the other his entire interest in the property of the firm, the transferee is not a creditor, and the transaction is not impeachable as a preference. In re Rudnick (D. C. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531. Where the bankrupt feloniously or fraudulently got possession of personal property which was in the custody of a warehouseman as bailee of the owner, and, on being discovered, settled with the warehouseman by turning over money, property, or securities, this does not constitute the giving of a preference, because the warehouseman was not a creditor of the bankrupt. Keystone Warehouse Co. v. Bissell (C. C. A. 1913) 203 Fed. 652, 30 Am. Bankr. Rep. 213.

As to the meaning of the phrase "person to be benefited thereby," it is held that a transaction which has the purpose and effect of exonerating or releasing a surety for the bankrupt "benefits" the latter within the meaning of the statute. In re Sanderson (D. C. 1906) 149 Fed. 273, 17 Am. Bankr. Rep. 871. And so, a transfer of property by an insolvent debtor by means of which a note given by himself and a surety is paid, and the transferee, who had obligated himself to indemnify the surety against loss thereon, is released from his liability, is one by which such transferee is benefited. Huntington v. Baskerville (1911) 192 Fed. 813, 113 C. C. A. 137, 27 Am. Bankr. Rep. 219.

A conveyance of real estate within four months before bankruptcy, made by the bankrupt to a stockholder of a creditor company, who held the same for the company, and paid for it with money which was furnished by the company, and received back by it from the bankrupt, is a voidable preference. Golden & Co. v. Loving (1914) 42 App. D. C. 489.

This section has no application to owners of property who have no claim against a bankrupt contractor, on account of possible liens by a preferred subcontractor. Jump v. Bernier (1915) 108 N. E. 1027, 221 Mass. 241.

4. —— **Preference over other creditors of same class.**—To constitute a preference, it is necessary that the preferred creditor should be placed in position to collect a greater percentage of his claim than "any other creditor of the same class." If all the creditors of the same class are equally interested in and benefited by the transaction in question, there is no preference. Gill v. Bell's Knitting Mills (1908) 128 App. Div. 691, 113 N. Y. Supp. 90. And it is said that the test of the classification of creditors is the percentage of their claims which they are entitled to draw out of the estate of the bankrupt. If they are entitled to receive the same percentage, they are in the same class, but if different percentages, in different classes. Swarts v. Fourth Nat. Bank (1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. And the fact that a debt owing by an insolvent is secured does not prevent a transfer of property by the insolvent to pay it from being preferential as to creditors not secured. Horstman v. Little (Tex. Civ. App. 1905) 88 S. W. 286. At least, creditors whose claims are secured by indorsement or guaranty of one or more third persons are in the same class as those whose claims are not so secured. Swarts v. Fourth Nat. Bank (1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. See In re Harpke (1902) 116 Fed. 295, 54 C. C. A. 97, 8 Am. Bankr. Rep. 535.

Strictly speaking, there are only two general classes of creditors, those who have priority and are to be paid in full, and those who are entitled to equal dividends after the priority claims have been satisfied. Livingstone v. Heineman (1903) 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39.

Payments made by a bankrupt to a clerk within three months prior to the filing of the petition, in the absence of specific application to other debts, are to be applied in payment of the wages earned by the clerk during that time, but such payments, up to the amount of wages so earned, do not constitute a preference which must be surrendered before the clerk can prove his claim for the remainder due him, unless the bankrupt's assets are insufficient to pay all the priority claims. In re Flick (D. C. 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465.

5. —— **Guarantors, sureties, and indorsers.**—A guarantor or surety for the bankrupt, or an indorser of his notes, or the accommodation maker of a note for his use and benefit, is a "creditor" within the meaning of the bankruptcy act, and if he receives money or security or collateral from the bankrupt to meet the obligation when it shall mature, or to secure himself against loss, under such circumstances as would constitute it a preference in other cases, he is to be treated as a preferred creditor, and must surrender his preference before being admitted to prove his debt, or may be required to surrender it at the suit of the trustee. In re W. A. Silvernail Co. (D. C. 1914) 218 Fed. 979; Lazarus v. Eagan (D. C. 1912) 206 Fed. 518, 30 Am. Bankr. Rep. 207; Paper v. Stern (C. C. A. 1912) 198 Fed. 642, 28 Am. Bankr. Rep. 592; Kobusch v. Hand (1907) 156 Fed. 660, 84 C. C. A. 372, 19 Am. Bankr. Rep. 379; Stern v. Paper (D.

C. 1910) 183 Fed. 228, 25 Am. Bankr. Rep. 451; Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; In re Christopher Bailey & Son (D. C. 1909) 166 Fed. 982, 21 Am. Bankr. Rep. 911; Swarts v. Siegel (1902) 117 Fed. 13, 54 C. C. A. 399, 8 Am. Bankr. Rep. 689; Crandall v. Coats (D. C. 1905) 133 Fed. 965, 13 Am. Bankr. Rep. 712; Thomas v. Woodbury (D. C. 1875) Fed. Cas. No. 13,916; Smith v. Little (C. C. 1873) 9 N. B. R. 111, Fed. Cas. No. 13,072; Scammon v. Cole (C. C. 1871) 5 N. B. R. 257, Fed. Cas. No. 12,432; Ahl v. Thorner (D. C. 1869) 3 N. B. R. 118, Fed. Cas. No. 103; Sill v. Solberg (C. C. 1881) 6 Fed. 468; Goldberg v. Harlan (1872) 33 Ind. App. 465, 67 N. E. 707; Bank of Wayne v. Gold (1911) 146 App. Div. 296, 130 N. Y. Supp. 942; Platt v. Ives (1913) 86 Conn. 690, 86 Atl. 579; M. Kahn & Bro. v. Bledsoe (1908) 22 Okl. 666, 98 Pac. 921; Horstman v. Little (Tex. Civ. App. 1905) 88 S. W. 286. Compare Horton v. Bamford (1911) 79 N. J. Eq. 356, 81 Atl. 761.

Where an agreement for the indemnification of a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor's being unable to complete the undertaking, and the contractor subsequently abandoned the contract and was adjudged bankrupt, the surety became a creditor from the date of the abandonment of the contract, within the provisions of the statute relating to preferences, although the amount of the surety's claim depended on contingencies and was not liquidated. Wood v. United States Fidelity & Guaranty Co. (D. C. 1905) 143 Fed. 424, 16 Am. Bankr. Rep. 21. So a surety for the bankrupt who has discharged the debt, either before or after the bankruptcy, is subrogated to the rights of the creditor, but is also affected by any preference received by the creditor before payment, which inheres in the claim. Livingston v. Heineman (1903) 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re Schmechel Cloak & Suit Co. (D. C. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719. But see In re New (D. C. 1902) 116 Fed. 116, 8 Am. Bankr. Rep. 566. But where an indorser receives from the maker of the note an amount sufficient to pay a part thereof, and loans him the balance required to pay it, he will not be chargeable with taking a preference beyond the amount actually paid to him by the maker. Thomas v. Woodbury (D. C. 1875) Fed. Cas. No. 13,916.

A creditor who receives the debtor's note or check, indorses it, and procures it to be discounted at a bank, remains a creditor within the meaning of the bankruptcy act, and the payment of the note or check to the bank after the debtor's insolvency and within four months prior to his bankruptcy, constitutes a preferential transfer of erty to the indorser, which will him from the allowance of any in his favor, unless the amount is first surrendered. Swarts v. Nat. Bank (1902) 117 Fed. 1, 54 A. 387, 8 Am. Bankr. Rep. 673; Lyon (1903) 121 Fed. 723, 58 C. 143, 10 Am. Bankr. Rep. 25; Meyer (D. C. 1902) 115 Fed. Am. Bankr. Rep. 598; In re bury Furniture Co. (D. C. 190 Fed. 255, 8 Am. Bankr. Rep. 79 see In re Bullock (D. C. 190 Fed. 667, 8 Am. Bankr. Rep Thomas v. Woodbury (D. C. 1875 Cas. No. 13,916. The payment bank by an insolvent, within months prior to his bankrupt notes given to third persons, but have been indorsed to and are ow the bank, constitutes a preferen en to the bank, which it must sur before proving a claim against t tate. In re George M. Hill Co. 130 Fed. 315, 64 C. C. A. 561, 66 A. 68, 12 Am. Bankr. Rep. 221 a note discounted by a bank w knowledge of the insolvency maker and in due course of bu by crediting the payee with the a of the discount, which note in the of the payee and indorser would provable against the maker's est bankruptcy until certain preferen ceived were surrendered, is prova the bank as a bona fide holder. Levi (D. C. 1903) 121 Fed. 198, Bankr. Rep. 176; In re Wyly 1902) 116 Fed. 38, 8 Am. Bankr 604.

6. Nature and form of transac Whether or not a given tran amounts to a preference is to termined by its effect in giving due advantage to the particular itor, rather than by its form, f court will look to the result and the way in which it is accomp Rogers v. Fidelity Sav. Bank & Co. (D. C. 1909) 172 Fed. 735, 2 Bankr. Rep. 1; In re C. J. Mcl & Sons (D. C. 1910) 178 Fed. 4 Am. Bankr. Rep. 446.

Any form of mortgage or oth which is meant to give to one or creditors an undue advantage ove ers will be a voidable preference Lean v. Lafayette Bank (C. C. Fed. Cas. No. 8,885. A contr conditional sale, by which the se allowed to retake possession goods in case of the buyer's defa bankruptcy, is not an unlawful p ence, as the bankrupt buyer do transfer any property or secur antecedent debt. John Deere Pl v. Edgar Farmer Store Co. (Wis. 143 N. W. 194; Big Four Imp Co. v. Wright (C. C. A. 1913) 20 535, 31 Am. Bankr. Rep. 125.

A chattel mortgage which is me and does give the secured credi advantage over other creditors

preference. In re Hersey (D. C. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; Matthews v. Westphal (C. C. 1880) 48 Fed. 664. And so is a deed of trust in the nature of a mortgage. May v. Le Claire (C. C. 1882) 18 Fed. 164. And an unrecorded bill of sale of furniture and fixtures given by a tenant as security for past-due rent. In re Eckenroth (D. C. 1876) Fed. Cas. No. 4,265. And a bill of sale of property to a creditor who has attached it. Parsons v. Topliff (1876) 119 Mass. 245. And an assignment by an insolvent trader of his stock, book accounts, and other assets to one of his creditors, the latter in return agreeing to assume and pay certain debts, is a preference if it enables that creditor to secure his own debt in full or in a larger proportion than other creditors. North v. House (D. C. 1872) 6 N. B. R. 365, Fed. Cas. No. 10,310.

The assignment of a policy of life insurance may constitute a voidable preference. Barnes v. Vetterlein (D. C. 1882) 16 Fed. 218. And so also the assignment of a claim against a fire insurance company for a loss under its policy. Hanson v. W. L. Blake & Co. (D. C. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325. And where a mortgage is given on property under circumstances such as to render it a voidable preference, and insurance is taken out on the mortgaged property in the name of the mortgagor, but at the instance and expense of the mortgagee, and, a loss occurring, the insurance is collected by the mortgagee, being less in amount than the mortgage debt, the insurance contract is no less a preference than the mortgage, and its proceeds are merely a substitute for the mortgage pro tanto, and therefore recoverable by the mortgagor's trustee in bankruptcy. Brown City Sav. Bank v. Windsor (C. C. A. 1912) 198 Fed. 28.

A lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with an intention of securing to himself an advantage over the other creditors, will be set aside as a preference. Carter v. Hobbs (D. C. 1899) 94 Fed. 108, 2 Am. Bankr. Rep. 224.

A preference is also involved (the other conditions being present) in the sale of a partner's interest in the business to his copartner and the taking of the latter's notes for the price. Crampton v. Jerkowski (C. C. 1880) 2 Fed. 489; Mattocks v. Rogers (D. C. 1874) Fed. Cas. No. 9,300. And see Off v. Hakes (1905) 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696. And in the act of a creditor in appropriating property in his hands under a claim of a factor's lien. Nudd v. Burrows (1875) 91 U. S. 426, 23 L. Ed. 286. Or an alleged vendor's lien. In re Klingaman (D. C. 1900) 101 Fed. 691, 4 Am. Bankr. Rep. 254. Or an agreement between the debtor and creditor enabling the latter to enforce a lien by attachment. Samson v. Burton (D. C. 1870) Fed. Cas. No. 12,285.

Where an unpaid vendor of merchandise accepts a return thereof, instead of payment, it may be regarded as a rescission of the contract of sale, rather than as a transfer of property. In re Aspinwall (D. C. 1882) 11 Fed. 136. Where a creditor obtains, in good faith, as security, a receipt for coal in the debtor's yard not separated from the common mass, he may take possession after discovering the insolvency of the debtor. Sherman v. Traders' Nat. Bank (C. C. 1879) Fed. Cas. No. 12,770.

An insurance effected by an insolvent debtor upon the house he occupies in pursuance of covenants in the lease is not a preference. In re Rosenfeld (D. C. 1868) 2 N. B. R. 116, Fed. Cas. No. 12,057. Nor is the surrender of a policy of insurance under a stipulation giving such right, with a return of a part of the premium paid. In re Independent Ins. Co. (D. C. 1872) Fed. Cas. No. 7,019. No preference is created by an equitable lien on funds or property arising from the acceptance of a bill of exchange. In re Baxter (C. C. 1886) 28 Fed. 452. And a deed of property executed by the bankrupt in pursuance of a decree of a state court, on a showing that he had misappropriated trust funds which had been finally invested in such property in his own name, is not voidable as a preference. In re Myers (C. C. 1877) Fed. Cas. No. 9,984. But it would be otherwise in regard to a sale under a decree which was procured by fraud and imposition practised on the court. Stern v. Louisville Trust Co. (1901) 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305.

Where it appeared that the bankrupt was a member of a stock exchange, the rules of which provided that, when a member became insolvent, he should assign his seat to be sold, and that the proceeds should be first applied to the payment of his debts to the members of the exchange, to the exclusion of his other creditors, but the purchaser of the seat could not become a member, or enjoy any of the privileges of membership, unless elected by the exchange, held, a member who became insolvent, complied with this rule, and was afterwards adjudged a bankrupt, was not guilty of giving a preference to those creditors whose debts were in this manner paid first; for while his incorporeal right to his seat was indeed

property, yet it was subject to certain vaid conditions and restrictions, including that of payment to members, and would not vest in his trustee in any event until those conditions had been complied with. Hyde v. Woods (1876) 94 U. S. 523, 24 L. Ed. 264.

A preference is none the less voidable because it was given in and as a part of a general assignment for the benefit of creditors, which assignment is annulled by the adjudication in bankruptcy. Stern v. Louisville Trust Co. (1901) 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305; Wilson v. Taylor (1911) 154 N. C. 211, 70 S. E. 286. And where a debtor enters upon a plan of composition and compromise with all his creditors, if one of them secures full payment while the others receive less, it is a voidable preference. In re Amory (D. C. 1843) Fed. (D. C. 1874) 10 N. B. R. 244, Fed. Cas. No. 6,139. A contract between a bankrupt and certain of its creditors, by which they agreed to contribute to the purchase of certain of the bankrupt's machinery only in case their debts against the bankrupt were fully satisfied, held preferential, and not to enable them to enforce a lien against the fund realized by the bankrupt's trustee on a sale of the machinery. In re Jacob Y. Shantz & Son Co. (D. C. 1913) 205 Fed. 425. A preference is created where the debtor compromises with all of his creditors except one, whom he promises to pay in full on a large extension of time, transferring to him property as security therefor. Ecfort v. Greely (D. C. 1873) 6 N. B. R. 433, Fed. Cas. No. 4,260.

But where, pursuant to a contemplated compromise settlement of a bankrupt's debts, defendant, a judgment creditor, was paid a stipulated amount to obtain a discharge of his lien, and he received the same in good faith, and it appeared that the settlement would have been completed but that the bankrupt became insane and it was then abandoned, it was held that the payment so received was not recoverable as a preference. Templeton v. Woollens (C. C. A. 1912) 200 Fed. 257, 29 Am. Bankr. Rep. 208. And see In re Folb (D. C. 1898) 91 Fed. 107, 1 Am. Bankr. Rep. 22. Several creditors may with the aid of their debtor conspire to gain an advantage over other creditors, by a voluntary preference, if the means used are not unlawful, and the preference is made more than four months before the bankruptcy of the debtor. Van Kleeck v. Miller (D. C. 1879) 19 N. B. R. 484, Fed. Cas. No. 16,860.

7. Procuring or suffering judgment.—Where a bankrupt, within four months prior to the filing of the petition, permitted two creditors to obtain judgments against him and to sell his stock of goods thereunder, such judgments constituted preferences, and the rupt's trustee was entitled to r the reasonable value of the goo sold. Moore v. John H. Smith & (D. C. 1913) 205 Fed. 431.

Something more than passive resistance on the part of an ins debtor is necessary to invalid judgment and levy on his pr when the debt is due and he has fense. But slight circumstances ing to show a desire on the part bankrupt to give a preference m sufficient to show that he "procu suffered" the judgment. Wils City Bank of St. Paul (1873) 17 473, 21 L. Ed. 723; Parsons v. well (C. C. 1880) 1 Fed. 74; H man v. Smith (1875) 42 Md. 1 N. B. R. 121; Sleek v. Turner (76 Pa. 142, 10 N. B. R. 580; Ke er v. Tool (1876) 81 Pa. 467, B. R. 334; Mason v. Warthens 7 W. Va. 532, 14 N. B. R. 346.

It is competent for a creditor stitute a suit against an insolvent or and to obtain judgment and execution, and unless the bankrup some act by which he has partic in some way in the action of the itor, the preference thereby ac is valid as against other credito far as it is affected by this part part of the statute. In re Run C. 1879) 3 Fed. 790.

A creditor may pursue his ins debtor to judgment and execution full knowledge of the insolvency withstanding the provisions o bankruptcy act, provided the does nothing to aid the pursui there be no collusion between the or and the creditor, the ordinary dies of the law are open to the Clark v. Iselin (1874) 21 Wall. 3 L. Ed. 568; Brown v. Jefferson ty Nat. Bank (C. C. 1881) 9 Fed.

A debtor does not procure or judgment who merely consents amicable action or revival, which the creditor no advantage whic could not at once have secured b versary process. Kemmerer v. (1876) 81 Pa. 467. Nor is it a of procuring or suffering jud where the debtor merely agrees t notice to a certain creditor when tion is issued against him, and d notify that creditor. Gaskill v. B (C. C. 1881) 8 Fed. 746. But a ment by default is prima facie fr lent, and one seeking to retain a erence secured thereby must ne all the circumstances under the ute making such a transfer void. Binns (D. C. 1870) Fed. Cas. No. And a judgment obtained by serv process on an absconding debtor secretly returns within the jurisd to permit such service, is procur suffered by him, within the meani the statute. Beattie v. Gardner (1871) Fed. Cas. No. 1,195. A preference is created if the debto

tributes to the rendition of the judgment at an earlier date than, without his aid, it could have been entered. Rogers v. Palmer (1880) 102 U. S. 263, 26 L. Ed. 164. Or where a member of an insolvent firm delivers a message at the request of a creditor, although unwillingly, directing an attorney to enter judgment on a judgment note which the firm had previously given. In re Benton (C. C. 1877) 16 N. B. R. 75, Fed. Cas. No. 1,333. Or where a judgment debtor agrees that the sheriff shall place a cashier in charge of his store, and that the proceeds of each day's sales shall be paid over to the sheriff and applied on the execution. In re Metzger Toy & Novelty Co. (D. C. 1902) 114 Fed. 957, 8 Am. Bankr. Rep. 307.

An order in void receivership proceedings whereby the bankrupt's property was transferred to defendant may, when made within four months of bankruptcy, be vacated as a preference. Jones v. Schaff Bros. Co. (1915) 174 S. W. 177, 187 Mo. App. 597.

8. —— Judgment by confession or consent.—A confession of judgment, or the giving of a warrant of attorney to confess judgment, by an insolvent debtor, with the intention of preferring the particular creditor, may be a voidable preference, and especially where this course is taken for the purpose of enabling that creditor to levy his execution before other creditors can do so. First Nat. Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542; Buchanan v. Smith (1872) 16 Wall. 277, 21 L. Ed. 280; Benjamin v. Chandler (D. C. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; Haughey v. Albin (D. C. 1869) 2 N. B. R. 399, Fed. Cas. No. 6,222; Fitch v. McGie (D. C. 1869) 2 N. B. R. 531, Fed. Cas. No. 4,835; Zahm v. Fry (C. C. 1874) 9 N. B. R. 546, Fed. Cas. No. 18,198; Street v. Dawson (C. C. 1870) 4 N. B. R. 207, Fed. Cas. No. 13,533. And a debtor who voluntarily confesses judgment in favor of the creditor, and allows him to issue an execution and to make a levy and sale, resulting in the creditor becoming the purchaser, "transfers" his property. Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. And the same principles apply in the case of a decree entered by consent. In re Mayo Contracting Co. (D. C. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551.

But an order or decree requiring a trustee to pay over money to his successor, made in a proceeding by the cestui que trust to have him removed on the ground of his insolvency, resulting in an adversary decree appointing a new trustee, is not a judgment "procured or suffered" by the insolvent. Fry v. Pennsylvania Trust Co. (1900) 195 Pa. 343, 46 Atl. 10. And the same is true of a judgment which merely confirms an award made more than four months before the bankruptcy of the debtor. In re Koslowski (D. C. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 723.

Although a judgment by confession may be entered under such circumstances as to make it a voidable preference, yet where it was intended merely as collateral security for the aggregate amount of several valid and existing judgments, its invalidity does not in any way affect the original judgments. Vogle v. Lathrop (C. C. 1870) 4 N. B. R. 439, Fed. Cas. No. 16,985.

9. Transfers of property.—The act does not permit an insolvent debtor to transfer any portion of his property in kind to a creditor in settlement of the debt, though it be an honest and valid one, if the effect will be to prefer that creditor over others, and the creditor has reasonable cause to believe that such result will follow. Sherman v. Luckhardt (1902) 96 Mo. App. 320, 70 S. W. 388; In re House (D. C. 1843) Fed. Cas. No. 6,735.

The trustee stands in the shoes of the bankrupt and cannot recover in assumpsit the proceeds of a sale of property which was in the possession of a warehouseman when the petition was filed, and the receipts for which were held by bona fide creditors who became pledgees thereof without knowledge of insolvency and long before bankruptcy proceedings and without intention to defraud. Chicago Title & Trust Co. v. First Nat. Bank (1912) 174 Ill. App. 339.

A preferential "transfer" of property may include a mortgage or any other kind of lien voluntarily created by the debtor. Coder v. Arts (1907) 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Ed. W. Wright Lumber Co. (D. C. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; In re Jones (D. C. 1902) 118 Fed. 673, 9 Am. Bankr. Rep. 262. Or a deed of land delivered with the understanding that it is not to be recorded but held as security. Ragan v. Donovan (D. C. 1911) 189 Fed. 138, 26 Am. Bankr. Rep. 311. Or a bill of sale of a stock of merchandise. W. B. Belknap & Co. v. Lyell (1907) 89 Miss. 197, 42 South. 799. Or an order drawn by the bankrupt on a third person and accepted by the latter. In re Hines (D. C. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 495. And an agreement to "transfer" property may be construed as an agreement to "deliver" it. Godwin v. Murchison Nat. Bank (1907) 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935.

Where the creditor simply takes possession of property of the debtor, meaning to satisfy his claim out of it, this may constitute a preference. Bailey v. Henderson (D. C. 1878) Fed. Cas. No. 737. Especially where the debtor thereupon gives the creditor a written release. Coolidge v. Ayers

(1904) 76 Vt. 405, 57 Atl. 970. But a preference is not created by the act of a creditor in taking possession of collaterals deposited as security, though within four months before the bankruptcy, where the collateral was set apart years before to secure the debtor's drawing credit. Sexton v. Kessler & Co. (1912) 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995.

A sum retained by a corporate creditor, with knowledge of the debtor's insolvency and within four months before his bankruptcy, which sum was due and owing to the bankrupt under an agreement by which the corporation, in paying its employés, was to deduct from their wages the amounts due from them to the bankrupt for supplies furnished by him to them, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, is not a voidable preference. Western Tie & Timber Co. v. Brown (1905) 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447.

The performance of labor by an insolvent debtor for his creditor, for which he is given credit on his indebtedness, is not a transfer of property. In re Abraham Steers Lumber Co. (D. C. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315.

A transfer may constitute a voidable preference under the act although the property is not conveyed directly to the preferred creditor, if the effect of the transaction is to enable him to secure a larger share of the debtor's estate than other creditors of the same class will receive in the bankruptcy. Western Tie & Timber Co. v. Brown (1904) 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111. But see this case on appeal (1905) 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447. Hence it is sufficient if the transfer is made to a third person for the creditor's benefit. National Bank of Newport v. National Herkimer County Bank (1912) 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, 28 Am. Bankr. Rep. 218. And a debtor cannot escape the effect of giving a preference by passing the conveyance through his wife and having her convey or mortgage it to the creditor. Gibson v. Dobie (C. C. 1871) 14 N. B. R. 156, Fed. Cas. No. 5,394. And a preference is created where the creditor induces and procures a third person to lend money to the bankrupt with which the creditor's claim is to be satisfied, taking a mortgage on the bankrupt's stock in trade as security. In re Beerman (D. C. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 431.

It makes no difference who the creditor may be. The officers of a corporation, for instance, may lawfully lend it money, but cannot take a preferential transfer of its property when it is insolvent. Atherton v. Emerson (1908) 199 Mass. 199, 85 N. E. 530; M
Chicago Title & Trust Co. (19
Ill. App. 68; Cullen v. Veas
Super. 1915) 95 Atl. 655.

The act of a foreign creditor
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preference. In re Pollmann
1907) 156 Fed. 221, 19 Am.
Rep. 474.

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Baskerville (1911) 192 Fed. 8
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In re Leech (D. C. 1908) 171 F
Vitzthum v. Large (D. C. 19
Fed. 685, 20 Am. Bankr. R
CONTRA, Lacy v. Chandler (T
App. 1914) 163 S. W. 328.

**10. —— Transfer of property
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voidable preference is created
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which the latter already has
lien, in satisfaction and disch
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property in substitution for
which the lien attaches, provi
property is of no greater val
the amount of the lien, so t
debtor's general estate is not
depleted. Ashuelot Bank v. F
C. 1884) 19 Fed. 237; Coxe
(C. C. 1872) 8 N. B. R. 562, F
No. 3,310; Catlin v. Hoffman
1874) 9 N. B. R. 342, Fed. C
2,521; Boothe v. Brooks (D.
12 N. B. R. 398, Fed. Cas. No
Hallack v. Tritch (C. C. 1878
B. R. 293, Fed. Cas. No. 5,956
v. Garrison (1904) 36 Tex. C
574, 82 S. W. 800; Posey v. M
(1902) 28 Tex. Civ. App. 452, 6
792. See Silberstein v. Stahl (1
Misc. Rep. 353, 66 N. Y. Supp.

A transfer by a bankrupt to
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with bankrupt, pays, is not a
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Lumber Co. (1914) 164 S. W.
Ky. 219.

But a preference is created
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Where defendant, with knowl

the insolvency of his brother-in-law, advanced money to take up notes of a bank which was pressing for payment and for such advancement took notes of the bankrupt and, on the maturity of the first of the series, procured a deed of trust of the bankrupt's property, of which the trustee immediately took possession, the deed constituted a preference. Dean v. Davis (C. C. A. 1914) 212 Fed. 88.

To justify a transaction of this kind, there must be an actual and valid lien of some kind, not a mere promise or unexecuted agreement to give security. Page v. Rogers (1909) 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Sharp v. Philadelphia Warehouse Co. (C. C. 1880) 19 N. B. R. 378, Fed. Cas. No. 12,709a. But if a creditor holds a valid and subsisting lien on the debtor's property, and the equity of redemption therein is released to him under such circumstances as to make it a fraudulent preference, though the conveyance is void, this will not divest the lien, but the parties will be remitted to their original position. Avery v. Hackley (1874) 20 Wall. 407, 22 L. Ed. 385.

11. Restoration of specific property or funds.—A transfer or surrender of property by an insolvent debtor will not constitute a voidable preference where the person receiving it was actually the owner of the property, and no title was vested in the bankrupt in any such sense that it could have been made available for his general creditors. Bradley, Clark & Co. v. Benson (1904) 93 Minn. 91, 100 N. W. 670; Sears v. Gilman (1908) 199 Mass. 384, 85 N. E. 466; In re Wright-Dana Hardware Co. (D. C. 1913) 205 Fed. 335, 30 Am. Bankr. Rep. 582. Where a broker buys stock for a customer on a margin, the title to the stock is in the customer, and not in the broker, the latter holding it merely as a pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker, and no preference is created by the transfer of the stock to the customer on the settlement of his account. Richardson v. Shaw (1906) 147 Fed. 659, 77 C. C. A. 643, 16 Am. Bankr. Rep. 876; In re Graff (D. C. 1902) 117 Fed. 343, 8 Am. Bankr. Rep. 744. Or by the broker's action in redeeming the stock (already pledged by him) and turning it over to the customer on demand. Richardson v. Shaw (1908) 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 19 Am. Bankr. Rep. 717.

A transfer of realty by an insolvent, though made within four months before his bankruptcy, is not a preference if made in good faith to his wife in replacement of her dotal property alienated by him, and the subject of the transfer does not exceed in value such dotal property. Gomila v. Wilcombe (1907) 151 Fed. 470, 81 C. C. A. 268, 18 Am. Bankr. Rep. 143.

Money, as well as other property, may be subject to this rule. Thus, the return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference. Richardson v. Shaw (1908) 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 19 Am. Bankr. Rep. 717. So where money is placed in the hands of one who afterwards becomes bankrupt, but on the agreement that it shall be used for a particular purpose, and it is not so used, but is returned to the owner, this does not create a preference. Sharp v. Simonitsch (1909) 107 Minn. 133, 119 N. W. 790; Dressel v. North State Lumber Co. (D. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; In re W. W. Mills Co. (D. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501. But the case is different where goods have passed to the bankrupt under a contract of sale. It is an unlawful preference if the seller accepts the return of the goods or a part of them in settlement of his claim, unless he has retained title in himself by some lawful reservation or agreement. Plummer v. Myers (D. C. 1905) 137 Fed. 660, 14 Am. Bankr. Rep. 805; West v. Fulling (1873) 36 Ind. App. 617, 76 N. E. 325.

12. —— Trust funds and money converted or embezzled.—If money stolen or embezzled by the bankrupt, or misappropriated to his own use while holding it in the character of a trustee, has been kept separate and apart from the bankrupt's own money, or if it is distinctly traceable into property or other funds into which it has been converted, the owner may follow it and reclaim it from the trustee in bankruptcy, on the theory that it does not constitute any part of the assets in bankruptcy. And if the fund (or its avails) is surrendered or restored to the owner before bankruptcy intervenes, it cannot be said to constitute the giving of a preference. Block v. Rice (D. C. 1909) 167 Fed. 693, 21 Am. Bankr. Rep. 691; McNaboe v. Columbian Mfg. Co. (1907) 153 Fed. 967, 83 C. C. A. 81, 18 Am. Bankr. Rep. 684; Goode v. Elwood Lodge (1903) 160 Ind. 251, 66 N. E. 742.

But if the person entitled to the fund, having knowledge of the embezzlement or conversion, and of the debtor's insolvency, accepts a payment out of the latter's general funds or a conveyance of property or a security offered, this is an election to treat the misappropriation as creating a debt, and consequently he will stand in no better position than any general creditor. Atherton v. Green (1910) 179 Fed. 806, 103 C. C. A. 298, 24 Am. Bankr. Rep. 650.

Under these circumstances, a payment or transfer of property, or the giving of a mortgage or other security, will constitute a voidable preference, supposing the other elements of a preference to be present. Clarke v. Rogers (1910) 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413; In re

Dorr (C. C. A. 1912) 196 Fed. 292, 28 Am. Bankr. Rep. 505; Burgoyne v. McKillip (C. C. A. 1910) 182 Fed. 452, 25 Am. Bankr. Rep. 387; In re Kearney (D. C. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721; Smith v. Township of Au Gres (C. C. A. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

Independently of his liability on any bond, there is an obligation of a contractual nature resting upon a defaulting testamentary trustee to restore to the trust estate the value of assets embezzled, and this obligation is a provable debt in bankruptcy. Hence, where one is a trustee in several trusts, and knowing himself to be insolvent, and within four months prior to his bankruptcy, he transfers his own property from himself individually to one of those trusts and to himself in the character of trustee therein, to make good a shortage, and the effect is to enable that trust to recover a larger share of its debt than the others, a voidable preference is given. Clarke v. Rogers (1913) 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953, 30 Am. Bankr. Rep. 39.

13. Giving present consideration—Security for present loan or future advances.—An unlawful preference is created, only when a transfer is made or security given for a pre-existing debt. In re Clifford (D. C. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; In re Busby (D. C. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; Marsh v. Walters (1915) 220 Fed. 805, 136 C. C. A. 409. At the time when a debt is created, the creditor has a right to dictate the terms on which he will part with his money or property, and he may therefore demand that he shall first be secured to such an extent as will satisfy him, and this does not constitute an unlawful preference. In re Busby (D. C. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650.

A creditor who takes security, though the debtor is insolvent and though his bankruptcy follows within four months, does not receive a preference which is voidable under the act, if the consideration was a loan or advance of money to the bankrupt made at the same time with the giving of the security. Tiffany v. Boatmen's Sav. Inst. (1873) 18 Wall. 375, 21 L. Ed. 868; Lindley v. Ross (C. C. A. 1912) 200 Fed. 733, 29 Am. Bankr. Rep. 610; In re Empire Cork Co. (D. C. 1912) 193 Fed. 225; In re Sayed (D. C. 1910) 185 Fed. 962, 26 Am. Bankr. Rep. 444; Powell v. Gate City Bank (1910) 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Hersey (D. C. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; In re Bartlett (D. C. 1909) 172 Fed. 679, 22 Am. Bankr. Rep. 891; In re Farmers' Supply Co. (D. C. 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; McDonald v. Clearwater Shortline Ry. Co. (C. C. 1908) 164 Fed. 1007, 21 Am. Bankr. Rep. 182; Crim v. Woodford (1905) 136 Fed. 34, 68 C. C. A. 14 Am. Bankr. Rep. 302; Far Bank of Edgefield v. C. D. Carr (1904) 127 Fed. 690, 62 C. C. A. 11 Am. Bankr. Rep. 733; Young v son (C. C. 1902) 115 Fed. 192, 8 Bankr. Rep. 377; In re Little (1901) 110 Fed. 621, 6 Am. Bankr. 681; In re Davidson (D. C. 1901 Fed. 882, 5 Am. Bankr. Rep. 52 re Wolf (D. C. 1899) 98 Fed. Am. Bankr. Rep. 555; In re Little er Lumber Co. (D. C. 1899) 92 585, 1 Am. Bankr. Rep. 483; Ex Ames (D. C. 1871) 7 N. B. R. Fed. Cas. No. 323; In re Stowe (1871) 6 N. B. R. 429, Fed. Cas. 13,513; Schulze v. Bolting (D 1878) 17 N. B. R. 167, Fed. Cas 12,489; In re Morrison (D. C. 1 10 N. B. R. 105, Fed. Cas. No. 9 In re Pierson (D. C. 1874) 10 N R. 107, Fed. Cas. No. 11,153; Pip Baldy (C. C. 1874) 10 N. B. R. Fed. Cas. No. 11,179; In re M gomery (D. C. 1875) 12 N. B 321, Fed. Cas. No. 9,732; In re B field & Poole Mfg. Co. (D. C. 1 16 N. B. R. 489, Fed. Cas. No. 1 Campbell v. Waite (D. C. 1877) 1 B. R. 93, Fed. Cas. No. 2,374; Ne Barbaree (1911) 135 Ga. 771, 70 638; Crooks v. People's Nat. (1901) 34 Misc. Rep. 450, 70 N Supp. 271; Claridge v. Evans (1 137 Wis. 218, 118 N. W. 198, 80 L. R. A. (N. S.) 144; Eason v. G son (1904) 36 Tex. Civ. App. 57 S. W. 800. Advancement of mone brick manufacturers under agree that they would manufacture brick the lender held not a voidable pr ence, the lender having taken po sion before bankruptcy. Sieg v. Gr (C. C. A. 1915) 225 Fed. 955.

A mortgage made in good faith t cure future sales of goods to the m gagor is valid to the extent of the vances actually made, and to such tent is not defeated but protecte the bankruptcy act. Marvin v. Cl bers (C. C. 1875) 13 N. B. R. 77, Cas. No. 9,179; In re Watkinson C. 1906) 142 Fed. 782, 16 Am. Ba Rep. 38; Peterson v. Nash Bros. (1 112 Fed. 311, 50 C. C. A. 260, 55 I A. 344, 7 Am. Bankr. Rep. 181. where new sales succeed payments, the net result is to increase the v of the debtor's estate, payments r by an insolvent debtor on a running count are not to be considered pr ential. Joseph Wild & Co. v. Pr dent Life & Trust Co. (1907) 153 562, 82 C. C. A. 516, 18 Am. Ba Rep. 506. A mortgage given for r ey borrowed at the time to pay the chase price of the property mortga whether or not the same identical r ey is used to make the payment, i effect a purchase money mortgage, entitled to protection as such. I Franklin (D. C. 1907) 151 Fed. 18 Am. Bankr. Rep. 218; Lindle

Ross (1912) 200 Fed. 733, 119 C. C. A. 177. A chattel mortgage, executed by an insolvent corporation under an agreement made at the time of the loan, though a few days thereafter, is not a security for a past debt, and is not invalidated by the Bankruptcy Act or by Stock Corporation Law N. Y. § 66. In re Metropolitan Dairy Co. (1915) 224 Fed. 444, 140 C. C. A. 646. A bank held to have a valid lien on collateral pledged to secure an indebtedness of a bankrupt for money borrowed within four months prior to the bankruptcy to redeem such collateral from a prior valid pledge. Dodge v. Harris (1915) 224 Fed. 434, 140 C. C. A. 128.

A person may sell or exchange his property, though he is insolvent at the time, if it is done in good faith and with no fraudulent design as against his creditors. And one who takes a conveyance of such property, acting in equal good faith, and who has already advanced the money therefor, or gives a present and adequate consideration for it, is not chargeable with receiving a preference. Ernst v. Mechanics' & Metals Nat. Bank (C. C. A. 1912) 201 Fed. 664, 29 Am. Bankr. Rep. 289; Mills v. Virginia-Carolina Lumber Co. (C. C. A. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Rosenfeld (D. C. 1868) 2 N. B. R. 116, Fed. Cas. No. 12,057; Harrison v. McLaren (D. C. 1874) 10 N. B. R. 244, Fed. Cas. No. 6,139; Sparhawk v. Richards (C. C. 1875) 12 N. B. R. 74, Fed. Cas. No. 13,205; Weeks v. Spooner (1906) 142 N. C. 479, 55 S. E. 432. But see Kerr v. Melum (1911) 27 S. D. 208, 130 N. W. 83. And either in the case of a security or a conveyance, it is not necessary that the transfer and the giving of the consideration should be exactly contemporaneous. For an advance will be considered a present consideration for a conveyance made within a reasonable time thereafter and in pursuance of a prior agreement. Douglass v. Vogeler (D. C. 1881) 6 Fed. 53; Gattman v. Honea (D. C. 1875) 12 N. B. R. 493, Fed. Cas. No. 5,271.

If one lends money to an insolvent debtor (whose bankruptcy follows within four months), and knows at the time that the borrower's purpose is not to use the money in supporting his credit or carrying on his business, but to use it in paying off one of the creditors, thereby giving a preference, the lender is so far affected by the fraudulent purpose that any security given to him for the loan will be voidable at the suit of the trustee in bankruptcy. Bucknam v. Goss (D. C. 1877) 13 N. B. R. 337, Fed. Cas. No. 2,097. And it seems that actual knowledge on the part of the lender is not necessary to produce this result, if the circumstances were so unusual and suspicious as to lay upon him the duty of making reasonable inquiries concerning the destination of the money, which inquiries would have enlightened him as to the debtor's purpose. Ex parte Mendell (D. C. 1870) Fed. Cas. No. 9,418.

If the consideration for a security or transfer, though contemporaneous with it, was illegal, as being contrary to law, to good morals, or to public policy, it will not support the lien or conveyance. Sharp v. Philadelphia Warehouse Co. (C. C. 1881) 10 Fed. 379; Adams v. Merchants' Nat. Bank (C. C. 1880) 2 Fed. 174.

Where it appears that the transfer or security was given in part to secure a pre-existing debt, and in part to secure a new advance of money made at the same time with it, and there was no actual fraud in the transaction as to the other creditors or upon the bankruptcy act, the creditor will be entitled to enforce his security against the estate of the debtor in bankruptcy to the extent of the money advanced at the time, although it is void as a preference so far as concerns the pre-existing debt. In re Wolf (D. C. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 555; In re Cobb (D. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Sanderlin (D. C. 1901) 109 Fed. 857, 6 Am. Bankr. Rep. 384; In re Hull (D. C. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302; In re Dismal Swamp Contracting Co. (D. C. 1905) 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re First Nat. Bank (1907) 155 Fed. 100, 84 C. C. A. 16, 18 Am. Bankr. Rep. 766. But see Tuttle v. Truax (D. C. 1868) 1 N. B. R. 601, Fed. Cas. No. 14,277.

An increase in a mortgage lien on a bankrupt's property, supported by a new and adequate consideration, and not lessening his estate or impairing in any respect the fund available to pay general creditors, must be sustained, although made within four months prior to his bankruptcy. State Bank of Williamson v. Fish (1909) 120 N. Y. Supp. 365.

An assignment of collateral by an insolvent debtor with intent to give a preference to a creditor who has reasonable grounds to believe that a preference is intended, made a short time before an adjudication of bankruptcy, as security for a pre-existing debt, and also for a small additional loan, is void as to the whole. Grannis v. Beardsley (C. C. 1876 & D. C. 1874) Fed. Cas. No. 5,688.

14. Prior agreement to give security or make transfer.—Where an agreement is made or a promise given, at the time when money is loaned or advanced, that a transfer of property shall be made or a security given to the lender, the subsequent execution of the transfer or giving of security does not constitute an illegal preference, though it takes place at a time when the debtor is insolvent and within four months prior to his bankruptcy. In re Harvey (D. C. 1914) 212 Fed. 340; Tomlinson

v. Bank of Lexington (1906) 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; Ryttenberg v. Schefer (D. C. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; Payne v. Solomon (D. C. 1876) 14 N. B. R. 162, Fed. Cas. No. 10,856; In re Wood (D. C. 1871) 5 N. B. R. 421, Fed. Cas. No. 17,937; Burdick v. Jackson (N. Y. 1876) 7 Hun, 488, 15 N. B. R. 318; M. & M. National Bank v. Brady's Bend Iron Co. (D. C. 1871) 5 N. B. R. 491, Fed. Cas. No. 9,018; Smoot v. Morehouse (1845) 8 Ala. 370, 42 Am. Dec. 644.

But there are decisions to the effect that a transfer of property to a creditor by an insolvent debtor four months prior to his bankruptcy, which would otherwise constitute a voidable preference, is not deprived of that character by the fact that it was made pursuant to a prior agreement made more than four months before the bankruptcy. Citizens' Trust Co. v. Tilt (1912) 200 Fed. 410, 118 C. C. A. 562, 29 Am. Bankr. Rep. 906; Lathrop Bank v. Holland (1913) 205 Fed. 143, 30 Am. Bankr. Rep. 62; In re Thomas (D. C. 1912) 199 Fed. 214, 29 Am. Bankr. Rep. 945; Tilt v. Citizens' Trust Co. (D. C. 1911) 191 Fed. 441, 27 Am. Bankr. Rep. 320; In re Smith (D. C. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; In re Great Western Mfg. Co. (1907) 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259; In re Dismal Swamp Contracting Co. (D. C. 1915) 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re Mandel (D. C. 1903) 127 Fed. 863, affirmed (1905) 135 Fed. 1021, 68 C. C. A. 546; In re Ronk (D. C. 1901) 111 Fed. 154, 7 Am. Bankr. Rep. 31; Second Nat. Bank v Hunt (1870) 11 Wall. 391, 20 L. Ed. 190; In re Connor (D. C. 1871) Fed. Cas. No. 3,118; Lloyd v. Strobridge (D. C. 1877) 16 N. B. R. 197, Fed. Cas. No. 8,435; In re Herman (D. C. 1913) 207 Fed. 594.

If the promise or agreement was of such a specific nature and related to such specific property as to give rise to an inchoate or equitable lien (in advance of its execution) then the creation of a specific lien at a later time, in accordance with the prior promise, will not violate the bankruptcy law. Sabin v. Camp (C. C. 1900) 98 Fed. 974, 3 Am. Bankr. Rep. 578; Stover v. Kennedy (C. C. 1878) Fed. Cas. No. 13,510. And see Gage Lumber Co. v. McEldowney (C. C. A. 1913) 207 Fed. 255, 30 Am. Bankr. Rep. 251. But these conditions are not met by a general parol agreement, entered into when the debt was contracted, not pledging any specific property, but merely that security should be given when required. In re Connor (D. C. 1871) Fed. Cas. No. 3,118; Southwick v. Whipple (D. C. 1880) 2 Fed. 770. Or if the debtor should become financially embarrassed. Sebring v. Wellington (1901) 63 App. Div. 498, 71 N. Y. Supp. 788. A mere

promise by the debtor, at the t
debt was contracted, to give a n
to secure it, but without specif
nature of the mortgage or the p
on which it was to be given, c
create an equitable mortgage,
execution of a mortgage on a
quent renewal of the debt, at
when the debtor is insolvent an
in four months before his ban
constitutes a transfer of prop
secure an antecedent debt, and
a preference. Pollock v. Jones
124 Fed. 163, 61 C. C. A. 555,
Bankr. Rep. 616. The prior
must contemplate the giving of
cific and definite security, not
"some" security; it must be
agreement as could be enforce
bill for specific performance.
Jackson Iron Mfg. Co. (D. C. 1
N. B. R. 438, Fed. Cas. No. 7,1
agreement that the creditor sh
a general lien on the property
debtor, a corporation, will not
Mathews v. Hardt (1903) 79 A
570, 80 N. Y. Supp. 462. And a
ment to pledge personal prop
security for a debt is not
where the goods are not deliv
the creditor nor set apart and
as his property, so that wh
creditor takes possession of th
erty shortly before the filing of
tion in bankruptcy, the transa
voidable as a preference. In r
dan (D. C. 1899) 98 Fed. 406
Bankr. Rep. 554; In re Arkor
ric Mfg. Co. (D. C. 1907) 1
914, 18 Am. Bankr. Rep. 470.
agreement, while negotiating a
make repayment out of a certa
does not create a lien on th
and hence when repayment is n
of it within four months before
ceeding in bankruptcy, it will b
ed to be preferential and voi
the suit of the trustee. Tor
Winfield Nat. Bank (1903) 66 K
71 Pac. 235. An agreement, ma
bankrupt more than four month
to the bankruptcy, by which it
to assign to a bank its future a
receivable, and the bank ag
make advances on the same, h
to operate as an equitable ass
of the accounts, which would
assignments made within th
months' period and otherwise p
tial. In re Cotton Manufa
Sales Co. (D. C. 1913) 209 Fed.

15. Exchange or substitution curities.—An exchange or subs
of one valid security for anoth
not create an unlawful pre
though occurring when the de
insolvent and within four month
to his bankruptcy, provided t
security is not of greater val
the old and does not put the
in better position with referenc
forcing his claim, since, in th
nothing is taken away from the
creditors of the bankrupt. Sa

Turpin (1875) 91 U. S. 114, 23 L. Ed. 235; Cook v. Tullis (1873) 18 Wall. 332, 21 L. Ed. 933; Clark v. Iselin (1874) 21 Wall. 360, 22 L. Ed. 568; Douglass v. Vogeler (D. C. 1881) 6 Fed. 53; Brett v. Carter (D. C. 1875) 14 N. B. R. 301, Fed. Cas. No. 1,844; Albany Exchange Bank v. Johnson (D. C. 1842) Fed. Cas. No. 133; Sawyer v. Turpin (C. C. 1873) Fed. Cas. No. 12,409; Deland v. Miller & Chaney Bank (1903) 119 Iowa, 368, 93 N. W. 304; Hutchinson v. Murchie (1882) 74 Me. 187.

Transfer by bankrupt in trust to secure party who executed indemnity bond to bonding company, which gave a bond to secure the discharge of lien of an attachment obtained within four months before bankruptcy, held valid unless intended to create a preference or defraud creditors or unless the bonding company had reason to believe that such was its purpose. In re Federal Biscuit Co. (1914) 214 Fed. 221, 130 C. C. A. 635.

The giving of a mortgage or pledge is not a preference when it is executed upon a renewal of the debt or loan, which was originally secured by a like mortgage or pledge. In re Noel (D. C. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; Chattanooga Nat. Bank v. Rome Iron Co. (C. C. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; In re Doran (D. C. 1877) Fed. Cas. No. 4,000. Nor is a preference created by the substitution and recording of a mortgage correcting a mistake in a prior unrecorded mortgage. Player v. Lippincott (C. C. 1877) Fed. Cas. No. 11,223. Or in the place of one not formally executed. Stewart v. Hoffman (1904) 31 Mont. 190, 77 Pac. 689. Nor by the release of pledged property and the taking of a pledge on other property to secure the same debt. Perry v. Booth (1901) 67 App. Div. 235, 73 N. Y. Supp. 216. But see Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200. Nor by the substitution of different collaterals for those already held by the creditor. In re Reese-Hammond Fire Brick Co. (C. C. A. 1910) 181 Fed. 641, 25 Am. Bankr. Rep. 323. Nor by the giving of a chattel mortgage in place of a prior valid bill of sale of the same property. Sawyer v. Turpin (1875) 91 U. S. 114, 23 L. Ed. 235. But a chattel mortgage is voidable as a preference, where the prior security was a conditional contract of sale, which was invalid because not recorded. L. A. Becker Co. v. Gill (C. C. A. 1913) 206 Fed. 36, 30 Am. Bankr. Rep. 429. But not where the chattel mortgage was substituted in place of valid collateral security. In re Davidson (D. C. 1901) 109 Fed. 882, 5 Am. Bankr. Rep. 528. A preference is not created by a confession of judgment for a debt already secured by a prior valid lien. Reber v. Gundy (D. C. 1882) 13 Fed. 53. Nor by the substitution of a deed of trust for a mechanic's lien on the same property. In re Weaver (D. C. 1874) 9 N. B. R. 132, Fed. Cas. No. 17,307. Nor by a mere change in the form of the obligation from an account to a note. O'Connor v. Parker (1871) 23 Mich. 22.

Where the bankrupt's debt consists of a sum of money with accumulated interest, some time overdue, secured by a valid mortgage, and the parties have an accounting and compute the amount due to date for both principal and interest, and a new mortgage is given for the sum so ascertained, upon the same property, the old mortgage being canceled, this is not to be regarded as an unlawful preference, though done within the time limited before the debtor's bankruptcy. Bernhisel v. Firman (1874) 22 Wall. 170, 22 L. Ed. 766. But see In re Jordon (D. C. 1874) 9 N. B. R. 416, Fed. Cas. No. 7,529; Forbes v. Howe (1869) 102 Mass. 427, 3 Am. Rep. 475. And a creditor who has obtained a valid lien by execution on property of greater value than the amount of the judgment may receive from the debtor bills receivable, accounts, and cash up to the amount of the execution, without violating the bankruptcy law, if the execution is thereupon released and the judgment satisfied. Clark v. Iselin (1874) 21 Wall. 360, 22 L. Ed. 568; Livingston v. Bruce (C. C. 1848) Fed. Cas. No. 8,410. And a broker who holds stocks of a customer as security for the money advanced in their purchase, does not gain a preference by selling the stocks and applying the proceeds on his claim. In re Filer (D. C. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835.

Sellers of property held not entitled to insurance placed thereon by the buyers, the original agreement of sale having been superseded by a chattel mortgage, and hence, the buyers being insolvent, a payment of the insurance money to the sellers constituted a preference. Bunday v. Huntington (1915) 224 Fed. 847, 140 C. C. A. 415.

Where a loan of money is simply evidenced by an indorsed promissory note, the substitution for it of a bond and mortgage is not such an exchange of securities as will prevent the mortgage being considered a preference, the other elements being present. In re Hirschowitz (D. C. 1912) 199 Fed. 202, 28 Am. Bankr. Rep. 571; In re Wolf (D. C. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 555. And a preference may be created by the substitution of one note for another, where that last given is made by a different party or is indorsed with a better name or matures earlier. McAtee v. Shade (C. C. A. 1910) 185 Fed. 442, 26 Am. Bankr. Rep. 151; In re Lane (D. C. 1874) 10 N. B. R. 135, Fed. Cas. No. 8,044. Or enables the creditor more easily or quickly to obtain judgment and levy on the debt-

or's property. Loudon v. First Nat. Bank (D. C. 1877) 15 N. B. R. 476, Fed. Cas. No. 8,525.

Where a bankrupt executed a note for its indebtedness to a corporation, which the corporation transferred to claimant, its principal stockholder, the fact that the corporation thereafter received from the bankrupt certain notes of a third person in part payment of its claim was insufficient to show that claimant had received a preference. Aiello v. Crampton (1912) 201 Fed. 891, 120 C. C. A. 189.

It does not necessarily follow that the new security is voidable to its entire extent. Where a debtor gives a mortgage in exchange or substitution for an existing valid mortgage, but of greater value, it may be voidable by his trustee in bankruptcy, but only as to such excess of value. In re Manning (D. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500.

16. Payments by debtor.—Payment of a debt in money is a "transfer," and if made under such circumstances as would constitute a preference in the case of a transfer of any other form of property, may be recovered by the debtor's trustee in bankruptcy. West Philadelphia Bank v. Dickson (1877) 95 U. S. 180, 24 L. Ed. 407; Pirie v. Chicago Title & Trust Co. (D. C. 1911) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; Vollmar v. Plage (D. C. 1911) 186 Fed. 598, 26 Am. Bankr. Rep. 590; In re Rice (D. C. 1908) 164 Fed. 514, 21 Am. Bankr. Rep. 211; In re W. W. Mills Co. (D. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; Wright v. William Skinner Mfg. Co. (1908) 162 Fed. 315, 89 C. C. A. 23, 20 Am. Bankr. Rep. 527; Sargent v. Blake (1908) 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Wright v. Sampter (D. C. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re John Morrow & Co. (D. C. 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Colton Export & Import Co. (1903) 121 Fed. 663, 57 C. C. A. 417, 10 Am. Bankr. Rep. 14; Swarts v. Fourth Nat. Bank (1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Fixen (1900) 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; In re Sloan (D. C. 1900) 102 Fed. 116, 4 Am. Bankr. Rep. 356; In re Christensen (D. C. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; Strobel & Wilken Co. v. Knost (D. C. 1900) 99 Fed. 409, 3 Am. Bankr. Rep. 631; In re Ft. Wayne Electric Corp. (1900) 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; In re Conhaim (D. C. 1899) 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Ft. Wayne Electric Corp. (D. C. 1899) 96 Fed. 803, 3 Am. Bankr. Rep. 186; In re Baxter (D. C. 1885) 25 Fed. 700; Metcalf v. Officer (C. C. 1880) 2 Fed. 640; Paige v. Loring (C. C. 1873) Fed. Cas. No. 10,672; Andrews v. Kellogg (1907) 41 Colo. 35, 92 Pac. 222; Landry v. Andrews 22 R. I. 597, 48 Atl. 1036; C Citizens' Bank (1909) 77 Miss. South. 637; Sherman v. Lu (1902) 96 Mo. App. 320, 70 S. Wright v. Cotten (1905) 140 52 S. E. 141; West v. Bank of (1906) 16 Okl. 328, 85 Pac. C. Wise Coal Co. v. Small (19 Fed. 524, 140 C. C. A. 508.

Payment of a debt by the b after the filing of the petition i ruptcy against him is unaut and ordinarily the trustee is en recover the amount paid; but debt was one wholly or in part able against the trustee, it is a exercise of discretion for the deny such recovery, either in w pro tanto. Toof v. City Nat (C. C. A. 1913) 206 Fed. 250, Bankr. Rep. 79. But where a just before filing his voluntary in bankruptcy, went to two of h itors, whose debts were barred statute of limitations, and paid them one dollar, and did this purpose of taking their claims the statute, so that they migh with the other creditors in the ing bankruptcy, and they had no edge or cause to believe that h to give them any advantage oth the revival of their debts, it w that no preference was created Banks (D. C. 1913) 207 Fed.

As respects the creation of a ence, it is immaterial in what f payment is made, whether in by a certified check. Cannon v M. Bell Co. (1901) 34 Misc. R 70 N. Y. Supp. 1024. Or by the ance of a draft drawn on the de the creditor. Fox v. Gardner 21 Wall. 475, 22 L. Ed. 685. O der on a third person to pay to t itor money which is due to the In re The Leader (D. C. 1911) 1 624, 26 Am. Bankr. Rep. 668. giving a lien on property fron the creditor realizes his debt In re Belding (D. C. 1902) 1 1016, 8 Am. Bankr. Rep. 718. insurance was effected on mo property, and the proceeds ther ing been collected, a portion was surrendered to the mortgag had become bankrupt, that it m repaid to the mortgagee in liq of an unsecured debt, the am relinquished at once became th erty of the mortgagor, and when constituted a preference. Stea & Lumber Co. v. Hammond (19 Fed. 559, 133 C. C. A. 411. ceptance by a creditor of a po the insurance money, under an ment seeking to avoid bankrupt ceedings, is a waiver of the cr rights under an order by the de the insurance company, before edge of the creditor's insolven such order is no defense to an by the trustee in bankruptcy to

the payment. Schuetz v. International Harvester Co. of America (Iowa, 1914) 149 N. W. 855.

It is immaterial on the question of a preference that the payment is not made directly into the creditor's hands, as, where the debtor's check passes through several banks and a clearing house and is finally credited to the creditor. In re Lyon (D. C. 1902) 114 Fed. 326, 7 Am. Bankr. Rep. 412. Where a creditor of the bankrupt assigns his account to a purchaser of the bankrupt's property, under an arrangement whereby such purchaser pays the claim, the legal effect is to appropriate out of the assets of the bankrupt the amount used in satisfying such claim by the purchaser assuming the liability, and an unlawful preference results therefrom. Hackney v. Hargreaves Bros. (1903) 68 Neb. 624, 94 N. W. 822; Rogers v. Fidelity Sav. Bank & Loan Co. (D. C. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1. This is also the case where the paying teller of a bank, claiming to be its creditor, draws his check and pays himself the amount out of the funds on hand, just before the bank closes its doors. In re Plant (D. C. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272. And where a bank which acts as agent for another bank for clearing house purposes pays, upon the day of its failure, to the latter, which has knowledge of its insolvency, deposits which have been made on its general account to meet checks in the clearing house, such payment is an illegal preference. Phelan v. Iron Mountain Bank (C. C. 1877) Fed. Cas. No. 11,069. Where check given by depositor in defendant's bank for amount of bond and mortgage executed by bankrupt was exchanged for a check on another bank, which was delivered to defendant in payment of an indebtedness, defendant held to have received a preferential transfer. Obermeier v. Kass (1914) 219 Fed. 529, 135 C. C. A. 279. And where the president and general manager of a bankrupt corporation acts for it in purchasing certain accounts against it, he can only charge the corporation for the amount actually paid by him for the accounts, and must account to the trustee in bankruptcy for all profits made. Atherton v. Emerson (1908) 199 Mass. 199, 85 N. E. 530. And a trustee in bankruptcy is not precluded from recovering, from the payee of a note, money paid by the bankrupt on the note within four months before his adjudication, by reason of the fact that there is a solvent indorser on the note. Harris v. Second Nat. Bank (1903) 110 Tenn. 239, 75 S. W. 1053; Bartholow v. Bean (1873) 18 Wall. 635, 21 L. Ed. 866.

There is no violation of the law against preferences where a debtor turns over money to his wife to be used, and which is in fact used, by her in defraying necessary household and family expenses, though she is also a creditor of his. Neumann v. Blake (1910) 178 Fed. 916, 102 C. C. A. 294, 24 Am. Bankr. Rep. 575.

Nor is the payment of house rent or rent of a store the giving of a preference where there is no intention to cheat other creditors or to evade the law. In re Locke (D. C. 1868) 2 N. B. R. 382, Fed. Cas. No. 8,439. But where an insolvent debtor, having a leasehold interest in a bakery where he carries on his business, pays the rent due on the same, as a means of enabling himself to continue the business, but with the purpose of defrauding his creditors, by hoarding and secreting the proceeds of the business so continued, and incurring new business debts without paying any old ones, the payment of the rent should be considered as a fraudulent preference under the bankruptcy law. In re Lange (C. C. A. 1899) 97 Fed. 107. Payments made by an insolvent to his landlord within four months of his adjudication in bankruptcy, and applied by the landlord, not to rent for the current year, but to rent in arrears, constitutes a preference. In re Louis J. Bergdoll Motor Co. (D. C. 1915) 225 Fed. 87. Where creditors of a bankrupt, with knowledge of its insolvency, placed a representative in charge and furnished goods on credit to replenish the stock, and would have succeeded in re-establishing the business, had not the issuance of an execution by another, precipitated bankruptcy, payments made for goods so furnished within four months prior to adjudication were preferential. In re Farmers' Store & Supply Co. (D. C. 1914) 214 Fed. 505.

A preference is not created by the payment of interest in advance to a bank to secure a renewal of a note held by it. In re Kellar (D. C. 1901) 110 Fed. 348, 6 Am. Bankr. Rep. 621. Nor by the payment of the salary of an officer of a bankrupt corporation, provided the amount does not exceed a fair compensation for his services. Atherton v. Emerson (1908) 199 Mass. 199, 85 N. E. 530. Nor by the payment of accrued interest on a statutory dower in real estate. In re Riddle's Sons (D. C. 1903) 122 Fed. 559, 10 Am. Bankr. Rep. 204.

A debt due to a railroad company for freight is not in any way privileged, and to pay it may constitute a preference, if the circumstances would produce that result in the case of any other creditor. Farrin v. Crawford (C. C. 1869) 2 N. B. R. 602, Fed. Cas. No. 4,686. Payment by insolvent makers to the holder of a note, for the purpose of relieving an indorser, is a preference under the statute. Landry v. Andrews (1901) 22 R. I. 597, 48 Atl. 1036.

Payments received by the president and manager of a bankrupt hotel company on money loaned to it to pay tax-

es, etc., while insolvent, held preferences, which were recoverable, and which precluded proof of the balance of the debt until returned. Cooper v. Miller (1913) 203 Fed. 383, 121 C. C. A. 567.

It is unnecessary, to constitute a preference, that the creditor should have been paid in full. The giving and acceptance of a partial payment may be equally within the statute. But a payment by an insolvent debtor of a percentage on claims of a part of his creditors, which does not lessen the percentage which his other creditors will receive, is not a preference nor forbidden by the bankruptcy law. In re Hapgood (D. C. 1873) Fed. Cas. No. 6,044.

Where a solvent corporation as a going concern declares dividends which are paid out of the capital stock and are received by the shareholders in ignorance, the trustee in bankruptcy after the corporation's insolvency cannot recover such dividends. Carlisle v. Ottley (1915) 85 S. E. 1010, 143 Ga. 797.

If the payment was made in total or partial discharge of a valid existing lien on property of the bankrupt, which would not have been disturbed by the bankruptcy proceedings, it cannot be considered a preference, because the assets available for general creditors are not thereby diminished. Root Mfg. Co. v. Johnson (1914) 219 Fed. 397, 135 C. C. A. 139. This rule has been applied where the creditor merely held an inchoate lien. In re Lynn Camp Coal Co. (C. C. 1908) 168 Fed. 998, 22 Am. Bankr. Rep. 60. And it applies where the obligation is in the form of a valid mortgage. Stewart v. Hopkins (1876) 30 Ohio St. 502. Compare Shutts v. First Nat. Bank (D. C. 1899) 98 Fed. 705, 3 Am. Bankr. Rep. 492. But a mortgage or deed of trust never delivered as a subsisting obligation cannot excuse a payment by the mortgagor on the indebtedness covered thereby, which payment otherwise would be invalid as a preference. Page v. Rogers (1909) 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496. A creditor holding security for less than the amount of his claim cannot, if he knows the debtor to be insolvent, obtain a valid preferential payment of the unsecured part of his debt within four months before the adjudication in bankruptcy. Claridge v. Evans (1908) 137 Wis. 218, 118 N. W. 198, 25 L. R. A. (N. S.) 144.

That the proceeds of a transfer of property by a bankrupt were applied on a debt due the government did not prevent a recovery of the goods or their value, as there are four classes of payments to be made before the government is paid. Parker v. Sherman (1914) 212 Fed. 917, 129 C. C. A. 437, affirming decree (D. C. 1912) 201 Fed. 155.

17. Payment or transfer by th son.—A payment received by a of a bankrupt from a third which does not come out of th of the bankrupt, does not con preference. Dressel v. Nort Lumber Co. (D. C. 1902) 119 1 9 Am. Bankr. Rep. 541; Maso tional Herkimer County Bank 172 Fed. 529, 97 C. C. A. 155, Bankr. Rep. 733. Thus, whe the bankrupt had made an as for the benefit of his credit just before bankruptcy pro were instituted against him, a which he was a member paid a claim against him on which was at most only partially liabl held that this payment did stitute a preference. In re H C. 1906) 144 Fed. 543, 16 Am Rep. 495. So, payments made wife of the bankrupt out of arate estate in settlement o against him, though made wit months before his bankruptcy, preferential. Goode v. Elwoo (1903) 160 Ind. 251, 66 N. E. 7 where directors of a corporat row money, which is used by poration, and thereafter, when poration is insolvent, pay the d money which they borrow b their individual notes, secured gage on their own property, no preference given by the cor Keegan v. Hamilton Nat. Bank 163 Ind. 216, 71 N. E. 647.

But where an insolvent tra veys his stock to certain pers are sureties on his note giv bank, and the sureties, in co tion of the transfer, agree to debt to the bank, the bank not pating in this arrangement, being paid by the sureties ou proceeds of the property, the preference as to the sureties, bu to the bank. Horstman v. Littl 99 Tex. 530, 90 S. W. 1095.

Payments made by a bank notes held not voidable pre which an indorser who paid the due was required to surrende terfield v. Woodman (1915) 2 956, 139 C. C. A. 436, modifyin In re National Boat & Engine C. 1914) 216 Fed. 208.

One of three interlocking tions, which received money from the sale of the bonds of company, held liable to it for su eys, where it loaned them wit thority to the third corporation Hunter Arms Co. (D. C. 1915) 866.

18. Payments to attorneys or future services.—It is not for a person who expects to voluntary petition in bankru expects that creditors will against him, to retain an atto

the purpose of such proceedings, and to pay him in advance a reasonable fee for his services, or transfer property to him in compensation for such services or give him security for the payment of his fee. In re Cummins (D. C. 1912) 196 Fed. 224, 28 Am. Bankr. Rep. 385; Triplett v. Hanley (C. C. 1871) Fed. Cas. No. 14,179; Williams v. Pultze (1877) 5 Ohio Dec. 503; Lyon v. Marshall (N. Y. 1851) 11 Barb. 241; Furth v. Stahl (1903) 205 Pa. 439, 55 Atl. 29. Compare In re Evans (D. C. 1869) 3 N. B. R. 261, Fed. Cas. No. 4,552. This does not constitute the giving of a preference, under the statute, to such attorney. Swartz v. Frank (1904) 183 Mo. 438, 82 S. W. 60. And the transaction will be valid as against the subsequent proceedings in bankruptcy, unless there was a fraudulent purpose to place assets out of the reach of the creditors. Goodrich v. Wilson (1876) 119 Mass. 429. Or unless some party in interest objects to it and petitions to have the transaction examined by the court, in which case the question of the reasonableness of the fee paid is to be determined and the excess, if any, refunded. In re Morris (D. C. 1903) 125 Fed. 841, 11 Am. Bankr. Rep. 145.

In a proceeding by a trustee against an attorney for a re-examination of the latter's fee, the question is whether the debtor, in making the transfer to the attorney, was acting in contemplation of the filing of a bankruptcy petition. As used in this section, authorizing re-examination of an attorney's fee where a debtor has contracted to pay same "in contemplation of the filing of a petition by or against him," the words quoted do not mean simply the consciousness by the debtor of a bankrupt condition, but it is essential that there be some relation between the knowledge of his condition and the transaction with the attorney. Where, in proceedings by a trustee in bankruptcy, to re-examine the payment of an attorney's fee by the debtor, the case turns upon the character of the attorney's service, such service must be of a kind relevant to the matter of bankruptcy, not one which would be necessary in the ordinary course of business, regardless of bankruptcy. A debtor's contract, made three days after a fire, with an attorney to collect insurance, where the insurers questioned their liability, was a proceeding in the usual course of business, having no necessary relationship to bankruptcy; and such contract could not of itself justify the conclusion that it was made "in contemplation of the filing of a petition" in bankruptcy, though a petition in bankruptcy was filed against the debtor five days after the transfer to the attorney. Tripp v. Mitschrich (C. C. A. 1914) 211 Fed. 424.

The provision of this section authorizing the re-examination by the bankruptcy court of fees paid by the bankrupt to an attorney in contemplation of bankruptcy, does not apply to fees paid to an attorney by assignees under a general assignment made by the bankrupt prior to the bankruptcy proceedings. In re Geller (D. C. 1914) 216 Fed. 558.

This part of the statute refers only to services rendered to the bankrupt prior to the commencement of the proceedings in bankruptcy. Pratt v. Bothe (1904) 130 Fed. 670, 65 C. C. A. 48, 12 Am. Bankr. Rep. 529.

The provisions of the statute on this subject refer only to such professional services as are rendered in aid of the bankruptcy proceedings and for the benefit of the creditors, or in the administration and distribution of the bankrupt's estate. Magee v. Fox (C. C. A. 1916) 229 Fed. 395. And they will not validate a transfer of an insolvent's property to an attorney in consideration of an agreement to negotiate with the creditors of the insolvent for a settlement of his difficulties without resort to the bankruptcy court, nor a payment or transfer of property for services to be performed in defending the bankupt against anticipated criminal proceedings which are not brought until after the filing of the petition in bankruptcy. In re Habegger (1905) 139 Fed. 623, 71 C. C. A. 607, 15 Am. Bankr. Rep. 198.

Although, in a case coming within the provisions of the statute, a transfer of property may be equally allowable as a payment of money, yet an agreement that the attorney shall take certain goods in payment for his services, where there is no actual delivery or change of possession, does not constitute a "transfer" of the property, and if the attorney takes possession of the goods after the adjudication, and therefore after they have passed into the custody of the law, he must restore them. In re Corbett (D. C. 1900) 104 Fed. 872, 5 Am. Bankr. Rep. 224.

As to a payment for legal services rendered in the past, and not relating to the bankruptcy proceedings, it stands on the same footing as a payment to any other creditor, and will be preferential in the same circumstances or under the same conditions. In re George W. Shiebler & Co. (D. C. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777. Unless the attorney has a lien on a particular fund or an agreement which amounts to an equitable assignment of it. In re Coney Island Lumber Co. (D. C. 1912) 199 Fed. 803.

19. Set-off or adjustment of mutual accounts.—A bank which had issued margin certificates to a depositor to secure performance of dealings on the Board of Trade did not receive a preference, where the depositor afterwards transferred his open trades to a corporation which carried them out, substituting its own securities for his and turning over the margin certificates

thus secured to the bank within four months of proceedings in bankruptcy against the original depositor, whereupon the bank applied the depositor's balance to his debt to the bank. Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co. (1913) 33 Sup. Ct. 829, 229 U. S. 435, 57 L. Ed. 1268, reversing decree (1912) 199 Fed. 704, 118 C. C. A. 142.

The application by a bank of the amount standing to the credit of a depositor in his general account, subject to check, on a note of the depositor or other indebtedness to the bank, does not constitute a voidable preference, though made while the depositor was insolvent and within four months prior to his bankruptcy. Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co. (1913) 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624; Studley v. Boylston Nat. Bank (1913) 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, 30 Am. Bankr. Rep. 161; New York County Nat. Bank v. Massey (1904) 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; Chicago Title & Trust Co. v. Federal Trust & Sav. Bank (D. C. 1911) 192 Fed. 967; In re Wright-Dana Hardware Co. (D. C. 1913) 207 Fed. 636; Tomlinson v. Bank of Lexington (1906) 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; In re George M. Hill Co. (1904) 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Scherzer (D. C. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451; Robinson v. Wisconsin, M. & F. Ins. Co. Bank (C. C. 1879) 18 N. B. R. 243, Fed. Cas. No. 11,969; Habegger v. First Nat. Bank (1905) 94 Minn. 445, 103 N. W. 216, 110 Am. St. Rep. 379; Cox v. First Nat. Bank (1910) 126 La. 88, 52 South. 227; Booth v. Prete (1904) 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; West v. Bank of Lahoma (1906) 16 Okl. 328, 85 Pac. 469; American Bank & Trust Co. v. Coppard (C. C. A. 1915) 227 Fed. 597; In re Radley Steel Const. Co. (D. C. 1914) 212 Fed. 462; Parker v. First Nat. Bank (Vt. 1915) 94 Atl. 1. CONTRA, In re Kellar (D. C. 1901) 110 Fed. 348, 6 Am. Bankr. Rep. 621. And see Evans v. National Broadway Bank (1905) 48 Misc. Rep. 248, 96 N. Y. Supp. 789; In re Starkweather & Albert (D. C. 1913) 206 Fed. 797, 30 Am. Bankr. Rep. 743.

This rule does not apply if the bank knew or had reasonable cause to believe that a preference was intended to be given. Ernst v. Mechanics' & Metals Nat. Bank (C. C. A. 1912) 201 Fed. 664, 29 Am. Bankr. Rep. 289; Ridge Ave. Bank v. Studheim (1906) 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; In re Warner (D. C. 1871) 5 N. B. R. 414, Fed. Cas. No. 17,177; Knoll v. Commercial Trust Co. (1915) 249 Pa. 197, 94 Atl. 750. That a debtor, while insolvent, paid unmatured notes to a bank in full, i
that he might stand well with
and be able to borrow from
again went into business, he
cient to show an intent to pr
bank. Batchelder v. Home Na
of Milford (1914) 105 N. E. 1
Mass. 420. Payment by a ban
notes held by a bank on which
indorser, a few days before th
ruptcy and before their maturi
check on his deposit in such ba
not valid as a set-off but to
tute a voidable preference un
section. Heyman v. Third Na
of Jersey City (D. C. 1914) 2
685. The rule allowing a s
such cases does not apply if it
that there was an intent on the
the bank to accumulate funds
bankrupt in its possession for
ultimate security, or that th
any restriction imposed by it
bankrupt's withdrawal of such
or an appropriation of such f
the bank towards the paymen
claim. In re Percy Ford Co.
1911) 199 Fed. 334, 28 Am.
Rep. 919. Where a bank, with
edge of the bankrupt's insolve
cumulated a fund in its deposit
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note owing by the bankrupt
bank, and two days before ban
obtained payment by a check
on the account, the transacti
stituted a preference, notwith
the set-off authorized by § 96
In re National Lumber Co. (19
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does not apply if the deposit w
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U. S. 435, 33 Sup. Ct. 829, 57
1268, 30 Am. Bankr. Rep. 624
the claim was assigned with kn
of insolvency and for the expre
pose of being used as a set-of
pected bankruptcy proceedings.
Shults (D. C. 1904) 132 Fed.
Am. Bankr. Rep. 84. And so,
bank, to which the bankrupt wa
ly indebted on the day the la
came insolvent, closed its acco
credited the balance, including a
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application an unlawful pre
Ernst v. Mechanics' & Meta
Bank (D. C. 1911) 200 Fed. 29
where a depositor's debt to th
exceeds the amount standing
credit, and he settles by giv
bank a check for the amount
credit balance and cash for the
der of the debt, the payment
will be a fraudulent preference,

the giving of the check may not. Hough v. First Nat. Bank (D. C. 1869) Fed. Cas. No. 6,721.

On the same principle it is held that a bank which receives from a clearing house association the proceeds of checks presented for clearing by a member shortly before suspending payment, cannot escape liability to account to the estate in bankruptcy of the defaulting member, where the clearing house, in revising the day's clearings because of such suspension, eliminated and returned the checks which had been debited against the defaulting member, on the theory that, under the doctrine of rescission and following of trust funds, the bank had the right to appropriate any property of the defaulting member and apply it to the reduction of an advance of currency made on that day, especially where such currency was paid out by such defaulting member over its counter to its customers; nor is the transaction any the less a preference because the clearing house, under its rules, might have called on its other members to pay pro rata the amount of the checks drawn upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was the result of the clearings of the previous day would not be entitled to participation. Rector v. City Deposit Bank Co. (1906) 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527, 15 Am. Bankr. Rep. 336.

A bank which credits to the deposit account of certain stock brokers the amount of a clearance loan to be used to clear securities and to be repaid later in the day, and which does not require a separate account to be kept of money received from deliveries of the stock so released, obtains a preference voidable on the subsequent bankruptcy of the brokers, where after their suspension it receives securities to make good the brokers' obligation to the bank. National City Bank of New York v. Hotchkiss (1913) 34 Sup. Ct. 20, 231 U. S. 50, 58 L. Ed. 115, affirming decree Ernst v. Mechanics' & Metals Nat. Bank of City of New York (1912) 201 Fed. 664, 120 C. C. A. 92.

20. Partial payments on running accounts.—The provisions of the bankruptcy act relating to preferences are not so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business where the transactions covered by the account between the parties, taken together, result in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate. In re Dickson (1901) 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Sagor (1903) 121 Fed. 658, 57 C. C. A. 412, 9 Am. Bankr. Rep. 361; Kimball v. E. A. Rosenham Co. (1902) 114 Fed. 85, 52 C. C. A. 33, 7 Am. Bankr. Rep. 718; C. S. Morey Mercantile Co. v. Schiffer (1902) 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670. Compare In re Arndt (D. C. 1900) 104 Fed. 234, 4 Am. Bankr. Rep. 773.

Payments made on an open account, though within four months of the debtor's adjudication in bankruptcy, which are received in good faith and without the creditor having knowledge of the debtor's insolvency, and which are less in amount than the credit sales made by such creditor to the debtor during that period, do not constitute a preference within the meaning of the bankruptcy law. Jaquith v. Alden (1903) 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, 9 Am. Bankr. Rep. 773; Yaple v. Dahl-Millikan Grocery Co. (1904) 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776, 11 Am. Bankr. Rep. 596; Jaquith v. Alden (1902) 118 Fed. 270, 55 C. C. A. 364, 9 Am. Bankr. Rep. 165.

A stockbroker, four months before his adjudication in bankruptcy, was indebted to a customer to the extent of $1,550, and afterwards he was employed to purchase and carry stocks on a margin, receiving considerable sums of money from the customer, and paying him considerable, but less, sums as profits on his operations. At the date of the adjudication, the bankrupt owed the customer $6,500. It was held that no injustice would be done in this case by treating the parties simply as debtor and creditor, and as the effect of the whole series of transactions was to increase the net indebtedness to the customer, and presumably to increase the bankrupt's estate, the customer was not in the position of one who had received a voidable preference. In re Topliff (D. C. 1902) 114 Fed. 323, 8 Am. Bankr. Rep. 141. Compare In re Gaylord (D. C. 1902) 113 Fed. 131, 7 Am. Bankr. Rep. 577.

Where a bankrupt corporation, while insolvent, made payments on notes indorsed for its accommodation by the mother of its secretary and treasurer, the effect of which was to relieve her from liability as indorser, they constituted preferences recoverable by the bankrupt's trustee. Platt v. Ives (1913) 86 A. 579, 86 Conn. 690.

21. Time of giving preference.—A preference given to a creditor, whether in the form of a payment, transfer of property, or security, is not contrary to the bankruptcy law unless given within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication. If it antedates that period, it is not impeachable in the sub-

sequent bankruptcy of the debtor, nor can the creditor be required to surrender it. Sturdivant Bank v. Schade (C. C. A. 1912) 195 Fed. 188, 27 Am. Bankr. Rep. 763; Jackson v. Sedgwick (1911) 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Arden (D. C. 1911) 188 Fed. 475, 26 Am. Bankr. Rep. 684; In re Farrell (1910) 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; Wood v. United States Fidelity & Guaranty Co. (D. C. 1905) 143 Fed. 424, 16 Am. Bankr. Rep. 21; In re Kindt (D. C. 1900) 101 Fed. 107, 4 Am. Bankr. Rep. 148; In re Terrill (D. C. 1900) 100 Fed. 778, 4 Am. Bankr. Rep. 145; In re Wise (D. C. 1900) 2 Nat. Bankr. News, 151; Maurer v. Frantz, 4 N. B. R. 431; Ashby v. Steere (C. C. 1846) Fed. Cas. No. 576; Pratt v. Christie (1904) 95 App. Div. 282, 88 N. Y. Supp. 585; Joseph v. Raff (1903) 82 App. Div. 47, 81 N. Y. Supp. 546; Brown v. City Nat. Bank (1911) 72 Misc. Rep. 201, 131 N. Y. Supp. 92; McKay v. Weager (1911) 134 N. Y. Supp. 66; Hurlbutt v. Brown (1903) 72 N. H. 235, 55 Atl. 1046; Aretz v. Kloos (1903) 89 Minn. 432, 95 N. W. 216, 769; Hawes v. Bank of Elberton (1905) 124 Ga. 567, 52 S. E. 922; Beatty v. Dudley (1882) 80 Ky. 381. The bankruptcy act does not avoid a lien for labor preserved and enforced by legal proceedings, where it attached more than eight months before proceedings in bankruptcy. Tube City Min. & Mill. Co. v. Otterson (1915) 146 P. 203. Where a transfer by a bankrupt more than four months before bankruptcy was kept secret until within that period, it was subject to be declared preferential. Gill v. Ely-Norris Safe Co. (1913) 156 S. W. 811, 170 Mo. App. 478.

A preference given to a creditor by means of a note or bond with warrant of attorney to confess judgment, is given, not when the note and warrant are executed and delivered, but when the warrant is executed by the entry of a judgment thereon and the levy of an execution on the debtor's property. Hence if judgment is entered on such a warrant within four months before bankruptcy, under circumstances making it fraudulent or preferential, it is not saved by the fact that the warrant may have been given any length of time before. In re Moyer (D. C. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577; Hood v. Karper (C. C. 1871) 5 N. B. R. 358, Fed. Cas. No. 6,664; Golson v. Niehoff (D. C. 1871) 5 N. B. R. 56, Fed. Cas. No. 5,524; In re Lord (D. C. 1871) 5 N. B. R. 318, Fed. Cas. No. 8,503; Ford v. Keys (C. C. 1872) Fed. Cas. No. 4,933. CONTRA, Balfour v. Wheeler (C. C. 1884) 18 Fed. 893; Field v. Baker (C. C. 1875) 11 N. B. R. 415, Fed. Cas. No. 4,762; Shimer v. Huber (C. C. 1879) 19 N. B. R. 414, Fed. Cas. No. 12,787; Longergan v. Fenlon (C. C. 1866) No. 8,475.

Payment within four mor fund created more than four n fore the bankruptcy of contr payment of claims against c by contractor's sureties an company owing the contractor an unlawful preference. Root v. Johnson (1914) 219 Fed. C. C. A. 139.

A garnishment lien cannot to the lien of execution iss judgment against defendant, upon the indebtedness owing nishee, so as to make out month period. Marsh v. Wil (1914) 144 N. W. 959, 124 Mi

A mortgage, pledge, or bill chattels takes effect from the given, rather than from the t the mortgagee or pledgee take sion of the goods. Hence i curity was valid when given as between the parties), and more than four months befor stitution of bankruptcy pr against the mortgagor or pledg not be assailed as a preferenc because the act of the secured in taking possession occurred wi period, but such act will be c as relating back to the inceptio lien. Thompson v. Fairbank 196 U. S. 516, 25 Sup. Ct. 3 Ed. 577, 13 Am. Bankr. R Humphrey v. Tatman (1905) 1 91, 25 Sup. Ct. 567, 49 L. Ed Am. Bankr. Rep. 74; In re Mantel & Tile Co. (D. C. 1 Fed. 275, 29 Am. Bankr. R First Nat. Bank v. Lanz (C 1913) 202 Fed. 117, 29 Am Rep. 247; Fisher v. Zollinge 149 Fed. 54, 79 C. C. A. 76; I tional Valve Co. (D. C. 1905) 679, 15 Am. Bankr. Rep. 524 Rogers & Woodward (D. C. 1 Fed. 560, 13 Am. Bankr. Rep re Automobile Livery Service C. 1910) 176 Fed. 792, 23 Am Rep. 799; Thompson v. F (1903) 75 Vt. 361, 56 Atl. 11, St. Rep. 899; Woods v. Klei 223 Pa. 256, 72 Atl. 523; C Zehner (1905) 212 Pa. 188, 61 Farnham v. Friedmeyer (1903) App. 54. But see In re Ball 1903) 123 Fed. 164, 10 Am. Rep. 564; Landis v. McDonald 88 Mo. App. 335; In re Klinga C. 1900) 101 Fed. 691, 4 Am. Rep. 254. The effect of taki session of personal property wit months of bankruptcy by a mo according to the terms of th gage made prior to such four period, is to be determined by t law. Coggan v. Ward (1913) 1 336, 215 Mass. 13.

An agreement to pledge co as security, or to assign a claim a third person, a particular f

the like, may constitute an equitable assignment thereof, and if so, will take effect, so far as regards this provision of the bankruptcy law, from the date of the agreement and not from the time of the actual delivery or formal pledge of the subject-matter. McDonald v. Daskam (1902) 116 Fed. 276, 63 C. C. A. 554, 8 Am. Bankr. Rep. 543; Godwin v. Murchison Nat. Bank (1907) 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935. Where complainant had an equitable lien on lumber manufactured and shipped to it by the bankrupt as late as the same month in which the bankruptcy intervened, complainant's right to the lumber having accrued under a contract of sale executed more than a year previous, such shipments did not constitute a preference. Gage Lumber Co. v. McEldowney (1913) 207 Fed. 255, 124 C. C. A. 641, reversing decree In re Clairfield Lumber Co. (D. C. 1911) 194 Fed. 181.

To constitute an equitable assignment within this rule there must be something more than a mere promise to assign upon a future contingency, something, in fact, sufficient to bind the parties in a court of chancery and to justify the application of the rule that equity will regard that as done which ought to have been done. Johnston v. Huff, Andrews & Moyler Co. (1904) 133 Fed. 704, 66 C. C. A. 534, 13 Am. Bankr. Rep. 287; Long v. Farmers' State Bank (1906) 147 Fed. 360, 77 C. C. A. 538, 17 Am. Bankr. Rep. 103. An agreement to give a mortgage, if definite and certain and relating to specific property, will be held in equity as equivalent to an actual mortgage, and may be sustained in the bankruptcy proceedings though actually executed within the four months period. Murray v. Beal (1901) 23 Utah, 548, 65 Pac. 726. CONTRA, In re Herman (D. C. 1913) 207 Fed. 594. So, also, where the mortgage first offered to the creditor was rejected by him because considered defective in form, a subsequent mortgage accepted and delivered will relate back to the former. In re Montgomery (D. C. 1875) 12 N. B. R. 321, Fed. Cas. No. 9,732. And where there was a valid transfer of goods by the bankrupt to a creditor in payment of the debt, sufficient to pass title, more than four months before the bankruptcy, the rights of the creditor will not be affected by the fact that the debtor, within the four months, entertaining a doubt as to the validity of the transaction, attempted to perfect it by filing a claim of exemption with reference to the goods transferred and then executing a bill of sale to the creditor. In re Ratliffe (D. C. 1910) 177 Fed. 587.

Where involuntary petition was filed by parties to assignment for benefit of creditors, and intervening petition subsequently filed by creditors not parties to the assignment, payments more than four months before the filing of the intervening petition, though within four months before the first petition, held not preferential; the first petition being void. Despres v. Galbraith (1914) 213 Fed. 190, 129 C. C. A. 534.

Property conveyed by wife of an insolvent to its beneficial owner, held not to be impressed with trust for benefit of insolvent's creditors under the national Bankruptcy Act, where he had worked a preference by putting his funds into such property more than four months before his adjudication as a bankrupt. Arbury v. De Niord (1915) 152 N. Y. S. 763.

A lien on part of the raw material used in a factory held not to support an assignment to the holder of all of the accounts for finished product sold, made within four months prior to bankruptcy of the manufacturer. Merchants' Nat. Bank of Baltimore v. Corr (1915) 221 Fed. 419, 137 C. C. A. 217.

A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy, when it was insolvent and the creditor had reason to believe it insolvent, is voidable as a preference, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period. In re W. W. Mills Co. (D. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Kansas City Stone & Marble Mfg. Co. (D. C. 1873) 9 N. B. R. 76, Fed. Cas. No. 7,610. All preferences made by the officers and directors of an insolvent corporation within four months of adjudication in bankruptcy held voidable, and recoverable by the trustee in bankruptcy after adjudication. Arnold v. Knapp (W. Va. 1915) 84 S. E. 895.

Where the bankrupt gave his note to a creditor, which he afterwards paid, the preference, if any, is in the payment and not in the giving of the note, and must be considered as having been given at the date of such payment. In re Wolf & Levy (D. C. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153. But where a note of the bankrupt, payable at a bank, was presented to the bank for payment on the day of its maturity, and was duly certified, and subsequently paid by the bank, the time of certification is to be taken as the time of payment, in determining whether the payment was preferential. In re Frazin (C. C. A. 1912) 201 Fed. 86, 29 Am. Bankr. Rep. 214. A creditor of a bankrupt is not liable to his estate as for conversion, or money had and received, where, after bankruptcy, he accepted certified checks theretofore tendered and delivered by bankrupt; the matter having meantime been under consideration. Early v. Electro Bleaching Gas Co. (1915) 153 N. Y. S. 698, 90 Misc. Rep. 613. But the fact that accounts assigned by the bankrupt to a creditor as collateral security more than four months before the bankruptcy are collected within the four months period,

does not entitle the trustee to recover such collections as preferences. Lowell v. International Trust Co. (1907) 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Bird (D. C. 1910) 180 Fed. 229, 25 Am. Bankr. Rep. 24.

A pledge of corporate stock by an insolvent debtor more than four months prior to his bankruptcy to secure an antecedent debt does not constitute a preference, although the stock is sold by the creditor within the four-months period. First Nat. Bank v. Lanz (1913) 202 Fed. 117, 120 C. C. A. 271. And where a debtor makes an absolute sale of property, under an agreement that the purchase money shall be applied by the vendee in paying the claims of certain creditors of the seller, the time of giving a preference, if any, is the time when the buyer takes possession of the property, and not the time when he pays those creditors. Fitch v. Bank of Grand Rapids (1911) 146 Wis. 439, 131 N. W. 1095.

A secret advantage given by a debtor to one creditor in a composition, made several years prior to the debtor's bankruptcy, cannot be reached and avoided as a preference under the present bankruptcy statute. Batchelder & Lincoln Co. v. Whitmore (1903) 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641. But compare In re Chaplin (D. C. 1902) 115 Fed. 162, 8 Am. Bankr. Rep. 121.

22. —— Time of filing petition.—The four months period within which preferences given by a bankrupt may be declared void is to be determined by computing four calendar months backward from the date of the filing of the petition in bankruptcy, and not by computing the time by days. Kelly v. Skaggs (1900) 90 Ill. App. 543. And either the day on which the transfer or payment was made, or the day on which the petition was filed, must be excluded. Dutcher v. Wright (1876) 94 U. S. 553, 24 L. Ed. 130; Kelly v. Skaggs (1900) 90 Ill. App. 543; Whitley Grocery Co. v. Roach (1902) 115 Ga. 918, 42 S. E. 282.

Amendments to a petition in involuntary bankruptcy filed by a single creditor or by an insufficient number of creditors, whereby other creditors join in the petition and set out their claims, relate back to the original filing of the petition, and do not advance the date of its filing, with reference to reckoning the prohibited period for preferences, though such joinder of creditors was necessary to make it sufficient. First State Bank v. Haswell (1909) 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330; Manning v. Evans (D. C. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217. See Witters v. Sowles (C. C. 1887) 32 Fed. 758.

A transfer of property made on the same day on which the petition in bankruptcy is filed will constitute an unlawful preference, if the other essen-

tials of a preference are pres
ler v. Faickney (1906) 42
App. 483, 94 S. W. 103; Mor
frey (C. C. 1844) Fed. Cas. N

23. —— Time of recording
lien.—The provision of Bankr
§ 3b (ante, § 9587), which dec
if the act of bankruptcy is
of a preference, the time sha
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law such recording or registe
quired or permitted, or, if
from the date when the
takes notorious, exclusive, o
ous possession of the proper
the petitioning creditors hav
actual notice of such transf
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and does not in any way lim
trol the provisions of the pr
tion. Little v. Holley-Broo
ware Co. (1904) 133 Fed. 874
A. 46, 13 Am. Bankr. Rep.
see Murphy v. W. T. Murp
(1904) 126 Iowa, 57, 101 N.
Asbury Park Building & Loa
Shepherd (N. J. Eq. 1901) 5

Where an alleged preferent
fer by a bankrupt was exec
than four months before b
but was recorded as require
St. Ohio 1908, § 4134, withir
months' period, it was subjec
tion by the bankrupt's trustee
standing the four months' pro
posed by this section. Carey
hue (1913) 209 Fed. 328, 126
254.

The phrase "required by la
recorded refers to the charac
instrument of transfer, rathe
the creditors or others who m
not be affected by an unreco
veyance. First Nat. Bank v
(1905) 142 Fed. 33, 73 C. C
15 Am. Bankr. Rep. 662; In
Bunch Commission Co. (D.
225 Fed. 243. A state stat
requires a conveyance or tr
be recorded in order to be
against any class or classes c
is a law by which such rec
"required." Dulany v. Mor
39 App. D. C. 523; Loeser
ings Deposit Bank & Trust C
148 Fed. 975, 78 C. C. A. 59
Bankr. Rep. 628; Bowler v.
Bank (1907) 21 S. D. 449, 1
618, 130 Am. St. Rep. 725. A
"require" a chattel mortgage
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an unrecorded mortgage void
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Nat. Bank v. Connett (1905)
33, 73 C. C. A. 219, 15 Am
Rep. 662.

Where the local law is such
ure to file or record a chattel
or other such instrument doe
fect its validity as between th
or as against general credi
only as against creditors hav
or subsequent purchasers c

brancers in good faith, the mortgage is not one which is "required" to be recorded or filed. In re East End Mantel & Tile Co. (D. C. 1913) 202 Fed. 275; In re Boyd (1914) 213 Fed. 774, 130 C. C. A. 288; Deupree v. Watson (C. C. A. 1914) 216 Fed. 483; In re Roberts (D. C. 1915) 227 Fed. 177; In re Jacobson & Perrill (D. C. 1912) 200 Fed. 812, 29 Am. Bankr. Rep. 603; Rogers v. Paige (1905) 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Meyer Bros. Drug Co. v. Pipkin Drug Co. (1905) 136 Fed. 396, 69 C. C. A. 240, 14 Am. Bankr. Rep. 477; In re Hunt (D. C. 1905) 139 Fed. 283; In re Chadwick (D. C. 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; Pew v. Price (Mo. 1913) 158 S. W. 338. Compare Loeser v. Savings Deposit Bank & Trust Co. (1906) 148 Fed. 975, 78 C. C. A. 597, 17 Am. Bankr. Rep. 628. And see First Nat. Bank v. Connett (1905) 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662; In re Montague (D. C. 1905) 143 Fed. 428, 16 Am. Bankr. Rep. 18.

This provision of the statute applies ordinarily to such instruments as deeds of conveyance. Ragan v. Donovan (D. C. 1911) 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Cahill (D. C. 1912) 208 Fed. 193, 30 Am. Bankr. Rep. 794. And to deeds of trust in the nature of mortgages. Dulany v. Morse (1913) 39 App. D. C. 523; Harris v. Exchange Nat. Bank (C. C. 1876) 14 N. B. R. 510, Fed. Cas. No. 6,119. A deed, given as security for a loan, executed more than four months previously, but withheld from record until the day preceding the filing of a petition in bankruptcy against the grantor, whose creditors had no notice of its existence, will be set aside as a voidable preference, irrespective of the sufficiency of the consideration or of the good faith of the parties, where the local statute makes a deed or mortgage effective as against creditors without notice only from the time of recording it. Dulany v. Morse (1913) 39 App. D. C. 523. The provision of the statute applies also to chattel mortgages. In re Mission Fixture & Mantel Co. (D. C. 1910) 180 Fed. 263, 24 Am. Bankr. Rep. 873; First Nat. Bank v. Johnson (1903) 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485.

Where a chattel mortgage by the bankrupt, securing $4,500, was recorded September 22, 1911, but no annual sworn statement was made or recorded as required by the state law, and the mortgagee took possession April 25, 1913, the four-month period began to run from the latter date. Williams v. German-American Trust Co. (C. C. A. 1915) 219 Fed. 507. The statute applies to bills of sale of chattels. Benner v. Scandinavian American Bank (Wash. 1913) 131 Pac. 1149; In re Reynolds (D. C. 1907) 153 Fed. 295, 18 Am. Bankr. Rep. 666. But see Coggan v. Ward (1913) 215 Mass. 13, 102 N. E. 336. But it does not apply to the lien given by an oral chattel mortgage. Mower v. McCarthy (1906) 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942. Nor to a conveyance of real estate absolute on its face but intended as a security, where the local law prohibits such a deed from being reduced to a mortgage except by a defeasance in writing, signed, sealed, and delivered by the grantor at the same time and recorded within sixty days. English v. Ross (D. C. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370. And the fact that a contract of conditional sale was not recorded until after the insolvency of the purchaser, or until within four months prior to his bankruptcy, does not constitute it a preferential transfer, nor deprive the seller of the right to reclaim the property if unpaid for. Bailey v. Baker Ice Mach. Co. (1915) 36 Sup. Ct. 50; In re Farmers' Co-operative Co. (D. C. 1913) 202 Fed. 1005; Big Four Implement Co. v. Wright (C. C. A. 1913) 207 Fed. 535.

Rev. Laws Minn. 1905, § 3502, providing for assignment of debts, does not require a "recording" or "registering," within this section, cls. "a," "b," as amended by Act Feb. 5, 1903, and Act June 25, 1910, so that a written assignment of a claim, made more than four months prior to bankruptcy, is not void as a preference, though never filed. Telford v. Henrickson (1913) 139 N. W. 941, 120 Minn. 427.

Where a contract providing for the execution of a trust deed to secure bonds of a corporation given for advances is not recorded, a trust deed executed pursuant to such contract within four months prior to the institution of bankruptcy proceedings cannot take effect by relation as of the date of the contract in order to sustain the same as against unsecured creditors. Morgan v. First Nat. Bank (1906) 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639.

Mortgages given and promised more than four months before bankruptcy for a present consideration held voidable preferences, where they were not acknowledged until within the four months. In re Caslon Press (C. C. A. 1915) 229 Fed. 133. Deeds placed in the possession of the grantee with the understanding that they are to be returned on the payment of the grantor's indebtedness to the grantee were not complete until recorded, at which time they were to be considered as having been executed for the purpose of determining whether they operated as a preference. In re Cahill (D. C. 1912) 208 Fed. 193.

The only effect of the provision concerning the recording or registering of a transfer is to carry forward the four months period within which a recordable transfer, which was in fact preferential, might be attacked as voidable,

leaving the question whether or not the transfer constituted a voidable preference to be determined according to the conditions and intentions of the parties at the date when it was actually made; and a transfer which was then made for a present consideration, and was therefore not preferential, does not become so because of delay in recording it; in other words, delay in placing the instrument on the record does not warrant the court in treating it as if made as security for an antecedent debt. Martin v. Commercial Nat. Bank (C. C. A. 1916) 228 Fed. 651; In re Watson (D. C. 1912) 201 Fed. 962, 30 Am. Bankr. Rep. 871; Debus v. Yates (D. C. 1910) 193 Fed. 427, 30 Am. Bankr. Rep. 823; In re Jackson Brick & Tile Co. (D. C. 1911) 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re Sturtevant (1911) 188 Fed. 196, 110 C. C. A. 68, 26 Am. Bankr. Rep. 574; Mattley v. Giesler (1911) 187 Fed. 970, 110 C. C. A. 90, 26 Am. Bankr. Rep. 116; In re Sayed (D. C. 1910) 185 Fed. 962, 26 Am. Bankr. Rep. 444; Seager v. Lamm (1905) 95 Minn. 325, 104 N. W. 1; Bradley, Clark & Co. v. Benson (1904) 93 Minn. 91, 100 N. W. 670; Farnham v. Friedmeyer (1903) 109 Ill. App. 54; Claridge v. Evans (1908) 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144.

Under this section, as amended in 1910, unless transfer within four months before bankruptcy is required to be recorded, invalidating circumstances must exist at time of transfer. Martin v. Commercial Nat. Bank of Macon, Ga. (C. C. A. 1916) 228 Fed. 651. The rule stated above is not affected by the amendment of 1910, changing the wording of this section. In re Watson (D. C. 1912) 201 Fed. 962, 30 Am. Bankr. Rep. 871. Whether a mortgage executed by a bankrupt to his creditor after June 25, 1910, was a voidable preferential transfer was to be determined by Bankr. Act, § 60b, as amended by Act June 25, 1910. Ogden v. Reddish (D. C. 1912) 200 Fed. 977.

24. **Insolvency of debtor.**—In order that a judgment rendered against a debtor, or a transfer of property or payment of money made by him, should operate as a voidable preference, it is essential that he should have been insolvent, for if solvent he has the right to give voluntary satisfaction to any one or more of his creditors, leaving the others to their legal remedies. In re Kassel (C. C. A. 1912) 195 Fed. 492, 28 Am. Bankr. Rep. 233; Coleman v. Decatur Egg Case Co. (1911) 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; In re Sayed (D. C. 1910) 185 Fed. 962, 26 Am. Bankr. Rep. 444; In re W. W. Mills Co. (D. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Wittenberg Veneer & Panel Co. (D. C. 1901) 108 Fed. 593, 6 Am. Bankr. Rep. 271; In re Oregon Bulletin Printing & Publishing Co. (D. C.) 13 N. B. R. 503, Fed. Cas. No. Empire State Trust Co. v. Will Fisher Co. (1904) 67 N. J. Eq. Atl. 502; Blyth & Fargo Co. v. (1908) 17 Wyo. 180, 97 Pa To entitle a trustee in bankru recover money collected on a ju as creating a preference, he m lege and prove that the bankru insolvent when the judgment v tained. McNeel v. Folk (W. Va 83 S. E. 192. This section d invalidate the lien of a judgm tered within four months prior filing of a petition in ban against the judgment defendant, subsequently adjudicated a ba where he was not insolvent wl judgment was entered. Keyston ing Co. v. Schermer (1913) 88 241 Pa. 361.

But the amendatory act of 1 far changes this rule that, in t of a transfer required by law to corded, it is sufficient if the de insolvent either at the time of the transfer or at the time it corded. McElvain v. Hardesty 169 Fed. 31, 94 C. C. A. 399, Bankr. Rep. 320.

It is not necessary in any ca the insolvent condition of the de the time of making the transfer be perpetuated by the existence same debts as compared with th assets, up to the time the truste action to avoid the conveyance. tinuous insolvency is sufficient, none of the debts existing at t of the transfer may remain, if n have been contracted in their O'Neill v. Kilduff (1908) 81 Co 70 Atl. 640.

In the case of a partnership, be shown that both the firm individual partners are insolv were insolvent at the time, that the aggregate of the part and individual assets is not suffi pay the debts. Levor v. Seiter 34 Misc. Rep. 382, 69 N. Y. Sup Rodolf v. First Nat. Bank (19 Okl. 631, 121 Pac. 629, 41 L. R. S.) 204.

An assignment made by a corp to secure a pre-existing indeb when the assignor is insolvent contemplation of insolvency is v der the United States bankrup John Agnew Co. v. Board of Ed of City of Paterson (1914) 89 A decree affirmed (Err. & App. 1 A. 1135.

It is not enough to show t debtor was financially embarras hard pressed by his creditors condition may exist and yet he solvent. In re Farmers' Sup (D. C. 1909) 170 Fed. 502, Bankr. Rep. 460.

"Insolvency" must here be stood in the sense given to it bankruptcy act itself, that is, son shall be deemed insolven

the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Ogden v. Reddish (D. C. 1912) 200 Fed. 977, 29 Am. Bankr. Rep. 531; Empire State Trust Co. v. William F. Fisher Co. (1904) 67 N. J. Eq. 88, 57 Atl. 502; Des Moines Sav. Bank v. Morgan Jewelry Co. (1904) 123 Iowa, 432, 99 N. W. 121; Summerville v. Stockton Milling Co. (1904) 142 Cal. 529, 76 Pac. 243; In re Chappell (D. C. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; Paper v. Stern (1912) 198 Fed. 642, 117 C. C. A. 346, 28 Am. Bankr. Rep. 592. Insolvency necessary to render a payment by a debtor a preference is not mere inability of the debtor to pay his debts in the usual course of business, but his inability to pay his debts out of the proceeds of his property at a fair valuation. Newman v. Tootle-Campbell Dry Goods Co. (Mo. App. 1913) 160 S. W. 825.

In making this estimate and comparison, all the property of the debtor which has value must be included, not omitting property exempt under the law of the state, and including property transferred in payment of or as security for a just debt, irrespective of whether or not it constitutes a preference, but not property transferred in fraud of creditors. Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800. Property subject to a mortgage must be included if the mortgage is not shown to be fraudulent as against creditors. Posey v. McManis (1902) 28 Tex. Civ. App. 452, 67 S. W. 792. And accounts against third persons in favor of the debtor are to be included if they are not shown in any way to be uncollectible. Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921. Where the principal asset consists of a plant or property which loses value if not kept in continuous operation—such as a hotel, a periodical publication, and some kinds of manufacturing establishments—the value assigned to it in making the estimate must be what it is worth as a going concern and not what it is worth as dead property after bankruptcy has intervened. In re Klein (C. C. A. 1912) 197 Fed. 241; J. W. Butler Paper Co. v. Goembel (1905) 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26; Chicago Title & Trust Co. v. John A. Roebling's Sons Co. (C. C. 1901) 107 Fed. 71, 5 Am. Bankr. Rep. 368. On the other hand, in adding up the bankrupt's debts, it is proper to include his liability as guarantor of the debt of a third person, the latter being insolvent, though the guaranty was oral and therefore within the statute of frauds. Huttig Mfg. Co. v. Edwards (1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349.

The trustee in bankruptcy, assailing a judgment or transfer as preferential, must assume the burden of showing the insolvency of the debtor by satisfactory and sufficient evidence; in the absence of this, the transaction cannot be disturbed. Cleage v. Laidley (1906) 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598; In re Clifford (D. C. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; In re Alexander (D. C. 1900) 102 Fed. 464, 4 Am. Bankr. Rep. 376; Evans v. National Broadway Bank (1905) 48 Misc. Rep. 248, 96 N. Y. Supp. 789; Kimball v. Dresser (1904) 98 Me. 519, 57 Atl. 787; Deland v. Miller & Chaney Bank (1903) 119 Iowa, 368, 93 N. W. 304; Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 467, 75 N. E. 837. The existence of unsatisfied judgments against the debtor does not necessarily prove his insolvency. Summerville v. Stockton Milling Co. (1904) 142 Cal. 529, 76 Pac. 243; Levor v. Seiter (1901) 34 Misc. Rep. 382, 69 N. Y. Supp. 987. But the fact that his paper has gone to protest may do so, in connection with other circumstances. In re Louis (D. C. 1869) Fed. Cas. No. 8,527. Evidence showing that the debtor was not in possession of ready money with which to meet a particular debt, of which he obtained a renewal, falls short of what is required. In re Chappell (D. C. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608. The fact that a corporation engaged in the performance of a contract which required a considerable expenditure before it was entitled to any payments, arranged with a bank for making overdrafts, is no evidence that it was insolvent. McDonald v. Clearwater Shortline Ry. Co. (C. C. 1908) 164 Fed. 1007, 21 Am. Bankr. Rep. 182.

25. Intention of debtor.—Prior to the amendment of 1910, it was held that there could be no voidable preference under the statute unless there was an actual intention, not merely an assumed or attributed intention, on the part of the debtor to give a preference to the creditor receiving it or to be benefited by it. Debus v. Yates (D. C. 1910) 193 Fed. 427, 30 Am. Bankr. Rep. 823; Kimmerle v. Farr (C. C. A. 1911) 189 Fed. 295, 26 Am. Bankr. Rep. 818; Germania Savings Bank & Trust Co. v. Loeb (C. C. A. 1911) 188 Fed. 285, 110 C. C. A. 263, 26 Am. Bankr. Rep. 238; In re Houghton Web Co. (D. C. 1910) 185 Fed. 213, 26 Am. Bankr. Rep. 202; In re Sayed (D. C. 1910) 185 Fed. 962, 26 Am. Bankr. Rep. 444; In re Salvator Brewing Co. (D. C. 1910) 183 Fed. 910, 25 Am. Bankr. Rep. 536; Tumlin v. Bryan (C. C. A. 1908) 165 Fed. 166, 21 Am. Bankr. Rep. 319; In re First Nat.

Bank (1907) 155 Fed. 100, 84 C. C. A. 16, 18 Am. Bankr. Rep. 766; In re Armstrong (D. C. 1906) 145 Fed. 202, 16 Am. Bankr. Rep. 583; Hardy v. Gray (1906) 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. Rep. 387; McNair v. McIntyre (1902) 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638; In re Smoke (D. C. 1900) 104 Fed. 289, 4 Am. Bankr. Rep. 434; Lynch v. Bronson (1908) 80 Conn. 566, 69 Atl. 538; Bradley, Clark & Co. v. Benson (1904) 93 Minn. 91, 100 N. W. 670; Parker v. Gates (1911) 97 Ark. 621, 135 S. W. 330; Webb's Trustee v. Lynchburg Shoe Co. (1908) 107 Va. 807, 60 S. E. 130; Bacon v. Merchants' Bank of Florence (1906) 146 Ala. 521, 40 South. 413; Harmon v. Feldheim (1902) 131 Mich. 470, 91 N. W. 744; Crooks v. People's Nat. Bank (1901) 34 Misc. Rep. 450, 70 N. Y. Supp. 271; Stern v. Mayer (1906) 113 App. Div. 181, 98 N. Y. Supp. 1028. CONTRA, Hotchkiss v. National City Bank (D. C. 1911) 200 Fed. 287; In re Doyle (D. C. 1912) 199 Fed. 247, 29 Am. Bankr. Rep. 102; Alexander v. Redmond (1910) 180 Fed. 92, 103 C. C. A. 446, 24 Bankr. Rep. 620; Parker v. Black (D. C. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; In re Hanyan (D. C. 1910) 180 Fed. 498, 24 Am. Bankr. Rep. 72; Gabriel v. Tonner (1902) 138 Cal. 63, 70 Pac. 1021; Schmidt v. Bank of Commerce (1910) 15 N. M. 470, 110 Pac. 613, 33 L. R. A. (N. S.) 558. Also it was held by many of the courts that if the necessary and inevitable result of a transfer was to give a preference to the creditor receiving it, it must be conclusively presumed that the intention of the debtor corresponded with the result, on the general principle that every man must be presumed to have foreseen and intended the necessary consequences of his own acts. First Nat. Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542; Toof v. Martin (1871) 13 Wall. 40, 20 L. Ed. 481; Collett v. Bronx Nat. Bank (D. C. 1912) 200 Fed. 111, 29 Am. Bankr. Rep. 454; In re Ball (D. C. 1907) 156 Fed. 682, 19 Am. Bankr. Rep. 609; In re Grant (D. C. 1901) 106 Fed. 496, 5 Am. Bankr. Rep. 837; In re McLam (D. C. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245; Giddings v. Dodd (C. C. 1871) 4 N. B. R. 657, Fed. Cas. No. 5,405; Graham v. Stark (D. C. 1869) 3 N. B. R. 357, Fed. Cas. No. 5,676; Chism v. Citizens' Bank (1900) 77 Miss. 599, 27 South. 637; Benedict v. Deshel (1903) 177 N. Y. 1, 68 N. E. 999; Hume v. Brown Shoe Co. (1911) 33 Okl. 634, 126 Pac. 823; Lazarus v. Eagen (D. C. 1912) 206 Fed. 518, 30 Am. Bankr. Rep. 287.

The amendatory act of 1910 only requires that the debtor shall be insolvent, that the transfer shall operate as a preference, and that the creditor shall have reasonable cause to believe that the enforcement of the transfer will effect a preference; and since this amendment it is not necessary the existence of the debtor's prefer, or the cause for beli creditor's part that a prefer intended, or that the debtor his insolvency, the test being the creditor had reasonable believe that the bankrupt was solvent, and that, in acceptin taining the transfer, the credi receive a larger percentage of than any other creditor of class. In re Harrison Bros 1912) 202 Fed. 243; In re He C. 1913) 207 Fed. 594; V Mitchell-Woodbury Co. (19 Mass. 514, 102 N. E. 119; H Third Nat. Bank of Jersey Ci 1914) 216 Fed. 685; Covi Brigman (D. C. 1914) 210 Rogers v. American Halibut C 216 Mass. 227, 103 N. E. 689; son v. Baker Grocery Co. (144 Pac. 673; Soule v. First N of Ashton (Idaho, 1914) 140 P

26. Creditor's knowledge or belief.—To constitute a voidabl ence it is strictly essential person receiving it or to be by it, or his agent acting for h transaction, should have r cause to believe that a prefer be effected by the enforcemen judgment, transfer, security, ment, as the case may be. Fa it cannot be recovered from the trustee in bankruptcy, no be required to surrender it, standing that it was given by s ent debtor and within four prior to his bankruptcy, and it may actually result in the creditor's receiving full satisf a larger proportion of his d other creditors receive. Josep Co. v. Provident Life & T (1909) 214 U. S. 292, 29 Sup. 53 L. Ed. 1003; Mayes v. Pa C. A. 1913) 208 Fed. 97; L. A Co. v. Gill (1913) 206 Fed. C. C. A. 170; Stockgrower Bank v. Corker (C. C. A. 1 Fed. 614; In re Edwards (D. 217 Fed., 102; Sheppard-St Co. v. Black (C. C. A. 1914) 643; Reber v. Shulman (1 Fed. 564, 106 C. C. A. 110, Bankr. Rep. 475; Greenhall negie Trust Co. (D. C. 1910) 812, 25 Am. Bankr. Rep. 30 Peacock (C. C. 1910) 178 Fed Am. Bankr. Rep. 159; Nelson Pub. Co. (D. C. 1910) 178 In re Kullberg (D. C. 1909) 585, 23 Am. Bankr. Rep. 75 Evans Lumber Co. (D. C. 1 Fed. 643, 23 Am. Bankr. R In re Neill-Pinckney-Maxwell C. 1909) 170 Fed. 481, 22 An Rep. 401; In re Burlage Bro 1909) 169 Fed. 1006, 22 Am Rep. 410; Ohio Valley Ban Mack (1906) 163 Fed. 155, A. 605, 20 Am. Bankr. Rep. 9

v. Citizens' Trust Co. (D. C. 1908) 163 Fed. 880, 21 Am. Bankr. Rep. 39; Coder v. Arts (1907) 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Maher (D. C. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340; McNair v. McIntyre (1902) 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638; In re Dundas (D. C. 1901) 111 Fed. 500, 7 Am. Bankr. Rep. 129; In re Blair (D. C. 1900) 102 Fed. 987, 4 Am. Bankr. Rep. 220; In re Eggert (D. C. 1900) 98 Fed. 843, 3 Am. Bankr. Rep. 541; Lindsey v. Lambert B. & L. Ass'n (D. C. 1880) 4 Fed. 48; Peckham v. Cozzens (D. C. 1880) 3 Fed. 794; Alleman v. Kneedler (C. C. 1880) 2 Fed. 671; In re Hoffman (1900) 2 Nat. Bankr. News, 554; Rankin v. Third Nat. Bank (C. C. 1876) 14 N. B. R. 4, Fed. Cas. No. 11,568; Winsor v. Kendall (C. C. 1874) Fed. Cas. No. 17,886; In re Black (D. C. 1874) 2 N. B. R. 171, Fed. Cas. No. 1,458; Lee v. Franklin Avenue German Sav. Inst. (D. C. 1869) 3 N. B. R. 218, Fed. Cas. No. 8,188; McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888; Nash v. Le Clercq (C. C. 1877) Fed. Cas. No. 10,021; Levor v. Seiter (1902) 69 App. Div. 33, 74 N. Y. Supp. 499; Capital Nat. Bank v. Wilkerson (1905) 36 Ind App. 467, 75 N. E. 837; Cullinane v. State Bank (1904) 123 Iowa, 340, 98 N. W. 887; Thompson v. First Nat. Bank (1904) 84 Miss. 54, 36 South. 65; Wilson v. Weighle (1905) 69 N. J. Eq. 561, 62 Atl. 458; Galveston Dry Goods Co. v. Frenkel (1905) 39 Tex. Civ. App. 19, 86 S. W. 949; Johnston v. George D. Witt Shoe Co. (1905) 103 Va. 611, 50 S. E. 153; Lampkin v. People's Nat. Bank (1902) 98 Mo. App. 239, 71 S. W. 715; Hawes v. Bank of Elberton (1905) 124 Ga. 567, 52 S. E. 922; Blankenbaker v. Charleston State Bank (1903) 111 Ill. App. 393; North v. Taylor (1901) 61 App. Div. 253, 70 N. Y. Supp. 339; Lewis v. First Nat. Bank (1904) 46 Or. 182, 78 Pac. 990; Townes v. Alexander (1904) 69 S. C. 23, 48 S. E. 214; Gamble v. Elkin (1903) 205 Pa. 226, 54 Atl. 782; Johnson v. Anderson (1903) 70 Neb. 233, 97 N. W. 339; Cummings v. Kansas City Wholesale Grocery Co. (1907) 123 Mo. App. 9, 99 S. W. 470; Herzberg v. Riddle (1911) 171 Ala. 368, 54 South. 635; Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921; Stuart v. Farmers' Bank (1908) 137 Wis. 66, 117 N. W. 820, 16 Ann. Cas. 821; Brooks v. Bank of Beaver City (1910) 82 Kan. 597, 109 Pac. 409; Maxwell v. Davis Trust Co. (1911) 69 W. Va. 276, 71 S. E. 270; Russell's Trustee v. Mayfield Lumber Co. (1914) 158 Ky. 219, 164 S. W. 783; Soule v. First Nat. Bank of Ashton (Idaho, 1914) 140 Pac. 1098; Shuetz v. Walter Boyt Saddlery Co. (Iowa, 1914) 147 N. W. 897; Kentucky Bank & Trust Co. v. Pritchett (Okl. 1914) 143 Pac. 338.

The statute does not require that the preferred creditor should have any actual knowledge on the subject of the debtor's insolvency or the result of the transaction in giving a preference, nor even that he should have any actual belief on that point. What the law requires is "reasonable cause to believe," and if this exists it is enough, without regard to the actual state of the creditor's mind or opinion. Toof v. Martin (1871) 13 Wall. 49, 20 L. Ed. 481; In re The Leader (D. C. 1911) 190 Fed. 624, 26 Am. Bankr. Rep. 668; In re Hines (D. C. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 495; Sundheim v. Ridge Avenue Bank (D. C. 1905) 138 Fed. 951, 15 Am. Bankr. Rep. 132; In re Eggert (C. C. A. 1900) 102 Fed. 735, 4 Am. Bankr. Rep. 449; Graham v. Stark (D. C. 1869) 3 N. B. R. 357, Fed. Cas. No. 5,676; Wilson v. Taylor (1911) 154 N. C. 211, 70 S. E. 286; Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800. The intent of a debtor making a transfer, or of the person receiving it, is immaterial if the creditor has reasonable cause to believe that the taking and enforcement thereof would give him a preference. In re Gaylord (D. C. 1915) 225 Fed. 234. Where a bankrupt in contemplation of insolvency mortgaged his assets to raise funds with which to pay preferred creditors, the mortgagee was entitled to enforce the lien of his mortgage, unless he not only knew of the mortgagor's plan to prefer creditors, but also that he intended to go into bankruptcy and thereby defraud his other creditors. In re Soforenko (D. C. 1913) 210 Fed. 562.

The creditor must have reasonable cause to believe that the debtor is insolvent, as, without this, there is no reason to suppose he is gaining a preference, and without such knowledge or belief the transaction will not be voidable though it actually results in a preference. Brigman v. Covington (1915) 219 Fed. 500, 135 C. C. A. 250; In re Gaylord (D. C. 1915) 225 Fed. 234; First Nat. Bank v. Orten (Okl. 1914) 142 Pac. 1096; Auffmordt v. Rasin (1880) 102 U. S. 620, 26 L. Ed. 262; In re Greenberger (D. C. 1913) 203 Fed. 583, 30 Am. Bankr. Rep. 117; Ogden v. Reddish (D. C. 1912) 200 Fed. 977, 29 Am. Bankr. Rep. 531; In re Pfaffinger (D. C. 1906) 154 Fed. 523, 18 Am. Bankr. Rep. 807; Wright v. Sampter (D. C. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Oliver (D. C. 1901) 109 Fed. 784, 6 Am. Bankr. Rep. 626; In re Eggert (D. C. 1900) 98 Fed. 843, 3 Am. Bankr. Rep. 541; Stobaugh v. Mills (D. C. 1873) 8 N. B. R. 361, Fed. Cas. No. 13,461; Gillenwaters v. Miller (1873) 49 Miss. 150; Pearsall v. Nassau Nat. Bank (1902) 74 App. Div. 89, 77 N. Y. Supp. 11; Des Moines Sav. Bank v. Morgan Jewelry Co. (1904) 123 Iowa, 432, 99 N. W. 121; Wright v. Cotten (1905) 140 N. C. 1,

52 S. E. 141; Evans v. Claridge (1908) 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Shelton v. First Nat. Bank (1912) 31 Okl. 217, 120 Pac. 959. The trustee need not show that the creditor had actual knowledge of the bankrupt's insolvency, but it is sufficient if the circumstances would have led to the conclusion that the bankrupt was insolvent and that the payment would operate as a preference. Rogers v. American Halibut Co. (1913) 216 Mass. 227, 103 N. E. 689. It does not follow that because a creditor knows of the insolvency of a firm, he has any cause to believe in the insolvency of one of the partners, who is his individual debtor. Jacobs v. Van Sickel (C. C. 1903) 123 Fed. 340, 10 Am. Bankr. Rep. 519. And neither the fact that a debtor's accounts are past due, nor the fact of his being financially embarrassed, is sufficient to impeach the good faith of a creditor in taking security, so as to render it voidable as a preference, where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency. J. W. Butler Paper Co. v. Goembel (1905) 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26.

If the creditor knows or has reasonable ground to believe that the debtor is insolvent, then it may be inferred without further proof, that he has also reasonable ground to believe that the enforcement of the judgment or transfer which he takes will effect a preference, such being its natural and inevitable result. In re Lynden Mercantile Co. (D. C. 1907) 156 Fed. 713, 19 Am. Bankr. Rep. 444; Graham v. Stark (D. C. 1869) 3 N. B. R. 357, Fed. Cas. No. 5,676; In re Hauck (D. C. 1878) 17 N. B. R. 158, Fed. Cas. No. 6,219; In re Kingsbury (D. C. 1869) 3 N. B. R. 317, Fed. Cas. No. 7,816; Johnson v. Cohn (1902) 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Hess v. Theodore Hamm Brewing Co. (1909) 108 Minn. 22, 121 N. W. 232; Hackney v. Raymond Bros. Clarke Co. (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; In re Rockaway Soda Water Mfg. Co. (D. C. 1915) 226 Fed. 520; Gill v. Ely-Norris Safe Co. (1913) 170 Mo. App. 478, 156 S. W. 811.

The preference which a transferee must have reasonable cause to believe will be effected is not the preference over unsecured creditors necessarily obtained by a mortgagee, but one made and accepted to evade the rule for equal distribution to creditors. In re Chicago Car Equipment Co. (C. C. A. 1914) 211 Fed. 638. Where an offer of compromise is made, creditors are not bound to investigate the debtor's ability to pay the amount offered, and ascertain whether it is his intention to pay it to all creditors alike, but are entitled to believe that the c made in good faith and to creditors, unless something occ put them on inquiry. Smith v. I Robin Co. (1910) 178 Fed. 27 C. C. A. 576, 24 Am. Bankr. Re Where a mercantile company, before its bankruptcy, sent a c letter to its creditors, in which i ed that its last season's busine not been good and that it was to meet its payments; that about to make a special sale, strongly advertised, for the p of paying its bills, and would the receipts from the sale am creditors; and that it was solve hoped to pay in full within thirt it was held that creditors re such circulars, and a few days after small payments on their were not chargeable with rea cause to believe that they were ed as a preference, though the was in fact insolvent and did n tribute the proceeds of the sa rata. In re Varley & Bauman ing Co. (D. C. 1911) 191 Fed. Am. Bankr. Rep. 840. But see min v. Chandler (D. C. 1905) 14 217, 15 Am. Bankr. Rep. 439. sale by a debtor will not be avoi cause the purchaser was aware intention of the seller to pref tain of his creditors by the use proceeds of the sale. Van Kl Miller (D. C. 1879) 19 N. B. Fed. Cas. No. 16,860. But w mortgagee of a bankrupt had able cause to believe that the m would "effect a preference," reasonable cause to believe would "operate as a preference," phrases, as used in the bankrupt being synonymous. Ogden v. (D. C. 1912) 200 Fed. 977, 2 Bankr. Rep. 531.

Whether an alleged preferred tor of a bankrupt had reasonabl to believe a preference was in when the payment was made, is tion of fact to be determined fr circumstances attending the pa Batchelder v. Home Nat. Bank ford (1914) 105 N. E. 1052, 218 420.

27. —— Grounds of suspici doubt.—To invalidate a payment, fer, or security, as a preference not enough that the creditor sho tertain doubts concerning the s of the debtor or the effect of the action as preferential, or that he have cause to regard the debto cumstances or the transaction i with suspicion. He must have a edge of such facts as will carry b yond this and furnish a reas ground to believe that the enfor of his transfer or security will gi a preference over other cre Rosenman v. Coppard (C. C. A. 228 Fed. 114; Nichols v. Elken

A. 1915) 225 Fed. 689; Beall v. Bank of Bowden (D. C. 1915) 219 Fed. 316; Brookheim v. Greenbaum (D. C. 1912) 225 Fed. 635; Batchelder v. Home Nat. Bank of Milford (1914) 218 Mass. 420, 105 N. E. 1052; Paper v. Stern (C. C. A. 1912) 198 Fed. 642, 28 Am. Bankr. Rep. 592; Stucky v. Masonic Sav. Bank (1883) 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Grant v. National Bank (1877) 97 U. S. 80, 24 L. Ed. 971; In re F. M. & S. Q. Carlile (D. C. 1912) 199 Fed. 612, 29 Am. Bankr. Rep. 373; First Nat. Bank v. Abbott (1908) 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436; Powell v. Gate City Bank (1910) 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Eggert (1900) 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Off v. Hakes (1905) 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696; May v. Le Claire (C. C. 1882) 18 Fed. 164; Claridge v. Kulmer (C. C. 1880) 1 Fed. 399; Mackel v. Bartlett (1907) 36 Mont. 7, 91 Pac. 1064; King v. Storer (1883) 75 Me. 62; Farmers' & Mechanics' Bank v. Wilson (1903) 4 Neb. (Unof.) 606, 95 N. W. 609: Suffel v. McCartney Nat. Bank (1906) 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004; Sirrine v. Stoner-Marshall Co. (1902) 64 S. C. 457, 42 S. E. 432; Gnichtel v. First Nat. Bank (N. J. Eq. 1904) 57 Atl. 508; Stevenson v. Milliken-Tomlinson Co. (1904) 99 Me. 320, 59 Atl. 472. But see Campbell v. Traders' Nat. Bank (D. C. 1871) 3 N. B. R. 498, Fed. Cas. No. 2,370; Guernsey v. Miller (1880) 80 N. Y. 181.

Knowledge of the fact that the debtor is not able to pay the creditor's debt in cash may raise a suspicion as to his solvency, but is not of itself reasonable cause to believe that a preference is intended. Andrews v. Kellogg (1907) 41 Colo. 35, 92 Pac. 222. Nor is knowledge of the fact that the debtor is offering to sell his business. Taft v. Fourth Nat. Bank (1900) 8 Ohio N. P. 59. Or that he has called his creditors together for the purpose of making terms with them. In re Kerr (D. C. 1869) 2 N. B. R. 388, Fed. Cas. No. 7,728. The general reputation of the debtor's solvency is not a safe test of the creditor's good faith. Carey v. Donohue (1913) 209 Fed. 328, 126 C. C. A. 254.

Foreign bankers having accepted and paid in due course and in entire good faith drafts with forged railroad bills of lading attached, covering alleged through shipments of cotton by rail and water to a foreign port, are not chargeable with knowledge that a preference was intended or given when the bankrupt consignors substituted in place of the fictitious bills of lading genuine bills of lading issued by an ocean carrier covering cotton subsequently shipped by such consignors to prevent the discovery of their dishonest methods, the physical possession of such cotton having passed during transit from a responsible railroad to a trustworthy steamship company, and the bankers having no actual knowledge of the fraud practiced upon them. Pyle v. Texas Transport & Terminal Co. (1915) 238 U. S. 90, 35 Sup. Ct. 667, 59 L. Ed. 1215.

28. —— **Facts putting on inquiry—Duty to investigate.**—Where a creditor, about to receive a payment or security from his debtor, has knowledge or notice of facts which would incite a man of ordinary prudence and business intelligence to inquire as to the debtor's solvency and the probable effect of the transaction as a preference, he is bound to prosecute a reasonably diligent inquiry to ascertain the truth; and if he fails to do so, he is chargeable with knowledge of the facts which such an inquiry would have disclosed; and if such ultimate knowledge would give him reasonable cause to believe that the transaction would result in giving him a preference, within the meaning of the bankruptcy law, then he cannot safely accept the payment, transfer, or security, for if the debtor's bankruptcy follows within four months, the transaction will be voidable at the suit of the trustee. Toof v. Martin (1871) 13 Wall. 49, 20 L. Ed. 481; R. H. Herron Co. v. Moore (C. C. A. 1913) 208 Fed. 134; Walters v. Zimmerman (D. C. 1913) 208 Fed. 62, 30 Am. Bankr. Rep. 780; Tilt v. Citizens' Trust Co. (D. C. 1911) 191 Fed. 441, 27 Am. Bankr. Rep. 320; Ragan v. Donovan (D. C. 1911) 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Thomas Deutschle & Co. (D. C. 1910) 182 Fed. 435, 25 Am. Bankr. Rep. 348; In re C. J. McDonald & Sons (D. C. 1910) 178 Fed. 487, 24 Am. Bankr. Rep. 446; Brewster v. Goff Lumber Co. (D. C. 1908) 164 Fed. 124, 21 Am. Bankr. Rep. 106; In re W. W. Mills Co. (D. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Tindal (D. C. 1907) 155 Fed. 456, 18 Am. Bankr. Rep. 773; English v. Ross (D. C. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; In re Virginia Hardwood Mfg. Co. (D. C. 1905) 139 Fed. 209, 15 Am. Bankr. Rep. 135; In re Eggert (1900) 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; National Exchange Bank v. Pepperdine (1900) 2 Nat. Bankr. News, 675; Judson v. Courier Co. (C. C. 1883) 15 Fed. 541; Buchanan v. Smith (1872) 16 Wall. 277, 21 L. Ed. 280; Clark v. Skilton (D. C. 1874) Fed. Cas. No. 2,834; Burpee v. First Nat. Bank (C. C. 1873) 9 N. B. R. 314, Fed. Cas. No. 2,185; In re Wright (D. C. 1869) 2 N. B. R. 490, Fed. Cas. No. 18,071; Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 560, 76 N. E. 258; Bardes v. First Nat. Bank (1904) 122 Iowa, 443, 98 N. W. 284; Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921; Wilson v. Taylor (1911) 154 N. C. 211, 70 S. E. 286; Andrews v.

Kellogg (1907) 41 Colo. 35, 92 Pac. 222; Whitwell v. Wright (1909) 115 N. Y. Supp. 48; Atherton v. Emerson (1908) 199 Mass. 199, 85 N. E. 530; Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Hackney v. Raymond Bros. Clarke Co. (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Walker v. Tenison Bros. Saddlery Co. (Tex. Civ. App. 1906) 94 S. W. 166; Christopherson v. Oleson (1905) 19 S. D. 176, 102 N. W. 685; Aronin v. Security Bank of New York (C. C. A. 1915) 228 Fed. 888; In re Gaylord (D. C. 1915) 225 Fed. 234; Utah Ass'n of Credit Men v. Boyle Furniture Co. (Utah, 1913) 136 Pac. 572; Newman v. Tootle-Campbell Dry Goods Co. (Mo. App. 1913) 160 S. W. 825; First Nat. Bank of Maysville v. Alexander (Okl. 1915) 153 Pac. 646.

"Reasonable cause to believe," in the bankruptcy act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property. Stern v. Paper (D. C. 1910) 183 Fed. 228, 25 Am. Bankr. Rep. 451.

If the creditor knows that the debtor has lost his position because of a defalcation, that his principal indorser is dead, and that his notes are overdue and unpaid, it is sufficient to put him on inquiry. Sebring v. Wellington (1901) 63 App. Div. 498, 71 N. Y. Supp. 788. In a suit by a bankrupt's trustee to recover an alleged preference from a bank, evidence of the continued protest of the bankrupt's checks from March, 1910, until November, when the preferences were given, held sufficient to put the bank on inquiry as to the bankrupt's insolvency. In a suit by a bankrupt's trustee to recover certain alleged preferences, evidence of knowledge that the bankrupt had forged the name of certain indorsers to certain notes held by defendant bank, taken in connection with other facts concerning his financial standing, held sufficient to give the bank reasonable cause to believe that he was insolvent. Conners v. Bucksport Nat. Bank (D. C. 1914) 214 Fed. 847, decree affirmed Bucksport Nat. Bank v. Conners (C. C. A. 1914) 216 Fed. 990.

A creditor is put on inquiry by the fact that he holds unpaid protested paper of the bankrupt. Swan v. Robinson (C. C. 1881) 5 Fed. 287. Or that the debtor, on drawing up the mortgage in question, asked to be allowed to secure other creditors in the same instrument. Lloyd v. Strobridge (D. C. 1877) 16 N. B. R. 197, Fed. Cas. No. 8,435. Facts held to show that defendant, who purchased stock of goods from bankrupt, must have known of mortgage thereon, and that the proceeds were to be applied for the benefit of the mortgagee, thus hindering and delaying other creditors, and hence his purchase was not in good faith. Parker v. Sherman (1914) 212 Fed. 917, 129 C. C. A. 437, affirming decree (D. C. 19 Fed. 155.

Mere knowledge that the debt to meet his obligations promptl sufficient to put the creditor on Arkansas Nat. Bank v. Sparks 83 Ark. 324, 103 S. W. 626; v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822. the fact that there are outstand unsatisfied judgments against t or. Summerville v. Stockton Co. (1904) 142 Cal. 529, 76 P Or that he is engaged in a busi a speculative character, and t creditor does not know of an property owned by the debtor his interest in certain contracts tiss v. Kingman (1908) 159 F 87 C. C. A. 60, 20 Am. Bankr.

Knowledge that money loane insolvent firm on security of b counts was to be used to pay a ing debt does not charge the tr with knowledge of any intent of rower to defraud so as to ent trustee in bankruptcy to set th fer aside as fraudulent. Van I v. National Discount Co. (19 Sup. Ct. 343, 227 U. S. 575, 57 652, affirming decree (1909) 1 518, 98 C. C. A. 300. A banke titled to transact business with er in the ordinary way, take notes, and receive partial pa and to assume that the custome vent, and not liable to restore p when bankruptcy intervenes. son v. Robertson (D. C. 1915) 2 985.

As to the kind of investigatio conducted by a creditor thus inquiry," his duty is not discha inquiries addressed to the debto at least if any better or more sources of information are open McGirr v. Humphreys Grocery C. 1911) 192 Fed. 55, 26 Am. Rep. 518; Singer v. Jacobs 1882) 11 Fed. 559. And his int avoidance of obvious and reliabl es of information will charge h the knowledge he could have from them. Pittsburgh Plate G v. Edwards (1906) 148 Fed. C. C. A. 191, 17 Am. Bankr. R At the same time, he is not ob trace to its ultimate source an mation of a suspicious nature may come to his knowledge. B baker v. Charleston State Bank 111 Ill. App. 393. And if the of the debtor's solvency is so to require an inventory and a debts to determine it, the failur this degree of diligence will not the creditor with knowledge. v. Carondelet Milling Co. (19 Mo. App. 275, 83 S. W. 764. he be charged with notice o which could be learned only fr mate and inaccessible sources, the books of the bankrupt, bu only responsible for such inf as could be obtained by open o

tion and reasonable inquiry. In re Wolf Co. (D. C. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73.

At the same time, if the creditor is permitted to examine the books of the debtor, or does make an independent investigation of his business and affairs, especially through the medium of an expert or accountant, he may claim the benefit of the knowledge so acquired, and if the result is not such as to furnish reasonable ground to believe the debtor insolvent and a preference intended, the creditor will be safe from the attack of the trustee in bankruptcy. Stratton v. Lawson (1902) 27 Wash. 310, 67 Pac. 562; Brown v. Guichard (1902) 37 Misc. Rep. 78, 74 N. Y. Supp. 735; Hussey v. Richardson-Roberts Dry Goods Co. (1906) 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Mayo Contracting Co. (D. C. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; In re Bartlett (D. C. 1909) 172 Fed. 679, 22 Am. Bankr. Rep. 891; In re Gaylord (D. C. 1915) 225 Fed. 234. So, also, where he inquired about the condition of the debtor corporation, not only from its officers, but also from others who were in position to know, and was assured that it was solvent and that its embarrassment was only temporary. In re Wolf Co. (D. C. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73.

The rule of constructive notice and diligent inquiry should not be applied with too great severity in the case of a young woman of no business experience whatever dealing with a banker, who was also a relative in whom she had confidence, she being "incapable of comprehending the significance of business facts which would have been more enlightening to men of the business world." Wright v. Sampter (D. C. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355.

29. —— **Circumstances constituting ground for belief.**—What constitutes "reasonable ground to believe" that a debtor is insolvent or intends a preference must depend on the facts and circumstances of each case. Whitwell v. Wright (1910) 136 App. Div. 246, 120 N. Y. Supp. 1065. And although the general business transactions and condition of the bankrupt, at the time of giving a preference, may not have been sufficient to raise this reasonable ground of belief, yet if the special facts and circumstances passing between the particular parties, and out of which the preference grew, were such as to give a reasonable cause for such belief, the creditor is chargeable with notice. Alderdice v. State Bank of Virginia (C. C. & D. C. 1875) Fed. Cas. No. 154.

If there is reasonable cause to believe that, at the time of the bankrupt's transfer of property within the statutory period, he is insolvent, and payment is accepted of a debt overdue, it is immaterial, upon the issue of the validity of the transfer, whether the transferee believes that the bankrupt is insolvent; he being charged with what should be reasonably inferred from the circumstances. Hewitt v. Boston Straw Board Co. (1913) 101 N. E. 424, 214 Mass. 260.

The mere fact that the creditor's claim is past due when a payment is made on it or security given for it, is not alone sufficient to charge him with knowledge that the debtor is insolvent or that a preference will be effected. In re Goodhile (D. C. 1904) 130 Fed. 471, 12 Am. Bankr. Rep. 374; Lyon v. Clark (1902) 129 Mich. 381, 88 N. W. 1046. Nonpayment of a debt on demand and circumstances sufficient to create a suspicion or fear of insolvency are insufficient to charge the creditor with notice so as to make a payment subsequently made before bankruptcy recoverable as a preference. Arthur v. Harrington (D. C. 1914) 211 Fed. 215. Nor the mere fact that an adjudication in bankruptcy actually follows within four months afterwards. Laundy v. First Nat. Bank (1903) 66 Kan. 759, 71 Pac. 259. Though it is otherwise if the creditor at the time knew that the bankrupt's attorney was then engaged in preparing a petition in bankruptcy. In re Galvin (1900) 2 Nat. Bankr. News, 146.

A creditor may know that his debtor is financially embarrassed, and may be insistent in his demands for settlement, and yet he may not have a reasonable cause to believe the debtor insolvent. Sharpe v. Allender (1909) 170 Fed. 589, 96 C. C. A. 104, 22 Am. Bankr. Rep. 431; Stackhouse v. Holden (1901) 66 App. Div. 423, 73 N. Y. Supp. 203. But see In re Kingsbury (D. C. 1869) 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Hines (D. C. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 495. Nor is such reasonable cause to be deduced from the mere fact that the debtor had some time previously compromised with his creditors at 45 cents on the dollar. Warren v. Tenth Nat. Bank (D. C. 1871) Fed. Cas. No. 17,-200.

Knowledge of a partnership creditor that the partnership is insolvent does not charge the creditor with knowledge that an individual partner is insolvent. In re Hull (D. C. 1915) 224 Fed. 796.

But the fact that suits are pending against the debtor on claims which he does not dispute, is a very suspicious circumstance, and, if coupled with other facts, may be enough to charge the creditor with notice. Crittenden v. Barton (1901) 59 App. Div. 555, 69 N. Y. Supp. 559; Empire State Trust Co. v. William F. Fisher Co. (1904) 67 N. J. Eq. 88, 57 Atl. 502.

Bank, which had protested notes and draft against insolvent corporation and pressed for payment of indebtedness to it, held to have cause to believe that

it was receiving a preference when receiving payments. Grandison v. National Bank of Commerce of Rochester (D. C. 1915) 220 Fed. 981. And a business man who allows his paper to go to protest, suspends payment, and closes the door of his place of business, proclaims to the world that he is insolvent. Markson v. Hobson (C. C. 1871) Fed. Cas. No. 9,099; Merchants' Nat. Bank v. Cook (1877) 95 U. S. 342, 24 L. Ed. 412.

In order to determine a debtor's insolvency within the bankruptcy act, all his salable property should be considered, including that exempt from execution, and if his creditor has reasonable cause to believe that the debtor is unable to meet his obligations as they mature in the ordinary course of business, he has notice of his insolvency. Patterson v. Baker Grocery Co. (Or. 1914) 144 P. 673.

Where the creditor learned that an account which the bankrupt had assigned as security was fictitious, and that his place of business was closed, and that it was rumored that he had absconded, and placed its claim in the hands of its attorney for collection, although it was not due, and the claim was paid shortly before the adjudication in bankruptcy, it was held that the creditor had reasonable cause to believe that a preference was intended by such payment. Pratt v. Columbia Bank (D. C. 1907) 157 Fed. 137, 18 Am. Bankr. Rep. 406.

The mere fact that a creditor demands security for a debt previously unsecured does not show that he has reasonable ground for believing the debtor to be insolvent. Perry v. Booth (1903) 80 App. Div. 373, 80 N. Y. Supp. 706; Congleton v. Schreihofer (N. J. Eq. 1903) 54 Atl. 144. But see In re Hickerson (D. C. 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682. This is especially the case where the security also covers a contemporary loan of money. Stedman v. Bank of Monroe (1902) 117 Fed. 237, 54 C. C. A. 269, 9 Am. Bankr. Rep. 4. But it is otherwise when it appears that the security given pledges substantially all of the debtor's unexempt property. Coder v. McPherson (1907) 152 Fed. 951, 82 C. C. A. 99, 18 Am. Bankr. Rep. 523; Roberts v. Johnson (1907) 151 Fed. 567, 81 C. C. A. 47, 18 Am. Bankr. Rep. 132. Or where the creditor knows that the property would be insufficient to satisfy the other creditors after paying his own debt. Robinson v. Tuttle (D. C. 1876) Fed. Cas. No. 11,968.

Evidence that the creditor was investigating the financial standing of the bankrupt immediately prior to and continuously up to the time when the transfer was executed is admissible on this point. Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 550, 76 N. E. 258. And it may be shown that he knew that the debtor was pressed and without credit, and th himself had been persistently pre his own claim for several mo Wright v. William Skinner Mfg. (1908) 162 Fed. 315, 89 C. C. A 20 Am. Bankr. Rep. 527. And re able cause to believe a debtor vent may arise from the fact th conveyed his residence for the fit of an insistent creditor, stati the time that it was his only ava resource. Brewster v. Goff (I 1908) 164 Fed. 127, 21 Am. B Rep. 239.

Circumstances justifying such a may also be found in the fact tha debtor settled with creditors b turning goods bought from them re Andrews (D. C. 1905) 135 Fed 14 Am. Bankr. Rep. 247. Or t creditor indirectly bought back from the debtor and sold them at a loss. Hardy v. Gray (1906 Fed. 922, 75 C. C. A. 562, 16 Bankr. Rep. 387. Or accepted fo of his claim goods for which h no use, or which were not of a that he dealt in or employed i business. In re Christopher Bai Son (D. C. 1909) 166 Fed. 98 Am. Bankr. Rep. 911; Fowler Bank v. White (C. C. A. 1912 Fed. 631, 28 Am. Bankr. Rep. Or that the money to make a pa was obtained by the sale of the or's entire stock in trade, especi such sale was made secretly or any suspicious conditions. Thom Adelman (D. C. 1905) 136 Fed. 9 Am. Bankr. Rep. 510. See Dun Thomas (1902) 28 Wash. 521, 6 909.

Where a grain company sells it vator and applies the proceeds to ing a debt due a bank, the bank c contend that, even if it knew the pany was insolvent at the time c payment, it was not an illegal erence if the company was ins when it began doing business wi bank some months prior th where the company had sustained losses and the sale of the elevato not in the usual course of busines a sale forced by the bank. Chish First Nat. Bank (1912) 176 Ill. 382.

Where it appears that over were made by a merchant in col with a defaulting teller in the for which a deed of preference given to the bank just before the ruptcy of the merchant, the de voidable, as such facts constitute sonable cause for the bank to b that the debtor was insolvent and a preference was intended. Ald v. State Bank of Virginia (C. C. C. 1875) Fed. Cas. No. 154.

30. —— Imputed knowledge of or attorney.—A preference will be

able if reasonable cause to believe that the debtor is insolvent and a preference intended is brought home either to the creditor himself or to "his agent acting therein." If the agent has knowledge of facts which should have induced such a belief, or of facts which should have put him upon inquiry as to the debtor's financial condition, that knowledge is imputed to the principal and the effect is the same as if he himself had taken part in the transaction being in possession of such information. In re Nassau (D. C. 1905) 140 Fed. 912, 14 Am. Bankr. Rep. 828; Constam v. Haley (C. C. A. 1913) 206 Fed. 260, 30 Am. Bankr. Rep. 650; Sage v. Wynkoop (C. C. 1877) 16 N. B. R. 363, Fed. Cas. No. 12,215; Mathews v. Riggs (1888) 80 Me. 107, 13 Atl. 48. And it is no defense to the trustee's suit to recover the preference that the creditor had no personal knowledge of the debtor's insolvency. Plummer v. Myers (D. C. 1905) 137 Fed. 660, 14 Am. Bankr. Rep. 805. And it is immaterial how or when the agent obtained his knowledge, or that he had confidential relations with the bankrupt, or personal interests which prevented him from disclosing his knowledge to his principal. Campbell v. Balcomb (1910) 183 Fed. 766, 106 C. C. A. 474, 25 Am. Bankr. Rep. 538.

But the agent must be one acting for the creditor "therein," that is, in the particular transaction by which the preference was created, though a general financial agent may answer this description. Wright v. Cotten (1905) 140 N. C. 1, 52 S. E. 141. Where the holder of a note against a bankrupt is charged with an agent's knowledge of facts indicating the bankrupt's insolvency, such notice is not limited to its effect to convert into preferences payments obtained through the activities of the agent, but extends as well to subsequent payments made by the bankrupt direct to the holder. Constam v. Haley (C. C. A. 1913) 206 Fed. 260, 30 Am. Bankr. Rep. 650.

Notice cannot be imputed to a principal which was acquired by one who was the clerk or agent of the bankrupt at the time the preference was given, and who was not employed by the creditor until afterwards. Whitson v. Farber Bank (1904) 105 Mo. App. 605, 80 S. W. 327. Where an indorsee of a note executed by the bankrupt intrusted it to the payees' agent to collect or adjust, the indorsee was charged with notice of the facts discovered by such agent concerning the maker's insolvency as to render subsequent payments on account preferences. Constam v. Haley (1913) 206 Fed. 260, 124 C. C. A. 128.

If the holder of a note sends it to a bank for collection, the bank is his agent, and he is to be charged with whatever knowledge the bank possesses. Hooker v. Blount (1906) 44 Tex. Civ. App. 162, 97 S. W. 1083. But where a bank, being the holder of a note, and having no correspondent in the town where the maker lives, sends it to its correspondent in the nearest large city for collection, and the latter sends it to the local bank for collection, although the local bank may know facts about the maker which would render the payment of the note to it a preference under the bankruptcy act, that knowledge is not imputable to the creditor, for the collecting bank is not its agent. Balcomb v. Old Nat. Bank (C. C. A. 1912) 201 Fed. 679, 29 Am. Bankr. Rep. 329. If the creditor sends his claim to a collection agency, and the agency employs an attorney to collect it, and the latter procures a confession of judgment, knowing the debtor to be insolvent, this does not affect the validity of the preference so far as concerns the creditor, the attorney not being his agent. Hoover v. Wise (1875) 91 U. S. 308, 23 L. Ed. 392.

An attorney at law employed directly by the creditor to take proceedings for the enforcement of the claim, or to effect a settlement with the debtor, is the creditor's "agent," and his knowledge is imputable to the creditor. Rogers v. Palmer (1880) 102 U. S. 263, 26 L. Ed. 464; Wight v. Muxlow (D. C. 1875) Fed. Cas. No. 17,629; Vogle v. Lathrop (C. C. 1870) 4 N. B. R. 439, Fed. Cas. No. 16,985; Mayer v. Hermann (C. C. 1872) Fed. Cas. No. 9,-344; Hewitt v. Boston Straw Board Co. (1913) 214 Mass. 260, 101 N. E. 424. And it is immaterial that the attorney, unknown to the creditor employing him, has special and peculiar facilities for acquiring information, as, by being the professional adviser of the debtor also. So long as the disclosure of the knowledge acquired would not involve a breach of professional confidence, the creditor is chargeable with it. Brown v. Jefferson County Nat. Bank (C. C. 1881) 9 Fed. 258.

In the case of a corporation which is a creditor, the knowledge of any of its principal officers will be imputed to the corporation itself. Farmers' Bank of Edgefield v. C. D. Carr & Co. (1904) 127 Fed. 690, 62 C. C. A. 446, 11 Am. Bankr. Rep. 733; Arnold v. Knapp (W. Va. 1915) 84 S. E. 895. Where a bankrupt was treasurer of a corporation, the fact that he knew himself to be insolvent at the time he made a payment on his indebtedness to the corporation did not charge it with knowl- of such fact. Arthur v. Harrington (D. C. 1914) 211 Fed. 215. A corporation is not chargeable with knowledge possessed by an officer who resigned before the giving of the alleged preference, though he is also the principal stockholder of the bankrupt corporation. Benner v. Blumauer-Frank Drug Co. (D. C. 1912) 198 Fed. 362, 28 Am. Bankr. Rep. 798. A person will be held

to have notice as an individual of what he does as the president of a corporation. Lancaster v. Collins (C. C. 1881) 7 Fed. 338.

Knowledge possessed by a township trustee as to the insolvency of his brother, a defaulting township treasurer, is imputable to the township itself. Painter v. Napoleon Tp. (D. C. 1910) 190 Fed. 637, 26 Am. Bankr. Rep. 324.

In the case of a banking corporation, either the president or the cashier may be regarded as the "agent" of the bank, so that if either has knowledge of circumstances which would furnish reasonable ground to believe that the debtor of the bank was insolvent and that a preference would result from any payment, transfer or security given to the bank, then the preference so given will be voidable. Nisbit v. Macon Bank & Trust Co. (C. C. 1882) 12 Fed. 686; Crooks v. People's Nat. Bank (1902) 72 App. Div. 331, 76 N. Y. Supp. 92, 495; Collett v. Bronx Nat. Bank (C. C. A. 1913) 205 Fed. 370, 30 Am. Bankr. Rep. 598.

31. Solicitation, coercion, or threats by creditor.—A preference is none the less voidable under the bankruptcy act because it was not yielded voluntarily, but was wrung from the debtor by the urgent solicitation of the creditor, by threats of prosecution, fear of exposure and disgrace, or any other form of coercion or pressure. First Nat. Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542; Strain v. Gourdin (C. C. 1874) 11 N. B. R. 156, Fed. Cas. No. 13,521; Van Kleeck v. Thurber (D. C. 1842) Fed. Cas. No. 16,861; Campbell v. Traders' Nat. Bank (D. C. 1871) 3 N. B. R. 498, Fed. Cas. No. 2,370; In re Amory & Leeds (C. C. 1844) Fed. Cas. No. 336c; Atkinson v. Farmers' Bank (D. C. 1844) Fed. Cas. No. 609; Rison v. Knapp (D. C. 1868) 4 N. B. R. 349, Fed. Cas. No. 11,861; Foster v. Hackley (C. C. 1869) 2 N. B. R. 406, Fed. Cas. No. 4,971; Wilson v. Brinkman (D. C. 1869) 2 N. B. R. 468, Fed. Cas. No. 17,794; Graham v. Stark (D. C. 1869) 3 N. B. R. 357, Fed. Cas. No. 5,676.

32. Preference of partnership or individual creditors.—The purpose of the bankruptcy act with reference to the joint assets of a bankrupt partnership is that they shall be first applied, in good faith, to the payment of partnership debts, and that the individual property of the several partners shall first be applied in payment of their separate debts; and any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts, or vice versa, is in violation of the act and will be frustrated by the court, the law being administered in such a manner as to prevent preferences and secure the equitable distribution of the estate. In re Jones (D. C. 1900) 100 Fed. 781. And see Johnson v. ley-Hoye Co. (D. C. 1911) 188 752, 26 Am. Bankr. Rep. 748. if a creditor of a firm, knowing th to be insolvent, takes a mortgage individual property of one of the ners, it is an unlawful prefe Mayes v. Palmer (C. C. A. 1913 Fed. 97; In re Parker (D. C. 188 Fed. 397; Pollock v. Jones (1903 Fed. 163, 61 C. C. A. 555. Bu Sargent v. Blake (1908) 160 Fe 87 C. C. A. 213, 20 Am. Bankr. 115. And the rule is the same member of the firm, owing a p debt, gives the firm's note for it, own note indorsed by the firm. Jones (D. C. 1900) 100 Fed. 7 Am. Bankr. Rep. 141. But if a so indorsed is paid by the firm, an individual partner becomes ban (but not the firm) his creditors c object to the payment as a prefe because the payee has not receive of the property of the bank Catchings v. Chatham Nat. Bank 180 Fed. 103, 103 C. C. A. 601, 24 Bankr. Rep. 843.

A partner's individual indorseme the firm's notes, while the firm w solvent, held to give the payee a erence. In re Frazer (D. C. 1915 Fed. 83. But, on the other ha mortgage given by a partner on h dividual property to secure his in ual debt is not voidable as a prefe in the subsequent bankruptcy o firm. Hewitt v. Northrup (N. Y. 9 Hun, 543, 16 N. B. R. 27, aff (1878) 75 N. Y. 506. Or at leas creditors of the firm will hav standing to object to it and see vacation. In re Lehigh Lumbe (D. C. 1900) 101 Fed. 216, 4 Bankr. Rep. 221. A preference firm to a firm creditor cannot b covered by the trustee in bankr of the continuing partner, the rig recover being a right of the cre of the firm, and not a right of the to which the continuing partner ceeds. Rubenstein v. Loftow 107 N. E. 718, 220 Mass. 156.

A mortgage given by a partnersh its property is not affected by s quent bankruptcy proceedings a one of the partners alone. In re derlin (D. C. 1901) 109 Fed. 8 Am. Bankr. Rep. 384.

In a suit by a trustee in bankr of a partnership to recover pay made to a creditor as a preferen must be shown that both the firm the partners individually were inso when the payment was made. T v. Bryan (C. C. A. 1908) 165 Fed. 21 Am. Bankr. Rep. 319; Worr Whitney (D. C. 1910) 179 Fed. 24 Am. Bankr. Rep. 749; Forsai Merritt (D. C. 1869) 3 N. B. R Fed. Cas. No. 4,946.

As to transactions between the ners themselves, it is held that w

one partner sells to his copartner his entire interest in the property of the firm, the transfer cannot be impeached as a preference, since the transferee is not a creditor, and the effect of the transfer is a loss to all the creditors of the firm alike. In re Rudnick (D. C. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531; Barnes v. Vetterlein (C. C. 1883) 16 Fed. 759.

33. Rights of preferred creditors as to proving claims.—The provision of section 57g (ante, § 9641), that the claims of preferred creditors shall not be allowed "unless such creditors shall surrender such preferences," is not a penal requirement in such sense that it must be construed strictly. Pirie v. Chicago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. It applies only to transactions which constitute preferences within the meaning of other provisions of the act, where preferences are defined and declared to be voidable. In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159. A claim by a chattel mortgagee to the proceeds of a sale of mortgaged property is not such a claim as will be disallowed until the surrender of an illegal preference. In re Johnson (D. C. 1915) 224 Fed. 180. A provision in bonds of a bankrupt corporation giving holders a contingent right to share in surplus at maturity of the bonds held not to defeat their right to prove as general creditors. In re Interborough Realty Co. (1915) 223 Fed. 646, 139 C. C. A. 300.

Where a creditor files proof of his claim and asks its allowance, and it is opposed on the ground of his having received a preference, and this is found to be the fact, allowance of the claim will be refused or withheld until he shall surrender the preference. In re Flynn & Co. (D. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318; In re Graff (D. C. 1902) 117 Fed. 343, 8 Am. Bankr. Rep. 744; In re Keller (D. C. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hoffman (1900) 2 Nat. Bankr. News, 554; Cookingham v. Morgan (C. C. 1870) 5 N. B. R. 16, Fed. Cas. No. 3,183; Bingham v. Richmond (D. C. 1872) 6 N. B. R. 127, Fed. Cas. No. 1,415. The referee has jurisdiction to determine whether or not a preference has been received when the creditor offers to prove his claim as an unsecured debt. In re Keystone Press (D. C. 1913) 203 Fed. 710, 29 Am. Bankr. Rep. 715. If the claim has been proved and allowed, and it is afterwards discovered that the creditor had been preferred, the claim may be expunged on motion of the trustee and at the cost of the creditor. In re Forsyth (D. C. 1873) 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Wise (1899) 2 Nat. Bankr. News. 151.

A creditor who has received partial satisfaction of his debt, by means of a preference, cannot retain it and prove a claim for the unsatisfied balance. The amount of the preference cannot be treated as a set-off, either to reduce the amount of his claim, or against the dividend to be received thereon, but the amount must be surrendered to the trustee. In re Chaplin (D. C. 1902) 115 Fed. 162, 8 Am. Bankr. Rep. 121; In re Sumner (D. C. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Colton Export & Import Co. (D. C. 1902) 115 Fed. 158, 8 Am. Bankr. Rep. 257; In re Keller (D. C. 1901) 109 Fed. 306, 6 Am. Bankr. Rep. 487; Batchelder & Lincoln Co. v. Whitmore (1903) 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641. And a creditor having both a claim entitled to priority and a common claim cannot so apply a preferential payment received as to reduce or extinguish the common claim and then prove the priority claim in full. In re Henry C. King Co. (D. C. 1902) 113 Fed. 110, 7 Am. Bankr. Rep. 619.

Where it was doubtful whether servants of the bankrupt were entitled to a preference to the amount of $300, under section 64b, cl. 4 (post, § 9648), they could file their claim for a preference to that amount, and for the balance as a general claim. In re Crawford Wollen Co. (D. C. 1915) 218 Fed. 951.

If the creditor will surrender his preference, all taint of fraud arising out of it is removed and he is restored to an equality with all other creditors, and may then prove his entire claim as unsecured. In re Richard (D. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Israel (C. C. 1876) Fed. Cas. No. 7,112; In re Huntenberg (D. C. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697; In re Nathan (1900) 2 Nat. Bankr. News, 611. In fact, a creditor in this position has his option either to make the surrender and take his place in the ranks of the unsecured creditors, or to retain and rely upon the preference received. In re Privett (D. C. 1904) 132 Fed. 592, 13 Am. Bankr. Rep. 151. A secured creditor of a bankrupt, who proves his debt as unsecured, waives his security. In re Burr Mfg. & Supply Co. (1914) 217 Fed. 16, 133 C. C. A. 126, reversing order (D. C. 1913) 209 Fed. 138. A secured creditor of a bankrupt is only required by § 57g (ante, § 9641), to surrender a preference as a condition to the allowance of his claim in case he attempts to have it allowed as an unsecured claim for any sum in excess of the value of his security. In re Keystone Press (D. C. 1913) 203 Fed. 710.

If a creditor comes into the court of bankruptcy to claim a fund which has been paid into court subject to the rights of conflicting claimants, yet if he does not seek to prove his claim as a general creditor, the fund must be paid over to him intact, on his title to it being decided, and without deducting a preference which he had received.

In re West Norfolk Lumber Co. (D. C. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648.

If allowance of the claim is opposed on this ground, it is incumbent upon the trustee to show the actual receipt by the creditor of money, goods, or other property or security which, if retained, will diminish the assets available for general creditors and give the preferred creditor an advantage over the rest. In re Hickey (D. C. 1901) 112 Fed. 287, 7 Am. Bankr. Rep. 282; In re George M. Hill Co. (1904) 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Christensen (1900) 2 Nat. Bankr. News, 695. But if the property preferentially transferred was a note of a third person, the creditor must be charged with the face value of it, without regard to the amount he actually realized on it. In re Chaplin (D. C. 1902) 115 Fed. 162, 8 Am. Bankr. Rep. 121. But the return of unsalable goods to the unpaid vendor of them, under an agreement that they may be exchanged for new and salable stock does not constitute the giving of a preference such that he must account for their value before being allowed to prove his claim. In re Nicholas (D. C. 1903) 122 Fed. 299, 10 Am. Bankr. Rep. 291. If the bankrupt's estate proves sufficient to pay in full the claims of all unpreferred creditors, and leave a surplus, then a creditor who had received a preference, and had been excluded from participation in the division of the estate in bankruptcy because of his refusal to surrender it, will be entitled, as against the bankrupt, to share in such surplus. In re Morton (D. C. 1902) 118 Fed. 908, 9 Am. Bankr. Rep. 508.

34. —— **Creditor's knowledge of intent to prefer.**—Prior to the amendatory act of 1903, the claim of a preferred creditor could not be proved and allowed without surrender of the preference, irrespective of the question whether or not such creditor had reasonable cause to believe that the debtor was insolvent and that a preference was intended or would result. Pirie v. Chicago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; In re Abraham Steers Lumber Co. (1901) 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332; In re Dickson (1901) 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; Mills v. Lewis (1901) 110 Fed. 512, 49 C. C. A. 131, 6 Am. Bankr. Rep. 612; In re Keller (D. C. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Bashline (D. C. 1901) 109 Fed. 965, 6 Am. Bankr. Rep. 194; In re Seckler (D. C. 1901) 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Flick (D. C. 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Alexander (D. C. 1900) 102 Fed. 464, 4 Am. Bankr. Rep. 376; In re Fixen (1900) 102 Fed. 295, C. C. A. 354, 50 L. R. A. 605, 4 Bankr. Rep. 10; In re Sloan (D. 1900) 102 Fed. 116, 4 Am. Bankr. 356; Strobel & Wilken Co. v. K (D. C. 1900) 99 Fed. 409, 3 Am. Ba Rep. 631; In re Fort Wayne Elec Corp. (1900) 99 Fed. 400, 39 C. C 582, 3 Am. Bankr. Rep. 634; In Conhaim (D. C. 1899) 97 Fed. 92 Am. Bankr. Rep. 249; In re Jour (1900) 2 Nat. Bankr. News, 581; I Wise (1899) 2 Nat. Bankr. News, 1 Harris v. Second Nat. Bank (1903) Tenn. 239, 75 S. W. 1053.

But the act of 1903 makes the render of a preference, as a conditio the allowance of the creditor's cl depend upon the preference b "voidable" under the other provis of the act, and hence the claim creditor cannot be disallowed or punged after proof, unless it is sh that the preference would be void in a suit by the trustee, that is, it n be shown that the bankrupt was solvent at the time and that the c itor had reasonable cause to bel that the enforcement of the trans payment, or security would effec preference. In re Frazin (C. C. 1912) 201 Fed. 86, 29 Am. Bankr. 214; In re Sam Z. Lorch & Co. (D 1912) 199 Fed. 944, 28 Am. Ba Rep. 784; Hardy v. Gray (1906) Fed. 922, 75 C. C. A. 562, 16 Bankr. Rep. 387; In re Bloch (1 142 Fed. 674, 74 C. C. A. 250, Am. Bankr. Rep. 748; In re penheimer (D. C. 1905) 140 51, 15 Am. Bankr. Rep. 267; In Pettingill & Co. (D. C. 1905) Fed. 218; In re Ratliff (D. C. 1 107 Fed. 80, 5 Am. Bankr. Rep. But if a given payment received creditor without knowledge of in vency need not be surrendered be proof, not being a preference within bankruptcy act because the resul the whole transaction was to incr the net indebtedness to the cred the same payment, received with kn edge of insolvency, is not a prefer and need not be surrendered. In Henry C. King Co. (D. C. 1902) Fed. 110, 7 Am. Bankr. Rep. 619.

35. —— **Surrender of preference.**— entitle a preferred creditor to p his claim, the "surrender" of the p erence must be voluntary or in sponse to the trustee's mere dem and not forced by litigation. In Greth (D. C. 1902) 112 Fed. 97 Am. Bankr. Rep. 598; In re Ow (D. C. 1901) 109 Fed. 623, 6 Bankr. Rep. 454; In re Israel (C 1876) Fed. Cas. No. 7,112; In re vidson (D. C. 1870) 3 N. B. R. Fed. Cas. No. 3,599; In re Richt Estate (C. C. 1870) 4 N. B. R. Fed. Cas. No. 11,803; In re To (D. C. 1870) 4 N. B. R. 52, Fed. No. 14,094; In re Ayers (D. C. 1 Fed. Cas. No. 685; In re Leland (D

1874) 9 N. B. R. 209, Fed. Cas. No. 8,230; In re Montgomery (D. C. 1869) 3 N. B. R. 374, Fed. Cas. No. 9,728; In re Stephens (D. C. 1872) 6 N. B. R. 533, Fed. Cas. No. 13,365; In re Graves (D. C. 1881) 9 Fed. 816; In re Drummond (C. C. 1868) Fed. Cas. No. 4,094; Phelps v. Sterns (D. C. 1870) 4 N. B. R. 34, Fed. Cas. No. 11,080; In re Scott (D. C. 1870) 4 N. B. R. 414, Fed. Cas. No. 12,518; In re Forsyth (D. C. 1873) 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Cramer (D. C. 1875) 13 N. B. R. 225, Fed. Cas. No. 3,345; Burr v. Hopkins (C. C. 1875) 12 N. B. R. 211, Fed. Cas. No. 2,192; In re Riorden (D. C. 1876) 14 N. B. R. 332, Fed. Cas. No. 11,852. This rule applies in cases where the transaction is tainted by fraud, but a creditor who has in good faith received a preference, which is voidable under the bankruptcy law only because given within four months prior to the filing of the petition, and who has in good faith retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, may still prove the debt so voidably preferred, notwithstanding the statutory provision concerning the "surrender" of preferences. Keppel v. Tiffin Sav. Bank (1905) 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, 13 Am. Bankr. Rep. 552; Page v. Rogers (1909) 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Streeter v. Jefferson County Nat. Bank (1893) 147 U. S. 36, 13 Sup. Ct. 236, 37 L. Ed. 68; In re Elletson Co. (D. C. 1912) 193 Fed. 84, 28 Am. Bankr. Rep. 434; In re John A. Baker Notion Co. (D. C. 1910) 180 Fed. 922, 24 Am. Bankr. Rep. 808; In re Clark (D. C. 1910) 176 Fed. 955, 24 Am. Bankr. Rep. 388; In re Otto F. Lange Co. (D. C. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; In re Baker (1900) 2 Nat. Bankr. News, 195; In re Newcomer (D. C. 1878) 18 N. B. R. 85, Fed. Cas. No. 10,148; In re Cadwell (D. C. 1883) 17 Fed. 693; In re Currier (D. C. 1875) 13 N. B. R. 68, Fed. Cas. No. 3,492; In re Cahill (D. C. 1912) 208 Fed. 193; Union Cent. Life Ins. Co. v. Drake (C. C. A. 1914) 214 Fed. 536.

If the preference given consisted of a payment of money, it must be paid over to the trustee in bankruptcy, and an offer by the creditor to allow the amount of the preference from any dividend payable to him on his claim is not sufficient. In re Flick (D. C. 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465. The costs of legal proceedings to vacate the preference may be charged against the preferred creditor if the circumstances of the case make it equitable to do so. In re Moyer (D. C. 1899) 97 Fed. 324. Where a conveyance of land is surrendered as having been preferential, the creditor is entitled to be reimbursed for money expended in paying off incumbrances on the property. Crandall v. Coats (D. C. 1905) 133 Fed. 965, 13 Am. Bankr. Rep. 712. Where the property transferred was a note of a third person, the statute is satisfied by a return of the note itself, and the trustee cannot refuse to receive it and demand its face value in cash. Dickinson v. Security Bank of Richmond (1901) 110 Fed. 353, 49 C. C. A. 84, 6 Am. Bankr. Rep. 551.

Where the court in a bankruptcy proceeding found that the application of a deposit by the bankrupt on a debt due a bank constituted a preference, its decree properly authorized the bank, upon payment of the deposit, to file a new or amended claim for the sums found to be preferences. In re Wright-Dana Hardware Co. (1914) 212 Fed. 397, modifying decree (D. C. 1913) 207 Fed. 636. The surrender of a chose in action must be completed by such indorsements or other forms of assignment as may be necessary to pass title. Traders' Ins. Co. v. Mann (1903) 118 Ga. 381, 45 S. E. 426.

Where petitioner's claim against a bankrupt was disallowed because it had received a preference of a $1,500 automobile, and a claim against M., and the $1,500 having been recovered and paid, and petitioner having offered to surrender the claim against M. as worthless, a petition to amend and prove its claim should thereafter be considered on the basis of a creditor who had received and surrendered a preference. In re Hamilton Automobile Co. (1913) 209 Fed. 596, 126 C. C. A. 418. A written waiver of a lien may be a sufficient surrender of it. In re Bolinger (D. C. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171. If the creditor has instituted proceedings in a state court to establish or enforce a lien, they must be abandoned or dismissed as a part of the surrender of his preference. In re Heinsfurter (D. C. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 113; Buckingham v. Schuylkill Silk & Plush Co. (1902) 38 Misc. Rep. 305, 77 N. Y. Supp. 857.

The surrender of a preference must be made to the trustee in bankruptcy, and not to the bankrupt or any other person. In re Bailey (D. C. 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; In re Currier (D. C. 1875) Fed. Cas. No. 3,492. Pending the appointment and qualification of a trustee, the proof of debt must be postponed, and the preferred creditor cannot vote in the election for trustee. In re Parham (D. C. 1878) 17 N. B. R. 300, Fed. Cas. No. 10,712. Ordinarily it is intended that the surrender shall be made by the creditor himself. But where the preference consisted in a deed of trust in the nature of a mortgage, it is sufficient if the trustee therein surrenders the property covered. In re Clarke (D. C. 1874) Fed. Cas. No. 2,843.

Where the question of preference has been contested, and decided by the referee in bankruptcy adversely to the

creditor, the referee should fix a reasonable time within which the creditor may surrender his preference and have his claim allowed. In re Oppenheimer (D. C. 1905) 140 Fed. 51, 15 Am. Bankr. Rep. 267. And where the creditor, on demand of the trustee in bankruptcy, has promised and agreed to pay over to him the amount of a preferential payment received by him, which promise he afterwards fulfills, he is not debarred from having his proof of claim allowed by the fact that, for the convenience of counsel, the actual payment of the money was delayed for a few days beyond the close of a year after the adjudication in bankruptcy. Hutchinson v. Otis, Wilcox & Co. (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

36. —— **Separate or independent claims.**—The provision of the bankruptcy act relating to the surrender of preferences, as a condition to the allowance of claims, is aimed at the preferred creditor, rather than the particular debt sought to be proved; and the sum total of the bankrupt's indebtedness to that creditor at the time the preference was given is affected by it, no matter what may be the nature and number of the items of that indebtedness, so that, although the preference was given in discharge of or as security for one particular debt, yet the creditor cannot be allowed to prove a claim upon any other debt, existing at that time, however separate and distinct, unless he will surrender the preference. In re Mayo Contracting Co. (D. C. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; Dunn v. Gans (1904) 129 Fed. 750, 64 C. C. A. 278, 12 Am. Bankr. Rep. 316; In re Delling (D. C. 1903) 124 Fed. 852, 10 Am. Bankr. Rep. 688; Livingstone v. Heineman (1903) 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re E. O. Thompson's Sons (D. C. 1903) 121 Fed. 607; In re Lyon (1903) 121 Fed. 723, 58 C. C. A. 143, 10 Am. Bankr. Rep. 25; Swarts v. Fourth Nat. Bank (1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Dickson (1901) 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Rogers Milling Co. (D. C. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Teslow (D. C. 1900) 104 Fed. 229, 4 Am. Bankr. Rep. 757; In re Flick (D. C. 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Gillette (D. C. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; In re Conhaim (D. C. 1899) 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Beswick (1900) 2 Nat. Bankr. News, 808; In re Myers (1900) 2 Nat. Bankr. News, 765; In re Richter's Estate (C. C. 1870) 4 N. B. R. 221, Fed. Cas. No. 11,803; In re Kingsbury (D. C. 1869) 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Barnes (D. C. 1874) Fed. Cas. No. 1,013; State Nat. Bank v. Monroe Cotton Press Co. (1887) 39 La. Ann. 834, 2 South. 605. CONTRA, In re Hurst (D. C.) 188 Fed. 707, 26 Am. Rep. 781; In re Wise (1899) Bankr. News, 151; In re Co (D. C. 1875) 12 N. B. R. 110 Cas. No. 3,079; Whiston v. Smi C. 1872) Fed. Cas. No. 17,52 re Stephens (D. C. 1872) 6 N. 533, Fed. Cas. No. 13,365; Cor Woodward (C. C. 1879) Fed. Ca 3,223; Cramton v. Tarbell (1878) Fed. Cas. No. 3,349. creditor having several claims the same debtor, who receives ment on account without speci propriation, under circumstances ing it a preference, cannot app payment to the extinguishment o of the claims, and then prove th ers as unsecured. Kimball v. Rosenham Co. (1902) 114 Fed. C. C. A. 33, 7 Am. Bankr. Rep C. S. Morey Mercantile Co. v. S (1902) 114 Fed. 447, 52 C. C. A. Am. Bankr. Rep. 670; Dunn v. (1904) 129 Fed. 750, 64 C. C. A 12 Am. Bankr. Rep. 316; In re haim (D. C. 1899) 97 Fed. 923, Bankr. Rep. 249; In re Kingsbu C. 1869) 3 N. B. R. 317, Fed No. 7,816. And the same princip plies where part of the original edness has been transferred or ed by the creditor to a third p no part of it can be allowed as a against the estate in bankruptcy the preference has been surre Swarts v. Fourth Nat. Bank (190 Fed. 1, 54 C. C. A. 387, 8 Am. Rep. 673. But this applies only state of the accounts between th ties at the time the preference w en. A creditor who has rece preference is not thereby debarre proving a claim in bankruptcy on arate and new debt created aft giving of the preference, and to the preference could have no re In re Wolf & Levy (D. C. 190 Fed. 127, 10 Am. Bankr. Rep. 1 re Abraham Steers Lumber Co. 112 Fed. 406, 50 C. C. A. 310, Bankr. Rep. 332; In re Weissn C. 1902) 115 Fed. 421, 8 Am. Rep. 177; In re Jourdan (1900) Bankr. News, 581; In re Arnold 1868) 2 N. B. R. 160, Fed. Cas. N But where notes given by a deb close an account are still held creditor and unpaid at the time ther indebtedness on account i tracted, both the notes and the a will constitute the indebtedness due, and a payment of the notes after, when the debtor is insolve within four months prior to his ruptcy, will constitute the givin preference, which must be surre before the account can be prove allowed. In re Jones (D. C. 190 Fed. 128, 10 Am. Bankr. Rep. 5 re Meyer (D. C. 1902) 115 Fed. Am. Bankr. Rep. 598.

37. **Proceedings to recover ence—Jurisdiction.**—When a c

who is alleged to have received a preference submits himself to the jurisdiction of the court of bankruptcy, the question of his rights and liabilities may be determined summarily. In re Black (D. C. 1868) 1 N. B. R. 353, Fed. Cas. No. 1,457. And see Giveen v. Smith (C. C. 1871) Fed. Cas. No. 5,467. But the trustee cannot require a creditor in this situation, who has not in any way become a party to the bankruptcy proceedings, to appear before the referee and litigate the question of preference, but he must proceed by plenary suit against the creditor in a proper court. In re Keystone Press (D. C. 1913) 203 Fed. 710, 29 Am. Bankr. Rep. 715; In re F. M. & S. Q. Carlile (D. C. 1912) 199 Fed. 612, 29 Am. Bankr. Rep. 373. Proceedings of a secured creditor to subject the mortgaged property of the bankrupt to the payment of its secured debt held not a general appearance authorizing a referee to determine whether a secured creditor had received a preference unless the creditor claimed to prove an unpaid balance remaining after applying the proceeds of the mortgaged property to the secured debt as an unsecured claim. In re Keystone Press (D. C. 1913) 203 Fed. 710.

The court of bankruptcy has jurisdiction of an action at law for the purpose of determining the question of an alleged preference. Kraver v. Abrahams (D. C. 1913) 203 Fed. 782, 29 Am. Bankr. Rep. 365; Fenlon v. Lonergan (1857) 29 Pa. 471; In re Mallory (D. C. 1871) 6 N. B. R. 22, Fed. Cas. No. 8,991. And an action by a trustee against a creditor to recover an alleged preference, begun by summons and complaint, is an action at law within the jurisdiction of the bankruptcy court, notwithstanding an allegation in the complaint of the conversion of the property by the creditor. Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. The federal court is not prevented from taking jurisdiction by the fact that the alleged preference consisted of a confessed judgment, under which there has been a levy and sale and a distribution of the proceeds to lien creditors. First Nat. Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542. But if the proceeds of a sale remain in the custody of the state court, the proper course for the trustee is to file an intervening petition, asking that such proceeds should be ordered delivered over to him. Bear v. Chase (C. C. A. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746. And in any case the fund, if recovered, must be turned over to the bankruptcy court and administered by it as a part of the bankrupt's estate. Lovell v. Latham & Co. (C. C. 1911) 186 Fed. 602, 26 Am. Bankr. Rep. 599.

38. —— **Right of action.**—Since a trustee in bankruptcy represents the whole body of creditors, and not merely lien claimants or the bankrupt, it is his right and duty to contest the validity of any conveyance, mortgage, payment, or other transfer of property by which one creditor has obtained a preference over others, and he is the only proper party to bring the necessary action. In re Metzger (D. C. 1868) 2 N. B. R. 355, Fed. Cas. No. 9,510; Balfour v. Wheeler (D. C. 1883) 15 Fed. 229. Such an action cannot be brought by a creditor who has not made himself a party to the bankruptcy proceedings. Smith v. Brainerd (1887) 37 Minn. 479, 35 N. W. 271. An attack by a bankruptcy trustee on a transfer as a voidable preference, if made within the four-month period, is not affected by state laws or decisions which apply only to attacks on other grounds. Williams v. German-American Trust Co. (1915) 219 Fed. 507, 135 C. C. A. 257. The amendment of 1910 to section 47 (ante, § 9631), authorizes the trustee to challenge any security or conveyance that a lien or judgment creditor might have challenged had bankruptcy not intervened. Corey v. Blackwell Lumber Co. (1913) 135 P. 742, 24 Idaho, 642.

The proper defendant in such an action is the party receiving the alleged preference or who is to be benefited by it. Gray v. Brunold (1903) 140 Cal. 615, 74 Pac. 303. It is immaterial that such party is a municipal corporation. Painter v. Napoleon Tp. (D. C. 1907) 156 Fed. 289, 19 Am. Bankr. Rep. 412.

It is not necessary to the trustee's right of action that the creditor should have actually received money or property, but a preference, voidable at the suit of the trustee, is given by the creation of a security, or by a release of the debtor's equity of redemption in property. Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955. Or by a transfer of a claim against a third person, which is credited upon the price of the bankrupt's stock in trade when bought by the preferred creditor. Hackney v. Raymond Bros. Clarke Co. (1903) 68 Neb. 624, 94 N. W. 822. Where the trustee, alleging that a sale by the bankrupt just prior to his adjudication, was fraudulent, brings an action against the purchaser for the value of the goods, and receives money in settlement of such claim, he is not thereby precluded from following the money received by the bankrupt for the goods into the hands of preferred creditors. Lampkin v. People's Nat. Bank (1902) 98 Mo. App. 239, 71 S. W. 715.

A previous demand for the return or surrender of a preference is not a condition precedent to the trustee's right to sue for its recovery or annulment. Eau Claire Nat. Bank v. Jackman (1907) 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596, 17 Am. Bankr. Rep. 675; Boonville Nat. Bank v. Blakey (1906) 166 Ind. 427, 76 N. E. 529; Capital Nat. Bank v. Wilkerson (1905) 36 Ind.

App. 467, 75 N. E. 837; Chicago Title & Trust Co. v. Moody (1908) 233 Ill. 634, 84 N. E. 656; Bowler v. First Nat. Bank (1907) 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

39. —— **Form of action or proceeding.**—Where a trustee in bankruptcy seeks to recover a preference, but without showing the need of an injunction or discovery or accounting, or of specific performance or the reformation or cancellation of any instrument, but merely asks a decree for the amount of the preference, he has an adequate remedy at law. Detroit Trust Co. v. Old Nat. Bank (1908) 155 Mich. 61, 118 N. W. 729; Boonville Nat. Bank v. Blakey (1906) 166 Ind. 427, 76 N. E. 529; Allen v. Gray (1911) 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B, 123. But if it is necessary to his case that he should avoid a conveyance, transfer, or incumbrance apparently good, or a judgment valid on its face, his proper course is to sue in equity, and it is none the less an equitable action because the ultimate relief sought is a money judgment. Dyer v. Kratzenstein (1905) 103 App. Div. 404, 92 N. Y. Supp. 1012; Lesser v. Bradford Realty Co. (1906) 116 App. Div. 212, 101 N. Y. Supp. 571; Andrews v. Mather (1902) 134 Ala. 358, 32 South. 738; In re Swenk (C. C. 1881) 9 Fed. 643. A trustee's suit to recover a prohibited preference is analogous to a suit by a judgment creditor to set aside a fraudulent conveyance, and hence its maintenance as a suit in equity is not objectionable on the ground of the existence of an adequate remedy at law. Pond v. New York Nat. Exch. Bank (D. C. 1903) 124 Fed. 992, 10 Am. Bankr. 343; Johnson v. Hanley (D. C. 1911) 188 Fed. 752, 26 Am. Bankr. Rep. 748; Goodenow v. Milliken (D. C. 1871) Fed. Cas. No. 5,535; Houghton v. Stiner (1904) 92 App. Div. 171, 87 N. Y. Supp. 10. CONTRA, Baden v. Bertenshaw (1903) 68 Kan. 32, 74 Pac. 639; Brock & Spight v. Oliver (1907) 149 Ala. 93, 43 South. 357. But where a suit in equity is brought by a trustee to avoid an alleged preferential transfer, and to recover a fund to be administered by the bankruptcy court, one claiming a lien on the fund if recovered cannot intervene and enforce such lien by cross-bill, for the rule is that the subject-matter of a cross-bill must be a defense to the original bill, or essentially connected with and necessary to a complete determination of the original suit. Lovell v. Latham & Co. (C. C. 1911) 186 Fed. 602, 26 Am. Bankr. Rep. 599.

Where the action is maintained in the bankruptcy court, it must be a plenary suit, and not a mere summary hearing, unless the defendant will consent; but if he is properly brought into court, it is competent for him to waive an objection of this kind, and in that case the issue may be determined in any appropriate form of proceeding. In (D. C. 1905) 137 Fed. 694, Bankr. Rep. 715; In re Ulrich 1869) Fed. Cas. No. 14,327.

40. —— **Pleading.**—In the t bill or complaint to avoid or re preference, it is not necessary t facts sufficient to constitute a c action to set aside a fraudulent ance of real estate, all that is sary being sufficient allegation preference given by an insolven four months of the filing of the in bankruptcy. Marion State Gossett (1911) 175 Ind. 211, 9 996; Lesser v. Bradford Rea (1906) 116 App. Div. 212, 10 Supp. 571. The plaintiff must n show his own capacity to sue, is done by alleging the filing petition in bankruptcy, the adju of the bankrupt, and the appo and qualification of the plaintiff tee, together with an allegatio mand and refusal of surrender preference. Lesser v. Bradford Co. (1906) 116 App. Div. 212, Y. Supp. 571; Capital Nat. Wilkerson (1905) 36 Ind. App. N. E. 837. Aside from this, t essential allegations of the c are (1) that the bankrupt wa vent when the alleged prefere given; (2) that it was with months prior to the bankrupt that the effect of the enforce the judgment or transfer will b able the defendant to obtain a percentage of his debt than a creditor of the same class; defendant had reasonable groun lieve that a preference woul from the transaction. The omi any one of these allegations v der the complaint demurrable. v. Napoleon Tp. (D. C. 1907) 1 289, 19 Am. Bankr. Rep. 412; son v. Lederer, Strauss & Co. 128 Iowa, 286, 103 N. W. 794.

The allegation of the debtor' vency must be specific; it is n cient to state that he was in fai cumstances and unable to m debts in full. Martin v. Bigelow 36 Misc. Rep. 298, 73 N. Y. Su And it is necessary to show, e or by necessary allegation, t payment was made or propert ferred out of the estate of th rupt. Richter v. Nimmo (19 App. Div. 422, 71 N. Y. Supp. 5

As to the allegation that the ence, if permitted to stand, wil the defendant to obtain a larg centage of his claim than othe tors of the same class, this is necessary. Schreyer v. Citize Bank (1902) 74 App. Div. 47 Y. Supp. 494; West v. Bank homa (1906) 16 Okl. 329, 469; Lesser v. Bradford Re (1906) 116 App. Div. 212, 10 Supp. 571; Crooks v. Peopl Bank (1899) 46 App. Div. 33

Y. Supp. 604. To show this, it is necessary to insert allegations disclosing the existence of other creditors, general unsecured creditors who are entitled to participate in the distribution of the estate. Gering v. Leyda (1911) 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137. And it has been held that the bill is demurrable if it fails to allege that there are not sufficient assets to pay all the creditors who have filed claims against the estate. Lesser v. Bradford Realty Co. (1905) 47 Misc. Rep. 463, 95 N. Y. Supp. 933. Or that if the complaint alleges that the schedules of the bankrupt show a certain amount of unsecured claims, it must also show the amount of preferred and secured claims. Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. But later and perhaps better considered decisions are to the effect that the trustee need not allege that the assets of the estate are not sufficient to pay the creditors in full. Kraver v. Abrahams (D. C. 1913) 203 Fed. 782, 29 Am. Bankr. Rep. 365. Or even that any creditor has filed a claim in the bankruptcy proceeding or any fact showing the necessity for recovering the alleged preference. Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955. And the value of the debtor's property and the extent of his indebtedness need not be set out, as these are matters of evidence. Crooks v. People's Nat. Bank (1899) 46 App. Div. 335, 61 N. Y. Supp. 604.

It is strictly necessary to aver that the defendant had reasonable cause to believe that the enforcement of the judgment or transfer would result in giving him a preference. Greene v. Montana Brewing Co. (1903) 28 Mont. 380, 72 Pac. 751; Johnson v. Anderson (1903) 70 Neb. 233, 97 N. W. 339; Peck v. Connell (1902) 21 Pa. Super. Ct. 22. But it is not necessary to aver a reason why he had such cause of belief or to state the evidence of it. Crooks v. People's Nat. Bank (1899) 46 App. Div. 335, 61 N. Y. Supp. 604.

It is not sufficient to allege that the transaction in question was fraudulent, or that there was a fraudulent intent on the part of the debtor or of the creditor; this kind of allegation cannot take the place of specific statements of the insolvency of the debtor and of the effect of the transaction as a preference. In re Leech (1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; Severin v. Robinson (1901) 27 Ind. App. 55, 60 N. E. 966; Hallack v. Tritch (C. C. 1878) 17 N. B. R. 293, Fed. Cas. No. 5,956.

But on the other hand, if all the elements of a voidable preference are pleaded, no allegation of fraud is needed, as the statute does not require the presence of any other fraud than such as is implied in the particular kind of transactions which it denounces as preferential. Chism v. Bank of Friars Point (Miss. 1900) 27 South. 610; Thompson v. First Nat. Bank (1904) 84 Miss. 54, 36 South. 65.

In an action at law by a trustee in bankruptcy to recover a preference, the complaint is not demurrable merely because it demands judgment for too large a sum. Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712.

41. —— **Defenses.**—Ignorance of the law is no defense to a creditor who is sued for the recovery of an illegal preference. Martin v. Toof (D. C. 1870) Fed. Cas. No. 9,167. Nor a decree of a land court granting registration of title to the property in question under the conveyance assailed as preferential, especially if the defendant is not a bona fide purchaser taking in reliance on the registered title. Morris v. Small (C. C. 1908) 160 Fed. 142, 20 Am. Bankr. Rep. 138. Nor can the preferred creditor resist the trustee's action on the ground that he has expended money in the custody and care of the property in question, his claim for compensation being one which must be presented for allowance against the estate in bankruptcy. In re Nechamkus (D. C. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189.

The defendant in a suit to recover an alleged preference may defend on the ground that his taking of the property was merely in pursuance of his rescission of a contract by which he had sold it to the bankrupt. Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921. Or he may escape liability by repudiating all claim to the property or its proceeds. Giveen v. Smith (C. C. 1870) Fed. Cas. No. 5,-466. Or he may show that the payment or transfer was not received from the bankrupt, but from a third person. North v. Taylor (1901) 61 App. Div. 253, 70 N. Y. Supp. 339.

42. —— **Set-off of amount of new credit.**—The provision of subdivision "c" of this section, with reference to the set-off of new credits, entitles a preferred creditor to a deduction of the amount of the new credit from a preference which he is required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover the preference. Kahn v. Cone Export & Commission Co. (1902) 115 Fed. 290, 53 C. C. A. 92, 8 Am. Bankr. Rep. 157; Gans v. Ellison (1902) 114 Fed. 734, 52 C. C. A. 366, 8 Am. Bankr. Rep. 153; McKey v. Lee (1901) 105 Fed. 923, 45 C. C. A. 127, 5 Am. Bankr. Rep. 267; Peterson v. Nash Bros. (1901) 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep.

181; In re Southern Overalls Mfg. Co. (D. C. 1901) 111 Fed. 518, 6 Am. Bankr. Rep. 633; In re Ryan (D. C. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396; In re Seckler (D. C. 1901) 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Soldosky (D. C. 1901) 111 Fed. 511, 7 Am. Bankr. Rep. 123. CONTRA, see In re Keller (D. C. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Christensen (D. C. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; In re Abraham Steers Lumber Co. (D. C. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315.

It is the intention of this provision that the preference shall have been given in settlement and discharge of an existing debt, and that a new and unconnected transfer of property on credit shall have ensued. In re John Morrow & Co. (D. C. 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Bailey (D. C. 1901) 110 Fed. 928, 7 Am. Bankr. Rep. 26. Where a mortgagee surrendered a portion of the proceeds of certain insurance to the mortgagor, that it might be repaid to the mortgagee and credited on an unsecured debt, the transaction was not such that, on the repayment being declared a preference, the mortgagee could claim the right then to credit it against the mortgage debt. Stearns Salt & Lumber Co. v. Hammond (1914) 217 Fed. 559, 133 C. C. A. 411. Deposits of an insolvent customer after the bank cashier has forbidden payment of checks against the deposit, and but a few hours before an involuntary petition in bankruptcy against the customer, constitute a voidable preference, and cannot be allowed by way of set-off against the customer's debt to the bank. Mechanics' & Metals Nat. Bank of City of New York v. Ernst (1913) 34 Sup. Ct. 22, 231 U. S. 60, 58 L. Ed. 121, affirming decree Ernst v. Mechanics' & Metals Nat. Bank of City of New York (1912) 201 Fed. 664, 120 C. C. A. 92.

Where preferential payments have been made on an account for goods sold, and the trustee demands their surrender before the claim shall be allowed, the creditor cannot set off the unpaid balance. In re Christensen (D. C. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; In re Ryan (D. C. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396. Payments made by a bankrupt, who was general manager of defendant, to it on overdrafts, which were retained, held voidable preferences, subject to defendant's right to set off subsequent credits made in good faith to the bankrupt and without security. Rogers v. American Halibut Co. (1913) 103 N. E. 689, 216 Mass. 227.

It is necessary that the property for which the credit was given should have been acquired by the bankrupt from the preferred creditor himself. Carleton Dry Goods Co. v. Rogers (190 Fed. 14, 57 C. C. A. 34, 9 Am. Rep. 787. But it is not necessa the property should remain a p the debtor's estate until his ad tion in bankruptcy, or that it be used in payment of preferred Kaufman v. Treadway (1904) S. 271, 25 Sup. Ct. 33, 49 L. E The creditor claiming this right off must allege and show all th essential to entitle him to it, th as if he sought to maintain a se action on his claim. In re Oliv C. 1901) 109 Fed. 784, 6 Am. Rep. 626.

43. —— **Burden of proof an dence.**—In an action to set aside cover a transfer, incumbrance, c ment, alleged to constitute an u preference, the burden of proof the trustee in bankruptcy to es the existence of each of the st elements of a voidable pref Carey v. Donohue (1913) 209 Fe 126 C. C. A. 254; Northern Neck Bank v. Smith (1913) 205 Fe 124 C. C. A. 207; Mayes v. Paln C. A. 1913) 208 Fed. 97; No Neck State Bank v. Smith (191 Fed. 894, 30 Am. Bankr. Rep. 5 re Dorr (C. C. A. 1912) 196 Fe 28 Am. Bankr. Rep. 505; Kimm Farr (C. C. A. 1911) 189 Fed. 2 Am. Bankr. Rep. 818; Bro Streicher (D. C. 1910) 177 Fe 24 Am. Bankr. Rep. 267; Cr Penny (D. C. 1880) 2 Fed. 187 sons v. Topliff (1876) 119 Mas 14 N. B. R. 547; Burnham v. Ft. Grocery Co. (1909) 144 Iowa, 5 N. W. 220; Getman v. Second Bank (1882) 89 N. Y. 136; St v. Gebo (1905) 48 Misc. Rep. 3 N. Y. Supp. 781; Keith v. Gett Nat. Bank (1903) 23 Pa. Super. Wickwire v. Webster City Sav. (1911) 153 Iowa, 225, 133 N. W Hackney v. First Nat. Bank (19 Neb. 588, 94 N. W. 805, 98 N. W Kentucky Bank & Trust Co. v. ett (Okl. 1914) 143 Pac. 338.

To show the fact that the bank law has become applicable to the action in question, by reason debtor's having been adjudged rupt as of a certain date, a p certified copy of the adjudicat bankruptcy is admissible. Cal Farmers' & Mechanics' Bank 99 Mo. App. 509, 73 S. W. 1098; son v. Farber Bank (1904) 10 App. 605, 80 S. W. 327. And proper to show that the defe attorney was present when the ruptcy proceedings were had, as ing notice thereof. Calkins v. ers' & Mechanics' Bank (1903) App. 509, 73 S. W. 1098. But t that the particular transactio which the trustee's suit is base alleged as an act of bankruptcy petition in bankruptcy, and th

adjudication was based on it, is not conclusive proof against the defendant that it constituted an illegal preference, because the issues in the two proceedings are not the same. Hussey v. Richardson-Roberts Dry Goods Co. (1906) 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Dunkle (D. C. 1870) 7 N. B. R. 72, Fed. Cas. No. 4,-160. But on the other hand, a decree of a state court adverse to the creditor, in a suit between the trustee and himself, is a conclusive estoppel upon the creditor if he seeks afterwards to prove his claim in the bankruptcy proceedings. In re Dakin (D. C. 1879) 19 N. B. R. 181, Fed. Cas. No. 3,539.

One thing absolutely essential to constitute a voidable preference is that the debtor should have been insolvent at the time it was given, and the trustee has the burden of proving this fact. In re Gaylord (D. C. 1915) 225 Fed. 234; Shuetz v. Walter Boyt Saddlery Co. (Iowa, 1914) 147 N. W. 897; In re F. M. & S. Q. Carlile (D. C. 1912) 199 Fed. 612, 29 Am. Bankr. Rep. 373; In re Arkonia Fabric Mfg. Co. (D. C. 1907) 151 Fed. 914, 18 Am. Bankr. Rep. 470; Edwards v. Carondelet Milling Co. (1904) 108 Mo. App. 275, 83 S. W. 764; J. W. Crancer & Co. v. Wade (1910) 26 Okl. 757, 110 Pac. 778. But in an action by the trustee to recover money paid by the bankrupt prior to his adjudication in alleged satisfaction of a debt, where the question at issue is whether any such debt existed in fact, it is not necessary to show that there were unsatisfied creditors at the time the payment was made, or at the time of bringing suit or of the trial. Breckons v. Snyder (1905) 211 Pa. 176, 60 Atl. 575.

The mere fact that the debtor was afterwards adjudged bankrupt raises no presumption that he was insolvent at any given time within four months prior to the filing of the petition. In re Chappell (D. C. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; Swartz v. Frank (1904) 183 Mo. 438, 82 S. W. 60. And the giving of a confession of judgment does not of itself raise a presumption of insolvency. In re Dibblee (D. C. 1869) 2 N. B. R. 617, Fed. Cas. No. 3,884. But the verified schedules of the bankrupt, containing a presumptively complete list of his assets and liabilities, are admissible in evidence on the question of his insolvency at the time of the transaction in suit, at least if it occurred not very long before the bankruptcy and without opportunity for any great change in either property or debts. In re Mandel (1905) 135 Fed. 1021, 68 C. C. A. 546; Lynch v. Bronson (1908) 80 Conn. 566, 69 Atl. 538; Summerville v. Stockton Milling Co. (1904) 142 Cal. 530, 76 Pac. 243; Hackney v. Raymond Bros. (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800. But see, CONTRA, Halbert v. Pranke (1904) 91 Minn. 204, 97 N. W. 976; Hibbs v. Marpe (1901) 84 Minn. 10, 86 N. W. 612; Batchelder v. Home Nat. Bank (1914) 218 Mass. 420, 105 N. E. 1052.

The admission in evidence, in an action by a trustee in bankruptcy to recover an alleged preferential payment, of the inventory and appraisement made in the bankruptcy proceeding, held not prejudicial to defendant, where the testimony of a witness also introduced by plaintiff placed a much higher valuation on the property than that shown by the appraisement. Bergdoll v. Harrigan (1914) 217 Fed. 943, 133 C. C. A. 615. The bankrupt's books of account are competent evidence on this issue, to which either party may have recourse, and while their showing as to the debtor's solvency or insolvency is not conclusive, yet it is ordinarily important evidence and entitled to much weight. Grandison v. National Bank of Commerce (D. C. 1915) 220 Fed. 981; Ernst v. Mechanics' & Metals Nat. Bank (D. C. 1911) 200 Fed. 295; In re Docker-Foster Co. (D. C. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584; Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800.

The bankrupt may also be called as a witness in the trustee's suit, and his testimony may be received concerning his financial condition at the date in question; and if the giving of a preference excites a suspicion of collusion between the bankrupt and the preferred creditor, or of a desire on the part of the former to aid and shield the latter, this only goes to the bankrupt's credibility, not his competency. Supplee v. Hall (1902) 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188; Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921; Otis v. Hadley (1873) 112 Mass. 100. And it is proper and permissible for the trustee in bankruptcy to testify as to the value of the assets of the bankrupt coming into his hands, the amount of debts proved, the amount he realized at a sale at auction of the bankrupt's assets, and other like matters, as all these matters have a tendency to show the bankrupt's solvency or insolvency at the time of the alleged preference, although of course they must be considered in connection with any changes in his financial condition which may be shown to have occurred in the interval. Ridge Ave. Bank v. Studheim (1906) 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 467, 75 N. E. 837; Lynch v. Bronson (1908) 80 Conn. 566, 69 Atl. 538; Coolidge v. Ayers (1905) 77 Vt. 448, 61 Atl. 40. But see Cullinane v. State Bank (1904) 123 Iowa, 340, 98 N. W. 887.

Where a grain company used the proceeds of a sale of its elevator to

pay a debt to a bank, in an action by its trustee in bankruptcy to recover such amount from the bank as an unlawful preference, evidence by farmers who had sold grain to the company that their checks had not been honored by such bank when presented after the sale is incompetent to show that the payment of the debt was an illegal preference, and does not show that the bank had knowledge of the transactions with the farmers, but such evidence is competent as against payments to the bank after the checks were presented, if such payments were not made in the usual course of business, or were made for the purpose of giving the bank a preference. Chisholm v. First Nat. Bank (1912) 176 Ill. App. 382. Where the validity of a mortgage is in issue, it is proper to show that, on the day following its execution, the mortgagor made a voluntary conveyance to his son of substantially all his property. Supplee v. Hall (1902) 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

Where defendant permitted a bankrupt's goods to be sold under execution for an amount less than defendant's claim, evidence of what the goods brought at the sale was admissible in a suit by the debtor's trustee in bankruptcy to recover the preference thereby obtained by defendant as bearing on the question whether defendant knew the debtor was insolvent at the time of the attachment. Patterson v. Baker Grocery Co. (Or. 1914) 144 P. 673.

The burden is on the trustee to establish the fact that the intention of the debtor in the transaction was to give a preference. Debus v. Yates (D. C. 1910) 193 Fed. 427, 30 Am. Bankr. Rep. 823; Stevens v. Oscar Holway Co. (D. C. 1907) 156 Fed. 90, 19 Am. Bankr. Rep. 399; Whitwell v. Wright (1910) 136 App. Div. 246, 120 N. Y. Supp. 1065; Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955. Such intention may be proved by circumstantial evidence, all the circumstances which go to to show the intent being considered. Little v. Alexander (1874) 21 Wall. 500, 22 L. Ed. 625; Atherton v. Emerson (1908) 199 Mass. 199, 85 N. E. 530; Wills v. Venus Silk Glove Mfg. Co. (1915) 156 N. Y. Supp. 115. The declarations of the bankrupt at and prior to the time of the transaction in question may also be shown. Nudd v. Barrows (1875) 91 U. S. 426, 23 L. Ed. 286. Failure of the defendant to produce the testimony of the bankrupt or of the creditor alleged to have been preferred, is strongly corroborative of such evidence in the case as tends to show an intent to prefer. Darling v. Townsend (D. C. 1880) 5 Fed. 176. But the testimony of the parties to an alleged preferential transfer is entitled to little weight as against proof of the transaction itself. Oxford Iron Co. v. Slafter (C. C. 1876) Fed. Cas. No. 10,637.

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Nat. Bank v. Jones (1874)
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(C. C. A. 1911) 189 Fed. 29
Bankr. Rep. 818; Brewster
Lumber Co. (D. C. 1908) 164
21 Am. Bankr. Rep. 106; In r
(D. C. 1899) 97 Fed. 922, 3 A
Rep. 245; Galveston Dry Goo
Frenkel (Tex. Civ. App. 190
W. 224; Blyth & Fargo Co.
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103 U. S. 293, 26 L. Ed. 478;
v. Tredway (1904) 195 U. S
Sup. Ct. 33, 49 L. Ed. 190
Bankr. Rep. 682; Ogden v. Re
C. 1912) 200 Fed. 977, 29 A
Rep. 531; Tilt v. Citizens'
(D. C. 1911) 191 Fed. 441
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mond (1910) 180 Fed. 92,
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Houghton Web Co. (D. C. 1
Fed. 213, 26 Am. Bankr.
Reber v. Louis Shulman & Br
1910) 179 Fed. 574, 24 Am
Rep. 782; Sparks v. Marsh
1910) 177 Fed. 739, 24 Am
Rep. 280; McElvain v. Hardes
169 Fed. 31, 94 C. C. A. 39
Bankr. Rep. 320; Getts v.
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163 Fed. 417, 21 Am. Bankr
Calhoun County Bank v. Ca
152 Fed. 983, 82 C. C. A. 11
Bankr. Rep. 509; Parker
(1907) 151 Fed. 18, 80 C. C.
Am. Bankr. Rep. 15; Harder
(1910) 66 Misc. Rep. 584, 1
Supp. 1102; Matthews v. Joan
Co. (1909) 156 Mich. 663, 1
272; Couturie v. Crespie (
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Wright (1909) 115 N. Y. 8
Atherton v. Emerson (1908)
199, 85 N. E. 530; Lynch v.
(1908) 80 Conn. 566, 69 Atl.
drews v. Kellogg (1907) 41
92 Pac. 222; Arkansas Nat.
Sparks (1907) 83 Ark. 324, 1
626; Walker v. Tenison Bros.
Co. (Tex. Civ. App. 1906)
166; Blyth & Fargo Co. v
(1908) 17 Wyo. 180, 97 Pac.
ter v. Clark (D. C. 1911)
153; Galbraith v. Whitake

119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427; Hewitt v. Boston Straw Board Co. (1913) 214 Mass. 260, 101 N. E. 424; Burnes v. Epstein (D. C. 1913) 201 Fed. 393; Owens v. Farmers' Bank of Abbeville (C. C. A. 1915) 228 Fed. 508; Covington v. Brigman (D. C. 1914) 210 Fed. 499; In re Chicago Car Equipment Co. (C. C. A. 1914) 211 Fed. 638; Patterson v. Baker Grocery Co. (Or. 1914) 144 Pac. 673; Continental & Commercial Trust & Savings Bank v. Breen & Kennedy (1914) 188 Ill. App. 467; Voorheis v. National Shawmut Bank (1914) 218 Mass. 69, 105 N. E. 382; Cauthorn v. Burley State Bank (1914) 26 Idaho, 532, 144 Pac. 1108; Soule v. First Nat. Bank of Ashton (Idaho, 1914) 140 Pac. 1098. In an action by a trustee in bankruptcy to recover as an unlawful preference an amount received by a bank in payment of a debt, an instruction that the law presumes that the bank had no reasonable cause to believe a preference would be created by the payment of the debt, and the jury should act on such presumption unless it is overcome by a preponderance of evidence, states the law correctly, and is not covered by an instruction informing the jury what the plaintiff must prove by a preponderance of evidence, but not informing the jury what the presumption of law is in such a case. Chisholm v. First Nat. Bank (1912) 176 Ill. App. 382.

The burden of showing that the creditor had reasonable cause to believe that a preference was intended is sufficiently sustained by showing facts and circumstances with respect to the debtor's financial condition such as would put an ordinarily prudent man on inquiry, which would have disclosed the debtor's insolvency and the consequent fact that the transfer would effect a preference. Capital Nat. Bank v. Wilkerson (1905) 36 Ind. App. 467, 75 N. E. 837. The existence of reasonable cause to believe that a preference was intended may be shown by circumstantial evidence. In re Baker (D. C. 1876) 14 N. B. R. 433, Fed. Cas. No. 763. The test of the sufficiency of the evidence to warrant the submission of the question to the jury does not rest on the assertions of either party as to his intent or belief, but on inferences which may fairly arise from the facts in evidence. Hamilton Nat. Bank v. Balcomb (1910) 177 Fed. 155, 100 C. C. A. 575, 24 Am. Bankr. Rep. 338. Such cause of belief is not shown by circumstantial evidence where the circumstances are as consistent with the theory of innocence and good faith on the part of the creditor as with the theory of a fraudulent purpose. Burnham v. Ft. Dodge Grocery Co. (1909) 144 Iowa, 577, 123 N. W. 220. Proof that the bankrupt, while insolvent, paid or secured the defendant creditor in full, without making adequate compensation to his other creditors, raises a presumption that the defendant knew that he was being preferred and that the debtor was insolvent, and casts upon him the burden of showing the contrary. Stobaugh v. Mills (D. C. 1873) 8 N. B. R. 361, Fed. Cas. No. 13,461; Crawford v. Rumpf (1903) 205 Pa. 154, 54 Atl. 709. The treasurer of a corporation, to whom it made a preferential payment while insolvent, will be presumed to have known its true financial condition. In re W. A. Silvernail Co. (D. C. 1914) 218 Fed. 979.

It is likewise necessary, in order to establish a voidable preference, to show that the preferred creditor actually received as a result of the transaction a greater percentage of his debt than that payable to the other creditors. Engel v. Union Square Bank (1905) 182 N. Y. 544, 75 N. E. 1129; Gering v. Leyda (1911) 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137. And the burden is on the trustee to show that the transaction took place within four months prior to the filing of the petition in bankruptcy. Allen v. Gray (1909) 63 Misc. Rep. 219, 115 N. Y. Supp. 928. And that the relation of debtor and creditor then subsisted between the parties, and not a a trust relation or other situation which would take the case out of the statute. Ferguson v. Bauernfeind (1909) 140 Wis. 42, 121 N. W. 647. And that the transaction was not a mere exchange or substitution of securities. State Bank of Williamson v. Fish (1909) 120 N. Y. Supp. 365.

Decisions on weight and sufficiency of evidence, see Grandison v. Robertson (D. C. 1915) 220 Fed. 985; In re Mosher (D. C. 1915) 224 Fed. 739; Harris v. Dodge (1915) 224 Fed. 432, 140 C. C. A. 126; Brookheim v. Greenbaum (D. C. 1912) 225 Fed. 635; Aronin v. Security Bank of New York (C. C. A. 1915) 228 Fed. 888; Cardozo v. Brooklyn Trust Co. (C. C. A. 1915) 228 Fed. 333; Newman v. Tootle-Campbell Dry Goods Co. (Mo. App. 1913) 160 S. W. 825; Rubenstein v. Lottow (1915) 220 Mass. 156, 107 N. E. 718; Kendall v. Kroeger-Amos-James Grocer Co. (1912) 173 Ill. App. 504.

44. —— **Trial.**—On the trial of an action to recover an unlawful preference, disputed issues of fact must be submitted to the jury, if there is sufficient evidence to warrant or require it, and not taken from them by binding instructions. Clingman v. Miller (1908) 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; Utah Ass'n of Credit Men v. Boyle Furniture Co. (1911) 39 Utah, 518, 117 Pac. 800; Blake v. Third Nat. Bank (1909) 219 Mo. 644, 118 S. W. 641.

The question whether or not the defendant had "reasonable cause to believe" that a preference would result from the transaction in question or

from the enforcement of the security obtained by him is a question of fact, and ordinarily he has the right to have the jury pass upon and decide it. Coleman v. Decatur Egg Case Co. (1911) 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; Wetstein v. Franciscus (1904) 133 Fed. 900, 67 C. C. A. 62, 13 Am. Bankr. Rep. 326; Ridge Ave. Bank v. Studheim (1906) 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Andrews v. Kellogg (1907) 41 Colo. 35, 92 Pac. 222; Brown v. Pelonsky (1912) 210 Mass. 502, 96 N. E. 1102; Hastings v. Fithian (1905) 71 N. J. Law, 311, 60 Atl. 350; Marden v. Sugden (1902) 71 N. H. 274, 52 Atl. 74; Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Upson v. Mt. Morris Bank (1905) 103 App. Div. 367, 92 N. Y. Supp. 1101; Hackney v. Raymond Bros. Clarke Co. (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Landis v. McDonald (1901) 88 Mo. App. 335; Harmon v. Walker (1902) 131 Mich. 540, 91 N. W. 1025; Deland v. Miller & Chaney Bank (1903) 119 Iowa, 368, 93 N. W. 304. But where the undisputed facts unmistakably show the existence of such reasonable cause of belief, it is not error to direct a verdict. Shale v. Farmers' Bank of Morrill (1910) 82 Kan. 649, 109 Pac. 408; Christopherson v. Oleson (1905) 19 S. D. 176, 102 N. W. 685. Where the only thing that would prevent a trustee in bankruptcy from recovering property sold under a mortgage foreclosure as a preference was the fact that he had taken possession under arrangement of the parties, a verdict for defendant was improperly directed where a portion of such property was not turned over to him. Clifford v. Dalton-Ingersoll Mfg. Co. (1913) 101 N. E. 373, 214 Mass. 302. Where there is no evidence in the case from which the jury could draw the conclusion that the creditor had reasonable cause to believe a preference was intended, binding instructions in favor of the defendant are proper. Keith v. Gettysburg Nat. Bank (1903) 23 Pa. Super. Ct. 14.

The instructions on matters of law, such as the meaning of "insolvency," the nature of a voidable preference, what constitutes reasonable cause to believe a preference was intended, and the like, must be framed with careful regard to the language of the statute and its accepted interpretation. Lynch v. Bronson (1908) 80 Conn. 566, 69 Atl. 538; Galveston Dry Goods Co. v. Frenkel (Tex. Civ. App. 1907) 103 S. W. 224; Johnston v. George D. Witt Shoe Co. (1905) 103 Va. 611, 50 S. E. 153; Wilkinson v. Anderson-Taylor Co. (1904) 28 Utah, 346, 79 Pac. 46; Forbes v. Howe (1869) 102 Mass. 427, 3 Am. Rep. 475; Blyth & Fargo Co. v. Kastor (1908) 17 Wyo. 180, 97 Pac. 921. But a charge in regard to the d having "ground to believe" ence was intended, instead to believe," in the languag statute, is not objectionable. v. Carondelet Milling Co. (Mo. App. 275, 83 S. W. 7 where the trustee's suit proce on the ground of the defend ing received an unlawful pre request to charge on the elem fraudulent conveyance is pr fused. Johnston v. George Shoe Co. (1905) 103 Va. 611 153. Where an assignment b rupt was attacked as a prefe not on the ground of actual finding that it was not give faith would not be regarded firmative finding of fraud. Henrickson (1913) 139 N. W. Minn. 427. In an action a creditor of a bankrupt pers cover preferential payments a tion on the "net result rul omits the elements of oper knowledge of insolvency and in the regular course of busi properly refused. Chisholm Nat. Bank of Le Roy (1915) 657, 269 Ill. 110, reversing (1914) 190 Ill. App. 354.

45. —— **Measure of damag covery.**—Where a transfer b rupt is found to be a voidab ence, the trustee is entitled the value of the property f istration in accordance with sions of the bankruptcy la some of the bankrupt's debts tracted subsequent to the Covington v. Brigman (D. C. Fed. 499.

If an unlawful preference c a payment of money, the tr vailing in a suit to annul i tled to a judgment for an equ Jones v. Kinney (D. C. 1871) No. 7,473. If it consisted of of personal property, he is a return of the specific pro still remains in the credito Cookingham v. Morgan (C. Fed. Cas. No. 3,183; Clarid mer (C. C. 1880) 1 Fed. where he left the disposition ties transferred by the bank bank to the absolute discret bank, the proceeds if sold t the place of the securities, t entitled to avoid the transfer erence under the bankruptcy a entitled to a return of the and an accounting as to any or interest collected in the he cannot hold the bank liabl preciation in the market va securities. Ernst v. Mechani als Nat. Bank (C. C. A. 1912 664. A trustee in bankruptc sued to recover securities a red by way of preference, c

to recover damages instead of a return of the securities, where they have depreciated in value and where defendant authorized to sell the securities in its discretion had exercised its judgment not to sell. National City Bank of New York v. Hotchkiss (1913) 34 Sup. Ct. 20, 231 U. S. 50, 58 L. Ed. 115, affirming decree Ernst v. Mechanics' & Metals Nat. Bank of City of New York (1912) 201 Fed. 664, 120 C. C. A. 92.

If the property transferred to the preferred creditor has been sold by him, or it is otherwise out of his power to return it, the trustee is entitled to a judgment for its value. McElvain v. Hardesty (1909) 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Andrews v. Kellogg (1907) 41 Colo. 35, 92 Pac. 222; Claridge v. Kulmer (C. C. 1880) 1 Fed. 399; Cookingham v. Morgan (C. C. 1870) 5 N. B. R. 16, Fed. Cas. No. 3,183; Drummond v. Smith (1909) 118 N. Y. Supp. 718. And where the bankrupt had given two mortgages on his stock of goods, both preferential, and the first mortgagee took possession, sold enough to pay his claim, and turned over the rest to the second mortgagee, and was then sued by the trustee in bankruptcy and his mortgage held void as a preference, it was held that he was liable for the value of the entire stock, and not merely for the value of the goods sold while the stock was in his possession. Whitson v. Farber Bank (1904) 105 Mo. App. 605, 80 S. W. 327.

If the preference consisted in a sale of the bankrupt's property to a creditor for less than half its value, but the amount received by the bankrupt has been turned over to the trustee, the latter is entitled to recover from the preferred creditor the difference between the amount so received and the value of the property. Stern v. Louisville Trust Co. (1901) 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305. For the purposes of a judgment in such cases, the value of the property preferentially transferred is to be taken as its actual market value at the time of the transfer, and not the sum which it brought on a sale of it by the preferred creditor or under process issued at his suit. First Nat. Bank v. Jones (1874) 21 Wall. 325, 22 L. Ed. 542. But if it appears that he sold the property to as good advantage as the trustee could have done, the creditor should not be held to account for more than he received. Allen v. McMannes (D. C. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276. And if the parties, at the trial, stipulate the market value of the property at the time of the transfer, the sum so fixed will be the measure of the defendant's liability. Gering v. Leyda (1911) 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137. Where one to whom a brick plant was transferred by a bankrupt, within four months before his bankruptcy, made large expenditures in putting in new machinery and otherwise improving the plant, any property thus added was no part of the estate in bankruptcy. Sieg v. Greene (C. C. A. 1915) 225 Fed. 955.

If the preference consisted in a judgment procured or suffered by the bankrupt, under which the creditor issued execution and sold property, he may be allowed credit for the actual expenses of the sale, but not including the officer's fees. Sedgwick v. Millward (D. C. 1871) 5 N. B. R. 347, Fed. Cas. No. 12,618.

The preferred creditor should also be charged with interest, but only from the time when demand was made on him for the surrender of the preference, as, after that time, he holds the property or fund as a trustee ex maleficio. Benjamin v. Chandler (D. C. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; Ommen v. Talcott (D. C. 1909) 175 Fed. 261, 23 Am. Bankr. Rep. 572; Cookingham v. Morgan (C. C. 1870) 5 N. B. R. 16, Fed. Cas. No. 3,183. According to some of the authorities, he should be charged with interest from the commencement of the action. Capital Nat. Bank v. Wilkerson (1873) 36 Ind. App. 467, 75 N. E. 837; Utah Ass'n of Credit Men v. Boyle Furniture Co. (Utah, 1913) 136 Pac. 572.

In the case where the money or property preferentially transferred would have been more than sufficient to pay in full all the remaining creditors of the bankrupt, only so much may be recovered by the trustee as is necessary for that purpose and for the costs and expenses of the bankruptcy proceedings. Rogers v. Page (1905) 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502.

Where the suit is brought and judgment recovered in the bankruptcy court, the bill containing a prayer for general relief, the court is not limited to the entry of a money judgment against the preferred creditor, but may issue an order commanding him to pay the amount of the judgment to the trustee in bankruptcy, and may commit him for contempt until compliance. In re Plant (D. C. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272. And the defendant is not entitled to have judgment withheld until he has proved his claim and a dividend in his favor has been declared, and to have the amount thereof deducted from the judgment. Templeton v. Kehler (D. C. 1909) 173 Fed. 574, 23 Am. Bankr. Rep. 39. The court of bankruptcy, possessing the full powers of a court of equity, may also enforce equities of the defendant as against any other creditor who would be entitled otherwise to share in the recovery. Allen v. McMannes (D. C. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276. On the other hand, the dismissal of a bill by the trustee to set aside an alleged

fraudulent preference, where the construction of the statute was doubtful, should be without costs. Collins v. Gray (C. C. 1871) Fed. Cas. No. 3,-013.

The right to dower in land revives, where a conveyance of such set aside as an illegal preferen the bankruptcy law, or is sur by the preferred creditor. In tert (D. C. 1875) 11 N. B. R. 2 Cas. No. 3,829.

CHAPTER SEVEN

Estates

Sec.
9645. Depositories for money.
9646. Expenses of administering estates.
9647. Debts which may be proved.
9648. Debts which have priority.
9649. Declaration and payment of dividends.
9650. Unclaimed dividends.
9651. Liens.
9652. Set-offs and counterclain
9653. Possession of property.
9654. Title to property.
9655. Bankruptcy records; clerks to keep; inspec
9656. Restriction of compens referees, receivers, and trustees.

§ 9645. (Act July 1, 1898, c. 541, § 61.) Depositories for

Depositories for Money.—a Courts of bankruptcy shall nate, by order, banking institutions as depositories for the of bankrupt estates, as convenient as may be to the reside trustees, and shall require bonds to the United States, sul their approval, to be given by such banking institutions, a from time to time as occasion may require, by like order incr number of depositories or the amount of any bond or chan depositories. (30 Stat. 562.)

Notes of Decisions

Depositories and their bonds.—Where a trustee in bankruptcy, depositing the bankrupt's money to his own account or his firm's account, paid to the bankrupt the amount set apart as exempt under Civ. Code Ga. 1910, § 3413, as soon as set apart by the referee, creditors of the bankrupt, holding waivers, could not compel the trustee to redeposit in a bankruptcy depository the money paid to the bankrupt. In re Barnett (D. C. 1914) 214 Fed. 263.

Under this section, the beneficiaries of the bond of a designated depository of the money of bankrupt estates include all depositing trustees and receivers of bankrupt estates. A surety on a depository's bond has no rigl rogation until all the creditor payment of the depository's en gation. An action may be br such a bond in the name of th States on behalf and for the the interested parties. Id. T of trustees and receivers i bankruptcy proceedings, thou on a single obligation, are se as the United States is not empowered to represent the as equitable beneficiaries, the law furnishes no remedy, and equity could alone afford an remedy. Illinois Surety Co. (C. C. A. 1915) 226 Fed. 665

§ 9646. (Act July 1, 1898, c. 541, § 62.) Expenses of admin estates.

Expenses of Administering Estates.—a The actual and sary expenses incurred by officers in the administration of shall, except where other provisions are made for their pa be reported in detail, under oath, and examined and appr disapproved by the court. If approved, they shall be pai lowed out of the estates in which they were incurred. (3 562.)

Notes of Decisions

Expenses of administration.—It is the policy of the bankruptcy act, manifest in all its provisions regarding expenses and fees, to reduce to a minimum the cost of administering estates, courts are bound to give th such a construction and appli will fulfill the intention of Co

this respect. In re Harrison Mercantile Co. (D. C. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419.

A deputy marshal appointed to take charge of a bankrupt's store and the stock of goods therein, and responsible on his bond for the value of the property, may hire a competent person as watchman if he has any reason to apprehend danger to the property, and charge in his accounts a reasonable sum as compensation for the services of such watchman. In re Scott (D. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625. Compare In re Pickhardt (D. C. 1912) 198 Fed. 879, 29 Am. Bankr. Rep. 524. But the creditors are not officers; and hence, for instance, the expenses of the creditors in attending meetings will not be allowed out of the estate. In re Ward (D. C. 1874) 9 N. B. R. 349, Fed. Cas. No. 17,145.

§ 9647. (Act July 1, 1898, c. 541, § 63.) Debts which may be proved.

Debts which may be Proved.—a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate. (30 Stat. 562, 563.)

Notes of Decisions

1. Construction of this section.
2. Creditors entitled to prove claims.
3. Estoppel to prove claim.
4. Fraud barring proof of claim.
5. Nature of claims provable.
6. Amount of claim provable.
7. Effect of payment or satisfaction.
8. Time of accrual of claims.
9. Claims on contracts.
10. —— Contracts of employment.
11. Promissory notes.
12. Judgments.
13. Equitable claims and demands.
14. Contingent demands and liabilities.
15. Unliquidated demands.
16. Assigned claims.
17. Debts payable in the future.
18. Interest accrued and accruing.
19. Costs, expenses, and collection fees.
20. Liability of bankrupt as indorser, guarantor, or surety.
21. Rights of bankrupt's surety or indorser.
22. Rights of creditor where several parties liable.
23. Claims of bankrupt's wife.
24. Claims for alimony.
25. Unpaid subscriptions to stock and stockholder's statutory liability.
26. Debts created by bankrupt's fraud.
27. Taxes and interest and penalties thereon.
28. Breaches of real covenants.
29. Claims for torts.
30. Fines, penalties, and forfeitures.
31. Debts barred by limitations.
32. —— Acknowledgment or part payment.
33. —— Dormant judgments.
34. Claims founded on illegal or immoral consideration.
35. Ultra vires and unlawful contracts of corporations.
36. Landlord's rights and remedies.
37. —— Landlord's lien.
38. —— Rent to accrue after adjudication.
39. —— Occupation and use of premises by trustee.
40. —— Damages for breach of contract or covenant.

1. Construction of this section.—The several subdivisions of this section are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others; and hence the provision of the first clause, limiting the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims which fall within the other classes. In re Smith

(D. C. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112.

This whole section should be so construed as to make all debts fairly within its meaning provable debts, in order to effectuate the purpose of the act in relieving insolvent debtors, and any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability. Dycus v. Brown (1909) 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

2. Creditors entitled to prove claims. —The court may permit the bankrupt himself, acting in a representative capacity as the administrator of an estate, to prove an equitable debt, arising from a loan of funds borrowed from the estate of his intestate, whether such loan was lawful or not. Warner v. Spooner (C. C. 1880) 3 Fed. 890. One to whom the bankrupt had previously made a general assignment for the benefit of his creditors may be permitted to prove a claim. In re Rudd (D. C. 1910) 180 Fed. 312, 25 Am. Bankr. Rep. 35. A surety for the bankrupt may prove a claim. Sessler v. Paducah Distilleries Co. (C. C. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723. A committee representing the bondholders of a bankrupt corporation may prove a claim against its estate. In re Medina Quarry Co. (D. C. 1910) 179 Fed. 929, 24 Am. Bankr. Rep. 769. But a corporation which is a mere agent of another corporation cannot prove claims against the estate of the latter in bankruptcy. Clere Clothing Co. v. Union Trust & Savings Bank (1915) 224 Fed. 363, 140 C. C. A. 49.

Mere accommodation paper, not based on any actual consideration does not constitute a provable claim in bankruptcy. Merchants' & Manufacturers' Nat. Bank v. Galbraith (1907) 157 Fed. 208, 84 C. C. A. 653, 19 Am. Bankr. Rep. 319. One who has dealt with a bankrupt corporation, but has agreed to accept shares of its stock in satisfaction of his claim, has no demand provable in bankruptcy. In re Le Sueur County Co-operative Co. (C. C. A. 1912) 195 Fed. 926, 27 Am. Bankr. Rep. 882.

A claim cannot be allowed where it is shown that the money in question was not advanced by the claimant personally, but by a corporation in which he was a stockholder. In re Watkinson (D. C. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 245. Where a bank furnished money or credit with which certain imported wool was purchased in a foreign country, taking bills of lading and trust receipts in its own name, and, when the wool was sold by the importer, became the owner of the account, it alone was entitled to prove the claim against the estate of the purchaser in bankruptcy. Assets Realization Co. v. Sovereign Bank of Canada (1914) 210 Fed. 156, 126 C. C. A. 662, affirming judgment In re Dunlap Carpet C. C. 1913) 206 Fed. 726.

It is no objection to the allow a claim against a bankrupt cor for money lent that it passed several hands, where the claim nished the money with the i that it should be a loan to the ration, and the latter received used it as such. In re Americ cialty Co. (C. C. A. 1911) 191 F 27 Am. Bankr. Rep. 463. But nishing materials to a subco of a general contractor of the States, who gave bond in co with the act of Congress of 1905, will be required to pur remedy prescribed by that act, not prove a claim under the ban law against the estate of th rupt contractor. In re Hawley 1912) 194 Fed. 751, 28 Am. Rep. 58.

Where a new company is o to take over and carry on the of a failing corporation, whic wards becomes bankrupt, one ing a director in both the old new company, takes an active organizing the new concern, a scribes and pays for some of i in cash, may be considered as itor of the bankrupt corporatio extent. In re Holbrook Shoe & er Co. (D. C. 1908) 165 Fed. Am. Bankr. Rep. 511. An the court in bankruptcy pro against a company owning th of another company held to aut creditor to establish his claim the proceeds of the latter c Carroll v. Stern (1915) 223 F 139 C. C. A. 253. Nor can a who lent money to the bankrup barred from proving his claim fact that he himself borrowed t ey from a bank, pledging as c the note and security given hin bankrupt. Ohio Valley Bank Mack (1906) 163 Fed. 155, 89 605, 20 Am. Bankr. Rep. 40.

One who sells property on c a third person, who turns it o corporation which does not b party to the contract of sale, thereby become a creditor of poration so as to be entitled to claim against its estate in ban In re Builders' Lumber Co. (D. 148 Fed. 244, 17 Am. Bankr. R

The rule that one may take ad of a contract to which he wa party, but which was made for efit between two other persons effective in bankruptcy, but hi to the agreement must have be effective before the bankruptcy promisor. Blake v. Atlantic N (1912) 33 R. I. 464, 82 Atl. 22 R. A. (N. S.) 874.

It is also a rule that a credi bankrupt, who is also his deb larger amount, will not be perm prove his claim against the e

long as his own debt remains unpaid. In re Gerson (D. C. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 850; In re Wiener & Goodman Shoe Co. (D. C. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

Where the father of a bankrupt, to whom the bankrupt was indebted, died after his adjudication, the right of the executor to prove the full indebtedness against the estate in bankruptcy is not affected by the fact that the father, by his will, left the bankrupt a share of his estate, from which any indebtedness due from the bankrupt was directed to be deducted. In re Woods (D. C. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

3. Estoppel to prove claim.—The ordinary principles of estoppel apply to a creditor seeking to prove a claim in bankruptcy. Sledge v. Denton (Tex. Civ. App. 1912) 147 S. W. 281. The rule that a creditor having his choice between two inconsistent remedies must make his election and cannot pursue both, applies to a proof of debt in bankruptcy. Du Vivier & Co. v. Gallice (C. C. A. 1906) 149 Fed. 118, 17 Am. Bankr. Rep. 557. Lender of money to corporation, who received stock under an agreement that he might elect to retain the stock or demand repayment of the loan, but who had not elected prior to bankruptcy, held estopped from demanding his rights as creditor. In re W. A. Silvernail Co. (D. C. 1914) 218 Fed. 977. One cannot rescind a contract and recover the original consideration, and at the same time prove a claim in bankruptcy upon the contract itself. In re Kenyon (D. C. 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 194; Scott v. Abbott (1908) 160 Fed. 573, 87 C. C. A. 475, 20 Am. Bankr. Rep. 335. And see In re Hirschman (D. C. 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; In re Howard (D. C. 1900) 100 Fed. 630, 4 Am. Bankr. Rep. 69. But where, prior to the bankruptcy, a claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which he was unsuccessful, it was held that he was entitled to file against the bankrupt's estate for his whole claim. In re Venstrom (D. C. 1913) 205 Fed. 325, 30 Am. Bankr. Rep. 569. And see Boden & Haac v. Lovell (C. C. A. 1913) 203 Fed. 234, 30 Am. Bankr. Rep. 353, where certain foreign attachment litigation was held unavailable to sustain an estoppel preventing claimants from asserting claims not involved in such litigation against the bankrupt.

A creditor of a bankrupt who, after the bankruptcy, has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt. In re Sweetser (D. C. 1904) 128 Fed. 165, affirmed, Dowse v. Hammond (1904) 130 Fed. 103, 64 C. C. A. 437. And the fact that a creditor, prior to the bankruptcy, had begun a suit to set aside a deed as fraudulent does not estop him, on the determination of the suit against him, from claiming the benefit of a lien reserved by such deed for his benefit. Maxwell v. McDaniels (C. C. A. 1912) 195 Fed. 426, 27 Am. Bankr. Rep. 692. So where the bankrupt commenced a suit before his bankruptcy, which was tried after the adjudication, and the defendant in that action set up in defense a particular claim as a distinct cause of action, but offered no evidence in support of it, and judgment went in favor of the bankrupt, this does not estop such defendant from proving his claim in the bankruptcy proceedings. In re People's Safe Deposit & Sav. Inst. (D. C. 1878) Fed. Cas. No. 10,971. Where, subsequent to bankruptcy, creditor recovered judgment against bankrupt and surety, such creditor's release and waiver of right to participate in dividends held not to prevent surety's proof of claim. Kilpatrick v. United States Fidelity & Guaranty Co. (C. C. A. 1916) 228 Fed. 587. And though one named as assignee in a general assignment for the benefit of creditors, which is voided by the bankruptcy of the assignor, has accepted the trust, this does not preclude him from proving a bona fide debt which he has against the bankrupt. In re Horton (D. C. 1872) Fed. Cas. No. 6,707. So a mere covenant by a creditor not to sue an accommodation acceptor does not prevent such creditor from proving against the drawer's estate in bankruptcy. Downing v. Traders' Bank (C. C. 1873) Fed. Cas. No. 4,046.

Where the president of a bankrupt corporation had loaned money to it on notes, he is not estopped to claim the allowance thereof against the corporation's estate in bankruptcy because of statements of assets and liabilities made at various times, which did not include the notes, in the absence of any evidence that he had knowledge of their contents, or that credit was extended to the corporation, and the position of creditors changed, on the faith thereof. Spencer v. Lowe (C. C. A. 1912) 198 Fed. 961, 29 Am. Bankr. Rep. 876. Claimant, having contributed $50,000 to a bankrupt corporation, which was thereafter represented as an increase in capital, and held himself out as connected with the business, held estopped, as to creditors who relied thereon, to claim that he was a creditor and not a stockholder. In re Desnoyers Shoe Co. (D. C. 1914) 210 Fed. 533. In bankruptcy proceedings against K. Co., the principal stockholder of D. Co., a seller of goods to D. Co. held not estopped from establishing his claim against proceeds of D.

Co.'s assets. Carroll v. Stern (1915) 223 Fed. 723, 139 C. C. A. 253.

Although the bankrupt's bookkeeper prepared a financial statement which was submitted to a bank as a basis for credit, and the statement did not show that the bankrupt was indebted to the bookkeeper for his salary, this does not estop the latter to file a claim for unpaid salary, in the absence of evidence that credit was extended on the faith of the statement. In re Cox (D. C. 1912) 199 Fed. 952, 29 Am. Bankr. Rep. 456.

Where the only claim filed by a brother of the bankrupt against his estate was based on notes and a mortgage which were clearly fraudulent, he was held bound by such action, and not permitted to prove the claim as one for wages of labor and so entitled to priority. In re Hemstreet (D. C. 1903) 139 Fed. 958, 14 Am. Bankr. Rep. 823.

4. Fraud barring proof of claim.—To constitute such fraud as will estop a creditor from sharing with other creditors in the distribution of the estate of his debtor in bankruptcy, he must have been guilty of some moral turpitude or breach of duty whereby the other creditors were deceived to their damage. No fiduciary or confidential relation exists between creditors of an insolvent debtor such as will preclude the allowance, against the estate of the debtor in bankruptcy, of the claim of a creditor who, though knowing of the debtor's insolvency, fails to inform the other creditors thereof. Crowder v. Allen-West Commission Co. (1914) 213 Fed. 177, 129 C. C. A. 521, affirming decree In re Hawks (D. C. 1913) 204 Fed. 309.

Where a creditor of a bankrupt actively participates or assists him in the execution of a scheme to delay or defraud his other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and the court of bankruptcy will not aid the conspirators by allowing claims for such advances or expenses against the estate. Butcher v. Werksman (D. C. 1913) 204 Fed. 330, 30 Am. Bankr. Rep. 332; In re Friedman (D. C. 1908) 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re L. M. Alleman Hardware Co. (D. C. 1909) 172 Fed. 611, 22 Am. Bankr. Rep. 871; In re Lansaw (D. C. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; In re Knox (D. C. 1900) 98 Fed. 585, 3 Am. Bankr. Rep. 371; In re Hugill (D. C. 1900) 100 Fed. 616, 3 Am. Bankr. Rep. 686; In re Hatje (D. C. 1875) 12 N. B. R. 548, Fed. Cas. No. 6,215. But see In re Medina Quarry Co. (D. C. 1910) 179 Fed. 929, 24 Am. Bankr. Rep. 769. And compare In re L. M. Alleman Hardware Co. (C. C. A. 1910) 181 Fed. 810, 25 Am. Bankr. Rep. 331. So also, where money is loaned or advances made for the pur-

pose of establishing a fictitiou
for the bankrupt and so enab
to cheat others. In re Fried
C. 1908) 164 Fed. 131, 21 Am
Rep. 213; In re Royce, Dry G
(D. C. 1904) 133 Fed. 100,
Bankr. Rep. 257. And so
creditor has attempted to gai
vantage over other creditors b
ing in his proof fictitious item
aggerated amounts, or by
fraudulent or illegal and non-
claims, his proof will not be
even to the extent of an hon
which may be included in it, bu
rejected as an entirety. In r
man (D. C. 1908) 164 Fed.
Am. Bankr. Rep. 213; In re K
C. 1900) 105 Fed. 503, 5 Am
Rep. 465; In re Elder (D. C.
N. B. R. 670, Fed. Cas. No
Marrett v. Atterbury (C. C. 1
N. B. R. 225, Fed. Cas. No. 9,

Fraudulent conduct barring
a claim in bankruptcy occurre
a creditor holding collateral
under a pledge, took the opp
as soon as a petition in bankru
been filed, to sell the security
self at a pretended auction at
fraction of its face value, and
notice to any party in interest
Mertens (D. C. 1905) 134 F
14 Am. Bankr. Rep. 226.
Turner v. Metropolitan Trust
C. A. 1913) 207 Fed. 495, wher
chase of pledged collateral
pledgee was held, under the p
circumstances, not to preven
against the estate in bankrupt

There is nothing illegal in e
ing to buy up all the claims ag
estate of a bankrupt, for the
of staying the bankruptcy pro
altogether; and if the purcha
in this, he should nevertheless
ed to prove such claims as he
quired as though he were an
creditor. In re Pease (D. C.
N. B. R. 173, Fed. Cas. No. 10
re Strachan (D. C. 1872) Fed.
13,519. An agreement by one
solvent's creditors to advanc
with which to make a composit
his creditors, on consideration
insolvent would pay such credit
in full, held not fraudulent,
preclude the creditor from subs
proving its whole debt against
solvent's estate in bankruptcy.
Hawks (D. C. 1913) 204 F
That a person adjudged a ban
1910 made a composition ag
with his creditors in 1899, and
secret agreement with A., one
to pay his claim in full in consi
of a loan of the money require
the other creditors the com
percentage, held not ground f
lowance of A.'s claim against t
rupt's estate, where the credit
er rescinded the composition,
debtor, after execution of the
tion, had voluntarily paid A. t

ey loaned. That one creditor who had advanced money to the debtor, knowing him to be insolvent, but believing that such money would enable him to become sufficiently prosperous to pay his debts, failed to notify the other creditors of the debtor's insolvency held not to constitute a breach of duty, fraud, or deceit on the other creditors or to authorize disallowance of such creditor's claim against the estate of such debtor in bankruptcy. Crowder v. Allen-West Commission Co. (1914) 213 Fed. 177, 129 C. C. A. 521, affirming decree In re Hawks (D. C. 1913) 204 Fed. 309.

The act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subordinate it to the claims of subsequent creditors. In re Ewald & Brainard (D. C. 1905) 135 Fed. 168, 14 Am. Bankr. Rep. 267; In re Abell (1912) 198 Fed. 484, 117 C. C. A. 243. But see In re Thweatt (D. C. 1912) 199 Fed. 319, 29 Am. Bankr. Rep. 84.

Such fraudulent conduct on the part of a creditor as will forfeit his right to prove against the bankrupt estate may also operate to the disadvantage of others who, though not directly implicated, are still bound by his acts, as in the case of a partner who, though innocent himself, cannot disavow fraudulent acts of his copartner done in the firm name. Capelle v. Hall (D. C. 1875) 12 N. B. R. 1, Fed. Cas. No. 2,391. And where the holder of a note has forfeited his claim against the estate of the bankrupt maker by taking a preference, the guarantors of the note have no right to prove it against the estate, their liability having been discharged by the principal. In re Ayers (D. C. 1874) Fed. Cas. No. 685.

5. Nature of claims provable.—Any debt which is recoverable either at law or in equity is provable in bankruptcy. In re Jordan (D. C. 1880) 2 Fed. 319; In re H. V. Keep Shirt Co. (D. C. 1912) 200 Fed. 80, 28 Am. Bankr. Rep. 765. See In re Hawks (D. C. 1913) 204 Fed. 309, 30 Am. Bankr. Rep. 365. "Provable" debts and "allowable" debts in bankruptcy are not necessarily equivalent terms. On the distinction, see R. P. Williams & Co. v. United States Fidelity & Guaranty Co. (1912) 11 Ga. App. 635, 75 S. E. 1067. Claims which are entitled to priority under the statute (such as claims for wages of labor) are provable and must be proved. But the fact that a father employed his minor son to work as his chief clerk, while the son paid board to his mother, does not establish an emancipation of the son, so as to entitle him to prove a claim for wages against his father's estate. In re Riff (D. C. 1913) 205 Fed. 406, 30 Am. Bankr. Rep. 594. Where a bankrupt prior to the bankruptcy promised to pay his minor children for their services in his store, with intent to relinquish his claim to their services, their claims for services were provable in bankruptcy. In re Kanter (D. C. 1914) 215 Fed. 276.

Any debt which may be proved by complying with any of the provisions of the statute is provable in bankruptcy. Rankin v. Florida, A. & G. C. R. Co. (D. C. 1868) 1 N. B. R. 647, Fed. Cas. No. 11,567. The fact that a claim arises as a consequence of the bankruptcy is sufficient to render it provable as a fixed liability absolutely owing at the date of the petition. In re Neff (1907) 157 Fed. 57, 84 C. C. A. 561, 19 Am. Bankr. Rep. 23.

A claim against the bankrupt for money loaned is liquidated and provable in bankruptcy. In re Halsey Electric Generator Co. (D. C. 1908) 163 Fed. 118, 20 Am. Bankr. Rep. 738. A claim upon an open account or account current is provable in bankruptcy. In re Stanton (C. C. 1845) Fed. Cas. No. 13,295.

It is no objection to the proof and allowance of a claim that it is of such a character as not to be barred or released by the bankrupt's discharge, as in the case of a debt created by him by fraud or while acting in a fiduciary capacity. In re Tebbetts (C. C. 1842) Fed. Cas. No. 13,817; Bourne v. Maybin (C. C. 1877) Fed. Cas. No. 1,700. A debt evidenced by a note or other writing is provable notwithstanding the fact that it is expressed to be payable in a particular species of currency or in gold coin. In re Whittaker (D. C. 1870) 4 N. B. R. 160, Fed. Cas. No. 17,598; In re Elder (D. C. 1870) Fed. Cas. No. 4,326. Such a debt is provable though it was stipulated to be paid in labor and merchandise. In re Spot Cash Hooper Co. (D. C. 1911) 188 Fed. 861, 26 Am. Bankr. Rep. 546; McMullin v. Bank of Penn Tp. (1845) 2 Pa. 343.

An attorney may file and prove a claim against the bankrupt for professional services rendered to him before the bankruptcy and in matters not connected therewith, although there was no express contract fixing the amount of his fees. In re Coney Island Lumber Co. (D. C. 1912) 199 Fed. 803. At least where his services conduced to the benefit of the estate or to its more prompt administration, as where they resulted in obtaining a reduction of taxes assessed against the property or stopping the prosecution of an attachment suit. In re Duran Mercantile Co. (D. C. 1912) 199 Fed. 961, 29 Am. Bankr. Rep. 450. So a ward may prove his claim against his guardian's estate in bankruptcy, notwithstanding the fact that the accounts

of the guardian are in course of settlement in the probate court of the state. Bourne v. Maybin (C. C. 1877) Fed. Cas. No. 1,700. The government if it holds a claim against a debtor in bankruptcy, may and should file proof of the same. U. S. v. Murphy (C. C. 1883) 15 Fed. 589. In the case of a bankrupt insurance company, under the former statute, it was held that a claim founded on a covenant to repay part of the premium paid for insurance on cancellation of the policy was provable. In re Independent Ins. Co. (D. C. 1872) Fed. Cas. No. 7,019. But see In re Western Ins. Co. (D. C. 1872) Fed. Cas. No. 17,435. And although money advanced to the bankrupt was purely in the form of a bonus, to induce him to erect and operate a manufacturing plant in a given locality, yet on his failure to do so and his ensuing bankruptcy, the amount so paid constitutes a provable claim. Sturgiss v. Meurer (1911) 191 Fed. 9, 111 C. C. A. 551, 26 Am. Bankr. Rep. 851. Where a subscriber for an increase of stock paid in advance the price thereof, under the agreement that such payment should be treated as loan until issuance of the stock, and before that the corporation was adjudged a bankrupt, the subscriber was entitled to have his claim allowed as a general claim against the bankrupt. Clark v. Hamilton (1914) 217 Fed. 229, 133 C. C. A. 223. Where claimant advanced money to a corporation on its agreement to pay dividends as on regular stock, to pay interest, to educate claimant's son in the business, and to issue stock therefor when the corporation's capital should be increased, the elements of the consideration except the last were valid and sufficient; and hence claimant could not prove his claim for the whole amount advanced on the theory that the contract was invalid for want of mutuality of obligation. In re Desnoyers Shoe Co. (D. C. 1914) 210 Fed. 533.

Although the debt was not originally contracted by the bankrupt, yet if he assumed and agreed to pay it (as in the case of one buying a going business and taking the assets and liabilities together, or buying mortgaged land with an assumption of the mortgage), it will be provable against his estate. In re Baumblatt (D. C. 1907) 153 Fed. 485, 18 Am. Bankr. Rep. 720; Begein v. Brehm (1890) 123 Ind. 160, 23 N. E. 496. So where a sale by an insolvent person, the proceeds of which were used to pay certain creditors in full, was set aside as constructively fraudulent as to other creditors, the vendee has a valid claim against the vendor's trustee in bankruptcy for the amount of the money he paid, less the expenses of setting aside the sale. Barber v. Coit (1906) 144 Fed. 381, 75 C. C. A. 319, 16 Am. Bankr. Rep. 419.

In those states where the separate property of a married woman is liable in equity for her business obli though under the local law sh technically a free trader, if gages in business on her own her obligations contracted in t ness are provable debts in ban MacDonald v. Tefft-Weller Co. 128 Fed. 381, 63 C. C. A. 123, A. 106, 11 Am. Bankr. Rep. 80

The amount contributed by ner to the capital of the par cannot, on the bankruptcy of t be proved as a debt entitled t ratably with the claims of the creditors. In re W. J. Floyd & C. 1907) 156 Fed. 206, 19 Am. Rep. 438.

Where one induces others with him in a purchase of prop representations as to its valu prove to be incorrect, but with express promise to reimburse t any loss which they may sust law will not raise such a pro implication, so as to create a as on an implied contract against his estate in bankruptcy zer v. Henking (1908) 158 F 86 C. C. A. 140, 15 L. R. A. 1151, 19 Am. Bankr. Rep. 300.

Owelty of partition is a legal on the land, but not created by tract of the parties but by t and therefore is not provable i ruptcy. Ex parte Walker (18 N. C. 340, 12 S. E. 136.

Where one institutes a suit his debtor and against another nishee, and the latter goes int ruptcy before the recovery of a ment, the creditor has no claim against the garnishee's Ex parte Columbian Ins. Co. 1871) Fed. Cas. No. 3,037. A c an account of profits against an er of a patent-right is not against his estate in bankrup re Boston & F. Iron Works 1885) 23 Fed. 880, citing Root way Co. (1881) 105 U. S. 189, L. Ed. 975.

Where a bankrupt's agent authority exchanged certain of for bonds, which the bankrupt's sold without knowledge of the lack of authority, the trustee c pudiate the transfer on return bonds, if possible, or to per other party to file an amende for their value. In re Charles ridge Lumber Co. (D. C. 1914) 973.

A pledgee of the bonds of a b corporation pledged to secure note, which purchased the bon sold at public auction, held, u facts shown, entitled to prove t against the estate. Turner v. politan Trust Co. of City of N (C. C. A. 1913) 207 Fed. 495.

6. Amount of claim provable claim by one member of a synd banking firms against the esta

bankrupt member, the court will examine into the accounts of all the members, in order to make a definite allowance against the bankrupt's estate. In re Cooke (D. C. 1875) 12 N. B. R. 30, Fed. Cas. No. 3,170.

Where a corporation gave its note to a bank for the indebtedness of a third party, for which it was not responsible, and also for its own debt, the note was invalid in the hands of the bank (having knowledge of the facts) to the extent of the amount of the debt of the third party, and it was held that the bank's claim against the estate of the corporation in bankruptcy must be reduced to the amount which the corporation itself owed when the note was given. Mapes v. German Bank of Tilden (1910) 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713.

Where a manufacturer consigned goods to factors, who advanced him their notes to an amount larger than was ultimately realized on the goods, which notes were indorsed by him and discounted, and both parties became bankrupt, and the factors, employing the goods then in their possession, made a composition with their creditors, including the holders of the notes, who reserved the right to prove in full against all other parties to them, it was held that such creditors, in proving against the estate of the manufacturer, would not be required to give credit for the full amount received by them on the composition, but would be required to abate their proof by giving credit for the property of such manufacturer so employed by the factors, which might, upon their application, have been applied towards paying their debts. Ex parte Harris (D. C. 1877) Fed. Cas. No. 6,109.

An indorsee before maturity of a negotiable note, without notice of existing equities, can only prove against the estate of the maker the amount paid therefor. In re Shelbourne (D. C. 1879) 19 N. B. R. 359, Fed. Cas. No. 12,745. And so, where a mortgage is given to indemnify the mortgagee for his advances, and he loans his acceptances to the mortgagor, and after the bankruptcy of the latter, buys up the paper at a discount, he can charge against the mortgaged property only what he paid in cash to take up the acceptances. Ex parte Ames (D. C. 1871) Fed. Cas. No. 323. But the pledgee of notes held to secure a debt in a smaller amount may prove them against the maker's estate to their full amount, and receive dividends to the extent of his debt. In re Anger Baking Co. (C. C. A. 1915) 228 Fed. 181; Bailey v. Nichols (D. C. 1869) 2 N. B. R. 478, Fed. Cas. No. 741. Where, prior to bankruptcy, claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which it was unsuccessful, it was entitled to file against the bankrupt's estate for its whole claim. In re Venstrom (D. C. 1913) 205 Fed. 325.

In a case where the fund to be distributed among the creditors of a bankrupt storage company consisted entirely of the proceeds of insurance on the property of such creditors, burned while in storage, the amount of which had been determined by an agreement between the insurers and the respective owners as to the value of the property of each, it was held that the creditors were bound by such valuations as between themselves, and one cannot be permitted to prove a larger claim. In re Reliance Storage & Warehouse Co. (D. C. 1900) 105 Fed. 351, 5 Am. Bankr. Rep. 249. So, where the bankrupt's brokers were carrying stocks on a margin, and, at the commencement of the bankruptcy proceedings, could have sold them out at a profit, but carried the stocks until a decline and finally sold them at a loss, all without application to the court, it was held that they could not prove their claim for differences against the estate. In re Daniels (D. C. 1875) Fed. Cas. No. 3,566.

Where the general manager of a trading corporation (who was also a stockholder and director) had been allowed a salary for his services at a fixed monthly rate, but by the mere agreement of the board of directors without any by-law or resolution or entry of record, it was held that he was not entitled to prove a claim against the estate of the corporation in bankruptcy for arrears of salary at the rate so fixed, but only for the reasonable value of his services as determined by the court. In re Grubbs-Wiley Grocery Co. (D. C. 1899) 96 Fed. 183, 2 Am. Bankr. Rep. 442.

For a buyer's breach of a contract for the manufacture and sale of certain articles of merchandise, the measure of the seller's damage, on the allowance of his claim against the bankrupt estate of the buyer, is the difference between the cost of manufacture and the contract price, notwithstanding the entire lot of goods were not manufactured or ready for delivery. In re Duquesne Incandescent Light Co. (D. C. 1910) 176 Fed. 785, 24 Am. Bankr. Rep. 419; Pratt v. Auto Spring Repairer Co. (1912) 196 Fed. 495, 116 C. C. A. 261, 28 Am. Bankr. Rep. 483.

Where an agreement indemnifying a contractor's surety, containing an assignment of the contractor's plant on the work in case he should be unable to carry out the contract, was executed more than four months before the contractor became bankrupt and while he was solvent, the amount of the surety's claim against the bankrupt is not the amount which the latter might have paid by reason of his liability on the bonds, independent of the plant so assigned, but the amount of the loss the

surety might sustain in completing the contract with such aid as he might gain by taking and using the plant. Wood v. United States Fidelity & Guaranty Co. (D. C. 1905) 143 Fed. 424, 16 Am. Bankr. Rep. 21.

7. Effect of payment or satisfaction.— A note which is subject to an offset for a larger amount is not a provable debt in bankruptcy. In re Ford (D. C. 1878) 18 N. B. R. 426, Fed. Cas. No. 4,932. A creditor cannot prove a claim which he has expressly waived or released to the bankrupt. In re Howard (D. C. 1900) 100 Fed. 630, 4 Am. Bankr. Rep. 69. Nor a claim which he had previously settled by an accord and compromise, receiving the consideration then agreed on, though less than the amount of the debt. In re Decker (D. C. 1875) Fed. Cas. No. 3,723; In re Lathrop (D. C. 1869) Fed. Cas. No. 8,103. Nor one which has been adjusted by accepting from the trustee in bankruptcy a surrender of the property in dispute or a quitclaim deed. Kenyon v. Mulert (C. C. A. 1911) 184 Fed. 825, 26 Am. Bankr. Rep. 184; In re Davis (D. C. 1910) 179 Fed. 871, 24 Am. Bankr. Rep. 667. Proof will not be permitted upon so much of a claim as has previously been satisfied by a payment in cash, or by a transfer and acceptance of property. In re Carpenter (D. C. 1910) 179 Fed. 743. See Haas-Baruch & Co. v. Portuondo (D. C. 1905) 138 Fed. 949, 15 Am. Bankr. Rep. 130. A vendor of goods under a conditional sale to the bankrupt may affirm the sale and enforce a claim on the notes given by the bankrupt, or he may retake the property, but he cannot do both, and if he chooses the latter course, he cannot prove the notes as a claim against the estate. In re Norton (D. C. 1910) 181 Fed. 901, 24 Am. Bankr. Rep. 794; In re Heinsfurter (D. C. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 113.

Merely taking a note, without any payment on it, does not discharge an original debt having any privileges under the bankruptcy law, and either may be proved. In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; Dowse v. Hammond (1904) 130 Fed. 103, 64 C. C. A. 437.

The acceptance of shares of stock in a corporation in lieu of payment of a debt may cancel the debt so that it will no longer be provable in bankruptcy, if the creditor expressly releases the debtor from liability. In re Norris (D. C. 1911) 190 Fed. 101, 26 Am. Bankr. Rep. 945. But this is not the case if there is no sufficient proof that the creditor ever accepted the stock. In re Blumer (D. C. 1882) 11 Fed. 700. Or if it was merely given as a substitute for collateral security held by the creditor and is not of value. In re Lorrilard (1901) 107 Fed. 677, 46 C. C. A. 535, 5 Am. Bankr. Rep. 602.

Where a creditor has received tial payment on his debt under eral assignment for the benefit itors, made before the bankrup cannot prove for the whole of t but only for the balance remain satisfied. In re Folb (D. C. 18 Fed. 107, 1 Am. Bankr. Rep. re Hamilton (D. C. 1880) 1 F

Where the holder of a note n a partnership and indorsed by the partners, both maker and i having been adjudicated ban proves his claim against the p ship estate after a dividend h declared and paid to other cr his right to a preference in futu idends cannot be considered eq to a dividend actually declared favor, or to an actual part pay his note by the maker, and h is entitled to prove his claim the estate of the indorser for amount of the note. In re Sw C. 1901) 106 Fed. 65, 5 Am. Rep. 415. Generally, the hold note who has received a divide the estate in bankruptcy of the can prove only the balance agai estate of the bankrupt indorser. Howard (D. C. 1871) 4 N. B. Fed. Cas. No. 6,750; In re (D. C. 1880) 14 Fed. 247. But other hand, a creditor whose cl been partly paid by an accomm indorser may prove the claim to amount without giving the est benefit of such part payment. Noyes Bros. (1903) 127 Fed. C. C. A. 218, 11 Am. Bankr. Re Swarts v. Fourth Nat. Bank 117 Fed. 1, 54 C. C. A. 387, Bankr. Rep. 673. Where a has received partial payment debt from a surety of the bankr right to prove the claim for its amount, against the estate in ba cy, is in the creditor in prefer the surety. In re Heyman 1899) 95 Fed. 800, 2 Am. Bank 651.

8. Time of accrual of claim provability of a claim depends u status at the time of the filing petition in bankruptcy, which date when the right of credi share in the estate becomes fixe any claim which is not then a p debt, as defined in the act, ca proved although it may thereaft within such definition. Zav Reeves (1913) 227 U. S. 625, Ct. 365, 57 L. Ed. 676, 29 Am. Rep. 493; Sexton v. Dreyfus 219 U. S. 339, 31 Sup. Ct. 256 Ed. 244, 25 Am. Bankr. Rep. 3 re American Vacuum Cleaner C. 1911) 192 Fed. 939, 26 Am. Rep. 621; Swarts v. Fourth Na (1902) 117 Fed. 1, 54 C. C. A. Am. Bankr. Rep. 673; In re P & Co. (D. C. 1905) 137 Fed. Am. Bankr. Rep. 728. A debt o which did not accrue or come i

istence until after the filing of the petition is not provable. Colman Co. v. Withoft (C. C. A. 1912) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Walker (D. C. 1910) 176 Fed. 455, 23 Am. Bankr. Rep. 805; In re Reading Hosiery Co. (D. C. 1909) 171 Fed. 195, 22 Am. Bankr. Rep. 562; In re Rome (D. C. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Black Diamond Copper Mining Co. (1908) 11 Ariz. 415, 95 Pac. 117; In re Riker (D. C. 1878) 18 N. B. R. 393, Fed. Cas. No. 11,833; In re Merrell (D. C. 1884) 19 Fed. 874; In re Ward (D. C. 1882) 12 Fed. 325; Phenix Nat. Bank v. Waterbury (1908) 123 App. Div. 453, 108 N. Y. Supp. 391. And it is immaterial that the claim was for money loaned to the bankrupt to be used in complying with the terms of a composition agreement. Zavelo v. J. S. Reeves & Co. (1911) 171 Ala. 401, 54 South. 654. And it is immaterial that the debt accrued or came into existence before any adjudication was made upon the petition, if it did not exist when the petition was filed; for the statute is explicit in fixing the date of filing the petition, and not the date of the adjudication, as the decisive time. In re Burka (D. C. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; In re Merrill (D. C. 1884) 21 Fed. 120. Compare Spalding v. Dixon (1848) 21 Vt. 45.

Where the filing of a petition in bankruptcy operates as a breach of an executory contract, because equivalent to a refusal to perform, the filing of the petition and the accrual of a claim for damages are contemporaneous, and the creditor may prove his claim for damages as one existing at the time of the filing of the petition. In re Swift (1901) 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374.

A claim founded upon an open account or a contract is not provable in bankruptcy unless it existed at the time of the filing of the petition. Colman Co. v. Withoft (C. C. A. 1912) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Roth & Appel (1910) 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Swift (1901) 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; In re Adams (D. C. 1904) 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Burka (D. C. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12. A debt, to be provable in bankruptcy, must continue to exist in the same condition after as at the time of the commencement of the proceedings; and proof of a claim as indorser upon a note made by the bankrupt will be disallowed where it appears that, after the adjudication of bankruptcy, a new note had been given and the first note taken up. In re Montgomery (D. C. 1869) 3 N. B. R. 426, Fed. Cas. No. 9,730. On this principle also, a claim against a bankrupt for work done under a contract after the filing of the petition cannot be proved as a debt against the estate, although the contract was entered into before the commencement of the proceedings, but was then wholly executory. In re Adams (D. C. 1904) 130 Fed. 381, 12 Am. Bankr. Rep. 368. Where an assignor held a bond secured by mortgage against the bankrupt at the time the petition was filed, and the property was sold and a judgment for a deficiency was entered a month after the bankruptcy, the assignor had a claim which was provable though not yet recoverable at the time of the filing of the petition. In re Fitzgerald (D. C. 1911) 191 Fed. 95, 28 Am. Bankr. Rep. 773.

9. Claims on contracts.—The provision of this section for the proof of claims founded on an "open account or upon a contract express or implied" is not limited by the provision that debts may be proved and allowed which are a "fixed liability, evidenced by a judgment or instrument in writing, absolutely owing." In re Lyons Beet Sugar Refining Co. (D. C. 1911) 192 Fed. 445, 27 Am. Bankr. Rep. 610. CONTRA, In re D. C. Clark Shoe Co. (D. C. 1913) 211 Fed. 341. An account for the balance due for goods sold and delivered is a provable debt. Standard Sewing Machine Co. v. Kattell (1909) 132 App. Div. 539, 117 N. Y. Supp. 32. So is the amount due on a conditional sale of property, provided such sale is not invalid under the laws of the state. In re Gray (D. C. 1908) 170 Fed. 638, 21 Am. Bankr. Rep. 375. So is a fixed sum due for subscriptions to a mercantile agency. In re Glick (D. C. 1911) 184 Fed. 967, 25 Am. Bankr. Rep. 871. So is a claim for damages for breach of an appeal bond. Coe v. Waters (1901) 16 Colo. App. 311, 64 Pac. 1054. Where a bankrupt, on full consideration paid before bankruptcy, contracted to absolutely pay the claimant $3 per day during the remainder of his life, the claim was fixed and provable. In re Miller (D. C. 1915) 225 Fed. 331.

A claim for damages for the breach of an executory contract is a claim "founded upon a contract" within the meaning of the statute, and is provable in bankruptcy, equally as in the case where the contract itself is for the payment of a fixed sum. In re Frederick L. Grant Shoe Co. (1904) 130 Fed. 881, 66 C. C. A. 78, 12 Am. Bankr. Rep. 349; In re Adams (D. C. 1904) 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Stern (1902) 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569; In re Swift (1901) 112 Fed. 316, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; Ex parte Pollard (D. C. 1875) 17 N. B. R. 228, Fed. Cas. No. 11,252; Forest City Steel & Iron Co. v. Detroit & T. S. L. R. Co. (1908) 154 Mich. 182, 117 N. W. 645; Lothrop v. Reed (Mass. 1866) 13 Allen, 294. Compare Watson v. Merrill (1905) 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453. And

if the bankrupt, at the time of the bankruptcy, by disenabling himself from performing his part of a particular contract, and by repudiating its obligation, could give to the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such other party may prove as a creditor in the bankruptcy proceedings, on the ground that bankruptcy is the equivalent of disenablement and repudiation or is an anticipatory breach of the contract. In re Pettingill & Co. (D. C. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; In re Swift (D. C. 1900) 105 Fed. 493, 5 Am. Bankr. Rep. 335; In re Saxton Furnace Co. (D. C. 1905) 142 Fed. 293, 15 Am. Bankr. Rep. 445; Pratt v. Auto Spring Repairer Co. (C. C. A. 1912) 196 Fed. 495, 28 Am. Bankr. Rep. 483; In re Duquesne Incandescent Light Co. (D. C. 1910) 176 Fed. 785, 24 Am. Bankr. Rep. 419; In re Spittler (D. C. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425; In re Neff (1907) 157 Fed. 57, 84 C. C. A. 561, 19 Am. Bankr. Rep. 911; In re National Wire Corp. (D. C. 1909) 166 Fed. 631, 22 Am. Bankr. Rep. 186; Wood v. Fisk (1913) 156 App. Div. 497, 141 N. Y. Supp. 342; Board of Commerce of Ann Arbor, Mich., v. Security Trust Co. (1915) 225 Fed. 454, 140 C. C. A. 486; In re Frank E. Scott Transfer Co. (C. C. A. 1914) 216 Fed. 308. CONTRA, In re Imperial Brewing Co. (D. C. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; In re Inman & Co. (D. C. 1910) 175 Fed. 312, 23 Am. Bankr. Rep. 566. But this rule does not apply if the claimant was himself in default, for if he failed to carry out his own part of the contract, he cannot file a claim for damages. In re Morgantown Tin Plate Co. (1911) 184 Fed. 109, 25 Am. Bankr. Rep. 836. And such a claim cannot be allowed for more than the amount of damages actually sustained; the court will not allow the creditor to take this means of enforcing a mere penalty. In re Bevier Wood Pavement Co. (D. C. 1907) 156 Fed. 583, 19 Am. Bankr. Rep. 462. The claim cannot include a sum named in the contract as liquidated damages, where it is not shown that the claimant has sustained any actual damage by the bankrupt's breach of the contract. Northwest Fixture Co. v. Kilbourne & Clark Co. (1904) 128 Fed. 256, 62 C. C. A. 638, 11 Am. Bankr. Rep. 725.

A claim for breach of contract may be proved in bankruptcy, though the time for performance had not arrived when the petition in bankruptcy was filed. Wood v. Fisk (1913) 141 N. Y. S. 342, 156 App. Div. 497. Where a contract by a bankrupt to furnish livery and baggage service to a hotel provided that it was subject to revocation by the hotel on six months' notice, such provision rendered the contract mutually obligatory for that term only, which limited the term for which the association was entitled to recover damages on termination of the contract b ruptcy. In re Frank E. Scott Co. (C. C. A. 1914) 216 Fed.

In a case where one holdin ent for an invention had gran corporation an exclusive lic manufacture the product, and poration had thereupon contr pay to the patentee a bonus o on the patented articles sold guaranty of a minimum numbe the year, and the corporation bankrupt before the end of t it was held that the patentee titled to prove a claim for the of royalty which had accrued u time of the bankruptcy at the rate, irrespective of the numb ticles actually sold, but that not prove a claim for future accruing during the remainde term, although he was entitled a claim for damages for the b the contract, to be estimated of the fact that, the licens fallen in, he was at liberty to of it again. In re Dr. Voorhe ing Hood Co. (D. C. 1911) 611.

The provision of this sectio allows proof of debts founded "contract express or implied," given a construction sufficient to include quasi contracts aris a conversion of property, wh tort has been waived. Reynold York Trust Co. (1911) 188 F 110. C. C. A. 409, 26 Am. Ban 698.

10. —— Contracts of emplo One employed as a salesman, tendent, manager, secretary, e regard his contract of employ dissolved by the employer's tion in bankruptcy (especially case where the bankrupt is a tion or a partnership) and may claim for the unpaid balance of ary to the time of the filing of tition. Ex parte Pollard (D. Fed. Cas. No. 11,252. See I H. Gladding Co. (D. C. 1903) 709, 9 Am. Bankr. Rep. 700. salary was not fixed by a writ tract or other instrument, he m the reasonable value of his In re Grubbs-Wiley Grocery C. 1899) 96 Fed. 183, 2 Am Rep. 442. And see In re M Portable Elevator Co. (D. C. 1 Fed. 247, 28 Am. Bankr. Rep has been ruled that the measu employé's damages in such a ca be the amount which he wou received under the contract for mainder of the term fixed, l amount as he would be able during that time from other In re Silverman (D. C. 1899) 219, 4 Am. Bankr. Rep. 83. preponderance of authority is effect that the employé cannot claim for any salary beyond of the filing of the petition i ruptcy, on the theory that his

tion of receiving a salary during the remainder of the term, if it can be called a debt or a claim for damages, is no more than a contingent liability, and the present statute has made no provision for the proof or allowance of claims of that character. In re Inman & Co. (D. C. 1909) 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re American Vacuum Cleaner Co. (D. C. 1911) 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Dr. Voorhees Awning Hood Co. (D. C. 1911) 187 Fed. 611; Orr v. Ward (1874) 73 Ill. 318; In re D. Levy & Sons Co. (D. C. 1913) 208 Fed. 479, 31 Am. Bankr. Rep. 25; In re Montague & Gillet (D. C. 1914) 212 Fed. 452.

The rule is substantially the same where the contract required the payment of commissions to a salesman in addition to his salary. Such commissions as were actually earned before the date of bankruptcy constitute a provable debt, but a claim for commissions on sales which possibly or probably might have been made if the contract had continued to its appointed term is top speculative and remote to be available as a provable debt in bankruptcy. See Clairemonte v. Napier Motor Co. (1909) 11 Cal. App. 265, 104 Pac. 712; In re Silverman (D. C. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83.

11. Promissory notes.—A promissory note is a provable debt in bankruptcy as being a "fixed liability evidenced by an instrument in writing," and may be proved by the payee or indorsee as the case may be. In re Shelbourne (D. C. 1879) 19 N. B. R. 359, Fed. Cas. No. 12,745. Notes made by a corporation are provable against its estate in bankruptcy, if duly executed under proper authority and for a legitimate corporate purpose. In re New York Car Wheel Works (D. C. 1905) 141 Fed. 430, 15 Am. Bankr. Rep. 571.

Where a loan was in fact made to a bankrupt corporation, the claim was provable against it, though evidenced by the individual notes of the corporation's executive officers. Hogin v. Central Nat. Bank (1915) 223 Fed. 325, 138 C. C. A. 587.

A claim on a note may be proved against the estate of the bankrupt indorser. In re Bruce (D. C. 1873) Fed. Cas. No. 2,044.

A claim founded on a promissory note will not be allowed where it appears that it was not founded upon a good and valid consideration. In re Hook (D. C. 1874) 11 N. B. R. 282, Fed. Cas. No. 6,672. And a renewal note, which is not supported by any fresh consideration, is not provable where the original note was without consideration. In re Stanford Clothing Co. (D. C. 1911) 187 Fed. 172, 26 Am. Bankr. Rep. 124; In re Cornwall (D. C. 1871) 4 N. B. R. 400, Fed. Cas. No. 3,251. See In re New York Car Wheel Works (D. C. 1905) 139 Fed. 421, 14 Am. Bankr. Rep. 595. But a note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consideration and may be proved as a debt in a second bankruptcy proceeding. In re C. H. Bennett Shoe Co. (D. C. 1908) 162 Fed. 691, 20 Am. Bankr. Rep. 704.

Further it is necessary that the claimant offering to prove on the note should be a holder in good faith and for value or at least (in the case of a remote indorsee) that he should prove affirmatively that his immediate indorser was a bona fide holder for value. In re Hopper-Morgan Co. (D. C. 1907) 156 Fed. 525, 19 Am. Bankr. Rep. 518, affirmed (1909) 166 Fed. 1020, 91 C. C. A. 37. A person to whom notes are sent for discount, and who fails to pay drafts drawn against the proceeds in favor of an indorser of the notes, cannot prove his claim on the notes against the bankrupt payee of the drafts, for, having failed to pay the drafts, he has no right to retain the notes and is not a holder for value. In re Howard (D. C. 1873) 6 N. B. R. 372, Fed. Cas. No. 6,751.

The cashier of a national bank had discounted notes for the maker of them, far in excess of the amount which the bank could legally loan to one person, and beyond the ability of the maker and indorser of the notes to pay, and this was done without the knowledge or consent of the other officers of the bank. A criminal prosecution was instituted against the cashier and he was sentenced to imprisonment for misapplying the funds of the bank, and criminal proceedings against the maker of the notes for aiding him in so doing likewise resulted in a conviction. The bank having become insolvent, its receiver sued on the cashier's bond and recovered judgment for the amount of the penalty of such bond. But it was held that these facts did not affect the validity of the notes, nor the bank's ownership of them, and the receiver might prove the same in bankruptcy against the estate of the indorser. In re Edson (D. C. 1902) 119 Fed. 487, 9 Am. Bankr. Rep. 505.

A pledgee in good faith and for value of a promissory note, transferred to him before maturity, may prove it for its full amount against the estate in bankruptcy of the maker, whatever may have been the equities between the maker and the pledgor; but if there are such equities as would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the note in pledge. Ex parte Kelty (D. C. 1869) Fed. Cas. No. 7,681.

12. Judgments.—A verdict, not followed by the entry of judgment before the institution of bankruptcy proceedings, is not a provable debt. In re Ostrom (D. C. 1911) 185 Fed. 988, 26 Am. Bankr. Rep. 273; Black v. McClel-

land (C. C. 1875) 12 N. B. R. 481, Fed. Cas. No. 1,462.

A judgment recovered before the filing of a petition in bankruptcy against the debtor is a provable debt. Johnson v. Joslyn (1907) 45 Wash. 310, 88 Pac. 324; Graham v. Pierson (N. Y. 1843) 6 Hill, 247; People's Nat. Bank of Independence v. Maxson (Iowa, 1915) 150 N. W. 601. The provability of such a judgment does not depend on the nature of the cause of action, and the judgment is provable although the cause of action by itself would not have constituted a provable claim. Howland v. Carson (1876) 28 Ohio St. 625. Compare Turner v. Turner (D. C. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289.

A judgment in an action for a tort, such as fraud, conspiracy, or deceit, is provable in bankruptcy. Landgraf v. Griffith (1875) 41 Ind. App. 372, 83 N. E. 1021. Judgment for damages for plaintiff in trover to recover goods purchased when insolvent, where no fraudulent misrepresentations are shown, is a provable debt, within Bankr. Act July 1, 1898, § 63a(4). Kreitlein v. Ferger (1915) 35 Sup. Ct. 685, 238 U. S. 21, 59 L. Ed. 1184, reversing judgments (1879) 97 N. E. 819, 52 Ind. App. 199, and (1875) 98 N. E. 1005, 52 Ind. App. 199. Judgment against city marshal for paying attached rents to attaching creditor with notice of assignee's claim held provable in bankruptcy. Ulner v. Doran (1915) 152 N. Y. S. 655, 167 App. Div. 259. A claim may be proved on a judgment for damages for negligence causing death. In re Putnam (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923. Or a judgment for breach of promise of marriage. In re Fife (D. C. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; In re Sidle (D. C. 1868) 2 N. B. R. 220, Fed. Cas. No. 12,844. Or a judgment recovered by a woman for seduction. In re McCauley (D. C. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122. Or a judgment fixing the liability of a stockholder in an insolvent corporation for a contribution equal to the amount of his stock to pay its debts. Dight v. Chapman (1904) 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

A judgment, proved as a debt in bankruptcy, is conclusive of the validity and amount of the claim. McKinsey v. Harding (D. C. 1869) 4 N. B. R. 38, Fed. Cas. No. 8,866. The conclusiveness of the judgment and its availability as a provable claim are not impaired by the fact that an appeal is pending or a writ of error with supersedeas of execution. In re Leszynsky (D. C. 1869) Fed. Cas. No. 8.278; In re Sheehan (D. C. 1873) 8 N. B. R. 345, Fed. Cas. No. 12,737. Under Code Civ. Proc. Cal. § 942, a judgment for damages for personal injuries, from which an appeal had been taken without bond, is a final judgment, on which a claim against a bankrupt's estate can be bas-

ed. In re Berlin Dye Works
dry Co. (D. C. 1915) 225 Fed

The liability of a bankrupt
on the bond of an administrat
a fixed liability absolutely owi
to be provable against his estat
no final judgment or decree
rendered in the probate cour
state adjudging the liability of
cipal, but only a decree nisi, w
der the law of the state, is me
liminary, requiring a further
make it final, and where suc
had been suspended prior to t
ruptcy. In re Wiseman (D.
123 Fed. 185, 10 Am. Bankr.

For the purpose of proving a
bankruptcy, a debt is not so n
a judgment recovered upon it
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upon it before the adjudication
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the adjudication and before the
application for discharge, he m
the original debt, although the
was for a less sum than the de
ed and offered for proof. In r
1 Nat. Bankr. News, 138; In
(D. C. 1870) 3 N. B. R. 584,
No. 1,975; In re Crawford
1870) 3 N. B. R. 698, Fed.
3,363; In re Stansfield (D.
16 N. B. R. 268, Fed. Cas. N
In re Vickery (C. C. 1870) 3
696, Fed. Cas. No. 16,930;
Carter (1884) 78 Va. 621. A
re Smith (D. C. 1910) 176
23 Am. Bankr. Rep. 864.

Where a creditor holding a
provable debt against a ban
the date of the adjudication t
brings suit in a state court
covers judgment, he may pr
judgment as an unsecured clai
the bankrupt's estate, less co
red and interest accrued after
of the petition up to the entry
ment. In re McBryde (D. C.
Fed. 686, 3 Am. Bankr. R
Compare Hackett v. Supreme
A. L. H. (1910) 206 Mass. 13
E. 133.

A creditor holding a promiss
valid and enforceable against t
at the date of the latter's adj
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statute of limitations has ne
may reduce the same to judg
suit brought in a state court a
adjudication, and the judgment
tablish the claim and stop the
of the statute, though it will
the creditor a lien or priority
him to levy on the bankrupt's
In re McBryde (D. C. 1899)
686, 3 Am. Bankr. Rep. 729.

A claim for damages for n
causing personal injuries is no
able debt, and it is not made
by the recovery of a judgme
after the filing of the petition
ruptcy. In re Crescent Lun

(D. C. 1907) 154 Fed. 724, 19 Am. Bankr. Rep. 112.

It has been held, in a case where the trustee, eighteen months after the adjudication, brought an action in a state court against a supposed debtor of the estate, but was defeated, and the defendant recovered a judgment on a counterclaim against the bankrupt, that the trustee was liable for the costs of the action, but that the creditor, having filed no claim within the time allowed, could not prove his judgment against the estate. In re Havens (D. C. 1910) 182 Fed. 367, 25 Am. Bankr. Rep. 116.

13. Equitable claims and demands.—As courts of bankruptcy have jurisdiction in equity as well as at law, equitable claims against a bankrupt are provable if within the purview of the general rules of equity, even though they have no status at law. In re Putman (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Upson (D. C. 1903) 123 Fed. 807, 10 Am. Bankr. Rep. 602; Sigsby v. Willis (D. C. 1869) 3 N. B. R. 207, Fed. Cas. No. 12,849; In re Blandin (D. C. 1871) 5 N. B. R. 39, Fed. Cas. No. 1,527; In re Buckhause (D. C. 1874) 10 N. B. R. 206, Fed. Cas. No. 2,086; In re Coney Island Lumber Co. (D. C. 1912) 199 Fed. 803.

In equity, and therefore in bankruptcy, a married woman can contract with her husband in respect to her separate estate and sue him in regard to it, and hence a claim in bankruptcy in favor of the wife of the bankrupt, for money loaned to a partnership of which he was a member, may be proved. In re James (1904) 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, 12 Am. Bankr. Rep. 573. And see In re Batchelder & Lincoln Co. (1903) 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641; In re Jordan & Blake (D. C. 1880) 2 Fed. 319.

A mere claim in equity to rescind a contract is not a debt which is provable in bankruptcy. Doggett v. Emerson (C. C. 1846) Fed. Cas. No. 3,962.

14. Contingent demands and liabilities.—Contingent demands and liabilities are not provable as debts in bankruptcy. Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re American Vacuum Cleaner Co. (D. C. 1911) 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Inman & Co. (D. C. 1909) 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re Wilson (D. C. 1912) 194 Fed. 564, 27 Am. Bankr. Rep. 867; In re Hartman (D. C. 1909) 166 Fed. 776, 21 Am. Bankr. Rep. 610; Phenix Nat. Bank v. Waterbury (1908) 123 App. Div. 453, 108 N. Y. Supp. 391; Leader v. Mattingly (1904) 140 Ala. 444, 37 South. 270.

A contingent claim in this sense is one where all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed. Colman Co. v. Withoft (C. C. A. 1912) 195 Fed. 250, 28 Am. Bankr. Rep. 328. A contingent claim is one the valuation or estimation of which it is substantially impossible to prove because of the uncertain or fortuitous elements which may enter into it. Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. The liability of an indorser of the bankrupt's promissory note, is not a contingent demand, although the note is not due at the time of the filing of the petition. Colman Co. v. Withoft (C. C. A. 1912) 195 Fed. 250, 28 Am. Bankr. Rep. 328.

The liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt. In re Pettingill (D. C. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728. The same rule has been applied to an agreement by the bankrupt to pay an annuity to his divorced wife "during her life or until she remarries." Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. And so of a claim against the bankrupt by his lessee for prospective profits of the business conducted at a stand on the bankrupt's premises, on breach of the lease by the bankrupt. In re Leland (D. C. 1875) Fed. Cas. No. 8,233. Nor can a claim be proved on a covenant in a lease permitting the lessor, on default, to re-enter and relet the premises at the risk of the lessee, the latter to remain liable for the rent and be credited with the sums actually realized. Ex parte Lake (D. C. 1877) 16 N. B. R. 497, Fed. Cas. No. 7,991; Bowditch v. Raymond (1888) 146 Mass. 109, 15 N. E. 285. And see In re Gallacher Coal Co. (D. C. 1913) 205 Fed. 183, 29 Am. Bankr. Rep. 766. Bonds of a corporation which by their terms were payable only out of funds created from the surplus earnings of the company held not provable in bankruptcy against the company, where there never had been any surplus earnings, and such funds had therefore never been created. Synnott v. Tombstone Consol. Mines Co. (C. C. A. 1913) 208 Fed. 251, denying rehearing (C. C. A. 1913) 207 Fed. 544. But a contract liability of the bankrupt, contingent at the time the petition was filed, but liquidated within the year allowed for making proof, is a provable debt. In re James Dunlap Carpet Co. (D. C. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882.

15. Unliquidated demands.—The provision of this section that unliquidated claims may be liquidated in such man-

ner as the court may direct, and may thereafter be proved and allowed against the estate, covers only such claims as, when liquidated, will be provable debts under the specifications of the preceding paragraph and does not enlarge the class of provable debts nor permit the proof of claims for damages for torts not reduced to certainty by judgment. Dunbar v. Dunbar (1903) 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re Southern Steel Co. (D. C. 1910) 183 Fed. 498, 25 Am. Bankr. Rep. 358; In re New York Tunnel Co. (1908) 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25; In re Hirschman (D. C. 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; Brown & Adams v. United Button Co. (1906) 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565. A claim which is both unliquidated and contingent is not a provable debt. Cotting v. Hooper, Lewis & Co. (1915) 220 Mass. 273, 107 N. E. 931.

A claim for damages for breach of a contract, where the amount of damage is to be ascertained by proof and not by mere calculation, is an unliquidated demand. In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689. And so is the liability arising upon a written guaranty to pay the future indebtedness of another person upon an open account. Hargroves v. Cooke (1854) 15 Ga. 321. And the liability of a bankrupt broker for stock purchased by him for a customer and converted to his own use, the exact time of the conversion not being shown. In re Graff (D. C. 1902) 117 Fed. 343, 8 Am. Bankr. Rep. 744. So where plaintiff was a partner with defendant in a transaction involving the purchase and sale of a certain commodity, and plaintiff knew, when defendant filed his petition in bankruptcy, that the venture would result in a loss, leaving the defendant indebted to him, though the exact amount was not then known and could not be ascertained until the rest of the stock on hand was disposed of, it was held that plaintiff had an "unliquidated claim" against defendant at the date of the bankruptcy. Dycus v. Brown (1915) 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190. In this classification also are included losses suffered by a broker in disposing of goods purchased for the bankrupt which he failed or refused to receive. In re Smith (D. C. 1872) Fed. Cas. No. 12,975. And a claim against a testamentary trustee for negligence and mismanagement. In re Griffin (D. C. 1910) 188 Fed. 389.

A claim against the estate of a bankrupt for sums of money obtained by him from the claimants, while in their employment, by means of forged indorsements, pilfering of cash, and inducing them to purchase stocks on false and fictitious orders, cannot be denied allowance, on the ground being an unliquidated demand, the amounts taken from and p by the claimants are certain. Filer (D. C. 1901) 125 Fed. Am. Bankr. Rep. 835.

When a creditor's claim agai bankrupt is unliquidated he ca once proceed to make proof of have it allowed. He must firs an application to the court to h claim "liquidated," and it will liquidated in such manner as th shall direct, or it must be liq by suit or in some other manne the court will allow or accept, a previous application to it, and after he may prove the claim manner prescribed by law, and its allowance for the amount f such liquidation. In re Rubel 1908) 166 Fed. 131, 21 Am. Rep. 566; In re Silverman (D. 101 Fed. 219, 4 Am. Bankr. R In re Heinsfurter (D. C. 18 Fed. 198, 3 Am. Bankr. Re In re Clough (D. C. 1868) 2 N 151, Fed. Cas. No. 2,905. Th dation may be effected by a hea fore the referee, by a plenary a court of competent jurisdic by permitting an action pending court to proceed to judgment. Buchan's Soap Corp. (D. C. 19 Fed. 1017, 22 Am. Bankr. Re In re Duquesne Incandescent Co. (D. C. 1910) 176 Fed. Am. Bankr. Rep. 419; In re Button Co. (D. C. 1906) 140 F 15 Am. Bankr. Rep. 390. against a bankrupt for breach o ise to marry, on which suit wa ing in a state court, held an unl ed claim, which the court prop dered liquidated by trial in th court. In re Martin (C. C. A 228 Fed. 184. Where an actio unliquidated claim is pending in court when bankruptcy occurs, trustee does not apply for a s permits the case to go to judgm claim is thereby liquidated, a judgment affords proper proof amount of the claim. In re B Soap Corp. (D. C. 1909) 16 1017, 22 Am. Bankr. Rep. 382. a claim secured by a mortgage bankrupt's stock in trade was by the trustee as a preferen thereupon the creditor sued in court to establish the validity mortgage, and in that action th gage was held to be invalid as erence, it was held that the c claim was thereby "liquidate was provable as an unsecure Powell v. Leavitt (C. C. A. 19 Fed. 89.

16. Assigned claims.—Where able claim against the bankrupt at the time the petition was f subsequent assignment of it wi with it all the rights and

which the assignor had, including the right to intervene in the bankruptcy proceedings. In re Fitzgerald (D. C. 1911) 191 Fed. 95, 26 Am. Bankr. Rep. 773. Except in the case of negotiable paper, the assignee will take the claim in the same condition in which his assignor held it, and will acquire no stronger or higher rights. In re Wiener & Goodman Shoe Co. (D. C. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200; Humphreys v. Blight's Assignee (C. C. 1803) Fed. Cas. No. 6,870. He may prove the claim for its full amount, although he purchased it at a discount. In re Houghton (D. C. 1842) Fed. Cas. No. 6,728. He may prove the claim and receive dividends on it, notwithstanding that the assignment was intended only as collateral security. In re American Specialty Co. (C. C. A. 1911) 191 Fed. 807, 27 Am. Bankr. Rep. 463. Compare In re Eagles (D. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733.

Where various creditors have all assigned their claims to a committee, with a view to purchasing the bankrupt's property and selling it for the benefit of the assignors, the right to prove the claims in the bankruptcy is in the committee, and not in the individual creditors. In re E. T. Kenney Co. (D. C. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

The form by which a claim against a bankrupt is transferred is immaterial, and cannot affect the right of the assignee to prove the claim, provided only that it is sufficient to estop the original holder from asserting any right to it. In re Miner (D. C. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100.

One taking an assignment of a proved claim as security for an antecedent liability of the person in whose name it is proved, who is apparently though not really the owner thereof, is not a purchaser for value, and cannot hold the claim against the true owner. In re Sime (D. C. 1875) Fed. Cas. No. 12,861.

It is not unlawful to buy up claims against an insolvent person for the purpose of preventing or stopping proceedings in bankruptcy against him. In re Strachan (D. C. 1872) Fed. Cas. No. 13,519. And it has been held that the allowance of a claim, in favor of an assignee who acquired it after the adjudication, but from an innocent and bona fide holder in whose hands it was valid and provable, will not be set aside upon an allegation by other creditors that the assignee bought the claim for the purpose of acquiring a majority interest in the estate, of controlling the bankruptcy proceedings in the interest of the bankrupt and himself, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out to the injury of other creditors. In re Headley (D. C. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272. But where a person intending to go into bankruptcy procured a friend to buy up a large part of his indebtedness at a small fraction of its nominal value, by disseminating false and discouraging statements as to the amount of dividends his estate would pay, it was remarked that no court of bankruptcy would hesitate to hold that claims thus tinctured with fraud should not be proven against the estate. In re State Ins. Co. (D. C. 1883) 16 Fed. 756. Where an insolvent, in contemplation of bankruptcy, executed a mortgage on real estate for $1,000 to his brother-in-law, which was fraudulent, and the mortgagee, after bankruptcy, assigned the mortgage to L., it was not provable as a claim against the bankrupt's estate. Butcher v. Werksman (D. C. 1913) 204 Fed. 330.

If the trustee has assets in hand more than sufficient to pay all other claims, debts purchased by agents for the bankrupt may be allowed to the extent of the sums paid therefor by the purchasers. In re Lathrop (D. C. 1871) Fed. Cas. No. 8,104.

17. Debts payable in the future.—A claim which constitutes a fixed liability and is absolutely owing at the time of filing a petition in bankruptcy is provable as a debt against the estate, though not yet matured. De Long v. Mechanics & Metals Nat. Bank (1915) 168 App. Div. 525, 153 N. Y. Supp. 1010. If one owing a debt has procured an extension of time for its payment and becomes bankrupt, the creditor has a provable claim, even before the expiration of the time agreed on. Ecfort v. Greely (D. C. 1873) 6 N. B. R. 433, Fed. Cas. No. 4,260. A promissory note made by the bankrupt is a provable debt in bankruptcy, although not due at the time of the filing of the petition. In re Percy Ford Co. (D. C. 1911) 199 Fed. 334, 28 Am. Bankr. Rep. 919.

A penal bond, executed by a person who is thereafter adjudged a bankrupt, to secure the payment to the obligee of an annuity during life, is an instrument creating a fixed liability absolutely owing at the time of the filing of the petition, payable in the future, and is provable as a debt against the bankrupt's estate for the amount of the penalty stated therein, where the value of the annuity, computed on the life tables, exceeds such penalty. Cobb v. Overman (1901) 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. Rep. 324 (overruling Bray v. Cobb [D. C. 1900] 100 Fed. 270, 3 Am. Bankr. Rep. 788); Haywood v. Shreve (1882) 44 N. J. Law, 94; Roosevelt v. Mark (N. Y. 1822) 6 Johns. Ch. 266.

A claim for attorney's fees under a stipulation in a mortgage which was not due when the petition was filed and no services had been rendered is not allowable against the bankrupt's estate.

British & American Mortgage Co. v. Stuart (C. C. A. 1914) 210 Fed. 425.

18. Interest accrued and accruing.—To entitle himself to interest on his claim proved in bankruptcy, the creditor must show either a debt entitled to interest by operation of law or else a mutual agreement of the parties that interest should be charged. In re Stevens (D. C. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9. The right to claim interest in bankruptcy proceedings may depend upon the making of a previous demand for payment. In re North Carolina Car Co. (D. C. 1903) 127 Fed. 178, 11 Am. Bankr. Rep. 488. Where a claimant sent a bankrupt annual statements, showing that the bankrupt was charged interest at 8 per cent. compounded annually, the bankrupt never having objected, the statements constituted accounts stated as against the bankrupt's trustee. In re Hawks (D. C. 1913) 204 Fed. 309. Even though the parties may have agreed that no interest should be payable on a loan of money, yet where this stipulation was based on the performance of certain acts on the part of the borrower, his failure to observe the contract may entitle the lender to claim interest as against his estate in bankruptcy. In re Fenn (D. C. 1909) 172 Fed. 620, 22 Am. Bankr. Rep. 833. But interest should not be allowed where the debt is one which would have been barred by the statute of limitations if it had not been saved by a new promise. In re Reed (D. C. 1874) Fed. Cas. No. 11,635. In the case of a debt put into judgment before the petition in bankruptcy was filed, interest may be proved with the debt. Ex parte O'Neil (D. C. 1867) Fed. Cas. No. 10,-527.

If, by the law of the state, the taking of usury causes a forfeiture of all interest, when the debt is put in suit, the same consequence attends the presentation in bankruptcy of a claim on which usury has been exacted. In re Prescott (D. C. 1874) 9 N. B. R. 385, Fed. Cas. No. 11,389.

In the case of all ordinary debts, interest accruing subsequent to the time of the filing of the petition in bankruptcy is not provable. In re Haake (D. C. 1872) 7 N. B. R. 61, Fed. Cas. No. 5,883; In re Bugbee (D. C. 1874) 9 N. B. R. 258, Fed. Cas. No. 2,115. But interest may run on a valid debt secured by a mortgage or other specific lien up to the time of its payment out of the proceeds of a sale of the property. In re Torchia (D. C. 1911) 185 Fed. 576, 26 Am. Bankr. Rep. 188.

Where an estate in bankruptcy proves to be solvent, that is, where all proved claims are paid in full and there remains a balance in the hands of the trustee, the proving creditors are entitled to an additional allowance of interest, from the date of filing the petition to the date when the last payment on their debts was made, before any par surplus shall be returned to th rupt. Johnson v. Norris (19 Fed. 459, 111 C. C. A. 291, Bankr. Rep. 107; In re John (Sons & Co. (1910) 177 Fed. 1 C. C. A. 392, 24 Am. Bankr. I Bromley v. Goodere, 1 Atkyns, parte Mills, 2 Ves. Jr. 295; Cle Clemons (1896) 69 Vt. 545, 38 A

19. Costs, expenses, and c fees.—The provision of this sec lowing proof of a claim for ' costs" includes costs incurred attachment proceeding prior to ing of the petition in ban though the lien of the attach dissolved by the adjudication. Allen (D. C. 1899) 96 Fed. 512 Bankr. Rep. 38; In re Preston 1871) 5 N. B. R. 293, Fed. C 11,393. Compare In re Hatje 1875) Fed. Cas. No. 6,215. especially the case if the att proceedings had the effect of ing the property for the benefi general creditors. In re Heller 1910) 176 Fed. 656, 23 Am. Rep. 792. Costs incurred by ment creditor in obtaining th ment and in defending an appea from are provable against the e the surety on the appeal bond. Waters (1901) 16 Colo. App. Pac. 1054. Although the costs able are ordinarily only those under the law of the state wh action was maintained, and n limited to the amounts fixed law, yet it is competent for t ties to a litigation to stipulate payment to such officers as a or master in chancery, and al stenographer, of fees in excess statutory rate, and when the done so, the amount agreed up be proved and allowed in ban In re J. B. Brewster & Co. (19 Fed. 109, 103 C. C. A. 42, Bankr. Rep. 838.

Costs, to be allowable at al have been incurred in an ac recover a provable debt, and he costs of an attachment laid by t of the bankrupt in a libel for are not provable in the bankrup re Foye (D. C. 1875) Fed. C 5,021. A creditor who sues, ers judgment, and levies execu fore the filing of the petition i ruptcy cannot be charged wi faith merely because he ma known or believed that the deb in financial straits when he be suit. In re Harnden (D. C. 19 Fed. 172, 29 Am. Bankr. Rep. 50 expenses and disbursements i by a creditor in endeavoring to the bankruptcy act and to obtain erence over other creditors ca allowed as a claim against the In re Archenbrown (D. C. 1876) R. 429, Fed. Cas. No. 503.

Where the creditor's claim is based upon a note which contains a stipulation for the payment of an attorney's fee, in addition to principal and interest, in case the note is "placed in the hands of an attorney for collection," the right to add the attorney's fee to the amount of the claim, in proving it in bankruptcy will depend upon the concurrence of two things, the maturity of the note and the placing it in an attorney's hands for collection, both before the filing of the petition in bankruptcy. If the note fell due and was so placed for collection, and the bankruptcy of the maker occurred after both these events, then the creditor will be entitled to prove his claim for the stipulated attorney's fee in addition to the face of the note. In re Edens Co. (D. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643. But if the note did not mature until after the institution of the bankruptcy proceedings, no such fee can be claimed, although it may have been given to an attorney for collection when due. In re T. H. Thompson Milling Co. (D. C. 1906) 144 Fed. 314, 16 Am. Bankr. Rep. 454; In re Edens Co. (D. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643; In re Garlington (D. C. 1902) 115 Fed. 999, 8 Am. Bankr. Rep. 602. And on the other hand, although the note fell due before the filing of the petition in bankruptcy, yet if it was not placed in the hands of an attorney for collection until after the institution of the bankruptcy proceedings, the claim for an attorney's fee cannot be proved, because not a "fixed liability absolutely owing" at the commencement of the proceedings. In re Keeton, Stell & Co. (D. C. 1903) 126 Fed. 426, 11 Am. Bankr. Rep. 367; In re V. & M. Lumber Co. (D. C. 1910) 182 Fed. 231; In re Gebhard (D. C. 1905) 140 Fed. 571, 15 Am. Bankr. Rep. 381. Compare Merchants' Bank v. Thomas (1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299. Further, where the law of the state regards a stipulation of this kind as merely a contract of indemnity—that is, as creating a liability for reasonable fees for services rendered, not exceeding the amount stipulated—a creditor will not be entitled to the allowance of such a fee unless he gives proof of collection services actually rendered and entitling him to indemnification. McCabe v. Patton (1909) 174 Fed. 217, 98 C. C. A. 225, 23 Am. Bankr. Rep. 335. Nor should an attorney's fee be allowed where the payee of the note, filing it for proof, is himself an attorney. In re Hersey (D. C. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863. In the case of an attorney's fee stipulated for in a mortgage, its allowance or rejection in bankruptcy will depend upon the wording of the particular instrument. Where the mortgagee proves his claim as a secured creditor, and the property is sold by the trustee in bankruptcy at private sale under orders of the court, a fee for the mortgagee's attorney cannot be claimed where the instrument only stipulated for such a fee in case it became "necessary to foreclose" the mortgage "by suit or proceedings in court." In re Roche (1900) 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369. But otherwise where it provided for an attorney's fee "in case legal services should become necessary to protect the interests" of the mortgagee. In re Holmes Lumber Co. (D. C. 1911) 189 Fed. 178, 26 Am. Bankr. Rep. 119. Although a state statute provides that a mortgagee may recover attorneys' fees on foreclosure, provided he will previously give a certain notice of his intention to foreclose, yet such fees do not constitute a provable claim in bankruptcy, where the bankruptcy of the mortgagor intervened after the giving of such notice, but before any foreclosure was had. In re Weiland (D. C. 1912) 197 Fed. 116, 28 Am. Bankr. Rep. 620.

As to the allowance of fees to the attorneys of creditors, independently of the agreement of the parties or of any statutory provisions, the rule is that such an allowance may be made on equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that such services were beneficial in fact. In re Zier & Co. (1905) 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646. See In re Crave & Martin Co. (1910) 183 Fed. 769, 106 C. C. A. 180; In re Duran Mercantile Co. (D. C. 1912) 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Coney Island Lumber Co. (D. C. 1912) 199 Fed. 803. Thus, attorneys who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, a second petition presented by other creditors resulting in an adjudication, are not entitled to an allowance of fees from the estate. In re Fischer (C. C. A. 1910) 175 Fed. 531, 23 Am. Bankr. Rep. 427. Where an adjudication of bankruptcy was made against a corporation which was already in the hands of a receiver appointed by a state court, and the attorneys for the receiver antagonized the bankruptcy proceedings and instigated litigation which delayed and obstructed such proceedings and caused a large amount of expense to the estate, it was held that they were not entitled to the allowance of any fees from the estate, and their belief that they were within their legal rights, and that the state court had prior jurisdiction of the case, was considered immaterial; and it was further held that they could not be allowed compensation for any services which were actually beneficial to the estate, where it appeared that, as a

whole, their services cost the estate and the general creditors several times the amount, in increased expenses of administration. In re Zier & Co. (1905) 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646; In re M. Zier & Co. (D. C. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527.

20. Liability of bankrupt as indorser, guarantor, or surety.—The liability of a bankrupt as an indorser of commercial paper is a debt provable against his estate. In re Letchworth (D. C. 1884) 19 Fed. 873; Hunt v. Taylor (1871) 108 Mass. 508, 4 N. B. R. 683; In re Morse (D. C. 1875) 11 N. B. R. 482, Fed. Cas. No. 9,853; Ex parte Farnsworth (D. C. 1870) Fed. Cas. No. 4,-672. And where a note has matured at the time of the filing of the petition, and there have been presentation, demand of payment, and protest, the liability of an indorser thereon is a "fixed liability absolutely owing." Whitwell v. Wright (1910) 136 App. Div. 246, 120 N. Y. Supp. 1065. But some of the cases have maintained that no provable claim on an indorsement can be said to have arisen unless dishonor, protest, and notice have preceded the institution of the proceedings in bankruptcy. In re Loder (D. C. 1870) 4 N. B. R. 190, Fed. Cas. No. 8,457; In re Schaefer (D. C. 1900) 104 Fed. 973; Stowell v. Richardson (Mass. 1861) 3 Allen, 64. Compare Ex parte Russell (D. C. 1877) 16 N. B. R. 476, Fed. Cas. No. 12,148. Notice of non-payment of a note is not necessary to bind the estate in bankruptcy of an indorser, where the estates of the maker and the indorser are both represented by the same trustees. In re T. A. McIntyre & Co. (D. C. 1912) 198 Fed. 579, 28 Am. Bankr. Rep. 459. In the case of a promissory note payable on demand, and which must therefore be presented for payment within a reasonable time in order to charge the indorser, it has been said that where such a note is not presented nor any demand made within four years, a protest made after that lapse of time does not fix any liability on the indorser, and a claim founded on the note cannot be proved against his estate in bankruptcy. In re Crawford (D. C. 1871) 5 N. B. R. 301, Fed. Cas. No. 3,364. But the prevailing opinion is that the liability of a bankrupt indorser of negotiable paper, though it does not become absolute by (dishonor and protest) until after the filing of the petition, is nevertheless a "debt" within the meaning of the statute, which enumerates debts on contract, express or implied, among those provable in bankruptcy; and it may be proved against his estate after such liability has become fixed, if within the time limited for proving claims. Moch v. Market Street Nat. Bank (1901) 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11; In re Phillip Semmer Glass Co. (1905) 135 Fed. 77, 67 551, 14 Am. Bankr. Rep. 2 Smith (D. C. 1906) 146 Fe Am. Bankr. Rep. 112; In (D. C. 1901) 105 Fed. 89 Bankr. Rep. 89; McNeil (1852) 11 Ga. 142; In re N (D. C.) 3 N. B. R. 230, Fed 10,254. It has been held that er of a note might prove a cla the estate of the bankrupt notwithstanding the fact that would not be due for more th after the adjudication in b In re Buzzini & Co. (D. C. Fed. 827. Even where the question is rendered nonneg the insertion of a restrictive in regard to the mode of its a proof against the bankrupt dorser of it will not be expun it is shown that it was nego his sole benefit. In re Grang 1873) 8 N. B. R. 30, Fed. Ca 684. But on the other hand, rupt cannot be held liable w shown that his indorsement note was forged and that he ceived any benefit from the p it. In re Lamon (D. C. 1909) 516, 22 Am. Bankr. Rep. 635.

A provable claim may be the liability of the bankrupt a on a replevin bond. Choate chett (Tenn. 1873) 12 Heisk. his liability as surety on the guardian. Davis v. McCurdy Wis. 569, 7 N. W. 665. A not teed by a corporation is provab its estate in bankruptcy. In r ka Bros. Co. (D. C. 1913) 206 But the bankruptcy act does mit proof of a claim against until there has been a forf breach of condition or failure formance, or, in the case of a nity bond, some actual loss or the obligee. Loeser v. A (1910) 176 Fed. 265, 100 C. 24 Am. Bankr. Rep. 75; Ki Fowle (Mass. 1862) 5 Allen, 1 bett v. Woodward (C. C. 18 Cas. No. 3,223; Loring v. (Mass. 1854) 1 Gray, 305. A the bankrupt is a guarantor, is nothing presently due or c liquidation at the time of the b cy, and no certainty that anyt ever be due or that any liab arise, no claim can be prove the bankrupt's estate. In re N Baker (1911) 186 Fed. 312, 1 A. 390; In re Pettingill & Co 1905) 137 Fed. 143, 14 Am. Ba 728.

21. Rights of bankrupt's sure dorser.—A surety on a bond, made the payment or discha obligation for which the princ liable, has a provable claim ag latter's estate in bankruptcy. Lyons Beet Sugar Refining Co 1911) 192 Fed. 445, 27 Am

Rep. 610; Liddell v. Wiswell (1887) 59 Vt. 365, 8 Atl. 680.

The bankrupt's surety has no provable claim, to be set up in his own name, until he has paid the debt or damages or liquidated the obligation called for by the bond. Insley v. Garside (1903) 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; R. P. Williams & Co. v. United States Fidelity & Guaranty Co. (1912) 11 Ga. App. 635, 75 S. E. 1067; Hester v. Baldwin (C. C. 1875) Fed. Cas. No. 6,438; Steele v. Graves (1880) 68 Ala. 21; Ecker v. Bohn (1876) 45 Md. 278, 16 N. B. R. 544. Compare Lipscomb v. Grace (1870) 26 Ark. 231, 7 Am. Rep. 607. And a partial payment is not sufficient to give him a provable claim pro tanto. Unless and until the debt or claim is paid in full, the right to prove it as a debt in bankruptcy is in the original creditor and not in the surety. In re Heyman (D. C. 1899) 95 Fed. 800, 2 Am. Bankr. Rep. 651; In re Hollister (D. C. 1880) 3 Fed. 452. But a surety need not necessarily pay in cash. If his individual note is expressly received and accepted in payment, he may then prove against the bankrupt principal. In re Morrill (D. C. 1873) Fed. Cas. No. 9,821. A surety on a bond to dissolve a garnishment, against whom judgment was recovered after the adjudication in bankruptcy of the principal, has a provable claim. Kilpatrick v. United States Fidelity & Guaranty Co. (C. C. A. 1916) 228 Fed. 587.

Where the surety holds collateral securities, for his own indemnity, and pays the debt of the principal, he can prove only the difference between the debt and the amount realized on the securities. In re Baldwin (D. C. 1878) 19 N. B. R. 52, Fed. Cas. No. 796.

The provision of the statute that "whenever a creditor, whose claim against a bankrupt is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor," does not give to a surety who has not taken up the obligation the right to institute proceedings in involuntary bankruptcy against the principal, but only to prove the claim, if the creditor fails to do so, after an adjudication of bankruptcy has been made. Phillips v. Dreher Shoe Co. (D. C. 1902) 112 Fed. 404, 7 Am. Bankr. Rep. 326. And see Insley v. Garside (1903) 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; In re Carter (D. C. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; Rosenthal v. Nove (1900) 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

An indorser of the bankrupt's paper may prove a claim for the amount, in his own name, against the estate, after he has paid the note, but not before. In re Salvator Brewing Co. (1912) 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Dr. Voorhees Awning Hood Co. (D. C. 1911) 187 Fed. 611; In re Morse (D. C. 1875) 11 N. B. R. 482, Fed. Cas. No. 9,853; Marks v. Barker (C. C. 1804) Fed. Cas. No. 9,096. See In re Elletson Co. (D. C. 1912) 193 Fed. 84, 28 Am. Bankr. Rep. 434. Though such an indorser may have become absolutely liable to the holder of the note, by due notice of its dishonor, before the filing of the petition in bankruptcy, this does not make him a creditor of the bankrupt. In re Riker (D. C. 1878) 18 N. B. R. 393, Fed. Cas. No. 11,833. When the holder of a note fails to prove the same against the maker's estate, thus showing that he looks to the indorser alone for payment, the indorser may prove it and receive dividends, though he has not proved the note. In re Ellerhorst (D. C. 1871) 5 N. B. R. 144, Fed. Cas. No. 4,381. Where indorsers of notes of the bankrupt paid a portion of the debt and secured their release as indorsers and the holders proved the notes for the entire amount against the bankrupt's estate, the indorsers were not entitled to prove the amount paid by them as claims against the estate, since under section 9641 (i), ante, they were only entitled to receive from the holders any overplus, after crediting dividends received from the bankrupt's estate and the amount paid by the indorsers. In re Manhattan Brush Mfg. Co. (D. C. 1913) 209 Fed. 997. An accommodation indorser of a note for the accommodation of a corporation not fully organized for want of the filing of a certificate of organization, as required by state statute, held entitled, on paying the note, to an allowance against the corporation, becoming a bankrupt, for the amount thereof. In re Halsey W. Kelley & Co., Inc. (D. C. 1914) 215 Fed. 155.

Under a state statute providing that, where a party to a negotiable instrument has been adjudged bankrupt, notice may be given either to the party himself or to his trustee, and that notice of dishonor is not necessary where the drawer and drawee are the same person, or to an indorser where he is the person to whom an instrument is presented for payment, where the maker and indorser of notes were partners, and were adjudged bankrupts, both as partners and individually, before the notes matured, and the same trustees were appointed for all the estates, it was held that notice of nonpayment on the maturity of the notes was not necessary to bind the estate of the indorser. In re T. A. McIntyre & Co. (D. C. 1912) 198 Fed. 579, 28 Am. Bankr. Rep. 459.

22. Rights of creditor where several parties liable.—The holder of a claim upon which several parties are personally liable may prove his claim

against the estates of any of them who become bankrupt, and may at the same time pursue the others at law, and notwithstanding partial payments after the bankruptcy, received from the nonbankrupts or from the estates of those in bankruptcy, the creditor may recover dividends from each estate in bankruptcy upon the full amount of his claim, as it stood at the time the petition in bankruptcy was filed therein, until, from all sources, he has received full payment of his claim. Board of Com'rs of Shawnee County v. Hurley (1909) 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209; In re Simon (D. C. 1912) 197 Fed. 105, 28 Am. Bankr. Rep. 611; In re Girvin (D. C. 1908) 160 Fed. 206, 20 Am. Bankr. Rep. 320; Downing v. Traders' Bank (C. C. 1873) 11 N. B. R. 371, Fed. Cas. No. 4,046; In re Hicks (D. C. 1879) 19 N. B. R. 299, Fed. Cas. No. 6,456; In re Howard (D. C. 1871) 4 N. B. R. 571, Fed. Cas. No. 6,750. Thus, the holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the acceptor, and the payee, and to receive dividends from all their estates until his debt is paid in full; and if only one of the parties is in bankruptcy, he may prove his claim against that one, and also proceed against the others at law. In re Babcock (C. C. 1844) Fed. Cas. No. 696. So, when the holder of a note proves his debt in bankruptcy against the maker of the note for the full amount thereof, as an unsecured claim, this does not affect or release an indorser from his liability on the note. Merchants' Nat. Bank v. Comstock (1873) 55 N. Y. 24.

The estate of the bankrupt is entitled to the benefit of a partial payment of the debt made, before the bankruptcy, by any of the other parties liable for it, and in this case the creditor can prove against the bankrupt only the unpaid balance of his claim after crediting the payment. In re Pulsifer (D. C. 1880) 14 Fed. 247; Ex parte Harris (D. C. 1877) 16 N. B. R. 432, Fed. Cas. No. 6,109; In re Weeks (D. C. 1875) 13 N. B. R. 263, Fed. Cas. No. 17,349; Sohier v. Loring (1850) 6 Cush. (Mass.) 537. Where the maker of a note becomes bankrupt after the holder has received part payment from the indorser, the creditor should prove a claim in the bankruptcy proceedings for the entire face of the note, because he is in the position of a trustee for the indorser, and if he receives, in dividends, more than enough to satisfy the unpaid balance of his claim, he will hold the surplus for the indorser, who will be entitled to reimbursement. In re Souther (D. C. 1874) 9 N. B. R. 502, Fed. Cas. No. 13,184; In re Ellerhorst (D. C. 1871) 5 N. B. R. 144, Fed. Cas. No. 4,381. And see In re Baxter (D. C. 1878) 18 N. B. R. 497, Fed. Cas. No. 1,120. But in other cases, nothing short of actual payment, or a present right to receive a dividend from an estate in bankruptcy, will operat
vent the creditor from provin
against the estates of the ot
sons liable; the fact that on
debtors, being in bankruptcy,
fered notes for composition
will not have this effect. In
(D. C. 1879) 19 N. B. R. 299,
No. 6,456. So where a credi
had sold goods to the bank
which a third person became
afterwards received from the s
security, a note of the bankrup
upon a separate transaction, it
that such note, being the pro
the surety, did not inure to t
rupt's interest, but to that of
ty, and was a separate debt,
the creditor was entitled to
both claims. In re H. V. Ke
Co. (D. C. 1912) 200 Fed. 80
Bankr. Rep. 765. But where a
of a bankrupt has a lien on t
erty of a third party, as par
security for his debt, he canno
his lien for a consideration
crediting the amount of the c
tion on his claim. Seay v. W
C. 1881) 9 Fed. 589.

23. Claims of bankrupt's bankruptcy a wife may be a cr
her husband, and may prove
tain a claim against his estate
ey which was her separate
and which she loaned to him,
to his keeping and managemen
lowed him to use in his busin
clearly appears that no gift wa
ed, but only a loan or trust
Remmerde (D. C. 1913) 206
30 Am. Bankr. Rep. 707; In re
son (D. C. 1902) 116 Fed. 100
Neiman (D. C. 1901) 109 F
Tucker v. Curtin (1906) 148
78 C. C. A. 557, 17 Am. Ban
354; Clark v. Hezekiah (D. C.
Fed. 663; In re Bigelow (D. C
N. B. R. 556, Fed. Cas. No. 1,38
Blandin (D. C. 1871) 5 N. B. R.
Cas. No. 1,527. The failure o
ried woman to register a clain
her husband as her separate
under the laws of Oregon,
affect her right to prove t
against his estate in bankrup
re Miner (D. C. 1902) 117 Fe
Am. Bankr. Rep. 100. This
plies notwithstanding the fact
law of the particular state
give to husband and wife any
contract with each other or to
other, and for this reason a
ment to repay the wife's mon
not be enforced by a suit
James v. Gray (1904) 131 Fed
C. C. A. 385, 1 L. R. A. (N.
12 Am. Bankr. Rep. 573; In re
C. 1911) 190 Fed. 390, 27 Am
Rep. 146; In re Domenig (D.
128 Fed. 146, 11 Am. Bankr. R
In re Nickerson (D. C. 1902)
1003. Compare In re Talbo
1901) 110 Fed. 924, 7 Am. Ban
29. But the wife's claim ag

bankrupt husband must be supported, like any other, by a valid consideration, and she cannot prove a claim where she has already received satisfaction of the debt in the form of a conveyance of property. In re Carpenter (D. C. 1910) 179 Fed. 743. Or where she had no valid title to the property placed in her husband's hands, having previously received the same from him as a gift under circumstances which rendered the transfer invalid. In re Tucker (D. C. 1905) 148 Fed. 928, 17 Am. Bankr. Rep. 247. And where a wife allows her husband to appropriate the income of her separate estate in the support of the family, this does not create such a debt on his part as is provable in bankruptcy against his estate. In re Jones (D. C. 1874) Fed. Cas. No. 7,444.

The wife of a bankrupt is entitled to the allowance of a claim for money lent to her husband, which she procured by mortgaging her own realty. In re Foss (D. C. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439. She is entitled to prove a claim on a note given to her by the bankrupt, regardless of the consideration therefor, if it is not shown that the bankrupt was indebted at the time the note was made. In re Kyte (D. C. 1908) 164 Fed. 302, 21 Am. Bankr. Rep. 110. See In re Chapman (D. C. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 570.

Under the civil law prevailing in Louisiana, a husband's debt to his wife for paraphernal property is provable against him in bankruptcy. Fleitas v. Richardson (1893) 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

As to a wife's claim of payment for services rendered to her husband in his business, as, in the capacity of a clerk, bookkeeper, or the like, a claim may be proved in bankruptcy for the value of such services if the law of the state has removed the disabilities of married women. In re Domenig (D. C. 1904) 128 Fed. 146, 11 Am. Bankr. Rep. 552; In re Cox (D. C. 1912) 199 Fed. 952, 29 Am. Bankr. Rep. 456. But not where the common law in this respect still prevails. In re Suckle (D. C. 1910) 176 Fed. 828, 23 Am. Bankr. Rep. 861; In re Winkels (D. C. 1904) 132 Fed. 590, 12 Am. Bankr. Rep. 696.

Under a state statute providing that a wife who is granted a divorce from her husband shall be entitled to one-third of his personal property absolutely, the interest of a wife in the personal property of her husband, after the commencement of an action for divorce, but before decree, is not such a claim as is provable against his estate in bankruptcy. Hawk v. Hawk (D. C. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463.

24. Claims for alimony.—Alimony awarded to a divorced wife by the decree of a competent court does not constitute a debt or claim which is provable against the estate of the husband in bankruptcy, whether the claim be for arrears remaining unpaid at the date of the bankruptcy or for installments to accrue thereafter. Audubon v. Shufeldt (1901) 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Hubbard (D. C. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528; Turner v. Turner (D. C. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Shepard (D. C. 1899) 97 Fed. 187; In re Anderson (D. C. 1899) 97 Fed. 321, 5 Am. Bankr. Rep. 858; In re Nowell (D. C. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; In re Smith, 1 Nat. Bankr. News, 471; In re Lawrie (D. C. 1899) 2 Nat. Bankr. News, 77; In re Garrett (D. C. 1875) 11 N. B. R. 493, Fed. Cas. No. 5,252; In re Lachemeyer (D. C. 1878) 18 N. B. R. 270, Fed. Cas. No. 7,966; Beach v. Beach (1883) 29 Hun (N. Y.) 181; Barclay v. Barclay (1900) 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty (1901) 96 Ill. App. 141; Maisner v. Maisner (1901) 62 App. Div. 286, 70 N. Y. Supp. 1107; Lemert v. Lemert (1903) 25 Ohio Cir. Ct. Rep. 253. CONTRA, In re Challoner (D. C. 1899) 98 Fed. 82, 3 Am. Bankr. Rep. 442; In re Houston (D. C. 1899) 94 Fed. 119, 2 Am. Bankr. Rep. 107; In re Van Orden (D. C. 1899) 96 Fed. 86, 2 Am. Bankr. Rep. 801; Arrington v. Arrington (1902) 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769.

But where a wife, after securing a decree of divorce granting alimony, removes into another state, and there sues to recover unpaid arrears of alimony and obtains a judgment, and the husband lists the said judgment as an indebtedness in his schedules in bankruptcy, it constitutes a provable debt against his estate. In re Williams' Estate (1909) 118 N. Y. Supp. 562.

25. Unpaid subscriptions to stock and stockholder's statutory liability.—The liability of a stockholder in a corporation to make good the difference between the face value of stock for which he has subscribed and the amount he has actually paid on it is a debt founded on contract, and is therefore provable against his estate in bankruptcy, at the instance of a judgment creditor of the corporation, although no assessment or call has yet been made by the corporation. In re Putman (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; Carey v. Mayer (1897) 79 Fed. 926, 25 C. C. A. 239; Glenn v. Abell (C. C. 1889) 39 Fed. 10; Marr v. Bank of West Tennessee (1880) 4 Lea (Tenn.) 578. See In re Watkinson (D. C. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 245. But some decisions hold that such a liability is not a provable debt until the corporation itself has been required to make the necessary assessment upon its stockholders, so that the extent of the liability of each may be determined. Gibson v. Lewis (C. C. 1875) 11 N. B. R. 247, Fed. Cas. No. 5,398; Sayre v. Glenn (1888) 87 Ala. 631, 6 South. 45; Glenn v. Howard (1886) 65 Md. 40, 3 Atl. 895. Receiv-

ers of an insolvent insurance company cannot prove a claim against the estate of a bankrupt subscriber to the stock of the company, where it did not appear that the subscription was necessary to pay debts, or that in an equalization between stockholders the bankrupt would be in the debtor, instead of the creditor, class. In re Bass (D. C. 1914) 215 Fed. 275.

As to the liability imposed by statute upon the stockholders of certain classes of corporations to be personally answerable for the debts of their company, to an extent proportioned to their holdings, even though their stock has been paid in full, it is generally held that this is not such a claim as can be proved in bankruptcy against a stockholder. James v. Atlantic Delaine Co. (C. C. 1875) 11 N. B. R. 390, Fed. Cas. No. 7,179; Bristol v. Sanford (C. C. 1874) 13 N. B. R. 78, Fed. Cas. No. 1,893; Bangs v. Lincoln (1858) 10 Gray (Mass.) 600. At least if his personal responsibility remains uncertain and contingent, or the amount for which he may become liable has not been ascertained. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591. But otherwise if it is liquidated and ascertained by a judgment or a decree in equity before the expiration of the time limited for proving debts. Garrett v. Sayles (C. C. 1880) 1 Fed. 371. Or if the receiver of the corporation can certainly determine the amount of it by ascertaining the amount of the assets and liabilities of the corporation, and thus determining how much will be needed from the stockholders to make up the deficiency of the assets of the corporation. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

26. Debts created by bankrupt's fraud.—A debt or liability is a provable claim against the estate of a bankrupt if essentially of a contractual character, although induced by the fraud of the bankrupt, or if the circumstances are such that the claimant may waive the tort and sue as upon an implied contract. Crawford v. Burke (1904) 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Filer (D. C. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Schwartz (C. C. 1877) 15 N. B. R. 330, Fed. Cas. No. 12,502. Under the former bankruptcy law, it was held that a debt or liability created by the fraud of the bankrupt could be proved and allowed against his estate, notwithstanding the fact that it would not be released by his discharge, the result being that any dividend received on it would be merely a payment on account, leaving the bankrupt liable for the unpaid balance. In re Wright (D. C. 1868) 2 N. B. R. 41, Fed. Cas. No. 18,070; In re Rosenberg (D. C. 1868) 2 N. B. R. 236, Fed. Cas. No. 12,054; In re Rundle (D. C. 1868) 2 N. B. R. 113, Fed. Cas. No. 12,138; In re Clews (D. C. 1878) 19 N. B. R. 109, Fed. Cas. No. 2 re Eureka Mfg. Co. (D. C. 18 Cas. No. 4,550.

A claim arising out of the co by stockbrokers of shares p and held by them on a custon count is provable on this Crawford v. Burke (1904) 19 176, 25 Sup. Ct. 9, 49 L. Ed. Am. Bankr. Rep. 659. And in bankruptcy proceedings ma the principle that money proc fraud may be recovered back ing a demand for money had ceived by the bankrupt to their re E. J. Arnold & Co. (D. C. 1 Fed. 789, 13 Am. Bankr. R There is an obligation resting defaulting testamentary trust pendently of his bond, to res value of the assets embezzled, of a contractual character, an a basis for proof of a claim ag estate in bankruptcy therefor successor in the trust. Clarke ers (1910) 183 Fed. 518, 106 64, 26 Am. Bankr. Rep. 413, (1913) 228 U. S. 534, 33 Sup. 57 L. Ed. 953. Where a bank was in the employ of a firm of caused them to purchase st false and fictitious orders purp have been given by custome purchases being in fact intende own benefit, the firm will have to treat him as the principa transactions, and to prove against him in bankruptcy, as money paid at his request an use. In re Filer (D. C. 1901) 261, 5 Am. Bankr. Rep. 835.

A creditor who advanced n the bankrupt on the strength latter's false and fraudulent r tations concerning his credit sources may prove a claim in b cy for the amount, for though was induced by fraud, there v the less a contract for its re In re E. J. Arnold & Co. (D. 133 Fed. 789, 13 Am. Bankr. R Compare In re Schuchardt (D. 15 N. B. R. 161, Fed. Cas. No So where the creditor has by means been induced to part wi he may affirm the contract a claim for the value of the g stead of electing to claim for sustained by the fraud. In r brant (D. C. 1903) 120 Fed. 992 Bankr. Rep. 184.

27. Taxes and interest and thereon.—State and municipal t from a bankrupt do not cons claim against his estate to be like those of creditors, and the interest will not be allowed after the filing of the petition application thereto, but it is of the court of bankruptcy to d payment of such taxes, togeth such penalties or interest as crued thereon under the laws state to the time of actual

Stanard v. Dayton (C. C. A. 1915) 220 Fed. 441; In re Kallak (D. C. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 414; In re Scheidt Bros. (D. C. 1908) 177 Fed. 599, 23 Am. Bankr. Rep. 778. See In re Duryee (D. C. 1880) 2 Fed. 68; Warren R. Co. v. Belvidere (1871) 35 N. J. Law, 584. Taxes accruing after the institution of the proceeding in bankruptcy are to be paid out of the estate. Stanard v. Dayton (C. C. A. 1915) 220 Fed. 441. Additional customs duties levied on reappraisement of coke imported into Alaska are not penal in their nature and may be collected from a bankrupt. U. S. v. Brown-Alaska Co. (1910) 4 Alaska, 89. Where a bankrupt, having sold certain orchard tracts, transferred the contracts and agreed that, in case of forfeiture, it would deed the tract or tracts to whom the assignee of the contract might elect, the bankrupt still held title to the land, and taxes assessed thereon were payable by the trustee, though the taxes were enforceable only against the land. In re Wenatchee Heights Orchard Co. (D. C. 1914) 212 Fed. 787.

Taxes which have been actually paid, though irregularly, are not a liability of the estate nor a provable debt, as where the bankrupt, being a deputy tax collector, has settled with his principal for the taxes on his own property, though the latter remains personally liable for the amount to the municipality. Moore v. Green (1906) 145 Fed. 480, 76 C. C. A. 250, 16 Am. Bankr. Rep. 607. Where taxes have been deducted from the value of property taken by creditors under attachments valid against the trustee, they are not a charge upon the estate. Foster v. Inglee (D. C. 1876) 13 N. B. R. 239, Fed. Cas. No. 4,973. Where a certified check for taxes against mortgaged property of the bankrupt was given to the city tax collector in payment of the taxes, and was received by him as such to prevent his bidding at a foreclosure sale, it constituted a satisfaction of the taxes, and precluded the city from establishing a claim therefor against the bankrupt's personal assets. City of Pittsburgh v. South Side Trust Co. (1913) 208 Fed. 984, 126 C. C. A. 72.

The provisions for the payment of taxes by the trustee in bankruptcy do not apply to an annual license fee imposed by the state law on corporations, which has been held by the courts of the state not to be a tax, but an arbitrary imposition laid on corporations as a condition of their continued existence; and neither is it a contractual obligation attaching by implication from the inception of the company, so as to be provable as a debt founded on contract, at least against the estate of a corporation becoming bankrupt before the fee for the year is assessed or collectible. In re Danville Rolling Mill Co. (D. C. 1903) 121 Fed. 432, 10 Am. Bankr. Rep. 327.

28. Breaches of real covenants.—A claim for damages for breach of the covenants in a deed, such as those of warranty of title, of possession, of quiet enjoyment, and against incumbrances, constitutes a provable debt in bankruptcy. Parker v. Bradford (1876) 45 Iowa, 311; Reed v. Pierce (1853) 36 Me. 455, 58 Am. Dec. 761; Abbott v. Rowan (1878) 33 Ark. 593; Jemison v. Blowers (1849) 5 Barb. (N. Y.) 686. CONTRA, Riggin v. Magwire (1872) 15 Wall. 549, 21 L. Ed. 232; Murray v. De Rottenham (1822) 6 Johns. Ch. (N. Y.) 52; Burrus v. Wilkinson (1856) 31 Miss. 537; Magwire v. Riggin (1869) 44 Mo. 512. See Bates v. West (1857) 19 Ill. 134; Bailey v. Moore (1859) 21 Ill. 165.

A lessee cannot prove a claim for damages for breach of a covenant for quiet enjoyment in the lease against the estate of his lessor in bankruptcy because of an eviction which did not take place until after the commencement of the proceedings in bankruptcy. In re Pennewell (1902) 119 Fed. 139, 55 C. C. A. 571, 9 Am. Bankr. Rep. 490.

29. Claims for torts.—A claim for damages for a tort, not connected with any contractual liability, and not reduced to judgment before the filing of the petition in bankruptcy, is not a provable debt. Brown & Adams v. United Button Co. (1906) 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565, affirming In re United Button Co. (D. C. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; In re Bailey (C. C. 1876) Fed. Cas. No. 729; Bever v. Swecker (1908) 138 Iowa, 721, 116 N. W. 704; Newman v. Goodard (1880) 20 Hun (N. Y.) 563; Lomax v. Spear (1874) 51 Ala. 532.

A claim of damages for a tort is not made provable by that clause of the section which provides that "unliquidated claims" may be liquidated in such manner as the court shall direct and may thereafter be proved and allowed; for this relates only to a matter of procedure, and does not enlarge the class of claims provable under the preceding paragraph, and contemplates only the liquidation of claims founded on contracts or on open accounts. Nor are the debts which may be proved in bankruptcy enlarged by the fact that it is assumed in the seventeenth section of the act (regulating the effect of a discharge) that liabilities for torts are provable and therefore released by a discharge, certain specified torts being thereupon excepted from the effect of a discharge. For this section, as originally enacted, referred only to judgments already recovered in actions for torts of the specified kinds, and was therefore not inconsistent with the sixty-third section of the statute, relating to provable debts. And the present want of harmony between the two sections is the result of the amendment of 1903, and therefore, in case of conflict, the sixty-third section, being specifical-

ly devoted to the enumeration and description of the classes of provable debts, must control. Brown & Adams v. United Button Co. (1906) 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565. See Biela v. Urbanczyk (1905) 38 Tex. Civ. App. 213, 85 S. W. 451.

A claim for unliquidated damages for negligence resulting in personal injuries is not a provable debt. Imbriani v. Anderson (1912) 76 N. H. 491, 84 Atl. 974. Nor a cause of action for negligence causing the death of a human being. In re New York Tunnel Co. (1908) 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25. Or for negligence or nuisance resulting in injury to goods. Brown & Adams v. United Button Co. (1906) 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565; Dusar v. Murgatroyd (C. C. 1803) Fed. Cas. No. 4,199. Or for trespass to land. Weisfield v. Beale (1911) 231 Pa. 39, 79 Atl. 878; Kellogg v. Schuyler (1846) 2 Denio (N. Y.) 73; Gilman v. Cate (1884) 63 N. H. 278. Or for deceit. In re Schuchardt (D. C. 1876) Fed. Cas. No. 12,483. Or for assault and battery and false imprisonment. Beers v. Hanlin (D. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; In re Hennocksburgh (D. C. 1872) Fed. Cas. No. 6,-367. But a claim for the wrongful repledge of collateral is one founded upon a contract and therefore a provable debt. Wood v. Fisk (N. Y. 1915) 109 N. E. 177.

In all those cases where the tort can be waived and a recovery had as upon a quasi contract, the claim may be provable, if the amount is definitely fixed, or after being liquidated as the court may direct. In re Griffin (D. C. 1910) 188 Fed. 389; In re Southern Steel Co. (D. C. 1910) 183 Fed. 498, 25 Am. Bankr. Rep. 358; Burgoyne v. McKillip (C. C. A. 1910) 182 Fed. 452, 25 Am. Bankr. Rep. 387; Clingman v. Miller (1908) 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; In re Filer (D. C. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Hirschman (D. C. 1900) 104 Fed. 69, 4 Am. Bankr. Fed. 715; Reinhardt v. Friederich (Ind. App. 1915) 108 N. E. 258; First Nat. Bank of Enosburg Falls v. Bamforth (Vt. 1916) 96 Atl. 600. A claim for the conversion of personal property is a provable debt. Weaver v. Voils (1879) 68 Ind. 191; Cole v. Roach (1873) 37 Tex. 413, 10 N. B. R. 288.

30. Fines, penalties, and forfeitures. —A judgment imposing a fine as a punishment for a crime or misdemeanor or any violation of a state statute is not a debt provable against the estate of the defendant in bankruptcy. In re Sutherland (D. C. 1868) Fed. Cas. No. 13,639; In re Moore (D. C. 1901) 111 Fed. 145, 6 Am. Bankr. Rep. 590. CONTRA, In re Alderson (D. C. 1899) 98 Fed. 588, 3 Am. Bankr. Rep. 544. A fine imposed on the bankrupt by a state court, as a punishment for a civil contempt in disobeying its ord a provable debt. People v. Kings County (D. C. 1913) 566, 31 Am. Bankr. Rep. 84. ment or sentence in a bastardy ing, condemning the defendar a fixed sum for the maintenan child, is not a debt provable ruptcy. In re Baker (D. C. Fed. 954, 3 Am. Bankr. Rep. re Cotton (D. C. 1843) Fed. 3,269; Hawes v. Cooksey (Ohio, 242; Commonwealth v. 21 Pittsb. Leg. J. O. S. (Pa.) liability of a bankrupt for the penalty for cutting trees, imp state statute, is not a debt fo an implied contract, such a proved against his estate in ba In re Southern Steel Co. (D. 183 Fed. 498, 25 Am. Bankr. A claim in favor of the Unit for fines or penalties incurre bankrupt for violations of th revenue laws is a provable bankruptcy. In re Rosey (D. Fed. Cas. No. 12,066. A cla United States against a ban recover as a penalty the value imported and entered contrar is a provable debt against the the bankrupt. In re Vetterle 1875) Fed. Cas. No. 16,929. of the United States on a for cognizance for bail in a crim is one for a penalty or forfei though provable in bankruptc be allowed for more than the ary loss actually sustained. ponigri (D. C. 1912) 193 Fe Am. Bankr. Rep. 513. The applies to a penalty imposed law on a corporation for failu port and pay the prescribed f nus to the state on an incre capital stock. Commonwealth Silk Mfg. Co. (1911) 192 Fed. C. A. 613, 27 Am. Bankr. A judgment for penalties rec the state against bankrupts f ing Agricultural Law N. Y. not a debt that can be proved ed as such against the bank tate under Bankr. Act. §§ 57j re Abramson (C. C. A. 1914) 878.

Where the government has a judgment against the bankr penalty incurred by a violati revenue laws and has proved as a creditor of the bankrup former by whose procurement action was prosecuted has n come into the bankruptcy cou petition asking for a summar cation of his right to a share o alty as against the United Sta court has no jurisdiction to e an adjustment in a proceeding ruptcy against the debtor. Th the informer is not against rupt but against the governm it must be worked out in th prescribed by the revenue l

not in a bankruptcy proceeding. In re Jayne (D. C. 1886) 28 Fed. 419.

31. **Debts barred by limitations.**—A debt or claim, once valid and which otherwise would be provable in bankruptcy, but which is barred by the statute of limitations of the state in which the bankrupt resides and where the proceeding in bankruptcy is pending, at the time of the filing of the petition, cannot be proved or allowed. In re Putman (D. C. 1911) 193 Fed. 464, 27 Am. Bankr. Rep. 923; Nicholas v. Murray (C. C. 1878) 18 N. B. R. 469, Fed. Cas. No. 10,223; In re Doty (D. C. 1877) 16 N. B. R. 202, Fed. Cas. No. 4,017; In re Kingsley (D. C. 1868) 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Hardin (D. C. 1868) 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Reed (D. C. 1874) 11 N. B. R. 94, Fed. Cas. No. 11,635; In re Noesen (D. C. 1875) 11 N. B. R. 422, Fed. Cas. No. 10,288; In re Cornwall (C. C. 1871) 6 N. B. R. 305, Fed. Cas. No. 3,250; Pace's Trustee v. Pace (1915) 162 Ky. 457, 172 S. W. 925. The rule is not altered by the fact that the debt is not barred under the statutes of the state in which the creditor resides, or of the state in which both parties lived when the contract was made. Hargadine-McKittrick Dry Goods Co. v. Hudson (1903) 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Resler (D. C. 1899) 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Hardin (D. C. 1868) 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Kingsley (D. C. 1868) 1 N. B. R. 329, Fed. Cas. No. 7,819.

A debt which was not barred by the statute of limitations at the time when the petition was filed will remain valid against the trustee throughout the bankruptcy proceedings, and will be provable at any time within a year after the adjudication, notwithstanding the whole term fixed by the statute of limitations has expired when the claim is offered for proof, for the institution of bankruptcy proceedings stops the running of the statute. In re McKinney (D. C. 1883) 15 Fed. 912; In re Graves (D. C. 1881) 9 Fed. 816; In re Wright (D. C. 1875) Fed. Cas. No. 18,068; In re Maybin (D. C. 1876) 15 N. B. R. 468, Fed. Cas. No. 9,337; Wofford v. Unger (1880) 53 Tex. 634; Minot v. Thacher (1844) 7 Metc. (Mass.) 348, 41 Am. Dec. 444.

32. —— **Acknowledgment or part payment.**—Payment on a barred debt by the debtor immediately before bankruptcy and the filing of his petition, to renew an outlawed debt to enable the creditor to come in and share in the distribution, the creditor having no reasonable cause to believe that it would appear as a preference held not fraudulent as to creditors nor as against the bankruptcy law. In re Banks (D. C. 1913) 207 Fed. 662. Acknowledgment by a bankrupt of a barred debt to his sister in contemplation of bankruptcy held not a fraud on his other creditors, or on the bankruptcy act. In re Blankenship (D. C. 1915) 220 Fed. 395. If a debtor, within four months before the filing of his petition in bankruptcy, gives a bond and mortgage to a creditor whose claim is outlawed under the state statute of limitations, the bond will revive the debt, even though the mortgage is voidable as a preference. In re Stendts, 1 Nat. Bankr. News, 509. A note extended after it was barred by limitation under the statute of Texas, unless the extension was in writing and signed by the maker and contains an acknowledgment of the debt, as required by Rev. St. Tex. 1911, art. 5705, is not provable against his estate in bankruptcy. Wood v. Ledgerwood (C. C. A. 1913) 210 Fed. 163.

The mere fact that the bankrupt includes in his schedule of debts a claim already barred by the statute of limitations does not revive it so as to make it a provable claim against his estate, to the prejudice of his other creditors, but it is the duty of the trustee in bankruptcy to oppose the allowance of the claim, on the ground of limitations, in behalf of the creditors in general. In re Banks (D. C. 1913) 207 Fed. 662; In re Resler (D. C. 1899) 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Lipman (D. C. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Wooten (D. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Kingsley (D. C. 1868) 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Ray (D. C. 1867) 1 N. B. R. 203, Fed. Cas. No. 11,589; In re Hardin (D. C. 1868) 1 N. B. R. 395, Fed. Cas. No. 6,048. Compare In re Hertzog (D. C. 1878) 18 N. B. R. 526, Fed. Cas. No. 6,433. If the estate proves sufficient to pay all the expenses of administration and all the other proved and allowed claims, the creditor whose debt was outlawed, but was included in the bankrupt's list of debts, should be entitled to satisfaction out of the surplus, because, as between the bankrupt and himself, the listing of the debt was a sufficient acknowledgment to take it out of the statute. In re Currier (D. C. 1912) 192 Fed. 695, 27 Am. Bankr. Rep. 597.

33. —— **Dormant judgments.**—A judgment is not a provable debt in bankruptcy if it has become dormant, or if it has not been kept alive in such manner as the law of the state prescribes, by suit or scire facias upon it, by the issue or levy of execution, or otherwise according to the local law, within the time limited by that law before the bankruptcy. In re Rebman (1906) 150 Fed. 759, 80 C. C. A. 594, 17 Am. Bankr. Rep. 767; In re Far-

mer (D. C. 1902) 116 Fed. 763, 9 Am. Bankr. Rep. 19; In re Lipman (D. C. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Morris (D. C. 1837) Fed. Cas. No. 9,825.

34. Claims founded on illegal or immoral consideration.—A claim arising on a contract which is illegal or contrary to morality is not provable in bankruptcy. Forsyth v. Woods (1870) 11 Wall. 484, 20 L. Ed. 207; Bailey v. Milner (D. C. 1868) 1 N. B. R. 413, Fed. Cas. No. 740; Buckner v. Street (C. C. 1871) 7 N. B. R. 255, Fed. Cas. No. 2,098.

A claim for money alleged to be due under a stock-gambling transaction, or other form of wagering contract, is not provable in bankruptcy. In re Ætna Cotton Mills (D. C. 1909) 171 Fed. 994, 22 Am. Bankr. Rep. 629; Hill v. Levy (D. C. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374; In re Chandler (D. C. 1874) 9 N. B. R. 514, Fed. Cas. No. 2,590; In re Green (D. C. 1877) 15 N. B. R. 198, Fed. Cas. No. 5,751. But money placed in the bankrupt's hands for the purpose of being used in a gambling transaction, since it could be recovered in an action at law, may likewise support a claim in bankruptcy. Streeter v. Lowe (1911) 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774; In re E. J. Arnold & Co. (D. C. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; Ex parte Young (D. C. 1874) Fed. Cas. No. 18,-145. And even if a contract to purchase stock was originally invalid as a gambling transaction on margins, in violation of a state statute, still the illegality cannot be asserted by the broker's trustee in bankruptcy against a claim by the purchaser, where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge or consent, and misappropriated the proceeds. In re Dorr (1911) 186 Fed. 276, 108 C. C. A. 322, 26 Am. Bankr. Rep. 408. And see In re Norris (D. C. 1911) 190 Fed. 101, 26 Am. Bankr. Rep. 945.

A claim founded upon a sale of intoxicating liquors, illegal and void under the laws of the state where made, is not provable in bankruptcy. Jacobs v. Ballantine Breweries Co. (1912) 193 Fed. 393, 113 C. C. A. 389, 27 Am. Bankr. Rep. 918; In re Town (D. C. 1873) 8 N. B. R. 38, Fed. Cas. No. 14,-111; In re Paddock (D. C. 1872) 6 N. B. R. 132, Fed. Cas. No. 10,657. But a claim for the price of spirituous liquors lawfully sold in New York to a citizen of Maine, who intended them for sale in Maine in violation of law, is provable in bankruptcy in Maine, though it could not be recovered in the courts of that state. In re Murray (D. C. 1870) 3 N. B. R. 765, Fed. Cas. No. 9,954.

A note which was given in part for a valid consideration, and in a consideration against publ if the two portions are distin may be proven in bankrupt much as was originally valid elder & Lincoln Co. v. (1903) 122 Fed. 355, 58 C. 10 Am. Bankr. Rep. 641.

Where the laws of the sta for the forfeiture of the e where it is tainted with usur the creditor could not recove tion of it by action in a state part of such debt will be p bankruptcy. In re Pittoch 1873) Fed. Cas. No. 11,189. given by the bankrupt for the bonus over the legal interes provable. Shaffer v. Fritche 1871) 4 N. B. R. 548, Fed. 12,697. But if the statute m vides for the forfeiture of a reserved, in case of usury, th prevent the proof and allowa principal sum. National Bank v. Moore (D. C. 1868) No. 10,041.

Where a state statute pro no property transported by should be delivered except o der and cancellation of the lading, and a carrier delive without requiring surrender bills of lading, and the con posited some of the bills as security for loans, and some were held by the original ven the consignee became bank the carrier took assignment drafts secured by the bills and open accounts, and bills owned by the original vendors cured the bills of lading, though the carrier had vio statute, it could recover ag bankrupt's trustee on the as In re T. H. Bunch Co. (D. 180 Fed. 519. A transfer of stock not stamped as require Law N. Y. § 270, as re-enacte 1910, c. 38, is not void, altho section 278 no action can tained thereon, and notes giv stock are valid and provable ruptcy. In re Wylly (D. C. Fed. 954.

Corporate bonds issued to ter, in violation of a state st voluntary obligations not e in bankruptcy to the prejudic actual creditors. In re Wyo ley Ice Co. (D. C. 1907) 153

35. Ultra vires and unla tracts of corporations.—A c has no power to purchase stock, where the transaction der it insolvent and so ope fraud on its creditors, and done, notes given by it for the price are invalid and cannot ed against its estate in b at least in the hands of t stockholder. In re S. P. Smit

Co. (D. C. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 123, affirmed, Menefee v. Phelan (1906) 140 Fed. 988, 72 C. C. A. 682. So, a company chartered for the purpose of buying and selling building materials has no power to bind itself as guarantor for the performance of a building contract by another, and such a contract, being ultra vires and void, affords no basis for a claim against its estate in bankruptcy. In re S. P. Smith Lumber Co. (D. C. 1904) 132 Fed. 620, 13 Am. Bankr. Rep. 118. So where a savings bank, in violation of its charter and the laws of the state, discounts notes of the bankrupt, neither the notes nor a claim for money loaned thereon can be proved. In re Jaycox (C. C. 1874) Fed. Cas. No. 7,237. The same rule applies where the charter of a manufacturing corporation limits the amount of indebtedness which it may lawfully incur to one-half the amount of its paid-up capital stock; debts contracted in excess of this limit are not provable. Cunningham v. German Insurance Bank (C. C. A. 1900) 101 Fed. 977, 4 Am. Bankr. Rep. 363. And so, a claim cannot be proved in bankruptcy against a corporation on a note which it gave to cover the indebtedness of a third party, for which it was in no way responsible. Mapes v. German Bank (1910) 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713. Or on notes which were authorized by the stockholders, but which were issued by the managing officer direct to his personal creditors as collateral security for a prior indebtedness of his own. American Woodworking Machinery Co. v. Norment (C. C. A. 1908) 157 Fed. 801, 19 Am. Bankr. Rep. 679.

Where the law of a state forbids all foreign corporations to do business within its limits until they have complied with certain requisites (such as appointing a resident agent upon whom process may be served, or the like) a foreign corporation which has not complied with the statute has no power to make contracts or to bring suits within the state. Consequently a contract made by the corporation, under such circumstances, with a citizen of the state is illegal, and is not provable against the estate of such citizen in bankruptcy. As the bankrupt himself might have avoided it, his trustee may object to its being proved. In re Comstock (D. C. 1874) 11 N. B. R. 169, Fed. Cas. No. 3,078; In re Montello Brick Works (D. C. 1909) 174 Fed. 498, 23 Am. Bankr. Rep. 375. But the holder of special stock of a corporation, which was illegally issued, may prove against the estate of the corporation a claim for the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before the insolvency. Reed v. Boston Machine Co. (1886) 141 Mass. 454, 5 N. E. 852.

36. Landlord's rights and remedies.—Upon the bankruptcy of a tenant, his possession of the leased premises becomes the possession of the court of bankruptcy, and thereafter the rights and claims of the landlord must be worked out through the bankruptcy proceedings, and not by independent action. In re Steadman (D. C. 1873) 8 N. B. R. 319, Fed. Cas. No. 13,330. So also the right of the bankrupt tenant to remove machinery or other fixtures from the building passes to his trustee in bankruptcy. In re Breck (D. C. 1875) Fed. Cas. No. 1,822.

The landlord may prove a claim in bankruptcy for rent accrued up to the commencement of the proceedings, if he has a written lease or a valid oral agreement, or even an implied promise to pay rent. In re Sherwoods (C. C. A. 1913) 210 Fed. 754; In re Scruggs (D. C. 1913) 205 Fed. 673; In re Miller (D. C. 1904) 132 Fed. 414, 13 Am. Bankr. Rep. 87. And he may claim his rent out of the proceeds of goods which were specifically liable for it while on the demised premises and which have been sold by the trustee in bankruptcy. In re Bowne (D. C. 1875) 12 N. B. R. 529, Fed. Cas. No. 1,741. Or out of money paid to the tenant in eminent domain proceedings on the basis of his obligation to pay rent. In re Clancy (D. C. 1874) 10 N. B. R. 215, Fed. Cas. No. 2,782. So, also, the landlord may prove a claim for rent accruing during a period when the premises stood vacant, having been surrendered by the tenant, the latter having agreed to account for the rent until they were relet. In re Bruce (D. C. 1873) Fed. Cas. No. 2,044. And where the original tenant assigned the lease or sublet the premises, the landlord, having agreed to the transfer, may prove his claim in bankruptcy against the estate of the assignee or sublessee. Witherow v. South Side Trust Co. (C. C. A. 1910) 181 Fed. 753; Wylie v. Smith (C. C. 1875) Fed. Cas. No. 18,-110.

It is also competent for a landlord to require the tenant to pay current taxes on the leased premises, and municipal assessments, and water rates, and to stipulate that they shall constitute a part of the rent reserved, and when this is done, he may include the amount thereof, remaining unpaid at the date of the bankruptcy, in his claim against the estate of the bankrupt tenant. Ellis v. Rafferty (1912) 199 Fed. 80, 117 C. C. A. 592, 29 Am. Bankr. Rep. 192; McCann v. Evans (C. C. A. 1911) 185 Fed. 93, 26 Am. Bankr. Rep. 47. And see In re Criblier (D. C. 1911) 184 Fed. 338, 25 Am. Bankr. Rep. 765; In re Sherwoods (C. C. A. 1913) 210 Fed. 754. But a state statute providing that, where a tenant unlawfully withholds possession of rented premises from his landlord, judgment shall go against such tenant "for double

the rent reserved or stipulated to be paid," relates merely to the measure of the amount for which the tenant shall be liable, and does not characterize the landlord's demand for double rent during the period of unlawful detention as a debt springing out of the original contractual relation; and hence such demand, not arising ex contractu, is not provable in bankruptcy. Hamilton v. McCroskey (1901) 112 Ga. 651, 37 S. E. 859. Where a lease provided that the tenant might make alterations in the premises, he agreeing to restore the property at the expiration of the lease to its former condition, and before the end of the term the tenant became bankrupt, and the landlord resumed possession of the premises and leased them to the trustee in bankruptcy afterwards seeking to prove a claim against the estate for the estimated cost of restoring the property, it was held that the claim was not provable, as the clause in the lease contemplated the expiration of the lease by its own terms, and not by re-entry by the landlord. In re Arnstein (D. C. 1899) 101 Fed. 706, 4 Am. Bankr. Rep. 246. And see In re O'Malley & Glynn (D. C. 1911) 191 Fed. 999, 27 Am. Bankr. Rep. 143.

Under lease of shoe manufacturing machinery providing for termination at lessor's option and payment of specified sums by lessee upon termination, where lessee became bankrupt and lessor terminated the lease, claim for such specified payments held provable in bankruptcy as a fixed liability. In re D. C. Clark Shoe Co. (D. C. 1913) 211 Fed. 341.

37. —— **Landlord's lien.**—A landlord to whom rent is due for the use of the premises by the bankrupt will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a condition precedent to the assertion of his rights against the bankrupt's property in the hands of the trustee, but be may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority of payment. In re Byrne (D. C. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268. But under the laws of some of the states, a landlord who takes from his tenant a mortgage on the personalty used or kept on the demised premises, covering not only arrears of rent but also other debts, is deemed to have waived his statutory lien on such property for rent due, and he will not be entitled to enforce such a lien against the property in the hands of the tenant's trustee in bankruptcy. In re Wolf (D. C. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 558. Up to the time of the commencement of the proceedings in bankruptcy, the landlord may enforce his lien by distress, if allowed by the laws of the state, and the security thus acquired is not invalidated by the adjudication of the tenant in bankruptcy, thou in four months thereafter. M Knox (1872) 16 Wall. 551, 2 481; Goodwin v. Sharkey (Pa. 149, 15 N. B. R. 526. the filing of the petition in ba the whole estate comes into structive custody and possessi bankruptcy court, and there landlord will not be permitted the goods on a distress war must proceed against the t bankruptcy. In re Bishop (D. 153 Fed. 304, 18 Am. Bankr. Buckey v. Snouffer (1856) 10 69 Am. Dec. 129; Noe v. Gibs 7 Paige (N. Y.) 513.

38. —— **Rent to accrue aft cation.**—A landlord cannot m claim in bankruptcy against t of his tenant for any rent ac to accrue under the terms of after the commencement of ceedings in bankruptcy. In Bros. Grocery Co. (1915) 219 135 C. C. A. 521; In re Galla Co. (D. C. 1913) 205 Fed. 18 Bankr. Rep. 766; South Side v. Watson (1912) 200 Fed. 5 C. A. 278, 29 Am. Bankr. In re Abrams (D. C. 1913) 1005, 29 Am. Bankr. Rep. 59 Scruggs (D. C. 1913) 205 Fe Am. Bankr. Rep. 94; In r Drug Co. (D. C. 1913) 204 30 Am. Bankr. Rep. 398; Co v. Withoft (C. C. A. 1912) 250, 28 Am. Bankr. Rep. 32 Roth & Appel (1910) 181 104 C. C. A. 649, 31 L. R. A 270, 24 Am. Bankr. Rep. 58 Rubel (D. C. 1908) 166 Fed Am. Bankr. Rep. 566; Watso rill (1905) 136 Fed. 359, 69 185, 69 L. R. A. 719, 14 An Rep. 453; In re Roth & App 1909) 174 Fed. 64, 22 Am. Ba 504; In re Hays, Foster & (D. C. 1902) 117 Fed. 87 Bankr. Rep. 144; Atkins v (1900) 105 Fed. 595, 44 C. 53 L. R. A. 118, 5 Am. Ba 313; In re Mahler (D. C. 1 Fed. 428, 5 Am. Bankr. Rep re Arnstein (D. C. 1899) 101 4 Am. Bankr. Rep. 246; Bra (D. C. 1900) 100 Fed. 27 Bankr. Rep. 788; In re Jeff C. 1899) 93 Fed. 948, 2 An Rep. 206; In re Collignon (D. 2 Nat. Bankr. News, 660; In stein (D. C. 1900) 2 Nat. Ban 106; In re Frankel (D. C. 190 Bankr. News, 840; In re Mah 1899) 2 Nat. Bankr. News, 7 Shilliday, 1 Nat. Bankr. News re May (D. C. 1874) 9 N. B Fed. Cas. No. 9,325; Bailey (C. C. 1875) 11 N. B. R. 271, No. 739; In re Commercial Co. (C. C. 1876) 14 N. B. R. Cas. No. 3,060; In re Lynch 1873) Fed. Cas. No. 8,634; v. Marden (1877) 123 Mass.

Am. Rep. 108; Scott v. Demarest (1912) 75 Misc. Rep. 289, 135 N. Y. Supp. 264. CONTRA, In re Miller Bros. Grocery Co. (D. C. 1913) 208 Fed. 573; In re Caswell-Massey Co. (D. C. 1910) 208 Fed. 571. Under lease of a cash carrier system, the lessor held entitled to enter and claim a forfeiture only for breach of the lease, and not for bankruptcy of the lessee; and hence such an entry and seizure on the intervention of bankruptcy waived a forfeiture and effected a surrender of the lease, precluding a claim for accruing rent after adjudication. In re Quaker Drug Co. (D. C. 1913) 204 Fed. 689. It is immaterial that the tenant may have given notes for the installments of rent to accrue in the future; they cannot be proved as debts against his estate. Atkins v. Wilcox (1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Hays, Foster & Ward Co. (D. C. 1902) 117 Fed. 879, 9 Am. Bankr. Rep. 144.

As to the effect of a covenant in the lease that, on default in the payment of any installment of rent, the rent for the entire term shall at once become due and payable, it has been held that the bankruptcy of the lessee, while so in default, will give the landlord a right to prove a claim for the entire rent so far as it is definitely fixed by the terms of the lease. In re Pittsburg Drug Co. (D. C. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227. But he must take the position of an ordinary general creditor, and will not be entitled to priority of payment. In re Cronson, 1 Nat. Bankr. News, 474. But if the tenant is not in default at the time of his bankruptcy, the filing of the petition will not cause the rent for the whole term to become exigible or mature notes given for future installments. Atkins v. Wilcox (1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313. Where a lease to a bankrupt of a store service system for a term of 10 years provided that, on a breach by the lessee or its bankruptcy, the lessor might enter and take possession of the property, which it did after the bankruptcy, a further provision that in such case the rent for the entire term should immediately become due and payable held one for a penalty, and a claim therefor against the bankrupt estate disallowed. In re Merwin & Willoughby Co. (D. C. 1913) 206 Fed. 116.

A provision in the lease that, in case the tenant shall be adjudicated a bankrupt, the lessor may re-enter and terminate the lease, and that the lessee will then pay to the lessor "as damages" a sum representing the difference between the rental value of the premises and the rent reserved for the residue of the term, does not create a liability which can be proved as a debt against the estate. Slocum v. Soliday (1910) 183 Fed. 410, 106 C. C. A. 56, 25 Am. Bankr. Rep. 460; In re Rhoads (D. C. 1900) 2 Nat. Bankr. News, 179. Compare In re Goldstein, 1 Nat. Bankr. News, 422. See In re Merwin & Willoughby Co. (D. C. 1913) 206 Fed. 116, 30 Am. Bankr. Rep. 485. So a state statute giving to the lessor a lien on the tenant's property on the premises, to secure the payment of one year's rent due or to become due, does not entitle the landlord, when the tenant becomes bankrupt during the term, to priority of payment out of his estate for a year's rent from the date of the adjudication. In re Jefferson (D. C. 1899) 93 Fed. 948, 2 Am. Bankr. Rep. 206.

39. —— **Occupation and use of premises by trustee.**—Where there is a leasehold estate among the assets of the bankrupt, the trustee may accept it if it is salable and has a money value, but he is not bound to do so unless it appears to be for the interest of the creditors. White v. Griffing (1877) 44 Conn. 437. If the trustee accepts the term, for the purpose of realizing its value as an asset, he is bound by the covenants of the lease, including that for the payment of rent at the stipulated rate. Ex parte Faxon (D. C. 1869) Fed. Cas. No. 4,704; White v. Griffing (1877) 44 Conn. 437. But there must be some positive and unequivocal act of acceptance by the trustee before he will be held liable on the lease. In re Washburn (D. C. 1874) 11 N. B. R. 66, Fed. Cas. No. 17,211. And he does not accept the premises and become responsible for the rent merely by leaving some goods there. In re Yeaton (D. C. 1870) Fed. Cas. No. 18,133. And occupation of the leased premises by the trustee independently of the lease, where he pays for such occupation, is not evidence of an election to accept the lease. In re Ten Eyck (D. C. 1872) 7 N. B. R. 26, Fed. Cas. No. 13,829.

If the trustee, without accepting or assuming the lease (or holding over after the expiration of the bankrupt's term), continues to occupy and use the demised premises for purposes connected with the administration of the estate, the landlord will be entitled to compensation for the reasonable value of the use of the premises by the trustee, from the date of the filing of the petition in bankruptcy until the possession is surrendered to him. In re Abrams (D. C. 1913) 200 Fed. 1005, 29 Am. Bankr. Rep. 590; In re Hunter (D. C. 1907) 151 Fed. 904, 18 Am. Bankr. Rep. 477; In re Hinckel Brewing Co. (D. C. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484; Bray v. Cobb (D. C. 1900) 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Chambers (D. C. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; In re Grimes (D. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re McGrath (D. C. 1871) 5 N. B. R. 254, Fed. Cas.

No. 8,808; In re Walton (D. C. 1873) 1 N. B. R. 557, Fed. Cas. No. 17,131; In re Ives (D. C. 1879) 18 N. B. R. 28, Fed. Cas. No. 7,116; In re Metz (D. C. 1873) Fed. Cas. No. 9,509; In re Croney (D. C. 1875) Fed. Cas. No. 3,411; In re Hamburger (D. C. 1875) 12 N. B. R. 277, Fed. Cas. No. 5,975; In re Hufnagel (D. C. 1875) 12 N. B. R. 554, Fed. Cas. No. 6,837. In ordinary circumstances, this may be fairly measured by the rent which the bankrupt was paying, and compensation to the lessor will be allowed at the rate of the rent reserved in the lease, if this appears fair and reasonable to the court. In re Breck (D. C. 1875) 12 N. B. R. 215, Fed. Cas. No. 1,822; In re Appold (D. C. 1868) 1 N. B. R. 621, Fed. Cas. No. 499; In re Cronson, 1 Nat. Bankr. News, 474. If the trustee continues to occupy and use the premises only for the purpose of storing the goods of the bankrupt therein until they can be sold, he should pay rent to the landlord only to the extent to which the estate in bankruptcy has been benefited by the use of the premises. That is, the landlord cannot recover the amount which would be a proper rental for the premises if used as a place of business by a merchant in trade, but only what they were worth as a mere storehouse. In re Fowler (D. C. 1876) Fed. Cas. No. 4,997; In re Lucius Hart Mfg. Co. (D. C. 1878) 17 N. B. R. 459, Fed. Cas. No. 8,592; In re Wheeler (D. C. 1878) 18 N. B. R. 385, Fed. Cas. No. 17,490; In re Dunham (D. C. 1870) Fed. Cas. No. 4,145. And even to this extent, the trustee is chargeable only for the time he actually used the place. In re Merrifield (D. C. 1869) 3 N. B. R. 98, Fed. Cas. No. 9,465. See Longstreth v. Pennock (C. C. 1872) 7 N. B. R. 449, Fed. Cas. No. 8,488. And if he surrenders the keys immediately after he receives them, he incurs no liability for rent which accrued before he took possession. In re Criblier (D. C. 1911) 184 Fed. 338, 25 Am. Bankr. Rep. 765. And in a case where the premises had been used by the bankrupt for the purpose of storing his goods, under a lease, and the trustee knew nothing of the lease until two or three months after his appointment, when he was applied to for the rent, whereupon he denied his liability and removed the goods, it was held that, as he had not accepted the lease and in fact derived no benefit from the premises, he was not liable to the landlord for any sum. In re Washburn (D. C. 1874) 11 N. B. R. 66, Fed. Cas. No. 17,211.

Whatever may be the sum to which the landlord is entitled for the use of his premises by the trustee, he is not required to prove it as a debt in the bankruptcy proceedings and share with other creditors. It should be settled by the court, paid as a part of the expenses of administering the estate, and entered as a credit item on the trustee's accounts. In re Jefferson (I 93 Fed. 948, 2 Am. Bankr. In re Butler (C. C. 1871) 501, Fed. Cas. No. 2,236; I (D. C. 1872) 6 N. B. R. 302 No. 17,315; In re Rose (D 3 N. B. R. 265, Fed. Cas. N In re Hoagland (D. C. 1878 R. 530, Fed. Cas. No. 6,54 the trustee has no cash in which to pay the landlord's may be ordered to sell sufficie al property for that purpos will take precedence of the claim to have his exemption out of such personalty. In (D. C. 1899) 96 Fed. 529, 2 Rep. 730.

40. —— **Damages for brea tract or covenant.**—A land bankrupt tenant cannot pro for the rent which would ha under the lease during the re the term, on the theory that is recoverable as damages f ant's breach of his contract o to pay the stipulated rent. Merrill (1905) 136 Fed. 359 A. 185, 14 Am. Bankr. Rep re Arnstein (D. C. 1899) 10 4 Am. Bankr. Rep. 246; Houghton (D. C. 1871) Fed 6,725; In re Croney (D. C. Cas. No. 3,411; In re Hufn 1875) 12 N. B. R. 554, Fed 6,837. Compare In re Calori (D. C. 1910) 179 Fed. 72 Bankr. Rep. 609. And see (C. C. 1882) 12 Fed. 779.

Where the lease contains covenant that, upon the ban the lessee, the lessor may ter lease and re-enter, and that shall thereupon be liable for damage sustained by the les count of the premises rema or being let for the remain term for a less rent than th in the lease, a claim for the such a covenant does not c "fixed liability absolutely ow time of the filing of the petiti ruptcy," but the liability is contingent, because of the as to whether the lessor wi and terminate the lease, and, whether there will be any lo amount; nor is such a clai as a debt "founded upon ex tract," under the clause of relating thereto, because this construed as permitting the claims which are contingent liability and amount at the ment of the proceedings. In (D. C. 1903) 124 Fed. 11 Bankr. Rep. 633; In re R pel (C. C. A. 1910) 181 Fe Am. Bankr. Rep. 588; In r C. 1900) 98 Fed. 967, 3 A Rep. 564. And for similar has been held that a claim f against a lessee for aband premises, a dwelling house,

was wrongfully entered, and burned and destroyed, is not a provable claim in bankruptcy proceedings. Winfree v. Jones (1905) 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201. A claim of the lessor of a coal mine for the cost of pumping the mine after abandonment of the lease, due to the bankruptcy of the lessee, in view of stipulations in the lease, held for a contingent liability, dependent on continuance of the term, and not provable against the estate. In re Gallacher Coal Co. (D. C. 1913) 205 Fed. 183. Where lease of machinery, authorizing termination at lessor's option upon bankruptcy of lessee, was not terminated until after the adjudication, claims for repairs, freight, and return charges, payable under the lease upon its expiration, held not provable. In re Jorolemon-Oliver Co. (1914) 213 Fed. 625, 130 C. C. A. 217. Obligation under leases of machinery to pay certain charges and expenses upon termination held provable, where leases were terminated by the bankruptcy. In re Desnoyers Shoe Co. (C. C. A. 1915) 227 Fed. 401.

§ 9648. (Act July 1, 1898, c. 541, § 64, as amended, Act Feb. 5, 1903, c. 487, § 14, Act June 15, 1906, c. 3333.) Debts which have priority.

Debts which have Priority.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. (30 Stat. 563. 32 Stat. 800. 34 Stat. 267.)

In this section, as originally enacted, in subdivision b thereof, clause 2 was as follows:

"(2) the filing fees paid by creditors in involuntary cases;"

It was amended by Act Feb. 5, 1903, c. 487, § 14, cited above, by adding to said clause the further provisions beginning with the words "and where property of the bankrupt," etc., to the end of the clause as set forth here.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took

effect, but that such cases should be adjudicated and disposed of c
to the provisions of the original act.

In this section, as originally enacted, also, in said subdivision
clause 4 was as follows:

"(4) wages due to workmen, clerks, or servants which have be
within three months before the date of the commencement of proce
to exceed three hundred dollars to each claimant;"

It was amended by Act June 15, 1906, c. 3333, last cited above, by
after the words "wages due to workmen, clerks," the words "travel
salesmen," making the clause read as set forth here.

The United States is entitled to priority of payment of all debts
an insolvent or bankrupt debtor, by R. S. § 3466, ante, § 6372.

Notes of Decisions

1. Construction of this section.
2. Rights of creditors entitled to priority.
3. Relative rank of priority claims.
4. Assignment of priority claims.
5. Priority of taxes.
6. —— Effect of sale of land by trustee.
7. —— Determination of amount or legality of tax.
8. —— What taxes included.
9. Costs and expenses of administration.
10. Receivers' certificates.
11. Attorney's claim for services.
12. Wages of workmen, clerks, and servants.
13. —— Who are workmen, clerks, and servants.
14. —— Managers, superintendents, and officers of companies.
15. —— Traveling salesmen.
16. —— Limitation of three months.
17. —— Advance of money to pay labor claims.
18. Claims of United States.
19. —— Subrogation to rights of United States.
20. Claims of state or municipality.
21. Claims to priority under state laws.
22. Landlord's claim for rent.
23. Trust creditors and trust funds.

1. Construction of this section.—This section was not repealed or in any way altered or affected by the amendatory act of June 25, 1910, which gives to the trustee in bankruptcy the rights of a creditor holding a lien. In re Lausman (D. C. 1910) 183 Fed. 647, 25 Am. Bankr. Rep. 186. This section does not merely prescribe the order of distribution of assets after satisfaction of liens against the property, but it creates prior liens to the extent stated in favor of the classes of debts specified, and is enforceable without reference to state statutes relating to the same subject. In re McDavid Lumber Co. (D. C. 1911) 190 Fed. 97, 27 Am. Bankr. Rep. 39. This section must not be extended by an unduly liberal construction, as it is contrary to the general policy of the bankruptcy act, which contemplates the equal distribution of the estate among all the creditors. In re Nounnan (Utah) 7 N. B. R. 15.

2. Rights of creditors entitled to priority.—Where a priority creditor votes his whole claim at a creditors' meeting in the election of a trustee, this will not amount to a waiver of his right of priority, and will not estop him from claiming the same, where no other creditor is shown to have been prejudiced. In re Ashland Steel Co. (1909) 168 Fed. 679, 94 C. C. A. 16
Bankr. Rep. 834. Taking t
note does not discharge a
debt entitled to priority n
the creditor from claiming hi
In re Worcester County
1900) 102 Fed. 808, 4 Am. B
496. Creditors entitled unde
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are entitled to prove the
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C. 1912) 200 Fed. 1016, 29 A
Rep. 149. Where a bankru
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his creditors to pay the full
his debt, and the debtor is
judged bankrupt, there is no
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to others who have become
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In re Merriman (D. C. 1878
587, Fed. Cas. No. 9,479.

3. Relative rank of priorit
Claims entitled to priority
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outrank claims secured by
A mortgage or other lien giv
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right of priority as against
unsecured creditors. In re
Co. (1903) 121 Fed. 706, 5
126, 10 Am. Bankr. Rep. 2
Yoke Vitrified Brick Co. (D
180 Fed. 235, 25 Am. Bank
In re Proudfoot (C. C. 1909
733, 23 Am. Bankr. Rep. 1
Cramond (D. C. 1906) 145
17 Am. Bankr. Rep. 22; In
1 Nat. Bankr. News, 214;
Connell (D. C. 1874) 9 N.
Fed. Cas. No. 8,712. CON
In re Blackstaff Engineerin
C. 1912) 200 Fed. 1019, 29 A
Rep. 663; In re Erie Lumb

C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; In re Tebo (D. C. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235.

Claims for wages, being enumerated in the fourth clause of the section, will take precedence over claims enumerated in the fifth clause, that is, "debts owing to any person who, by the laws of the states or the United States, is entitled to priority." Hence such labor claims must be paid in full in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on. In re Byrne (D. C. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268. Wages and labor claims must be paid in full in preference to debts or claims due to the United States. Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. (1912) 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873. The actual and necessary cost of preserving the bankrupt's estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction is entitled to priority of payment over taxes due to the state. State of New Jersey v. Lovell (1910) 179 Fed. 321, 102 C. C. A. 505, 24 Am. Bankr. Rep. 562. Where a state statute creates a lien in favor of employés performing labor in the manufacture of lumber, but provides that the debt or claim shall not remain a lien on the product, unless a statement thereof is filed within thirty days and an action begun within three months, holders of such claims, perfected according to the statute, against the estate of the employer in bankruptcy, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, and this although both classes of claims are equally claims for "wages" within the bankruptcy law. In re Kerby-Dennis Co. (1899) 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402.

Where the estate of a bankrupt is insufficient to pay in full the claims entitled to preference, the court may, where equity requires it, scale a claim which would ordinarily be entitled to priority over others. In re Grignard Lithographing Co. (D. C. 1907) 158 Fed. 557, 19 Am. Bankr. Rep. 743.

A bank which is not shown to have had constructive notice of a fraudulent agreement between a corporation and its director not to record a mortgage securing a note assigned to the bank as collateral security, does not lose its priority against unsecured creditors after the corporation became bankrupt. Hicks v. Second Nat. Bank of Cincinnati, Ohio (1915) 224 Fed. 53, 139 C. C. A. 615.

4. Assignment of priority claims.—A claim which is accorded priority by the bankruptcy law itself, such as a claim for wages, or one which is given priority by the laws of the state, does not lose its right to be satisfied in full in advance of distribution to general creditors by the fact of its having been assigned to a third person before the commencement of the proceedings in bankruptcy. Shropshire, Woodliff & Co. v. Bush (1907) 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77; In re Bennett (1907) 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847; In re Fuller & Bennett (D. C. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443; In re Brown (D. C. 1870) 3 N. B. R. 720, Fed. Cas. No. 1,974. But see In re Westlund (D. C. 1900) 99 Fed. 399, 3 Am. Bankr. Rep. 646. Nor is its priority lost by its assignment after the filing of the petition in bankruptcy. In re Campbell (D. C. 1900) 102 Fed. 686, 4 Am. Bankr. Rep. 535. And where as the statute speaks of debts for wages "due to" workmen, clerks, etc., it is satisfied if the debt was originally so due, and does not mean that it must continue to be so due until bankruptcy proceedings are begun or until the claim is proved and allowed. Shropshire, Woodliff & Co. v. Bush (1907) 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77. The fact that a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number, who were also laborers and who held claims of their own, in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amounts due each when collected, does not deprive the claims so assigned of their right to priority. In re Harmon (D. C. 1903) 128 Fed. 170, 11 Am. Bankr. Rep. 64. But where one holding an assignment of claims for wages exchanges them with the bankrupt for the latter's note or other obligation, this operates as a novation of the wage claims and extinguishes the right of priority given to them by the statute. In re Fuller & Bennett (D. C. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443.

5. Priority of taxes.—A state need not prove its claim in bankruptcy in order to recover taxes due to it on property of the bankrupt. Stokes v. State (1872) 46 Ga. 412, 12 Am. Rep. 588.

A claim for taxes due either to the United States or a state is entitled to priority over all other claims. In re Brand (D. C. 1867) Fed. Cas. No. 1,809. It is entitled to priority even over the trustee's commissions and his necessary expenses. In re Weiss (D. C. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247. It is immaterial that, through the negligence of the officers charged with the collection of taxes, they have accumulated until the aggregate amount with interest will absorb all or a large part of the estate.

In re Weissman (D. C. 1910) 178 Fed. 115, 24 Am. Bankr. Rep. 150. It makes no difference that the taxes in question were levied on property which never passed into the hands of the trustee in bankruptcy. City of Chattanooga v. Hill (1905) 139 Fed. 600, 71 C. C. A. 584, 15 Am. Bankr. Rep. 195; City of Waco v. Bryan (1904) 127 Fed. 79, 62 C. C. A. 79, 11 Am. Bankr. Rep. 481. Nor that they were levied upon the exempt property of the bankrupt. In re Tilden (D. C. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300. The priority right of a county or municipality in respect to taxes due to it is not lost by the fact that the property assessed has been struck off to it at a tax sale for want of other bidders. Hecox v. Teller County (C. C. A. 1912) 198 Fed. 634, 28 Am. Bankr. Rep. 525. Or that the property has been sold for less than the amount due as taxes, as the county or municipality will in that case be entitled to priority of payment for the balance due. In re Stalker (D. C. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

If there is any statute of limitations applicable to the tax in question, such as a municipal tax, it may be invoked by the trustee in bankruptcy as a protection against being required to pay the tax. In re Stalker (D. C. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

This provision of the bankruptcy law is to be construed in accordance with equitable principles, such as that of the marshaling of assets; and where taxes due to a county are a lien on property of the bankrupt, the greater portion of which has been taken to satisfy a mortgage, leaving no more than enough to pay the costs and expenses of administration, it is within the power of the court to require the county to resort to the mortgaged property. In re Oxley (D. C. 1913) 204 Fed. 826, 30 Am. Bankr. Rep. 406.

Where the bankrupt is not the owner of the property, but a lessee of it, the state or municipality cannot come upon his estate in bankruptcy with a preferential claim for payment of the taxes, though he covenanted in the lease to pay all taxes assessed upon the property. For such a covenant is not made for the benefit of the state or municipality and cannot be enforced by it. In re Broom (D. C. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427; In re Siegel-Hillman Dry Goods Co. (D. C. 1900) 2 Nat. Bankr. News, 856; In re William A. Harris Steam Engine Co. (D. C. 1915) 225 Fed. 609. And if the owner pays the taxes, which the bankrupt lessee had covenanted to pay, he may prove a claim therefor as a general creditor in the bankruptcy proceedings, but is not entitled to be subrogated to the rights of the state or municipality so as to occupy the position of a creditor entitled to priority. Cooper Grocery Co. v. Bryan (1904) 127 Fed. 815, 62 C. C. A. 495, 11 Am. Ba
734; In re Parker (D. C. 18
Cas. No. 10,719.

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6. —— Effect of sale of land tee.—A sale of the land by th
in bankruptcy does not divest
of the state for taxes due upo
though the sale was made fr
cumbrances. Stokes v. Stat
46 Ga. 412, 12 Am. Rep. 588, 9
191; Mesker v. Koch (1881)
68; Meeks v. Whatley (1873)
337, 10 N. B. R. 498. Comp
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634, 12 Am. Bankr. Rep. 12
Conhaim (D. C. 1900) 100 F
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(D. C. 1900) 101 Fed. 251
Bankr. Rep. 112. See In re
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Bankr. Rep. 567. And the p
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claim priority. In re M. I. Hil
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741, 27 Am. Bankr. Rep. 612.

**7. —— Determination of a
legality of tax.**—A trustee of
rupt corporation is not bound b
termination of the comptroller
a license or franchise tax on
poration, but the amount and l
the tax is reviewable by the b
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1914) 216 Fed. 642. The cou
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not conclusive on the court
ruptcy. New Jersey v.
(1906) 203 U. S. 483, 27 Sup.
51 L. Ed. 284, 17 Am. Bankr.
Where the claim of a city
against a bankrupt for unpaid
supported by sworn valuation

unjust nor illegal, the claim must be allowed as preferred, without reference to the hardship worked on general creditors. In re Bushnell (D. C. 1914) 215 Fed. 651. The court is authorized to refuse to allow a claim for personal taxes on the ground that the property supposed to be taxed did not actually exist. In re Otto Freund Arnold Yeast Co. (D. C. 1910) 178 Fed. 305, 24 Am. Bankr. Rep. 458. State held not entitled to allowance of tax in bankruptcy, where it was based upon bankrupt's padded and false return, when, if real facts had been disclosed, no assessment could properly have been made. In re E. C. Fisher Corp. (D. C. 1915) 229 Fed. 316.

8. —— **What taxes included.**—The provision of the bankruptcy act requiring the trustee to pay all taxes legally due and owing by the bankrupt intends that, while the estate is in the hands of the trustee, his custody of it shall not operate as a bar to the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself. In re Conhaim (D. C. 1900) 100 Fed. 268, 4 Am. Bankr. Rep. 58. Compare In re Booth (D. C. 1876) 14 N. B. R. 232, Fed. Cas. No. 1,645. The funds of the estate in the hands of the trustee are subject to state and local taxation in that taxing district where the values might have been assessed for taxation if the bankruptcy had not supervened, and on proper application the court will order the payment of such taxes by the trustee, as coming within the spirit, if not the letter, of the bankruptcy act. In re Sims (D. C. 1902) 118 Fed. 356, 9 Am. Bankr. Rep. 162. Since the statute makes no distinction, taxes are entitled to priority of payment whether they were assessed before the commencement of the bankruptcy proceedings or during their pendency. In re Prince & Walter (D. C. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Flynn (D. C. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

The word "tax," as used in this section, will include all obligations imposed by the state and general governments under their respective taxing or police powers for governmental or public purposes; and hence it will include a license fee or tax imposed on the privilege of carrying on certain lines of business supposed to require regulation under the police power, such as dealing in intoxicating liquors or cigarettes. In re Otto F. Lange Co. (D. C. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478. But see In re Ott (D. C. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637. The term will also include an annual license fee or franchise tax imposed on a corporation by the state which granted its charter, though it does no business and has no property in that state. New Jersey v. Anderson (1906) 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63; In re Halsey Electric Generator Co. (D. C. 1909) 175 Fed. 825, 23 Am. Bankr. Rep. 401. But a bonus required by the state law to be paid to the state by any corporation on increasing its capital stock, is not a tax. Commonwealth of Pennsylvania v. York Silk Mfg. Co. (1911) 192 Fed. 81, 112 C. C. A. 613, 27 Am. Bankr. Rep. 525.

An obligation imposed by state statute on corporations doing business within the state to collect from resident holders of its bonds or other obligations the state tax on such bonds, by the process of having the treasurer of the corporation withhold the amount of such tax from the interest due the bondholders, is not a tax on the corporation, though it is liable to the state therefor, and hence is not entitled to priority of payment out of the estate of the corporation in bankruptcy. In re York Silk Mfg. Co. (D. C. 1911) 188 Fed. 735, 26 Am. Bankr. Rep. 650; In re Wyoming Valley Ice Co. (D. C. 1906) 145 Fed. 267, 16 Am. Bankr. Rep. 594. An assessment levied on an employer of labor under Workmen's Compensation Act (Laws Wash. 1911, p. 345) held not a tax entitled to a preferred payment. In re Farrell (D. C. 1914) 211 Fed. 212.

Water rents due to a municipality, which are levied annually on property as tax is levied and made a lien in like manner, are "taxes" within the meaning of the bankruptcy law. In re Industrial Cold Storage & Ice Co. (D. C. 1908) 163 Fed. 390, 20 Am. Bankr. Rep. 904; In re Moller (C. C. 1877) Fed. Cas. No. 9,700. But not a charge for water furnished by a city, as shown by a meter. In re Hills (1915) 221 Fed. 260, 137 C. C. A. 150.

Assessments levied for local improvements are entitled to priority of payment as "taxes," if the law of the particular state regards and treats them as taxes, and gives the same remedies for their enforcement. In re Stalker (D. C. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

9. **Costs and expenses of administration.**—Where property of the estate is turned over to the admiralty court to be sold for the satisfaction of maritime liens, the proceeds of the sale are subject to the payment of the necessary costs incurred by the bankruptcy court in preserving the property until it was so turned over. In re Hughes (D. C. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303.

Among the "costs of administration," after the trustee takes charge of the estate, may be included the expense of storage of the property and the pay of a watchman or keeper. In re Allen (D. C. 1899) 96 Fed. 512, 3 Am. Bankr.

Rep. 38; In re Mitchell (1914) 212 Fed. 932, 129 C. C. A. 452. And rent of the store or other building occupied by the bankrupt as his place of business. In re Abrams (D. C. 1913) 200 Fed. 1005. Though not the rent of such portion of the building as he occupies as a residence. In re Hersey (D. C. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860. An expert employed by the bankrupt, after the commencement of the proceedings and before the adjudication, with the consent of the creditors, to make certain surveys and calculations having an important bearing on the collection of the bankrupt's claims against third persons, and who renders services which inure largely to the benefit of the creditors, may have a preferred claim for his compensation. In re Nounnan & Orr (1871) 1 Utah, 44. But one who has paid the premium on a policy of fire insurance held by him under a pledge, and which is afterwards assigned to the receiver of the assured in bankruptcy, is not entitled to a preference for the payment of such claim, and the payment of the same by the receiver is not authorized. In re Hamilton (D. C. 1900) 102 Fed. 683, 4 Am. Bankr. Rep. 543.

The fees paid by voluntary bankrupts on filing their papers are not returnable to them, but it has been held that a person advancing money to the bankrupt to pay the fees, has a first lien on the estate for its repayment. Whiston v. Smith (D. C. 1872) Fed. Cas. No. 17,523.

The "costs of administration" are next entitled to satisfaction, and these will include the commissions of the referee and trustee. In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22. And ordinary and necessary expenses incurred in caring for and collecting the estate of the bankrupt, but not usually the cost of continuing the bankrupt's business. Nor expenditures made by the receiver or trustee, for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable. In re Bourlier Cornice & Roofing Co. (D. C. 1905) 133 Fed. 958, 13 Am. Bankr. Rep. 585.

A claim for taxable costs incurred by a creditor in good faith before the filing of the petition in an action to recover a provable debt, is a claim which may be proved and allowed in the bankruptcy proceedings, but it is not a debt entitled to priority of payment. In re The Copper King (D. C. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 148; In re Daniels (D. C. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699; In re Beaver Coal Co. (D. C. 1901) 107 Fed. 98, 5 Am. Bankr. Rep. 787; In re Allen (D. C. 1899) 96 Fed. 512, 3 Am. Bankr. Rep. 38. Unless there is some provision of the local law under which such costs may claim a preference. In re Daniels (D. C. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699; In
(D. C. 1900) 99 Fed. 935, 4 A
Rep. 51.

An assignee for the benefi
itors, whose functions are
by the institution of bankru
ceedings against the assign
lien on the assets and a prefe
for his necessary disburse
for the reasonable value of
es and those of his counsel,
as such services increased o
the estate of the bankrupt.
v. Scruggs (1903) 190 U. S
Sup. Ct. 710, 47 L. Ed. 116
Bankr. Rep. 1; In re Chase
Fed. 753, 59 C. C. A. 629.
Stearns v. Flick (D. C.
Fed. 919, 4 Am. Bankr. Rep.
Peter Paul Book Co. (D. C.
Fed. 786, 5 Am. Bankr. Rep
to compensation of a receive
ed by a state court, see In
Alison Lumber Co. (D. C.
Fed. 643, 14 Am. Bankr. Re
attorney for whom another is
ed upon his client's bankrup
in the same position as any
itor respecting services not r
the action, except that he
to a charging lien upon the
his hands. Kraus v. Centu
Electric Fixture Co. (1914)
S. 1086, 161 App. Div. 916.

The holder of a lien on spe
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which is not disputed, is
payment in full from the p
the property, when it is s
trustee, with interest to th
payment, and cannot be r
contribute anything to the g
penses of the bankruptcy
In re Allert (D. C. 1908) 173
23 Am. Bankr. Rep. 101; In
Coal & Coke Co. (D. C.
Fed. 658, 23 Am. Bankr.
But see In re Tebo (D. C.
Fed. 419, 4 Am. Bankr. Rep.
ing v. Moore (1911) 37 App.
But a secured creditor who
of the bankruptcy court and
to realize on his security may
ed to contribute his proport
costs of the proceedings, and
for the preservation of the
during their pendency, wher
not sufficient unincumbered
the purpose. In re J. H. Al
ber Co. (D. C. 1905) 137 F
Am. Bankr. Rep. 78.

10. Receivers' certificate
amount of an issue of receive
cates authorized by a court
ruptcy, to raise the money re
the care and preservation of
erty of the estate, represents
diture for the benefit of all
interest, and such certificate
titled to priority of payment
proceeds of such property.
ka Fishing & Development
1909) 167 Fed. 875, 21 A
Rep. 685. The receiver had

thorized to borrow the sum of $10,000, and began by borrowing half of that amount, for which he issued certificates. These were purchased by a company which was the surety on the bankrupt's bond guaranteeing the performance of the contracts which the receiver expected to complete. He also incurred other indebtedness of the same character, for which no certificates were issued, to an amount in excess of the authorized limit, all of which was done with the knowledge of the surety company, to which the receiver paid $1,000 on account of the certificates which it held. It was held that the holders of the debts incurred by the receiver, for which no certificates were issued, to the amount of $6,000, were entitled to participate in the bankrupt's assets in the hands of the receiver on the same footing with the remaining $4,000 of the certificates. In re Restein (D. C. 1908) 162 Fed. 986, 20 Am. Bankr. Rep. 832.

11. Attorney's claim for services.—Where the bankrupt's attorney includes his fee in the bankrupt's list of debts as an unsecured claim, it will not be entitled to priority as a part of the costs of administration. In re Morris (D. C. 1903) 125 Fed. 841, 11 Am. Bankr. Rep. 145. Where the purchaser of property subject to a mortgage, while a foreclosure suit was pending in a state court, filed his voluntary petition in bankruptcy, with the manifest intention of acting adversely to the interests of the mortgagee, it was in the discretion of the court to reject a claim of the bankrupt's attorney for compensation for professional services rendered. Liddon & Bro. v. Smith (1905) 135 Fed. 43, 67 C. C. A. 517, 14 Am. Bankr. Rep. 204.

Compensation of attorneys employed by a trustee in bankruptcy is properly included in the costs of administration, the allowance of a fee to the attorney for the petitioning creditors not being exclusive of the right to allow a priority claim to the attorneys for the trustee. In re Standard Fullers' Earth Co. (D. C. 1911) 186 Fed. 578, 26 Am. Bankr. Rep. 562; In re Grignard Lithographing Co. (D. C. 1907) 158 Fed. 557, 19 Am. Bankr. Rep. 743. Where an attorney is retained by the trustee in a suit to recover a voidable or fraudulent preference made by the bankrupt, his reasonable fee should be allowed as part of the expenses of administration, and accorded priority of payment. Page v. Rogers (1906) 149 Fed. 194, 79 C. C. A. 153, 17 Am. Bankr. Rep. 854.

12. Wages of workmen, clerks, and servants.—Laborers, whose services contributed to enhance the assets of the bankrupt, held to have a lien for wages due, and to be entitled to priority of payment. In re Blackstaff Engineering Co. (D. C. 1912) 200 Fed. 1019.

A claimant who comes within the statute does not lose his right of priority by reason of the fact that, within four months before the bankruptcy and while the employer was insolvent, he recovered a judgment against him for the wages due. In re Haskell (D. C. 1915) 228 Fed. 819; In re Anson (D. C. 1899) 101 Fed. 698, 4 Am. Bankr. Rep. 231. But see In re Burton Bros. Mfg. Co. (D. C. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218. And the claim of a father for the wages due to his minor son, employed by the bankrupt, is entitled to the same priority. In re Harthorn (D. C. 1870) 4 N. B. R. 103, Fed. Cas. No. 6,162. Wages earned by the wife and daughter of a bankrupt within three months prior to the bankruptcy, under contracts with him, held provable against his estate as preferred claims. In re Strauch (D. C. 1913) 208 Fed. 842. But a claim for wages for an unexpired term of employment, the employé having been wrongfully discharged, is not entitled to priority, because in reality the demand is for damages for breach of the contract, and not for "wages which have been earned," etc. In re Pevear (D. C. 1878) 17 N. B. R. 461, Fed. Cas. No. 11,053. And where, by agreement, a clerk permits his employer to retain a certain portion of his wages each week to form a fund which is to be paid to the clerk or used for his benefit later, and the employer becomes bankrupt, the clerk cannot claim priority for the sums so retained during the preceding three months as "wages," because the fund has become, by the contract between the parties, a debt of a different class. In re Flick (D. C. 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465. Where trustee was authorized to continue under bankrupt's contract and to borrow money, the lender to have a lien subject only to costs of administration, laborers, and materialmen, held entitled to priority. Unpaid laborers, employed by trustee, in continuing under bankrupt's contract, held entitled to no priority of payment over materialmen, having perfected no lien. In re John W. Farley & Co. (C. C. A. 1915) 227 Fed. 378.

A state statute cannot enlarge the class of persons to whom the bankruptcy law gives priority in the character of "workmen, clerks, or servants." Though a person not a workman, clerk, or servant might come under the description of "employé," or similar comprehensive term, in a state statute giving priority of payment, this would not entitle him to priority in bankruptcy. For the clause specifically relating to labor claims is not affected or enlarged by that relating to claims entitled to priority under the laws of a state. In re Crown Point Brush Co. (D. C. 1912) 200 Fed. 882, 29 Am. Bankr. Rep. 638; In re Slomka (1903) 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635; In re Shaw (D. C. 1901) 109 Fed. 782, 6 Am. Bankr. Rep. 501;

that purpose. Bell v. Arledge (1912) 192 Fed. 837, 113 C. C. A. 161, 27 Am. Bankr. Rep. 773; United Surety Co. v. Iowa Mfg. Co. (1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; In re St. Louis Ice Mfg. & Storage Co. (D. C. 1906) 147 Fed. 752, 17 Am. Bankr. Rep. 194; In re North Carolina Car Co. (D. C. 1903) 127 Fed. 178, 11 Am. Bankr. Rep. 488; In re Paulson (D. C. 1842) Fed. Cas. No. 10,849. An assignee of workmen employed by a bankrupt is entitled to the same priority to which the assignors were entitled. In re Dutcher (D. C. 1914) 213 Fed. 908.

Orders for goods drawn by a manufacturing company in favor of its employés are not preferred claims in the hands of the drawees against the estate of the company in bankruptcy. In re Erie Rolling Mill Co. (D. C. 1880) 1 Fed. 585.

Claimants, holding undated time checks issued by bankrupt to laborers, for which they exchanged goods under an arrangement with bankrupt, without any assignment or contract with the laborers, held not subrogated to the laborers' right to preference. In re McGowin Lumber Co. (D. C. 1915) 223 Fed. 553; J. C. Stewart & Co. v. McLeod (1915) 222 Fed. 253, 138 C. C. A. 75; Bell v. Arledge (1914) 219 Fed. 675, 135 C. C. A. 347; J. P. Browder & Co. v. Hill (1905) 136 Fed. 821, 69 C. C. A. 499, 14 Am. Bankr. Rep. 619. One who cashes checks given by a bankrupt to his workmen for wages is entitled to a preference as an assignee of the claims for wages; the checks unpaid not discharging the debts for which they were given. In re Stultz Bros. (D. C. 1915) 226 Fed. 989.

Under the law of Massachusetts, laborers working on a state building have an equitable lien on funds remaining in the hands of the state's officers, which is superior to any interest of the contractor's trustee in bankruptcy. Burr v. Com. (1912) 212 Mass. 534, 99 N. E. 323.

18. Claims of United States.—In all cases of insolvency or bankruptcy of one indebted to the United States, the government is entitled to priority of payment out of the debtor's property. U. S. v. Fisher (1805) 6 U. S. (2 Cranch) 358, 2 L. Ed. 304.

The provision of this section that claims of the United States against the bankrupt shall be entitled to priority of payment, and be paid in full, is in pari materia with R. S. §§ 3466, 3467, ante, §§ 6372, 6373, providing for priority of debts due the United States in cases of insolvency, and requiring every assignee or other person to first pay the debts of the United States, and therefore entitles the United States to priority, whether it prove its debt in the bankruptcy proceedings or not. In re Stoever (D. C. 1904) 127 Fed. 394.

This right of priority in favor of the United States no longer exists under the bankruptcy act of 1898, so far as regards labor claims, but since the section of the act relating to priority claims not only specifies such claims but also prescribes the order of their payment, and since, in that enumerated order, labor claims are named before "debts entitled to priority under the laws of the United States," it follows that labor claims must be paid in full before payment of any debt due to the United States, except for taxes. Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. (1912) 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

The United States, not being bound by the bankrupt acts, and not being compelled to proceed under them to recover a claim against a bankrupt, is entitled to allowance from the bankrupt estate of its full claim, regardless of the rights of the creditors. In re Huddell (D. C. 1891) 47 Fed. 206. By the Revised Statutes the right of priority in payment of debts due the United States is established, inter alia, in cases where an act of bankruptcy has been committed, and every assignee and other person who pays debts due by the person or estate from whom or for which he acts before he has discharged all that may be owing the United States by such person or estate is made personally answerable for whatever may be needed to satisfy the unpaid claims of the government. U. S. v. Murphy (C. C. 1883) 15 Fed. 589. The United States, by omitting to prove its claim in the bankruptcy proceedings until after the distribution is made, does not lose its right to proceed against the trustee personally, as the doctrines of waiver, laches, and estoppel cannot be invoked against the government. U. S. v. Barnes (C. C. 1887) 31 Fed. 705.

A claim founded upon the indorsement of a bill of exchange, of which the government is the holder, is entitled to priority. U. S. v. Fisher (1805) 2 Cranch, 358, 2 L. Ed. 304. And so is a claim for breach of condition of a bond given under the internal revenue laws. In re Webb (D. C. 1869) 2 N. B. R. 614, Fed. Cas. No. 17,313. And for a penalty incurred by a violation of the internal revenue laws. In re Rosey (D. C. 1873) Fed. Cas. No. 12,066. The claim of the United States against an agent importing goods for his principal for the duties has priority, and, on the agent becoming a bankrupt, the trustee failing to pay the debt is personally liable. Walkof v. Fox (1915) 153 N. Y. S. 27, judgment affirmed Walkoff v. Same (1915) 155 N. Y. S. 1146. The government is entitled to payment out of the estate of the bankrupt debtor whether he is principal or surety, or solely or jointly liable with others. Lewis v. U. S. (1875) 92 U. S. 618, 23 L. Ed. 513. Where a bankrupt firm, through fraudulent undervaluations of goods entered at the custom

house, has incurred a forfeiture of their value to the United States, the claim of the latter against the firm for the tort is joint and several; and upon proof of the debt, containing a statement of the facts, the United States is entitled, under R. S. §§ 3466, 5501, ante, § 6372, and post, § 10287, to priority of payment out of any of the proceeds of either the joint or several estates, without reference to what may be the particular claim of priority in its proof of debt. In re Vetterlein (D. C. 1884) 20 Fed. 109.

In the distribution of a bankrupt's effects in this country, the United States is entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved its debt under the commission of bankruptcy, and had voted for an assignee. Harrison v. Sterry (1809) 5 Cranch, 289, 298, 3 L. Ed. 104. An agent of the United States in England cannot, by conforming to the bankrupt laws there, lessen the priority of the United States established here. Harrison v. Sterry (D. C. 1807) Fed. Cas. No. 6,144.

The right of priority is not in the nature of a lien, but only a preferential right of payment out of the general estate, and the government has no right of preference over the holders of valid liens. U. S. v. Hooe (1805) 3 Cranch, 73, 2 L. Ed. 370; U. S. v. Mechanics' Bank (D. C. 1829) Fed. Cas. No. 15,756; The Thomas Scattergood (D. C. 1828) Fed. Cas. No. 11,106; U. S. v. Griswold (C. C. 1881) 8 Fed. 496. The government is not bound by the general equity rule for marshaling assets, nor by any rule prescribed by the bankruptcy law in conformity thereto, any further than as that rule is founded, in the particular case, on the liens of the several parties inter sese. In re Strassburger (C. C. 1877) Fed. Cas. No. 13,526. And hence the government may enforce its right of priority without first exhausting securities which it may hold. U. S. v. Lewis (C. C. 1875) Fed. Cas. No. 15,595, affirmed (1875) 92 U. S. 618, 23 L. Ed. 513.

After an execution had been issued by the proper officers of the government on certain real estate of one of several joint judgment debtors of the United States, another of the judgment debtors was adjudicated bankrupt and the defendant appointed his trustee. During the entire course of the administration of the latter's estate, the real estate exceeded in value the amount of the whole debt, the execution of it continued in force, and the officers of the government, with full knowledge of the facts, never even intimated the right of priority for the claim, nor demanded its payment. Acting on a belief, induced by these circumstances that the government relied for satisfaction exclusively on the property so levied on, the assignee withheld only his bankrupt's full contributive portion of the judgment, on proper demand paid this to the United States, and distributed all the assets according to law. Held that the officers of the government having received its quota of the debt, and having executed a release to the debtor whose property had been taken in execution, the trustee of the debtor was not personally liable. U. S. v. Murphy (C. C. 1883) 15 Fed. 589.

The United States is not bound by the rule for the division of an estate as between partnership and separate creditors; that is, though the claim of the government is against an individual partner, it is entitled to priority of payment out of the partnership funds, and vice versa. U. S. v. Lewis (C. C. 1875) Fed. Cas. No. 15,595, affirmed (1875) 92 U. S. 618, 23 L. Ed. 513; In re Strassburger (C. C. 1877) Fed. Cas. No. 13,526.

Under former bankruptcy acts it was held that the general government, not being specifically named in such statutes, was not bound by them, and therefore was not compelled to proceed against a bankrupt debtor under and in accordance with such acts, but was entitled to an allowance of its full claim out of the estate in bankruptcy, without regard to the rights of other creditors. In re Huddell (D. C. 1891) 47 Fed. 206; Lewis v. U. S. (1875) 92 U. S. 618, 23 L. Ed. 513; Mott v. Maris (C. C. 1808) Fed. Cas. No. 9,880; U. S. v. Fisher (1805) 2 Cranch, 358, 2 L. Ed. 304; Harrison v. Sterry (1809) 5 Cranch, 289, 3 L. Ed. 104; In re Bousfield & Poole Mfg. Co. (D. C. 1878) 17 N. B. R. 153, Fed. Cas. No. 1,704.

Voting for an assignee, and proving the debt before the commissioners, did not deprive the United States of their right to priority of payment. Harrison v. Sterry (1809) 9 U. S. (5 Cranch) 289, 3 L. Ed. 104. The government is not bound to go into a bankruptcy court, nor is its debt barred by a certificate of discharge; but, to secure priority in payment out of funds upon which such court is administering under the act, the right must be asserted in that court, and worked out through that act. Failure of the government, with full knowledge of the adjudication of bankruptcy, to make this claim before final settlement of the estate, waives such right, and leaves it no ground on which to hold the assignee responsible out of his own means. Having done all he had undertaken to do when he had distributed the estate according to the terms of the act, the orders of the court, and the directions of a committee of creditors, the assignee would not be liable on an express or an implied assumpsit. U. S. v. Murphy (C. C. 1883) 15 Fed. 589.

The provisions of R. S. § 3466, ante, § 6372, and the provisions of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the

extent of the repugnancy, superseded by it; hence, the provisions of the national banking act protecting the United States by requiring national banks to deposit satisfactory security, withdraws national banks, which have failed, from that class of insolvent persons out of whose estates demands of the United States are, under this section to be paid in preference to the claims of other creditors. This view of the banking law is not affected by the subsequent enactment in 1867 of the bankrupt act, giving priority to the demands of the United States against the estates of bankrupts. That act dealt only with the estates of persons adjudged insolvent under that law, and covers only the distribution of their estates. Cook County Nat. Bank v. U. S. (1882) 2 S. Ct. 561, 563, 107 U. S. 445, 27 L. Ed. 537. Banking Law N. Y. (Consol. Laws, c. 2) § 19, declares that dividends to be paid by the superintendent of banks out of the assets of institutions in his charge for administration shall be paid to such persons and in such amounts and upon such notice as may be directed by the supreme court in the judicial district in which the principal office of such corporation or individual banker is located. Held, that where a New York trust company, prior to failure, had been appointed a depositary for bankruptcy funds, whether deposits made by trustees in bankruptcy were entitled to preference under R. S. § 3466, ante, § 6372, giving preference to debts due the United States, was solely within the jurisdiction of the state supreme court, and could not be determined on a motion in bankruptcy for orders requiring the superintendent of banks to pay out such deposits. In re Bologh (D. C. 1911) 185 Fed. 825.

19. —— Subrogation to rights of United States.—A surety for the bankrupt on a bond executed to the United States, who pays a judgment recovered against him on the bond, is entitled to be subrogated to the claim and right of priority of the government. Title Guaranty & Surety Co. v. Guarantee Title & Trust Co. (1909) 174 Fed. 385, 98 C. C. A. 603, 23 Am. Bankr. Rep. 340. Where a contract for government work provided for the retention of percentages until the work was completed, and, the contractor having become a bankrupt, its surety satisfied unpaid claimants to an amount larger than the percentages retained, such surety was entitled to receive the amount so retained in preference to the contractor's general creditors, without reference to whether the complainants had an enforceable right thereto under Act Aug. 13, 1894 (ante, § 6923), authorizing a suit under certain circumstances on a contractor's bond. In re Scofield Co. (C. C. A. 1914) 215 Fed. 45.

A surety who has paid money for a bankrupt in discharge of a customs duty bond is entitled to subrogation to the rights and priority of the United States. Kerr v. Hamilton (C. C. 1809) Fed. Cas. No. 7,731. But see Pollock v. Pratt (C. C. 1811) Fed. Cas. No. 11,256. And so is one who purchased imported goods, and who was compelled, in order to obtain possession of them, to pay the duties which the importer should have paid. In re Kirkland (C. C. 1875) Fed. Cas. No. 7,843. And so is an internal revenue officer who has paid to the government the amount of a dishonored check received by him from a debtor to the government. In re McBride (D. C. 1878) 19 N. B. R. 452, Fed. Cas. No. 8,662. But see Wilkinson v. Babbitt (C. C. 1877) Fed. Cas. No. 17,668.

20. Claims of state or municipality.—A state is a "person" within the meaning of that provision of the bankruptcy act which gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority," and hence is a preferred claimant against a bankrupt if its own laws so provide. In re Western Implement Co. (D. C. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167. And if the insolvency law of the state makes the municipal corporations of the state preferred creditors of an insolvent, a county having a claim against a bankrupt is entitled to priority of payment out of his estate. In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Wright (D. C. 1899) 95 Fed. 807, 2 Am. Bankr. Rep. 592. But not unless some state law so provides. In re Waller (D. C. 1905) 142 Fed. 883, 15 Am. Bankr. Rep. 753; In re Manistee Watch Co. (D. C. 1912) 197 Fed. 455, 28 Am. Bankr. Rep. 316. And if the state law regulating assignments for creditors or the administration of insolvents' estates declares that it shall be for the equal and common benefit of all creditors, and supersedes the common-law rule that debts due the crown were entitled to priority as against general creditors, the state itself can claim no priority in bankruptcy proceedings against its debtor. In re Devlin (D. C. 1910) 180 Fed. 170, 24 Am. Bankr. Rep. 863.

But assuming the state to be entitled to priority, this right will attach to a claim upon a contract for the hire of convict labor. In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Dodge (C. C. 1877) Fed. Cas. No. 3,949; In re Southwestern Car Co. (D. C. 1879) 19 N. B. R. 404, Fed. Cas. No. 13,192. And for the price of goods made in the state prison and sold to the bankrupt, or any other property of the state so sold. In re Mercer (1909) 171 Fed. 81, 96 C. C. A. 185, 22 Am. Bankr. Rep. 413; In re Mellor (D. C. 1878) 17 N. B. R. 402, Fed. Cas. No. 9,401. And a judgment rendered in

favor of the state against a surety on a bail bond given for the appearance of a person under indictment for a crime. In re Chamberlin (D. C. 1877) 17 N. B. R. 49, Fed. Cas. No. 2,580. But the state has no claim to priority against a bankrupt bank in which the warden of a penitentiary had deposited funds in his own name, as he is liable to the state on his bond. In re Corn Exchange Bank (C. C. 1877) 15 N. B. R. 431, Fed. Cas. No. 3,242.

21. Claims to priority under state laws.—While a state law could not, of its own force, grant or determine priorities of payment in the distribution of a bankrupt's estate, yet that clause of the national bankruptcy law which accords priority to "debts owing to any person who, by the laws of the states or the United States, is entitled to priority" adopts the law of the state for this purpose and makes it applicable as federal law in determining the question of priorities. In re Bennett (1907) 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847. And see In re New Galt House Co. (D. C. 1911) 199 Fed. 533; Bean v. Orr (C. C. A. 1910) 182 Fed. 599, 25 Am. Bankr. Rep. 400; In re Bazemore (D. C. 1911) 189 Fed. 236, 26 Am. Bankr. Rep. 494; Central Trust Co. of Illinois v. George Lueders & Co. (1915) 221 Fed. 829, 137 C. C. A. 387. And the controlling principle is that the creditor shall be allowed the same priority under the bankruptcy act as he would have had under the state law governing the distribution of the estates of insolvent debtors, if that law had not been superseded by the bankruptcy act. In re Jones (D. C. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206. For a state insolvency law, though its operation upon insolvents is suspended while the national bankruptcy law is in force, still remains a "law of the state" within the meaning of this clause. In re Wright (D. C. 1899) 95 Fed. 807, 2 Am. Bankr. Rep. 592. And a creditor may claim a right of priority in payment which the law of the state gives him, though he does not set up such claim until more than a year after the adjudication in bankruptcy, when the question of the distribution of assets first arises. In re Ashland Steel Co. (1909) 168 Fed. 679, 94 C. C. A. 165, 21 Am. Bankr. Rep. 834. But this provision does not operate to place all preferred debts of this class upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands of his trustee in the same relative rank and order in which they are fixed by the state statutes. In re Falls City Shirt Mfg. Co. (D. C. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437. Under Rem. & Bal. Code Wash. § 1162, liens of laborers removing timber from land sold to a bankrupt held prior in right to a lien on the logs reserved in the vendor's conveyance, to secure payment of the balance due on the price. In re Little Elk Logging Co. (D. C. 1914) 218 Fed. 142.

Priority of payment in bankruptcy may be claimed under a statute providing that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien on its property and effects involved in the business, superior to any mortgage or other incumbrance thereon. Louisville Woolen Mills v. Johnson (C. C. A. 1916) 228 Fed. 606; Central Trust Co. of Illinois v. George Lueders & Co. (1915) 221 Fed. 829, 137 C. C. A. 387; In re Bennett (1907) 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847. And see In re I. Rheinstrom & Sons Co. (D. C. 1913) 207 Fed. 119. So the laws of some states give a preferential right of payment to the holders of mechanics' liens, and this will be recognized and enforced in bankruptcy. In re Clark Coal & Coke Co. (D. C. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273. See In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

Where the civil law prevails, community property is primarily a fund for the payment of community debts, and will be so applied in bankruptcy, the law postponing the claim of an antenuptial creditor. In re Chavez (C. C. A. 1906) 149 Fed. 73. 17 Am. Bankr. Rep. 641. In some states also, the statutes give a preference to debts due from an insolvent person in the character of a guardian, to his ward, which will furnish the rule for distribution in bankruptcy. In re Crow (D. C. 1902) 116 Fed. 110, 7 Am. Bankr. Rep. 545. Compare In re Jones (D. C. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206. And if the local law gives priority to the legal costs and expenses of an attachment suit against an insolvent, as is the case in several states, such items will be accorded a like priority in bankruptcy proceedings. In re Amoratis (1910) 178 Fed. 919, 102 C. C. A. 297; In re Iroquois Mach. Co. (D. C. 1909) 166 Fed. 629, 22 Am. Bankr. Rep. 183; In re Goldberg & Bros. (D. C. 1906) 144 Fed. 566; In re Lewis (D. C. 1900) 99 Fed. 935, 4 Am. Bankr. Rep. 51. But compare In re The Copper King (D. C. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 148.

Right of antecedent creditors under Ky. St. § 1907, to set aside a conveyance valid as to subsequent creditors, is not a debt given priority by state law. Globe Bank & Trust Co. of Paducah, Ky., v. Martin (1915) 35 Sup. Ct. 377, 236 U. S. 288, 59 L. Ed. 583, denying certiorari In re Martin (1912) 193 Fed. 841, 113 C. C. A. 627.

22. Landlord's claim for rent.—Where the law of the state gives priority of payment to the claim of a landlord for rent due and unpaid, in case of the in-

solvency of the tenant or a levy on his goods, it will be applicable in bankruptcy proceedings against the tenant, and the lessor will be entitled to claim such priority of payment. In re Mt. Winans Lumber Co. (D. C. 1915) 228 Fed. 831; In re Grovenstein-Bishop Co. (D. C. 1915) 223 Fed. 878; Longstreth v. Pennock (1874) 20 Wall. 575, 22 L. Ed. 451; In re Bayley (D. C. 1909) 177 Fed. 522, 22 Am. Bankr. Rep. 249; In re Burns (D. C. 1909) 175 Fed. 633, 23 Am. Bankr. Rep. 640; In re V. D. L. Co. (D. C. 1909) 175 Fed. 635, 23 Am. Bankr. Rep. 643; In re West Side Paper Co. (D. C. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289; In re Morris (D. C. 1908) 159 Fed. 591, 19 Am. Bankr. Rep. 781; In re Bishop (D. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635; In re Renda (D. C. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re Gerson, 1 Nat. Bankr. News, 315; In re Cronson, 1 Nat. Bankr. News, 474; In re Shilliday, 1 Nat. Bankr. News, 475. And he is not required to bring an action in a state court for the establishment of his lien, or to levy on the property, but may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority. In re Byrne (D. C. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; In re Pittsburg Drug Co. (D. C. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227. Unless the local statute requires him to levy a distress as a condition precedent to claiming a lien. In re Chaudron & Peyton (D. C. 1910) 180 Fed. 841, 24 Am. Bankr. Rep. 811; In re Southern Co. of Baltimore City (D. C. 1904) 180 Fed. 838.

Where the landlord permits the receiver or trustee in bankruptcy to make a sale in bulk of the entire equipment of the bankrupt's business, including some assets which would be subject to his claim for rent and some which would not, making no objection and interposing no claim, he cannot ask the court to apportion the proceeds of the sale so as to give him priority of payment out of any part of the fund. In re McFadgen (D. C. 1907) 156 Fed. 715, 19 Am. Bankr. Rep. 481. But see In re Federal Biscuit Co. (1914) 218 Fed. 753, 134 C. C. A. 431.

Where the state law limits the right of priority to such rent as may be due for not more than one year last past, the landlord cannot gain a preferred right to more than a year's rent by distraining on the property after the adjudication in bankruptcy, though before the appointment of a trustee. In re Duble (D. C. 1902) 117 Fed. 794, 9 Am. Bankr. Rep. 121. Priority can be given only to such rent as is past due at the date of the adjudication, which fixes the rights of priority creditors as well as others, so that the landlord can gain no advantage from a provision in the lease (or even in the state statute) that the rent for the entire unexpired portion of the term shall become due and payable upon the bankruptcy of the tenant. In re Abrams (D. C. 1913) 200 Fed. 1005, 29 Am. Bankr. Rep. 590; Wilson v. Pennsylvania Trust Co. (1902) 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. Rep. 169; In re Jefferson (D. C. 1899) 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Winfield Mfg. Co. (D. C. 1905) 140 Fed. 185, 15 Am. Bankr. Rep. 257. Compare In re Keith-Gara Co. (D. C. 1913) 203 Fed. 585, 29 Am. Bankr. Rep. 466; Ludlow v. Pugh (1914) 213 Fed. 450, 130 C. C. A. 96. Where it was agreed between the landlord and the bankrupt that the counter indebtedness of the landlord to the bankrupt should be applied as it arose to other indebtedness of the bankrupt to the landlord than rent, it would be so applied, though such application resulted in a larger claim for rent, entitled to priority. In re Bell Engraving Co. (D. C. 1914) 214 Fed. 510. Where the bankrupt occupied a part of the leased premises as a storeroom, and the remainder for living quarters, the landlord will have a preferred claim on the goods in the storeroom for the amount due as rent for the entire premises. In re Hersey (D. C. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860.

If the statute gives the landlord a preferential claim on goods and chattels of the tenant "liable to distress," he cannot claim priority of payment out of the proceeds of the bankrupt's liquor license sold by the trustee. In re Myers (D. C. 1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536.

The claim will be restricted to rent properly so called, and will not be allowed to include the amount of an unpaid city water tax. In re Family Laundry Co. (D. C. 1912) 193 Fed. 297, 27 Am. Bankr. Rep. 517. Or a sum which the landlord was compelled to pay to discharge a lien for repairs made by the municipal health department. In re Schomacker Piano Forte Mfg. Co. (D. C. 1908) 163 Fed. 413, 20 Am. Bankr. Rep. 899. The bankruptcy law does not entitle a landlord's claim to priority over all other claims whatever, but only over those not specified in the bankruptcy act as being higher in rank or right. In re Consumers' Coffee Co. (D. C. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500. Under Civ. Code La. art. 2705 et seq., the lien of a landlord who distrained property of a lessee before bankruptcy held superior to the claims of wage-earners. In re Mock (D. C. 1915) 228 Fed. 94.

23. Trust creditors and trust funds. —The right of a creditor to recover or reclaim property of his which was held by the bankrupt in trust for him, or to receive payment in full out of trust funds in the hands of the trustee in bankruptcy, does not depend upon the insolvency laws of the states or laws giving priority to favored claims. Smith v. Mottley (1906) 150 Fed. 266, 80 C.

C. A. 154, 17 Am. Bankr. Rep. 863. A trust creditor of a bankrupt is not entitled to any preference over the general creditors merely because of the character of his claim. But he is entitled to satisfaction of his claim if he can show that the trust fund, or property into which it was converted, came into the hands of the trustee in bankruptcy and increased the assets of the estate, even though the property cannot be exactly identified. In re Brunsing, Tolle & Postel (D. C. 1909) 169 Fed. 668, 22 Am. Bankr. Rep. 129; In re J. M. Acheson Co. (1909) 170 Fed. 427, 95 C. C. A. 597, 22 Am. Bankr. Rep. 338; In re Smith, Thorndyke & Brown Co. (D. C. 1908) 159 Fed. 268, 20 Am. Bankr. Rep. 312; Smith v. Mottley (1906) 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; In re North Carolina Car Co. (D. C. 1903) 127 Fed. 178, 11 Am. Bankr. Rep. 488; John Deere Plow Co. v. McDavid (1905) 137 Fed. 802, 70 C. C. A. 422; In re Tracy (D. C. 1911) 185 Fed. 844; In re Gaskill (D. C. 1904) 130 Fed. 235, 12 Am. Bankr. Rep. 251. But first, the trust must be distinctly established, and a contract or transaction which merely creates the relation of debtor and creditor between the parties, without impressing a trust on any fund or property, will not be sufficient to support a claim to payment in full. In re Meyer (D. C. 1901) 106 Fed. 828, 5 Am. Bankr. Rep. 596; Smith v. Mottley (1906) 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; Block v. Shaw (1906) 78 Ark. 511, 95 S. W. 806. But subject to this condition, the general rule may apply to special deposits in a bank or trust company. Riley v. Pope (D. C. 1911) 186 Fed. 857, 26 Am. Bankr. Rep. 618; In re Smart (D. C. 1905) 136 Fed. 974, 14 Am. Bankr. Rep. 672; Binghampton Trust Co. v. Gregory (1911) 148 App. Div. 520, 132 N. Y. Supp. 950; In re Smith, Thorndyke & Brown Co. (1909) 170 Fed. 900, 96 C. C. A. 76, 22 Am. Bankr. Rep. 350.

§ 9649. (Act July 1, 1898, c. 541, § 65, as amended, Act Feb. 5, 1903, c. 487, § 15.) Declaration and payment of dividends.

Declaration and Payment of Dividends.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act. (30 Stat. 563. 32 Stat. 800.)

In this section, as originally enacted, subdivision b thereof did not contain the two provisos annexed to the subdivision as set forth here. Said provisos, beginning with the words "Provided, That the first dividend," etc., to the end

of the subdivision as set forth here, were added by amendment by Act Feb. 5, 1903, c. 487, § 15, cited above.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Notes of Decisions

1. Meaning of "dividend" in bankruptcy.
2. Funds for distribution as dividends.
3. Time for declaration of dividends.
4. Declaration and payment of dividends.
5. Opening and setting aside order.
6. Payment of dividends.
7. Recovery of dividends paid on rejected claims.
8. Claims proved after dividend.
9. Interest on dividends.

1. Meaning of "dividend" in bankruptcy.—As used in this section, the term "dividend" applies only to payments made on the claims of the general and unsecured creditors, and not to disbursements by the trustee in discharge of taxes, claims entitled to priority, or valid liens, and not to the claims of secured creditors at all, except in so far as the amount of the claim may exceed the value of the security. Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co. (1911) 50 Colo. 342, 116 Pac. 122; In re Utt (1901) 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Hinckel Brewing Co. (D. C. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Mammoth Pine Lumber Co. (D. C. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; In re Gardner (D. C. 1900) 103 Fed. 922, 4 Am. Bankr. Rep. 420; In re Ft. Wayne Electric Corp. (D. C. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 706. Compare In re Barber (D. C. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306.

Upon the filing of a petition in bankruptcy, there vests in each creditor as a cestui que trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. Board of County Com'rs of Shawnee County v. Hurley (1909) 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209. If the creditor had an action pending on his claim at the time of the adjudication in bankruptcy, and the debtor fails to obtain a discharge, then dividends in the bankruptcy proceedings received by the plaintiff will merely reduce his cause of action pro tanto. American Woolen Co. v. Maaget (1912) 86 Conn. 234, 85 Atl. 583. A demand proved in bankruptcy is not merged in the judgment of allowance, but the creditor may sue thereon in the state court, where the bankrupt was refused a discharge and no dividend was paid on the demand. Valente v. Cosentino (1914) 105 N. E. 551, 218 Mass. 125.

2. Funds for distribution as dividends.—If the bankrupt misappropriated trust funds in his hands, and the money has come into the possession of the trustee, the defrauded cestui que trust may follow and reclaim the fund by appropriate proceedings; but it is on the theory of its being his property and not a part of the estate in bankruptcy. In re Wilkes-Barre Furniture Mfg. Co. (D. C. 1904) 130 Fed. 796, 12 Am. Bankr. Rep. 472. But one acquiescing in an order of the court for the sale of his own property and property of the bankrupt in one lot, and who thereafter prays for preference in payment out of the proceeds of the sale, is estopped from receiving a larger proportion of such proceeds than the ratio which the value of his property bore to the value of the lot sold at the time of the sale. In re Great Western Mfg. Co. (1907) 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259. Money contributed by relatives and friends of the bankrupt, to increase his estate, under an agreement with creditors, may constitute a fund for dividends, but not where its payment was induced by a bargain which was contrary to law or to public policy, such as an agreement not to prosecute the bankrupt criminally. In re Rosenblatt (D. C. 1907) 153 Fed. 335, 18 Am. Bankr. Rep. 663.

Where property or its value is recovered by the trustee in bankruptcy by means of a suit to vacate a fraudulent conveyance or a voidable preference, or to dissolve attachment or other liens which are not preserved in bankruptcy, the proceeds constitute a fund available for dividends, that is, for distribution among all the general creditors proportionally, and are not for the benefit of those alone who began an attack on the fraudulent transaction or who held provable claims at that time. In re Martin (1912) 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; In re Kohler (1908) 159 Fed. 871, 87 C. C. A. 51, 20 Am. Bankr. Rep. 89; Treseder v. Burgor (1906) 130 Wis. 201, 109 N. W. 957.

Where a person buys up claims against a bankrupt partnership, and agrees to pay any amount in excess of five per cent. of the claims received from the estate of the partnership, a dividend on the partnership claims is received from the bankrupt estate of the partnership, though the funds therefor were derived from the estate in bankruptcy of one of the partners, and though the assets of that partner were not formally transferred to the assets of the firm estate; for the only way in which a firm creditor could share in the surplus of a partner's estate is by its transfer, actual or constructive, to the partnership estate, and hence a constructive transfer by operation of law

must be held to have been made. Frame v. Attermeier (1911) 147 Wis. 485, 133 N. W. 603.

3. Time for declaration of dividends.—When all the known assets of the bankrupt have been collected and reduced to money, and the estate is ready to be closed, a final dividend may be declared at any time after the expiration of three months from the declaration of the first dividend. In re Bell Piano Co. (D. C. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Eldred (D. C. 1907) 155 Fed. 686, 19 Am. Bankr. Rep. 52; In re Mills (D. C. 1874) 11 N. B. R. 117, Fed. Cas. No. 9,610. And this may be done notwithstanding the fact that the period of one year from the date of the adjudication, within which time creditors may prove their claims, has not yet expired, and creditors proving thereafter will only be entitled to subsequently discovered assets and unclaimed dividends. In re Stein (D. C. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

4. Declaration and payment of dividends.—The declaration and payment of a dividend may be stayed by the court, when a motion is pending to expunge certain claims, the allowance or disallowance of which will materially affect the result and the amount of the shares of other creditors. In re Jaycox (D. C. 1872) 7 N. B. R. 303, Fed. Cas. No. 7,240.

The distribution of the bankrupt's estate is strictly governed by the provisions of this section. In re York Silk Mfg. Co. (D. C. 1911) 188 Fed. 735, 26 Am. Bankr. Rep. 650. An order entered by consent of all known creditors, in proceedings against an insolvent corporation, for the settlement of the estate and distribution of the proceeds as therein provided, but not in accordance with any express provision of the bankruptcy act, must be held subject to the rights of any unknown creditors who may appear within the time allowed by law and present their claims. In re Lockwood (D. C. 1900) 104 Fed. 794, 4 Am. Bankr. Rep. 731. So where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any order or warrant of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney. In re Rude (D. C. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

Rate of the dividend to be distributed among creditors depends upon the amount of proved claims, the amount of assets, and the fixing of the rate of distribution by the bankruptcy court. Bausman v. Mead (1913) 182 Ill. App. 35.

It is competent to postpone the claim of one creditor to that of another, when the fraudulent conduct of the one, as compared with the innocence and good faith of the other, demands that such a course should be taken. In re Paris Modes Co. (C. C. A. 1912) 196 Fed. 357, 28 Am. Bankr. Rep. 470. The court is not authorized to postpone payment of dividends on a claim which has been allowed, because the creditor had received a voidable preference or fraudulent conveyance of property which had been surrendered to the trustee. Wells v. Lincoln (1914) 214 Fed. 227, 130 C. C. A. 641, modifying judgment In re Wenatchee Heights Orchard Co. (D. C. 1913) 209 Fed. 84. An alleged indebtedness from one creditor of the bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends. In re Girard Glazed Kid Co. (D. C. 1905) 136 Fed. 511, 14 Am. Bankr. Rep. 485.

The trustee in bankruptcy cannot be permitted to make a profit out of his trust; and where he has purchased a claim against the estate for less than its face value, dividends will be allowed thereon only to the extent of the amount he actually paid for it, with interest, and even though he has transferred the claim to another. In re Sweetser (C. C. 1907) 157 Fed. 567.

5. Opening and setting aside order.—A motion to reopen or vacate an order for a dividend may be made by any person interested, on proper papers and notice, and on the showing of a sufficient case, the referee and trustee will be forbidden to take steps for the payment of the dividend until the further orders of the court. In re New York Mail S. S. Co. (D. C. 1869) 3 N. B. R. 280, Fed. Cas. No. 10,212. An order for a dividend, when made pursuant to proper notice and filed in court, becomes virtually a judgment of the court, and cannot be disturbed except for some error committed by the referee and apparent from his memoranda and papers on file in the case. In re Smith (D. C. 1876) 15 N. B. R. 97, Fed. Cas. No. 12,989. The correctness of an order declaring a dividend is to be determined with reference to the time when it was made, and if proper at that time the subsequent filing of further claims does not afford ground for subjecting it to review. Whether an order declaring a dividend, which was right when made, should be revoked because of the subsequent filing of a new and large claim, is a matter within the discretion of the referee, the exercise of which is not reviewable, except so far as it proceeds on erroneous principles of law. In re Henry Siegel Co. (D. C. 1914) 216 Fed. 943.

After a dividend has been not only declared but actually paid out to the creditors entitled, it cannot be set aside,

notwithstanding the fact that it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration. In re Scott (D. C. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324; In re Smith (D. C. 1876) 15 N. B. R. 97, Fed. Cas. No. 12,989.

6. Payment of dividends.—Checks issued by a trustee in payment of dividends, if made payable to attorneys, should designate them as such, and they must also, in compliance with the rules, state the account on which they are drawn, to constitute proper vouchers corresponding with the dividend sheet. Checks payable to persons whose names do not appear on the dividend sheet, or which do not show what claims are covered thereby, or the authority of the payee to receive them, will not be approved as proper vouchers. In re Carr (D. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

The trustee may withhold the payment of a dividend, if its declaration, so far as regards the particular claim concerned was unauthorized. In re Herrick (D. C. 1876) 13 N. B. R. 312, Fed. Cas. No. 6,420. He may withhold payment if the creditor is also a debtor to the bankrupt firm or a member of it, until the determination of a suit by the trustee to recover the debt. Atkinson v. Kellogg (D. C. 1874) 10 N. B. R. 535, Fed. Cas. No. 613. If the trustee withholds payment of a dividend without a sufficient legal reason, the creditor may have an order requiring him to pay it. In re Augusta Pottery Co. (D. C. 1908) 163 Fed. 1011, 21 Am. Bankr. Rep. 64. Any court of general jurisdiction, including a state court, has jurisdiction of an action against the trustee to recover a dividend declared and which the trustee has fraudulently converted to his own use. Berford v. Barnes (1887) 45 Hun (N. Y.) 253.

A dividend declared, but unpaid, may be assigned, and the assignee may take proper steps to enforce its payment. Rockland Sav. Bank v. Alden (1907) 103 Me. 230, 68 Atl. 863, 14 L. R. A. (N. S.) 1220, 13 Ann. Cas. 806. See Stires v. First Nat. Bank (1909) 83 Neb. 193, 119 N. W. 258. But a dividend declared and due to a particular creditor, but not yet paid to him, cannot be attached or garnished in the hands of the trustee. In re Hollander (D. C. 1910) 181 Fed. 1019, 25 Am. Bankr. Rep. 48; In re Argonaut Shoe Co. (1911) 187 Fed. 784, 109 C. C. A. 632, 26 Am. Bankr. Rep. 584; Cowart v. W. E. Caldwell Co. (1910) 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720; In re Bridgman (D. C. 1868) 2 N. B. R. 252, Fed. Cas. No. 1,867; Gilbert v. Quimby (C. C. 1880) 1 Fed. 111; In re Chisholm (D. C. 1880) 4 Fed. 526. The bankruptcy court, in the absence of statutory authority, has no jurisdiction to permit the garnishment of a declared dividend. In re American Electric Telephone Co. (C. C. A. 1914) 211 Fed. 88. Dividends declared by a bankrupt's trustee, while still in his possession and unpaid to the claimants, are in the custody of the court, and cannot be reached by attachment or garnishment from a State court. In re Argonaut Shoe Co. (1911) 187 Fed. 784, 109 C. C. A. 632, 26 Am. Bankr. Rep. 584; Gilbert v. Quimby (C. C. 1880) 1 Fed. 111; Cowart v. W. E. Caldwell Co. (1910) 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720. A bill in equity will not lie in favor of a partnership creditor, to restrain the application of a dividend in the hands of an assignee in bankruptcy to the debt of an individual creditor, where both of the creditors have attached such dividend under process issued by a state court. Gilbert v. Quimby (C. C. 1880) 1 Fed. 111, 114.

A creditor of the creditor, claiming a specific lien on the fund, may assert his rights in the court of bankruptcy, or if he has a suit pending in a state court, that court may appoint a receiver who will represent him in the bankruptcy proceeding and receive the money coming to the defendant as a dividend, and then account to the court appointing him for the same. In re Hollander (D. C. 1910) 181 Fed. 1019, 25 Am. Bankr. Rep. 48; Jackson v. Miller, 9 N. B. R. 143.

7. Recovery of dividends paid on rejected claims.—Where a dividend has been paid on an allowed claim, and afterwards the claim is reconsidered and rejected, in whole or in part, the trustee may recover from the creditor the amount of the dividend so paid or a proportional part. For the purposes of such recovery a plenary suit is not necessary, at least where the creditor has contested the reconsideration and rejection of his claim, as he thereby submits himself to the jurisdiction of the bankruptcy court, and in such a case it may simply make an order requiring him to pay to the trustee in bankruptcy a designated amount. Pirie v. Chicago Title & Trust Co. (1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. Prior to a direct or indirect allowance of a claim, it is not necessary for the trustee to move for a reconsideration of the claim, as the statute directs, in order to recover dividends paid. In re Two Rivers Woodenware Co. (1912) 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518. Where a judgment of the state court against a bankrupt pending bankruptcy proceedings was reversed on an appeal taken after the time within which the bankruptcy court required an order to suspend payment of dividends, the bankrupt's trustee was entitled to recover

the dividends paid on such claim. Nelson v. Heckscher (1914) 219 Fed. 679, 135 C. C. A. 351.

8. Claims proved after dividend.—Where the trustee reserves money sufficient to pay a like dividend on claims which had previously been disallowed for want of sufficient proof, but with leave to the creditors to amend, the latter have no lien on the money so reserved, nor is the referee bound to distribute it to them; so that if, thereafter, a claim for an attorney's fee is presented, which is entitled to priority of payment as part of the costs of administration, it must be paid out of such reserved fund, in preference to the general creditors. In re Scott (D. C. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324. And where all the assets of the estate have been collected and reduced to money and a final dividend declared, any creditor who has not then proved his claim is debarred from participating in the fund. In re Bell Piano Co. (D. C. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Miller (D. C. 1842) Fed. Cas. No. 9,556; In re Coulter (D. C. 1913) 206 Fed. 906, 30 Am. Bankr. Rep. 75.

9. Interest on dividends.—A trustee in bankruptcy is not bound to pay interest upon dividends which may be declared upon debts which have been fairly and reasonably disputed, from the time that like dividends were declared upon undisputed debts. Hersey v. Fosdick (C. C. 1884) 20 Fed. 44. But where the payment of a dividend to a particular creditor has been withheld, in consequence of delays attributable to the trustee or to other creditors, interest should be allowed from the time it became payable; and this interest will be reckoned at the rate of legal interest in the state, where the trustee has not applied to have the money set aside or invested pending an investigation or re-examination of the claim; and where, upon appeal from an order allowing interest at seven per cent. upon a creditor's dividend, the creditor procures an order directing the trustee to deposit the money with a trust company pending the appeal, it does not constitute a waiver of his right to full interest, but is merely a change of investment by the trustee for the greater security of the creditor. In re Kitzinger (D. C. 1879) 19 N. B. R. 307, Fed. Cas. No. 7,863.

§ 9650. (Act July 1, 1898, c. 541, § 66.) Unclaimed dividends.

Unclaimed Dividends.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: Provided, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends. (30 Stat. 564.)

Notes of Decisions

Unclaimed dividends.—The object of inserting this provision in the statute has been thus explained: "To those familiar with the incidents following the administration of the bankruptcy act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that act, elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository remained uncalled for by the distributees for a great number of years, and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned fund, in equity, should either be distributed pro rata among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a casus omissus of the bankruptcy act, which section 66 of the act of 1898 sought to remedy. In re Fielding (D. C. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135. It was held that unclaimed dividends on the bankrupt's estate would not be awarded to his administrator, after many years, when opposed by creditors whose claims had not been paid in full. In re Blight's Estate (D. C. 1842) Fed. Cas. No. 1,540.

§ 9651. (Act July 1, 1898, c. 541, § 67, as amended, Act Feb. 5, 1903, c. 487, § 16, and Act June 25, 1910, c. 412, § 12.) Liens.

Liens.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

e That all conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released

from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. (30 Stat. 564. 32 Stat. 800. 36 Stat. 842.)

In this section, as originally enacted, subdivision e thereof did not contain the provision at the end thereof as set forth here, beginning with the words "For the purpose of such recovery," etc. Said provision was added at the end of said subdivision by amendment by Act Feb. 5, 1903, c. 487, § 16, cited above.

In this section, as originally enacted, also, subdivision d thereof was as follows:

"d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

It was amended by Act June 25, 1910, c. 412, § 12, last cited above, by inserting therein, after the words "in order to impart notice, shall," the words "to the extent of such present consideration only," making said subdivision d read as set forth here.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

Transfers, etc., constituting preferences, within section 60 of this act, ante, § 9644, are voidable by the trustee, and he may recover the property or its value, by the provisions of that section.

The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, by section 70 of this act, post, § 9654.

Notes of Decisions

I. Effect of bankruptcy on existing liens

1. Construction of this section.
2. Validity of liens as against trustee.
3. Equitable liens.
4. Liens invalid as against creditors.
5. Mortgages of real property.
6. Chattel mortgages.
7. —— Filing or recording.
8. —— Right of trustee to impeach.
9. —— After-acquired property.
10. Pledges and assignments of collateral.
11. Maritime liens.
12. Attorney's lien for services.
13. Vendors' liens.
14. Statutory liens.
15. Landlord's lien for rent.
16. Mechanics' and laborers' liens.
17. Liens acquired by legal proceedings before bankruptcy.
18. Lien of attachment.
19. —— Effect of dissolution of attachment.
20. Lien by garnishment.
21. Date of attachment or garnishment.
22. Judgment or execution.
23. Dissolution of liens by adjudication.
24. Insolvency of debtor.
25. Date of attaching of lien as affecting dissolution.
26. Rights of bona fide purchasers.
27. Rights of trustee as to property affected by liens.
28. Conveyance or surrender of property under order of court.
29. Subrogation of trustee to rights of lienholder.
30. Rights and remedies of creditor on dissolution of lien.
31. Costs and fees under dissolved lien.

II. Proceedings to establish or enforce liens

32. Remedies in general.
33. Jurisdiction of court of bankruptcy.
34. Jurisdiction of state courts.
35. Conflicting jurisdiction of federal and state courts.
36. Permission of bankruptcy court to sue in state court.
37. Restraining proceedings in state courts.
38. —— Priority of jurisdiction in state court.
39. —— Protecting interest of general creditors.
40. Foreclosure of mortgages.
41. —— Restraining foreclosure in state court.
42. —— Protecting interests of general creditors.
43. —— Power of sale in mortgage or trust deed.
44. —— Abandonment of property by trustee.

II. Proceedings to establish or enforce liens—Cont'd

45. Proceedings out of court.
46. Redemption of property by trustee.
47. Sale of property by order of bankruptcy court.
48. Marshalling assets.

III. Fraudulent conveyances voidable by trustee

49. Construction of this section.
50. Rights of trustee as to transfers.
51. Election by trustee.
52. Trustee's right of action exclusive.
53. Conditions precedent to trustee's action.
54. —— Proof of debts and insufficiency of assets.
55. Nature and form of transaction.
56. —— Sale and transfer of property.
57. —— Transfers to bankrupt's wife.
58. —— Fraudulent incorporation.
59. —— Mortgage or other lien or security.
60. —— Payment or transfer of money.
61. —— Judgment or execution.
62. Sales of merchandise in bulk.
63. Preference and fraudulent transfer distinguished.
64. Transfers void under state laws.
65. —— Chattel mortgages.
66. —— Conditional sales.
67. Transfers fraudulent as to partnership or individual creditors.
68. Property or rights transferred.
69. Time of conveyance or transfer.
70. Insolvency of debtor.
71. Intention of debtor.
72. —— Intention as to future creditors.
73. Consideration.
74. —— Nature of consideration.
75. —— Past debts and present advances.
76. —— Adequacy of consideration.
77. —— Want or invalidity of consideration.
78. Knowledge, bad faith, or participation of transferee.
79. Rights and liabilities of transferees.
80. Rights of bona fide purchasers.
81. Jurisdiction of trustee's suit.
82. Form of action or proceeding.
83. Parties.
84. Pleading and practice.
85. Burden of proof and evidence.
86. Nature and extent of trustee's recovery.
87. Rights of creditors in property or fund recovered.

I. EFFECT OF BANKRUPTCY ON EXISTING LIENS

1. Construction of this section.—Although clause "f" of this section relates in terms only to liens on property of a person "against" whom a petition in bankruptcy is filed, it is held that it applies to cases of voluntary bankruptcy as well as to involuntary cases. In re Richards (1899) 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Dobson (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 420; In re Beals (D. C. 1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639; In re Vaughan (D. C. 1899) 97 Fed. 560, 3 Am. Bankr. Rep. 362; In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Rhoads (D. C. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380; In re McCartney (D. C. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 367; Gabriel v. Tonner (1902) 138 Cal. 63, 70 Pac. 1021; McKenney v. Cheney (1903) 118 Ga. 387, 45 S. E. 433; Jones v. Stevens (1901) 94 Me. 582, 48 Atl. 170; Stickney & Babcock Coal Co. v. Goodwin (1901) 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; Brown v. Case (1901) 180 Mass. 45, 61 N. E. 279; Cavanaugh v. Fenley (1905) 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; National Bank & Loan Co. v. Spencer (1900) 53 App. Div. 547, 65 N. Y. Supp. 1001; Wallace v. Camp (1901) 200 Pa. 220, 49 Atl. 942; Mencke v. Rosenberg (1902) 202 Pa. 131, 51 Atl. 767, 90 Am. St. Rep. 618; Rothermel v. Moyer (1904) 24 Pa. Super. Ct. 325; Gardiner v. Ross (1905) 19 S. D. 497, 104 N. W. 220; Farrell v. W. B. Lockett & Co. (1905) 115 Tenn. 494, 91 S. W. 209. CONTRA, In re De Lue (D. C. 1899) 91 Fed. 510, 1 Am. Bankr. Rep. 387; In re O'Connor (D. C. 1899) 95 Fed. 943; In re Easley (D. C. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715. And see In re Kemp (D. C. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242. Although this clause may apply to proceedings on debts contracted before the passage of the act, it is not objectionable as impairing the obligation of contracts, since it affects only the remedy and not the contract itself. In re Rhoads (D. C. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380. This provision is not intended solely for effect in the courts of bankruptcy, but is equally binding on the state courts. Thompson v. Ragan (1904) 117 Ky. 577, 78 S. W. 485. And it overrides and is superior to all state laws on the same subject. Atkinson v. Purdy (D. C. 1844) Fed. Cas. No. 616.

Clause "f" of this section is merely carrying out the general purposes of the bankruptcy act to secure to creditors the bankrupt's entire property. Corey v. Blackwell Lumber Co. (1913) 135 P. 742, 24 Idaho, 642.

The two clauses "c" and "f" of this section are irreconcilable and repugnant, and in case of conflict between them, clause "c" must give way, and clause "f" must prevail, as being the latest expression of the legislative will. Cook v. Robinson (C. C. A. 1912) 194 Fed. 785, 28 Am. Bankr. Rep. 182; In re Richards (1899) 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Rhoads (D. C. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380. The two clauses must be read together for the light they may throw on each other, in construing the act as a whole. Folger v. Putnam (1912) 194 Fed. 793, 28 Am. Bankr. Rep. 173. It has been held that the particular or special provisions in clause "c" are to be taken as exceptions to the general provisions of clause "f." Ex parte

Chase (1901) 62 S. C. 353, 38 S. E. 718.

2. Validity of liens as against trustee. —Except as to the classes of liens expressly declared by the bankruptcy act to be dissolved by an adjudication within four months after they attached, and except also in cases of fraud or attempted preference, the rule is that proceedings in bankruptcy do not interfere with existing valid liens, but the trustee takes the property of the bankrupt subject to all such liens as would have been enforceable against it in the hands of the bankrupt himself. Rode & Horn v. Phipps (1912) 195 Fed. 414, 115 C. C. A. 316, 27 Am. Bankr. Rep. 827; Atchison, T. & S. F. Ry. Co. v. Hurley (1907) 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Tucker v. Curtin (1906) 148 Fed. 929, 78 C. C. A. 557, 17 Am. Bankr. Rep. 354; In re Boschelli (D. C. 1910) 183 Fed. 864, 25 Am. Bankr. Rep. 528; In re Columbia Fireproof Door & Trim Co. (D. C. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714; In re Platteville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Clifford (D. C. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; Schoenthaler v. Rosskam (1903) 107 Ill. App. 427; Mattocks v. Baker (D. C. 1880) 2 Fed. 455; Robinson v. Tuttle (D. C. 1876) Fed. Cas. No. 11,968; Presbyterian Board, etc., v. Gilbee (1905) 212 Pa. St. 310, 61 Atl. 925. The rule that the filing of a petition in bankruptcy is in effect an attachment and injunction has no application to those holding substantial claims, antedating the filing, to liens upon property of the bankrupt. In re Rathman (1910) 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246.

As the trustee does not occupy the technical position of a purchaser for value, he is supposed to take with notice of any given lien. State v. Superior Court of King County (1911) 63 Wash. 312, 115 Pac. 307, Ann. Cas. 1913D, 1119; Clason v. Morris (1812) 10 Johns. (N. Y.) 524.

As to liens which are protected and preserved by this section, the bankruptcy law makes no distinction between them, as to the manner in which they originated, or whether they are enforceable at law or in equity. Reed v. Bullington (1873) 49 Miss. 223. The law will preserve them all and direct their payment in the relative order of their rank and priority. McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888; In re Longfellow (D. C. 1878) Fed. Cas. No. 8,486. If the trustee in bankruptcy does not undertake the administration of the property affected, and the lien creditor does not prove his debt in the bankruptcy proceeding, the lien will survive that proceeding. Clanton v. Estes (1887) 77 Ga. 352, 1 S. E. 163.

In order to be preserved and protected by this section of the bankruptcy law, the lien claimed by a creditor must be valid under the laws of the particular state. In re United States Lumber Co. (D. C. 1913) 206 Fed. 236, 30 Am. Bankr. Rep. 682; In re Hersey (D. C. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; Platt v. Preston (D. C. 1879) Fed. Cas. No. 11,219. Though the rights of a trustee in bankruptcy and those of an assignee in insolvency under a state statute are defined in similar language, yet a state statute making a certain transfer void as against an assignee eo nomine does not make it void as against a trustee in bankruptcy. In re Loveland (1907) 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18.

Where the question is purely between the trustee in bankruptcy and the lien creditor, the rights of the former are measured by those of the bankrupt. If the contract or arrangement by which the lien was created was binding on the bankrupt, it will be binding on his trustee. In re Greek Mfg. & Enterprising Co. (D. C. 1909) 167 Fed. 424, 21 Am. Bankr. Rep. 717. An agreement under which a creditor claims a lien on property, while good as between the parties, may not be good as against a trustee, under section 8 of the amendatory act of June 25, 1910. Scandinavian-American Bank v. Sabin (C. C. A. 1915) 227 Fed. 579. But if it was not binding as between the immediate parties —as, for instance, in the case of an agreement for a lien on personal property, but without change of possession—it will not affect the property in the hands of the trustee. In re Faulhaber Stable Co. (1909) 170 Fed. 68, 95 C. C. A. 344, 22 Am. Bankr. Rep. 381; Bank of Leavenworth v. Hunt (1870) 11 Wall. 391, 20 L. Ed. 190. But if the circumstances were such that the bankrupt would be estopped to take advantage of a defect or irregularity, the estoppel may also be set up against his trustee. Allen v. Whittemore (D. C. 1876) Fed. Cas. No. 241. Where a corporation, before becoming bankrupt, had given a mortgage on its property, but without complying with the state law requiring such a mortgage to be authorized by a vote of the stockholders in meeting, it was held that its trustee in bankruptcy could not take advantage of the defect, in view of the fact that the courts of the state had construed that provision of the statute as being for the exclusive benefit of the stockholders. In re V. & M. Lumber Co. (D. C. 1910) 182 Fed. 231. But the trustee is not so far in privity with the bankrupt as to be prohibited from attacking judgments against him collaterally, as, in the case of a judgment obtained on a debt not due. Partridge v. Dearborn (D. C. 1873) Fed. Cas. No. 10,785.

It is necessary that the lien should

be in full force and vitality at the date of the adjudication. If it has been in any way released or relinquished before that time, it cannot be revived as against the trustee. Sage v. Wynkoop (C. C. 1877) 16 N. B. R. 363, Fed. Cas. No. 12,215, affirmed (1881) 104 U. S. 319, 26 L. Ed. 740. But see Crane v. Penny (D. C. 1880) 2 Fed. 187, as to the right of a trustee in bankruptcy to plead that an execution was dormant at the time of the adjudication. Where defendant accepted a bankrupt's notes for a transfer of right to cut timber from certain land, such acceptance and renewal of the notes worked a suspension of the right to enforce his lien until the notes were due or the bankrupt's inability to pay them became manifest. Cullen v. Armstrong (D. C. 1913) 209 Fed. 704. The filing of an ordinary claim against the estate of a bankrupt by one who sold him property by a contract of conditional sale was not inconsistent with the assertion of a lien on the insurance proceeds of the property, and not a waiver of the lien. In re Zitron (D. C. 1913) 203 Fed. 79.

After the adjudication it is too late to fasten any lien upon the property of the bankrupt however far the debt or claim may antedate it. In re York Silk Mfg. Co. (D. C. 1911) 188 Fed. 735, 26 Am. Bankr. Rep. 650; In re Badenheim (C. C. 1876) 15 N. B. R. 370, Fed. Cas. No. 716.

Liens which may follow the specific property into the hands of the trustee in bankruptcy and be preserved by the bankruptcy law include the lien of a state for taxes. In re Brand (D. C. 1867) Fed. Cas. No. 1,809. And the lien of a factor for advances to his principal and for his commissions. Boise v. Talcott (D. C. 1914) 212 Fed. 268; Ommen v. Talcott (1911) 188 Fed. 401, 112 C. C. A. 239, 26 Am. Bankr. Rep. 689; In re Roseberry (D. C. 1877) 16 N. B. R. 340, Fed. Cas. No. 12,052; Nisbet v. Sigel-Campion Live Stock Commission Co. (1912) 21 Colo. App. 494, 123 Pac. 110. And the lien of a municipal corporation on a stock of goods belonging to one of its public officers which was purchased wholly or in part with public moneys misappropriated by him. Smith v. Township of Au Gres (C. C. A. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745. And the lien of a private corporation, created by its by-laws, on the stock of each stockholder to cover his indebtedness to the corporation. In re Dunkerson (D. C. 1868) Fed. Cas. No. 4,156; In re Bigelow (D. C. 1868) Fed. Cas. No. 1,395. And the lien created by the filing of a judgment creditor's bill to set aside a fraudulent conveyance and subject the property conveyed to the satisfaction of the judgment, after the service of process thereon. Bradley v. United Wireless Telegraph Co. (1911) 79 N. J. Eq. 458, 81 Atl. 1107; In re Beadle (D. C. 1879) Fed. Cas. No. 1,155. Compare In re Pitts (D. C. 1881) 9 Fed. 542. And see Blick v. Nimmo (1913) 121 Md. 139, 88 Atl. 116. At least, such a lien will be good after the service of an injunction or the appointment of a receiver. In re Smith (C. C. 1842) Fed. Cas. No. 12,997; Johnson v. Rogers (D. C. 1876) 15 N. B. R. 1, Fed. Cas. No. 7,408. A customer of bankrupt brokers, whose stocks had been loaned by them and sold by the borrowers on their insolvency, held not entitled by subrogation to a lien on the proceeds of the sale of their seat in the stock exchange. In re Van Schaick & Co. (C. C. A. 1915) 228 Fed. 465.

3. Equitable liens.—A merely personal claim against a bankrupt's estate does not constitute a lien. Eason v. Garrison (1904) 36 Tex. Civ. App. 574, 82 S. W. 800; Hotchkiss v. National City Bank (D. C. 1911) 200 Fed. 287. That a bankrupt bank converted and dissipated the proceeds of a note sent it for collection held not to give the owner a lien upon, or right to priority of payment from, the general assets of the bankrupt. Macy v. Roedenbeck (C. C. A. 1915) 227 Fed. 346.

The bankruptcy act will save and protect equitable liens, as well as those given by statute or raised by the explicit agreement of the parties, and the court of bankruptcy will recognize a lien of this character wherever a court of equity would do so. Gage Lumber Co. v. McEldowney (C. C. A. 1913) 207 Fed. 255, 30 Am. Bankr. Rep. 251; In re Hoffman (D. C. 1912) 199 Fed. 448, 28 Am. Bankr. Rep. 680; Parker v. Bates (D. C. 1913) 203 Fed. 294, 30 Am. Bankr. Rep. 198; Atchison, T. & S. F. Ry. Co. v. Hurley (1907) 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Smith v. Township of Au Gres (C. C. A. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; Hanson v. W. L. Blake & Co. (D. C. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re J. F. Grandy & Son (D. C. 1906) 146 Fed. 318, 17 Am. Bankr. Rep. 206; In re MacDougall (D. C. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; Loving v. Moore (1911) 37 App. D. C. 214; Crosby v. Ridout (1906) 27 App. D. C. 481; Kelly-Buckley Co. v. Cohen (1907) 195 Mass. 585, 81 N. E. 297; Smith v. Godwin (1907) 145 N. C. 242, 58 S. E. 1089; Gardner v. Planters' Nat. Bank (1909) 54 Tex. Civ. App. 572, 118 S. W. 1146; Newlin v. McAfee (1879) 64 Ala. 357; Fletcher v. Morey (C. C. 1843) Fed. Cas. No. 4,864; Ex parte General Assignee (D. C. 1842) Fed. Cas. No. 5,305. See also the following cases, where the circumstances were held not sufficient to create an equitable lien: Elmore v. Symonds (1903) 183 Mass. 321, 67 N. E. 314; Ross v. Saunders (C. C. 1903) 123 Fed. 737; Moore v. Green (1906) 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep.

648; In re Teter (D. C. 1909) 173 Fed. 798, 23 Am. Bankr. Rep. 223; Ernst v. Mechanics' & Metals Nat. Bank (C. C. A. 1912) 201 Fed. 664, 29 Am. Bankr. Rep. 289. Where a mortgagor, after having paid a part of the mortgage debt, borrowed further sums from the mortgagee, and indorsements were made on the mortgage note to the effect that such sums should be added to the amount previously remaining due thereon, it was held that the mortgage was a valid lien in equity for the full amount as so increased, as against the mortgagor's trustee in bankruptcy. In re Loveland (1907) 155 Fed. 838, 84 C. C. A. 72. Where a loss under an insurance policy taken out by the receiver in bankruptcy occurs before the appointment of a trustee, the money paid on the policy stands in place of the realty, and is impressed with an equitable lien in favor of the mortgagees. Reilley v. Buffalo German Ins. Co. (1914) 147 N. Y. S. 1086, 86 Misc. Rep. 69. The mother of a bankrupt held entitled to a lien on his home, which was built with money advanced by her, as against his trustee. Parker v. Bates (D. C. 1913) 203 Fed. 294.

A written agreement whereby specific property or a fund is made security for a debt creates an equitable lien. Root Mfg. Co. v. Johnson (1914) 219 Fed. 397, 135 C. C. A. 139. And an equitable lien on personal property may be created by a verbal agreement, provided the intention is clear to charge some particular property. Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244. An oral agreement by a mortgagor to insure the property for the benefit of the mortgagee, whose money was used in its purchase, will give the mortgagee an equitable lien on the proceeds of the insurance after the property has been destroyed by fire, as against the mortgagor or his trustee in bankruptcy. Hanson v. W. L. Blake & Co. (D. C. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325. A purchaser of drafts drawn by a bankrupt on a London bank, which were refused payment because of the intervening bankruptcy, held entitled to an equitable lien on securities deposited by the bankrupt in New York to protect such drafts, pursuant to an agreement with the drawee. In re Hollins (C. C. A. 1914) 215 Fed. 41, affirming order In re H. B. Hollins & Co. (D. C. 1914) 210 Fed. 965. One whose money or property was held by the bankrupt in the capacity of a trustee, and was converted or misappropriated by the latter, the proceeds going to swell his general estate, may claim a lien on the assets of the bankrupt to the extent of his loss, provided he is able to trace his property, either in its original shape or in a substituted form, into the hands of the trustee in bankruptcy. In re Brown (1912) 193 Fed. 24, 113 C. C. A. 348; In re A. O. Brown & Co. (1912) 193 Fed. 30, 113 C. C. A. 354.

4. Liens invalid as against creditors.—Since a trustee in bankruptcy is the representative of the creditors, no one can successfully assert against him a lien on property of the bankrupt which, though it might have been good as against the bankrupt himself, would be invalid as against his creditors. First Nat. Bank v. Staake (1906) 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639; McHarg v. Staake (1906) 202 U. S. 150, 26 Sup. Ct. 584, 50 L. Ed. 971, 15 Am. Bankr. Rep. 646; Casey v. Cavaroc (1877) 96 U. S. 467, 24 L. Ed. 779; Receivers of Virginia Iron, Coal & Coke Co. v. Staake (1904) 133 Fed. 717, 66 C. C. A. 550; In re Thomas (D. C. 1912) 199 Fed. 214, 232, 29 Am. Bankr. Rep. 945; In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; Hanson v. W. L. Blake & Co. (D. C. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re I. S. Vickerman & Co. (D. C. 1912) 199 Fed. 589, 29 Am. Bankr. Rep. 298; In re Booth (D. C. 1900) 98 Fed. 975; Skilton v. Codington (1906) 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Moore v. Young (C. C. 1868) Fed. Cas. No. 9,782; In re Wynne (C. C. 1868) 4 N. B. R. 23, Fed. Cas. No. 18,117; Odell v. Flood (D. C. 1876) Fed. Cas. No. 10,428; Todd v. Townsend (D. C. 1874) Fed. Cas. No. 14,075; Johnson v. Rogers (D. C. 1876) 15 N. B. R. 1, Fed. Cas. No. 7,408; Edmondson v. Hyde (C. C. 1872) 7 N. B. R. 1, Fed. Cas. No. 4,-285; In re Morrill (D. C. 1873) 8 N. B. R. 117, Fed. Cas. No. 9,821; In re Dunn (D. C. 1877) 11 N. B. R. 270, Fed. Cas. No. 4,172; Benner v. Scandinavian American Bank (1913) 73 Wash. 488, 131 Pac. 1149. It is immaterial in this respect whether the invalidity arises from failure to record the instrument creating the alleged lien or from any other cause. Security Warehousing Co. v. Hand (1907) 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 19 Am. Bankr. Rep. 291, affirming (1906) 143 Fed. 32, 74 C. C. A. 186, 16 Am. Bankr. Rep. 49. See In re Thackara Mfg. Co. (D. C. 1905) 140 Fed. 126, 15 Am. Bankr. Rep. 258, holding the lien of an outstanding execution invalid because it had been allowed to lie dormant in the hands of the sheriff for several months. So, a creditor who sold machinery to the bankrupt with the understanding that it was to be used in a vessel being built under contract for the United States was held to have no lien upon the machinery, nor upon the contract or its proceeds, because an act of congress makes void the assignment of any interest in government contracts. In re Waters-Colver Co. (D. C. 1913) 206 Fed. 845, 30 Am. Bankr. Rep. 763. The provision of this section which makes invalid as liens against the es-

tate of a bankrupt claims which for want of record would not have been valid liens against the claims of creditors, applies only to claims which are required by the state law to be recorded. In re Lane Lumber Co. (1914) 217 Fed. 550, 133 C. C. A. 402; Id., 555, 133 C. C. A. 407, affirming judgments (D. C. 1913) 210 Fed. 82. But it must be shown that general creditors were misled to their injury, or induced to give credit to the bankrupt, by reason of the concealment or other irregularity which they allege as a ground for rejecting the alleged lien. In re MacDougall (D. C. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; In re Gerstman (C. C. A. 1907) 157 Fed. 549, 19 Am. Bankr. Rep. 145.

Prior to the amendatory act of 1910, it was generally held that the trustee in bankruptcy represents only the general creditors, and hence, if none of them is in position at the time of the adjudication in bankruptcy to attack the validity of an alleged lien, in virtue of having fastened a lien on the property involved or of holding an execution or attachment or other similar process, neither can the trustee in bankruptcy attack it, notwithstanding fraud, concealment, or other cause of impeachment. In re New York Economical Printing Co. (1901) 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615; In re Burnham (D. C. 1905) 140 Fed. 926, 15 Am. Bankr. Rep. 548; In re Lausman (D. C. 1910) 183 Fed. 647, 25 Am. Bankr. Rep. 186; Skilton v. Codington (1903) 86 App. Div. 166, 83 N. Y. Supp. 351. And if the lien was invalid as to one creditor, but valid as against others, or if only one creditor was in position to enforce his rights against it, the trustee could avoid it only to the extent of the claim of that creditor. In re New York Economical Printing Co. (1901) 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615. This rule was changed by the amendment of 1910, giving to the trustee in bankruptcy the rights of a creditor holding a lien or an unsatisfied execution. Niagara Falls Hydraulic Power & Mfg Co. v. Schermerhorn (1908) 60 Misc. Rep. 209, 111 N. Y. Supp. 576; In re Werner (C. C. 1878) Fed. Cas. No. 17,416; Beers v. Place (D. C. 1870) 4 N. B. R. 459, Fed. Cas. No. 1,233. The trustee is not now in the situation of a general creditor, but occupies the more favorable position of a judgment or execution creditor, and can resist the enforcement of any lien which would be invalid as against a creditor of that class. In re Hammond (D. C. 1911) 188 Fed. 1020, 26 Am. Bankr. Rep. 336; Sturdivant Bank v. Schade (C. C. A. 1912) 195 Fed. 188, 27 Am. Bankr. Rep. 673.

5. **Mortgages of real property.**—Where a mortgage on real property of the bankrupt is not invalidated by the provisions of this section, the trustee takes the property charged with the mortgage and has no greater interest or higher rights than the bankrupt himself. In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Dunavant (D. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41. The trustee is entitled only to the equity of redemption or the surplus proceeds of the property. Lyall v. Miller (C. C. 1855) Fed. Cas. No. 8,613; In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689. Erroneous stipulation by mortgagor as to amount due at the time of an assignment held not to increase the lien of the mortgage as against the mortgagor's trustee in bankruptcy and creditors. In re Howard (D. C. 1913) 207 Fed. 402. The trustee is bound by the mortgagor's covenant to keep the premises insured for the benefit of the mortgagee. In re Sands Ale Brewing Co. (D. C. 1872) Fed. Cas. No. 12,307.

Where a bill is filed by a junior mortgagee for the foreclosure and sale of the equity of redemption, the trustee in bankruptcy of the mortgagor has no standing to object to the order in which the priority of valid and subsisting liens on the mortgaged property is fixed by the decree of foreclosure, as he can get nothing in any event until all valid liens have been satisfied. Jerome v. McCarter (1876) 94 U. S. 734, 24 L. Ed. 136. And see In re Times Pub. Co. (D. C. 1910) 183 Fed. 603.

A security otherwise valid is not avoided merely because taken in the form of an absolute deed instead of a mortgage. Gaffney's Assignee v. Signaigo (C. C. 1870) Fed. Cas. No. 5,169; Alter v. Clark (D. C. 1911) 193 Fed. 153. Nor because it covers all of the bankrupt's property, if given to secure bona fide debts and liabilities. Sidener v. Klier (D. C. 1869) Fed. Cas. No. 12,843. Nor because, being a partnership obligation, it in terms adopts a debt incurred by one of the partners in behalf of the firm and includes it in the mortgage. Wait v. Bull's Head Bank (D. C. 1879) 19 N. B. R. 500, Fed. Cas. No. 17,043. A deed of trust executed in the name of a bankrupt corporation by its officers, without authority or ratification by the directors, held not to create a valid lien as against its unsecured creditors. Bernard v. Lea (C. C. A. 1913) 210 Fed. 583. Under Bal. Ann. Codes & St. Wash. §§ 4535, 4536, providing for the execution and record of real estate mortgages, a mortgage of a corporation's real property, though defectively acknowledged, having been properly recorded, held to create a valid lien on such property as against the corporation's trustee in bankruptcy entitled only to the rights of a lien creditor. Pacific State Bank v. Coats (1913) 205 Fed. 618, 123 C. C. A. 634.

A mortgage which was valid when executed and entirely free from fraud is

not invalidated in the bankruptcy proceedings simply because it was not placed on the record until after the debtor had become insolvent or until shortly before the filing of the petition in bankruptcy, provided it is not shown that there was any fraudulent purpose in so withholding it from the record, and if the law of the state is such that recording is not necessary to its vadidity as between the parties. Martin v. Commercial Nat. Bank (C. C. A.) 228 Fed. 651; In re Brown (D. C. 1915) 228 Fed. 533; Sturdivant Bank v. Schade (1912) 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; In re Doran (1907) 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760; In re Adams (D. C. 1899) 97 Fed. 188, 2 Am. Bankr. Rep. 415; In re Wright (D. C. 1899) 96 Fed. 187, 2 Am. Bankr. Rep. 364; Stewart v. Hopkins (1876) 30 Ohio St. 502; Clark v. Hezekiah (D. C. 1885) 24 Fed. 663; Curry v. McCauley (C. C. 1884) 20 Fed. 583; Seaver v. Spink (1872) 8 N. B. R. 218, 65 Ill. 441; Folsom v. Clemence (1873) 111 Mass. 273. But see Bostwick v. Foster (C. C. 1878) 18 N. B. R. 123, Fed. Cas. No. 1,682; In re Lukens (D. C. 1905) 138 Fed. 188, 14 Am. Bankr. Rep. 683; In re Randolph (D. C. 1911) 187 Fed. 186, 26 Am. Bankr. Rep. 623. A deed of trust on certain of bankrupts' assets, neither filed nor recorded as required by Rev. St. Tex. 1911, art. 6824, created no lien enforceable against the bankrupts' trustee, though mentioned in the bankrupts' voluntary petition. Cooper Grocery Co. v. Park (1914) 218 Fed. 42, 134 C. C. A. 64. A mortgage on lands in Georgia, executed in Florida, which was attested in accordance with Civ. Code Ga. 1910, § 4203, held to entitle the mortgagee to priority upon bankruptcy of the mortgagor. In re Williams (D. C. 1915) 224 Fed. 984.

The trustee cannot recover the value of the mortgaged property if the mortgagee took possession before the commencement of the proceedings in bankruptcy, although the mortgage was not properly recorded. Miller v. Jones (C. C. 1876) 15 N. B. R. 150, Fed. Cas. No. 9,576.

In the case of an indemnity mortgage given to a surety, the holder can enforce it to the extent of the indemnity contracted for, but not to any greater extent, although he may have paid debts or incurred liabilities to a larger amount. Whatever might be his equities as against the mortgagor himself in this case, he can claim no more than the face of the mortgage as against the trustee in bankruptcy. Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co. (1900) 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183. And see In re Stoddard Bros. Lumber Co. (D. C. 1909) 169 Fed. 190, 22 Am. Bankr. Rep. 435. If the surety in such a case, has not paid the creditors to whom he became bound as surety, the mortgage may be held by the court of bankruptcy to inure to their benefit. In re Pierce (D. C. 1874) Fed. Cas. No. 11,140.

In the case of a valid mortgage, the discharge of the debtor in bankruptcy does not extinguish the mortgage debt so far as the same is necessary to uphold the mortgage. Chamberlain v. Meeder (1844) 16 N. H. 381; Sosnowski v. Rape (1882) 69 Ga. 548; Thaxton v. Roberts (1881) 66 Ga. 704; Carlisle v. Wilkins (1874) 51 Ala. 371.

6. Chattel mortgages. — A chattel mortgage is a valid form of security and gives a lien which may be enforced as against the trustee in bankruptcy of the mortgagor, if free from fraud, based on an actual consideration, and recorded or filed as required by local law. In re Baar (1914) 213 Fed. 628, 130 C. C. A. 292; Title Guaranty & Surety Co. v. Witmire (1912) 195 Fed. 41, 115 C. C. A. 43, 28 Am. Bankr. Rep. 235; Davis v. Turner (1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; In re Durham (D. C. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; Simmons v. Greer (1909) 174 Fed. 654, 98 C. C. A. 408, 23 Am. Bankr. Rep. 443; Long v. Gump (1906) 144 Fed. 824, 75 C. C. A. 554, 16 Am. Bankr. Rep. 501; In re Collins (D. C. 1875) Fed. Cas. No. 3,004; Ex parte Ames (D. C. 1871) 7 N. B. R. 230, Fed. Cas. No. 323; In re Gregg (D. C. 1868) 3 N. B. R. 529, Fed. Cas. No. 5,796. But it is always open to the trustee to question the validity of the mortgage. Carlsbad Water Co. v. New (1905) 33 Colo. 389, 81 Pac. 34; In re Hartman (D. C. 1911) 185 Fed. 196, 26 Am. Bankr. Rep. 76. Or to show that its lien has been lost by delay on the part of the mortgagee in taking possession after default. Knapp v. Milwaukee Trust Co. (1910) 216 U. S. 545, 30 Sup. Ct. 412, 56 L. Ed. 610; Hanson v. W. L. Blake & Co. (D. C. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re Forbes (D. C. 1874) Fed. Cas. No. 4,922; Stewart v. Hoffman (1905) 31 Mont. 184 77 Pac. 689, 81 Pac. 3; Schaupp v. Miller (D. C. 1913) 206 Fed. 575, 30 Am. Bankr. Rep. 699. A mortgagee who is in possession of the mortgaged property at the time of the adjudication in bankruptcy against the mortgagor is entitled to retain such possession as against the trustee in bankruptcy and the general creditors. In re Howard (D. C. 1913) 207 Fed. 402; Coggan v. Ward (Mass. 1913) 102 N. E. 336. But compare Cornelius v. Boling (1907) 18 Okl. 469, 90 Pac. 874. The trustee may show that the lien of the mortgage has been lost by the mortgagee's allowing the mortgaged goods to be inextricably commingled with other property not covered by it. In re Holmes Lumber Co. (D. C. 1911) 189 Fed. 178, 26 Am. Bankr. Rep. 119.

If, for any reason, a chattel mortgage is null and void as against the other

creditors of the mortgagor, it is not valid against his trustee in bankruptcy. Harvey v. Crane (C. C. 1871) 5 N. B. R. 218, Fed. Cas. No. 6,178; Kane v. Rice (D. C. 1873) 10 N. B. R. 469, Fed. Cas. No. 7,609. Under a state statute providing that "any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void," the holder of such a note and mortgage has no lien, as against the trustee in bankruptcy, even though he has taken possession. In re Birck & Co. (1905) 142 Fed. 438, 73 C. C. A. 554, 15 Am. Bankr. Rep. 694. But where the state law provides that mortgages may be made only on certain enumerated kinds of personal property, yet provides that mortgages of other kinds of chattels shall be valid between the parties, and their heirs, legatees, personal representatives, and persons who, before parting with value, have actual notice thereof, a chattel mortgage of property other than that specified, if executed in good faith and for a good consideration, is valid against the mortgagor's trustee in bankruptcy and the general creditors. In re Grainger (1908) 160 Fed. 69, 87 C. C. A. 225, 20 Am. Bankr. Rep. 166.

A chattel mortgage upon a stock of goods which allows the mortgagor to remain in possession and sell the goods and buy others in their place, is fraudulent and void as against his creditors, at least in the absence of a provision for an accounting, and therefore may also be avoided by his trustee in bankruptcy. In re Noethen (C. C. A. 1912) 201 Fed. 97, 29 Am. Bankr. Rep. 234; In re Marine Construction & Dry Dock Co. (1906) 144 Fed. 649, 75 C. C. A. 451, 16 Am. Bankr. Rep. 325; In re First Nat. Bank (1905) 135 Fed. 62, 67 C. C. A. 536, 14 Am. Bankr. Rep. 180; In re Antigo Screen Door Co. (1903) 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359; Stroud v. McDaniel (1901) 106 Fed. 493, 45 C. C. A. 453, 5 Am. Bankr. Rep. 695; In re Hawks (D. C. 1913) 204 Fed. 309, 30 Am. Bankr. Rep. 365; In re Tucker (D. C. 1908) 161 Fed. 584, 20 Am. Bankr. Rep. 404; Mitchell v. Mitchell (D. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; In re Standard Telephone & Electric Co. (D. C. 1907) 157 Fed. 106, 19 Am. Bankr. Rep. 491; Marden v. Phillips (D. C. 1900) 103 Fed. 196, 4 Am. Bankr. Rep. 566; In re Leigh (D. C. 1899) 96 Fed. 806; In re Forbes (D. C. 1874) Fed. Cas. No. 4,922; Smith v. Ely (C. C. 1874) 10 N. B. R. 553, Fed. Cas. No. 13,044; In re Manly (D. C. 1869) 3 N. B. R. 291, Fed. Cas. No. 9,-031; Benner v. Scandinavian American Bank (1913) 73 Wash. 488, 131 Pac. 1149. Under the law of Oregon, as settled by decisions, where it appears either from the face of the mortgage or by evidence aliunde that a chattel mortgage has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade, without accounting therefor, the mortgage is void as to attaching creditors, though there was no actual fraudulent intent, and it is equally void as to the trustee in bankruptcy of the mortgagor. Scandinavian-American Bank v. Sabin (C. C. A. 1915) 227 Fed. 579.

The security must be based upon a real, present, and sufficient consideration, and failing this, it creates no lien which will be preserved in the bankruptcy proceedings. In re Builders' Lumber Co. (D. C. 1906) 148 Fed. 244, 17 Am. Bankr. Rep. 449; In re Levine (D. C. 1912) 196 Fed. 589, 28 Am. Bankr. Rep. 481. See Stedman v. Bank of Monroe (1902) 117 Fed. 237, 54 C. C. A. 269, 9 Am. Bankr. Rep. 4. And if the circumstances suggest a fraudulent transaction or an attempt to give a preference, the burden may be on the mortgagee to show both his good faith in the matter and the existence of a good consideration. In re Sims (D. C. 1878) 19 N. B. R. 57, Fed. Cas. No. 12,889; In re Ewald v. Brainard (D. C. 1905) 135 Fed. 168, 14 Am. Bankr. Rep. 267. A chattel mortgage given by a bankrupt on payment of a present consideration in cash and also to cover an antecedent indebtedness is valid, in the absence of actual fraud shown, though made within four months prior to the filing of the petition, in so far as it secures alleged advances at the time it was made, which were used for the benefit of his creditors. In re Mahland (D. C. 1911) 184 Fed. 743. 26 Am. Bankr. Rep. 81. If the alleged debt is purposely exaggerated for the sake of deceiving a creditor and hiding the property from execution, and the mortgagee knows the fact and records the mortgage with an affidavit that the entire amount is justly due, the whole transaction is so vitiated with fraud that the mortgage cannot be enforced in bankruptcy even to the extent of the sum really due. In re Hugill (D. C. 1900) 100 Fed. 616, 3 Am. Bankr. Rep. 686. But a renewal chattel mortgage given to a bankrupt's creditor may be good so far as the renewal debts were previously validly secured, although the renewal mortgage be otherwise invalid. In re Endlar (1911) 192 Fed. 762, 113 C. C. A. 48. As to the validity of a curative chattel mortgage, given in place of one technically defective, and for that reason not recorded, see In re International Mahogany Co. (1906) 147 Fed. 147, 78 C. C. A. 58, 15 Am. Bankr. Rep. 797.

7. —— **Filing or recording.**—Where the law of the state makes a chattel mortgage invalid as against the creditors of the mortgagor, if it is not filed or recorded, it is also invalid, for the same cause, as against his trustee in bankruptcy. Mattley v. Giesler (1911) 187 Fed. 970, 110 C. C. A. 90, 26 Am. Bankr. Rep. 116; In re Beckhaus

(1910) 177 Fed. 141, 100 C. C. A. 561, 24 Am. Bankr. Rep. 380; In re Southern Textile Co. (1909) 174 Fed. 523, 98 C. C. A. 305, 23 Am. Bankr. Rep. 172; Simmons v. Greer (1909) 174 Fed. 654, 98 C. C. A. 408, 23 Am. Bankr. Rep. 443; In re McDonald (D. C. 1908) 173 Fed. 99, 23 Am. Bankr. Rep. 51; In re Shiebler (D. C. 1908) 165 Fed. 363, 21 Am. Bankr. Rep. 309; In re Burlage Bros. (D. C. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; In re Shaw (D. C. 1906) 146 Fed. 273, 17 Am. Bankr. Rep. 196; In re H. G. Andrae Co. (D. C. 1902) 117 Fed. 561, 9 Am. Bankr. Rep. 135; In re Jones (D. C. 1902) 116 Fed. 431, 8 Am. Bankr. Rep. 626; In re Tatem (D. C. 1901) 110 Fed. 519, 6 Am. Bankr. Rep. 426; In re Wright (D. C. 1900) 107 Fed. 428; In re Booth's Estate (D. C. 1900) 98 Fed. 975; In re Leigh (D. C. 1899) 96 Fed. 806; Goodrich v. Dore (1907) 194 Mass. 493, 80 N. E. 480; Clark v. Williams (1906) 190 Mass. 219, 76 N. E. 723. But where, as under the law in Wisconsin, the failure of a chattel mortgagee to file his mortgage or take possession of the property, without fraud or collusion, renders the mortgage voidable only as to subsequent creditors or those who acquire a lien, the taking possession by the holder of an unrecorded chattel mortgage, after the filing of a petition in bankruptcy against the mortgagor, validates the mortgage as against the general creditors, so that it cannot be attacked in their behalf by the trustee. In re Antigo Screen Door Co. (1903) 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359. And see In re Chadwick (D. C. 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528. It is stated to be the settled law in Georgia (which will be recognized by the courts of bankruptcy sitting within that state) that recording is not essential to the validity of a chattel mortgage, and under this rule, a chattel mortgage given to a bank to secure a present loan, made by the bank in good faith and without knowledge of the borrower's insolvency, although unrecorded, will create a valid lien as against the trustee in bankruptcy, provided that the withholding of the mortgage from record was not for any fraudulent purpose nor pursuant to any agreement between the parties. In re Josephson (D. C. 1902) 116 Fed. 404, 8 Am. Bankr. Rep. 423. Where the mortgage is recorded or filed, but not until a considerable time after its execution, or just before the commencement of the bankruptcy proceedings, this does not necessarily invalidate it. In re Roberts (D. C. 1915) 227 Fed. 177; In re Perrin (D. C. 1873) 7 N. B. R. 283, Fed. Cas. No. 10,995; In re Barman (D. C. 1876) 14 N. B. R. 125, Fed. Cas. No. 999. Except as to creditors of the bankrupt who became such between the time of the execution and the filing of the mortgage. In re Jacobson & Perrill (D. C. 1912) 200 Fed. 812, 29 Am. Bankr. Rep. 603; In re Harnden (D. C. 1912) 200 Fed. 175, 29 Am. Bankr. Rep. 507; Detroit Trust Co. v. Pontiac Sav. Bank (1912) 196 Fed. 29, 115 C. C. A. 663, 27 Am. Bankr. Rep. 821; Post v. Berry (1910) 175 Fed. 564, 99 C. C. A. 186, 23 Am. Bankr. Rep. 699; In re Wade (D. C. 1911) 185 Fed. 664, 26 Am. Bankr. Rep. 169; Mattley v. Wolfe (D. C. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; In re J. C. H. Claussen & Co. (D. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; In re Doran (D. C. 1906) 148 Fed. 327, 17 Am. Bankr. Rep. 799; In re Beede (D. C. 1905) 138 Fed. 441, 14 Am. Bankr. Rep. 697; In re Adams (D. C. 1899) 97 Fed. 188, 2 Am. Bankr. Rep. 415; In re Kauffman, 2 Nat. Bankr. News, 778. Where an unfiled chattel mortgage, void as to subsequent creditors under the state law, is set aside in bankruptcy proceedings against the mortgagor, the mortgagee will be entitled to share in the proceeds of the mortgaged property with the mortgagor's subsequent creditors. In re Huxoll (1912) 193 Fed. 851, 113 C. C. A. 637, 27 Am. Bankr. Rep. 579. But see In re Cannon (D. C. 1902) 121 Fed. 582, 10 Am. Bankr. Rep. 64, holding that both the mortgagee and the antecedent creditors must be excluded from the distribution. See Detroit Trust Co. v. Pontiac Sav. Bank (1915) 237 U. S. 186, 35 Sup. Ct. 509, 59 L. Ed. 907. Plaintiff, who held a chattel mortgage on the property of a bankrupt, delayed filing his mortgage. In the meantime others extended credit. There was a second chattel mortgage, which was expressly subject to that of plaintiff, and likewise there were general unsecured creditors whose debts were incurred before plaintiff's mortgage was given. Held, that subsequent creditors had priority; that plaintiff then had priority to the extent of his mortgage above the claim of such creditors; that next came the second mortgagee; and that after the bankrupt claimed his exemptions plaintiff and the other general creditors were entitled to the remainder. Hollenbeck v. Louden (1915) 152 N. W. 116, 35 S. D. 320.

Where, by a secret agreement between a bankrupt and one of his creditors, who held a chattel mortgage on the bankrupt's stock, the mortgage was withheld from record in order that the bankrupt might obtain credit to which he was not entitled, the mortgage was fraudulent and void, not only as to subsequent creditors, but as to all those interested in the bankrupt's estate. Fourth Nat. Bank of Macon v. Willingham (1914) 213 Fed. 219, 129 C. C. A. 563; In re Duggan (D. C. 1910) 182 Fed. 252, 25 Am. Bankr. Rep. 105; In re Hickerson (D. C. 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; In re Noel (D. C. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; Texas Brewing Co. v. Mallette (1902) 28 Tex. Civ. App. 461, 67 S. W. 441; Deland v. Miller &

Rep. 291; Guarantee Title & Trust Co. v. First Nat. Bank (C. C. A. 1911) 185 Fed. 373, 26 Am. Bankr. Rep. 85; Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee (1909) 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442. An agreement to give and deliver a pledge, made in good faith, to secure a present loan or consideration protected by state law, is valid. In re Harvey (D. C. 1914) 212 Fed. 340.

Where a coal company had contracted with a railway company to supply it with coal, and was unable to go on with its deliveries for lack of funds, and the railway company advanced money for this purpose, it was held that the transaction amounted to a pledge, in favor of the railway company, of such a quantity of coal thereafter to be mined, and as fast as mined, as the moneys so advanced would pay for, and that this pledge was enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued the performance of the contract. Hurley v. Atchison, T. & S. F. Ry. Co. (1909) 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, 22 Am. Bankr. Rep. 17, affirming Atchison, T. & S. F. Ry. Co. v. Hurley (1907) 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396. A pledge of insurance policies to secure an indebtedness by assigning the same to the creditor is not invalidated by their redelivery to the pledgor, especially where the assignment covers also renewals. J. M. Radford Grocery Co. v. Powell (C. C. A. 1915) 228 Fed. 1. Persons paying drafts drawn for the price of goods shipped to the drawer, under an agreement that the goods should be pledged as security therefor, have a lien as against the trustee in bankruptcy of the purchaser. Fletcher v. Morey (C. C. 1843) Fed. Cas. No. 4,864.

11. Maritime liens.—Maritime liens are among the classes of securities preserved and protected by the bankruptcy law, if valid and free from fraud and preferential features. The Home (D. C. 1878) 18 N. B. R. 557, Fed. Cas. No. 6,657; The Loulie Dole (C. C. 1882) 14 Fed. 862; The Ironsides (D. C. 1869) Fed. Cas. No. 7,069. Where a maritime lien exists, a court of bankruptcy will enforce such lien with the same effect as would a court of admiralty. In re New England Transp. Co. (D. C. 1914) 220 Fed. 203. And such a lien which, by the law of the admiralty, would take precedence over charges of an earlier date, may be accorded a similar preference in a court of bankruptcy. In re Scott (D. C. 1869) 3 N. B. R. 742, Fed. Cas. No. 12,517. A maritime lien, existing at the time when the petition in bankruptcy was filed, may be enforced by process in admiralty against the vessel after the filing of the petition, and while the trustee in bankruptcy, in such a case, has the right to appear and be heard, the court of bankruptcy will accept the determination of the admiralty court as to the validity and amount of the lien. The Ironsides (D. C. 1869) Fed. Cas. No. 7,069. But compare In re People's Mail S. S. Co. (D. C. 1869) Fed. Cas. No. 10,970. And a court of admiralty, which has obtained full jurisdiction over a vessel in a suit to enforce maritime liens thereon, before the institution of bankruptcy proceedings against the owner, is not deprived of such jurisdiction by the adjudication in bankruptcy, but will retain jurisdiction and determine all questions with respect to such liens. The Philomena (D. C. 1911) 200 Fed. 859; The Bethulia (D. C. 1911) 200 Fed. 862.

12. Attorney's lien for services.—The institution of proceedings in bankruptcy will not displace or invalidate an attorney's lien on securities belonging to the bankrupt in the possession of the attorney, or on funds collected for the bankrupt or a judgment recovered for him, or (as the law is in some states) upon his cause of action. In re Eurich's Ft. Hamilton Brewery (D. C. 1908) 158 Fed. 644, 19 Am. Bankr. Rep. 798; In re Baxter & Co. (1907) 154 Fed. 22, 83 C. C. A. 106, 18 Am. Bankr. Rep. 450; Kneeland v. Pennell (1907) 54 Misc. Rep. 43, 104 N. Y. Supp. 498; Clarke v. Clarke (C. C. 1853) Fed. Cas. No. 18,279; Hartman v. Swiger (D. C. 1914) 215 Fed. 986; Schoenherr v. Van Meter (1915) 215 N. Y. 548, 109 N. E. 625. The fact that an attorney, in drawing up the bankrupt's schedule of assets, includes certain notes or securities in his possession does not estop him from claiming a lien thereon for his professional services. In re Brown (D. C. 1842) Fed. Cas. No. 1,984. So when a suit in which the bankrupt is the plaintiff, and which is pending and undetermined at the time of the bankruptcy, is taken up and prosecuted by the trustee, an attorney's lien for compensation for services rendered in the suit prior to the adjudication in bankruptcy is preserved and is binding upon the trustee. In re Wilson (D. C. 1882) 12 Fed. 235. Attorneys for bankrupts were not entitled to a lien for fees for services rendered to the bankrupts subsequent to the institution of the proceedings in an ancillary suit by the receiver to recover moneys belonging to the estate. Musica v. Prentice (C. C. A. 1914) 211 Fed. 326, affirming decree In re A. Musica & Son (D. C. 1913) 205 Fed. 413. Appeal dismissed Lazarus, Michel & Lazarus v. Prentice (1914) 34 S. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305.

13. Vendors' liens.—A vendor's lien on real property is not divested by the bankruptcy of the purchaser. In re

Lane Lumber Co. (1914) 217 Fed. 550, 133 C. C. A. 402; Ex parte Drewry (D. C. 1875) Fed. Cas. No. 4,081; Deaton v. Southern Irr. Co. (Tex. Civ. App. 1912) 144 S. W. 294; Stewart v. Mercantile Co. (Tex. Civ. App. 1912) 147 S. W. 1166. Compare Bernard v. Lea (C. C. A. 1913) 210 Fed. 583. Where a trustee in bankruptcy seeks to quiet title to land the bankrupt had contracted to purchase, the vendor is entitled to a lien for the balance of the purchase price with the agreed interest. Whalen v. Wolford (1915) 150 P. 608, 96 Kan. 211. The holder of a note given for the price of land had a purchase-money lien on the land paramount to all other demands against it, and which was not affected by the purchaser's bankruptcy. Sheridan State Bank v. Rowell (D. C. 1914) 212 Fed. 529. A trustee in bankruptcy of a vendee held not a purchaser or incumbrancer in good faith and for value within Rev. Codes Idaho, §§ 3441, 3443, though entitled to the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings under § 47a, ante, § 9631, as amended, and hence a vendor's lien for the unpaid portion of the price was valid against the vendee's trustee in bankruptcy though not recorded. Where vendors of real property had a valid lien against the bankrupt vendee for the unpaid portion of the price, such lien was not affected by the vendors' failure to commence suit to foreclose the lien prior to the institution of bankruptcy proceedings. In re Lane Lumber Co. (D. C. 1913) 210 Fed. 82.

Where a claimant had sold goods to the bankrupt, taking his notes as conditional payment, but retained possession of the property until after the adjudication in bankruptcy and after the notes fell due and remained unpaid, it was held that he had a lien for the unpaid portion of the price, which the trustee in bankruptcy must recognize. In re Manuel J. Portuondo Co. (D. C. 1905) 135 Fed. 592, 14 Am. Bankr. Rep. 337. A statute providing that property shall not be exempt from claims for its purchase money and for the seizure and sequestration of the property in a suit for the purchase money, does not give the seller of personalty a lien arising at the time of the sale, and such as to be protected by the bankruptcy act, but only a right to gain a lien by attachment, and a lien so acquired will be divested by the adjudication in bankruptcy of the purchaser within four months thereafter. In re Wilkes (D. C. 1902) 112 Fed. 975, 7 Am. Bankr. Rep. 574. A vendor's lien may also be reserved by the contract of the parties, and will be preserved in bankruptcy on the same terms and under the same conditions as other liens. In re Muncie Pulp Co. (1907) 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56; National Bank of Commerce v. Williams (1907) 159 Fed. 615, 86 C. C. A. 605, 20 Am. Bankr. Rep. 79.

A contract of conditional sale, in which the seller attempts to reserve for himself a lien, to secure payment of the price, on so much of the property as may remain in the buyer's hands and on the proceeds of what he has sold, is generally held invalid in bankruptcy, unless the contract is filed or recorded like a chattel mortgage. Pontiac Buggy Co. v. Skinner (D. C. 1908) 158 Fed. 858, 20 Am. Bankr. Rep. 206. Compare American Woodworking Machinery Co. v. Norment (C. C. A. 1908) 157 Fed. 801, 19 Am. Bankr. Rep. 679. But failure to file or record such a contract will not defeat the lien in bankruptcy, where all the creditors of the bankrupt had actual notice of the sale and its conditions, because in that case the trustee would represent no class as to which the condition would be void, actual notice removing the necessity of showing constructive notice. In re Bazemore (D. C. 1911) 189 Fed. 236, 26 Am. Bankr. Rep. 494. But in some states, a contract of this kind is valid only from the time of its record, as against creditors even with actual notice, and where this is the law, it would be of course be void as against the trustee in bankruptcy. In re Builders' Lumber Co. (D. C. 1906) 148 Fed. 244, 17 Am. Bankr. Rep. 449.

14. Statutory liens.—It is entirely within the power of a state legislature to create classes of liens by statutory enactment, in respect to property within the state, and such liens, being otherwise valid, will be protected in the bankruptcy courts. In re Burt (C. C. 1874) Fed. Cas. No. 2,209; Moore v. Green (1906) 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648. But before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same as required by such statute. In re Franklin (D. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218. A lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit in a state court within a prescribed time, is not preserved as a valid incumbrance on the bankrupt's estate when no suit has been instituted in the state court, and no step taken in the bankruptcy proceedings equivalent to such suit, within the time limited by the law, the mere commencement of bankruptcy proceedings not being a sufficient compliance with the statute. In re Brunquest (D. C. 1876) Fed. Cas. No. 2,055. Filing of petition in bankruptcy held equivalent to issuance of execution, within Act Pa. June 16, 1836, § 83 (P. L. 777), relative to payment of rent out of property taken on execution and subject to distress. In re W. R. Kuhn Co. (1915) 225 Fed. 13, 140 C. C. A. 473.

If the lien springs directly from the statute, or from the acts, transactions,

or relations specified in the statute as the ground of it, and not from the steps prescribed by the statute as necessary to perfect or enforce it—such as filing or recording a claim in a state court, or beginning a suit—then it is not a lien "obtained through legal proceedings" in such sense as to be avoided by the subsequent bankruptcy of the debtor within four months, notwithstanding that some sort of legal proceedings may be necessary to perfect or secure it. Moore v. Green (1906) 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648; Tube City Min. & Mill Co. v. Otterson (Ariz. 1915) 146 Pac. 203. A lien on personal property to secure purchase money under Code Miss. 1906, § 3079, held a lien created by statute and not by judicial proceedings, where a suit was brought to enforce the same within four months prior to bankruptcy. Norris v. Trenholm (1913) 209 Fed. 827, 126 C. C. A. 551.

Among the kinds of liens thus preserved in the bankruptcy proceedings and following the property into the hands of the trustee, may be mentioned a lien given by statute for materials and supplies furnished to carry on the business of a manufacturing corporation. In re Bennett (1907) 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847; In re Starks-Ullman Saddlery Co. (1909) 171 Fed. 834, 96 C. C. A. 506, 22 Am. Bankr. Rep. 596. Also a lien given by statute for the protection of keepers of livery and boarding stables. In re Pratesi (D. C. 1903) 126 Fed. 588, 11 Am. Bankr. Rep. 319; In re Mero (D. C. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171. And the lien of a state or municipality for taxes. City of Waco v. Bryan (1904) 127 Fed. 79, 62 C. C. A. 79, 11 Am. Bankr. Rep. 481.

15. Landlord's lien for rent.—A common-law or statutory lien of a landlord for rent is of a nature to be preserved and enforced in bankruptcy proceedings against the tenant. Courtney v. Fidelity Trust Co. (C. C. A. 1914) 219 Fed. 57, 134 C. C. A. 595; In re Floyd-Scott Co. (D. C. 1915) 224 Fed. 987; In re City Drug Store (D. C. 1913) 224 Fed. 132; In re J. Sapinsky & Sons (D. C. 1913) 206 Fed. 523; In re Southern Hardware & Supply Co. (D. C. 1913) 210 Fed. 381; I. Trager & Co. v. Cavaroc Co. (1909) 124 La. 611, 50 South. 598; Shapiro v. Thompson (1909) 160 Ala. 363, 49 South. 391. This includes rent reserved under a ground rent deed. Large v. Bosler (Pa. 1844) 2 Clark, 29. The trustee in bankruptcy cannot defeat the landlord's claim for rent to become due during the remainder of the term by vacating the premises and surrendering possession. Mitchell Storebuilding Co. v. Carroll (1912) 193 Fed. 616, 113 C. C. A. 484, 27 Am. Bankr. Rep. 894; Friedman v. Murphey (Ariz. 1912) 124 Pac. 654; In re J. Sapinsky & Sons (D. C. 1913) 206 Fed. 523, 30 Am. Bankr. Rep. 416; In re Meyer (D. C. 1912) 195 Fed. 653, 28 Am. Bankr. Rep. 17; In re Mitchell (D. C. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 324; Martin v. Orgain (1909) 174 Fed. 772, 98 C. C. A. 246, 23 Am. Bankr. Rep. 454; I. Trager Co. v. Cavaroc Co. (1909) 124 La. 611, 50 South. 598; Shapiro v. Thompson (1909) 160 Ala. 363, 49 South. 391; McLean v. Klein (C. C. 1875) Fed. Cas. No. 8,884; Austin v. O'Reilly (C. C. 1875) 12 N. B. R. 329, Fed. Cas. No. 665; In re Trim (D. C. 1871) 5 N. B. R. 23, Fed. Cas. No. 14,174; Ex parte Morrow (D. C. 1869) 2 N. B. R. 665, Fed. Cas. No. 9,850; In re Wynne (C. C. 1868) 4 N. B. R. 23, Fed. Cas. No. 18,117; In re Hoagland (D. C. 1878) 18 N. B. R. 530, Fed. Cas. No. 6,545; In re Dunham (D. C. 1870) Fed. Cas. No. 4,145; In re Eckenroth (D. C. 1876) Fed. Cas. No. 4,265; Watson v. Lemar (D. C. 1842) Fed. Cas. No. 17,287; Loudon v. Blandford, 56 Ga. 150. See In re Gallacher Coal Co. (D. C. 1913) 205 Fed. 183, 29 Am. Bankr. Rep. 766. A provision in a coal mine lease, giving the lessor a lien to secure all amounts that might become due under the lease, did not extend to a claim for damages caused by the bankruptcy of the lessee and consequent abandonment of the lease. In re Gallacher Coal Co. (D. C. 1913) 205 Fed. 183. The validity of a lien for rent reserved in an unrecorded lease, as against a trustee in bankruptcy, was governed by the local law. Dellinger v. Waite-Thresher Co. (C. C. A. 1915) 228 Fed. 506.

Where the lease had terminated, but the tenant remained in possession under a contract to purchase, and was so holding at the time of his bankruptcy, the relation of landlord and tenant no longer existed, and the landlord had no lien on the tenant's personal property for subsequently accruing rent on the nonperformance of the contract of purchase. Des Moines Nat. Bank v. Council Bluffs Sav. Bank (C. C. A. 1906) 150 Fed. 301, 18 Am. Bankr. Rep. 108. A landlord has no priority under a lease containing a covenant constituting the rent a lien or mortgage on all goods on the premises, where such lease is void as against the creditors of the tenant for not having been recorded as a chattel mortgage under the state laws. In re Dyke (D. C. 1873) 9 N. B. R. 430, Fed. Cas. No. 4,227. So, where the leasehold interest of the bankrupt tenant is sold by the trustee, the landlord has no lien on the proceeds of the sale for rent overdue at the time of the bankruptcy. In re Ruppel (D. C. 1899) 97 Fed. 778, 3 Am. Bankr. Rep. 233.

Where the state law is such that the landlord's lien attaches to goods and chattels on the demised premises when the same are levied on under an execution, it has been held that the landlord cannot claim a lien in the bankruptcy

proceedings against the tenant by reason of the levy of an execution on the goods within four months prior to the bankruptcy proceedings, as the lien of the execution would be dissolved thereby. In re Whealton Restaurant Co. (D. C. 1906) 143 Fed. 921, 16 Am. Bankr. Rep. 294; In re Butler (C. C. 1871) 6 N. B. R. 501, Fed. Cas. No. 2,236; Appeal of Barnes (1874) 76 Pa. 50, 13 N. B. R. 543. But, on the other hand, if the court of bankruptcy takes possession of the chattels which would be liable to the lien and orders them sold, its process may be regarded as an equitable execution, for the purpose of preserving the landlord's lien, such a case being clearly within the equity of the statute. Longstreth v. Pennock (1874) 20 Wall. 575, 22 L. Ed. 451; In re Hoover (D. C. 1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330. But a landlord to whom rent is due for the use of the premises by the bankrupt as a store will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a precedent step to the assertion of his rights against the bankrupt's property in the hands of the trustee, but he may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority. In re Byrne (D. C. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268. But where the statute gives the lien, not upon mere default in the payment of rent, but upon the levy of a distress warrant, the landlord will have no lien available in the bankruptcy proceedings unless he has levied his distraint before the filing of the petition in bankruptcy. In re Grovenstein-Bishop Co. (D. C. 1915) 223 Fed. 878; In re Potee Brick Co. (D. C. 1910) 179 Fed. 525; Morgan v. Campbell (1874) 22 Wall. 381, 22 L. Ed. 796; In re Joslyn (D. C. 1870) 3 N. B. R. 473, Fed. Cas. No. 7,550. But see In re Rose (D. C. 1869) 3 N. B. R. 265, Fed. Cas. No. 12,043. The fact that a distraint is necessary to perfect the inchoate lien does not make it a lien "obtained through legal proceedings" in such sense as to be dissolved by the adjudication in bankruptcy of the tenant within four months. In re West Side Paper Co. (1908) 162 Fed. 110, 89 C. C. A. 110, 20 Am. Bankr. Rep. 660 (reversing [D. C. 1908] 159 Fed. 241), 20 Am. Bankr. Rep. 289; In re Potee Brick Co. (D. C. 1910) 179 Fed. 525; Henderson v. Mayer (1912) 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, 28 Am. Bankr. Rep. 387.

16. Mechanics' and laborers' liens.—The liens given by statute to mechanics, subcontractors, and materialmen are not dissolved by the adjudication in bankruptcy of the owner, contractor, or other person liable, but on the contrary are preserved and may be enforced against the trustee in bankruptcy. In re Grissler (1905) 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; Hastings v. Thompson (1911) 47 Pa. Super. Ct. 424; National Fire Proofing Co. v. Daly (1910) 77 N. J. Eq. 583, 78 Atl. 1135; Clifton v. Foster (1869) 103 Mass. 233, 4 Am. Rep. 539; In re Wilkinsburg Borough School Dist. (1912) 234 Pa. 373, 83 Atl. 410; Felin v. Conway (1906) 32 Pa. Super. Ct. 171; Grainger & Co. v. Riley (C. C. A. 1913) 201 Fed. 901, 29 Am. Bankr. Rep. 114; Hildreth Granite Co. v. City of Watervliet (1914) 161 App. Div. 420, 146 N. Y. Supp. 449. Persons furnishing material to a contractor for use in the construction of a building have no claim to the amount due the contractor in preference to his general creditors, where they are not entitled to a lien under the mechanics' lien laws. In re Fowble (D. C. 1914) 213 Fed. 676. This rule applies also to the statutory liens existing in some states for the wages of labor. In re Kerby-Dennis Co. (1899) 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; In re Laird (1901) 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1; In re Lowensohn (D. C. 1900) 100 Fed. 776, 4 Am. Bankr. Rep. 79. In the case last cited, it appeared that a clothier gave out garments in lots, to different tailors, to be made up by the piece and returned in whole or broken lots for examination, and to be paid for at stated intervals if approved, and the tailors employed other workmen in making up the goods. It was held that, as against the estate of the clothier in bankruptcy, the tailors had a lien upon all articles remaining in their hands, not only for the work done upon those articles, but also for work done upon any portions of the same specific lot which had been returned for examination and not yet paid for, and also that, where the whole of a particular lot had been returned for examination, this was not such an unqualified delivery of the goods as to deprive the workmen of their lien for labor bestowed on that lot, unless there had been such a delay in afterwards demanding payment as would amount to a waiver of the lien. Selling agents for a bankrupt manufacturing company on commission held not entitled to a lien for their services as "workmen, laborers or other persons performing labor" by contract, under Code W. Va. 1913, c. 75, § 7 (sec. 3848). In re Crawford Wollen Co. (D. C. 1915) 218 Fed. 951.

Liens of these kinds are not opposed to either the terms or the policy of the bankruptcy law, since they do not in any way prefer one creditor at the expense of another, nor diminish the general assets of the debtor otherwise applicable to the payment of his general creditors. In re Coulter (D. C. 1871) 5 N. B. R. 64, Fed. Cas. No. 3,276. On the bankruptcy of a construction company under contract with

the city and the appointment of an ancillary receiver, held, that no liens could be filed, under Municipal Improvements Liens Act, against the fund due the construction company from the city. John Agnew Co. v. Board of Education of City of Paterson (1914) 89 A. 1046, decree affirmed (Err. & App. 1914) 90 A. 1135.

Although the local law requires that a mechanic's or materialman's lien shall be perfected by the filing or recording of a claim, or even the institution of a suit, within a limited time, yet this does not make it a lien "obtained through legal proceedings," in such sense that it will be dissolved by the subsequent adjudication in bankruptcy of the debtor within four months thereafter. In re West Norfolk Lumber Co. (D. C. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; In re Kerby-Dennis Co. (1899) 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; Id. (D. C. 1899) 94 Fed. 818, 2 Am. Bankr. Rep. 218; In re Emslie (1900) 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126; In re Beck, 2 Nat. Bankr. News, 532; Holland v. Cunliff (1902) 96 Mo. App. 67, 69 S. W. 737.

If, by the local law, the lien of a mechanic or materialman arises from the doing of the work and attaches to the building from that time, upon the condition subsequent that the lien creditor shall file or record a certain notice within a given time, the lien is not affected or impaired by the commencement of bankruptcy proceedings between the doing of the work and the filing of the notice, but the notice may be filed, and the lien thereby perfected, after the adjudication in bankruptcy, provided it is done within the time prescribed by the state statute. In re Coulter (D. C. 1871) 5 N. B. R. 64, Fed. Cas. No. 3,276; In re McAllister-Newgord Co. (D. C. 1912) 193 Fed. 265, 27 Am. Bankr. Rep. 459; In re Grissler (1905) 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; In re Georgia Handle Co. (1901) 109 Fed. 632, 48 C. C. A. 571, 6 Am. Bankr. Rep. 472; In re Lillington Lumber Co. (D. C. 1904) 132 Fed. 886, 13 Am. Bankr. Rep. 153; Crane Co. v. Smythe (1904) 94 App. Div. 53, 87 N. Y. Supp. 917; Sabin v. Connor (D. C. 1871) Fed. Cas. No. 12,197; Clifton v. Foster (1869) 103 Mass. 233, 4 Am. Rep. 539, 3 N. B. R. 656; In re Dey (C. C. 1872) Fed. Cas. No. 3,871; Church E. Gates & Co. v. Jno. F. Stevens Const. Co. (1915) 169 App. Div. 221, 154 N. Y. Supp. 605; Moreau Lumber Co. v. Johnson (N. D. 1914) 150 N. W. 563. But if the statute gives the lien only from the time of filing the notice, this must be done before the institution of the proceedings in bankruptcy, and if not, the trustee in bankruptcy will take the property free from any claims of mechanics or materialmen, and they cannot thereafter raise a lien by filing their notices. In re Roeber (1902) 121 Fed. 449, 57 C. C. A. 565, 9 Am. Bankr. Rep. 303; In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; Lazzari v. Havens (1902) 39 Misc. Rep. 255, 79 N. Y. Supp. 395; Garretson v. Clark (N. J. Eq. 1904) 57 Atl. 414; In re Sabin (D. C. 1875) 12 N. B. R. 142, Fed. Cas. No. 12,194; Hildreth Granite Co. v. City of Watervliet (1913) 82 Misc. Rep. 243, 143 N. Y. Supp. 867. Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within 30 days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion. Harrison v. Knaffl (Tenn. 1913) 161 S. W. 1003.

Where a bank advanced money to a building contractor to enable him to complete his contract, in consideration of an assignment of the amount due him from the owner, it was held that the bank could not claim a lien in the character of a laborer or a materialman. Though property is charged with valid liens of this kind, it cannot be withheld from the control of the court of bankruptcy, but must be turned over to the trustee to be administered for the benefit of all concerned, due recognition being given to the liens. In re Cramond (D. C. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22. The lien claimants must discontinue any proceedings they may have begun in the state courts. In re Cook (D. C. 1871) Fed. Cas. No. 3,151. Nor can the claimant insist upon his lien in the bankruptcy proceedings if he has previously waived it by accepting security for his debt, unless, indeed, the security proves to have been entirely void. In re Lynn Camp Coal Co. (D. C. 1908) 168 Fed. 998, 22 Am. Bankr. Rep. 60.

If the state law is such that the liens of mechanics relate back to the commencement of the building, there can be no priority among the mechanics in the bankruptcy proceedings, but they all stand upon the same footing and are to be paid in full or pro rata as the funds may suffice. In re Hoyt (D. C. 1873) Fed. Cas. No. 6,805.

17. Liens acquired by legal proceedings before bankruptcy.—Under subdivision "c" of this section, if the enforcement of the lien will work a preference, it is not necessary that the creditor should have known, or had reasonable cause to believe, that the debtor was insolvent, or that the lien should have been sought and permitted in fraud of the act. In re Burrus (D. C. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296. Under the construction given to this provision, an attaching creditor "obtains" his lien when proceedings instituted by him result in its attaching to an insolvent's estate in such

manner as to effect a preference, and the debtor "permits" it when he allows a state of facts to exist rendering such lien possible, and cannot and does not in good faith resist it. In re Arnold (D. C. 1899) 94 Fed. 1001, 2 Am. Bankr. Rep. 180; In re Burrus (D. C. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296.

But under the wider provisions of clause "f" of this section, all liens obtained through legal proceedings against an insolvent debtor, within four months prior to the filing of a petition in bankruptcy by or against him, are annulled by his adjudication, irrespective of the question whether the debtor suffered or permitted the lien to be obtained, and irrespective of any knowledge by the creditor of the debtor's insolvency. In re Richards (1899) 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145. But this provision of the statute does not apply to property set apart by the bankruptcy court as exempt. Burcell v. Goldstein (1912) 23 N. D. 257, 136 N. W. 243. It is strictly necessary, that the lien should have been created within four months before the filing of the petition and that the debtor should have been insolvent at the time it was created. Gay v. Ray (1907) 195 Mass. 8, 80 N. E. 693; W. S. Danby Millinery Co. v. Dogan (1907) 47 Tex. Civ. App. 323, 105 S. W. 337.

If a valid lien upon particular property or a fund has been acquired more than four months before bankruptcy proceedings, its enforcement within that time is not an illegal preference under the bankruptcy act. Wood v. Kerkeslager (1909) 225 Pa. 296, 74 Atl. 174. An order of a referee in bankruptcy, directing that a receiver take charge of and administer as part of the assets certain property on which a valid judicial lien had been obtained in state court more than four months prior to filing of petition in bankruptcy, held erroneous. In re Pilcher & Son (D. C. 1915) 228 Fed. 139. The time and manner in which a lien attaches to property through legal proceedings begun before bankruptcy depends wholly upon the law of the state in which the property is located. In re Schow (D. C. 1914) 213 Fed. 514. A money judgment rendered in a state court pending bankruptcy proceedings does not impose a lien on lands forming a part of the bankrupt's nonexempt property. Chambers v. Kirk (Okl. 1914) 139 P. 986.

This section does not apply to a lien obtained by a landlord by a levy of a distress warrant for past-due rent under a lease entered into in good faith and giving him the right to resort to that remedy. In re Robinson & Smith (1907) 154 Fed. 843, 83 C. C. A. 121, 18 Am. Bankr. Rep. 563; Schall v. Kinsella (1906) 117 La. 687, 42 South. 221. This provision of the statute applies to a seizure of property on a writ of replevin. In re Hymes Buggy & Implement Co. (D. C. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; In re Weinger, Bergman & Co. (D. C. 1913) 126 Fed. 875, 11 Am. Bankr. Rep. 424; In re Haynes (D. C. 1903) 123 Fed. 1001, 10 Am. Bankr. Rep. 715. And it applies to the lien secured by the filing of a creditor's bill. In re Potee Brick Co. (D. C. 1910) 179 Fed. 525. Where a receiver of a corporation appointed by a state court did not take possession nor qualify until less than four months prior to bankruptcy of the corporation, the bankruptcy court will control. Stacey v. McNicholas (Or. 1915) 148 P. 67. The taking possession of property of a corporation by a court through receivers in a creditor's suit constitutes a "levy," and the jurisdiction of the court over the property is not affected by bankruptcy proceedings against the corporation instituted more than four months thereafter. Blair v. Brailey (1915) 221 Fed. 1, 136 C. C. A. 524, certiorari denied (1915) 35 S. Ct. 938, 238 U. S. 634, 59 L. Ed. 1499. This section applies to a suit to reach and subject the surplus income of an estate held in trust for the debtor. In re Tiffany (D. C. 1914) 133 Fed. 799, 13 Am. Bankr. Rep. 310. And it applies to a suit to vacate a chattel mortgage, as being invalid against creditors. Dunn Salmon Co. v. Pillmore (1907) 55 Misc. Rep. 546, 106 N. Y. Supp. 88. A creditor who sues on behalf of all creditors to set aside a fraudulent conveyance by the debtor does not thereby acquire a lien, within the meaning of this section, providing that liens acquired within four months prior to the filing of the petition in bankruptcy are void. Blick v. Nimmo (1913) 88 A. 116, 121 Md. 139.

A mortgage creditor does not lose his lien by suing for and obtaining a decree of foreclosure and an advertisement of the property for sale, within four months prior to the debtor's bankruptcy, for the lien is not one created by the decree, but by the mortgage itself. In re Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346.

Where property of a bankrupt, at the time of the bankruptcy, is in the lawful custody of a state court under seizure in a pending suit begun within four months, the court of bankruptcy has power to stay such suit and to direct the property to be turned over for administration in the bankruptcy proceedings. Orr v. Tribble (D. C. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849.

18. Lien of attachment.—The lien acquired by an attachment of the property of an insolvent debtor is a lien "obtained through legal proceedings," both on general principles and by the explicit description of it as such in the bankruptcy law, and is dissolved by the filing of a petition in bankruptcy by or against the debtor, if that occurs within four months after its date. Bear

v. Chase (C. C. A. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; In re Tune (C. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; Zeiber v. Hill (D. C. 1870) 8 N. B. R. 239, Fed. Cas. No. 18,206; Lindner v. Brock (1879) 40 Mich. 618; Howe v. Union Ins. Co. (1872) 42 Cal. 528; Tootle v. Sheldon (1880) 10 Neb. 44, 4 N. W. 358; Peck v. Jenness (1845) 16 N. H. 516, 43 Am. Dec. 573; Ingraham v. Phillips (Conn. 1803) 1 Day, 117; Reed v. Bullington (1873) 49 Miss. 223; Dyke v. Farmersville Mill & Light Co. (Tex. Civ. App. 1915) 175 S. W. 478.

No valid lien can be obtained by an attachment issued after the commencement of the bankruptcy proceedings. Phillips v. Helmbold (1875) 26 N. J. Eq. 202. Where an attachment was discharged on the giving of a surety undertaking for which defendant had deposited indemnifying securities, and defendant became a bankrupt within four months, the attachment will be vacated on motion by the bankrupt's trustee. C. Tennant Sons & Co. v. New Jersey Oil & Meal Co. (1912) 139 N. Y. S. 1023, 78 Misc. Rep. 497. The statute does not apply to cases where the property seized under the attachment is exempt property of the bankrupt. Robinson v. Wilson (1875) 15 Kan. 595, 22 Am. Rep. 272, 14 N. B. R. 565; Burcell v. Goldstein (1912) 23 N. D. 257, 136 N. W. 243; First International Bank v. Lee (N. D. 1913) 141 N. W. 716. Or where the person or corporation proceeded against in bankruptcy is not amenable to the bankruptcy law. In re New Amsterdam Motor Co. (D. C. 1910) 180 Fed. 943, 24 Am. Bankr. Rep. 757. In other cases, the effect of the statute in dissolving attachment liens is not confined to those issuing from courts of the United States, but applies as well to the process of the state courts. Wood v. Carr (1903) 73 S. W. 762, 24 Ky. Law Rep. 2144; Bank of Columbia v. Overstreet (Ky. 1873) 10 Bush, 148, 13 N. B. R. 157. And the appointment by the state court of a receiver of the property of the debtor, and a transfer to him of the attached property, prior to the appointment of the trustee in bankruptcy, does not so alter the rights of the parties as to entitle the attaching creditor to preference in the payment of any judgment he may obtain. Miller v. Bowles (1874) 58 N. Y. 253.

19. —— **Effect of dissolution of attachment.**—The effect of the dissolution of an attachment by the commencement of proceedings in bankruptcy is to release the attached property. Bank of Garrison v. Malley (1910) 103 Tex. 562, 131 S. W. 1064; Lehman, Stern & Co. v. E. Martin & Co. (1913) 132 La. 231, 61 South. 212. This result follows though no order of dissolution may be entered in the court where the action is pending. Sullivan v. Rabb (1888) 86 Ala. 433, 5 South. 746. See King v. Will J. Block Amusement Co. (1908) 193 N. Y. 608, 86 N. E. 1126. A purchaser of the property under the attachment has no standing to maintain a bill to clear his title or set aside conveyances. Hatfield v. Moller (C. C. 1880) 4 Fed. 717. Further proceedings in the suit in which the attachment was issued may be enjoined by the court of bankruptcy. In re Bellows (C. C. 1844) Fed. Cas. No. 1,278; C. Tennant Sons & Co. v. New Jersey Oil & Meal Co. (1912) 78 Misc. Rep. 497, 139 N. Y. Supp. 1023; Pope v. Title Guaranty & Surety Co. (1913) 152 Wis. 611, 140 N. W. 348; In re Federal Biscuit Co. (C. C. A. 1913) 203 Fed. 37, 29 Am. Bankr. Rep. 393. The attached property must be surrendered to the trustee in bankruptcy. New Orleans Acid & Fertilizer Co. v. Grissom (1902) 79 Miss. 662, 31 South. 336. But if the property attached has already been sold and the proceeds paid over to the attaching creditor, it is doubtful whether he can be made to refund them at the suit of the trustee. Botts v. Hammond (C. C. A. 1900) 99 Fed. 917, 3 Am. Bankr. Rep. 775.

20. **Lien by garnishment.**—The rendition of a judgment against the garnishee creates a lien on the fund or property, and even the service of the writ, before judgment, if it does not create a lien, at least raises a specific right to a lien and in either case the right or preference secured by the creditor is "obtained through legal proceedings," in such sense as to be dissolved by the subsequent adjudication of the debtor within four months. In re Ransford (C. C. A. 1912) 194 Fed. 658, 28 Am. Bankr. Rep. 78; Longley Bros. v. McCann (1909) 90 Ark. 252, 119 S. W. 268; Fairlamb v. Smedley Const. Co. (1908) 36 Pa. Super. Ct. 17; Hobbs v. Thompson (1909) 160 Ala. 360, 49 South. 787, 18 Ann. Cas. 381; Cavanaugh v. Fenley (1905) 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; Wilbur v. Wilson (C. C. 1876) Fed. Cas. No. 17,637; Howe v. Union Ins. Co. (1872) 42 Cal. 528; In re Peck (D. C. 1877) 16 N. B. R. 43, Fed. Cas. No. 10,886. See London Guarantee & Accident Co. v. Mossness (1903) 108 Ill. App. 440. Where an attachment is sued out against a defendant within four months of his bankruptcy, and is dissolved, a garnishment in aid of such attachment falls with it. Hobson-Starnes Coal Co. v. Alabama Coal & Coke Co. (Ala. 1914) 66 So. 622. The effect is to vest in and transfer to the trustee in bankruptcy the indebtedness of the garnishee to the bankrupt, and he alone has the right to claim and collect it. Wright-Dalton-Bell-Anchor Store Co. v. Sanders (1910) 142 Mo. App. 50, 125 S. W. 517; Peck Lumber Co. v. Mitchell, 1 Nat. Bankr. News,

262. Where a garnisher has notice of a prior lien on the money which he attempts to garnish, such lien will prevail against his rights, and also against a trustee in bankruptcy to whom the money was subsequently transferred, the latter also having notice of the prior lien. Gardner v. Planters' Nat. Bank (1909) 54 Tex. Civ. App. 572, 118 S. W. 1146. No judgment can thereafter be properly rendered against the garnishee in the suit of the creditor. Wright-Dalton-Bell-Anchor Store Co. v. Sanders (1910) 142 Mo. App. 50, 125 S. W. 517. And if, nevertheless, a judgment is so rendered, it is void, and must be treated as a nullity whenever drawn in question whether directly or collaterally. In re Beals (D. C. 1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639.

And the decree of the federal court adjudicating the principal debtor a bankrupt will constitute a complete defense to any attempt to enforce a judgment rendered by the state court against the garnishee. Hall v. Chicago, B. & Q. R. Co. (1910) 88 Neb. 20, 128 N. W. 645.

21. Date of attachment or garnishment.—A lien by attachment or garnishment secured more than four months before the filing of the petition in bankruptcy is not dissolved by the adjudication, but remains a valid charge on the property or fund, which must be recognized and allowed in the bankruptcy proceedings. Doe v. Childress (1874) 21 Wall. 642, 22 L. Ed. 549; Crowe v. Reid (1876) 57 Ala. 281; Martin v. Lile (1879) 63 Ala. 406; Daggett v. Cook (1870) 37 Conn. 341; Carr v. Thomas (1882) 18 Fla. 736; Bowman v. Harding (1869) 56 Me. 559; Currier v. King (1908) 81 Vt. 285, 69 Atl. 873; Stickney & Babcock Coal Co. v. Goodwin (1901) 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; Francis Batchelder & Co. v. Wedge (1907) 80 Vt. 353, 67 Atl. 828; Bloch Bros. v. Moore (Ala. 1905) 39 South. 1025; Allen v. Ingalls (1911) 33 Nev. 281, 111 Pac. 34, 114 Pac. 758; In re Albrecht (D. C. 1877) 17 N. B. R. 287, Fed. Cas. No. 145; In re Maher (D. C. 1909) 169 Fed. 997, 22 Am. Bankr. Rep. 290; Holladay v. Hare (1886) 69 Cal. 515, 11 Pac. 28; Ressmeyer v. Norwood (1912) 117 Md. 320, 83 Atl. 347; In re J. L. Philips & Co. (D. C. 1915) 224 Fed. 628; Light v. Hunt (Ga. App. 1916) 87 S. E. 763; Pelton v. Sheridan (Or. 1914) 144 Pac. 410.

To constitute an attachment of personal property, the officer must actually take it into his custody and control, and the mere taking of a receipt for certain property, followed by a return that he had attached it more than four months before the bankruptcy proceedings, though it would estop the receiptor from denying that there was an attachment, is not enough to create a lien as against the trustee in bankruptcy. In re Ashley (D. C. 1879) 19 N. B. R. 237, Fed. Cas. No. 581. See Merceline State Bank v. Smith (1906) 122 Mo. App. 61, 98 S. W. 104; In re Schow (D. C. 1914) 213 Fed. 514.

Having a valid lien, accruing more than four months before the bankruptcy, the creditor will be entitled to prosecute his action to judgment, at least so far as to obtain a decree in rem against the specific property attached, and to proceed to a sale of the property thereunder. In re Snell (D. C. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35; May v. Courtnay (1872) 47 Ala. 185; Hill v. Harding (1886) 116 Ill. 92, 4 N. E. 361; Gillett v. McCarthy (1880) 23 Kan. 668; Stoddard v. Locke (1870) 43 Vt. 574, 5 Am. Rep. 308, 9 N. B. R. 71; Bates v. Tappan (1868) 99 Mass. 376, 3 N. B. R. 647. See Ray v. Wight (1876) 119 Mass. 426, 20 Am. Rep. 333, 14 N. B. R. 563. If the proceeds are not sufficient to satisfy his whole claim against the debtor, he may come into the bankruptcy proceedings with a claim for the balance, after crediting the amount realized under the attachment. In re Knight, Yancey & Co. (D. C. 1911) 190 Fed. 893, 26 Am. Bankr. Rep. 787.

22. Judgment or execution.—A creditor holding an unsatisfied judgment, or an execution levied on property of the debtor, can claim no preference or advantage over other creditors if the debtor is adjudged bankrupt within four months after its date. The judgment may remain as a provable debt against the bankrupt, but its lien is lost. In re Harrington (D. C. 1912) 200 Fed. 1010, 29 Am. Bankr. Rep. 666; Severin v. Robinson (1869) 27 Ind. App. 55, 60 N. E. 966; L. Mohr & Sons v. Mattox (1904) 120 Ga. 962, 48 S. E. 410; Burgett v. Paxton (1881) 99 Ill. 288. Compare Doyle v. Hall (1899) 86 Ill. App. 163. As merging the original cause of action, as an obligation, as an evidence of debt, as the basis for a new suit, as evidence in the courts of another state, as subject to revival by scire facias, and in all other respects save only the question of lien, the judgment is not affected. See Pope v. Title Guaranty & Surety Co. (1913) 152 Wis. 611, 140 N. W. 348. Where a judgment is rendered within four months of an adjudication of bankruptcy, it becomes a lien on real estate which the trustee does not elect to take, in spite of subdivision "f" of this section, although not effective as against the trustee, or persons claiming under him, or the insolvent personally. McCarty v. Light (1913) 139 N. Y. S. 853, 155 App. Div. 36. CONTRA, People's Nat. Bank of Independence v. Maxson (Iowa, 1915) 150 N. W. 601. The provision of this section applies to judgment liens on ex-

empt property. People's Nat. Bank of Independence v. Maxson (Iowa, 1915) 150 N. W. 601. Where a grantee takes subject to the lien of a judgment against the grantor, who is subsequently declared a bankrupt, the rights of judgment creditors to enforce their lien against the grantee cannot be effected by any action of the trustee in bankruptcy to which they are not parties, or by the fact that the trustee elects to confirm the sale and collect the balance of the purchase money. Keystone Brewing Co. v. Schermer (1913) 88 A. 657, 241 Pa. 361. Where a partner sold his interest in the firm to his partner more than four months before the bankruptcy of the latter, and in the meantime firm creditors recovered judgments against it, they could not enforce the same against the partnership property in the possession of the bankruptcy court, but were only entitled to establish their claims in such proceedings. In re Suprenant (D. C. 1914) 217 Fed. 470.

Questions as to whether a lien arises from the delivery of an execution to the sheriff before levy, or whether it covers property held under a contract of conditional sale, will be controlled by the law of the state, and the federal courts will be governed by the decisions of its highest tribunal. Reardon v. Rock Island Plow Co. (1909) 168 Fed. 654, 94 C. C. A. 118, 22 Am. Bankr. Rep. 26; Pence v. Cochran (D. C. 1881) 6 Fed. 269.

The bankruptcy act is held applicable in this particular, not only to judgments rendered in contested actions, but also to judgments by confession. In re Weeks (D. C. 1870) 4 N. B. R. 364, Fed. Cas. No. 17,350; Jordan v. Downey (1874) 40 Md. 401, 12 N. B. R. 427; Hoover v. Greenbaum (1874) 61 N. Y. 305. And to judgments entered by consent. In re Richard (D. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506. A judgment imposing a fine for a violation of a state law or a municipal ordinance is not excepted. In re Green (D. C. 1910) 179 Fed. 870, 24 Am. Bankr. Rep. 665. A judgment lien on property for its purchase price obtained within four months prior to the bankruptcy of the debtor held not protected from avoidance by the adjudication by a state statute (2 Comp. St. N. J. 1910, p. 2245, § 10) providing that as against the debtor there should be no exemptions from such a judgment. In re O'Brien (D. C. 1914) 215 Fed. 129.

It is not the judgment which the bankruptcy law annuls or avoids, but the lien or preference springing from it, and hence it applies only to judgments of which a lien on property is a necessary result or concomitant. Metcalf v. Barker (1902) 187 U. S. 174, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Kavanaugh (D. C. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832. A decree foreclosing a mortgage, entered within four months before the bankruptcy of the mortgagor, is not a judgment creating a lien, such as to be rendered void by the adjudication, but merely a decree for the enforcement of a prior lien, which is not affected by the proceedings in bankruptcy. In re McKane (D. C. 1907) 152 Fed. 733. And so, a judgment dispossessing a tenant, rendered shortly before his bankruptcy, is not one which creates a lien on his estate. Plaut v. Gorham Mfg. Co. (D. C. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

Where a judgment has been recovered, an execution issued and levied, and a sale of the property made thereunder, all within four months prior to the bankruptcy, the title of the execution purchaser is expressly saved by the statute in case he bought in good faith and for value and without notice, and as to the proceeds of the sale, they may perhaps be recovered by the trustee in bankruptcy if they yet remain in the hands of the sheriff, but not after they have been paid over to the judgment creditor, saving questions as to preference or fraud. Nelson v. Svea Pub. Co. (D. C. 1910) 178 Fed. 136; In re Bailey (D. C. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; In re Franks (D. C. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; In re Francis-Valentine Co. (D. C. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Kenney (D. C. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; Dyson v. Harper (1875) 54 Ga. 282; Clement v. King (1910) 152 N. C. 456, 67 S. E. 1023. Compare In re Breslauer (D. C. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33.

If a lien was gained by the recovery of a judgment, or by the levy of an execution thereunder, more than four months before the institution of bankruptcy proceedings, it is not dissolved or affected by the adjudication of the debtor, but the creditor is entitled to claim and enforce the advantages of his position. In re Bruce (D. C. 1907) 158 Fed. 123, 19 Am. Bankr. Rep. 770; United States Fidelity & Guaranty Co. v. Murphy (1908) 4 Ga. App. 13, 60 S. E. 831; Tucker v. Denico (1905) 27 R. I. 239, 61 Atl. 642; Meirkord v. Helming (1908) 139 Iowa, 437, 116 N. W. 785; Kaminsky v. Horrigan (1907) 2 Ga. App. 332, 58 S. E. 497; In re Fuller (D. C. 1870) 4 N. B. R. 115, Fed. Cas. No. 5,148; Virginia-Carolina Chemical Co. v. Rylee (1913) 139 Ga. 669, 78 S. E. 27; In re L'Hommedieu (1906) 146 Fed. 708, 77 C. C. A. 134, 16 Am. Bankr. Rep. 850; In re Zeis (D. C. 1916) 229 Fed. 472; Robinson & Co. v. Cosner (1915) 136 La. 595, 67 South. 468. Bankruptcy proceedings do not discharge vested equitable liens of judgment creditors acquired more than four months before the bankruptcy proceedings, on property fraudulent-

ly kept from creditors in such proceedings. Robinson v. Tischler (Fla. 1915) 67 So. 565. An execution levied on property under a judgment in a state court, recorded more than four months prior to filing of a voluntary petition in bankruptcy by the judgment debtor, held to give a valid preferential lien, in view of Code Ala. 1907, § 4157, though the judgment was not recorded in a county to which the property was removed. In re Pilcher & Son (D. C. 1915) 228 Fed. 139. Where personal property has been levied on under a mortgage fi. fa. more than four months prior to the adjudication of the defendant in execution as a bankrupt, and a forthcoming bond has been given, the seizure by the bankruptcy court of the property levied on will not release the surety on the forthcoming bond. Kinney v. Avery & Co. (Ga. App. 1914) 80 S. E. 663. The statute does not affect the lien of an execution levied within the four months, but founded on a judgment recovered two years before. In re Easley (D. C. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715. A creditor who obtained a judgment against the debtor after the filing of a petition in bankruptcy by other creditors against the debtor, but nearly a year before the adjudication of bankruptcy, and who filed and recorded the judgment over four months before the adjudication, did not thereby obtain a preferred claim under the bankruptcy law. In re Octave Mining Co. (D. C. 1914) 212 Fed. 457.

If the lien of a judgment has been lost by lapse of time, and the judgment has become dormant by the laws of the state, there is no lien which is enforceable in bankruptcy. In re Cozart (D. C. 1870) 3 N. B. R. 508, Fed. Cas. No. 3,313. Where sale under execution issued more than four months before bankruptcy was repeatedly adjourned, and would not have been adjourned without consent of execution creditor, held, that it had become dormant as against trustee in bankruptcy. In re Zeis (D. C. 1916) 229 Fed. 472; In re Monarch Acetylene Co. (D. C. 1916) 229 Fed. 474. Where an execution has been returned "nulla bona," there is no lien enforceable in the bankruptcy proceedings. In re E. Matthews & Sons (D. C. 1908) 163 Fed. 127, 20 Am. Bankr. Rep. 570. But this is not necessarily the case because a sale under the execution has been enjoined by strangers. In re Randolph (D. C. 1911) 187 Fed. 186, 26 Am. Bankr. Rep. 623. An execution levied upon property after the filing of a petition in bankruptcy, while not rendered void by subdivision "f" of this section, which applies only to liens prior to the filing of the petition, creates no lien which will be recognized by the bankruptcy court. In re Schow (D. C. 1914) 213 Fed. 514.

The validity of a levy which is valid under the state law, being a matter of record, is conclusive and cannot be enquired into in the bankruptcy proceedings, and if the recital of a levy is false, the officer may be held to answer for it to the proper party, but this does not entitle the trustee in bankruptcy to claim or hold the proceeds of sale. Armstrong v. Rickey (D. C. 1869) 2 N. B. R. 473, Fed. Cas. No. 546.

A judgment creditor of a bankrupt, having a lien on his real estate, has no better claim than any other creditor to the proceeds of a fire insurance policy taken by the bankrupt for his own benefit. In re Balsier (D. C. 1914) 215 Fed. 134.

23. Dissolution of liens by adjudication.—Although the filing of the petition in bankruptcy fixes the date from which the period of four months preceding is to be calculated, with reference to the dissolution of liens obtained within that period, it is not the filing of the petition which vacates the lien but the adjudication of the debtor as a bankrupt, and hence if an adjudication is denied and the petition dismissed, the lien remains in full force. Sullivan v. King (1903) 31 Tex. Civ. App. 432, 72 S. W. 207. And even where the adjudication is duly made, it does not affect valid liens on such of the debtor's property as is exempt by law. In re Snyder (D. C. 1914) 216 Fed. 989; First International Bank of Portal v. Lee (N. D. 1913) 141 N. W. 716; Jewett Bros v. Huffman (1905) 14 N. D. 110, 103 N. W. 408. Compare In re Forbes (1911) 186 Fed. 79, 108 C. C. A. 191, 26 Am. Bankr. Rep. 355; In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

It is within the jurisdiction of the court of bankruptcy to order that the rights obtained under the levy, attachment, or other lien shall be preserved for the benefit of the estate. But if no such order is made, the lien is dissolved without the necessity of any judgment to that effect on the part of the court of bankruptcy. Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; Thompson v. Fairbanks (1903) 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899; Goodnough Mercantile Co. v. Galloway (1906) 48 Or. 239, 84 Pac. 1049; Watschke v. Thompson (1901) 85 Minn. 105, 88 N. W. 263. But it is entirely proper practice for the trustee in bankruptcy to apply to the state court where the proceeding is pending for an order discharging the attachment or other lien. Hardt v. Schuylkill Plush & Silk Co. (1902) 69 App. Div. 90, 74 N. Y. Supp. 549; Kent v. Downing (1871) 44 Ga. 116, 10 N. B. R. 538; Louden v. King (1873) 50 Ga. 302; King v. Loudon (1874) 53 Ga. 64; Dickerson v. Spaulding (N. Y. 1876) 7 Hun, 288, 15 N. B. R. 313. And for this purpose he need not make himself

formally a party of record. Louden v. King (1873) 50 Ga. 302; King v. Loudon (1874) 53 Ga. 64. But laches of the trustee in failing to move for the dissolution of an attachment which is avoided by the adjudication in bankruptcy will not validate it. Hardt v. Schuylkill Plush & Silk Co. (1902) 69 App. Div. 90, 74 N. Y. Supp. 549. The rights of the parties are not altered by the fact that a receiver of the debtor's estate had been appointed by the state court and the attached property turned over to him. Miller v. Bowles (1874) 58 N. Y. 253. But if the property has already been sold under the process of the state court, the title of the purchaser is not impeachable in the bankruptcy proceedings, if he bought in good faith, for value, and without notice. Zahm v. Fry (C. C. 1874) Fed. Cas. No. 18,198.

This section relates merely to levies, judgments, attachments, and liens acquired through legal proceedings, and not to contractual or quasi contractual liens. Gray v. Arnot (N. D. 1915) 154 N. W. 268. The statute does not operate upon and dissolve liens obtained by execution, levy, attachment, or other process, as against all the world, but only as against the trustee in bankruptcy and those claiming under him. McKenney v. Cheney (1903) 118 Ga. 387, 45 S. E. 433; Frazee v. Nelson (1901) 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391. And a court will not presume the appointment and qualification of a trustee, merely because the bankruptcy act provides for such appointment, when the question is as to the discharge of a lien alleged to be invalidated by the adjudication of the debtor. Schoenthaler v. Rosskam (1903) 107 Ill. App. 427. In effect, this statutory dissolution of liens is for the benefit of creditors, not for the benefit of the bankrupt, and as to him all such liens remain in force notwithstanding his adjudication in bankruptcy, as, for instance with reference to his exempt property or property which the trustee disclaims or which never comes into his possession. Miller v. Barto (1910) 247 Ill. 104, 93 N. E. 140; Rochester Lumber Co. v. Locke (1903) 72 N. H. 22, 54 Atl. 705. And although a sale of land on execution within four months before the defendant's adjudication in bankruptcy, may be avoided by his trustee, its nullity cannot be pleaded by a former grantee of the same property. Hutchins v. Cantu (Tex. Civ. App. 1902) 66 S. W. 138. Nor does the adjudication of the principal debtor release the sureties on a replevin bond or forthcoming bond. Kaminsky v. Horrigan (1907) 2 Ga. App. 332, 58 S. E. 497; Ehrlich v. Sklamberg (Mun. Ct. 1909) 116 N. Y. Supp. 602; In re Federal Biscuit Co. (1914) 214 Fed. 221, 130 C. C. A. 635. Compare Kaiser v. Richardson (N. Y. 1874) 5 Daly, 301. After nullification of the lien of attachment by the filing of a petition in bankruptcy, the sheriff holds merely as an involuntary bailee for the benefit of the trustee. Gray v. Arnot (N. D. 1915) 154 N. W. 268.

24. **Insolvency of debtor.**—Reasonable cause to believe a person to be insolvent means knowledge of a state of facts which would put a prudent man upon inquiry as to the condition of the person with whom he is dealing. Rison v. Knapp (D. C. 1868) 4 N. B. R. 349, Fed. Cas. No. 11,861; In re McDonough (D. C. 1869) 3 N. B. R. 221, Fed. Cas. No. 8,775; Webb v. Sachs (D. C. 1877) 15 N. B. R. 168, Fed. Cas. No. 17,325; Scammon v. Cole (C. C. 1871) 5 N. B. R. 257, Fed. Cas. No. 12,432. Reasonable cause to believe the debtor insolvent may be imputed to a creditor when he knows that the debtor cannot pay his debts in the ordinary course of his business. Wilson v. Brinkman (D. C. 1869) 2 N. B. R. 468, Fed. Cas. No. 17,794; In re Forsyth (D. C. 1873) 7 N. B. R. 174, Fed. Cas. No. 4,948. Or that the debtor has been embarrassed for two years, had made small payments on overdue debts, has unavailingly applied for extensions of time, has been pressed by his creditors, and has declined to give a mortgage on the ground that it would injure his credit. Hall v. Wager (C. C. 1871) 5 N. B. R. 181, Fed. Cas. No. 5,951. So the debtor's repeated failure to fulfill promises in regard to paying the claim, the creditor also having knowledge of other debts, charges him with notice of insolvency, or reasonable cause for belief. In re Armstrong (D. C. 1877) 16 N. B. R. 275, Fed. Cas. No. 539. And so also, where creditors have to sue for the collection of accounts long overdue, and the debtor submits to suits on claims against which he has no defense. Stranahan v. Gregory (D. C. 1871) 4 N. B. R. 427, Fed. Cas. No. 13,522; Mayer v. Hermann (C. C. 1872) Fed. Cas. No. 9,344; Dunning v. Perkins (C. C. 1871) Fed. Cas. No. 4,180. Again, where a creditor takes a check, the fact that payment of it is refused puts him upon inquiry. Warren v. Tenth Nat. Bank (D. C. 1871) 5 N. B. R. 479, Fed. Cas. No. 17,200. And it is said that the existence of a financial crisis or panic constitutes of itself reasonable cause to believe persons otherwise in doubtful circumstances to be insolvent. In re Clarke (D. C. 1874) 10 N. B. R. 21, Fed. Cas. No. 2,843.

Under the definition of insolvency as accepted in the application of former bankruptcy laws (inability to meet debts as they mature in the ordinary course of trade), it was held that a creditor who has knowledge of any transactions by the debtor out of the ordinary course of trade is put upon inquiry as to his solvency. Scammon v. Hobson (D. C. 1872) Fed. Cas. No. 12,434. And the giving of a mortgage

to secure prior advances or a pre-existing debt is out of the usual course of business, and is therefore a circumstance to put the creditor upon inquiry. In re Holland (D. C. 1876) Fed. Cas. No. 6,603; Wager v. Hall (1872) 16 Wall. 584, 21 L. Ed. 504. But compare Ex parte Packard (D. C. 1871) Fed. Cas. No. 10,650; McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888. But on the other hand, the creditor is not to be charged with knowledge of his debtor's insolvency, or reasonable cause to believe in it, merely from the fact that he knows that the debtor is embarrassed in carrying on his business for want of means. In re Wynne (C. C. 1868) 4 N. B. R. 23, Fed. Cas. No. 18,117. Or that the debtor was short of funds on the particular occasion, and wished the creditor to take a note and mortgage in substitution for a check on a bank. Collins v. Bell (D. C. 1870) 3 N. B. R. 587, Fed. Cas. No. 3,010. So the fact that a person doing a large business obtains renewals of his commercial paper, or under special circumstances pays a large discount, is not notice of insolvency where it appears that such commercial paper was selling at equal rates in the market. Golson v. Niehoff (D. C. 1871) 5 N. B. R. 56, Fed. Cas. No. 5,524. And in a rural community, the mere non-payment of a note at maturity is not sufficient evidence of insolvency to put a creditor on inquiry. Shaffer v. Fritchery (D. C. 1871) 4 N. B. R. 548, Fed. Cas. No. 12,697.

As to the meaning of the phrase "contemplation of bankruptcy," some of the decisions under the former statutes applied the strict rule that this could only mean the debtor's contemplation of the commission of an act denounced by the statute as an act of bankruptcy, or his contemplation of a decree adjudicating him a bankrupt either on his own petition or in involuntary proceedings. Buckingham v. McLean (1851) 13 How. 151, 14 L. Ed. 91; In re Craft (C. C. 1868) 2 N. B. R. 111, Fed. Cas. No. 3,317; In re Goldschmidt (D. C. 1869) 3 N. B. R. 164, Fed. Cas. No. 5,520. But other decisions held that the phrase means contemplation on the debtor's part of a state of insolvency such as to involve a thorough breaking up of his business, and hence something more than insolvency in the sense of mere inability to pay debts promptly and as they mature. Everett v. Stone (C. C. 1844) Fed. Cas. No. 4,577; McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888; Hutchins v. Taylor (C. C. 1842) Fed. Cas. No. 6,953; In re Dibblee (D. C. 1869) 2 N. B. R. 617, Fed. Cas. No. 3,884; Atkinson v. Farmers' Bank (D. C. 1844) Fed. Cas. No. 609. Payments made or securities given by a party who knew himself to be insolvent, were not considered as being "in contemplation of bankruptcy" if, at the time, he fully expected to continue his business and retrieve his losses. Atkinson v. Farmers' Bank (D. C. 1844) Fed. Cas. No. 609.

Insolvency of persons against whom liens specified in subdivision "f" of this section are obtained, held indispensable to their avoidance under that section, and to the jurisdiction of the court of bankruptcy to order conveyance or make other orders to that effect thereunder. Stone-Ordean-Wells Co. v. Mark (C. C. A. 1915) 227 Fed. 975. To satisfy the statute, it is necessary that the debtor should have been insolvent at the time the lien attached or was obtained. If he was then solvent, the lien is not dissolved by his subsequent adjudication in bankruptcy, though it be within four months. Newberry Shoe Co. v. Collier (1910) 111 Va. 288, 68 S. E. 974; Jackson v. Valley Tie & Lumber Co. (1908) 108 Va. 714, 62 S. E. 964; D. C. Wise Coal Co. v. Columbia Zinc & Lead Co. (1911) 157 Mo. App. 315, 138 S. W. 67; W. S. Danby Millinery Co. v. Dogan (1907) 47 Tex. Civ. App. 323, 105 S. W. 337. And his insolvency must be alleged in any proceeding to avoid or discharge the lien, and proved by satisfactory evidence. Simpson v. Van Etten (C. C. 1901) 108 Fed. 199, 6 Am. Bankr. Rep. 204; Hardt v. Schuylkill Plush & Silk Co. (1902) 69 App. Div. 90, 74 N. Y. Supp. 549; Kellogg-Mackay-Cameron Co. v. William Schmidt Baking Co. (1902) 101 Ill. App. 209; In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449.

25. Date of attaching of lien as affecting dissolution.—After the filing of a petition in bankruptcy no creditor can gain an advantage over others by fastening any kind of a lien upon property of the bankrupt. Cox v. State Bank (C. C. 1903) 125 Fed. 654, 11 Am. Bankr. Rep. 112; In re Engle (D. C. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; Morgan v. Campbell (1874) 22 Wall. 381, 22 L. Ed. 796; Kinmouth v. Braeutigam (1902) 63 N. J. Eq. 103, 52 Atl. 226.

Certain classes of liens acquired within four months prior to the filing of the petition are expressly avoided by the statute upon the subsequent adjudication of the debtor, such as the lien of an execution and levy on personal property. Rothermel v. Moyer (1904) 24 Pa. Super. Ct. 325. And the lien acquired by an attachment. In re Federal Biscuit Co. (1914) 214 Fed. 221, 130 C. C. A. 635; Ernest Wolff Mfg. Co. v. Battreal Shoe Co. (Mo. App. 1915) 180 S. W. 396. And the lien of a distress warrant. In re D. H. Dougherty Co. (D. C. 1901) 109 Fed. 480, 6 Am. Bankr. Rep. 457; In re United Motor Chicago Co. (1915) 220 Fed. 772, 136 C. C. A. 378. And the statutory lien acquired by proceedings against a manufacturing corporation by a laborer in its employment. In

re Monroe Lumber Co. (D. C. 1910) 186 Fed. 252, 24 Am. Bankr. Rep. 371.

Where four months or more have intervened between the attaching of the lien and the institution of the bankruptcy proceedings, the lien is not annulled but preserved. In re Louisell Lumber Co. (1913) 209 Fed. 784, 126 C. C. A. 508. This is the case in regard to the lien of an attachment. Hurlbutt v. Brown (1903) 72 N. H. 235, 55 Atl. 1046; Tucker v. Denico (1905) 26 R. I. 560, 59 Atl. 920. And the lien of a garnishment. Citizens' Nat. Bank v. Dasher (Ga. App. 1915) 84 S. E. 482. And the lien acquired by the rendition and entry of a final judgment. In re Harrington (D. C. 1912) 200 Fed. 1010; Hillyer v. Le Roy (1904) 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919. And the lien obtained by levy of an execution on land. Virginia-Carolina Chemical Co. v. Rylee (1913) 139 Ga. 669, 78 S. E. 27. Or by the docketing of a judgment in the county where the debtor's land lies. In re Dunavant (D. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41. As applied to judgments, the provisions of this section relate only to the lien of the judgment, and do not render unenforceable against a surety a judgment rendered against a bankrupt principal within four months before the filing of the petition in bankruptcy. Pope v. Title Guaranty & Surety Co. (1913) 152 Wis. 611, 140 N. W. 348.

A deed takes effect from its delivery, if there are no restrictions upon the right of the grantee to record it, and it will give a title available as against a trustee in bankruptcy if delivered more than four months before the beginning of the bankruptcy proceedings, though not recorded until later. National Bank of Fredericksburg v. Conway (C. C. 1876) 14 N. B. R. 513, Fed. Cas. No. 10,037. The lien of an attachment is not dissolved by the bankruptcy of the debtor if the writ was issued more than four months before the filing of the petition in bankruptcy, though it was amended within that period to cure a formal defect. Harrington v. Fire Ass'n (C. C. 1877) Fed. Cas. No. 6,106.

An attachment made on February 8th will be dissolved by an adjudication in bankruptcy on a petition filed on June 8th following, and the time of day when the attachment was made or the petition filed is immaterial. In re Warner (D. C. 1906) 144 Fed. 987, 16 Am. Bankr. Rep. 519; Jones v. Stevens (1901) 94 Me. 582, 48 Atl. 170. The maxim that the law does not take account of fractions of a day has no application to transactions in bankruptcy, as the time thereof is made certain by record. Westbrook Mfg. Co. v. Grant (1872) 60 Me. 88, 11 Am. Rep. 181.

A creditor who brings suit against his debtor and secures the issue and levy of an attachment, more than four months before the filing of a petition in bankruptcy against the debtor, acquires a lien which will not be dissolved by the adjudication in bankruptcy, notwithstanding the fact that the judgment in the action, which enforces the lien, was rendered within the four-months period. Metcalf v. Barker (1902) 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; In re Crafts-Riordon Shoe Co. (D. C. 1910) 185 Fed. 931, 26 Am. Bankr. Rep. 449; In re United States Graphite Co. (D. C. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; In re Beaver Coal Co. (1902) 113 Fed. 889, 51 C. C. A. 519, 7 Am. Bankr. Rep. 542; In re Blair (D. C. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; Jackson v. Valley Tie & Lumber Co. (1908) 108 Va. 714, 62 S. E. 964; Pepperdine v. Bank of Seymour (1903) 100 Mo. App. 387, 73 S. W. 890; Wakeman v. Throckmorton (1902) 74 Conn. 616, 51 Atl. 554; Hurlbutt v. Brown (1903) 72 N. H. 235, 55 Atl. 1046; Kittredge v. Warren (1844) 14 N. H. 509; Rowe v. Page (1874) 54 N. H. 190, 13 N. B. R. 366; Hudson v. Adams (D. C. 1878) 18 N. B. R. 102, Fed. Cas. No. 6,832. CONTRA, see In re Johnson (D. C. 1901) 108 Fed. 373, 6 Am. Bankr. Rep. 202; Duffield v. Horton (N. Y. 1877) 10 Hun, 140, 16 N. B. R. 59; In re Cook (C. C. 1842) Fed. Cas. No. 3,152.

The equitable lien arising from a creditor's bill to set aside a fraudulent conveyance, having its date from the filing of the bill, and not from the date of the decree rendered in the suit, is not avoided by the bankruptcy proceedings, where the bill is filed more than four months prior to the petition in bankruptcy, though the decree is rendered within such four months. Metcalf v. Barker (1902) 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Doyle v. Heath (1900) 22 R. I. 213, 47 Atl. 213; Snyder v. Smith (1904) 185 Mass. 58, 69 N. E. 1089; Schoenthaler v. Rosskam (1903) 107 Ill. App. 427; Taylor v. Taylor (1900) 59 N. J. Eq. 86, 45 Atl. 440; Iselin v. Goldstein (1901) 35 Misc. Rep. 489, 71 N. Y. Supp. 1069; Ninth Nat. Bank v. Moses (1903) 39 Misc. Rep. 664, 80 N. Y. Supp. 617; In re O'Connor (D. C. 1899) 95 Fed. 943. Compare In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815. So, also, the title of a receiver appointed in proceedings supplementary to execution relates back to the date of the service of the order, and will be superior to that of the trustee in bankruptcy, if the order was served more than four months before the beginning of the bankruptcy proceedings, regardless of the fact that the receiver was appointed within that period. Arnold v. Greene Gold-Silver Co. (1910) 68 Misc. Rep. 449, 125 N. Y. Supp. 29; Wrede v. Clark (1909) 132 App. Div. 293, 117 N. Y. Supp. 5; Smith v. Meisenheimer (1898) 104 Ky. 753, 47 S. W. 1087. But see In re O'Connor (D. C. 1899) 95 Fed. 943.

Where the law of the state gives a lien to an award of arbitrators, it is valid against the trustee in bankruptcy if the award was made more than four months before the bankruptcy, though the judgment confirming it was obtained within that time. In re Koslowski (D. C. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 723. The lien of a chattel mortgage depends upon the date of its execution, and not upon the subsequent act of the mortgagee in taking possession of the goods. Thompson v. Fairbanks (1903) 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899. But see Bank of Leavenworth v. Hunt (1870) 11 Wall. 391, 20 L. Ed. 190. But the merely provisional or inchoate lien acquired by the service of garnishment process, which under the law of the state can be made effective only through the recovery of a judgment and a levy or demand thereunder, is not of a kind to be preserved in the bankruptcy proceedings where the judgment was given within the four months, irrespective of the time when the process was served. In re Lesser (D. C. 1901) 108 Fed. 201, 5 Am. Bankr. Rep. 326. But compare Albany & Northern Ry. Co. v. Dunlap Hardware Co. (1910) 8 Ga. App. 171, 68 S. E. 868.

Although the statute speaks of the dissolution of liens obtained through a suit or proceeding which was "begun" against a person within four months before his bankruptcy, this does not necessarily refer to the beginning of the suit or action itself, but to the beginning of that part or branch of the proceedings whose special object is to secure a lien on property. In re Higgins (D. C. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364. It is competent for a state to provide by law that the lien of a judgment, in a certain class of cases, shall relate back to the institution of the suit, and the bankruptcy law will preserve such lien. Voyles v. Parker (C. C. 1880) 4 Fed. 210. The revival of a judgment by amicable scire facias and confession, though within four months thereafter the debtor is adjudged bankrupt, is not in fraud of the bankruptcy law. Kemmerer v. Tool (1876) 81 Pa. 467, 12 N. B. R. 334. The lien obtained by the levy of an execution on property newly purchased or acquired by the debtor, within four months prior to the bankruptcy, will be dissolved by the adjudication, though the judgment was entered more than four months previously. In re Darwin (1902) 117 Fed. 407, 54 C. C. A. 581, 8 Am. Bankr. Rep. 703; In re Spacht (1900) 2 Nat. Bankr. News, 238. And so will the lien obtained on land in another county within the four-months period, by the transfer to that county of an older judgment. Mencke v. Rosenberg (1902) 202 Pa. 131, 51 Atl. 767, 90 Am. St. Rep. 618. So, although a judgment may have been standing for several years, yet if garnishment proceedings founded on it were begun within four months before the bankruptcy of the debtor, the lien thereby acquired will be dissolved. Armour Packing Co. v. Wynn (1904) 119 Ga. 683, 46 S. E. 865. And so of an attachment sued out within the prescribed period, no matter how long the original action may have been pending. In re Higgins (D. C. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364, disapproving In re De Lue (D. C. 1899) 91 Fed. 510, 1 Am. Bankr. Rep. 387. Where a creditor holding a note with warrant of attorney to confess judgment enters up judgment thereon and levies on the debtor's property, the latter being then insolvent, and within four months thereafter a petition in bankruptcy is filed by or against the debtor, the lien is dissolved, notwithstanding the fact that the note was given more than four months before and at a time when the debtor was solvent. In re Richards (1899) 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Rhoads (D. C. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380; In re Engle (D. C. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; Ferguson v. Greth (1900) 195 Pa. 272, 45 Atl. 735, 78 Am. St. Rep. 812.

26. Rights of bona fide purchasers.—An adjudication in bankruptcy does not affect the title acquired by a bona fide purchaser at a sale under a levy, judgment, attachment, or other lien, provided he bought without notice of the debtor's insolvency or of his intention to prefer a creditor or work a fraud upon the act, and without reasonable cause for inquiry into the circumstances in this respect. In re Alabama Coal & Coke Co. (D. C. 1913) 210 Fed. 940; Dreyer v. Kicklighter (D. C. 1916) 228 Fed. 744; In re Kenney (D. C. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; State Bank v. Munroe (1902) 109 Ill. App. 34; Jones v. Springer (1909) 15 N. Mex. 98, 103 Pac. 265. Where a bank took an assignment of certain accounts receivable from the bankrupt to secure a present loan, within four months prior to bankruptcy, in good faith and without notice or reasonable cause for inquiry, it was entitled to the benefit of its lien as against a subsequent attachment sought to be preserved for the benefit of the estate. In re Alabama Coal & Coke Co. (D. C. 1913) 210 Fed. 940.

The provision of this section saving the rights of bona fide purchasers is intended only for their benefit, and affords no protection to the creditor in the execution or attachment. In re Kaupisch Creamery Co. (D. C. 1901) 107 Fed. 93, 5 Am. Bankr. Rep. 790. Nor to one acting in concert or collusion with the creditor. In re Goldberg (D. C. 1903) 121 Fed. 578, 10 Am. Bankr. Rep. 97. Nor to the officer making the sale or who holds the proceeds thereof. Jones v. Stevens (1901) 94 Me. 582, 48 Atl. 170; In re Ken-

ney (D. C. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494.

Surrounding circumstances, leading an ordinarily prudent business man to conclude that execution debtor is insolvent, will deprive purchaser at execution sale of status of bona fide purchaser. Dreyer v. Kicklighter (D. C. 1916) 228 Fed. 744. A person is not to be considered a bona fide purchaser, who, in addition to knowledge of suspicious circumstances, is aware that he is purchasing a large and valuable amount of property at a grossly inadequate consideration. In re Goldberg (D. C. 1903) 121 Fed. 578, 10 Am. Bankr. Rep. 97. Where, a few days before an execution sale, one who became the purchaser was handed a copy of the debtor's assignment for the benefit of creditors, and the debtor was present at the sale and publicly announced that he was insolvent, and the assignee exhibited the assignment and forbade the sale, the purchaser had reasonable cause to believe that the sale would not stand, and he cannot hold his purchase against the trustee in bankruptcy of the debtor. Brown v. Case (1901) 180 Mass. 45, 61 N. E. 279. And the same rule has been applied against the purchaser at an execution sale who merely had heard rumors that the debtor had already been adjudged bankrupt, this being sufficient to put him upon inquiry. Wallace v. Camp (1901) 200 Pa. 220, 49 Atl. 942.

27. Rights of trustee as to property affected by liens.—Where the lien of an attachment, execution, or other writ is dissolved by the adjudication of the debtor as a bankrupt within four months, it is the right and duty of the trustee in bankruptcy to demand and recover the property affected from the possession of the officer holding it under the writ. In re Walsh Bros. (D. C. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Francis-Valentine Co. (C. C. A. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522; In re Fellerath (D. C. 1899) 95 Fed. 121; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co. (D. C. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Benedict (1902) 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Smith v. Godwin (1907) 145 N. C. 242, 58 S. E. 1089; Ansonia Brass & Copper Co. v. Pratt (N. Y. 1877) 10 Hun, 443, 16 N. B. R. 170. And the pendency of an action of replevin in a state court against the officer by a stranger claiming ownership of the property is no justification for his refusal to surrender it. In re Francis-Valentine Co. (C. C. A. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522. And the trustee has sufficient title to maintain trover against the officer, after demand and refusal, and is not required to apply first to the court from which the process issued for an order for its delivery to him. Cooley v. Cook (1878) 125 Mass. 406. And the same course may be pursued against one who holds attached property under a receipt to the sheriff or a forthcoming bond. Parks v. Sheldon (1870) 36 Conn. 466, 4 Am. Rep. 95; Towle v. Robinson (1844) 15 N. H. 408. Even if the property is in the possession of a receiver appointed by a state court, it should be surrendered to the trustee in bankruptcy, on his petition to the state court for an order to that effect. In re English (1904) 127 Fed. 940, 62 C. C. A. 572, 11 Am. Bankr. Rep. 674; Ballin v. Ferst (1874) 55 Ga. 546; Rodgers v. Forbes (1902) 23 Ohio Cir. Ct. R. 438. It is proper, but not necessary, for the trustee formally to move the state court for the discharge or vacating of the judgment or other lien in question. Thompson v. Ragan (1904) 117 Ky. 577, 78 S. W. 485; Gage v. Bates Machine Co. (1902) 71 N. H. 384, 52 Atl. 457.

After the trustee in bankruptcy has asserted, under the sanction of the court with the assent of a debtor to the bankrupt estate, the power to take legal possession of the debtor's stock which he had agreed to hold as security for the debt, it is too late for the creditors of the bankrupt under an agreement with such debtor thereafter made to raise the question whether the original agreement between the debtor and the bankrupt was ineffective to operate as a lien as to creditors for want of delivery. Merchants' Nat. Bank of the City of New York v. Sexton (1913) 33 Sup. Ct. 725, 228 U. S. 634, 57 L. Ed. 998, affirming decree In re Kessler (1911) 186 Fed. 127, 108 C. C. A. 239. A receiver or trustee in bankruptcy may retain property purchased conditionally and pay the balance due with the court's approval. In re Wegman Piano Co. (D. C. 1915) 221 Fed. 128.

If property has already been sold for the enforcement of a lien upon it, before the filing of a petition in bankruptcy, the bankruptcy proceedings will not affect the title acquired by a purchaser at such sale taking without notice and in good faith. In re Weitzel (D. C. 1911) 191 Fed. 463, 27 Am. Bankr. Rep. 370; In re Goldman (D. C. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100. Where an attachment lien has been nullified by the filing of a petition in bankruptcy, the trustee may recover the property, though it has been sold under the attachment after the filing of the petition. Gray v. Arnot (N. D. 1915) 154 N. W. 268. The officer holding the proceeds of a sale made under a lien which is dissolved by the proceedings in bankruptcy may be enjoined from paying over the money to the lien creditor, and may be compelled, by order of the court of bankruptcy, to surrender it to the trus-

tee. Clark v. Larremore (1903) 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, 9 Am. Bankr. Rep. 476; Bear v. Chase (1900) 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; In re Duguid (D. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Kenney (D. C. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Richards (D. C. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath (D. C. 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Franks (D. C. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; Pennington v. Lowenstein (D. C. 1868) 1 N. B. R. 570, Fed. Cas. No. 10,938; In re Benedict (1902) 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Schmilovitz v. Bernstein (1901) 22 R. I. 330, 47 Atl. 884; Kosches v. Libowitz (Tex. Civ. App. 1900) 56 S. W. 613. But if the money arising from the sale has been paid over to the lien creditor, it cannot be reclaimed from him by the trustee. For the statute does not apply to the case of a lien which has been satisfied and discharged by sale and the application of the proceeds to the debt before the filing of a petition in bankruptcy. Farrell v. W. B. Lockett & Co. (1905) 115 Tenn. 494, 91 S. W. 209; Levor v. Seiter (1902) 69 App. Div. 33, 74 N. Y. Supp. 499; Greene v. Montana Brewing Co. (1903) 28 Mont. 380, 72 Pac. 751; Davis v. Jewett Bros. (1903) 17 S. D. 410, 97 N. W. 16. Compare McCord v. McNeil (C. C. 1877) Fed. Cas. No. 8,714. If a sheriff levies an execution on property of the debtor and sells it, after the filing of a petition in bankruptcy (which is said to have the effect of a caveat and an injunction to all the world), he is liable to the trustee in bankruptcy for the proceeds of the sale, though he has paid them over to the creditor before receiving any notice of the bankruptcy. Miller v. O'Brien (C. C. 1871) 9 N. B. R. 26, Fed. Cas. No. 9,586; In re Grinnell (D. C. 1873) 9 N. B. R. 29, Fed. Cas. No. 5,830. And see Balms v. Hutton, 9 Bing. 471; Garland v. Carlisle, 10 Bing. 452.

The rule that the trustee is entitled to the possession of property covered by a lien which is dissolved by the adjudication in bankruptcy is subject to this limitation, that due recognition must be given to, and provision made for, other liens which are valid and unaffected by the bankruptcy and which affect the same property, for the trustee is only the representative of the general or unsecured creditors, and his right to the property is measured by the interest which they may have in it. In re Torchia (1911) 188 Fed. 207, 110 C. C. A. 248, 26 Am. Bankr. Rep. 579; Stewart v. Platt (1879) 101 U. S. 731, 25 L. Ed. 816; Houston Ice & Brewing Co. v. Fuller (1901) 26 Tex. Civ. App. 239, 63 S. W. 1048; McElvain v. Hardesty (1909) 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; In re Sink, 2 Nat. Bankr. News, 645. Expenses of operating vessels of bankrupt shipowner by trustee after adjudication held not chargeable to proceeds of vessels as against holders of maritime liens, where there were general funds of the estate. In re New England Transp. Co. (D. C. 1914) 220 Fed. 203. Where the legal title and the mortgagee's title vested in a trustee in bankruptcy there was no merger of the mortgage lien, as it was to the advantage of the trustee to keep the lien alive to defeat a junior mortgage. Fidelity & Deposit Co. of Maryland v. Albrecht (Tex. Civ. App. 1914) 171 S. W. 819.

28. Conveyance or surrender of property under order of court.—Where a claim to the possession of property of a bankrupt's estate, as against the trustee's right of possession, is based solely on the lien of an execution, attachment, or other writ or process, the lien of which is avoided by the adjudication in bankruptcy, the person or officer so in possession is not an adverse claimant, but holds as bailee for the trustee, and must deliver the property on a proper demand, and he may be required to do so by a summary order of the court of bankruptcy. Staunton v. Wooden (1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736. So the court may receive from one indebted to the bankrupt the amount of the debt, although it was garnished within four months before the adjudication in bankruptcy, and judgment entered therefor against such debtor in a state court, and may make such order as may be necessary to protect the garnishee. In re McCartney (D. C. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 367.

29. Subrogation of trustee to rights of lienholder.—The word "prevented," as used in clause "b" of this section, providing that when a creditor is prevented from enforcing his lien by his debtor, who afterwards becomes a bankrupt, the trustee shall be subrogated to the creditor's rights, means "prevented" by bankruptcy proceedings. In re Schweitzer (D. C. 1914) 217 Fed. 495.

The preservation of a lien and subrogation of the trustee are proper in cases where, if this course were not pursued, the property affected would not come into the hands of the trustee at all, but would be claimed by the holder of a valid and undissolved lien, with a possible loss to the estate of its value over and above the amount of the incumbrance. Thompson v. Fairbanks (1903) 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899. And see Merchants' Nat. Bank v. Sexton (1913) 228 U. S. 634, 33 Sup. Ct. 725, 57 L. Ed. 998, 30 Am. Bankr. Rep. 278. These provisions of the statute were only designed to preserve some interest acquired by virtue

of the invalid or dissolvable lien which would not otherwise pass to the trustee in bankruptcy. Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803. To construe them as referring only to liens on property which, if such liens were annulled, would vest in the trustee, would restrict their application to a contingency already provided for in the statute. First Nat. Bank v. Staake (1906) 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639.

A lien acquired by an attaching creditor on real property which, but for such attachment, would have passed to a subsequent purchaser under an unrecorded deed, should be preserved by order of the court of bankruptcy for the benefit of the bankrupt's estate, although it would be liable to dissolution as having been acquired within four months before the bankruptcy. Receivers of Virginia Iron, Coal & Coke Co. v. Staake (1904) 133 Fed. 717, 66 C. C. A. 547, 13 Am. Bankr. Rep. 281; First Nat. Bank v. Staake (1906) 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639; In re Baird (D. C. 1904) 126 Fed. 845, 11 Am. Bankr. Rep. 435. Where the debtor has sold personal property, but under circumstances such as to make the sale void as against attaching creditors, and an attachment has been levied within four months before the bankruptcy, its lien will not be dissolved, but will be preserved for the benefit of the estate. Love v. Hill (1908) 21 Okl. 347, 96 Pac. 623. Where a chattel mortgage given by the insolvent is void as against judgment creditors because not filed as required by law, but would be valid as to general creditors and would, as to them, entitle the mortgagee to the possession of the property, judgment liens which have attached (though within four months before the bankruptcy) will be preserved by subrogating the trustee to the rights of the judgment creditors. In re Beede (D. C. 1905) 138 Fed. 441, 14 Am. Bankr. Rep. 697; Dunn Salmon Co. v. Pillmore (1907) 55 Misc. Rep. 546, 106 N. Y. Supp. 88. And so as to the liens of execution creditors on property held by the insolvent debtor under a contract of conditional sale. Rock Island Plow Co. v. Reardon (1912) 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, 27 Am. Bankr. Rep. 492. And on the same principle, any advantage which a creditor may have gained by taking the proper steps to subject to his claim property apparently belonging to the bankrupt or standing in his name, but claimed by a third party, should be preserved and transferred to the trustee in bankruptcy. In re Hammond (D. C. 1899) 98 Fed. 845; Patten v. Francis D. Carley & Co. (1902) 69 App. Div. 423, 74 N. Y. Supp. 993; In re Merrow (D. C. 1904) 131 Fed. 993, 12 Am. Bankr. Rep. 615. The trustee in bankruptcy, whose bankrupts had assigned to their creditors to secure loans certain notes held by the bankrupts secured by the stock in trade and accounts, is entitled under the rule of subrogation and under this section to participate in the collaterals to the extent that the funds of the bankrupt estate have been used to discharge a secured debt and acquire the collateral notes, including a deposit to the bankrupt's credit which the secured creditor set off against the debt. Merchants' Nat. Bank of the City of New York v. Sexton (1913) 33 Sup. Ct. 725, 228 U. S. 634, 57 L. Ed. 998, affirming decree In re Kessler (1911) 186 Fed. 127, 108 C. C. A. 239. A referee held to have power under section 67f of the bankruptcy act to order an attachment lien on a bankrupt's homestead, valid under the state law, preserved for the benefit of the estate. In re Malone's Estate (D. C. 1915) 228 Fed. 566.

This authority and discretion on the part of the court of bankruptcy with reference to the preservation of liens otherwise voidable, when an advantage is thereby to be gained for the benefit of the general estate, is not confined to liens which would be void as creating a preference. In re Baird (D. C. 1904) 126 Fed. 845, 11 Am. Bankr. Rep. 435. It extends to all classes of liens, including liens of judgments. In re Beede (D. C. 1905) 138 Fed. 441, 14 Am. Bankr. Rep. 697; Wills v. E. K. Wood Lumber & Mill Co. (Cal. App. 1915) 154 Pac. 613. And to liens of executions. Reardon v. Rock Island Plow Co. (1909) 168 Fed. 654, 94 C. C. A. 118, 22 Am. Bankr. Rep. 26; In re Schweitzer (D. C. 1914) 217 Fed. 495. The title or lien acquired by an assignee under a general assignment, valid according to the law of the state where made, if it would be to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but, if the court of bankruptcy will so order, may be retained by the trustee for the benefit of the creditors. In re Fish Bros. Wagon Co. (C. C. A. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149. So, the trustee has such an interest in mortgaged land of the bankrupt as will entitle him to pay the mortgage debt and have the mortgage assigned to himself, although it is not in process of foreclosure, where such a course will benefit the estate by enabling him to sell the property to better advantage. In re Bacon (D. C. 1904) 132 Fed. 157, 12 Am. Bankr. Rep. 730. But the statute does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun. Taylor v. Taylor (1900) 59 N. J. Eq. 86, 45 Atl. 440. Nor will the preservation

of the lien and the subrogation of the trustee be ordered merely to enable him to defeat another lien on the same property which is valid and which possesses at least equal claims to the consideration of a court of equity. In re Sentenne & Green Co. (D. C. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; In re Moore (D. C. 1901) 107 Fed. 234, 6 Am. Bankr. Rep. 175; Thompson v. Fairbanks (1905) 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437. And in any event, if the substitution of the trustee is desired, proper steps must be taken to that end before the lien is discharged. In re Walsh Bros. (D. C. 1912) 195 Fed. 576, 28 Am. Bankr. Rep. 243. And where a sheriff is holding property of the bankrupt under a levy, voidable because made within the four months, and the trustee in bankruptcy takes possession of the property, the lien of the levy is wholly discharged, and the trustee cannot thereafter assert any rights under it as against an adverse claimant. Davis v. Crompton (1907) 158 Fed. 785, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53.

30. Rights and remedies of creditor on dissolution of lien.—If a lien obtained through legal proceedings is dissolved by the adjudication of the debtor in bankruptcy within four months thereafter, it is extinguished for any and all purposes, and cannot afterwards be made effective, even though the bankrupt fails to obtain his discharge. St. Cyr v. Daignault (D. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 638. The only remedy of the creditor in such a case is to prove his claim as a general creditor, and as such to share in the distribution of the estate. In re Brand (D. C. 1867) 3 N. B. R. 324, Fed. Cas. No. 1,809; Cole v. Duncan (1871) 58 Ill. 176. He should apply to the court of bankruptcy for an application in his favor of the proceeds of the sale of the property by the trustee in bankruptcy if he has any superior claim on them. D. C. Wise Coal Co. v. Columbia Zinc & Lead Co. (1911) 157 Mo. App. 315, 138 S. W. 67. If he has paid off other liens or charges on the property affected by his lien, in order to preserve it, he is entitled to be repaid the amount thereof out of the general funds of the estate, though his own lien is dissolved by the bankruptcy proceedings, since his discharge of liens which otherwise would have bound the property in the hands of the trustee has pro tanto increased the assets of the estate. In re Baker (D. C. 1875) Fed. Cas. No. 762. A creditor in this situation is not required to execute an assignment to the trustee of his lien, as a condition precedent to his sharing in the distribution of the estate (unless its preservation for the benefit of the estate is ordered by the court), where he has refrained from enforcing his lien in obedience to an injunction from the bankruptcy court. In re Carrier (D. C. 1892) 51 Fed. 900.

The dissolution of a lien on particular property, as having been obtained within the four-months period, does not enlarge other liens on the same property or affect their rank and priority. In re Nelson (D. C. 1877) Fed. Cas. No. 10,100.

Where an attachment upon property of the bankrupt for its full value is dissolved by the adjudication, a judgment creditor who has made a levy of execution subsequent to such attachment is not entitled to priority of payment. All the right which the judgment creditor acquired was by a levy on property already incumbered to its full value, and such a levy does not give him security. In re Klancke (D. C. 1870) Fed. Cas. No. 7,864; In re Steele (D. C. 1877) Fed. Cas. No. 13,345.

31. Costs and fees under dissolved lien.—Where a lien acquired by attachment, execution, or other process is dissolved by an adjudication in bankruptcy, the sheriff or other officer holding the property under his writ is entitled to his fees for services rendered up to the filing of the petition in bankruptcy. Platt v. Stewart (D. C. 1875) 11 N. B. R. 191, Fed. Cas. No. 11,221; In re Welch (D. C. 1871) Fed. Cas. No. 17,367. But he has no lien on the property itself for such fees or his costs, unless such a lien is expressly given by the state statute. If it is, he must be paid his fees and expenses before being ordered to deliver up the property to the trustee in bankruptcy. Wilkinson v. Raymond (1903) 80 App. Div. 378, 81 N. Y. Supp. 82; In re Housberger (D. C. 1868) 2 N. B. R. 92, Fed. Cas. No. 6,734. His fees are taxable in the court from which the writ issued, and when there taxed and allowed, may be made the basis of a claim in the court of bankruptcy, but the property must be surrendered forthwith. In re Francis-Valentine Co. (1899) 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; In re Stevens (D. C. 1870) 5 N. B. R. 298, Fed. Cas. No. 13,392. On the other hand, if he applies first to the court of bankruptcy for an allowance of his fees, and is dissatisfied with its decision, his only remedy is by appeal, and he cannot recur to the state court. Johnson v. Woodend (1901) 44 Misc. Rep. 524, 90 N. Y. Supp. 43.

After the adjudication in bankruptcy the officer can make no fees or charges, except it may be for the preservation of the property as a temporary custodian. At that time he becomes a simple bailee of the property, holding the same for the use of the trustee to be subsequently appointed, and is not entitled to make additional costs in his official character. In re Preston (D. C. 1873) 6 N. B. R. 545, Fed. Cas. No. 11,394; Barker v. McLeod (1879) 14 Nev. 148.

As for the creditor whose lien is dis-

solved by the bankruptcy proceedings, his claim for costs and disbursements incurred by him and for attorneys' fees is a provable debt in bankruptcy, but is not entitled to priority of payment, and is not a lien on the property affected or on the proceeds of the trustee's sale of it. In re Allen (D. C. 1899) 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Young (D. C. 1899) 96 Fed. 606, 2 Am. Bankr. Rep. 673; Hanson v. Stephens (1902) 116 Ga. 722, 42 S. E. 1028; In re Davis (D. C. 1869) Fed. Cas. No. 3,616; In re Preston (D. C. 1873) 6 N. B. R. 545, Fed. Cas. No. 11,394; In re Ward (D. C. 1874) 9 N. B. R. 349, Fed. Cas. No. 17,145. But if a lien creditor successfully prosecutes his claim to priority of payment, his attorney is entitled to a fee, which becomes a lien on the fund so secured for his client, and may be fixed and enforced by the court of bankruptcy. In re Rude (D. C. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319. But he may claim such a lien if it is expressly given by the law of the state. Gardner v. Cook (D. C. 1872) 7 N. B. R. 346, Fed. Cas. No. 5,226. A more liberal rule is applied in cases where the lien is ordered to be preserved for the benefit of the estate. Here the court may direct the payment out of the general funds, not only of the sheriff's costs and the disbursements of the lien creditor, but also a reasonable compensation to attorneys for professional services previously rendered. Receivers of Virginia Iron, Coal & Coke Co. v. Staake (1904) 133 Fed. 717, 66 C. C. A. 547, 13 Am. Bankr. Rep. 281; In re Jenks (D. C. 1877) 15 N. B. R. 301, Fed. Cas. No. 7,276; In re Ward (D. C. 1874) 9 N. B. R. 349, Fed. Cas. 17,145; Ex parte Holmes (D. C. 1876) 14 N. B. R. 493, Fed. Cas. No. 6,631.

Where a third person having possession of goods of the bankrupt, refuses to surrender them to the trustee on the latter's demand, on the mistaken theory that he has a lien on them for storage, though this claim is rejected, he will be entitled to suitable compensation for the storage and care of the goods from the time of the commencement of the proceedings in bankruptcy up to the time of the demand and refusal. In re Kelly (D. C. 1883) 18 Fed. 528.

II. PROCEEDINGS TO ESTABLISH OR ENFORCE LIENS

32. Remedies in general.—An adjudication of bankruptcy brings the bankrupt's assets into the custody of the court of bankruptcy for administration, and a creditor of the bankrupt, having a lien on such property at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim in the character of a secured creditor as the bankruptcy law directs. In re Falls City Shirt Mfg. Co. (D. C. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Rude, 2 Nat. Bankr. News, 498; McFarland Carriage Co. v. Solanes (C. C. 1901) 108 Fed. 532, 6 Am. Bankr. Rep. 221. The provision of the bankruptcy act, that valid liens shall not be affected, relates only to the obligation of the contract, and not to the remedies for its enforcement, which may be changed without impairing the contract. In re Hasie (D. C. 1913) 206 Fed. 789, 30 Am. Bankr. Rep. 83.

Where the rules of a stock exchange give to members of the exchange a lien for debts due them from a defaulting member upon the proceeds of the sale of his seat, by proving their claims before a committee while the fund remains in their hands, but do not expressly assume to make this remedy exclusive, a court of bankruptcy, when equity requires it, may properly recognize and enforce such lien after the fund has come under its control. Hutchinson v. Otis (1902) 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382, affirmed Hutchinson v. Otis, Wilcox & Co. (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

For the purpose of asserting his lien, a secured creditor or pledgee of property is always entitled to intervene in the bankruptcy proceedings against his debtor. Fisher v. Cushman (1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; Ward v. First Nat. Bank (C. C. A. 1913) 202 Fed. 609, 29 Am. Bankr. Rep. 312. And even where one has waived or relinquished his lien, through oversight or a mistake of fact not operating to the prejudice of any one else, he may come into the court of bankruptcy and ask to be restored to his lien, which relief will be granted if he shows himself entitled to it. Hutchinson v. Otis (1902) 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382, affirmed Hutchinson v. Otis, Wilcox & Co. (1903) 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

In any petition for the recognition and enforcement of a lien, the facts should be clearly and fully set forth, and the appropriate measure of relief asked for. Teter v. Viquesney (1910) 179 Fed. 655, 103 C. C. A. 213, 24 Am. Bankr. Rep. 242; In re Gosch (D. C. 1903) 121 Fed. 604, 9 Am. Bankr. Rep. 613; In re George W. Shiebler & Co. (D. C. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777. Such petition may be opposed by the trustee in bankruptcy without formal pleadings. In re Mulligan (D. C. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8. Where the facts rest in parol, they may be established by the evidence of the parties to the transaction, if credible and uncontradicted, without further testimony. Union Trust Co. v. Bulke-

ley (1907) 150 Fed. 510, 80 C. C. A. 328, 18 Am. Bankr. Rep. 35. If the validity of the lien is contested on the ground that the debtor was insolvent at the time it was created, the burden of proving such insolvency is on the party asserting it. Jackson v. Valley Tie & Lumber Co. (1908) 108 Va. 714, 62 S. E. 964.

33. **Jurisdiction of court of bankruptcy.**—The court of bankruptcy has jurisdiction to inquire into and determine the validity, extent, and priority of liens asserted upon any property of the bankrupt which has come into its actual or constructive possession, in a summary manner, or at any rate without the formalities attending a plenary suit, on the petition of the trustee desiring to contest the alleged lien or to settle any question in regard to it. In re Kligerman (D. C. 1915) 219 Fed. 758; Courtney v. Fidelity Trust Co. (1914) 219 Fed. 57, 134 C. C. A. 595; Ex parte Christy (1845) 3 How. 292, 11 L. Ed. 603; In re Eppstein (1907) 156 Fed. 42, 84 C. C. A. 208, 19 Am. Bankr. Rep. 89; In re Hobbs & Co. (D. C. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544; In re Lemmon & Gale Co. (1901) 112 Fed. 296, 50 C. C. A. 247, 7 Am. Bankr. Rep. 291; In re Kellogg (D. C. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623; In re Ellis Bros. Printing Co. (D. C. 1907) 156 Fed. 430, 19 Am. Bankr. Rep. 472; Wakeman v. Throckmorton (1902) 74 Conn. 616, 51 Atl. 554; Jungbecker v. Huber (1907) 101 Tex. 148, 105 S. W. 487; In re Logan (D. C. 1912) 196 Fed. 678, 28 Am. Bankr. Rep. 543; Bear Gulch Placer Mining Co. v. Walsh (D. C. 1912) 198 Fed. 351, 28 Am. Bankr. Rep. 724; In re Hooven-Owens-Rentschler Co. (C. C. A. 1912) 195 Fed. 424, 28 Am. Bankr. Rep. 135. Or on the petition of the lien claimant, without regard to the possession of the property, if the latter voluntarily comes into court asserting a lien on the property and seeking to have it established, protected, or enforced as against the trustee. In re MacDougall (D. C. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; In re Platteville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244; Reeve v. Kernan (N. J. 1914) 90 Atl. 285. But if the property is in the possession of the claimant (as, for instance, a chattel mortgagee) his claims upon it cannot be determined in a summary proceeding at the instance of the trustee, unless with the consent of the lienor. In re Buntrock Clothing Co. (D. C. 1899) 92 Fed. 886, 1 Am. Bankr. Rep. 454; Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244: In re L. B. Pickens & Bro. (D. C. 1911) 184 Fed. 954, 26 Am. Bankr. Rep. 6; In re Munro (D. C. 1912) 195 Fed. 817, 28 Am. Bankr. Rep. 369. A chattel mortgagee, having failed to object to certain preliminary proceedings in the bankruptcy court, by which it acquired jurisdiction of the property, sold the same, and obtained the proceeds, held not entitled thereafter to object that the bankruptcy court had no jurisdiction to determine the validity of its lien. T. E. Wells & Co. v. Sharp (1913) 208 Fed. 393, 125 C. C. A. 609, affirming decree In re Plymouth Elevator Co. (D. C. 1911) 191 Fed. 633. And where the question to be determined is a matter in controversy between third persons, the test of jurisdiction to hear and decide it is the necessity of so doing in order to administer the estate of the bankrupt. In re Hobbs & Co. (D. C. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544; In re Graves (D. C. 1908) 163 Fed. 358, 20 Am. Bankr. Rep. 818; Spears v. Frenchton & B. R. Co. (1914) 213 Fed. 784, 130 C. C. A. 442; In re Traunstein (D. C. 1915) 225 Fed. 317. A court of bankruptcy being vested with exclusive jurisdiction to administer estates of insolvents when such jurisdiction is properly invoked cannot refuse to exercise it by determining the validity of indebtedness created by a state receiver for a bankrupt. In re Benwood Brewing Co. (D. C. 1913) 202 Fed. 326.

Where a fund is in an equity court, and an issue is made as to its ownership, between a surety company asserting a lien against it and a trustee in bankruptcy, the court will adjudicate the issue with regard to the bankruptcy act and the rights of the respective parties under it, and to that end protect the estate of the bankrupt. Lyttle v. National Surety Co. (1915) 43 App. D. C. 136.

The court of bankruptcy will not undertake to determine or adjust liens upon property of the bankrupt, unless it appears that the trustee has at least a probable interest in it for the general creditors. In re Gibbs (D. C. 1901) 109 Fed. 627, 6 Am. Bankr. Rep. 485. But compare Chauncey v. Dyke Bros. (1902) 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444.

34. **Jurisdiction of state courts.**—The jurisdiction of a state court over a proceeding to establish and enforce a valid lien on property is not taken away by the mere fact of the intervening bankruptcy of the debtor; but unless its hand is stayed by the order of the court of bankruptcy, or the parties have placed themselves in a position where they can no longer invoke its jurisdiction, it may proceed, without regard to the bankruptcy proceedings, to render such judgment as may be appropriate in the case. Hobbs v. Head & Dowst Co. (1911) 184 Fed. 409, 106 C. C. A. 519, 26 Am. Bankr. Rep. 63;

Frazier v. Southern Loan & Trust Co. (1900) 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 588; In re Maaget (D. C. 1909) 173 Fed. 232, 23 Am. Bankr. Rep. 14; In re Platteville Foundry & Machine Co. (D. C. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Major (D. C. 1877) Fed. Cas. No. 8,981; Kimberling v. Hartly (C. C. 1880) 1 Fed. 571; Thames v. Miller (C. C. 1873) Fed. Cas. No. 13,860; Mattocks v. Farrington (D. C. 1879) Fed. Cas. No. 9,298; Kritzer v. Tracy Engineering Co. (1911) 16 Cal. App. 287, 116 Pac. 700; Mass v. Kuhn (1909) 130 App. Div. 68, 114 N. Y. Supp. 444; Murphey v. Brown (1909) 12 Ariz. 268, 100 Pac. 801; Linthicum v. Fenley (Ky. 1875) 11 Bush, 131; Vance v. Lane's Trustee (1904) 82 S. W. 297, 26 Ky. Law Rep. 619; Reed v. Equitable Trust Co. (1902) 115 Ga. 780, 42 S. E. 102; Dyson v. Harper (1875) 54 Ga. 282; South End Imp. Co. v. Harden (N. J. Eq. 1902) 52 Atl. 1127; Douglas v. St. Louis Zinc Co. (1875) 56 Mo. 388; Davis v. Lumpkin (1879) 57 Miss. 506; Bradley v. United Wireless Telegraph Co. (1911) 79 N. J. Eq. 458, 81 Atl. 1107, affirmed (1914) 83 N. J. Eq. 688, 93 Atl. 1084. Compare Goodnough Mercantile Co. v. Galloway (1906) 48 Or. 239, 84 Pac. 1049; Clifton v. Foster (1869) 103 Mass. 233, 4 Am. Rep. 539.

Bankruptcy proceedings against a corporation do not stand in the way of a resort to a method prescribed by Rev. Laws Minn. 1905, §§ 3184–3190, of enforcing the liability of a stockholder for corporate debts. Selig v. Hamilton (1914) 34 S. Ct. 926, 234 U. S. 652, 58 L. Ed. 1518, affirming judgment Hamilton v. Selig (D. C. 1912) 195 Fed. 153.

A chattel mortgagee, notwithstanding the mortgagor's bankruptcy, may sue a sheriff levying on the property without complying with Civ. Code Cal. §§ 2968, 2969, and recover the damages fixed by section 3336. Lackenbach v. Finn (1915) 147 P. 471, 26 Cal. App. 482.

A judgment so rendered by a state court will be conclusive and binding on the trustee in bankruptcy, if he was heard in the case or had an opportunity to intervene. In re Van Alstyne (D. C. 1900) 100 Fed. 929, 4 Am. Bankr. Rep. 42; Frazier v. Southern Loan & Trust Co. (1900) 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710; Jackson v. Valley Tie & Lumber Co. (1908) 108 Va. 714, 62 S. E. 964; O'Reilly v. Pietri (La. 1914) 64 South. 922. Where the original contractor is adjudged a bankrupt during the construction of the building, his trustees should be made a party defendant in actions by subcontractors or materialmen, and the judgment taken against him should be made the basis of the liens claimed against the property. Eberle v. Drennan (Okl. 1913) 136 P. 162. Failure to take proper steps to secure a hearing on the merits in the highest state court of the exceptions to a judgment enforcing a mechanics' lien against a bankrupt's estate is not ground for going behind the state court's judgment at the instance of the trustee in bankruptcy to defeat the lien, where the failure to get the exceptions considered was due solely to the conduct of those then representing the estate. Hobbs v. Head & Dowst Co. (1914) 34 S. Ct. 253, 231 U. S. 692, 58 L. Ed. 440, affirming decrees (1911) 184 Fed. 409, 106 C. C. A. 519, and (1911) 185 Fed. 1006, 107 C. C. A. 663. Where a purchaser of land from an assignee in bankruptcy is put in possession, and is made a party to subsequent foreclosure proceedings in a state court which has jurisdiction of the parties and of the foreclosure of liens, he cannot maintain ejectment against one who purchases the land on such proceedings, and is put in possession, on the ground that the state court had no jurisdiction by reason of the bankruptcy proceedings, but the error, if any, can be corrected by appeal from the decree in foreclosure only. Adams v. Conner (1890) 10 S. Ct. 304, 133 U. S. 296, 33 L. Ed. 623.

A judgment so rendered by a state court cannot be reviewed, reversed, or modified by the court of bankruptcy. In re Eash (D. C. 1907) 157 Fed. 996, 19 Am. Bankr. Rep. 738. But see D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. (1907) 123 Mo. App. 249, 100 S. W. 680, as to a judgment enforcing a lien dissolved by the adjudication in bankruptcy.

The jurisdiction of a state court to establish and enforce a lien is not taken away by the fact that the lien in question is one which would be voidable under the bankruptcy act at the instance of the trustee in bankruptcy, if he does not seek to annul it or assert any right to the property in controversy. Rochester Lumber Co. v. Locke (1903) 72 N. H. 22, 54 Atl. 705. And see Davis v. Planters' Trust Co. (D. C. 1912) 196 Fed. 970, 28 Am. Bankr. Rep. 495. A garnishee against whom judgment has been entered has no standing, after both the plaintiff and the defendant in the suit have been adjudicated bankrupts, to move the court to dissolve the garnishment and strike off the judgment, as only the trustee in bankruptcy of the defendant can take such action. Lamorelle v. Nass (1906) 30 Pa. Super. Ct. 190. But see Armour Packing Co. v. Wynn (1904) 119 Ga. 683, 46 S. E. 865.

Jurisdiction of state courts to foreclose vendor's lien under Act La. No. 63 of 1890, on agricultural products in hands of a third person, was lost on dissolution of attachment under subdivision "f" of this section, where bankruptcy proceedings were begun within four months of the attachment. Lehman, Stern & Co. v. S. Gumbel & Co. (1915) 35 S. Ct. 307, 236 U. S. 448, 59

L. Ed. 666, affirming judgment Same v. E. Martin & Co. (1913) 61 So. 212, 132 La. 231.

A creditor will not be enjoined from prosecuting a pending suit to enforce a lien, where this would result in injury to other lien claimants. In re Grissler (1905) 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508. Where prior to bankruptcy proceedings the state court had foreclosed loggers' liens and adjudged the proceeds of the sale of the logs to the lien claimants, the entry of a formal judgment would not be enjoined, nor would the fund be transferred to the bankruptcy court for distribution among the lien claimants. In re Bach (D. C. 1914) 212 Fed. 575. A state court will not grant an injunction, at the instance of a general creditor of an insolvent debtor, to tie up the assets of the debtor, which have come into the hands of another creditor by execution on the latter's judgment, until the former creditor can institute bankruptcy proceedings against the debtor. Vietor v. Lewis (1898) 24 Misc. Rep. 515, 53 N. Y. Supp. 944. Again, if the court of bankruptcy has assumed jurisdiction of a controversy respecting an alleged lien, the state court will naturally not attempt to interfere with the full exercise of that jurisdiction. Ball v. Walker (1885) 26 W. Va. 741. And again, if the lien creditor has made himself a party to the proceedings in bankruptcy, he is subject to the jurisdiction of the court of bankruptcy and must work out his rights in that forum alone. Francisco v. Shelton (1889) 85 Va. 779, 8 S. E. 789; Reed v. Bullington (1873) 49 Miss. 223.

35. Conflicting jurisdiction of federal and state courts.—A court of equity may decree an equitable lien on a bankrupt's property, though the fund should be administered by the bankruptcy court. Robinson v. Tischler (Fla. 1915) 67 So. 565. A state court acquired jurisdiction to foreclose a mortgage by the filing of the suit and the granting of an order for executory process before the filing of petitions in bankruptcy, though the land was not seized until after the filing of the petition. McLoughlin v. Knop (D. C. 1913) 214 Fed. 260. The state courts have concurrent jurisdiction to sell the property of a bankrupt for the purpose of foreclosing a mortgage, and, where their jurisdiction has attached prior to bankruptcy, it should not be disturbed. McLoughlin v. Knop (D. C. 1913) 214 Fed. 260.

Property in the possession of a bankrupt's trustee cannot be taken on replevin without the consent of the bankruptcy court. In re Brockton Ideal Shoe Co. (D. C. 1912) 212 Fed. 764. An order directing receivers to appear in a bankruptcy proceeding and oppose the adjudication of defendant held not a surrender by the court of its jurisdiction over the property to the bankruptcy court. Blair v. Brailey (1915) 221 Fed. 1, 136 C. C. A. 524, certiorari denied (1915) 35 S. Ct. 938, 238 U. S. 634, 59 L. Ed. 1499. Issuance of an order authorizing a state receiver to apply to the bankruptcy court for restoration of possession of land surrendered to a receiver of the bankruptcy court held not error. Luxury Fruit Co. v. Harris (Ga. 1914) 83 S. E. 1093, 142 Ga. 866. Application of state court receiver for possession of property voluntarily surrendered to receiver in bankruptcy, pursuant to order of the superior court, reversed by the supreme court, held to be denied. Wright v. Harris (D. C. 1915) 221 Fed. 736.

The act of a bankrupt in voluntarily dismissing a cross-action in insolvency proceedings, under which a receiver had taken possession of land, held not to deprive the state court of its power to restore the status, so far as possession of the land was concerned. Luxury Fruit Co. v. Harris (1914) 83 S. E. 1093, 142 Ga. 866.

Attachment by writ of garnishment does not place the possession of the property in the court or the one who has obtained the writ, and the attachment does not create any lien in favor of attaching creditors which is recognized by the bankruptcy law; and attaching creditors must assert their rights against the debtor in the bankruptcy court. Lehman, Stern & Co. v. E. Martin & Co. (1913) 61 So. 212, 132 La. 231.

36. Permission of bankruptcy court to sue in state court.—A creditor holding a valid lien on property of a bankrupt, which is not dissolved by the adjudication in bankruptcy, is entitled to perfect his title and enforce his rights as though no proceeding in bankruptcy had been commenced, and it is not necessary that he should first apply to the court of bankruptcy for leave to do so. Eyster v. Gaff (1875) 91 U. S. 521, 23 L. Ed. 403; Jerome v. McCarter (1876) 94 U. S. 734, 24 L. Ed. 136; In re Mertens (1906) 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362. CONTRA, In re Emslie (C. C. A. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126. A state court has no jurisdiction to foreclose a mortgage after bankruptcy has intervened without leave of the bankruptcy court and making the trustee a party. McLoughlin v. Knop (D. C. 1913) 214 Fed. 260. A court of bankruptcy may, in the exercise of its discretion, grant permission to lien claimants of the bankrupt to sue in state courts to enforce their liens, and it may modify its order permitting suits in the state courts, provided that, in so doing, it does not deprive the claimants of any right to which they may be entitled in the bankruptcy proceedings. Virginia Iron, Coal & Coke Co. v. Olcott (1912) 197 Fed. 730, 117 C. C. A. 124, 28 Am.

Bankr. Rep. 321. If the property in question is in the custody of the court of bankruptcy, no one can proceed in a state court for the purpose of enforcing a lien on it, unless with the permission of the bankruptcy court. Owen v. Potter (1898) 115 Mich. 556, 73 N. W. 977.

37. **Restraining proceedings in state courts.**—An adjudication of bankruptcy draws the property and assets of the bankrupt within the exclusive jurisdiction of the court of bankruptcy for the purposes of administration and distribution, and it may defend that jurisdiction by all appropriate means. In re Lines (D. C. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; In re Vastbinder (D. C. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148.

The court of bankruptcy has jurisdiction to assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, and to ascertain and settle the amount of such liens, and make provision for the liquidation and settlement thereof; and as incidental to this, it has ample power to restrain a claimant of such lien from proceeding elsewhere to enforce his lien. In re Clark (C. C. 1872) Fed. Cas. No. 2,801.

If any creditor brings an action in a state court to establish or enforce a lien on any property of the bankrupt, at least without the permission of the bankruptcy court first obtained, it is an unwarrantable interference with its jurisdiction and control over the property, and the creditor will be enjoined from the further prosecution of his action. In re Emslie (1900) 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126; Beall v. Walker (1885) 26 W. Va. 741; In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; In re Roger Brown & Co. (C. C. A. 1912) 196 Fed. 758, 28 Am. Bankr. Rep. 336; In re Tomlinson (D. C. 1912) 193 Fed. 101, 27 Am. Bankr. Rep. 780; In re Trayna & Cohn (C. C. A. 1912) 195 Fed. 486, 27 Am. Bankr. Rep. 594. And it is generally proper so to enjoin the secured creditor when the value of the property exceeds the amount secured by the mortgage or other lien, or where the validity or amount of the lien is disputed, or there is danger that the property may be sacrificed, or where the course taken by the secured creditor would be prejudicial to the interests of the general body of creditors. In re San Gabriel Sanatorium Co. (C. C. A. 1900) 102 Fed. 310, 4 Am. Bankr. Rep. 197; In re Pittelkow (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Snedaker (Utah) 3 N. B. R. 629; In re Iron Mountain Co. (C. C. 1872) 4 N. B. R. 645, Fed. Cas. 7,065; The Skylark (D. C. 1869) Fed. Cas. No. 12,929; McLean v. Lafayette Bank (C. C. 1843) Fed. Cas. No. 8,885; Platt v. Dickenson (D. C. 1878) Fed. Cas. No. 11,216a; In re Kerosene Oil Co. (D. C. 1868) 2 N. B. R. 528, Fed. Cas. No. 7,725; In re Hanna (D. C. 1871) 4 N. B. R. 411, Fed. Cas. No. 6,026; Getz v. First Nat. Bank (C. C. 1878) Fed. Cas. No. 5,374; In re Kerosene Oil Co. (C. C. 1869) 3 N. B. R. 125, Fed. Cas. No. 7,726; Foster v. Ames (C. C. 1869) 2 N. B. R. 455, Fed. Cas. No. 4,965; In re Brinkman (D. C.) 7 N. B. R. 421, Fed. Cas. No. 1,884; Whitman v. Butler (D. C. 1873) 8 N. B. R. 487, Fed. Cas. No. 17,579; Markson v. Heaney (C. C. 1871) 4 N. B. R. 510, Fed. Cas. No. 9,098; McKay v. Funk (1873) 37 Iowa, 661, 13 N. B. R. 334; Markson v. Haney (1874) 47 Ind. 31, 12 N. B. R. 484. A trustee in bankruptcy by applying to a state court to set aside an order granting executory process for the foreclosure of a mortgage could not impair or affect the jurisdiction of the bankruptcy court to enjoin the foreclosure. George B. Matthews & Sons v. Joseph Webre Co. (D. C. 1914) 213 Fed. 396.

Although the action in the state court may have been pending at the time of the adjudication in bankruptcy, yet its further prosecution may be stayed or enjoined when it affects property which is in the actual custody or possession of the bankruptcy court through its trustee, receiver, or other officer. In re Dana (C. C. A. 1909) 167 Fed. 529, 21 Am. Bankr. Rep. 683; In re Whitener (1900) 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198; In re Neely (D. C. 1901) 108 Fed. 371. Or where the lien, if enforced, would constitute a preference voidable under the bankruptcy law. Bear v. Chase (1900) 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; In re Kimball (D. C. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161. Compare Heath v. Shaffer (D. C. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98. Under section 70, subd. "e" (post, § 9654), where state court had obtained jurisdiction of land to foreclose mortgage before the intervention of bankruptcy, held, that the trustee, who claimed it was fraudulently transferred by the bankrupt, should obtain any protection by injunction or stay of proceedings to which he might be entitled in the state court, though he had intervened in the state court and his prayer for injunction had been denied. McLoughlin v. Knop (D. C. 1913) 214 Fed. 260. Prosecution of a suit to enforce a lien may be stayed where the lien is of such a character as to be dissolved by the adjudication in bankruptcy, as having been acquired within four months prior thereto. In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Pruschen, 1 Nat. Bankr. News, 526; In re Ransford (C. C. A. 1912) 194 Fed. 658, 28 Am. Bankr. Rep. 78. Or even where the continuance of the action in the state court would embarrass the administration of the estate in bankruptcy. In re

Gutman (D. C. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; In re Munro (D. C. 1912) 195 Fed. 817, 28 Am. Bankr. Rep. 369; In re Roger Brown & Co. (1912) 196 Fed. 758, 116 C. C. A. 386, 28 Am. Bankr. Rep. 336; Virginia Iron, Coal & Coke Co. v. Olcott (1912) 197 Fed. 730, 117 C. C. A. 124, 28 Am. Bankr. Rep. 321. Subdivision "a" of section 9595, ante, does not authorize a court of bankruptcy to stay a suit to foreclose a valid mortgage on property of a bankrupt pending in a state court when the petition was filed. In re Wagner's Estate (D. C. 1913) 206 Fed. 364. Where general creditors claimed an interest in the mortgaged property of an alleged bankrupt, it was proper to stay a sale on foreclosure until 20 days after adjudication and the appointment of a trustee. In re Morse (D. C. 1914) 210 Fed. 900. Where mortgage and foreclosure judgment were more than four months old before bankruptcy petition was filed, and sheriff had seized the property, sale under state court process held not to be enjoined. Broach v. Mullis (D. C. 1915) 228 Fed. 551.

The jurisdiction of the federal court in these cases is not affected by the fact that the creditor's cause of action is such as would not be affected by the discharge of the debtor in bankruptcy. Bear v. Chase (1900) 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746. See In re Van Buren (D. C. 1908) 164 Fed. 883, 20 Am. Bankr. Rep. 896. Or the fact that the bankrupt may already have received his discharge. Southern Loan & Trust Co. v. Benbow (D. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Driggs (D. C. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621. Or the fact that the claim of the particular creditor is not mentioned in the bankrupt's schedules, at least where he has knowledge of the bankruptcy proceedings. In re Beerman (D. C. 1901) 112 Fed. 662, 7 Am. Bankr. Rep. 434. See In re Bluestone Bros. (D. C. 1909) 174 Fed. 53, 23 Am. Bankr. Rep. 264.

A trustee in bankruptcy cannot have an injunction against a foreclosure in a state court of a mortgage against the bankrupt, where he appeared and permitted the proceedings to advance to a final adjudication, and no injury is done thereby to the estate of the bankrupt. Augustine v. McFarland (D. C. 1876) 13 N. B. R. 7, Fed. Cas. No. 648.

An injunction issued by a court of bankruptcy restraining litigants from prosecuting a suit in a state court against a bankrupt should not be extended to the court or the judge thereof, unless in case of imperative necessity, assuming that the court has power so to extend it. In re Dana (C. C. A. 1909) 167 Fed. 529, 21 Am. Bankr. Rep. 683. The state court should respect the purpose of the injunction, and refuse to sanction any further proceedings in the case by any of the parties. Levi v. Goldberg (1902) 76 App. Div. 210, 78 N. Y. Supp. 367.

On ancillary application, trustee under mortgage on bankrupt's property held to be restrained from foreclosing until it applied for and obtained leave from the court having jurisdiction of the mortgaged premises. In re Patterson Lumber Co. (D. C. 1916) 228 Fed. 916. A federal district court has ancillary jurisdiction over a petition by a bankrupt's trustee, appointed and qualified in another district, to restrain the prosecution of distress proceedings by a landlord against property of the bankrupt within the district. In re Printograph Sales Co. (D. C. 1914) 210 Fed. 567.

Where there is no dispute as to the title to the property but only a question as to the enforcement of a lien upon it, a formal or plenary proceeding is not necessary, but the petition to enjoin the creditor from foreclosing may be heard and determined in a summary manner. In re Clark (C. C. 1872) 6 N. B. R. 403, Fed. Cas. No. 2,801. The court of bankruptcy has no jurisdiction to enjoin the plaintiff in a suit against the bankrupt in a state court from collecting his judgment from the surety on the bankrupt's bail bond. Jaquith v. Rowley (1903) 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. Where a bankrupt corporation within four months prior to adjudication conveyed certain real property to a director in trust to indemnify him as surety on an indemnifying bond to a surety company to obtain an undertaking to discharge an attachment, the conveyance to the director being valid, the trustee was entitled to have the attachment suit stayed. In re Federal Biscuit Co. (1913) 203 Fed. 37, 121 C. C. A. 373.

38. —— **Priority of jurisdiction in state court.**—If a state court of competent jurisdiction has taken cognizance of an action to establish or enforce a lien on property of a debtor, and the action is pending at the time of his adjudication in bankruptcy, but the lien is not dissolved thereby, because it attached more than four months previously, the jurisdiction of the state court is not divested by the bankruptcy proceedings, and the federal court has no rightful authority to enjoin the creditor from the further prosecution of his action. Metcalf v. Barker (1902) 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Pickens v. Roy (1902) 187 U. S. 177, 23 Sup. Ct. 78, 41 L. Ed. 128, 9 Am. Bankr. Rep. 47; In re Wagner's Estate (D. C. 1913) 206 Fed. 364, 30 Am. Bankr. Rep. 396; Pickens v. Dent (1901) 106 Fed. 653, 45 C. C. A. 522, 5 Am. Bankr. Rep. 644; In re United Wireless Telegraph Co. (D. C. 1911) 192 Fed. 238, 27 Am. Bankr. Rep. 1; In re Shinn (D. C. 1911) 185 Fed. 990, 25 Am. Bankr. Rep. 833; Ex parte Donaldson (D. C. 1867) 1 N. B. R. 181,

Fed. Cas. No. 3,981; Clarke v. Rist (C. C. 1844) Fed. Cas. No. 2,861. Compare New River Coal Land Co. v. Ruffner Bros. (1908) 165 Fed. 881, 91 C. C. A. 559, 20 Am. Bankr. Rep. 100; In re Baughman (D. C. 1905) 138 Fed. 742, 15 Am. Bankr. Rep. 23. This rule applies with special force where the property to be affected is in the actual custody and possession of the state court. Tennessee Producer Marble Co. v. Grant (1905) 135 Fed. 322, 67 C. C. A. 676, 14 Am. Bankr. Rep. 288; In re Seebold (1901) 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358; White v. Thompson (1903) 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653; In re Shoemaker (D. C. 1902) 112 Fed. 648, 7 Am. Bankr. Rep. 437; Downer v. Brackett (D. C. 1842) 21 Vt. 599, Fed. Cas. No. 4,043. Or where it is in the possession of a receiver appointed by the state court. In re Sterlingworth Ry. Supply Co. (D. C. 1908) 165 Fed. 267, 21 Am. Bankr. Rep. 342.

39. —— **Protecting interest of general creditors.**—The fact that a trustee in bankruptcy may be interested in the result of a litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the bankruptcy court. In re Horton (1900) 102 Fed. 986, 43 C. C. A. 87.

A creditor will not be enjoined from proceeding to enforce a valid lien, except where this is necessary to protect an equity of the bankrupt, or to prevent a sacrifice of, or serious injury to, the interests of the creditors at large. In re Davis (D. C. 1870) 8 N. B. R. 167, Fed. Cas. No. 3,620; Blake v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; Pennington v. Sale (D. C. 1868) 1 N. B. R. 572, Fed. Cas. No. 10,939; In re Wilbur (D. C. 1867) 3 N. B. R. 276, Fed. Cas. No. 17,633. A pending suit will not ordinarily be stayed unless the trustee in bankruptcy shows that he has some interest in it as the representative of the general creditors, or that such a course may result in securing for them some surplus over the claims of the lien creditor. In re Mercedes Import Co. (1908) 166 Fed. 427, 92 C. C. A. 179, 20 Am. Bankr. Rep. 648; In re Arden (D. C. 1911) 188 Fed. 475, 26 Am. Bankr. Rep. 684. If it is clearly shown that the property affected is of no value beyond the admitted incumbrances upon it, so that there is nothing to be gained for the general creditors, an injunction will be refused, or, if issued, will be dissolved. In re O'Malley (D. C. 1879) Fed. Cas. No. 10,507a; In re Iron Mountain Co. (C. C. 1872) 4 N. B. R. 645, Fed. Cas. No. 7,065; McLean v. Rockey (C. C. 1843) Fed. Cas. No. 8,891.

40. **Foreclosure of mortgages.**—A mortgage creditor of a bankrupt has a right to institute proceedings in the court of bankruptcy to enforce his lien and to reach other assets. Owen v. Potter (1898) 115 Mich. 556, 73 N. W. 977. And where the mortgagee of property has proved his debt in the bankruptcy proceedings, and the court of bankruptcy has made an order for the sale of the property, in a proceeding to which he was a party, he cannot then go into a state court and sue for foreclosure. Levy v. Haake (1878) 53 Cal. 267.

A mortgagee may prosecute a suit in a state court for the establishment and enforcement of his lien without regard to the pendency of proceedings in bankruptcy against the debtor, provided that he has not made himself a party to those proceedings and subjected himself to the jurisdiction of the court of bankruptcy by proving his claim or otherwise, and provided that no action is taken by the trustee in bankruptcy to interfere with such suit, nor any order to that effect issued by the bankruptcy court. Jerome v. McCarter (1876) 94 U. S. 734, 24 L. Ed. 136; In re Roseberry (D. C. 1877) 16 N. B. R. 340, Fed. Cas. No. 12,052; Sedgwick v. Grinnell (D. C. 1878) Fed. Cas. No. 12,612; In re Davis (D. C. 1870) 4 N. B. R. 715, Fed. Cas. No. 3,620; In re Smith (D. C. 1868) 1 N. B. R. 599, Fed. Cas. No. 12,973; Swope v. Arnold (D. C. 1871) 5 N. B. R. 148, Fed. Cas. No. 13,702; Yeadon v. Planters' & Mechanics' Bank (D. C. 1843) Fed. Cas. No. 18,130; Brown v. Gibbons (1873) 37 Iowa, 654, 13 N. B. R. 407; Hayes v. Dickinson (N. Y. 1876) 9 Hun, 277, 15 N. B. R. 350; Barber v. Terrell (1875) 54 Ga. 146; Cumming v. Clegg (1874) 52 Ga. 605, 14 N. B. R. 49; Winship v. Phillips (1874) 52 Ga. 593, 14 N. B. R. 50; Hall v. Bliss (1875) 118 Mass. 554, 19 Am. Rep. 476, 14 N. B. R. 329; Hatcher v. Jones (1874) 53 Ga. 208, 14 N. B. R. 387; Biddle's Appeal (1871) 68 Pa. 13, 9 N. B. 144; Green v. Arbuthnot (Pa. 1876) 4 Wkly. Notes Cas. 357.

The jurisdiction of a state court over a pending foreclosure suit is not divested by the adjudication of the mortgagor in bankruptcy, and if the mortgage was given more than four months before the filing of the petition in bankruptcy, and its validity is not assailed on any other ground under the bankruptcy law, the state court may proceed to foreclosure and sale, and the mortgagee should not be stayed by injunction from either the court of bankruptcy or the state court. Jerome v. McCarter (1876) 94 U. S. 734, 24 L. Ed. 136; In re Rohrer (1910) 177 Fed. 381, 100 C. C. A. 613, 24 Am. Bankr. Rep. 52; Clark v. Norwalk Steel & Iron Co. (C. C. 1908) 188 Fed. 999; In re Lattimer (D. C. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re McKane (D. C. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; In re

Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; Wikle v. Jones (1909) 133 Ga. 266, 65 S. E. 577; Parks v. Baldwin (1905) 123 Ga. 869, 51 S. E. 722; Harvey v. Smith (1901) 179 Mass. 592, 61 N. E. 217; Furth v. Stahl (1903) 205 Pa. 439, 55 Atl. 29; Carter v. People's Nat. Bank (1900) 109 Ga. 573, 35 S. E. 61; Merrill v. Jordan (1880) 60 N. H. 425; Lenihan v. Hamann (1873) 55 N. Y. 652; Cutter v. Dingee (D. C. 1876) 14 N. B. R. 294, Fed. Cas. No. 3,518; In re Irving (D. C. 1876) 14 N. B. R. 289, Fed. Cas. No. 7,073; Getz v. First Nat. Bank (C. C. 1878) Fed. Cas. No. 5,374. Compare Carpenter v. O'Connor (1898) 16 Ohio Cir. Ct. R. 526; In re Doran (1907) 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760.

Where, prior to the commencement of the proceedings in bankruptcy, a receiver is appointed in an action in a state court to foreclose a mortgage, property in his possession cannot be taken by the trustee in bankruptcy without discharging the mortgage debt. Davis v. Railroad Co. (C. C. 1873) Fed. Cas. No. 3,648. But after the appointment of the trustee, a receiver will not be appointed for the bankrupt's mortgaged land, as the trustee is clothed with like functions as a receiver. In re Bennett (C. C. 1877) Fed. Cas. No. 1,313.

The trustee in bankruptcy is a proper party to the suit in the state court, where he must appear and assert his rights, and he should apply for leave to intervene, or he may be directed by the bankruptcy court so to apply. Eyster v. Gaff (1875) 91 U. S. 521, 23 L. Ed. 403; In re Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; Heath v. Shaffer (D. C. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; In re Porter (D. C. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259. In such an action, the defense of usury is available to the trustee in bankruptcy. In re Kellogg (1903) 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7; In re Miller (D. C. 1901) 118 Fed. 360, 9 Am. Bankr. Rep. 274. If the trustee does not ask to be joined as a party in the suit, it is not necessary to stay the proceedings and compel him to come in. Oliver v. Cunningham (C. C. 1881) 6 Fed. 60. The trustee in bankruptcy will not be barred or in any way affected by a decree of foreclosure if he was not joined as a party in the suit in which it was rendered, since he succeeds in title to the equity of redemption of the bankrupt. Barron v. Newberry (C. C. 1857) Fed. Cas. No. 1,056; Townshend v. Thomson (1892) 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870; Griffin v. Hodshire (1889) 119 Ind. 235, 21 N. E. 741; Cobleigh v. Spitznagle (1905) 120 Ill. App. 110; Leary v. Shaffer (1881) 79 Ind. 567. But this rule does not apply where the trustee has disclaimed any interest in the property. Scott v. Gordon (1904) 109 Mo. App. 695, 83 S. W. 550.

Instead of a decree of foreclosure, the state court may, in proper circumstances make its order giving the trustee in bankruptcy the right to redeem, or if he has no funds in hand for that purpose, it may order a sale under the mortgage, with directions that the surplus shall be paid into court for the benefit of the trustee. Jobbins v. Montague (1872) 23 N. J. Eq. 182. But no deficiency decree can be rendered against the mortgagor, at least until the question of his discharge has been determined. Scott v. Ellery (1892) 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050; McKay v. Funk (1873) 37 Iowa, 661.

If foreclosure proceedings have proceeded in a state court so far as the rendition of a judgment or decree before any adjudication in bankruptcy is made, the whole matter is then within the exclusive jurisdiction of the state court, and the execution of the decree will not be stayed or enjoined. In re Gerdes (D. C. 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; In re Holloway (D. C. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659.

The adjudication in bankruptcy is no bar to an ejectment by a mortgagee against a third person, not connected with the trustee in bankruptcy, though such suit is brought without permission of the court of bankruptcy, where the trustee never assumed possession of nor intermeddled with the estate affected. Eyster v. Gaff (1873) 2 Colo. 228.

41. —— Restraining foreclosure in state court.—The court of bankruptcy may stop the prosecution of a foreclosure suit in a state court, where such suit was not begun until after the institution of the bankruptcy proceedings. In re San Gabriel Sanatorium Co. (1900) 102 Fed. 310, 42 C. C. A. 369, 4 Am. Bankr. Rep. 197. Or where the validity of the mortgage is denied on common-law grounds. In re Duryea (D. C. 1878) 17 N. B. R. 495, Fed. Cas. No. 4,196. Or where it is claimed that the lien of the mortgage was dissolved by the adjudication in bankruptcy following within four months after it was given. In re Oxley (D. C. 1910) 182 Fed. 1019, 25 Am. Bankr. Rep. 656. Or where the giving of the mortgage was the act of bankruptcy on which the adjudication was based. In re Donnelly (D. C. 1910) 188 Fed. 1001, 26 Am. Bankr. Rep. 304. Or where the proceedings taken by the holder of a chattel mortgage were not such as to bring the property within the jurisdiction of the state court. In re Brooks (D. C. 1898) 91 Fed. 508. But an adjudication that a mortgage is invalid as an illegal preference does not prevent the mortgagee from suing in a state court to foreclose the mortgage,

so far as the same affects exempt property. Morris v. Covey (1912) 104 Ark. 226, 148 S. W. 257.

The court of bankruptcy will, in general, interfere with the creditor's proceedings only where the interests of the general creditors will be materially affected or where there is controversy as to the validity of the alleged lien. Goddard v. Weaver (C. C. 1872) 6 N. B. R. 440, Fed. Cas. No. 5,495. In the absence of such circumstances, it may permit the creditor to proceed in his own way and allow him to make a sale of the property. In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Grinnell (D. C. 1873) 9 N. B. R. 29, Fed. Cas. No. 5,830; In re Sacchi (C. C. 1872) 6 N. B. R. 497, Fed. Cas. No. 12,200. If any fraud is discoverable in the sale, the bankruptcy court will not hesitate to interfere, as was done in a case where a pledgee of valuable collateral sold it to himself at a pretended auction sale for about one-sixth its nominal value, after the filing of a petition in bankruptcy against the pledgor, and without any other authority than the contract of pledge, and without notice to the pledgor or any other party in interest. In re Mertens (D. C. 1905) 134 Fed. 101, 14 Am. Bankr. Rep. 226. Where there was a growing crop on the mortgaged real property of a bankrupt which the trustee had been directed by the creditors to cultivate and harvest, the mortgagee would not be permitted to foreclose, though he might have any relief to which he would be entitled in equity, and, when the property was eventually sold, he could not suffer any diminution of right or be subjected to any greater expense than by a foreclosure in the state court. George B. Matthews & Sons v. Joseph Webre Co. (D. C. 1914) 213 Fed. 396. But where the whole property of the bankrupt, including that affected by the lien of a mortgage, has been sold in the bankruptcy proceedings, the secured creditor can enforce his lien upon the proceeds by proper application to the court of bankruptcy, and in these circumstances a foreclosure suit in a state court is unnecessary. Owen v. Potter (1898) 115 Mich. 556, 73 N. W. 977.

42. —— **Protecting interests of general creditors.**—Where it appears that it would be for the interest of the creditors at large to have mortgaged real estate taken by the trustee and administered with the remainder of the assets, preserving the lien of the secured creditor, the court of bankruptcy has jurisdiction to order the trustee to take possession of the property, and to enjoin the secured creditor from selling it or otherwise interfering with it. In re Booth (D. C. 1899) 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Zehner (D. C. 1912) 193 Fed. 787, 27 Am. Bankr. Rep. 536. As where it appears that its value greatly exceeds the amount of the incumbrance and that the surplus is more likely to be realized by a sale made by the trustee. In re Ball (D. C. 1902) 118 Fed. 672, 9 Am. Bankr. Rep. 276; In re Zehner (D. C. 1912) 193 Fed. 787, 27 Am. Bankr. Rep. 536. Or that the mortgagee is endeavoring to delay the sale unreasonably and to prevent the property from bringing a fair price. In re Holloway (D. C. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659. Or where a large and valuable tract of land is incumbered by numerous mortgages, the separate foreclosure of which would involve heavy expense and leave little or nothing for the general creditors, while such a result could be avoided by administering the property in the bankruptcy proceeding. In re Pittelkow (D. C. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472.

Since the trustee in bankruptcy when appointed, will be under the duty of investigating the security and the property which it is alleged to cover, and of determining whether there is any equity which can be made available for the general creditors, a sale made before he is qualified will be at least voidable as against him. In re Brooks (D. C. 1898) 91 Fed. 508, 1 Am. Bankr. Rep. 531; Taylor v. Robertson (C. C. 1884) 21 Fed. 209.

Another course open to the court of bankruptcy is to permit the mortgage creditor to continue his action in the state court, making the trustee a party, in order that all questions as to its validity under the state laws may be there determined, but at the same time to reserve to the trustee the right to sell the property in the bankruptcy proceedings and hold the proceeds to await the decision of the state court. In re Johnson (D. C. 1904) 127 Fed. 618, 11 Am. Bankr. Rep. 544. As to the mortgagee's claim on rents and profits of the property collected by the trustee while in possession, see In re Chase (D. C. 1904) 133 Fed. 79, 13 Am. Bankr. Rep. 294; In re Hollenfeltz (D. C. 1899) 94 Fed. 629, 2 Am. Bankr. Rep. 499.

43. —— **Power of sale in mortgage or trust deed.**—A power of sale given in a mortgage is not a power coupled with an interest, and therefore it is revoked by the bankruptcy of the mortgagor. Lockett v. Hill (C. C. 1874) 9 N. B. R. 167, Fed. Cas. No. 8,443: Morris v. Davidson (1873) 49 Ga. 361. But in the case of a deed of trust by which the legal title is vested in one or more trustees for the benefit of the lawful holder of the obligation secured, nothing comes within the scope of the bankruptcy proceedings but the grantor's reversionary or equitable title. McGready v. Harris (1873) 54 Mo. 137. See In re Davis (D. C. 1874) 2 N. B. R. 391, Fed. Cas. No. 3,618.

44. —— **Abandonment of property by trustee.**—If the trustee is satisfied that

the secured creditor's claim is valid and that the property covered is of no greater value than will be sufficient to pay it, he may abandon the property to the creditor. Second Nat. Bank v. National State Bank (Ky. 1873) 10 Bush, 367; In re Moller (D. C. 1876) Fed. Cas. No. 9,699. And when this is done it is perfectly permissible for the creditor to proceed as if no proceeding in bankruptcy were pending, and for a state court to take and exercise jurisdiction without regard to such proceeding. Stoddard v. Locke (1870) 43 Vt. 574, 5 Am. Rep. 308, 9 N. B. R. 71; Second Nat. Bank v. National State Bank (Ky. 1873) 10 Bush, 367. And such abandonment may be presumed when the trustee takes no steps to bring the property within the jurisdiction of the court of bankruptcy for administration. Crowe v. Reid (1876) 57 Ala. 281. Or when he permits a pending foreclosure suit to proceed without objection or intervention. In re Stansfield (D. C. 1877) 16 N. B. R. 268, Fed. Cas. No. 13,294.

45. Proceedings out of court.—As to property which comes to the trustee for administration, a landlord cannot enforce his claim for rent by distress, but is only entitled to proceed against the trustee in the bankruptcy court. In re Bishop (D. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635. A creditor cannot levy execution on real property on which his judgment is a lien, unless permitted by the court of bankruptcy. In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815. It must not be understood that the creditor, even if his judgment lien is perfect, will have the right to issue and levy an execution and cause a sale of the property, after it has passed into the control of the trustee in bankruptcy. While he has the advantageous position of a secured creditor, he will not be allowed to interfere, at will, with property in the custody of the bankruptcy court. Pennington v. Sale (D. C. 1868) 1 N. B. R. 572, Fed. Cas. No. 10,939; Davis v. Anderson (D. C. 1872) 6 N. B. R. 145, Fed. Cas. No. 3,623; Russell v. McCord (D. C. 1878) 17 N. B. R. 508, Fed. Cas. No. 12,157. Distress proceedings by a landlord against a bankrupt tenant not instituted until after adjudication in bankruptcy in the court of primary jurisdiction are unsustainable as against the bankrupt's trustee, who, under section 70a (post, § 9654), acquires title to the bankrupt's assets as of the date of adjudication. In re Printograph Sales Co. (D. C. 1914) 210 Fed. 567. Tax sales of a bankrupt's property made after the adjudication in bankruptcy may be avoided. Stanard v. Dayton (C. C. A. 1915) 220 Fed. 441. And a pre-existing tax lien cannot be converted into a full title by taking out a tax deed, without the sanction of the court. In re Eppstein (1907) 156 Fed. 42, 84 C. C. A. 208, 19 Am. Bankr. Rep. 89. A creditor may be restrained from proceeding to sell property under the power contained in a chattel mortgage or a deed of trust. Massachusetts Bonding & Ins. Co. v. Kemper (1915) 220 Fed. 847, 136 C. C. A. 593; In re Hasie (D. C. 1913) 206 Fed. 789, 30 Am. Bankr. Rep. 83; In re Nathan (D. C. 1899) 92 Fed. 590; In re Jersey Island Packing Co. (1905) 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689. The holder of a chattel mortgage cannot take possession of the property covered after the appointment of a trustee in bankruptcy, without the consent of such trustee. In re Gutman (D. C. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; In re Rosenberg (D. C. 1869) Fed. Cas. No. 12,055; Hutchings v. Muzzy Iron Works (D. C. 1873) 8 N. B. R. 458, Fed. Cas. No. 6,952.

A pledgee, acting fairly, has the right to sell the property in accordance with the terms of the contract and apply the proceeds in payment of his debt, accounting to the trustee for any surplus, and he will not be enjoined from so doing. Hiscock v. Varick Bank (1907) 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1; John Mathews, Inc., v. Knickerbocker Trust Co. (1911) 192 Fed. 557, 113 C. C. A. 29, 27 Am. Bankr. Rep. 627; In re Ironclad Mfg. Co. (C. C. A. 1912) 192 Fed. 318; In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re Mertens (1906) 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362; In re Mayer (C. C. A. 1907) 157 Fed. 836, 19 Am. Bankr. Rep. 356; In re Browne (D. C. 1900) 104 Fed. 762, 5 Am. Bankr. Rep. 220. Compare In re Cobb (D. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129. But where bonds deposited as collateral to a corporation's note were simple promises to pay, not secured, and had never been issued by the bankrupt until delivery to secure the bankrupt's note, the creditor was held not entitled to sell the bonds to realize funds with which to pay the note, since to do so would simply increase the corporation's indebtedness, to the prejudice of other creditors. In re Matthews (D. C. 1911) 188 Fed. 445, 26 Am. Bankr. Rep. 19. Where one is employed in the capacity of a factor to purchase goods for a bankrupt, and the goods so bought are not shipped and sold under the bankrupt's instructions because of his bankruptcy, the factor is entitled to sell the property for the best price obtainable and charge the bankrupt with the loss in satisfaction of his lien. Couturie v. Roensch (Tex. Civ. App. 1911) 134 S. W. 413.

46. Redemption of property by trustee.—A trustee in bankruptcy is vested with such an interest in the mortgaged real estate of the bankrupt as entitles him to pay off the mortgage debt and have the mortgage assigned to himself

or to a person designated by him, although it is not in process of foreclosure, where it is shown that such a course will be for the benefit of the estate, by enabling him to sell the property to better advantage; and the court of bankruptcy has jurisdiction, on his petition, to compel the mortgagee to accept payment and execute the assignment. In re Bacon (D. C. 1904) 132 Fed. 157, 12 Am. Bankr. Rep. 730; In re Straub (D. C. 1908) 158 Fed. 375, 19 Am. Bankr. Rep. 808; Foster v. Ames (C. C. 1869) 2 N. B. R. 455, Fed. Cas. No. 4,965. Where payment of an alleged specific lien is made by a bankrupt's trustee after notice to all creditors and without objection, a general judgment creditor claiming a prior lien cannot thereafter object, the rule being that lien creditors who are not prompt and persistent in asserting their rights may lose them. In re Torchia (D. C. 1911) 185 Fed. 576, 26 Am. Bankr. Rep. 188.

47. Sale of property by order of bankruptcy court.—The court of bankruptcy has jurisdiction and power to dispose of incumbered property of the bankrupt in any manner deemed best for the interests of all concerned. It may order such property to be sold by the trustee in bankruptcy, and may direct the sale to be made subject to a particular lien, admitted to be valid, or free of all liens and incumbrances, and in the latter case the proceeds of the sale will be brought into court for distribution to those entitled, and any valid lien will be transferred from the property to the fund in court. In re Booth (D. C. 1899) 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Pittelkow (D. C. 1891) 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Schnepf (D. C. 1867) 1 N. B. R. 190, Fed. Cas. No. 12,471; In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728; In re Hambright (D. C. 1869) 2 N. B. R. 498, Fed. Cas. No. 5,973; Davis v. Anderson (D. C. 1872) 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Salmons (D. C. 1868) 2 N. B. R. 56, Fed. Cas. No. 12,268; Second Nat. Bank v. National State Bank (Ky. 1873) 10 Bush, 367, 11 N. B. R. 49. It is within the jurisdiction of the court, admitting the validity of a lien claimed on property of the bankrupt, to order the sale of the property and the payment of the lien creditor out of the proceeds, preserving the remainder for the general creditors. In re Arden (D. C. 1911) 188 Fed. 475, 26 Am. Bankr. Rep. 684; In re Vastbinder (D. C. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148. And this action may be taken not only at the instance of the trustee in bankruptcy, but the lien creditor himself may petition the court to take charge of the property and order its sale, or for leave to conduct the sale himself, in either case first proving his debt and making at least a prima facie showing as to the validity and priority of his lien. In re Stewart (D. C. 1868) 1 N. B. R. 278, Fed. Cas. No. 13,418; In re Bigelow (D. C. 1868) 1 N. B. R. 632, Fed. Cas. No. 1,396.

An order of the bankruptcy court so made will oust the jurisdiction of the state courts to foreclose the lien in the ordinary way. In re Devore (D. C. 1877) 16 N. B. R. 56, Fed. Cas. No. 3,847.

If it is quite clear that the property is not worth anything more than the amount of the mortgage or other incumbrance upon it, the court will not order its sale, but will leave the creditor to deal with it in his own way. In re Lambert (D. C. 1869) 2 N. B. R. 426, Fed. Cas. No. 8,026; Foster v. Ames (C. C. 1869) Fed. Cas. No. 4,965.

If a sale has been ordered and made and the proceeds brought into court, all questions concerning the right of the creditor to payment out of the fund, or the amount to which he is entitled, must be determined by the bankruptcy court on a petition for distribution, not by a suit at law. In re Masterson (D. C. 1870) 4 N. B. R. 553, Fed. Cas. No. 9,268. And if the property does not bring as much as the amount of the lien, the creditor is not entitled to be paid in full out of the estate as holding a privileged debt; in other words, he cannot come upon the general funds of the estate for the deficiency in the character of a lien creditor, though he may prove a claim for such deficiency as a general or unsecured creditor. In re Purcell (D. C. 1868) Fed. Cas. No. 11,469. And even ahead of the claim of the lien creditor, the proper costs and expenses of the sale must be paid out of the proceeds. In re Baughman (D. C. 1908) 163 Fed. 669, 20 Am. Bankr. Rep. 81; In re Ellerhorst (C. C. 1872) 7 N. B. R. 49, Fed. Cas. No. 4,380; In re Dummont (D. C. 1871) 4 N. B. R. 17, Fed. Cas. No. 4,127. Where property incumbered by a valid lien is sold, and more is realized than is required to satisfy the lien, the surplus will be available for creditors. But if the bankrupt had a right to compel contribution from a person jointly interested with him in the property, the claim of creditors to be subrogated to this right can only be considered and determined in ancillary proceedings instituted for that purpose. In re Straub (D. C. 1908) 158 Fed. 375, 19 Am. Bankr. Rep. 808.

48. Marshalling assets.—As among the various secured creditors of a bankrupt, the general equitable principle of marshalling securities will be applied, so that a creditor having security on two or more funds or properties will be required to exhaust that on which his lien stands alone, before pro-

ceeding against that on which other creditors beside himself have liens. In re Sauthoff (D. C. 1876) 14 N. B. R. 364, Fed. Cas. No. 12,379; In re Bowler (D. C. 1877) Fed. Cas. No. 1,735; McLean v. Lafayette Bank (C. C. 1848) Fed. Cas. No. 8,889. Where a creditor held several judgment notes against a debtor and also some mortgages and two insurance policies as collateral, and caused judgment to be entered on the notes and execution issued thereon, and shortly afterwards a petition was filed against the debtor and he was adjudged bankrupt, it was held that the court had power so to marshall the assets as to require such creditor to foreclose a mortgage before resorting to the general fund. In re Sauthoff (D. C. 1876) 14 N. B. R. 364, Fed. Cas. No. 12,379. Where the purchaser of a tract of land gave a mortgage back covering the entire property and afterwards divided it into lots, and sold some of them, and others remained on his hands at the time of his adjudication in bankruptcy, and these were sold by the trustee in bankruptcy discharged of incumbrances, thus displacing the lien of a second mortgage which covered these lots only, it was held that the fund belonged to the first mortgagee and not to the second. In re Carothers (D. C. 1882) 12 Fed. 692.

III. FRAUDULENT CONVEYANCES VOIDABLE BY TRUSTEE

49. Construction of this section.—The conveyances or transfers intended by subdivision "e" of this section are only such as are fraudulent either at common law or under the statutes of the state, as distinguished from those which are in fraud of the bankruptcy act itself. Bailey v. Wood (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1912A, 950; Allen v. Montgomery (1873) 48 Miss. 101.

Prior to the filing of a voluntary bankruptcy petition, the bankrupt is the owner of all his property and may sell and incumber it except in fraud of creditors or in violation of law, and after filing and prior to adjudication he retains title though holding as trustee for creditors. In re Banks (D. C. 1913) 207 Fed. 662.

With subdivision "e" of this section should be compared section 70e (post, § 9654). In consequence of the latter provision, it is held that, if there be any kind of transfer of property which a creditor of the grantor might have avoided, though it was neither made with intent to delay or defraud creditors nor is denounced as void by the laws of the state, then the trustee in bankruptcy may avoid it, and without any regard to the time when it was made as compared with the date of bankruptcy. Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor (1906) 130 Wis. 201, 109 N. W. 957; Friedman v. Verchofsky (1903) 105 Ill. App. 414; Sharp v. Fitzhugh (1905) 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold (1912) 103 Ark. 105, 146 S. W. 118; Thomas v. Fletcher (D. C. 1907) 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros. (D. C. 1904) 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck (D. C. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727. Notwithstanding these specific provisions, the whole act must be read in the light of the predominating purpose of congress with reference to the distribution of the assets, which was to prevent any inequality of payment among the unsecured creditors. Sellers v. Hayes (1904) 163 Ind. 422, 72 N. E. 119.

50. Rights of trustee as to transfers.—With respect to the ownership of property in general, and so far as regards valid sales, liens, and incumbrances, the trustee merely succeeds to the title of the bankrupt and has no stronger rights than he. In re Great Western Mfg. Co. (1907) 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259.

By the express terms of the act, the trustee represents creditors, succeeds to their rights, and is invested with the same rights of action which they would have had (if bankruptcy had not intervened) concerning any such conveyances or transfers. In re Lukens (D. C. 1905) 138 Fed. 188, 14 Am. Bankr. Rep. 683; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee (1909) 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442; In re Rodgers (1903) 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Pfeiffer v. Roe (1905) 108 App. Div. 54, 95 N. Y. Supp. 1014; Beasley v. Smith (Ga. 1915) 87 S. E. 293. A trustee in bankruptcy holds not only the legal title to the bankrupt's estate, but he also represents the creditors of the bankrupt, and has such rights as the creditors possessed, and he can avoid any transfer which the creditors could have avoided, and the trustee has plenary power to take all steps necessary to subject the bankrupt's property to the satisfaction of his debts. Benner v. Scandinavian American Bank (Wash. 1913) 131 P. 1149. The trustee in bankruptcy may, by proper proceedings, avoid or annul any transfer made by the bankrupt which any creditor might have attacked by similar proceedings. Thomas v. Roddy (1907) 122 App. Div. 851, 107 N. Y. Supp. 473; Cox v. Wall (1903) 132 N. C. 730, 44 S. E. 635; Landis v. McDonald (1901) 88 Mo. App. 335; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co. (1911) 152 Mo. App. 401, 133 S. W. 412; Earle v. National Metallurgic Co. (1910) 77 N. J. Eq. 17, 76 Atl. 555; Hunt v. Doyal (1907) 128 Ga. 416, 57 S. E. 489; In re Mullen (D. C. 1900)

101 Fed. 413, 4 Am. Bankr. Rep. 224; Everett v. Stone (C. C. 1844) Fed. Cas. No. 4,577; Bradshaw v. Klein (D. C. 1868) 1 N. B. R. 542, Fed. Cas. No. 1,-790; In re Metzger (D. C. 1868) 2 N. B. R. 355, Fed. Cas. No. 9,510; In re Leland (D. C. 1874) 9 N. B. R. 209, Fed. Cas. No. 8,230; Id. (C. C. 1873) Fed. Cas. No. 8,234. The trustee occupies exactly as strong a position, and especially since the amendment of 1910, as a creditor who has levied an attachment or one who holds a judgment or an unsatisfied execution. In re Rodgers (1903) 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Bunnell v. Bronson (1906) 78 Conn. 679, 63 Atl. 396; Putnam v. Southworth (1908) 197 Mass. 270, 83 N. E. 887; In re Carpenter (D. C. 1903) 125 Fed. 831, 11 Am. Bankr. Rep. 147. Since an execution creditor may maintain an action of trespass on the case against persons who have fraudulently conspired to secrete and transfer the property of the debtor, such an action may be maintained by the debtor's trustee in bankruptcy subsequently appointed, by virtue of the amendment of 1910 giving him the rights and remedies of an execution creditor. Sattler v. Slonimsky (D. C. 1912) 199 Fed. 592, 28 Am. Bankr. Rep. 729. The trustee in bankruptcy may maintain a suit to set aside any fraudulent conveyance made within four months before the filing of the petition in bankruptcy, which could have been attacked by creditors holding an attachment or an unsatisfied execution. Allen v. Massey (1872) 17 Wall. 351, 21 L. Ed. 542; Schmitt v. Dahl (1903) 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590; Adams' Assignee v. Branch (1880) 3 Ky. Law Rep. 178; McMaster v. Campbell (1879) 41 Mich. 513, 2 N. W. 836. A corporation's trustee in bankruptcy has capacity to contest the validity of a mortgage covering the bankrupt's real and personal property. Pacific State Bank v. Coats (C. C. A. 1913) 205 Fed. 618, 30 Am. Bankr. Rep. 655. It is immaterial to the trustee's right of action to set aside a fraudulent conveyance or transfer that the particular transaction would have been valid and binding as between the immediate parties to it. Dulany v. Morse (1913) 39 App. D. C. 523; Adams v. Merchants' Nat. Bank (C. C. 1880) 2 Fed. 174; Crooks v. Stuart (C. C. 1881) 7 Fed. 800; Mann v. Flower (1879) 25 Minn. 500. It is immaterial that the bankrupt himself could not have sustained an action to recover the money or property, vacate the conveyance, or otherwise annul his own act. Elmore v. Symonds (1903) 183 Mass. 321, 67 N. E. 314; Bennett v. Ætna Ins. Co. (1909) 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414; Carr v. Gale (C. C. 1847) Fed. Cas. No. 2,435.

As to property conveyed in fraud of creditors, the trustee is not merely a successor to the rights of defrauded creditors, but he is invested with the title. Hillyer v. Le Roy (1903) 84 App. Div. 129, 82 N. Y. Sup. 80; Annis v. Butterfield (1904) 99 Me. 181, 58 Atl. 898; Starks v. Curd (1889) 88 Ky. 164, 10 S. W. 419; In re Wynne (C. C. 1868) 4 N. B. R. 23, Fed. Cas. No. 18,117; Mann v. Flower (1879) 25 Minn. 500. And he may sue to vacate or avoid any fraudulent transfer of the bankrupt's property, whether or not there is any creditor armed with a lien or otherwise in position to attack such transfer. Sheldon v. Parker (1902) 66 Neb. 610, 92 N. W. 923. And see Faulkner v. Kaplon (D. C. 1913) 203 Fed. 114. CONTRA, Coleman v. Hughey (Mo. 1913) 158 S. W. 829.

A bill by the trustee to vacate a fraudulent conveyance should be maintained in his own name as trustee, and not in the name of the bankrupt or of any creditor. Exchange Nat. Bank v. Stewart (1909) 158 Ala. 218, 48 South. 487. As it is the duty of the trustee to represent the unsecured creditors, he is not entitled to sue to annul a conveyance merely as given in fraud of a creditor who has a lien on the property. Cowan v. Staggs (Ala. 1912) 59 South. 153. A suit by a trustee in bankruptcy to divest from defendants title to property of the bankrupt corporation claimed to have been fraudulently conveyed to defendants is brought on the theory that the transfer of the property was in fraud of the corporate creditors, and, if it was not fraudulent, the suit cannot be maintained. Coleman v. Hagey (Mo. 1913) 158 S. W. 829. The trustee cannot complain of the fraudulent character of a mortgage given by a purchaser from the bankrupt to a third person, unless he can impeach the sale from the bankrupt to the purchaser on other grounds. Sellers v. Hayes (1904) 163 Ind. 422, 72 N. E. 119.

51. Election by trustee.—Where property is alleged to have been conveyed in fraud of creditors, but it appears that it could only be recovered by costly and doubtful litigation, with probable small benefit to the estate, the trustee is not bound to claim the property, but he may elect either to do so, and to proceed for its recovery, or not to claim it, and if he does not elect to take it within a reasonable time, it is deemed an election to reject it. Nash v. Simpson (1886) 78 Me. 142, 3 Atl. 53. If the trustee has once elected not to attempt to set aside a conveyance or transfer by the bankrupt, he cannot afterwards come into equity to attack it. Laughlin v. Calumet & C. Canal & Dock Co. (1895) 65 Fed. 441, 13 C. C. A. 1. And see Greenhall v. Carnegie Trust Co. (D. C. 1910) 180 Fed. 812, 25 Am. Bankr. Rep. 300. Where a debtor, within four months before his bankruptcy, sold and assigned certain accounts to a third person, and his trustee, with full knowledge of the facts, applied for and obtained an order from

the court of bankruptcy requiring the bankrupt to turn over a part of the proceeds of the sale which had not been accounted for, such action of the trustee was held an election to affirm the sale and he could not thereafter maintain a petition against the assignee to recover the accounts, on the ground that the sale was fraudulent. Thomas v. Sugerman (1907) 157 Fed. 669, 85 C. C. A. 337, 19 Am. Bankr. Rep. 509.

52. **Trustee's right of action exclusive.**—Before the appointment of a trustee in bankruptcy, creditors may, if necessary to preserve their rights, sue to set aside fraudulent transfers or conveyances. Guaranty Title & Trust Co. v. Pearlman (D. C. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

After the adjudication in bankruptcy and the appointment of a trustee, no creditor has the right to institute legal proceedings to set aside a transfer or conveyance alleged to have been fraudulent, as that right pertains to the trustee alone. Trimble v. Woodhead (1880) 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon (1878) 98 U. S. 20, 25 L. Ed. 43; Barnes Mfg. Co. v. Norden (1902) 67 N. J. Law, 493, 51 Atl. 454; In re Gray (1900) 47 App. Div. 554, 62 N. Y. Supp. 618; Elder's Ex'rs v. Harris (1882) 76 Va. 187; Bolling v. Munchus (1877) 59 Ala. 482; Thurmond v. Andrews (Ky. 1893) 10 Bush, 400, 13 N. B. R. 157; Anderson v. Anderson (1883) 80 Ky. 638; Allen v. Montgomery (1873) 48 Miss. 101, 10 N. B. R. 503; Goodwin v. Sharkey (N. Y. 1868) 5 Abb. Prac. N. S. 64, 3 N. B. R. 558; Scott v. Devlin (D. C. 1898) 89 Fed. 970; In re Lowe (D. C. 1884) 19 Fed. 589; New Orleans Nat. Banking Ass'n v. Le Breton (C. C. 1882) 14 Fed. 646; Allen v. Massey (C. C. 1870) 4 N. B. R. 248, Fed. Cas. No. 231; McMahon v. Pithan (Iowa, 1914) 147 N. W. 920. CONTRA, Robinson v. Tischler (Fla. 1915) 67 South. 565. As to suits begun by creditors more than four months before the bankruptcy, the right to continue them after the appointment of a trustee, and the preference gained by the suing creditors, see Boyd v. Arnold (1912) 103 Ark. 105, 146 S. W. 118; Hillyer v. Le Roy (1904) 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919. Where a bankrupt's creditors, seeking equitable relief on the ground of fraud by reason of equitable liens acquired prior to the bankruptcy proceedings, do not purposely violate the bankruptcy law or seek an unlawful preference, they are entitled to equitable relief. Robinson v. Tischler (Fla. 1915) 67 So. 565. The adjudication in bankruptcy and appointment of a trustee constitute a complete defense to a creditor's bill filed for such a purpose in a state court. Leseure v. Weaver (1902) 108 Ill. App. 616.

The refusal or failure of the trustee in bankruptcy to sue for the avoidance of an alleged fraudulent conveyance within the time prescribed by law, or at all, does not transfer the right to any creditor or to the creditors generally, nor authorize them to sue in their own behalf. Moyer v. Dewey (1880) 103 U. S. 301, 26 L. Ed. 394; Ruhl-Koblegard Co. v. Gillespie (1907) 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929. Compare Bates v. Bradley (N. Y. 1881) 24 Hun, 84. CONTRA, Casey v. Baker (D. C. 1914) 212 Fed. 247. The remedy of creditors who are dissatisfied with the refusal or inactivity of the trustee is to apply to the court of bankruptcy for an order directing the trustee to institute the necessary proceedings. If the court is satisfied that such action should be taken and will probably result in benefit to the estate, it has power to require the trustee to proceed. Glenny v. Langdon (1878) 98 U. S. 20, 25 L. Ed. 43; McMaster v. Campbell (1879) 41 Mich. 513, 2 N. W. 836; Freelander v. Holloman (D. C. 1873) 9 N. B. R. 331, Fed. Cas. No. 5,081.

53. **Conditions precedent to trustee's action.**—Since the bankruptcy law vests the trustee with title to all property conveyed by the bankrupt in fraud of creditors, he may proceed to recover such property notwithstanding the fact that there may be, at the time, no creditor who has put his claim in judgment and thus placed himself in a position to assail the transfer as fraudulent. The trustee's title "accrues by force of the act, and not through the right of the creditor to assert the fraud." Platt v. Matthews (D. C. 1882) 10 Fed. 280. The bankruptcy law makes it impossible for creditors to reduce their claims to judgment after the adjudication, although this is usually necessary as a condition precedent to the right to avoid a fraudulent conveyance, or even that the creditor should hold an execution returned unsatisfied. Thomas v. Roddy (1907) 122 App. Div. 851, 107 N. Y. Supp. 473; Riker v. Gwynne (Sup. 1908) 116 N. Y. Supp. 10. But the trustee occupies the position of an execution creditor, and hence it is not a prerequisite to his right to institute proceedings for such purpose, nor a condition to his action, that judgments at law should have been obtained upon the claims of the creditors in whose behalf the equitable remedy is invoked. Mitchell v. Mitchell (D. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; Mueller v. Bruss (1901) 112 Wis. 406, 88 N. W. 229; Thomas v. Roddy (1907) 122 App. Div. 851, 107 N. Y. Supp. 473; Crary v. Kurtz (1906) 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549; Beasley v. Coggins (1904) 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; Hobbs v. Frazier (1911) 61 Fla. 611, 55 South. 848; Hood v. Blair State Bank (1902) 3 Neb. (Unof.) 432, 91 N. W. 701; Ryan v. Rogers (1908) 14 Idaho, 309, 94 Pac.

427; Cragin v. Carmichael (C. C. 1873) 11 N. B. R. 511, Fed. Cas. No. 3,319. Compare Earle v. National Metallurgic Co. (1910) 77 N. J. Eq. 17, 76 Atl. 555. Nor is any demand necessary before the commencement of an action by the trustee to recover property unlawfully transferred by the bankrupt. Goldberg v. Harlan (1903) 33 Ind. App. 465, 67 N. E. 707. Neither is he bound to tender to the purchaser the amount which the latter may have paid to the bankrupt. Johnston v. Forsyth Mercantile Co. (D. C. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669. The trustee is bound to show some actionable injury to the estate which he represents, and therefore an action will not lie to avoid an alleged fraudulent sale of personal property, where the goods have already been seized under a warrant in bankruptcy and turned over to the trustee, whose possession is undisputed. Smith v. Claflin (D. C. 1879) 19 N. B. R. 523, Fed. Cas. No. 13,026.

54. —— **Proof of debts and insufficiency of assets.**—In a suit to set aside a fraudulent conveyance or transfer, the trustee must be prepared to show that there were creditors of the bankrupt at the time of the alleged fraud, except in those cases where the transaction may be regarded as fraudulent with respect to subsequent creditors. Union Trust Co. v. Amery (1912) 67 Wash. 1, 120 Pac. 539; Coleman v. Hagey (Mo. 1913) 158 S. W. 829. Also he must allege and show that there are proved and allowed claims against the estate in bankruptcy, or at least provable debts, at the time of bringing the suit, for otherwise there would be no one for him to represent and a recovery would simply inure to the benefit of the bankrupt himself, which is not the purpose of the act. Crary v. Kurtz (1906) 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549; Leavengood v. McGee (1907) 50 Or. 233, 91 Pac. 453; Nicholas v. Murray (C. C. 1878) 18 N. B. R. 469, Fed. Cas. No. 10,223. See Treseder v. Burgor (1906) 130 Wis. 201, 109 N. W. 957. Compare Donegan v. Davis (1880) 66 Ala. 362. Hence, if the creditors purporting to be represented in the action by the trustee have failed to present their claims for allowance within the time required by the statute, and are therefore barred from participation in the estate, the action cannot be maintained. Cartwright v. West (1911) 173 Ala. 198, 55 South. 917. Such a suit may be prosecuted for the sole benefit of one person, if he is the only creditor of the bankrupt. Level Land Co. v. Sivyer (1901) 112 Wis. 442, 88 N. W. 317. But not where that creditor has so conducted himself with reference to the transaction in suit as to estop himself from alleging its fraudulent character. Parker v. Travers (1908) 74 N. J. Eq. 812, 71 Atl. 612.

Further, and to put himself in a position analogous to that of a creditor holding an execution returned unsatisfied, the trustee must aver that the assets of the estate in his hands are not sufficient to satisfy the claims filed against it. Knapp v. Milwaukee Trust Co. (1910) 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; Prescott v. Galluccio (D. C. 1908) 164 Fed. 618, 21 Am. Bankr. Rep. 229; Mueller v. Bruss (1901) 112 Wis. 406, 88 N. W. 229; Flint v. Chaloupka (1908) 81 Neb. 87, 115 N. W. 535; Shelly v. Nolen (1905) 38 Tex. Civ. App. 343, 88 S. W. 524; McKey v. Smith (1912) 255 Ill. 465, 99 N. E. 695. Compare Entwisle v. Cohen (1910) 141 App. Div. 834, 125 N. Y. Supp. 935. It is not necessary for the trustee to allege and show an insufficiency of assets where the bankrupt states in his petition or schedule that he has no assets. In re Schoenfield (D. C. 1911) 190 Fed. 53, 27 Am. Bankr. Rep. 64.

55. **Nature and form of transaction.**—Any disposition of real or personal property by a debtor which would have been void as against his creditors, as being fraudulent at common law or under the statutes of the state, if no petition in bankruptcy had been filed against him, will be equally void as against creditors represented by his trustee in bankruptcy. Union Trust & Sav. Bank v. Amery (1913) 72 Wash. 648, 131 Pac. 199; In re Wynne (C. C. 1868) 4 N. B. R. 23, Fed. Cas. No. 18,117; In re Morrill (D. C. 1873) 8 N. B. R. 117, Fed. Cas. No. 9,821; Smith v. Ely (C. C. 1874) 10 N. B. R. 553, Fed. Cas. No. 13,044. This section applies to an act by which bankrupt surrenders his property for the benefit of a particular creditor. Bailey v. Baker Ice Mach. Co. (1915) 36 S. Ct. 50. An indorser or guarantor of a note of a bankrupt is a creditor within section 60b (ante, § 9644), so as to charge him with a preferential payment made to the holder of the note, and he and the owner of the note may be charged for the receipt of a preferential payment, but only the amount by which the assets of the estate have thereby been depleted must be returned. Continental & Commercial Trust & Savings Bank v. Breen & Kennedy (1914) 188 Ill. App. 467. Where the evidence showed that the defendant and another conspired with the bankrupt in the conveyance of property of the bankrupt to the defendant for the purpose of defrauding creditors of the former, the principles governing constructive fraud are inapplicable. Blake v. Thwing (1914) 185 Ill. App. 187. A general assignment by a debtor, available at common law or made pursuant to a state statute, not providing for the debtor's release, and hence not an insolvent law, is upheld if not attacked by federal bankruptcy proceedings within the time limited therefor. Pelton v. Sheridan (Or. 1914) 144 P. 410. Deposit

just before bankruptcy of all one's assets, to be paid to creditors pro rata, is a general assignment for creditors, void against the trustee in bankruptcy, as regards right to administer them. Gill v. Farmers' & Manufacturers' Bank (1915) 176 S. W. 1111, 189 Mo. App. 401. Bankrupt having made assignments for the benefit of creditors, sales of his stocks of goods by the assignee to his daughter and his wife's nephew held fraudulent, and for the benefit of bankrupt. Faulkner v. Kaplon (D. C. 1913) 203 Fed. 114.

56. —— **Sale and transfer of property.**—One may lawfully sell any part of his property for a present fair consideration, even though he is insolvent, and the transfer will not be voidable in bankruptcy, if the laws of the state were complied with in respect to delivery and other such requisites, and there was no intent to place the property beyond the reach of creditors. In re Ozark Cooperage & Lumber Co. (1910) 180 Fed. 105, 103 C. C. A. 603, 24 Am. Bankr. Rep. 835; Burnes v. Epstein (D. C. 1913) 201 Fed. 393. And see Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206. The mere fact that the defendant, having purchased property from the bankrupt, got it at a bargain price or for much less than its actual value, is not enough to warrant setting aside the sale as fraudulent, since mere inadequacy of price is not alone a proof of fraud. Klein v. Gallin (1913) 141 N. Y. Supp. 831. Selection, separation, weighing, and marking of certain hop bales by the buyer on the seller's ranch, and transportation thereof to the station for shipment to a consignee, held a sufficient delivery and change of possession to render the transfer valid under Civ. Code Cal. § 3440. Williamson v. Richardson (1913) 205 Fed. 245, 123 C. C. A. 427.

A transfer of property for a past consideration, or in discharge of an unsecured debt, will generally be voidable either as a preference or as a fraud on the creditors. In re Webb Co. (D. C. 1915) 224 Fed. 258; Carpenter v. Karnow (D. C. 1911) 193 Fed. 762, 28 Am. Bankr. Rep. 21; Greenhall v. Carnegie Trust Co. (D. C. 1910) 180 Fed. 812, 25 Am. Bankr. Rep. 300; In re Connelly (D. C. 1913) 204 Fed. 479, 30 Am. Bankr. Rep. 340; Raley v. Raymond Bros. Co. (1905) 73 Neb. 496, 103 N. W. 57; In re Ansley Bros. (D. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457. But where a debtor, shortly before his bankruptcy, conveys real and personal property which he had previously sold and for which he had received payment, but had not yet conveyed, the conveyance is not void, although the debtor knew that he was insolvent, as the title to such property was merely held by him in trust for the purchaser. Steadman v. Caswell (D. C. 1880) Fed. Cas. No. 13,330a. A contract of conditional sale of machinery to a bankrupt, duly filed in accordance with Gen. St. Kan. 1909, § 5237, though within four months prior to bankruptcy, held not a "transfer" by the bankrupt to the claimant, but a retention of title in him and enforceable against the bankrupt's trustee. Baker Ice Mach. Co. v. Bailey (1913) 209 Fed. 603, 126 C. C. A. 425. Where defendant received certain notes of third persons and a check from a bankrupt after having delivered to him a car load of metal, which became a part of the bankrupt's estate, but which was not paid for, defendant was entitled to retain the notes and check regardless of his knowledge of the bankrupt's insolvency. Burnes v. Epstein (D. C. 1913) 201 Fed. 393. Where W. sold an automobile truck to a bankrupt, without reserving a lien for the unpaid portion of the price, and later, with knowledge of impending bankruptcy, accepted a return of the truck, and sold it to another, and appropriated the proceeds, he was properly required to surrender such proceeds to the bankrupt's trustee. In re Cónnelly (D. C. 1913) 204 Fed. 479.

The trustee in bankruptcy may avoid a pretended sale which is merely colorable, and amounts to no more than a device to put the apparent title in a third person while the debtor remains the real owner. In re Siegel (D. C. 1908) 164 Fed. 559, 21 Am. Bankr. Rep. 154; Visanska v. Cohen (D. C. 1908) 165 Fed. 552, 21 Am. Bankr. Rep. 350. And a transaction whereby a chose in action is assigned to a third person, without any consideration, but merely that he may collect the money and hand it to the bankrupt. O'Sullivan's Trustee v. Douglass (1907) 30 Ky. Law Rep. 366, 98 S. W. 990. Or where the sale includes the fixtures and furniture and the lease of the debtor's place of business, and so deprives him of the means of continuing his business. Brooks v. D'Orville (D. C. 1874) Fed. Cas. No. 1,951. Or where a voluntary settlement by a debtor effects the payment of debts and contingent liabilities existing at the time, but by means of contracting other obligations, which result afterwards in his insolvency. Spaulding v. McGovern (C. C. 1878) Fed. Cas. No. 13,218. A transaction by which a bankrupt transferred accounts receivable receiving advances thereon of a certain per cent. of their face held a pledge and not a sale of the accounts, and the contracts under which the pledges were made held usurious. Home Bond Co. v. McChesney (C. C. A. 1914) 210 Fed. 893, affirming order In re American Fibre Reed Co. (D. C. 1913) 206 Fed. 309. Where persons who subsequently became stockholders of a corporation placed property in the hands of a bankrupt, on the faith of which money was loaned to her, a subsequent transfer

of the property to the corporation for the benefit of such stockholders was fraudulent and subject to vacation at the instance of the bankrupt's trustee. Osborn v. Peace (D. C. 1914) 215 Fed. 181. Advancement to enable bankrupt to keep in business long enough to prevent avoidance of prior preferences is a fraud on the bankruptcy act, so that the trustee can recover property assigned in consideration of the advancement. Rubenstein v. Lottow (1915) 107 N. E. 718, 220 Mass. 156.

57. —— **Transfers to bankrupt's wife.**—A transfer of property by a debtor to his wife, either directly or through an intermediary, should be carefully scrutinized, and it will be voidable at the instance of his trustee in bankruptcy if found to have been without consideration and in contemplation of insolvency, or merely colorable, the wife taking the record title, but the husband retaining all the fruits of ownership and the power of disposition. Henkel v. Seider (D. C. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773; In re Smith (D. C. 1899) 100 Fed. 795, 3 Am. Bankr. Rep. 95; In re Wood (D. C. 1881) 5 Fed. 443; Fisher v. Henderson (D. C. 1873) 8 N. B. R. 175, Fed. Cas. No. 4,820; Lawrence v. Graves (C. C. 1871) 5 N. B. R. 279, Fed. Cas. No. 8,138; Saxton v. Sebring (1904) 96 App. Div. 570, 89 N. Y. Supp. 372; Breschemier v. Houston (Iowa, 1903) 96 N. W. 756; In re Eldred (D. C. 1869) 3 N. B. R. 256, Fed. Cas. No. 4,328; Jackson v. Jetter (Iowa, 1913) 142 N. W. 431. Use of bankrupt's money by his brother in creating a trust for the bankrupt's wife for the purpose of concealing bankrupt's money held a transfer avoidable by the trustee, as one which a creditor might have avoided. Milkman v. Arthe (D. C. 1914) 213 Fed. 642. A trustee in bankruptcy may recover from the bankrupt's wife property purchased by her savings from money given her for the maintenance of the household, which was not a valid gift by the husband. Milkman v. Arthe (D. C. 1914) 221 Fed. 134, decree reversed (1915) 223 Fed. 507, 139 C. C. A. 55.

58. —— **Fraudulent incorporation.**—Where an embarrassed merchant or manufacturer procures the organization of a corporation, to which he transfers his stock and property, ostensibly as his successor in business, but which is really conducted thereafter solely for his own benefit, the purpose being to delay and defraud his creditors by interposing an apparently new ownership between the property and their claims, such a transfer is voidable in bankruptcy. In re Berkowitz (D. C. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; In re Holbrook Shoe & Leather Co. (D. C. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511; In re Medina Quarry Co. (D. C. 1910) 179 Fed. 929, 24 Am. Bankr. Rep. 769; Ludvigh v. American Woolen Co. (D. C. 1907) 159 Fed. 796, 19 Am. Bankr. Rep. 795; Foster v. Hip Lung Ying Kee & Co. (1909) 243 Ill. 163, 90 N. E. 375. See In re L. M. Alleman Hardware Co. (D. C. 1907) 158 Fed. 119, 19 Am. Bankr. Rep. 765; In re Jamaica Slate Roofing & Supply Co. (D. C. 1912) 200 Fed. 460. Bankrupt's wife held to have received voidable preference, where bankrupt assigned lease of dancing academy to her, and organized corporation, transferring the bulk of the stock to her. Block v. Academy Ball Room, Inc. (D. C. 1915) 221 Fed. 1004. But it is otherwise where the creditors themselves engineer the formation of the corporation, or cause it to be operated for their benefit, rather than for that of the debtor. In re A. L. Robertshaw Mfg. Co. (D. C. 1904) 133 Fed. 556, 13 Am. Bankr. Rep. 409.

59. —— **Mortgage or other lien or security.**—One may take a mortgage or other security upon the property of an insolvent or failing debtor, and maintain it as against his trustee in bankruptcy, provided full and present consideration was given and there was no knowledge of an intent to defraud or to give a preference. In re Mosher (D. C. 1915) 224 Fed. 739; Grinstead v. Union Savings & Trust Co. (1911) 190 Fed. 546, 111 C. C. A. 398, 27 Am. Bankr. Rep. 123; Lindley v. Ross (C. C. A. 1912) 200 Fed. 733, 29 Am. Bankr. Rep. 610; First Nat. Bank v. Haverkampf (1911) 16 N. M. 497, 121 Pac. 31. A conveyance of property by a bankrupt to a mortgagee in payment of that and other valid liens is not voidable in the bankruptcy proceedings. Meservey v. Roby (1912) 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529. Nor is the enforcement of an existing mechanic's lien necessarily invalid as against subsequent proceedings in bankruptcy. Fehling v. Goings (1904) 67 N. J. Eq. 375, 58 Atl. 642. Nor a transaction the effect of which is merely to render specific a previously existing general lien. Duplan Silk Co. v. Spencer (1902) 115 Fed. 689, 53 C. C. A. 321, 8 Am. Bankr. Rep. 367. An antecedent agreement by a debtor to execute a mortgage to a particular creditor to secure its claim did not render the mortgage, when executed, fraudulent as to the mortgagor's other creditors. In re Hawks (D. C. 1913) 204 Fed. 309. It is not necessarily fraudulent in bankruptcy to convert alimony due and accruing under a decree of court into an annuity for life secured by a duly recorded mortgage of specific property. Savage v. Savage (1905) 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599.

But a mortgage or other security

newly given for a debt past due is generally voidable in bankruptcy, either as a preference or as a fraud on the other creditors. In re Salvator Brewing Co. (D. C. 1910) 183 Fed. 910, 25 Am. Bankr. Rep. 536; Bradley v. Farwell (C. C. 1874) Fed. Cas. No. 1,779; Bradley v. Converse (C. C. 1876) Fed. Cas. No. 1,776; Durack v. Wilson (1905) 46 Misc. Rep. 237, 94 N. Y. Supp. 232; Mathews v. Hardt (1903) 79 App. Div. 570, 80 N. Y. Supp. 462. That a renewal of a chattel mortgage may be invalid as against the trustee in bankruptcy of the debtor, see Scott v. One Thousand Island Boat & Engine Co. (Sup. 1911) 134 N. Y. Supp. 150. Adjudication in bankruptcy held to avoid assignment of mortgaged property for payment of the mortgages and payment of any balance to unsecured creditors, and the property, subject to the mortgages, passed to the trustee. In re Cutler & John (D. C. 1916) 228 Fed. 771. A deed of trust executed to secure a present advancement by the beneficiary with knowledge of the bankrupt's insolvency in order to take up notes held by a pressing creditor with knowledge that foreclosure would result in the reduction of the value of the bankrupt's assets, the payment of a preferred debt, and failure to pay other debts, was constructively fraudulent and invalid. Dean v. Davis (C. C. A. 1914) 212 Fed. 88.

A temporary loan upon exorbitant interest, upon the conveyance of the insolvent borrower's whole assets, is a fraud on the bankruptcy law and is void. Brooks v. Davis (C. C. 1876) Fed. Cas. No. 1, 950. A mortgage of all the bankrupt's stock of goods to claimant to secure a loan of $6,000, the proceeds of which was paid to favored creditors and which precipitated bankruptcy, held fraudulent and void as to creditors. Johnson v. Dismukes (C. C. A. 1913) 204 Fed. 382, affirming decree In re Thweatt (D. C. 1912) 199 Fed. 319.

A mortgage given by a corporation to secure the personal indebtedness of its principal stockholder is voidable in bankruptcy. American Wood Working Machinery Co. v. Norment (C. C. A. 1908) 157 Fed. 801, 19 Am. Bankr. Rep. 679. Mortgage bonds, issued by a bankrupt corporation and pledged for an invalid consideration, held not entitled to share in the lien of the mortgage. In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208. A mortgage by a bankrupt to secure advances to be made to a corporation of which he was an officer and stockholder, and on whose paper he was indorser, to be used in carrying out contracts in which he was vitally interested, held not fraudulent nor preferential, but valid and enforceable. Angle v. Bankers' Surety Co. (D. C. 1913) 210 Fed. 289. A mortgage made by a corporation which lacks the consent of the necessary proportion of the stockholders, as provided by the state statute, is voidable in bankruptcy. In re Eagle Steam Laundry Co. (D. C. 1910) 176 Fed. 740, 23 Am. Bankr. Rep. 859.

A mortgage given by a bankrupt, although for a valid consideration and valid as between the parties, if withheld from record by agreement or understanding between them, so as not to affect the mortgagor's credit, may be set aside at the suit of his trustee. National Bank of Athens v. Shackelford (1913) 208 Fed. 677, 125 C. C. A. 575. Failure to record a second real estate mortgage given by a bankrupt is only relevant as to the intention of the parties, and is corroborative of fraud in case the mortgage is otherwise shown to be without consideration or in fraud of creditors. Butcher v. Werksman (D. C. 1913) 204 Fed. 330. Failure to record a New York mortgage is not, as to general creditors, a badge or indicia of fraud, the statute authorizing recordation not being for their protection. In re Mosher (D. C. 1915) 224 Fed. 739.

A chattel mortgage comes within the terms of the bankruptcy law, and may be avoided by the trustee, if fraudulent and void as against creditors, whether for failure to record, or because there was no change of possession, or the mortgagor was not bound to account for sales, or for other reasons. In re Geiver (D. C. 1912) 193 Fed. 128, 28 Am. Bankr. Rep. 413; Egan State Bank v. Rice (1902) 119 Fed. 107, 56 C. C. A. 157, 9 Am. Bankr. Rep. 437; In re Platts (D. C. 1901) 110 Fed. 126, 6 Am. Bankr. Rep. 568; Kappner v. St. Louis & St. J. R. Ass'n (C. C. 1875) Fed. Cas. No. 7,612; In re Leland (C. C. 1873) Fed. Cas. No. 8,234; In re Jacobson & Perrill (D. C. 1912) 200 Fed. 812, 29 Am. Bankr. Rep. 603; Johnson v. Dismukes, 204 Fed. 382, 29 Am. Bankr. Rep. 686; In re Raney (D. C. 1912) 202 Fed. 996. Compare In re Durham (D. C. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115. Where a chattel mortgage was valid as between the parties under the law of the state where made, and the rights of any creditor did not attach prior to the time of the mortgagee taking possession, the trustee in bankruptcy of the mortgagor, was not entitled to the mortgaged chattels. In re East End Mantel & Tile Co. (D. C. 1913) 202 Fed. 275. The provisions of this section do not affect the validity of a chattel mortgage recorded prior to bankruptcy. In re Virgin (D. C. 1915) 224 Fed. 128. A chattel mortgage executed by a bankrupt to claimant held to have been given for a valid consideration, and not to hinder, delay, or defraud creditors, or to have been withheld from record with a fraudulent intent, and, having been recorded prior to the attachment of

the lien of the trustee in bankruptcy, was enforceable against him. Anderson v. J. O. & N. B. Chenault (C. C. A. 1913) 208 Fed. 400. A mortgage executed by a bankrupt corporation held not fraudulent as to the mortgagor's creditors as permitting it to sell off the mortgaged property without accounting for the proceeds to the mortgagee. In re Haywood Wagon Co. (1914) 219 Fed. 655, 135 C. C. A. 391. Where a bankrupt in good faith and for present consideration executed a chattel mortgage on all its property, which mortgage provided that the bankrupt might sell a portion of the property without liability to account therefor to the mortgagee, the mortgage was not thereby rendered void as against the trustee, except as to the property the bankrupt was so authorized to sell. Peterson v. Sabin (1914) 214 Fed. 234, 130 C. C. A. 608.

A pledge of personal property as security for the payment of an existing debt, disguised as a bill of sale with a separate instrument of defeasance, without change of possession, is voidable in bankruptcy. In re Groezinger (D. C. 1912) 199 Fed. 935, 28 Am. Bankr. Rep. 732. See In re American Fibre Reed Co. (D. C. 1913) 206 Fed. 309, 30 Am. Bankr. Rep. 223. Successive assignments of accounts by way of security under contract for advances to enable the assignor to get the goods without knowledge of the assignor's insolvency and without fraudulent intent, were good as against the bankrupt assignor's general creditors. Greey v. Dockendorff (1913) 34 Sup. Ct. 166, 231 U. S. 513, 58 L. Ed. 339, affirming decree In re Schwab-Kepner Co. (1913) 203 Fed. 475, 121 C. C. A. 597.

60. —— **Payment or transfer of money.**—Where property is purchased by a man with his own money, but, by his direction or procurement, the conveyance is made to his wife and the title vested in her, it may properly be said, within the meaning of the bankruptcy law, that the money so paid by him is "transferred," and if this is done in fraud of his creditors, the title to the fund will pass to his trustee in bankruptcy, and the land, as representing it, may be subjected to the administration of the estate. Platt v. Mead (D. C. 1881) 9 Fed. 91; In re Meyers (D. C. 1868) 1 N. B. R. 581, Fed. Cas. No. 9,518; In re Schonberg (D. C. 1874) Fed. Cas. No. 12,477. The rule is the same when any third person, other than the bankrupt's wife, is made the cover to receive the title, the bankrupt furnishing the money. Hyde v. Cohen (D. C. 1874) 11 N. B. R. 461, Fed. Cas. No. 6,967; Parker v. Travers (1908) 74 N. J. Eq. 812, 71 Atl. 612. Payment on a debt within four months of the filing of the petition in bankruptcy, with insurance money received for the destruction of a building exempt as a homestead under Rev. Laws Okl. 1910, §§ 3342, 3343, held not a preference. First Nat. Bank of Cleveland v. Orten (1914) 142 P. 1096.

Where a majority stockholder of a corporation, with knowledge of its precarious financial condition, agreed to sell to the corporation its stock of a par value of $5,100 for $2,000, receiving $500 cash and notes secured by a deed of trust covering all the corporation's assets for the balance, the transaction was fraudulent as against the corporation's creditors and void as against its trustee in bankruptcy. M. V. Moore & Co. v. Gilmore (C. C. A. 1914) 216 Fed. 99. On purchase of shares of its own, outstanding stock by a corporation and payment therefor without diminishing capital stock, resulting in injury to creditors, held its trustee in bankruptcy could recover the payments. Union Trust & Savings Bank v. Amery (1913) 131 P. 199, 72 Wash. 648. Under § 70, post, § 9654, a trustee in bankruptcy of a corporation may not recover corporate funds used to pay for purchase of stock without showing that the payment was in fraud of creditors. Coleman v. Dana (1915) 178 S. W. 256, 191 Mo. App. 370.

One may loan money to his wife to enable her to purchase real estate, and if the loan is repaid before the institution of bankruptcy proceedings against the husband, the land cannot be taken from the wife or impressed with a trust for the husband's creditors. Clark v. Else (1906) 21 S. D. 112, 110 N. W. 88.

It may also be a fraudulent "transfer" of property, within the meaning of the statute, when funds are diverted by an insolvent debtor from the claims of his creditors and invested in a homestead. Painter v. Napoleon Township (D. C. 1910) 190 Fed. 637, 26 Am. Bankr. Rep. 324; Johnson v. May (C. C. 1877) 16 N. B. R. 425, Fed. Cas. No. 7,397. But see In re Letson (1907) 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506. Or when a payment to a creditor covers not only existing debts but also the amount of a note not yet due. Irish v. Citizens' Trust Co. (D. C. 1908) 163 Fed. 880, 21 Am. Bankr. Rep. 39. But a set-off by a bank of a deposit account due to a bankrupt against his liability to the bank on a note is not a "transfer of property" by the bankrupt. Booth v. Prete (1909) 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306.

A gift of money or property of considerable value by a husband to his wife is in fraud of his creditors, and recoverable by his trustee in bankruptcy, if made while he was insolvent and in contemplation of the bankruptcy which shortly followed. Wiley v. McBride (1905) 74 Ark. 34, 85 S. W. 84; In re Friedman (D. C. 1907) 153 Fed. 939. And this includes payments made by him on policies of insurance on his own life for the wife's benefit. In re Bear

(D. C. 1875) 11 N. B. R. 46, Fed. Cas. No. 1,178.

61. —— Judgment or execution.—A debtor may "transfer" his property to another by voluntarily confessing judgment in favor of such other and allowing him to issue execution and make a levy and sale resulting in his becoming the purchaser. Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712. But the plaintiff in a pending suit has the right to abandon or settle the contest at any stage, at his election, and on his subsequent adjudication as a bankrupt his trustee has no cause of action growing out of the settlement of the case, unless in the direction of pursuing the proceeds of a compromise actually received by the bankrupt. Edington v. Masson (1910) 177 Fed. 209, 101 C. C. A. 379, 24 Am. Bankr. Rep. 183. Where property of the debtor is sold under execution in coercive adversary proceedings, in which he made an active though unsuccessful defense, it cannot be said that the sale is in any sense a fraud on his creditors. Nelson v. Svea Pub. Co. (D. C. 1910) 178 Fed. 136.

62. Sales of merchandise in bulk.—Where a merchant sells his entire stock in trade at one time to one purchaser, it is such an unusual occurrence and so far out of the ordinary course of business as to be presumptive evidence of fraud and to charge the purchaser with knowledge of the facts and with bad faith, so that the burden is on him to sustain the validity of his purchase by showing that he took all reasonable and proper steps to ascertain the seller's financial condition and that he bought in good faith and for a present fair consideration. Walbrun v. Babbitt (1872) 16 Wall. 577, 21 L. Ed. 489; In re Calvi (D. C. 1911) 185 Fed. 642, 26 Am. Bankr. Rep. 206; Dokken v. Page (1906) 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf (D. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432; In re Hemstreet (D. C. 1903) 139 Fed. 958, 14 Am. Bankr. Rep. 823; Norton v. Billings (C. C. 1880) 4 Fed. 623; Main v. Glen (D. C. 1875) Fed. Cas. No. 8,973; In re Dean (D. C. 1874) 2 N. B. R. 89, Fed. Cas. No. 3,700; Foster v. Hackley (C. C. 1869) 2 N. B. R. 406, Fed. Cas. No. 4,971; Parker v. Sherman (D. C. 1912) 201 Fed. 155; In re Lipman (D. C. 1912) 201 Fed. 169, 29 Am. Bankr. Rep. 139. Compare Shelton v. Price (D. C. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431. And if it is shown that the sale was made secretly, or with an evident desire to conceal it, that it was made at night, or made hurriedly and with little or no preliminary negotiation, that it was made after a superficial examination of the goods or without taking an inventory, and particularly if the price paid was considerably less than the value of the goods, these are indicia of fraud counting heavily against the purchaser in the trustee's suit to set aside the sale as fraudulent. Dokken v. Page (1906) 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf (D. C. 1906) 146 Fed. 109, 17 Am. Bankr. Rep. 48; Johnston v. Forsyth Mercantile Co. (D. C. 1907) 155 Fed. 268, 19 Am. Bankr. Rep. 48; In re Lipman (D. C. 1912) 201 Fed. 169; Godwin v. Tuttle (Or. 1914) 141 Pac. 1120.

If the state law is construed as available only in favor of those creditors whose claims arose from the sale of the stock of merchandise or some part of it, and only as giving such a creditor a lien, analogous to a vendor's lien, which may be enforced by appropriate legal proceedings in the event of a sale in violation of the provisions of the act, but not as enabling any creditor to treat the sale as a nullity and proceed with the collection of his entire debt, then a sale made in defiance of the statute is not such a one as may be impeached by the trustee in bankruptcy of the seller, for the general estate of the seller can derive no benefit from such impeachment. Sellers v. Hayes (1904) 163 Ind. 422, 72 N. E. 119. And see Gorham v. Buzzell (D. C. 1910) 178 Fed. 596, 24 Am. Bankr. Rep. 440. Further, where personal property, part of the bankrupt merchant's stock in trade, was sold to the same defendant, but at three different times, shortly before bankruptcy, the goods not comprising the entire stock in trade, it was not a sale in bulk. Carpenter v. Karnow (D. C. 1911) 193 Fed. 762, 28 Am. Bankr. Rep. 21. Substantially the same rules apply to the case of a mortgage covering an entire stock in trade or the whole assets of a partnership or corporation. Pollock v. Jones (1903) 124 Fed. 163, 61 C. C. A. 555, 10 Am. Bankr. Rep. 616; Zartman v. First Nat. Bank (1907) 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

63. Preference and fraudulent transfer distinguished.—A transfer or conveyance to a creditor is not voidable under this section of the act merely because it gives that creditor a larger percentage of his debt than other creditors will obtain, and because given and received with that intention. These circumstances may make the transaction voidable as a preference, but it is not voidable as a fraudulent conveyance unless there was an actual fraudulent intent and a purpose to secure some advantage to the bankrupt himself. Coder v. Arts (1909) 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772; In re Maher (D. C. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340. And see Meservey v. Roby (1912) 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529; In re Doyle (D. C. 1912) 199 Fed. 247, 29 Am. Bankr. Rep. 102; Van Iderstine v. National Discount Co. (1909) 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Githens v. Shiffler (D. C. 1902) 112 Fed. 505, 7

Am. Bankr. Rep. 453; In re Doyle (D. C. 1912) 199 Fed. 247, 29 Am. Bankr. Rep. 102; Ex parte Stubbins, L. R. 17 Ch. Div. 58; Kingsbury v. First Nat. Bank (1905) 71 Kan. 570, 81 Pac. 187; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co. (1911) 152 Mo. App. 401, 133 S. W. 412. Compare In re Hill (D. C. 1905) 140 Fed. 984, 15 Am. Bankr. Rep. 499; Allen v. French (1901) 178 Mass. 539, 60 N. E. 125.

If, in a case of payments made to certain creditors to the exclusion of others, there is any substantial evidence of an intent to delay or defraud the unpaid creditors, it is properly submitted to the consideration of the jury. Webb's Trustee v. Lynchburg Shoe Co. (1907) 106 Va. 726, 56 S. E. 581.

A payment of money or a transfer of property by an insolvent debtor, for the purpose of discharging or securing a bona fide existing debt, in good faith and without any intent to affect other creditors injuriously beyond what must necessarily result from the corresponding diminution of the debtor's assets, is not in itself a "fraudulent transfer," nor evidence of an intent to delay or defraud creditors, and is not voidable by the trustee in bankruptcy unless violative of those provisions of the statute which relate specifically to preferences. Coder v. Arts (1907) 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; Manning v. Evans (D. C. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; Congleton v. Schreihofer (N. J. Eq. 1903) 54 Atl. 144; Maffi v. Stephens (Tex. Civ. App. 1906) 93 S. W. 158. If the debtor intended to give a preference, and the creditor knew it or had reasonable cause to believe it, the transfer is voidable in the character of a preference, without regard to an actual fraudulent intent on either part. Ferguson v. Lederer, Strauss & Co. (1905) 128 Iowa, 286, 103 N. W. 794. To make a conveyance voidable under this section of the act it is not enough to show that the debtor intended to give a preference, or that he had a fraudulent design to hinder, delay, or exclude his other creditors. Sargent v. Blake (1908) 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Blakey v. Boonville Nat. Bank (D. C. 1899) 95 Fed. 267, 2 Am. Bankr. Rep. 459; Townes v. Alexander (1904) 69 S. C. 23, 48 S. E. 214.

A mortgage given by an insolvent debtor, subsequently and within four months adjudged a bankrupt, to secure money borrowed at the time for the purpose of preferring certain of his creditors, is voidable, provided the lender knew or had reason to believe that such was his purpose. In re Pease (D. C. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66. Where a corporation executed mortgages covering all its property, to certain favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured, held, that the mortgages were intended to "hinder, delay, and defraud" creditors, and were on that ground voidable in bankruptcy. In re Steininger Mercantile Co. (1901) 107 Fed. 669, 46 C. C. A. 548, 6 Am. Bankr. Rep. 68.

64. Transfers void under state laws.—All transfers, conveyances, or incumbrances of property made by an insolvent debtor, within four months before his bankruptcy, are voidable at the suit of the trustee in bankruptcy, if held null and void as against creditors by the law of the state, whether or not they would be voidable at common law, and whether or not within the specific denouncements of the bankruptcy act. Allen v. Massey (1872) 17 Wall. 351, 21 L. Ed. 542; Pew v. Price (1913) 251 Mo. 614, 158 S. W. 338; In re Bement (C. C. A. 1909) 172 Fed. 98, 96 C. C. A. 412, 22 Am. Bankr. Rep. 616; Wright v. Sampter (D. C. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Broome (D. C. 1869) 3 N. B. R. 343, Fed. Cas. No. 1,966; In re J. S. Appel Suit & Cloak Co. (D. C. 1912) 198 Fed. 322, 28 Am. Bankr. Rep. 818; Pew v. Price (Mo. 1913) 158 S. W. 338. Where an action is brought to set aside a conveyance alleged to be fraudulent and void under the state law, actual fraud or an actual fraudulent intent is not necessary to be made out unless the state law requires it. If that law avoids, as to creditors, transactions only presumptively fraudulent, or attended by "legal" as distinguished from "actual" fraud, the same will be void at the suit of the trustee in bankruptcy. In re Geiver (D. C. 1912) 193 Fed. 128, 28 Am. Bankr. Rep. 413. In determining the validity of any transfer or incumbrance alleged to be voidable under the law of the state, and assailed distinctly on that ground, the courts of bankruptcy will follow and be governed by the applicable decisions of the courts of the state. Allen v. Massey (1872) 17 Wall. 351, 21 L. Ed. 542; Chicago Bank v. Kansas Bank (1890) 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; Etheridge v. Sperry (1891) 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Dooley v. Pease (1901) 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Thompson v. Fairbanks (1905) 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman (1905) 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; Swager v. Smith (C. C. A. 1912) 194 Fed. 762, 27 Am. Bankr. Rep. 660; Howard v. Prince (D. C. 1874) 11 N. B. R. 322, Fed. Cas. No. 6,762; Sieg v. Greene (C. C. A. 1915) 225 Fed. 955; Holbrook v. International Trust Co. (1915) 220 Mass. 150, 107 N. E. 665.

The trustee in bankruptcy may avoid a mortgage which is invalid under the laws of the state because made by a corporation while insolvent. Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co. (1905) 67 N. J. Eq. 602, 60 Atl. 940. The trustee in bankruptcy, as the representative of creditors, may resist adverse claims to property or liens thereon on the ground of failure of compliance with a state statute providing that every sale of goods in the possession of the vendor, not accompanied by immediate delivery and change of possession, shall be presumed fraudulent as to creditors. Skillen v. Endelman (1902) 39 Misc. Rep. 261, 79 N. Y. Supp. 413; In re Waite-Robbins Motor Co. (D. C. 1911) 192 Fed. 47, 27 Am. Bankr. Rep. 541; Benner v. Scandinavian American Bank (Wash. 1913) 131 Pac. 1149; In re Colonial Mill & Lumber Co. (D. C. 1914) 215 Fed. 640; Parker v. Sherman (D. C. 1912) 201 Fed. 155. The trustee in bankruptcy may take advantage of a state statute prohibiting any corporation, while incurring debts and liabilities, from giving to a stockholder and director for the benefit of another stockholder or director any part of its capital. Hazard v. Wight (1911) 201 N. Y. 399, 94 N. E. 855. A transfer or mortgage of property, which is invalid under the law of the state because made to one having knowledge or reasonable cause to suspect that it was made with the intention of hindering or defrauding creditors, will be voidable by the trustee in bankruptcy. In re Walden Bros. Clothing Co. (D. C. 1912) 199 Fed. 315, 29 Am. Bankr. Rep. 80. Where a state statute provides that certain transfers of property shall be declared void "at the suit of any creditor," it cannot be invoked in a case where bankruptcy proceedings were instituted before any such suit was commenced. In re Chadwick (D. C. 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528. And see Mayhew v. Todisman (1912) 246 Mo. 288, 151 S. W. 436. And though the rights of a trustee in bankruptcy and those of an assignee in insolvency under the state statute are defined in similar terms, yet it does not follow that a state statute making a certain transfer void as against an assignee eo nomine will also make it void as against a trustee in bankruptcy. In re Loveland (1907) 155 Fed. 838, 84 C. C. A. 72; Stellwagen v. Clum (1914) 218 Fed. 730, 134 C. C. A. 408.

65. —— **Chattel mortgages.**—In the case of a chattel mortgage, aside from any question of actual fraud or of an intention to contravene or defeat the bankruptcy law, the validity of such an instrument is to be tested by the law of the state; and if that law prescribes certain conditions as essential to its validity when attacked by other creditors —such as registration or filing for record, change of possession, accountability for sales out of stock, or the like,— the trustee in bankruptcy may assail and avoid it for lack of compliance with those conditions. Holt v. Crucible Steel Co. (1912) 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756; Pacific State Bank v. Coats (1913) 205 Fed. 618, 123 C. C. A. 634; Millikin v. Second Nat. Bank (1913) 206 Fed. 14, 124 C. C. A. 148; Toof v. City Nat. Bank (1913) 206 Fed. 250, 124 C. C. A. 118; Massachusetts Bonding & Ins. Co. v. Kemper (1915) 220 Fed. 847, 136 C. C. A. 593; In re Cooper's Estate (D. C.) 226 Fed. 317; In re Palmer (D. C. 1914) 218 Fed. 74; In re Marriner (D. C. 1915) 220 Fed. 542; Davis v. Hanover Savings Fund Soc. (C. C. A. 1913) 210 Fed. 768; Schaupp v. Miller (D. C. 1913) 206 Fed. 575; In re Virgin (D. C. 1915) 224 Fed. 128; In re Bolstad (D. C. 1915) 224 Fed. 283; In re Mosher (D. C. 1915) 224 Fed. 739; In re Jacobson & Perrill (D. C. 1912) 200 Fed. 812; In re Nuckols (D. C. 1912) 201 Fed. 437; In re Watson (D. C. 1912) 201 Fed. 962; In re Pittsburgh-Big Muddy Coal Co. (C. C. A. 1914) 215 Fed. 703; Deupree v. Watson (D. C. 1912) 201 Fed. 962; Coggan v. Ward (1913) 215 Mass. 13, 102 N. E. 336; Gill v. Ely-Norris Safe Co. (1913) 170 Mo. App. 478, 156 S. W. 811; In re Noethen (D. C. 1912) 195 Fed. 573, 27 Am. Bankr. Rep. 910; In re Jules & Frederic Co. (D. C. 1911) 193 Fed. 533, 27 Am. Bankr. Rep. 136; Alter v. Clark (D. C. 1911) 193 Fed. 153; In re Geiver (D. C. 1912) 193 Fed. 128, 28 Am. Bankr. Rep. 413; In re Jackson Brick & Tile Co. (D. C. 1911) 189 Fed. 636, 26 Am. Bankr. Rep. 915; Mishawaka Woolen Mfg. Co. v. Teasdale (1911) 145 Wis. 73, 129 N. W. 671; Low v. Taylor (1907) 73 N. J. Eq. 406, 68 Atl. 128; In re Walden Bros. Clothing Co. (D. C. 1912) 199 Fed. 315, 29 Am. Bankr. Rep. 80; L. A. Becker Co. v. Gill (C. C. A. 1913) 206 Fed. 36, 30 Am. Bankr. Rep. 429; In re United States Lumber Co. (D. C. 1913) 206 Fed. 236, 30 Am. Bankr. Rep. 682.

The rule in some of the states that chattel mortgages upon changeable stocks of merchandise of which the mortgagor is in possession, with liberty to sell in the ordinary course of business and apply the proceeds to his own use, are fraudulent and void, must be given effect in the bankruptcy court. In re Thorson Bros. (D. C. 1913) 209 Fed. 961; In re Noethen (1912) 201 Fed. 97, 119 C. C. A. 435; In re Raney (D. C. 1912) 202 Fed. 996. A chattel mortgage on a stock of merchandise, given to secure payment of a part of the purchase price, and allowing the mortgagor to sell but did not require him to apply the proceeds to the payment of the mortgage debt or to the purchase of new stock, held fraudulent as to the mortgagor's creditors and un-

enforceable in bankruptcy proceedings against the mortgagor. In re Purtell (D. C. 1914) 215 Fed. 191. Under the laws of Arkansas, a merchandise mortgage permitting the mortgagor to remain in possession and sell the merchandise without accounting to the mortgagee is absolutely void; but one permitting him to retain possession, sell the property, and account for all receipts to the mortgagee, less the expense of carrying on the business and the mortgagor's living expenses, is valid. In re Hawks (D. C. 1913) 204 Fed. 309. Under Civ. Code Ga. 1910, § 3349, relating to crop mortgages, a crop mortgage, though not recorded until after action brought against the mortgagor on a note, held prior to the claim of the holder of the note in bankruptcy; the mortgagor having been declared a bankrupt before recovery of judgment on the note. In re Beard (D. C. 1913) 204 Fed. 129.

The trustee in bankruptcy may take advantage of decisions in the courts of the state against the validity of a chattel mortgage where the principal part of the property covered consists of articles perishable in their nature, or which would ordinarily be consumed in the use before sale on foreclosure could be made. Swager v. Smith (C. C. A. 1912) 194 Fed. 762, 27 Am. Bankr. Rep. 660.

A mining lease, reserving a lien for royalties, held not a conveyance to secure a debt, which was required to be recorded by Code Ala. 1907, §§ 3376, 3386, but valid and enforceable, on the bankruptcy of the lessee, for past-due royalties. In re Gallacher Coal Co. (D. C. 1913) 205 Fed. 183.

66. —— Conditional sales.—Where a contract of conditional sale of goods to the bankrupt is voidable under the laws of the state, because not duly filed or recorded as required by statute, it may be avoided by the trustee in bankruptcy for the same reason. L. A. Becker Co. v. Gill (1913) 206 Fed. 36, 124 C. C. A. 170; In re Johnson (D. C. 1914) 215 Fed. 666; In re O'Brien (D. C. 1914) 215 Fed. 129; In re White's Express Co. (C. C. A. 1914) 215 Fed. 894; In re Zephyr Mercantile Co. (D. C. 1913) 203 Fed. 576; In re M. L. B. Sturkey Co. (D. C. 1915) 224 Fed. 251; In re Pacific Electric & Automobile Co. (D. C. 1915) 224 Fed. 220; In re Wall (D. C. 1910) 207 Fed. 994; In re United States Lumber Co. (D. C. 1913) 206 Fed. 236; In re Johnson (D. C. 1914) 212 Fed. 311; In re Vandewater & Co. (D. C. 1915) 219 Fed. 627. Where a contract for the sale of fertilizers on credit to the bankrupt provided that the proceeds of sales made by him should be held for the seller to be applied on the price, such debts constituted personal property and required the contract to be recorded, under Civ. Code S. C. 1912, § 3542, and the seller as against the bankrupt's trustee was not entitled to a lien thereon on failure to record. Townsend v. Ashepoo Fertilizer Co. (C. C. A. 1914) 212 Fed. 97.

67. Transfers fraudulent as to partnership or individual creditors.—The trustee of a bankrupt partnership can sue to set aside fraudulent transfers of its property or assets on the same grounds and under the same conditions as in the case of an individual bankrupt. Barker v. Franklin (1902) 37 Misc. Rep. 292, 75 N. Y. Supp. 305; Shainwald v. Lewis (D. C. 1881) 6 Fed. 753; Hull v. Hudson (1911) 9 Del. Ch. 205, 80 Atl. 674. The validity of a mortgage given by the partnership as such is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone. McNair v. McIntyre (1902) 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638. Where an insolvent partnership, within four months prior to its bankruptcy, incumbers its property to secure the individual debt of one partner, or pays such debt with firm assets, the transfer is voidable by the trustee. In re W. J. Floyd & Co. (D. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438. CONTRA, Crawford v. Sternberg (1915) 220 Fed. 73, 135 C. C. A. 641. Unless in the case where all who were creditors of the firm at the time consented to the transaction or were paid off before the bankruptcy. Merchants' Bank v. Thomas (1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; Thompson v. First Nat. Bank (1904) 84 Miss. 54, 36 South. 65.

The dissolution of a partnership while insolvent, and the division of the firm property among the partners, to be held as their individual property, thus giving individual creditors a more advantageous position than firm creditors, the latter being justly and equitably entitled to priority of payment from such property, is contrary to the whole theory of the bankruptcy law; and where such dissolution takes place within four months before the firm is adjudged bankrupt, it will be treated as a void transfer, and the property in the hands of both partners will be treated as firm property, without regard to any actual fraudulent intention on their part. In re Head (D. C. 1902) 114 Fed. 489, 7 Am. Bankr. Rep. 556; In re Terens (D. C. 1910) 175 Fed. 495, 23 Am. Bankr. Rep. 680. See Hodgskin v. Heim (1901) 33 Misc. Rep. 548, 67 N. Y. Supp. 876. A pretended dissolution of a partnership, with a fraudulent intention to place the continuing partner in a position where he can claim individual exemptions in bankruptcy out of the firm's assets, is ineffectual as against partnership creditors. In re Abrams (D. C. 1912) 193 Fed. 271. Where one of the partners of an insolvent firm sells and transfers his entire interest in the firm and its business to his co-partner, the latter agree-

ing to assume the firm debts, the transaction is not necessarily fraudulent and voidable under the bankruptcy law. In re Rudnick (D. C. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531. But it is so if made in contemplation of the bankruptcy of the continuing partner, and with no bona fide expectation of continuing the business. In re Byrne (D. C. 1868) 1 N. B. R. 464, Fed. Cas. No. 2,270. Or if the sale was fictitious, the money paid being covertly returned to the buyer and afterwards used in the firm's business. Burrill v. Lawry (D. C. 1878) Fed. Cas. No. 2,199. A chattel mortgage taken by the retiring partner and covering all the goods in stock and to be acquired, and which is by agreement kept from the record, is fraudulent and void as to subsequent creditors. In re Stephens (D. C. 1872) Fed. Cas. No. 13,365.

Where a firm which became bankrupt paid a substantial sum of money to one of the partners in return for his investment in the business, after he saw that it was not going to be profitable, and when the partners knew that the financial condition of the firm was precarious, it was held that this constituted a withdrawal of the partner's interest before the firm's debts were paid, and he was therefore bound to repay the amount to the firm's trustee in bankruptcy. In re Rosenthal (D. C. 1912) 200 Fed. 190, 29 Am. Bankr. Rep. 515.

68. Property or rights transferred.—Under the provisions of this section relating to fraudulent transfers of "property," that term may include the furniture and other belongings of the debtor's own house, when given to his wife without consideration and while he is insolvent. In re Pierce (C. C. 1877) Fed. Cas. No. 11,139. It will include a lease or leasehold interest if it has value. Jones v. Slauson (C. C. 1888) 33 Fed. 632. And a claim for money or other chose in action. O'Sullivan's Trustee v. Douglass (1907) 30 Ky. Law Rep. 366, 98 S. W. 990. See Williamson v. Colcord (D. C. 1875) Fed. Cas. No. 17,752. And the salary of a city official, when assigned by him in fraud of his creditors. O'Sullivan's Trustee v. Douglass (1907) 30 Ky. Law Rep. 366, 98 S. W. 990. And a policy of life insurance having a cash surrender value. Kirkpatrick v. Johnson (D. C. 1912) 197 Fed. 235, 28 Am. Bankr. Rep. 291. And a paid-up endowment life policy taken out by the bankrupt, the insured, and transferred to his wife. Bailey v. Wood (1909) 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722.

Since creditors can be defrauded only by the transfer of something to which they might have had recourse for the satisfaction of their claims, the statute does not apply to a transfer of real property in which the bankrupt had no beneficial interest though he held the legal title, such title being held merely in trust for his wife. Phillipps v. Kleinman (1911) 232 Pa. 571, 81 Atl. 648. And the trustee in bankruptcy cannot maintain an action to recover property which never stood in the bankrupt's name, although he paid the price of it, when it was transferred directly from the seller to a third person, notwithstanding this course was taken in pursuance of a purpose, on the part of the bankrupt and the person taking the title, to hinder and defraud creditors, since the property cannot be said to have been transferred by the bankrupt. London v. Epstein (1910) 138 App. Div. 513, 123 N. Y. Supp. 399. Any mortgage or conveyance of a homestead or other exempt property which would be good against the debtor under the state law will also be good against his trustee in bankruptcy. In re National Grocer Co. (C. C. A. 1910) 181 Fed. 33, 24 Am. Bankr. Rep. 360; Cowan v. Burchfield (D. C. 1910) 180 Fed. 614, 25 Am. Bankr. Rep. 293; Hackney v. First Nat. Bank (1903) 68 Neb. 588, 94 N. W. 805, 98 N. W. 412. See Bohannon v. Clark (1904) 78 S. W. 479, 25 Ky. Law Rep. 1710. The use of money or of the proceeds of nonexempt property by an insolvent debtor to purchase a homestead, or to discharge a lien thereon, is not fraudulent and does not invalidate his claim to the homestead exemption, or give his trustee in bankruptcy the right to subject the homestead to a lien for the amount so diverted from his creditors. In re Wilson (1903) 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522; Gray v. Brunold (1903) 140 Cal. 615, 74 Pac. 303. CONTRA, In re Boston (D. C. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388.

69. Time of conveyance or transfer.—If no petition in bankruptcy is filed by or against the debtor until more than four months have elapsed after a sale or other transfer of property by him, or the giving of a mortgage thereon, or a gift or a preferential payment or an assignment for creditors, the transaction will remain valid so far as the bankruptcy law is concerned, and cannot be impeached by a trustee in bankruptcy subsequently appointed. In re Mosher (D. C. 1915) 224 Fed. 739; Johnson v. Wilson (D. C. 1914) 217 Fed. 99; First Nat. Bank v. Exchange Nat. Bank (1915) 153 N. Y. Supp. 818; Sturdivant Bank v. Schade (C. C. A. 1912) 195 Fed. 188, 27 Am. Bankr. Rep. 673; In re Shinn (D. C. 1911) 185 Fed. 990, 25 Am. Bankr. Rep. 833; Little v. Holley-Brooks Hardware Co. (1904) 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422; In re Kindt (D. C. 1900) 101 Fed. 107, 4 Am. Bankr. Rep. 148; Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Murphy v. W. T. Murphy & Co. (1904) 126 Iowa, 57, 101 N. W. 486; McIntire v. Jennings (1905) 38 Wash. 119, 80 Pac. 278; Ea-

son v. Garrison (1904) 36 Tex. Civ. App. 574, 82 S. W. 800; Watson v. Taylor (1874) 21 Wall. 378, 22 L. Ed. 576. See In re Taylor (D. C. 1899) 95 Fed. 956; Merrill v. Hussey (1906) 101 Me. 439, 64 Atl. 819. The transfer must have been made, or the lien given, more than four months before the bankruptcy. If made or given within that period, it will not be saved by the fact that it merely carried into effect an agreement entered into at an earlier date. Vitzthum v. Large (D. C. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666. But compare Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803. And see Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595, holding that property delivered by a bankrupt in good faith within four months prior to the bankruptcy on a previous contract of sale does not vest in the trustee, even though the transfer may be voidable as a preference. Facts held insufficient to constitute a constructive trust of the proceeds of bankrupts' tobacco crop, so that an order for payment of claimant's debt out of such proceeds, having been given within four months before the debtors were declared bankrupts, was invalid as against the bankrupts' trustee. Maltbie v. Olds (1914) 92 A. 403, 88 Conn. 633. A purchase from a bankrupt within four months prior to the filing of the petition in bankruptcy, which is not based on good faith and a present fair consideration, constitutes actual fraud, and under the bankruptcy act, the sale is void in toto as to creditors of the bankrupt. Blake v. Thwing (1914) 185 Ill. App. 187.

It is the date when the transfer or incumbrance is executed, not the date when it is recorded, which fixes the question of its validity in bankruptcy. Davis v. Hanover Savings Fund Soc. (C. C. A. 1913) 210 Fed. 768; Underleak v. Scott (1912) 117 Minn. 136, 134 N. W. 731; Dean v. Plane (1901) 96 Ill. App. 428, affirmed (1902) 195 Ill. 495, 63 N. E. 274. CONTRA, In re Tysor-Cheatham Mercantile Co. (D. C. 1910) 178 Fed. 733, 24 Am. Bankr. Rep. 434; Arnold v. Eastin's Trustee (1903) 116 Ky. 686, 76 S. W. 855; Cartwright v. West (Ala. 1914) 64 South. 293.

These provisions of the statute did not enable the trustee in bankruptcy to set aside a fraudulent conveyance or transfer made before the passage of the bankruptcy act. In re Brown (D. C. 1898) 91 Fed. 358; Gardner v. Haines (1905) 19 S. D. 514, 104 N. W. 244. Compare Shelley v. Nolen (1905) 39 Tex. Civ. App. 307, 88 S. W. 524.

Although the statute makes no specific provision covering the case of a sale or transfer of property by the bankrupt after the filing of the petition against him, yet such an attempt to control the disposition of his assets is of course a fraud upon the law itself, and is clearly voidable by the trustee in bankruptcy, at least when made to a party chargeable with knowledge of the facts. In re Denson (D. C. 1912) 195 Fed. 854, 28 Am. Bankr. Rep. 158.

Another section of the bankruptcy act (post, § 9654, subd. "e"), provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided," and if a trustee in bankruptcy bases his suit distinctly on this provision of the statute—that is, on his statutory right to avoid any transfer of property which any creditor of the bankrupt might have avoided—then it is immaterial whether the transfer or conveyance which he attacks was made more or less than four months before the filing of the petition in bankruptcy. Thomas v. Fletcher (D. C. 1907) 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros. (D. C. 1904) 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck (D. C. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727; Cartwright v. West (1908) 155 Ala. 619, 47 South. 93; Commercial State Bank & Trust Co. v. Bates (1910) 96 Miss. 386, 51 South. 599; Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor (1906) 130 Wis. 201, 109 N. W. 957; Friedman v. Verchofsky (1903) 105 Ill. App. 414; Sharp v. Fitzhugh (1905) 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold (1912) 103 Ark. 105, 146 S. W. 118; Underleak v. Scott (1912) 117 Minn. 136, 134 N. W. 731; Cookingham v. Ferguson (C. C. 1871) 4 N. B. R. 635, Fed. Cas. No. 3,182; Cady v. Whaling (C. C. 1877) Fed. Cas. No. 2,285; In re Herpich (C. C. 1877) 15 N. B. R. 426, Fed. Cas. No. 6,418; Knowlton v. Moseley (1870) 105 Mass. 136. Except as prohibited by the bankruptcy act, a husband may legally prefer his wife as a creditor, in the absence of fraud, actual or constructive, to which she is a party. Weld v. McKay (1914) 218 Fed. 807, 134 C. C. A. 495.

70. Insolvency of debtor.—A conveyance or incumbrance of property made at a time when the debtor was solvent is not voidable at the suit of his trustee, although bankruptcy follows within four months. Adams v. Collier (1887) 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; Milkman v. Arthe (1915) 223 Fed. 507, 139 C. C. A. 55; Butcher v. Cantor (D. C. 1911) 185 Fed. 945, 26 Am. Bankr. Rep. 424; Metropolitan Nat. Bank v. Rogers (1893) 53 Fed. 776, 3 C. C. A. 666; Richardson v. Winnissimmet Nat. Bank (1905) 189 Mass. 25, 75 N. E. 97; Mercer's Trustee v. Mercer (1903) 74 S. W. 285, 24 Ky. Law Rep. 2469; Dutton v. Cloar (1901) 26 Tex. Civ. App.

547, 65 S. W. 70; Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998; In re Cornwall (C. C. 1871) 6 N. B. R. 305, Fed. Cas. No. 3,250; Sedgwick v. Wormser (D. C. 1872) 7 N. B. R. 186, Fed. Cas. No. 12,626; Sedgwick v. Lynch (D. C. 1872) 8 N. B. R. 289, Fed. Cas. No. 12,615. CONTRA, Holbrook v. International Trust Co. (1915) 220 Mass. 150, 107 N. E. 665; Buttz v. James (N. D. 1916) 156 N. W. 547. If the trustee, in a suit to set aside a conveyance or incumbrance of property by the bankrupt, does not allege insolvency at the date of the transfer, or offer evidence to show that fact, the court will presume that the bankrupt was solvent at that time. Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998.

Some decisions hold that a transfer is voidable by the trustee if the remaining assets of the debtor would be insufficient to pay his debts, that is, although he may have been solvent before making the transfer, yet if it left him insolvent the statute is satisfied. National Bank & Loan Co. v. Spencer (1900) 53 App. Div. 547, 65 N. Y. Supp. 1001; Hamlin v. Arbolino (1911) 72 Misc. Rep. 190, 131 N. Y. Supp. 45. But other decisions hold that the debtor must be insolvent both before and at the making of the transfer, since the statute avoids transfers made by the bankrupt "while insolvent." Upson v. Mt. Morris Bank (1905) 103 App. Div. 367, 92 N. Y. Supp. 1101; Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998. When the point at which insolvency becomes material has been determined, the condition itself is to be ascertained by applying the statutory definition, taking into account all the primary and contingent indebtedness of the bankrupt and all his property, the latter at a fair valuation. Rutland County Nat. Bank v. Graves (D. C. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; Bailey v. Wood (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Gill v. Ely-Norris Safe Co. (1913) 170 Mo. App. 478, 156 S. W. 811. A trader is insolvent when he does not meet his obligations as they mature in the ordinary course of business, though the rule does not apply to all persons. Holbrook v. International Trust Co. (1915) 107 N. E. 665, 220 Mass. 150.

71. Intention of debtor.—In the case of conveyances held null and void as to creditors under the laws of the particular state, it is probably not necessary to show an actual fraudulent purpose on the part of the debtor, in order to avoid them in bankruptcy, since these laws usually apply to cases of constructive, technical, or presumed fraud. Lavender v. Bowen (Iowa 1904) 101 N. W. 760. But where an action to avoid a conveyance or incumbrance is based on the provision of the bankruptcy law which makes such transfers or liens voidable when made within four months prior to bankruptcy and "with the intent and purpose to hinder, delay, or defraud his creditors, or any of them," an actual fraudulent purpose on the part of the debtor is an essential element of the trustee's right of action, and unless it is affirmatively established the transaction must stand good. Van Iderstine v. National Discount Co. (1909) 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Coder v. Arts (1907) 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Kayser (1910) 177 Fed. 383, 100 C. C. A. 615, 24 Am. Bankr. Rep. 174; Rutland County Nat. Bank v. Graves (D. C. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; In re Burnstine (D. C. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596; Thompson v. Fairbanks (1903) 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899 (affirmed [1905] 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437); Conley v. Nelin (Tex. Civ. App. 1910) 128 S. W. 424; Barnard v. Davis (1875) 54 Ala. 565; Vowinkel v. Moser (1906) 213 Pa. St. 587, 63 Atl. 130. It is not enough to show that the necessary consequence of the transfer or incumbrance is to hinder creditors in enforcing their claims, or that it defrauds them in the sense of leaving the debtor insolvent or even penniless, or that the property so disposed of was more in value than the debtor could rightfully withdraw from the reach of his creditors. Adams v. Collier (1887) 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; Kentucky Bank & Trust Co. v. Pritchett (Okl. 1914) 143 Pac. 338. The statute cannot be read as denouncing any transfer which produces a given result, irrespective of the motive. On the contrary it is aimed only at such conveyances as would be fraudulent and voidable at common law or under the statute of Elizabeth, and under the bankruptcy act, as in those cases, an actual fraudulent intent on the part of the debtor is essential. Coder v. Arts (1909) 213 U. S. 223, 29 Sup. Ct. 436; Sargent v. Blake (1908) 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115. The good faith of an alleged conveyance by a bankrupt in fraud of creditors is to be measured by the same standard of care that is applied to a creditor in accepting payments, or transfers as payments, from an insolvent debtor. Lewis v. Julius (D. C. 1913) 212 Fed. 225.

A sale, payment, or mortgage made in good faith and for the honest purpose of discharging a debt, and in the expectation that by so doing the person could continue in business, cannot be set aside as a fraudulent transfer, whatever may be the effect on the other creditors. Tiffany v. Lucas (1872) 15 Wall. 410, 21 L. Ed. 198. Nor would

it be voidable where a fair and honest sale of property was made with the particular view of keeping out of bankruptcy. Darby v. Lucas (C. C. 1870) Fed. Cas. No. 3,573; Mercer v. Warfield's Guardian (1880) 1 Ky. Law Rep. 273. Though a man is insolvent, he may give to his wife a reasonable and suitable amount of money for current household expenses. Gray v. Brunold (1903) 140 Cal. 615, 74 Pac. 303. A transfer of exempt property is not voidable by the trustee. Bohannon v. Clark (1904) 25 Ky. Law Rep. 1710, 78 S. W. 479. But a conveyance of property by a debtor for the purpose of compelling a creditor to compromise, by the hindrance and delay thereby occasioned, is voidable as to all creditors. Voorheis v. Blanton (C. C. A. 1898) 89 Fed. 885.

72. —— **Intention as to future creditors.**—If a person is solvent and able to meet his debts, and makes a transfer or conveyance of property in good faith and without any fraudulent purpose at the time, it is not voidable, though he afterwards contracts debts, becomes insolvent, and is thrown into bankruptcy. Warren v. Moody (1887) 122 U. S. 132, 7 Sup. Ct. 1063, 30 L. Ed. 1108; Savage v. Savage (1905) 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599; Herring v. Richards (D. C. 1880) 3 Fed. 439; Sedgwick v. Place (D. C. 1871) 5 N. B. R. 168, Fed. Cas. No. 12,620; Jones v. Clifton (C. C. 1878) 18 N. B. R. 125, Fed. Cas. No. 7,457; Anonymous (C. C. 1843) Fed. Cas. No. 474. But if a person is engaged in a hazardous business and fears loss, and conveys property to his wife or children as an anchor to protect his family in case of insolvency, or if he takes this course because he is about to embark in new enterprises or speculations and means to secure his property against seizure for the debts which he expects to contract, then the transfer is fraudulent as to those who subsequently become his creditors and will be voidable by his trustee in bankruptcy. Beasley v. Coggins (1904) 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; U. S. v. Griswold (C. C. 1881) 8 Fed. 556; Barker v. Barker's Assignee (C. C. 1874) 2 Woods, 87, 12 N. B. R. 474, Fed. Cas. No. 986; Scott v. Mead (D. C. 1889) 37 Fed. 865; Sedgwick v. Place (C. C. 1874) 10 N. B. R. 28, Fed. Cas. No. 12,621; Burdick v. Gill (C. C. 1881) 7 Fed. 668; Antrim v. Kelly (D. C.) 4 N. B. R. 587, Fed. Cas. No. 494; Case v. Phelps (1868) 39 N. Y. 164, 5 N. B. R. 452; Caller v. McNabb (C. C. 1878) Fed. Cas. No. 2,322. Compare In re Foss (D. C. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene, the settler proposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. Smith v. Vodges (1875) 92 U. S. 183, 23 L. Ed. 481.

73. **Consideration.**—A sale, assignment, or mortgage of property by one who is afterwards adjudged a bankrupt is not voidable at the instance of his trustee if the purchaser or mortgagee took the same in good faith and gave a present consideration fairly proportioned to the value of the property, irrespective of the motive or purpose of the bankrupt. National Bank of Goldsboro v. Hill (D. C. 1915) 226 Fed. 102; Anderson v. J. O. & N. B. Chenault (C. C. A. 1913) 208 Fed. 400; Vollmer v. Plage (D. C. 1911) 186 Fed. 598, 26 Am. Bankr. Rep. 590; In re McCord (C. C. A. 1909) 174 Fed. 820, 23 Am. Bankr. Rep. 164; Perry v. Avery (1907) 148 Mich. 211, 111 N. W. 746; Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998; Rosenfeld v. Siegfried (1901) 91 Mo. App. 169; Mathews v. Hardt (1903) 79 App. Div. 570, 80 N. Y. Supp. 462; Friedman v. Verchofsky (1903) 105 Ill. App. 414; Piedmont Sav. Bank v. Levy (1905) 138 N. C. 274, 50 S. E. 657, 3 Ann. Cas. 785; In re Pusey (D. C. 1872) 7 N. B. R. 45, Fed. Cas. No. 11,478; In re Keefer (D. C. 1870) 4 N. B. R. 389, Fed. Cas. No. 7,636; Flournoy v. Newton (1850) 8 Ga. 306. A sale by an insolvent trader of his entire stock in trade, if for its full value, and without any marks of secrecy, haste, or intent to defraud or prefer, cannot be impeached in his subsequent bankruptcy. In re Strenz (D. C. 1881) 8 Fed. 311. Although it may be proved or admitted that the transfer was made with intent to defraud creditors, yet if it is also established that the purchaser acted in good faith, then the only question for decision is whether the price paid was a present fair consideration. Montgomery v. McNicholas (D. C. 1905) 138 Fed. 956, 15 Am. Bankr. Rep. 93. A chattel mortgage, executed by a mortgagor subsequently adjudged a bankrupt, held not to be set aside unless the bankrupt was guilty of actual fraud, which was not shown by the fact that the mortgagee, giving full consideration, stipulated that part of the proceeds should be applied to relieve a corporation of which he was president and a relative of liability as accommodation indorsers of the bankrupt. In re Baar (1914) 213 Fed. 628, 130 C. C. A. 292. But the fact of payment and the amount of the consideration must be clearly and fully established by satisfactory evidence.

Greensfelder v. Corbett (1901) 190 Ill. 565, 60 N. E. 847.

74. —— **Nature of consideration.**—The consideration which will save a conveyance or transfer from being voidable in bankruptcy may be cash or solvent credit. Unmack v. Douglass (1903) 75 Conn. 633, 55 Atl. 12. A pledge of its mortgage bonds by a bankrupt corporation as security for notes of another corporation, whose property bankrupt had taken over with an assumption of its indebtedness, held valid. Butterfield v. Woodman (1915) 223 Fed. 956, 139 C. C. A. 436, modifying decree In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208. A mortgage given by one subsequently bankrupt, to induce persons to indorse his note so that he could obtain a loan, held not a preference within Bankruptcy Act, § 60b, as amended. In re Mosher (D. C. 1915) 224 Fed. 739. The consideration for a transfer or conveyance may be the surrender of securities of equal value. Shaffer v. Fritchery (D. C. 1871) 4 N. B. R. 548, Fed. Cas. No. 12,697; First State Bank v. Sibley County Bank (1905) 96 Minn. 456, 105 N. W. 485. Or real property deeded in exchange for other land. Hoffman v. Chicago Title & Trust Co. (1902) 198 Ill. 452, 64 N. E. 1027. Or the assumption of the unpaid balance of purchase money due on the property transferred. Unmack v. Douglass (1903) 75 Conn. 633, 55 Atl. 12. Or the relinquishment of a dower interest in the bankrupt's lands, at least to the extent of the value of the dower released. Moore v. Green (1906) 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648. That a transfer by a failing husband to his wife, though absolute in form, was in fact a mortgage, did not show that it was fraudulent, where she did not claim the value of the property, but only a lien for a debt. Weld v. McKay (1914) 218 Fed. 807, 134 C. C. A. 495.

Marriage may be a good consideration for a transfer of property, but not where the gift to the wife consists of house furnishings of large value bought on credit, she having knowledge of the husband's insolvency, and the whole transaction being part of a scheme to defraud his creditors. Hosmer v. Tiffany (1907) 54 Misc. Rep. 402, 105 N. Y. Supp. 1055. Nor where the woman had a husband living and was therefore incapable of entering into the marriage contract with the bankrupt. Hosmer v. Tiffany (1906) 115 App. Div. 303, 100 N. Y. Supp. 797. Past services rendered by a relative in the capacity of a housekeeper, which were given gratuitously at the time and not regarded as the foundation of any indebtedness, cannot support a transfer of property as against the trustee in bankruptcy. Bartlett v. Mercer (D. C. 1876) Fed. Cas. No. 1,078. In a suit by the trustee to recover the consideration for an annuity purchased by the bankrupt in fraud of creditors, the payments to begin several years later, the execution of the insurance company's executory contract does not constitute a payment of value which would prevent a termination of the contract and recovery of the consideration. Smith v. Mutual Life Ins. Co. (C. C. 1910) 178 Fed. 510, 24 Am. Bankr. Rep. 514.

75. —— **Past debts and present advances.**—A mortgage, deed of trust, or other form of security, based solely upon an antecedent debt and without any new consideration, is voidable if given within four months before bankruptcy, because it lacks the saving element of a "present fair consideration," because it operates as a preference, and because it is constructively fraudulent, since it removes from the reach of general creditors part of the assets to which they might have had recourse. National Bank of Goldsboro v. Hill (D. C. 1915) 226 Fed. 102; Morgan v. First Nat. Bank (1906) 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; William Firth Co. v. South Carolina Loan & Trust Co. (1903) 122 Fed. 569, 59 C. C. A. 73; Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co. (1905) 67 N. J. Eq. 602, 60 Atl. 940; Lehrenkrauss v. Bonnell (1910) 138 App. Div. 493, 122 N. Y. Supp. 866; In re Antisdel (D. C. 1878) 18 N. B. R. 289, Fed. Cas. No. 490; Gillespie v. McKnight (D. C. 1870) 3 N. B. R. 468, Fed. Cas. No. 5,435. Where the mortgage or other lien is given partly to secure an old debt, but partly also in consideration of fresh advances, it will constitute a valid lien to the extent of the new consideration (if otherwise unimpeachable) but no further. City Nat. Bank v. Bruce (1901) 109 Fed. 69, 48 C. C. A. 236, 6 Am. Bankr. Rep. 311; Phillips v. Kahn (1904) 96 App. Div. 166, 89 N. Y. Supp. 250; Asbury Park Building & Loan Ass'n v. Shepherd (N. J. Eq. 1901) 50 Atl. 65. Although the consideration may consist wholly of a present loan or advance of money, without including any past debts, still the mortgage will be sustainable in bankruptcy only to the extent of the money actually advanced, with proper interest, not to the extent of an exaggerated or fictitious value recited in the notes or mortgage. In re Sawyer (D. C. 1904) 130 Fed. 384, 12 Am. Bankr. Rep. 269; Jackson v. Sedgwick (C. C. 1911) 189 Fed. 508, 26 Am. Bankr. Rep. 836. A transfer of property by a bankrupt to a creditor, which pays one of several notes owed to him in full, amounts to a preference. Wilson v. Mitchell-Woodbury Co. (1913) 102 N. E. 119, 214 Mass. 514.

76. —— **Adequacy of consideration.**—Where the transaction in question is a sale of goods, it will be voidable in bankruptcy if the price paid was so inadequate that it cannot be regarded as

a "fair consideration." Ott v. Doroshow (D. C. 1906) 147 Fed. 762, 17 Am. Bankr. Rep. 417; Myers v. Fultz (1904) 124 Iowa, 437, 100 N. W. 351; Gans v. Weinstein (1903) 83 App. Div. 358, 82 N. Y. Supp. 280. But if the transfer was made in good faith and for a valuable consideration, it is not necessary, in order to save it, to show strictly that the price paid was fully equal to the value of the property, provided it was not so inadequate as to amount in itself to an actual fraud on creditors. Meservey v. Roby (C. C. A. 1912) 198 Fed. 844, 28 Am. Bankr. Rep. 529. The sale will not be set aside on this ground unless there was such a gross inadequacy of price as would put the purchaser upon inquiry as to the fraudulent intent of the seller in disposing of the goods. Dunlop v. Thomas (1902) 28 Wash. 521, 68 Pac. 909. Or such as would impress him with the conviction that the sale could not have been made in good faith. Myers v. Fultz (1904) 124 Iowa, 437, 100 N. W. 351.

77. —— Want or invalidity of consideration.—A voluntary transfer by one of all his property, with intent to defraud his creditors and to secure it to himself and his children, is fraudulent, though the transferee acted in good faith, and the trustee in bankruptcy of the transferror may maintain an action to set aside the transfer. Clowe v. Seavey (1913) 102 N. E. 521, 208 N. Y. 496, affirming judgment (1912) 135 N. Y. S. 1105, 151 App. Div. 912.

Mortgage bonds pledged by a bankrupt corporation for an invalid consideration held not entitled to share in the lien of the mortgage. Butterfield v. Woodman (1915) 223 Fed. 956, 139 C. C. A. 436, modifying decree In re National Boat & Engine Co. (D. C. 1914) 216 Fed. 208.

78. Knowledge, bad faith, or participation of transferee.—A transfer or incumbrance of property cannot be set aside, although the party making it is insolvent at the time and is adjudged bankrupt within four months, if the person receiving it, in addition to giving a present fair consideration, is a "purchaser in good faith." Van Iderstine v. National Discount Co. (1913) 227 U. S. 575, 33 Sup. Ct. 343; Young v. Allen (C. C. A. 1913) 207 Fed. 318, 30 Am. Bankr. Rep. 261; Shelton v. Price (D. C. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431; Pratt v. Christie (1904) 95 App. Div. 282, 88 N. Y. Supp. 585; Kennedy v. Pierce's Loan Co. (1903) 100 Mo. App. 269, 73 S. W. 357; Clarke v. Sherman (1905) 128 Iowa, 353, 103 N. W. 982; Bunnell v. Bronson (1906) 78 Conn. 679, 63 Atl. 396; Lewis v. First Nat. Bank (1904) 46 Or. 182, 78 Pac. 990. Compare Beecher v. Clark (C. C. 1874) 10 N. B. R. 385, Fed. Cas. No. 1,223. This rule prevails even though a fraudulent intent on the part of the bankrupt to cheat or obstruct his creditors is fully made out. In re Benjamin (D. C. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351; Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998. Compare Sherman v. Luckhardt (1903) 67 Kan. 682, 74 Pac. 277; Lehrenkrauss v. Bonnell (1910) 138 App. Div. 493, 122 N. Y. Supp. 866; Clowe v. Seavey (1913) 208 N. Y. 496, 102 N. E. 521.

But if the purchaser or incumbrancer acted in collusion with the bankrupt, participated in his fraudulent purpose, or even had a guilty knowledge of it, the sale or lien cannot stand as against the trustee in bankruptcy. McAtee v. Shade (C. C. A. 1910) 185 Fed. 442, 26 Am. Bankr. Rep. 151; Bolander v. Gentry (1868) 36 Cal. 105, 95 Am. Dec. 162, 2 N. B. R. 655; Crump v. Chapman (D. C. 1877) 15 N. B. R. 571, Fed. Cas. No. 3,455. And see Grant v. National Bank of Auburn (D. C. 1912) 197 Fed. 581, 28 Am. Bankr. Rep. 712.

Knowledge on the part of the purchaser or lienor, such as will defeat the transaction, is knowledge that the bankrupt is not acting in good faith and with an honest purpose but is seeking to gain an advantage for himself by defeating or obstructing his creditors. In re Soudan Mfg. Co. (1902) 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45; Houck v. Christy (1907) 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330. Or, as otherwise stated, knowledge that there are equitable claims upon the property in question such as should prevent the debtor from disposing of it in the way and at the price intended. Friedman v. Verchofsky (1903) 105 Ill. App. 414. The assignee of a mortgage given by a bankrupt to third persons stands in no better position than his assignor, where he took with knowledge of all the facts. In re Mosher (D. C. 1915) 224 Fed. 739.

If there are any circumstances attending the transaction sufficient to arouse the suspicions of an ordinarily careful and prudent person, then the purchaser is bound to exercise ordinary diligence in making and pursuing inquiries in order to ascertain whether or not the seller can make a transfer of the property which will not be in violation of the bankruptcy law, and he will be chargeable with any knowledge which such reasonable inquiries would have revealed. In re Moody (D. C. 1905) 134 Fed. 628, 14 Am. Bankr. Rep. 272; In re Calvi (D. C. 1911) 185 Fed. 642, 26 Am. Bankr. Rep. 206; McWilliams v. Thomas (Tex. Civ. App. 1903) 74 S. W. 596; Gans v. Weinstein (1902) 37 Misc. Rep. 209, 75 N. Y. Supp. 155; Lumpkin v. Foley (C. C. A. 1913) 204 Fed. 372, 29 Am. Bankr. Rep. 673. A mortgagee is not to be charged with knowledge of a fraudulent purpose on the part of the debtor merely because he is aware that

a large part of the money borrowed is to be used in paying outstanding unsecured debts. Van Iderstine v. National Discount Co. (1913) 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, 29 Am. Bankr. Rep. 478; In re Soudan Mfg. Co. (1902) 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45. Nor is he to be charged with knowledge of a fraudulent purpose on the part of the bankrupt merely because he has acted as his attorney. Webb v. Manheim (1905) 109 App. Div. 63, 95 N. Y. Supp. 1003. But where a mortgagor of chattels is selling off the goods for his own use with the consent of the mortgagee, the latter is not a bona fide holder of the mortgage. Skillen v. Endelman (1902) 39 Misc. Rep. 261, 79 N. Y. Supp. 413.

Where the person taking the property, or acquiring a lien on it, acted in collusion with the seller or mortgagor, not only knowing of his fraudulent purpose, but joining in the transaction for the purpose of assisting him in carrying it out, the sale or lien is voidable at the instance of the trustee in bankruptcy, even though it was based upon an honest debt or though the purchaser gave full value. Gorham v. Buzzell (D. C. 1910) 178 Fed. 596, 24 Am. Bankr. Rep. 440; In re Kyte (D. C. 1910) 182 Fed. 166, 25 Am. Bankr. Rep. 337; In re Pease (D. C. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; E. S. Bonnie & Co. v. Perry's Trustee (1904) 117 Ky. 459, 78 S. W. 208; Parker v. Travers (1908) 74 N. J. Eq. 812, 71 Atl. 612; Babbitt v. Walbrun (C. C. 1871) 6 N. B. R. 359, Fed. Cas. No. 695. And see In re Groezinger (D. C. 1912) 199 Fed. 935, 28 Am. Bankr. Rep. 732. An agreement to withhold the deed or mortgage from the record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law, and so to warrant setting aside the conveyance or mortgage without more, but it is a fact which constitutes more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all the facts and circumstances of the case. Rogers v. Page (1905) 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Cowan v. Burchfield (D. C. 1910) 180 Fed. 614, 25 Am. Bankr. Rep. 293; Dean v. Plane, 195 Ill. 495, 63 N. E. 274.

79. Rights and liabilities of transferees.—When a sale or incumbrance of property is set aside at the instance of the trustee in bankruptcy as fraudulent in fact, the buyer or lienor having taken in bad faith, with knowledge of the circumstances, or having participated in the bankrupt's fraudulent purpose such transferee is not entitled to retain any portion of the property, or to receive credit for property or money actually advanced, in other words, he loses any consideration which he may have given for the transfer. Johnson v. Cohn (1902) 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Rosenbluth v. De Forrest & Hotchkiss Co. (1911) 85 Conn. 40, 81 Atl. 955; Holloway v. Brame (1904) 83 Miss. 335, 36 South. 1; Allen v. French (1902) 180 Mass. 487, 62 N. E. 987; Jackson v. Sedgwick (D. C. 1912) 193 Fed. 374; Scammon v. Hobson (D. C. 1872) Fed. Cas. No. 12,434; Blake v. Thwing (1914) 185 Ill. App. 187; Rubenstein v. Lottow (1915) 220 Mass. 156, 107 N. E. 718. A creditor to whom a bankrupt has granted a preference cannot surrender part of the property received in partial reduction of the damages sustained by the estate of the bankrupt. Wilson v. Mitchell-Woodbury Co. (1913) 102 N. E. 119, 214 Mass. 514. The transferee is not entitled to reimbursement for the cost of improvements made on the property or for money advanced to reduce incumbrances. In re Mead (D. C. 1878) 19 N. B. R. 81, Fed. Cas. No. 9,365. Where, to defraud a bankrupt's creditors, his wife, with his money, purchased goods at the bankrupt's sale and other goods which she transferred to a corporation, held that, before such property could be recovered for the benefit of the bankrupt's creditors, the obligations of the corporation for goods purchased by it should be first paid. Woodford v. Rice (D. C. 1913) 207 Fed. 473. The fact that the fraudulent vendee of real property, prior to accepting an absolute transfer of it from the bankrupt, held a mortgage upon the same property will not entitle him to a lien thereon. Railton v. Chicago Title & Trust Co. (1906) 125 Ill. App. 617, affirmed (1906) 224 Ill. 485, 79 N. E. 600. From one to whom, in consideration of advancement to bankrupt, constituting a fraud on the bankruptcy act, bankrupt assigned accounts, the trustee may recover, in addition to the accounts or their proceeds, interest on sums collected by the assignee. Rubenstein v. Lottow (1915) 107 N. E. 718, 220 Mass. 156.

But if the transferee acted in good faith, having no knowledge of the fraudulent design of the bankrupt and giving value, and it is therefore decided that the transfer is not void in toto, but only voidable to the extent of the excess of the value of the property over the consideration given, then the transferee is entitled to be protected to the extent of the actual present consideration paid or given. Jackson v. Sedgwick (C. C. 1911) 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Chase (D. C. 1904) 133 Fed. 79, 13 Am. Bankr. Rep. 294; Paddock v. Fish (D. C. 1882) 10 Fed. 125; Clowe v. Seavey (1911) 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Weatherwax v. Gorman (1907) 150 Mich. 316, 113 N. W. 1105. And see Unity Banking & Sav. Co. v. Boyden (1908) 159 Fed. 916, 87 C. C. A. 96, 20 Am. Bankr. Rep. 264. Where,

after the execution of a fraudulent bill of sale of a certain vessel, the buyer paid various claims which were valid liens thereon, and after the sale had been adjudged void at the instance of the seller's trustee in bankruptcy, the buyer voluntarily surrendered the vessel to the trustee, it was held that the court had no further jurisdiction to require the trustee to reimburse the buyer to the amount of the liens so paid as a condition to decreeing a delivery to the trustee. Arnold v. Eastin's Trustee (1903) 116 Ky. 686, 76 S. W. 855. As to the right of the grantee or lienor to add interest to the amount of his valid claims, see Dean v. Plane (1902) 195 Ill. 495, 63 N. E. 274. If the transferee acted in good faith and without knowledge of fraud, the trustee cannot have the sale or lien canceled and recover the specific property without returning the consideration received. Sharood v. Jordan (1903) 90 Minn. 249, 95 N. W. 1108. He may give bonds to secure the transferee for the amount that is found to be due to him. Horton v. Bamford (1911) 79 N. J. Eq. 356, 81 Atl. 761. An application of a preferred creditor to have the avoidance of the preference conditioned upon his admission to participate as a general creditor in the distribution of the assets to the full amount of the debt due at the date of performance, held to have been properly denied by the court below, where the court did not deny the right of the preferred creditor to prove his claim for the surrender of the preference. Golden & Co. v. Loving (1914) 42 App. D. C. 489.

Where a deed of land from the bankrupt to his wife is vacated as voluntary and therefore fraudulent, the wife is entitled to a homestead allowance out of the proceeds of the property. Smith v. Kehr (C. C. 1872) Fed. Cas. No. 13,071, affirmed, Kehr v. Smith (1873) 20 Wall. 31, 22 L. Ed. 313. Where an assignment of a cause of action constitutes an unlawful preference in bankruptcy and no steps are taken in the bankruptcy court to set it aside, it is not subject to collateral attack by a defendant in an action of fraud by the assignor to the use of the assignee. Leonard v. Springer (1912) 174 Ill. App. 516. If the trustee in bankruptcy sues the transferee for the value of the property and recovers a judgment, and the transferee thereupon pays the judgment, he becomes invested with full title to the property itself, in so far as title was vested in the bankrupt or the trustee. Thompson v. Toland (1874) 48 Cal. 99. A mortgagee in possession of the mortgaged property when the mortgagor was adjudicated a bankrupt was entitled to retain such possession as against the trustee in bankruptcy and general creditors. In re Howard (D. C. 1913) 207 Fed. 402.

80. Rights of bona fide purchasers.—A purchase from a bankrupt, within four months prior to the filing of the petition in bankruptcy, in good faith and for a present fair consideration, is not in contravention of the bankruptcy act, and the purchaser cannot be deprived of the property by the application of the principles governing constructive fraud. Blake v. Thwing (1914) 185 Ill. App. 187.

A conveyance by a failing husband to his wife will be sustained, if the bona fide character thereof is shown. Weld v. McKay (1914) 218 Fed. 807, 134 C. C. A. 495.

Although one may have acquired property under such circumstances that the transfer constituted a fraud upon the creditors of the grantor, and therefore may be unable to hold the property as against the grantor's trustee in bankruptcy, yet, until proceedings for its recovery are begun, his title is defeasible only and not absolutely void, and therefore he may in the mean time convey a good and unimpeachable title to a third person, and if the latter took in good faith, gave value, and had no notice of the facts which would invalidate the title of his immediate grantor, the trustee in bankruptcy has no remedy against him. Bush v. Export Storage Co. (C. C. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; Paddock v. Fish (D. C. 1882) 10 Fed. 125; Jarrell v. Harrell (C. C. 1871) 7 N. B. R. 400, Fed. Cas. No. 7,222; Dennett v. Mitchell (D. C. 1842) Fed. Cas. No. 3,789; Judson v. Kelty (D. C. 1871) 6 N. B. R. 165, Fed. Cas. No. 7,567; Coolidge v. Ayers (1904) 76 Vt. 405, 57 Atl. 970; Hackney v. First Nat. Bank (1903) 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; Unmack v. Douglass (1903) 75 Conn. 633, 55 Atl. 12; Union Trust & Savings Bank v. Amery (1913) 72 Wash. 648, 131 Pac. 199. The trustee may proceed against the fraudulent grantee and recover judgment for the value of the property transferred. Hackney v. First Nat. Bank (1903) 68 Neb. 588, 94 N. W. 805. If the third purchaser gave a mortgage for a part of the price, the trustee may claim the mortgage and the right to enforce it, as representing the bankrupt's creditors. Prescott v. Galluccio (D. C. 1908) 164 Fed. 618, 21 Am. Bankr. Rep. 229. But the court should not decree the setting aside of the conveyance from the bankrupt to his immediate grantee, as this would cloud the title of an innocent holder. Skillin v. Maibrunn (1903) 176 N. Y. 588, 68 N. E. 1124.

If a fraudulent grantee of property executes a mortgage on the same to one who lends his money in good faith, on the credit of the mortgagor's apparent title and without notice of any claims which might be asserted against that title by the trustee in bankruptcy of the grantor, the rights of such mortgagee must be fully recognized and protected in the bankruptcy proceedings. Putnam v. Southworth (1908) 197

Mass. 270, 83 N. E. 887; Brooks v. D'Orville (D. C. 1874) Fed. Cas. No. 1,951; Sedgwick v. Place (C. C. 1874) 10 N. B. R. 28, Fed. Cas. No. 12,621. But he must have recorded his mortgage before the adjudication in bankruptcy. Putnam v. Southworth (1908) 197 Mass. 270, 83 N. E. 887. The bankruptcy law does not prevent a creditor of the fraudulent grantee, without notice, from acquiring rights in the property superior to those of the trustee in bankruptcy of the grantor, as, by levying an attachment on the property. In re Mullen (D. C. 1900) 101 Fed. 413, 4 Am. Bankr. Rep. 224.

The bona fide purchaser of negotiable paper secured by a mortgage, before maturity and without notice, takes the mortgage, as he does the notes, free from equities arising between the previous parties thereto, and also free from any latent equity existing in a trustee in bankruptcy at the time of the assignment of the notes, of which latent equity there is no notice actual or constructive. In re Schwarz (D. C. 1912) 200 Fed. 309, 29 Am. Bankr. Rep. 700; Carpenter v. Longan (1872) 16 Wall. 271, 21 L. Ed. 313. He is entitled to protection and to the benefit of his security, as against the trustee, although his immediate vendor held it under such circumstances of fraud as would have made him liable to an action by the trustee to set aside the security. Myers v. Hazzard (C. C. 1881) 50 Fed. 155. A purchaser of negotiable instruments secured by a mortgage issued by an insolvent within four months of bankruptcy cannot defeat the right of the insolvent's creditors to set aside the incumbrance by mere proof that the purchaser is a bona fide one within the purview of the Negotiable Instruments Law, but must bring himself within the Bankruptcy Act. Clement v. Saratoga Holding Co. (1914) 145 N. Y. S. 628, 161 App. Div. 898.

The mere fact that the property transferred was the bankrupt's whole stock of goods may not be enough to charge a purchaser from the fraudulent grantee with notice of the fraud. Babbitt v. Walbrun (C. C. 1870) Fed. Cas. No. 694. But if he had reasonable cause to believe that the transfer was fraudulent, or was aware of suspicious circumstances and omitted to make proper inquiries, he cannot claim to occupy the position of an innocent purchaser without notice. Lewis v. Julius (D. C. 1913) 212 Fed. 225; Bentley v. Young (D. C. 1914) 210 Fed. 202; Blake v. Thwing (1914) 185 Ill. App. 187; In re Moody (D. C. 1905) 134 Fed. 628, 14 Am. Bankr. Rep. 272; Darby v. Lucas (C. C. 1870) Fed. Cas. No. 3,573. The mere institution of proceedings in bankruptcy does not give constructive notice to third persons that they must be on their guard in dealing with property which the bankrupt had previously conveyed or incumbered, because there may be ground to attack such conveyance or incumbrance as fraudulent. In re Mullen (D. C. 1900) 101 Fed. 413, 4 Am. Bankr. Rep. 224; Paddock v. Fish (D. C. 1882) 10 Fed. 125. But after the trustee in bankruptcy has begun his action to set aside a transfer of property as fraudulent, no third person can acquire a good title to it from the defendant in that action. Brewster v. Goff (D. C. 1908) 164 Fed. 127, 21 Am. Bankr. Rep. 239.

81. Jurisdiction of trustee's suit.—A suit by a trustee in bankruptcy to set aside an alleged fraudulent conveyance by the bankrupt may be maintained either in the court of bankruptcy or in any state court which would have had jurisdiction of a similar action by the creditors; for this purpose the jurisdiction of the two courts is concurrent. Johnston v. Forsyth Mercantile Co. (D. C. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; Carter v. Hobbs (D. C. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215. And see Whittington v. Simmons (1877) 32 Ark. 377. But when the court of bankruptcy has taken jurisdiction, any proceedings in the state court which would interfere with the full exercise of that jurisdiction or with its control of the property in suit may be restrained. Kellogg v. Russell (C. C. 1874) Fed. Cas. No. 7,666. Where an action of this kind has been begun in a United States court by judgment creditors, its jurisdiction to proceed with the case is not affected by the filing of a petition in bankruptcy against the debtor. National Bank of the Republic v. Hobbs (C. C. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190. But it should not take jurisdiction of a creditor's bill when proceedings in bankruptcy have already been commenced. Cruchet v. Red River Min. Co. (C. C. 1906) 155 Fed. 486, 18 Am. Bankr. Rep. 814.

82. Form of action or proceeding.—Since a trustee's suit to set aside a fraudulent transfer of property is in the nature of a creditor's bill, he may appropriately proceed by a bill in equity, notwithstanding the fact that there may be a remedy at law. Parker v. Black (1907) 151 Fed. 18, 80 C. C. A. 484, 18 Am. Bankr. Rep. 15; Wall v. Cox (1900) 101 Fed. 403, 41 C. C. A. 408, 4 Am. Bankr. Rep. 659; Cox v. Wall (D. C. 1900) 99 Fed. 546; Schrenkeisen v. Miller (D. C. 1877) Fed. Cas. No. 12,480; In re Hunt (D. C. 1869) 2 N. B. R. 539, Fed. Cas. No. 6,881; Lisberger v. Garnett (C. C. 1877) Fed. Cas. No. 8,383; Gnichtel v. First Nat. Bank (1902) 66 N. J. Eq. 88, 53 Atl. 1041; Thompson v. First Nat. Bank (1904) 84 Miss. 54, 36 South. 65. Compare Gray v. Beck (D. C. 1881) 6 Fed. 595. And see Frank v. Musliner (1902) 76 App. Div. 616, 78 N.

Y. Supp. 369; Blake v. Thwing (1914) 185 Ill. App. 187. Equity had no jurisdiction of a bill by a bankrupt's trustee to recover an alleged preference, consisting of a payment of money only, under Judicial Code, § 267, ante, § 1244. First State Bank of Milliken v. Spencer (1915) 219 Fed. 503, 135 C. C. A. 253.

If the trustee sues at law, he may, according to the circumstances of the case, bring an action for money had and received. Elmore v. Symonds (1903) 183 Mass. 321, 67 N. E. 314. Or an action of trover. Mowry v. Reed (1905) 187 Mass. 174, 72 N. E. 936. Or assumpsit where the goods transferred have been converted into money. Lyon v. Clark (1902) 129 Mich. 381, 88 N. W. 1046.

If the trustee, upon his appointment, finds a suit already commenced and in progress in a state court by one or more of the creditors to set aside a fraudulent conveyance by the bankrupt, he may apply to the court of bankruptcy for permission to intervene in such action, and leave will generally be granted if it appears to be for the best interests of the estate. In re Riker (D. C. 1901) 107 Fed. 96, 5 Am. Bankr. Rep. 720; Kinmouth v. Braeutigam (N. J. Eq. 1904) 57 Atl. 1013; Bunch v. Smith (1906) 116 Tenn. 201, 93 S. W. 80; Atkins v. Globe Bank & Trust Co. (Ky. 1910) 124 S. W. 879; Tharp v. Tharp's Trustee (Ky. 1909) 119 S. W. 814. See Davis v. W. F. Vandiver & Co. (1905) 143 Ala. 202, 38 South. 850.

83. Parties.—The bankrupt himself is neither a necessary nor a proper party to a bill in equity by his trustee to set aside an alleged fraudulent conveyance or transfer. Buffington v. Harvey (1877) 95 U. S. 99, 24 L. Ed. 381; Benton v. Allen (C. C. 1880) 2 Fed. 448; Huntington v. Saunders (C. C. 1883) 14 Fed. 907.

Where several persons are all connected with various fraudulent undertakings for the purpose of preventing the bankrupt's property from reaching the control of the trustee, although they are not all connected with each fraudulent act, but some of them performed one act and some another, all tending to the same result, the trustee may join them all in one suit to obtain possession of the property involved. Potts v. Hahn (D. C. 1887) 32 Fed. 660; Jones v. Slauson (C. C. 1888) 33 Fed. 632; Strasburger v. Bach (C. C. A. 1907) 157 Fed. 918, 19 Am. Bankr. Rep. 732; Norcross v. Nathan (D. C. 1900) 99 Fed. 414, 3 Am. Bankr. Rep. 613. But in a suit to recover a preferential transfer only those persons who have received some benefit or advantage from it are proper defendants. Page v. Moore (D. C. 1910) 179 Fed. 988, 24 Am. Bankr. Rep. 745.

84. Pleading and practice. — As to matters of pleading and practice, the trustee's suit will be governed by the laws and rules of the court where it is brought, and where that is a federal court, the suit is treated as one in equity and will be governed by the rules of pleading and practice in equity, independently of the state practice. Westall v. Avery (1909) 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673; In re Hawks (D. C. 1913) 204 Fed. 309.

The trustee's bill or complaint must set forth specifically all the facts and circumstances necessary to show the nature of the transaction in controversy and its fraudulent character. In re McIntosh (1907) 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; Johnston v. Forsyth Mercantile Co. (D. C. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; Comstock v. Tracey (C. C. 1891) 46 Fed. 162; Gray v. Brunold (1903) 140 Cal. 615, 74 Pac. 303. Allegations in a bill by trustee in bankruptcy to recover realty alleged to have been conveyed by the bankrupt to his wife in fraud of creditors held sufficient to sustain a finding that the transfer was colorable and that the bankrupt was the beneficial owner. McKey v. Cochran (1914) 104 N. E. 693, 262 Ill. 376. If trustee, suing to recover property fraudulently transferred, sought to recover property subsequently acquired by transferee as proceeds of that transferred, held, that the complaint should show the necessary facts. Hane v. Crown & Keystone Co. (D. C. 1915) 223 Fed. 439. A bill by the trustee of a bankrupt corporation to recover the amount paid by the corporation on an accommodation note in fraud of its creditors, while insolvent, which does not allege that the holder knew of the fraud, is insufficient. Gulledge v. Woods (Miss. 1914) 66 So. 536.

Such a bill, seeking to set aside a chattel mortgage and a sale thereunder, and also an assignment for the benefit of creditors, as fraudulent against creditors, and to recover the property, is not multifarious, its object being to recover the estate and clear it of incumbrances, and all the acts of the defendants having been done with a common purpose. Platt v. Preston (D. C. 1879) 19 N. B. R. 241, Fed. Cas. No. 11,219.

The answer should deny specifically the essential allegations of the bill. Prestridge v. Wallace (1908) 155 Ala. 540, 46 South. 970. Under Civ. Code Cal. § 3440, declaring certain transfers fraudulent, except as to property exempt from execution, held, that the exception extended to the transferee, and that, relying thereon in an action by the transferror's trustee in bankruptcy, it was incumbent upon him to set forth in his answer the facts bringing him within the exception. Meyer v. Perkins (Cal. App. 1913) 130 P. 206, re-

hearing denied by Supreme Court, Id. 208.

It is not necessarily a defense that the property in suit is already in the possession of the trustee, having been seized by the marshal. Kellogg v. Russell (C. C. 1874) Fed. Cas. No. 7,666. Nor that the bankrupt's discharge was granted notwithstanding opposition to it on the ground of the same alleged fraudulent transaction. Jones v. Milbank (1872) 6 Lans. (N. Y.) 73.

Where the conveyance of a bankrupt is attacked as in fraud of creditors, his grantee may plead limitations as a defense to the bankrupt's liabilities existing antecedently to the conveyance. Pace's Trustee v. Pace (1915) 172 S. W. 925, 162 Ky. 457.

In a suit by a trustee in bankruptcy to reach property transferred by the bankrupt to wife, a finding that wife knew of her husband's fraudulent intent, without finding any secret trust, held not to sustain decree for plaintiff. Lyon v. Wallace (1915) 108 N. E. 1075, 221 Mass. 351. The verdict of jury in favor of a trustee in bankruptcy to set aside a transfer of book accounts as fraudulent cannot be treated as a finding of intent to defraud of which the transferee had notice. Van Iderstine v. National Discount Co. (1913) 33 Sup. Ct. 343, 227 U. S. 575, 57 L. Ed. 652, affirming decree (1909) 174 Fed. 518, 98 C. C. A. 300. In an action to recover money paid by a corporation for its outstanding stock from a person who claimed that he sold the stock to a third person, whether the stock was sold to the corporation was a question of fact. Union Trust & Savings Bank v. Amery (1913) 131 P. 199, 72 Wash. 648.

85. Burden of proof and evidence.— In a suit to set aside an alleged fraudulent transfer of property, the trustee must assume the burden of proving the fraud charged by clear and satisfactory evidence. Woodford v. Rice (D. C. 1913) 207 Fed. 473; McCrory v. Donald (Ala. 1915) 68 South. 306; Finch v. Cecil (N. C. 1915) 86 S. E. 991; Peterson v. Mettler (D. C. 1912) 198 Fed. 938, 29 Am. Bankr. Rep. 158; Jacobs v. Van Sickel (C. C. 1903) 123 Fed. 340, 10 Am. Bankr. Rep. 519; Benton v. Allen (C. C. 1880) 2 Fed. 448; Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Klein v. Gallin (Sup. 1913) 141 N. Y. Supp. 831; Smith v. Eldredge (Sup. 1913) 143 N. Y. Supp. 87; Kanne v. Kanne (1912) 119 Minn. 265, 138 N. W. 25; Halbert v. Pranke (1904) 91 Minn. 204, 97 N. W. 976; Sharood v. Jordan (1903) 90 Minn. 249, 95 N. W. 1108; Bailey v. Wood (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Eason v. Garrison (1904) 36 Tex. Civ. App. 574, 82 S. W. 800; Falls City Tinware Co.'s Trustee v. Levine (1907) 104 S. W. 716, 31 Ky. Law Rep. 1103; Coleman v. Hagey (Mo. 1913) 158 S. W. 829; Horine v. Luria (1912) 49 Pa. Super. Ct. 171; Gilmore v. Wall (1912) 31 Okl. 754, 123 Pac. 1060. A purpose to hinder or defraud creditors, and knowledge thereof on the part of the transferee, cannot be presumed from the bare fact of a conveyance of property by one who was then insolvent and afterwards becomes bankrupt. Webb's Trustee v. Lynchburg Shoe Co. (1907) 106 Va. 726, 56 S. E. 581; Dutton v. Cloar (1901) 26 Tex. Civ. App. 547, 65 S. W. 70; Love v. Export Storage Co. (1906) 143 Fed. 1, 74 C. C. A. 155, 16 Am. Bankr. Rep. 171. Compare Thomas v. Roddy (1907) 122 App. Div. 851, 107 N. Y. Supp. 473. And see Fouche v. Shearer (D. C. 1909) 172 Fed. 592, 22 Am. Bankr. Rep. 828; Klinger v. Hyman (1915) 223 Fed. 257, 138 C. C. A. 499. Proof of highly suspicious facts in connection with the transfer or in the conduct of the parties may make out a prima facie case of fraud. In re Hunt (D. C. 1869) 2 N. B. R. 539, Fed. Cas. No. 6,881. In a creditors' suit against the members of an insolvent banking firm, to set aside alleged fraudulent transfers of the bank's assets, the failure of the defendants to produce the important books of the bank when required, or to account for the same, raises a presumption of fraud of the most damaging character. National Bank of Republic v. Hobbs (C. C. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190. The fact alone that a sale is made out of the usual course of business of the debtor is not sufficient to stamp the transaction as fraudulent, though it may be a badge of fraud, depending for its effect on the surrounding facts. Houck v. Christy (1907) 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330; Babbitt v. Walbrun (C. C. 1870) 4 N. B. R. 121, Fed Cas. No. 694.

In this connection, the trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring the transfer or conveyance by the debtor to have been fraudulent and void. In re Lesser (D. C. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815. And every declaration of the bankrupt in reference to defrauding his creditors and acts on his part showing the nature and intent of the fraudulent scheme are admissible where a prima facie case of conspiracy is made out. Tyler v. Angevine (C. C. 1879) Fed. Cas. No. 14,306. And it may be shown that, eight days after another sale made a month before the sale in question, a secret agreement was entered into between the parties whereby the vendor was reinvested with an interest in the property sold. Rosenthal v. Walker (1884) 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. But evidence of transactions with others than the transferee in question, proper to be

considered in determining the bankrupt's intention, or as bearing on the question of his insolvency, is not admissible against the transferee without evidence that he had knowledge of such transactions. Doxsee v. Waddick (1904) 122 Iowa, 599, 98 N. W. 483. So evidence of what the bankrupt said to the defendant some days before, when he borrowed the money of him, as to what he wanted it for, or of statements then made by the bankrupt as to his financial condition, or of the time fixed for repayment, has no bearing on the question whether the defendant knew or had reasonable cause to believe the bankrupt was insolvent when he repaid the loan. Goodrich v. Wilson (1876) 119 Mass. 429. And testimony that the bankrupt secreted the money which he received on the sale in question, for the purpose of defrauding his creditors, does not show that the defendant had any knowledge of such fraudulent intent. Schilling v. Curran (1904) 30 Mont. 370, 76 Pac. 998. And so, where a bill of sale is attacked as fraudulent, evidence that the bankrupt secreted certain of his property is not admissible except for the purpose of showing what goods were on hand at the date of the bill of sale. Frank v. Musliner (1902) 76 App. Div. 616, 78 N. Y. Supp. 369. The trustee's case must fail where the only witnesses introduced, who were the parties to the transaction attacked, all testify that the transfer was made in good faith and for a fair consideration. Entwisle v. Seidt (D. C. 1907) 155 Fed. 864, 19 Am. Bankr. Rep. 185. In suit by trustee in bankruptcy to reach property transferred by bankrupt to wife, the mere fact that neither husband nor wife was called by the defense held not to sustain plaintiff's burden of showing secret trust. Lyon v. Wallace (1915) 108 N. E. 1075, 221 Mass. 351.

It is also incumbent on the trustee to prove, by competent and satisfactory evidence, that the bankrupt was insolvent at the time of the transaction in question and that the transferee knew of it or had sufficient cause to believe it. Van Iderstine v. National Discount Co. (1909) 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Gans v. Weinstein (1903) 83 App. Div. 358, 82 N. Y. Supp. 280; Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Horton v. Bamford (1911) 79 N. J. Eq. 356, 81 Atl. 761; Way v. Ruff (1910) 112 Minn. 57, 127 N. W. 564, 609. The insolvency may be shown by the books of the bankrupt, including private memorandum books. In re E. S. Wheeler & Co. (1907) 158 Fed. 603, 85 C. C. A. 425, 19 Am. Bankr. Rep. 461. Or by the debtor's schedules in bankruptcy, if filed shortly after the transfer in question. Saxton v. Sebring (1904) 96 App. Div. 570, 89 N. Y. Supp. 372; Buttz v. James (N. D. 1916) 156 N. W. 547. The schedules are not evidence if filed more than a year after the transaction which is alleged to have been fraudulent. Barr v. Sofranski (1909) 130 App. Div. 783, 115 N. Y. Supp. 533. In an action by trustee in bankruptcy to set aside a conveyance, evidence that the bankrupt was reputed in the community to be insolvent at date of the conveyance was admissible. First Bank of Maysville v. Alexander (Okl. 1915) 153 P. 646.

Evidence that a bankrupt, while insolvent, conveyed valuable property to his brother for an inadequate consideration, that by agreement between them the brother withheld the deeds from record, and that the bankrupt afterwards borrowed large sums of money on his representation that he owned such property, will be sufficient to establish actual fraud and entitle the bankrupt's trustee to recover the property. Peterson v. Mettler (D. C. 1912) 198 Fed. 938, 29 Am. Bankr. Rep. 158. Where the transfer attacked is a payment of money, it is not necessary to trace it to the present possession of the defendant. Smith v. Mutual Life Ins. Co. (C. C. 1910) 178 Fed. 510, 24 Am. Bankr. Rep. 514. Where the trustee's contention is that the bankrupt conspired with several other persons to secure or convert his property, and withdraw it from the reach of the creditors, he will establish his case by proof that any two of the defendants acted in concert in the fraudulent scheme, though he may be unable to prove that all of the defendants were parties to the conspiracy. Saxton v. Sebring (1904) 96 App. Div. 570, 89 N. Y. Supp. 372.

On the other hand, at least when the trustee has made out a prima facie case, the defendant must assume the burden of proving that he was a purchaser for value and in good faith and for a fair consideration. Bentley v. Young (D. C. 1914) 210 Fed. 202; Pope v. Cantwell (D. C. 1913) 206 Fed. 908; Sturdivant Bank v. Schade (1912) 195 Fed. 188, 27 Am. Bankr. Rep. 673; Lawrence v. Lowrie (D. C. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; Wick v. Hickey (Iowa, 1905) 103 N. W. 469; Buttz v. James (N. D. 1916) 156 N. W. 547. The wife of bankrupt, who purchased goods at trustee's sale and other goods which she transferred to a corporation organized to carry on the business, held to have the burden of showing that the purchases were not made with money furnished her by the bankrupt. Woodford v. Rice (D. C. 1913) 207 Fed. 473. The defendant may present all competent evidence bearing on the question of good faith and the consideration given. Joseph v. Raff (1903) 176 N. Y. 611, 68 N. E. 1118; Hunt v. Doyal (1907) 128 Ga. 416, 57 S. E. 489. The bona fide character of a conveyance by a failing husband to his wife may be established by the uncorroborated testimony of the husband or wife. Weld v. McKay (1914) 218 Fed. 807, 134 C. C. A. 495.

The defendant is not estopped from claiming that the conveyance in question was valid as to him by the fact that the adjudication in bankruptcy was based upon an allegation that it was a fraudulent conveyance and an act of bankruptcy. In re Marter (D. C. 1875) 12 N. B. R. 185, Fed. Cas. No. 9,143. Nor by the fact that the same transaction was specified as a ground of opposition to the bankrupt's application for discharge. Bradley v. Hunter (1874) 50 Ala. 265. The question whether or not the conveyance or transfer drawn in question was fraudulent is a question of fact, which must go to the jury. Bailey v. Wood (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Webb's Trustee v. Lynchburg Shoe Co. (1908) 107 Va. 807, 60 S. E. 130; Coolidge v. Ayers (1904) 76 Vt. 405, 57 Atl. 970; Dutton v. Cloar (1901) 26 Tex. Civ. App. 547, 65 S. W. 70; Sherman v. Luckhardt (1902) 96 Mo. App. 320, 70 S. W. 388.

Decisions on weight and sufficiency of evidence in suits by trustees in bankruptcy to set aside alleged fraudulent transfers or conveyances, see Harvey v. Stowe (1914) 219 Fed. 17, 134 C. C. A. 635; Rison v. Parham (1915) 219 Fed. 176, 134 C. C. A. 550; Stroecker v. Patterson (1915) 220 Fed. 21, 135 C. C. A. 597; Ridgeway v. Kendrick (1913) 208 Fed. 849, 126 C. C. A. 7; In re Snodgrass (1913) 209 Fed. 325, 126 C. C. A. 251; Walsh v. First Nat. Bank (1913) 201 Fed. 522, 120 C. C. A. 30; Deupree v. Watson (C. C. A. 1914) 216 Fed. 483; Dean v. Davis (C. C. A. 1914) 212 Fed. 88; In re Cotton Manufacturers' Sales Co. (D. C. 1913) 209 Fed. 629; Kiendl v. Taunton (D. C. 1913) 206 Fed. 509; Cartwright v. West (Ala. 1914) 64 South. 293; McCrory v. Donald (Ala. 1915) 68 South. 306; Guernsey v. Douglas (Cal. 1915) 153 Pac. 227; Brewer v. Brown (1915) 268 Ill. 562, 109 N. E. 264; McKey v. Cochran (1914) 262 Ill. 376, 104 N. E. 693; Meehan v. Pithan (Iowa, 1914) 147 N. W. 913; Holbrook v. International Trust Co. (1915) 220 Mass. 150, 107 N. E. 665; Wellman v. Kaiser Inv. Co. (Mo. 1914) 171 S. W. 370; Gregory v. Binghamton Trust Co. (1915) 168 App. Div. 805, 154 N. Y. Supp. 376; Smith v. Eldredge (Sup. 1913) 143 N. Y. Supp. 87; Klein v. Gallin (Sup. 1913) 141 N. Y. Sup. 831; Bean v. Parker (Vt. 1915) 96 Atl. 17.

86. Nature and extent of trustee's recovery.—In the case of a fraudulent conveyance of real property, vacated at the suit of the trustee in bankruptcy, the plaintiff is entitled to a decree declaring and establishing the title as vested in him. Currie v. Look (1906) 14 N. D. 482, 106 N. W. 131. Or a decree requiring the defendant to execute the necessary deed. McFarland v. Goodman (C. C. 1874) Fed. Cas. No. 8,789. In the case of a fraudulent transfer of a note and mortgage, the trustee is entitled to an order requiring that they shall be assigned to him. Clarke v. Sherman (1905) 128 Iowa, 353, 103 N. W. 982. If the property transferred was a certificate of corporate stock, and it still remains in the hands of the defendant, he may be required to surrender the certificate itself to the trustee in bankruptcy and to account for dividends received. Wasey v. Holbrook (1910) 141 App. Div. 336, 125 N. Y. Supp. 1087. See In re Kessler & Co. (D. C. 1909) 174 Fed. 906, 23 Am. Bankr. Rep. 391. If the property in controversy consisted of chattels, they are to be delivered in specie to the trustee. Edwards v. Schillinger Bros. Co. (1910) 153 Ill. App. 219. Generally, if it is in the power of the fraudulent transferee to restore the status quo by delivering to the trustee the identical property which he received from the bankrupt, this is the relief which the trustee must seek and obtain, and he cannot abandon the pursuit of the property itself and simply have a judgment in personam for its value against the defendant. Phipps v. Sedgwick (1877) 95 U. S. 3, 24 L. Ed. 591; Wasey v. Holbrook (1910) 141 App. Div. 336, 125 N. Y. Supp. 1087; Off v. Hakes (1905) 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696. But if the surrender of certificates of corporate stock (the property fraudulently transferred) would offer insufficient relief because of their depreciation in value, the court may render a personal judgment against the transferee. Wasey v. Holbrook (1909) 65 Misc. Rep. 84, 120 N. Y. Supp. 675. And see Gill v. Ely-Norris Safe Co. (1913) 170 Mo. App. 478, 156 S. W. 811.

In the case of a fraudulent payment of money, the natural and only appropriate judgment is one against the transferee personally for the sum shown to have been received by him. Andreas' Assignee v. Rust (1882) 3 Ky. Law Rep. 772; Greenhall v. Carnegie Trust Co. (D. C. 1910) 180 Fed. 812, 25 Am. Bankr. Rep. 300; Smith v. Mutual Life Ins. Co. (C. C. 1907) 158 Fed. 365, 19 Am. Bankr. Rep. 707. Where the transfer assailed consisted in the assignment of a judgment, the collection of the judgment should not be enjoined, but the court should direct payment to be made to the trustee in bankruptcy. Barnard v. Davis (1875) 54 Ala. 565. In an action by the trustee of a bankrupt in a state court to set aside voidable conveyances, a personal judgment against the bankrupt on the claims of creditors was unauthorized. Douthat v. Roberts (W. Va. 1914) 80 S. E. 819.

If the property has passed into the possession of a bona fide holder for value, taking by assignment or transfer from the original fraudulent transferee without notice, so that it can no longer be reclaimed or recovered by the

trustee in bankruptcy, then the appropriate relief of the latter is a judgment for damages against the fraudulent grantee, measured by the value of the property. Skillin v. Maibrunn (1903) 176 N. Y. 588, 68 N. E. 1124; Pfeiffer v. Roe (1905) 108 App. Div. 54, 95 N. Y. Supp. 1014; Gray v. Brunold (1903) 140 Cal. 615, 74 Pac. 303. The judgment should include in the case of real estate, the rents and profits which he received or should have received from it while in his hands. Gray v. Chase (1903) 184 Mass. 444, 68 N. E. 676. The value of the property, for the purpose of the trustee's recovery, is not measured by the price the fraudulent transferee paid for it. In re Denson (D. C. 1912) 195 Fed. 854, 28 Am. Bankr. Rep. 158. Nor necessarily by its estimated value at the time of the transfer, but rather by the price for which he sold it to the present holder. Russell v. Powell (1905) 38 Wash. 651, 80 Pac. 837. The transferee may be held to account for any profit he made out of the property. Shuman v. Fleckenstein (D. C. 1877) 15 N. B. R. 224, Fed. Cas. No. 12,826. See Dunlop v. Thomas (1902) 28 Wash. 521, 68 Pac. 909.

Where a new corporation, organized to succeed the bankrupt, took the latter's assets under a lease which was void for fraud as against creditors, and operated the bankrupt's property for a considerable period, the corporation is not to be considered as a mere trespasser, but is liable in an accounting for its acts under the lease for the net profits earned after allowance of expenditures other than taxes. In re Medina Quarry Co. (D. C. 1910) 179 Fed. 929, 24 Am. Bankr. Rep. 769.

In the case of a joint purchase, fraudulent and voidable under the bankruptcy act, each purchaser is liable for the full value of the property, although they were interested in different proportions. Schulenburg v. Kabureck (C. C. 1873) Fed. Cas. No. 12,487. But where the actual purchaser was only acting as agent for another, and surrendered the property to his principal, it would be error to make an order requiring the agent to turn over the property to the trustee. In re Denson (D. C. 1912) 195 Fed. 854, 28 Am. Bankr. Rep. 158. So where the fraudulent transaction consisted of a sale of the bankrupt's property and application of the proceeds to the discharge of an unrecorded chattel mortgage, and the trustee's action is to set aside the sale, the court should not adjudge that the mortgage be canceled, the mortgagee not being a party to the suit, and the mortgage not being void to the extent that it evidenced a debt, though not a lien against subsequent creditors. E. S. Bonnie & Co. v. Perry's Trustee (1904) 117 Ky. 459, 78 S. W. 208.

As against the trustee in bankruptcy, the wife of the bankrupt is not barred or estopped to claim dower by reason of her having joined her husband in a deed which is fraudulent as to creditors, and which has for that reason been set aside at the instance of the trustee. When the deed is decreed to be fraudulent and void at the suit of the trustee, he cannot set it up to defeat the right of the wife to dower. Cox v. Wilder (C. C. 1872) Fed. Cas. No. 3,308.

87. Rights of creditors in property or fund recovered.—When the trustee in bankruptcy procures a fraudulent conveyance or transfer of property of the bankrupt to be set aside, and the property subjected to the payment of the provable debts in bankruptcy, this will inure to the benefit of all the creditors of the bankrupt having provable claims, including those whose claims accrued subsequent to the transfer, and not merely to the advantage of those who, as existing creditors, or holding judgments, would have been entitled to attack the conveyance at the time it was made. Kehr v. Smith (1873) 20 Wall. 31, 22 L. Ed. 313; Platt v. Mead (D. C. 1881) 9 Fed. 91; In re Lowe (D. C. 1884) 19 Fed. 589; Smith v. Kehr (C. C. 1872) 7 N. B. R. 97, Fed. Cas. No. 13,071; Pratt v. Curtis (D. C. 1871) 6 N. B. R. 139, Fed. Cas. No. 11,375; White v. Jones (D. C. 1873) 6 N. B. R. 175, Fed. Cas. No. 17,550; Treseder v. Burgor (1906) 130 Wis. 201, 109 N. W. 957; Maffi v. Stephens (1908) 49 Tex. Civ. App. 354, 108 S. W. 1008. See also In re Martin (1912) 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; Boyd v. Arnold (1912) 103 Ark. 105, 146 S. W. 118; Allen v. McMannes (D. C. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276. Preservation by the bankruptcy court under subdivision "f" of this section of lien of attachments in state court to set aside fraudulent conveyance, entitles all creditors of a bankrupt to participate in the fund from sale under order of the state court, which while setting aside the conveyance as to antecedent creditors held that under Ky. St. § 1907, it was valid as to subsequent creditors. Globe Bank & Trust Co. of Paducah, Ky., v. Martin (1915) 35 S. Ct. 377, 236 U. S. 289, 59 L. Ed. 583, denying certiorari In re Martin (1912) 193 Fed. 841, 113 C. C. A. 627. A fraudulent conveyance being good as between the parties to it, a judgment thereafter recovered does not attach as a lien on the property, and when it is vacated at the suit of the trustee, there is no superior equity, or right to prior satisfaction, in a creditor who holds a judgment. Neal v. Foster (C. C. 1888) 36 Fed. 29; Wood v. Wright (C. C. 1880) 4 Fed. 511. See Pool v. Ragland (1876) 57 Ala. 414. So, a creditor's bill instituted subsequent to an adjudication in bankruptcy against the debtor, to set aside a chattel mortgage and a sale of a stock of merchandise, does not give rise to a lien in favor of the creditor filing the same on the goods sought to be reached. Moore-Schafer Shoe Mfg. Co. v. Billings (1905) 46 Or. 401, 80 Pac. 422.

§ 9652. (Act July 1, 1898, c. 541, § 68.) Set-offs and counterclaims.

Set-Offs and Counterclaims.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy. (30 Stat. 565.)

Notes of Decisions

1. Right of set-off in general.
2. Nature of claims subject to set-off.
3. Partnership and individual debts.
4. Meaning of mutual debts and mutual credits.
5. Time of accrual of debts or claims.
6. Claims purchased with a view to set-off.
7. Claims already filed or proved.
8. Joint debts and credits.
9. Set-off against deposit account in bank.
10. Unpaid stock subscriptions.
11. Set-off against trustee.
12. Suit to recover preference.

1. Right of set-off in general.—The provision of this section for the set-off of mutual debts or credits is permissive rather than mandatory. In re Kyte (D. C. 1910) 182 Fed. 166, 25 Am. Bankr. Rep. 337. It does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of legal or equitable set-off would not authorize it. Morris v. Windsor Trust Co. (1914) 213 N. Y. 27, 106 N. E. 753; Wagner v. Citizens' Bank & Trust Co. (1909) 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 19 Ann. Cas. 483. A bankrupt who lists a claim against him in his schedule without mentioning any offset may be estopped from afterwards alleging a counterclaim. Pindel v. Holgate (1915) 221 Fed. 342, 137 C. C. A. 158. The object of this provision is to give to the court of bankruptcy the right to apply the principles of set-off to mutual credits when its action is invoked for that purpose. Cumberland Glass Mfg. Co. v. De Witt (1915) 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042. The court may disallow a claim of set-off against the bankrupt, when its allowance would work injustice. Hitchcock v. Rollo (C. C. 1872) Fed. Cas. No. 6,535. It may order a set-off where injustice would otherwise result, though an action at law could not be maintained on the claim in question. Wyckoff v. Williams (1910) 136 App. Div. 495, 121 N. Y. Supp. 189.

Where a debtor of the bankrupt who had a claim against the latter which the law would allow him to offset, mistook his legal rights in the matter and acted on incompetent advice, to the effect that the bankruptcy law would prevent any set-off, and therefore paid the entire amount of his debt to the trustee in bankruptcy, it was held that he was entitled to a return of the money so paid by him. In re Farmers' & Mechanics' Bank (D. C. 1882) 13 Fed. 361. But a claim cannot be used in this way where the transaction out of which it arose was fraudulent. McKay v. Weager (Sup. 1911) 134 N. Y. Supp. 66. Though the allowance of a set-off enables the particular creditor to obtain payment in full of his claim, while other creditors are only partially paid, and thus he becomes a preferred creditor, yet it is a preference growing out of the business relations of the parties as they stood at the time, and not one contrived between them, and therefore it is not obnoxious to the act. Drake v. Rollo (C. C. 1872) 4 N. B. R. 689, Fed. Cas. No. 4,066. Compare In re White (1910) 177 Fed. 194, 101 C. C. A. 364, 24 Am. Bankr. Rep. 107.

2. Nature of claims subject to set-off.—A perfectly gratuitous expenditure of money with no expectation of repayment (as by a father for the support and education of his children) cannot be made the subject of a set-off. Embry v. Bennett (C. C. A. 1908) 162 Fed. 139, 20 Am. Bankr. Rep. 651. And a payment on a note given by an insolvent to close up an existing account with a creditor, made within four months of the filing of his petition in bankruptcy, cannot be treated as a set-off against a new debt afterwards created by him with the same creditor, when he seeks to prove the latter in the bankruptcy proceedings. In re Seay (D. C. 1902) 113 Fed. 969, 7 Am. Bankr. Rep. 700; In re Abraham Steers Lumber Co. (1901) 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332. So also, a creditor proving a claim against the bankrupt on an open account cannot be subjected to a set-off which would reduce or extinguish it, merely because he applied funds sent to him by the bankrupt to the satisfaction of another claim (which was secured by mortgage) instead of applying them, as the debtor directed, to the open account. Stewart v. Hopkins (1876) 30 Ohio St. 502.

A contingent liability or obligation cannot be set off against a debt absolutely owing to the bankrupt. Abbott v. Hicks, 7 Scott, 715.

A claim for unliquidated damages for a tort or a breach of contract cannot be set off against a debt absolutely owing to the bankrupt. Pindel v. Holgate (1915) 221 Fed. 342, 137 C. C. A. 158; In re Becker Bros. (D. C. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228. But compare In re Harper (D. C. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918, holding that the trustee in bankruptcy may allege, as a set-off against a claim filed by a creditor, a claim for unliquidated damages existing in favor of the bankrupt against such creditor, which passed to the trustee, and which under the law of the state the bankrupt, but for his bankruptcy, might have pleaded as a counterclaim in an action by the creditor. A judgment obtained by a trustee in bankruptcy for a penalty incurred by the violation of a state statute against usury cannot be set off against a claim of the judgment debtor against the bankrupt estate. Wilson v. National Bank of Rolla (C. C. 1880) 3 Fed. 391.

Money or property held or due under a trust must be employed or applied according to the terms of the trust, and cannot be made the subject of a set-off as against the private debt or obligation of the trustee. Western Tie & Timber Co. v. Brown (1905) 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447; Libby v. Hopkins (1881) 104 U. S. 303, 26 L. Ed. 769; In re Davis (D. C. 1903) 119 Fed. 950, 9 Am. Bankr. Rep. 670; Scammon v. Kimball (C. C. 1873) Fed. Cas. No. 12,435; In re Troy Woolen Co. (D. C. 1873) 8 N. B. R. 412, Fed. Cas. No. 14,203; In re Lane (D. C. 1874) 13 N. B. R. 43, Fed. Cas. No. 8,043; Alvord v. Ryan (C. C. A. 1914) 212 Fed. 83.

Where a creditor has goods of the bankrupt in his hands, which could be reached only by a suit at law or in equity, there is a "debt" or "claim" against him which may be the subject of a set-off. Murray v. Riggs (1818) 15 Johns. (N. Y.) 571. A creditor of the bankrupt who has in his possession, at the time of the bankruptcy, goods consigned to him by the bankrupt for sale, may sell the goods and, as against a claim for the proceeds, set off his claim against the bankrupt. Goodrich v. Dobson (D. C. 1876) 43 Conn. 576, Fed. Cas. No. 18,297. A trustee in bankruptcy, substituted as defendant for bankrupt in replevin by plaintiff, claiming under a transfer from the bankrupt, could under Code Civ. Proc. N. Y. § 501, set up as counterclaim his right to avoid the transfer under the Bankruptcy Act. Gleason v. Bush (1915) 152 N. Y. S. 54, 166 App. Div. 865. The value of property converted by the bankrupt may be set off. McCabe v. Winship (D. C. 1877) 17 N. B. R. 113, Fed. Cas. No. 8,668. Where a main contractor was entitled to complete the work and use the bankrupt subcontractor's materials and tools, and he did so at a great loss, any claim for such materials and tools could be set off against the contractor's claim for damages. In re Manneschmidt (D. C. 1913) 202 Fed. 815. A claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company. Drake v. Rollo (C. C. 1872) Fed. Cas. No. 4,066. Where a landlord received a specified sum from the tenant for an extension of the lease for a definite period, but the lessee obtained no benefit from the extension because of his bankruptcy during the original term, in proceedings to establish claims for rent and for damages to the leased premises, the lessor must account to the estate for the sum so received. In re Abrams (D. C. 1913) 200 Fed. 1005, 29 Am. Bankr. Rep. 590.

A creditor having two distinct debts, and holding property in pledge for one of them, with power of sale existing at the date of the bankruptcy, may apply the surplus proceeds after paying the first debt to the discharge of the second. Ex parte Whiting (D. C. 1876) 14 N. B. R. 307, Fed. Cas. No. 17,573; In re McVay (D. C. 1882) 13 Fed. 443; In re Searles (D. C. 1912) 200 Fed. 893, 29 Am. Bankr. Rep. 635.

3. Partnership and individual debts.—In partnership cases, the right of set-off cannot be so applied as to run counter to the cardinal rule that firm assets are for firm creditors and the separate estates of the partners for their individual creditors. But as between the partners themselves, claims arising out of independent dealings may be offset against demands growing out of the partnership affairs. In re Voetter (D. C. 1880) 4 Fed. 632; Warren v. Burnham (C. C. 1887) 32 Fed. 579. A debt owing from a bankrupt partnership to a creditor and one owing from the creditor to an individual partner are not "mutual debts," which may be set off against each other. In re Neaderthal (1915) 225 Fed. 38, 140 C. C. A. 364.

4. Meaning of mutual debts and mutual credits.—In order that debts may be set off under this section they must be mutual and must be in the same right. In re Howe Mfg. Co. (D. C. 1912) 193 Fed. 524, 27 Am. Bankr. Rep. 477.

Where the creditor has goods or choses in action of the bankrupt put in his hands before the bankruptcy by a valid contract, by the terms of which the deposit will result in a debt, as, if they are deposited for sale or collection, the case of mutual credits has arisen within the meaning of the bankruptcy law. Ex parte Caylus (D. C.

1871) Fed. Cas. No. 2,534; Marks v. Barker (C. C. 1804) Fed. Cas. No. 9,096; Rose v. Hart, 8 Taunt. 499. And see Walther v. Williams Mercantile Co. (1909) 169 Fed. 270, 94 C. C. A. 546, 22 Am. Bankr. Rep. 328. Where there is a debt due on one side, and on the other a delivery of property with directions to turn it into money, the property thus delivered constitutes a "credit" within the meaning of the statute. Goodrich v. Dobson (D. C. 1876) 43 Conn. 576, Fed. Cas. No. 18,297. A customer of a bankrupt stockbroker held entitled to a set-off equal to the value of stock converted, and entitled to have the value of the stock fixed as of the date of the bankruptcy. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889. Where the shares on hand of stockbrokers purchasing stock for customers was at the time they became bankrupts less than the amount required to satisfy the demands of the customers, any customer indebted to the brokers could set off his indebtedness against shares not recoverable. In re H. B. Hollins & Co. (D. C. 1914) 212 Fed. 317.

Where a bankrupt had deposited chattels with a bailee for the purpose of having certain work done upon them, and the trustee sought to recover them in an action of trover, it was held that the defendant was not entitled to retain them for his general balance for such work done by him for the bankrupt previously to the bankruptcy, for this was not a case of mutual credits. Rose v. Hart, 8 Taunt. 499; Birdwood v. Raphael, 5 Price, 593. Neither under this section nor under general principles can a party sued for conversion of a pledge set off as a counterclaim rights based on contracts unconnected with the conversion. Morris v. Windsor Trust Co. (1914) 106 N. E. 753, 213 N. Y. 27, reversing order (1914) 148 N. Y. S. 1131, 163 App. Div. 955. So, in an action by the trustee in bankruptcy of an insolvent corporation, which carried on a livery stable, for board of defendant's horses, the latter cannot offset his personal claims against the former owner of the stable, who had conducted the business in the same name adopted by the corporation, and afterwards managed the business, since, whatever equities the defendant may have against such former owner, he has no counterclaim against the trustee. Davis v. Lohsen (1901) 34 Misc. Rep. 769, 68 N. Y. Supp. 795. Where a claim against a bankrupt insurance company for loss under its policies has been assigned, after notice of insolvency, the assignee cannot set it off against his previous indebtedness to the company, the debts and credits not being "mutual" within the meaning of the law. Hitchcock v. Rollo (C. C. 1872) Fed. Cas. No. 6,535. Where the trustee of a bankrupt corporation is prosecuting an action against another corporation for goods sold, a creditor of the bankrupt cannot have the value of the property credited on his claim against the bankrupt, and have the action dismissed, on the contention that the goods were bought by him from the bankrupt and sold by him to the other corporation, when it appears that he was an officer of the bankrupt corporation and in charge of its sales, and at the same time an officer and agent of the purchasing corporation. In re Fort Wayne Electric Corp. (D. C. 1899) 95 Fed. 264, 2 Am. Bankr. Rep. 503. Where a claimant ordered materials from a corporation, but another corporation furnished the materials, intending to charge the same to the claimant, and became bankrupt, and the claimant, before changing his position or suffering any loss, learned of the facts and insisted on receiving the materials from the bankrupt, held, that the claimant made himself a debtor to the bankrupt without any right to offset against the shipment any claim he had against the other corporation. In re Belleview Pipe & Foundry Co. (1910) 189 Fed. 169. A corporation, dissolved for distribution of its assets, held entitled, on the bankruptcy of its treasurer, to set off, as against the amount the treasurer was entitled as a stockholder, the amount he was in default. Marcus Shipping Ass'n v. Barnes (Iowa, 1915) 151 N. W. 525.

5. Time of accrual of debts or claims. —To entitle a person to a set-off against the estate of a bankrupt, his debt or demand must be a provable one, and therefore must have been in existence at the commencement of the proceeding in bankruptcy. Shepherd v. Turner (1825) 3 McCord (S. C.) 249, 15 Am. Dec. 631; Smith v. Brinkerhoff (1852) 2 Edm. Sel. Cas. (N. Y.) 369; Moore v. Third Nat. Bank (1909) 41 Pa. Super. Ct. 497. And if he was not the original holder of the claim he must have acquired it before the filing of the petition in bankruptcy. Smith v. Brinkerhoff (1850) 8 Barb. (N. Y.) 519; Ogden v. Cowley (1807) 2 Johns. (N. Y.) 274. A creditor of a bankrupt cannot obtain a preference of his debt by purchasing the property of the bankrupt through the intervention of an agent, and tendering the notes of the bankrupt in payment for the same; and in an action by the trustee to recover the value of such property, the creditor cannot set off the notes of the bankrupt. Fleming v. Andrews (C. C. 1880) 3 Fed. 632.

But if a debt or claim constitutes a fixed and definite liability at the time of the bankruptcy, it is a provable debt, although the time for its payment has not yet arrived, and a debt not yet due may be set off against a debt due immediately, if it is of a provable nature. Ex parte Prescot, 1 Atk. 230; Ex parte Wagstaff, 13 Ves. 65; In re City Bank of Savings, Loan & Discount (D. C. 1873) 6 N. B. R. 71, Fed. Cas. No.

2,742. Thus, notes made by the bankrupt, though not due at the time of the bankruptcy, may be used as a set-off in an action against the holder by the trustee in bankruptcy. Frank v. Mercantile Nat. Bank (1905) 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805. An indorser or surety who pays the debt of his principal after the latter's bankruptcy may claim the benefit of it as a set-off, provided his contract of indorsement or suretyship was made before the filing of the petition. In re Dillon (D. C. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63; Marks v. Barker (C. C. 1804) Fed. Cas. No. 9,096.

6. Claims purchased with a view to set-off.—When it is alleged that a claim attempted to be set off was purchased by the creditor or transferred to him with a view to its being so used, the question turns upon his knowledge or notice of the insolvency of the debtor, or, in the case of involuntary bankruptcy, of the commission of an act of bankruptcy. Mattocks v. Lovering (C. C. 1880) 3 Fed. 212; Rollins v. Twitchell (D. C. 1876) 14 N. B. R. 201, Fed. Cas. No. 12,027; Mattox v. Cady (C. C. 1878) Fed. Cas. No. 9,301; Hovey v. Home Ins. Co. (C. C. 1874) 10 N. B. R. 224, Fed. Cas. No. 6,743. If this particular fact is drawn in issue, the burden is on the party claiming the right of set-off to show that he had no notice or knowledge of the insolvency of the party with whom he was dealing, and consequently no intention of using the claim in question as a set-off in the latter's bankruptcy. In re Shults (D. C. 1905) 135 Fed. 623, 14 Am. Bankr. Rep. 378. Though this clause of the statute speaks only of claims "purchased by or transferred to" the debtor of the bankrupt, it is held that, where an indorser of the bankrupt's paper takes it up within four months prior to the bankruptcy, knowing that the bankrupt is insolvent, and for the purpose of setting it off against his debt to the bankrupt, the statute applies, and it cannot be so used. Mason v. National Herkimer County Bank (C. C. A. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733.

7. Claims already filed or proved.—Where the creditor proved his claim, but omitted to credit the bankrupt with a debt due to him from the creditor, and the trustee sued for such debt, it was held that the creditor could not offer the claim already proved, by way of set-off to that suit; for his doing so would be equivalent to the prosecution of an original suit for its amount, the right to which he had waived. Brown v. Farmers' Bank of Kentucky (1869) 6 Bush (Ky.) 198; Russell v. Owen (1875) 61 Mo. 185. A creditor who has proved his claim in the bankruptcy proceedings may withdraw the same and plead it as a set-off in a suit brought against him by the trustee, and that if he is not allowed thus to plead the claim, and judgment goes against him in the trustee's suit, the court of bankruptcy, having full power over such a judgment, is bound by the statute to set off against it the claim of the creditor at its proper value. Harmanson v. Bain (D. C. 1877) Fed. Cas. No. 6,073. A creditor, holding a note secured by collateral and another unsecured, which was proved as such, held entitled to apply a surplus arising from a subsequent sale of the collateral as a set-off on the unsecured note. In re Searles (D. C. 1912) 200 Fed. 893.

8. Joint debts and credits.—Where a bankrupt owed a debt to two persons jointly, and held a joint note given by one of them and a third person, it was held that the two claims were not subject to set-off under the bankruptcy act, being neither mutual debts or credits. Gray v. Rollo (1873) 18 Wall. 629, 21 L. Ed. 927. A solvent partnership which is indebted to a bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners. In re Shults (D. C. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84. A claim on promissory notes of a partner cannot be set off against a judgment in behalf of the firm, the debts not being in the same right. In re T. M. Lesher & Son (D. C. 1910) 176 Fed. 650, 25 Am. Bankr. Rep. 218. Where five persons, only one of whom was solvent, had a joint claim against the estate of a bankrupt, and each of them had severally become liable to the trustee in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration for the other, it was held that there could be no set-off of such claims. In re Crystal Spring Bottling Co. (D. C. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55. Where the bankrupt and a person who was indebted to him were jointly liable on a promissory note to a bank, and the bank proved its claim on the note, and thereafter the bankrupt's debtor took up the note, it was held that the latter could not set off against his indebtedness to the estate the moiety of the note which the bankrupt should have paid, but that, on paying his debt to the trustee, he should be subrogated to the rights of the bank as to that moiety, and entitled to receive such dividends as should be declared thereon. In re Bingham (D. C. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223.

Where a debtor of the bankrupt paid a debt to a creditor on which he was jointly liable with the bankrupt, and the creditor to whom the payment was made had received a preference, which he had not surrendered, and therefore was not entitled to prove his claim in

the bankruptcy, it was held that the debtor paying the claim was not entitled to set off the payment against his debt to the bankrupt by virtue of his right of subrogation to the rights of the creditor, since he succeeded to the creditor's disabilities as well as to his rights, but that the claim of such debtor was a "mutual credit," within the meaning of the bankruptcy act, and on that ground he was entitled to have the same set off against the claim of the bankrupt's estate against him. Morgan v. Wardell (1901) 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. Where part of a claim accrued to the bankrupt himself before the bankruptcy, but the remainder to his trustee after the bankruptcy, one desiring to set off a claim in his own favor must show against which portion of the trustee's claim, if any, it is available by way of set-off. Howard v. Magazine & Book Co. (1911) 147 App. Div. 335, 131 N. Y. Supp. 916.

9. Set-off against deposit account in bank.—A general deposit account in a bank subject to check becomes, upon the bankruptcy of the depositor, a security for, and a payment pro tanto of, his liabilities to the bank, by the operation of the law of mutual credits. Hough v. First Nat. Bank (D. C. 1869) Fed. Cas. No. 6,721; Ex parte Howard Nat. Bank (D. C. 1876) 16 N. B. R. 420, Fed. Cas. No. 6,764. Where a bankrupt is indebted to a bank, on promissory notes or otherwise, in which he also has a balance to the credit of his general deposit account, the bank is entitled to have the one claim set off against the other, and to account to the trustee in bankruptcy only for the balance of the money on deposit after satisfying its own claims, or, if those claims exceed the amount of the bankrupt's balance, then to prove its claim for the remainder. New York County Nat. Bank v. Massey (1904) 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; Seammon v. Kimball (1875) 92 U. S. 362, 23 L. Ed. 483; In re Myers (D. C. 1900) 99 Fed. 691, 3 Am. Bankr. Rep. 760; In re Little (D. C. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Meyer (D. C. 1901) 107 Fed. 86, 5 Am. Bankr. Rep. 593; In re Kalter (D. C. 1900) 2 Nat. Bankr. News, 264; In re Petrie (D. C. 1871) 7 N. B. R. 332, Fed. Cas. No. 11,040; Blair v. Allen (C. C. 1874) Fed. Cas. No. 1,-483; Booth v. Prete (1909) 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; Steinhardt v. National Park Bank (1907) 120 App. Div. 255, 105 N. Y. Supp. 23; Whitaker v. Crowder State Bank (1910) 26 Okl. 786, 110 Pac. 776; West v. Bank of Lahoma (1906) 16 Okl. 328, 85 Pac. 469; Toof v. City Nat. Bank (C. C. A. 1913) 206 Fed. 250, 30 Am. Bankr. Rep. 79; In re Wright-Dana Hardware Co. (C. C. A. 1914) 212 Fed. 397; Conquest v. Broadway Nat. Bank (Tenn. 1916) 183 S. W. 160; Chisholm v. First Nat. Bank of Le Roy (1915) 269 Ill. 110, 109 N. E. 657. A deposit with a bank before the beginning of bankruptcy proceedings would not be such a transfer as would be unavailable as a set-off, unless it were fraudulent as against creditors and not valid as the basis of any legal claims. In re Radley Steel Const. Co. (D. C. 1914) 212 Fed. 462.

A bank is entitled to set off against the balance due to the bankrupt on his deposit account any debt or claim which it holds against him, if fixed and absolute, although not due at the date of the bankruptcy. Germania Savings Bank & Trust Co. v. Loeb (1911) 188 Fed. 285, 110 C. C. A. 263, 26 Am. Bankr. Rep. 238; De Long v. Mechanics' & Metals' Nat. Bank (1915) 168 App. Div. 525, 153 N. Y. Supp. 1010; Shields v. John Shields Const. Co. (N. J. 1910) 89 Atl. 1022. Notes of the bankrupt discounted by the bank prior to the filing of the petition in bankruptcy may be set off against his deposit account, whether matured or not at the date of the adjudication in bankruptcy. Frank v. Mercantile Nat. Bank (1905) 100 App. Div. 449, 91 N. Y. Supp. 488, affirmed (1905) 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805. The bankrupt's liability as indorser of a note held by the bank may be set off against his deposit account, though such liability did not become absolute until after the filing of the petition. In re Philip Semmer Glass Co. (1905) 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25.

Although the deposit account may have been transferred on the books of the bank to an assignee for creditors or a receiver, or even to the trustee in bankruptcy, yet if there has been no actual payment of the money nor any change of possession, it is not too late to claim the right of set-off. In re Myers (D. C. 1900) 99 Fed. 691, 3 Am. Bankr. Rep. 760. Compare Pearsall v. Nassau Nat. Bank (1902) 74 App. Div. 89, 77 N. Y. Supp. 11. Where a bank, holding a note of the bankrupt and also having funds of his on deposit sufficient to satisfy it, paid over the entire fund to the trustee in bankruptcy, through oversight, without first satisfying the note, it was entitled to recover the amount of the note from the trustee in a court of equity, without first offering to satisfy the note or bringing it into court for cancellation. Union Nat. Bank v. McKey (1900) 102 Fed. 662, 42 C. C. A. 583.

If a bank, after the commencement of proceedings in bankruptcy, collects money on drafts deposited with it by the bankrupt before that time, it may apply the money towards the payment

of a note of the bankrupt held by it. In re Farnsworth (D. C. 1873) 5 Biss. 223, 14 N. B. R. 148, Fed. Cas. No: 4,673. And see In re Northrup (D. C. 1907) 152 Fed. 763, 18 Am. Bankr. Rep. 335. But compare Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co. (1912) 199 Fed. 704, 118 C. C. A. 142. And a firm note to a bank, assumed by an insolvent partner on the dissolution of the firm, becomes his individual indebtedness, so that such debt and the amount due to him as a depositor, independent of any partnership consideration, become mutual debts within the meaning of the bankruptcy law. Hooks v. Gila Valley Bank & Trust Co. (1909) 12 Ariz. 315, 100 Pac. 806.

Where, on motion of the receiver to compel a bank to turn over a deposit by the bankrupt, the bank claims a right to hold the deposit by way of set-off on claims not yet matured, its right to refuse a check of the depositor or the order of the court as to disposition of the deposit depends on whether a claim of the nature of the one set up is provable against the estate. In re Radley Steel Const Co. (D. C. 1914) 212 Fed. 462. A liability as indorser, where the principal is solvent, cannot be set off against a bank deposit by the indorser on his bankruptcy. Ex parte Howard Nat. Bank (D. C. 1876) Fed. Cas. No. 6,764.

A bank will not be allowed to set off a deposit made by a bankrupt shortly prior to the bankruptcy against a previous indebtedness of the bankrupt contrary to the agreement under which the deposit was made. Farmers' & Merchants' State Bank of Waco, Tex., v. Park (1914) 209 Fed. 613, 126 C. C. A. 607. A bank will not be allowed to set off its claim against a deposit made by the bankrupt, where the money was deposited under an agreement that the bankrupt should use it to pay salary checks and pay roll checks and for certain other specified purposes. Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co. (1912) 199 Fed. 704, 118 C. C. A. 142. Nor where the bank received a deposit from a customer merely for safe-keeping, the money to be ultimately appropriated for the benefit of his creditors, and the bank knew him to be insolvent. Lynam v. Belfast Nat. Bank (1904) 98 Me. 448, 57 Atl. 799. Where the treasurer of a town deposited money in a bank which failed, and town warrants paid with the bank's money were in the hands of the bank at the time of its bankruptcy, and the trustee in bankruptcy obtained the warrants, it was held that, although the town was liable to him on the warrants, no right to set-off could exist in favor of the treasurer and the sureties on his bond. Town of Cicero v. Grisko (1909) 240 Ill. 220, 88 N. E. 478. Surety for H. Bank, a county depository, operated by a partnership, could not offset, in suit by the partnership's trustee in bankruptcy on notes, an amount which surety had paid the county treasurer for loss of county funds deposited after a partner's death, whether or not surety knew deceased was a partner; he being chargeable with notice. In re Hallock (D. C. 1915) 226 Fed. 821.

The mutual accounts between a bankrupt and his bank of deposit are closed by operation of law at the time when the petition in bankruptcy is filed, and no right of set-off exists in the bank as to deposits made after that time, even though neither party knew of the filing of the petition when the deposit was made. In re Michaelis & Lindeman (D. C. 1912) 196 Fed. 718.

Where a bank claims a set-off against the claim of the bankrupt's trustee for money on deposit, its claim arising out of the bankrupt's alleged conversion of certain property of which the bank was the real owner, the claim can be adjudicated only in a plenary suit, and cannot be reached by a summary order. In re Boston-Cerrillos Mines Corp. (D. C. 1913) 206 Fed. 794, 30 Am. Bankr. Rep. 739. Owners of securities in the hands of bankrupts, who were brokers, which had been wrongfully pledged as collateral for a bank loan, and were sold by the bank, held subrogated to the bank's right of set-off with respect to a general balance to the credit of the bankrupts in their deposit account. In re Leavitt & Grant (C. C. A. 1914) 215 Fed. 901.

On the bankruptcy of a bank or banker, a depositor, having a balance to the credit of his deposit account, is entitled to set off the same against a note on which he is indebted to the bank. In re Shults (D. C. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84; Winslow v. Bliss (1870) 3 Lans. (N. Y.) 220.

10. Unpaid stock subscriptions.—A stockholder indebted to a bankrupt corporation for unpaid shares of stock cannot set off against such liability a debt due to him from the corporation. Sawyer v. Hoag (1873) 17 Wall. 610, 21 L. Ed. 731; Scammon v. Kimball (1875) 92 U. S. 362, 23 L. Ed. 483; Id. (C. C. 1873) 8 N. B. R. 337, Fed. Cas. No. 12,435; In re Howe Mfg. Co. (D. C. 1912) 193 Fed. 524, 27 Am. Bankr. Rep. 477; Kiskadden v. Steinle (1913) 203 Fed. 375, 121 C. C. A. 559, 29 Am. Bankr. Rep. 346. Where the trustee of a bankrupt insurance company sues a stockholder for the unpaid balance of his subscription to its capital, the latter cannot set off a claim against the company for a loss under its policy. Scammon v. Kimball (C. C. 1873) Fed. Cas. No. 12,435. The claim of a creditor of a bankrupt corporation, who is also a stockholder and indebted to the corporation on an unpaid stock subscription, should not be allowed until such indebtedness has been collected, and, if uncollectible, the

amount may be applied on his claim as an equitable set-off. Kiskadden v. Steinle (1913) 203 Fed. 375, 121 C. C. A. 559. The fact that stockholders of a bankrupt corporation are also holders of its bonds, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions. Babbitt v. Read (C. C. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254. The trustee of a bankrupt corporation may interpose as a set-off against the claim of a stockholder a claim against him for the difference between the value of property turned over by him in payment for his stock and the nominal value of the stock, and the court, in the interest of creditors, will scrutinize with care the integrity and fairness of the transaction. In re Royce Dry Goods Co. (D. C. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257.

11. Set-off against trustee.—A trustee in bankruptcy has no other or greater rights than the bankrupt had when he became bankrupt; and hence when a third person had at that time a right as against the bankrupt to a credit, he is entitled to assert such right in a suit against him by the trustee. Wasey v. Whitcomb (1911) 167 Mich. 58, 132 N. W. 572. And for the purpose of a set-off in such a suit, it is immaterial that the creditor has not proved his claim in bankruptcy or that the year allowed for that purpose has expired. Norfolk & W. Ry. Co. v. Graham (1906) 145 Fed. 809, 76 C. C. A. 385, 16 Am. Bankr. Rep. 610; Wagner v. Burnham (1909) 224 Pa. 586, 73 Atl. 990. A party against whom a judgment has been rendered in favor of the truste may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in his favor against the bankrupt. Tootle-Weakley Millinery Co. v. Billingsley (1905) 74 Neb. 531, 105 N. W. 85. The provision of the statute in relation to the set-off of mutual debts or credits is broad enough to include a liability on the part of a creditor which has accrued to a trustee in bankruptcy as such, though not to the bankrupt himself, when the creditor's claim and such liability are mutual. In re Crystal Spring Bottling Co. (D. C. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55. In an action by a trustee in bankruptcy to recover the price of certain live stock, where defendant set up as a counterclaim a demand for services rendered by him in keeping the stock before and after the time when the trustee acquired title thereto, it was held that so much of the claim as related to services rendered before the plaintiff acquired title was not a valid claim against the estate, and could not be allowed as a counterclaim, but otherwise as to so much of the claim as related to services rendered after the plaintiff acquired title to the property. Moran v. Bogert (1875) 3 Hun (N. Y.) 603. A claim based on a breach of contract by a bankrupt after the bankruptcy is not available as counterclaim against a claim for services or materials supplied by the trustee in bankruptcy, while continuing a contract partly performed by the bankrupt, because of want of mutuality, though the claim is available as against any claim of the bankrupt set up by the trustee. Howard v. Magazine & Book Co. (1911) 147 App. Div. 335, 131 N. Y. Supp. 916.

12. Suit to recover preference.—In a suit by a trustee in bankruptcy to recover an unlawful preference, the creditor will not be allowed to set off the debt in respect to which the preferential transfer of property or payment was made. Western Tie & Timber Co. v. Brown (1904) 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111; Moody v. Chicago Title & Trust Co. (1907) 138 Ill. App. 233; Harris v. Second Nat. Bank (1903) 110 Tenn. 239, 75 S. W. 1053; Schmidt v. Bank of Commerce (1910) 15 N. Mex. 470, 110 Pac. 613, 33 L. R. A. (N. S.) 558. Nor will he be entitled to credit for services rendered or disbursements made in caring for or disposing of the property in question. Ommen v. Tallcott (D. C. 1909) 175 Fed. 261, 23 Am. Bankr. Rep. 572. So a court of equity, in a suit by the trustee in bankruptcy to recover a preference, will not entertain a cross-bill for the recovery by the defendant of the amount of the dividend to which he claims to be entitled from the bankrupt estate, but will require him to prove his claim in the bankruptcy court, though it may permit him, on the giving of security, to retain in his hands sufficient of the amount which the complainant is entitled to recover to cover his dividend in case his claim shall be allowed. Ommen v. Tallcott (D. C. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 570. Nor is this rule confined to cases in which the trustee is forced to bring suit in order to avoid the preference. It is likewise applicable where he opposes the allowance of a claim filed by a creditor, on the ground that the creditor has received a preference which he has not surrendered. In re Christensen (D. C. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202.

§ 9653. (Act July 1, 1898, c. 541, § 69.) Possession of property.

Possession of Property.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect

his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition. (30 Stat. 565.)

Notes of Decisions

1. Custody and control of property.
2. Rights and duties of bankrupt before appointment of trustee.
3. Jurisdiction in voluntary cases.
4. Warrant and seizure before adjudication.
5. Seizure of property in hands of third person.
6. Remedies against marshal seizing property of stranger.
7. —— Suit for damages in state court.
8. Restraining waste or disposition of property by bankrupt.
9. Restraining interference with property by third persons.
10. Enjoining levy or judicial sale.
11. Enjoining seizure under replevin.
12. Restraining proceedings in state courts.
13. Indemnity bond by petitioning creditors.
14. Forthcoming bond by bankrupt.

1. Custody and control of property.—An estate in bankruptcy is regarded as in the custody and subject to the exclusive jurisdiction of the court of bankruptcy from the time of the filing of the petition. Corbett v. Riddle (1913) 209 Fed. 811, 126 C. C. A. 535; Acme Harvester Co. v. Beekman Lumber Co. (1911) 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262; In re Walsh Bros. (D. C. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; Whittlesey v. Philip Becker & Co. (1911) 142 App. Div. 313, 126 N. Y. Supp. 1046; Smith v. Berman (1910) 8 Ga. App. 262, 68 S. E. 1014; Gage Lumber Co. v. McEldowney (C. C. A. 1913) 207 Fed. 255, 30 Am. Bankr. Rep. 251. The removal and concealment by third persons of property, in contemplation of the appointment of a receiver in bankruptcy, and after the filing of the petition, is a contempt against the court of bankruptcy. In re Iron Clad Mfg. Co. (D. C. 1912) 193 Fed. 781. Property of which the bankruptcy court has taken possession through its trustee is withdrawn from the jurisdiction of all other courts, and cannot be taken from the trustee's possession on process from a state court. Meek v. Eggerman (Okl. 1916) 155 P. 522.

2. Rights and duties of bankrupt before appointment of trustee.—After the adjudication in bankruptcy and before the appointment and qualification of a trustee, the title to the bankrupt's property remains unchanged; it is not divested until there is a trustee to take it. Schoenthaler v. Rosskam (1903) 107 Ill. App. 427. The bankrupt is not to be regarded as civiliter mortuus during this period. Plaut v. Gorham Mfg. Co. (D. C. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42. Until a trustee is appointed, the bankrupt has the right to pursue all proper legal measures for securing and preserving the estate. Hampton v. Rouse (1874) 22 Wall. 263, 22 L. Ed. 755; Blake v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; March v. Heaton (D. C. 1868) 2 N. B. R. 180, Fed. Cas. No. 9,061; Myers v. Callaghan (C. C. 1881) 5 Fed. 726; In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728; Jones v. Leach (D. C. 1868) 1 N. B. R. 595, Fed. Cas. No. 7,475; In re Jessup (D. C. 1884) 19 Fed. 94; In re Steadman (D. C. 1873) 8 N. B. R. 319, Fed. Cas. No. 13,330. The bankrupt may file a petition to enjoin the enforcement of a judgment against the property. In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728. Or to restrain a sheriff from selling under a levy. Jones v. Leach (D. C. 1868) 1 N. B. R. 595, Fed. Cas. No. 7,475. The bankrupt may redeem his land from a tax sale. Hampton v. Rouse (1874) 22 Wall. 263, 22 L. Ed. 755. He may maintain a suit for damages occasioned by an unlawful judicial sale of a portion of the property. Johnson v. Collier (1912) 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306. He is the proper person to be notified of the dishonor of notes or bills on which he is an indorser, and is competent to waive demand and notice. Ex parte Tremont Nat. Bank (D. C. 1875) Fed. Cas. No. 14,169. If the bankrupt dies before the appointment of a trustee, the trust and duty of holding and preserving the property devolve upon his heirs. Ferguson v. Dent (C. C. 1885) 24 Fed. 412.

By reason of the exclusive nature of the bankruptcy act, the manner of its enforcement, and the forum in which it is enforced, creditors obtain rights in

the assets and property of their insolvent debtors, of which they may not be deprived by the voluntary action of the debtors. In re Heleker Bros. Mercantile Co. (D. C. 1914) 216 Fed. 963. And after the filing of the petition in bankruptcy, the bankrupt is not justified in selling any portion of his property, even for the purpose of raising money to pay lawful fees, unless by leave of the court. In re Pryor (D. C. 1868) Fed. Cas. No. 11,457; In re Jessup (D. C. 1884) 19 Fed. 94. See Shipman v. Daubert (1879) 7 Mo. App. 576. And compare In re Livingston & Turk (C. C. A. 1913) 205 Fed. 364, 30 Am. Bankr. Rep. 531. The bankruptcy court has no jurisdiction to punish the bankrupt as for contempt, where, subsequent to the adjudication, he sold and disposed of certain of his assets and converted the money to his own use, while holding his property subject generally to the orders of the court, but his act in selling it not being in violation of any particular order. In re Probst (C. C. A. 1913) 205 Fed. 512, 30 Am. Bankr. Rep. 600. Where a partner was a trustee in bankruptcy, and his copartners secured an injunction against his delivery to his successor of alleged partnership funds received by the trustee, the funds, having been received by the successor without notice, are no longer subject to the jurisdiction of the state court. Broussard v. Le Blanc (1916) 182 S. W. 78. If the property is perishable, or must be sold at once for fear of deterioration, the court will order the marshal to sell it, and the bankrupt cannot become the purchaser. March v. Heaton (D. C. 1868) Fed. Cas. No. 9,061.

3. Jurisdiction in voluntary cases.—Though this section relates in terms only to "a bankrupt against whom an involuntary petition has been filed," yet in voluntary cases, if circumstances make it necessary or proper that the court should take actual charge of the property by a receiver or the marshal, pending the appointment of a trustee, it has power to do so. The Ironsides (D. C. 1869) Fed. Cas. No. 7,069. Where a bankrupt, after the filing of the petition, absconded from the jurisdiction and was arrested in a distant city, and there subjected to search, resulting in the discovery on his person of a large sum of money belonging to his estate in bankruptcy, which was claimed by his receiver, it was held that the court was not required to order the restoration of the money to the bankrupt, on the ground that the search had been unlawful, since it would then have power immediately to order him to surrender it to the receiver. In re A. Musica & Son (D. C. 1913) 205 Fed. 413, 30 Am. Bankr. Rep. 555. Under the provisions of this section and of section 2, subd. 3 (ante, § 9586), the bankruptcy court is limited to the appointment of a receiver "to take charge of the property of the bankrupt" pending the election of a trustee. Greenhall v. Hurwitz (1913) 141 N. Y. S. 914, 80 Misc. Rep. 186.

4. Warrant and seizure before adjudication.—A warrant for the sequestration of the bankrupt's property may issue before the adjudication where he has disposed of a part of his assets and has expressed an intention of going abroad. In re Hale (D. C. 1878) 18 N. B. R. 335, Fed. Cas. No. 5,911; In re Clark (D. C. 1878) 17 N. B. R. 554, Fed. Cas. No. 2,811.

The practice of uniting in one petition a prayer for an adjudication in involuntary bankruptcy against the debtor and a prayer for a warrant directing the marshal to seize and hold his property pending the adjudication is condemned. The proceedings for such warrant and in execution thereof are separate and distinct from the petition in bankruptcy, and must be prosecuted by separate petition. In re Kelly (D. C. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306. The application for a warrant is to be supported by affidavits, and these must set forth fully and specifically all the essential facts, including the insolvency of the debtor, and the facts constituting the alleged act of bankruptcy or neglect of his property. In re Kelly (D. C. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306. It is not a sufficient compliance with the statute where the application is supported merely by an affidavit of the bankrupt that he waives proof of the necessary facts and consents to the issuance of the warrant. In re Sarsar (D. C. 1903) 120 Fed. 40, 9 Am. Bankr. Rep. 576. Where the affidavits show the necessary facts, the warrant will not be vacated where such facts are not disproved, and it appears that the purpose of the bankrupt in moving to vacate the warrant is merely to deprive the marshal of his fees. In re Clark (D. C. 1878) 17 N. B. R. 554, Fed. Cas. No. 2,811.

If the marshal, acting merely as the messenger of the court, has taken possession of the bankrupt's property, but without any order of court to that effect, his possession is not that of the court of bankruptcy. The Ironsides (D. C. 1869) Fed. Cas. No. 7,069. Property in the custody of the marshal, under a warrant in bankruptcy, may be insured under the direction of the judge or referee. In re Carow (D. C. 1871) 4 N. B. R. 543, Fed. Cas. No. 2,426.

5. Seizure of property in hands of third person.—The marshal will be justified in taking possession not only of such property of the bankrupt as may remain in the latter's own hands, but also of all property actually belonging to the bankrupt which may be found in the possession of third persons holding it as the bankrupt's agents, custodians, or bailees. Feibelman v. Packard

(1883) 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Sharpe v. Doyle (1880) 102 U. S. 686, 26 L. Ed. 277; In re White (D. C. 1913) 205 Fed. 393, 29 Am. Bankr. Rep. 358; In re Franklin Suit & Skirt Co. (D. C. 1912) 197 Fed. 591, 28 Am. Bankr. Rep. 278. A marshal appointed to take charge of the property of an alleged bankrupt has the right to seize property in the possession of a third person, even though the latter claims it adversely, where there is reason to believe that it actually belongs to the bankrupt's estate; and the bankruptcy court has jurisdiction to determine the title thereto, and if the adverse claimant files a petition for its recovery in the bankruptcy court, he thereby assents to the jurisdiction of that court summarily to determine his rights. Further, the fact that property was unlawfully taken from one in possession of it by state officers, by an unreasonable or unlawful search and seizure, affords no reason why it may not be lawfully seized while in the possession of such authorities by the marshal acting as receiver in bankruptcy. Le Master v. Spencer (C. C. A. 1913) 203 Fed. 210, 29 Am. Bankr. Rep. 264. But on motion in bankruptcy to require third parties to turn over property, alleged to belong to the bankrupt, to the receiver, specific proof must be made as to the identity or value of the property; and a search of a third person's premises for property belonging to the bankrupt is proper only as to specific property or to obtain known assets of the bankrupt. In re Iron Clad Mfg. Co. (D. C. 1912) 193 Fed. 781.

Property of a bankrupt in the hands of third persons is included within the provisions of the statute, so that it may be seized by the marshal, where the possessor's title rests upon a foundation which is void or voidable under the bankruptcy act, as in the case of a purchaser from an assignee under a general assignment for creditors, which assignment was itself an act of bankruptcy, and the sale having been made before the appointment of a trustee in bankruptcy, but after and with notice of the filing of the petition in bankruptcy. Bryan v. Bernheimer (1901) 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623. CONTRA, In re Rockwood (D. C. 1899) 91 Fed. 363, 1 Am. Bankr. Rep. 272; In re Kelly (D. C. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306; Beach v. Macon Grocery Co. (1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Kolin (1905) 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531; In re Andre (1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132. And see In re Gibson (1908) 22 Okl. 867, 98 Pac. 923. The marshal, acting under a warrant, is justified in seizing property in the hands of third persons not only where the possessor claims under an assignment for creditors, but also where the transfer to him was fraudulent or preferential. Sharpe v. Doyle (1880) 102 U. S. 686, 26 L. Ed. 277; Feibelman v. Packard (1883) 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; In re Rochford (1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; McNulty v. Feingold (D. C. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338; In re Moody (D. C. 1904) 131 Fed. 525, 12 Am. Bankr. Rep. 718; In re Knopf (D. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432; In re Smith, 1 Nat. Bankr. News, 61; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Briggs (D. C. 1870) 3 N. B. R. 638, Fed. Cas. No. 1,869; Stevenson v. McLaren (1876) 23 Minn. 111, 14 N. B. R. 403; In re Miller (C. C. 1874) Fed. Cas. No. 9,551. A third person in the possession of property may be summarily ordered to surrender it, where the validity of the title which he sets up in himself depends on a question of law rather than one of fact. In re Michaelis & Lindeman (D. C. 1912) 196 Fed. 718.

Where a justice of the peace refused to regard an adjudication in bankruptcy, but proceeded to render judgment and order the sale of attached property which, by virtue of such adjudication had passed into the jurisdiction of the court of bankruptcy, the latter court was held justified in directing the seizure of the property by the marshal. In re Tune (D. C. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285. But if the property is in the hands of a receiver appointed by a state court, it cannot be seized on the warrant, as the possession of the receiver is that of the court which appointed him. Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29.

If property which really belongs to a third person is erroneously seized, the court of bankruptcy may order it to be returned to him. But this course should not be taken where his right to it is in good faith denied by creditors of the bankrupt; in that case the claimant will be required to assert his rights in a plenary action. In re Young (1901) 111 Fed. 158, 49 C. C. A. 283, 7 Am. Bankr. Rep. 14. Where the property seized was in the possession of an assignee for the benefit of creditors (the assignment being rendered nugatory by the subsequent institution of the bankruptcy proceedings), it was said that it should be restored to him only on condition of his releasing the marshal from all damages, and his agreeing not to dispose of the property without the approval of the bankruptcy court. In re Manahan (D. C. 1878) 19 N. B. R. 65, Fed. Cas. No. 9,003.

6. Remedies against marshal seizing property of stranger.—Where the marshal, in the execution of a warrant of seizure in bankruptcy, has taken possession of property which did not belong to the bankrupt, but was owned by a third person, the latter may file a

petition in the court of bankruptcy, setting up his title to the property in question, and praying for an order that it may be restored to him. On such intervention, the bankruptcy court has authority to grant him full protection and justice, and will order the immediate return to him of the property seized, or its proceeds if it has already been sold. In re Harthill (D. C. 1871) 4 N. B. R. 392, Fed. Cas. No. 6,161; In re Davidson (D. C. 1868) 2 N. B. R. 114, Fed. Cas. No. 3,598; Krippendorf v. Hyde (1884) 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lammon v. Feusier (1884) 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337; Gumbel v. Pitkin (1888) 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374. The marshal or receiver may defend his possession of goods seized as belonging to the bankrupt. In re Lipman (D. C. 1912) 201 Fed. 169. The claimant may be allowed costs, counsel fees, and damages occasioned by the seizure and detention of the property, to be paid by the creditors at whose instance his property was taken. In re Abraham (1899) 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. The owner of the property cannot be compelled to submit his claims to adjudication in a summary proceeding, on petition, rule to show cause, and reference to a referee, but he may maintain a plenary action against the marshal in the court of bankruptcy if he prefers to do so. In re Russell (C. C. A. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658.

7. —— **Suit for damages in state court.**—The owner of property wrongfully seized by the marshal as belonging to the estate in bankruptcy may abandon the property and maintain an action for damages against the marshal, in the nature of trespass or trover, in a state court. Buck v. Colbath (1865) 3 Wall. 334, 18 L. Ed. 257; In re Russell (C. C. A. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; Marsh v. Armstrong (1874) 20 Minn. 81 (Gil. 66), 18 Am. Rep. 355, 11 N. B. R. 125; In re Davidson (D. C. 1868) 2 N. B. R. 114, Fed. Cas. No. 3,598; In re Marks (D. C. 1869) 2 N. B. R. 575, Fed. Cas. No. 9,095. See Leroux v. Hudson (1883) 109 U. S. 468, 3 Sup. Ct. 309, 27 L. Ed. 1000. Compare Hudson v. Schwab (C. C. 1878) 18 N. B. R. 480, Fed. Cas. No. 6,835. If the petitioning creditors in the bankruptcy proceedings have given the marshal a bond of indemnity, they will be bound to defend such a suit against him in the state court. In re Marks (D. C. 1869) 2 N. B. R. 575, Fed. Cas. No. 9,095. The fact that the claimant may have applied to the bankruptcy court to stop proceedings for the sale of the property until he could establish his title will not make him a party to the bankruptcy proceedings, nor will the decision on such application make his title res judicata in his action against the marshal for trespass. Marsh v. Armstrong (1874) 20 Minn. 81, 18 Am. Rep. 355. If the marshal justifies under his warrant, and the state courts hold that he had no authority under the laws of the United States to levy on the property in controversy, the decision is one which may be reviewed by the Supreme Court of the United States. Sharpe v. Doyle (1880) 102 U. S. 686, 26 L. Ed. 277. The claimant cannot maintain an action of replevin in any state court against the marshal or the trustee in bankruptcy for the specific restoration of the property, and if such an action is begun, its prosecution will be enjoined by the court of bankruptcy. In re Russell (C. C. A. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; Freeman v. Howe (1860) 24 How. 450, 16 L. Ed. 749; Covell v. Heyman (1884) 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Petterson v. Mater (C. C. 1885) 26 Fed. 31; Summers v. White (1895) 71 Fed. 106, 17 C. C. A. 631; Hannebutt v. Cunningham (1879) 3 Ill. App. 353; Feusier v. Lammon (1870) 6 Nev. 209; Lewis v. Buck (1862) 7 Minn. 104 (Gil. 71), 82 Am. Dec. 73; Munson v. Harroun (1864) 34 Ill. 422, 85 Am. Dec. 316.

If a United States marshal, under process from the federal court, seizes property which does not belong to the defendant in the writ, but to a third person, the latter cannot have a writ of injunction from a state court forbidding the marshal to sell the property. It is for the federal court to give him relief in that behalf. Brooks v. Montgomery (1871) 28 La. Ann. 450.

8. **Restraining waste or disposition of property by bankrupt.**—The bankruptcy court has power to restrain the commission of any act that will interfere with or prevent the due administration of the bankruptcy act to preserve the statu quo pending adjudication of bankruptcy. In re Schow (D. C. 1914) 213 Fed. 514. If the circumstances make it necessary for the preservation of the estate, after the filing of a petition in bankruptcy, that the bankrupt himself or any third person should be restrained from wasting, selling, or otherwise disposing of the property, an injunction may issue for that purpose, to be in force until a trustee is elected and qualified. Hampton v. Rouse (1874) 22 Wall. 263, 22 L. Ed. 755; In re Ulrich (D. C. 1873) 8 N. B. R. 15, Fed. Cas. No. 14,328; Hyde v. Bancroft (D. C. 1873) 8 N. B. R. 24, Fed. Cas. No. 6,966; Ex parte Harris (D. C. 1845) Fed. Cas. No. 6,110; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912; Johnson v. Price (C. C. 1876) 13 N. B. R. 523, Fed. Cas. No. 7,407; In re Camp (D. C. 1868) 1 N. B. R. 242, Fed. Cas. No. 2,346. The officers of a bankrupt corporation may be enjoined from withdrawing funds

of the corporation on deposit in a bank. In re McGinley (1915) 219 Fed. 159, 135 C. C. A. 57. The bankrupt may be enjoined from collecting accounts due to him, from squandering his assets, or from making transfers or gifts or mortgages of his property. In re Calendar (D. C. 1842) Fed. Cas. No. 2,308; In re Irving (D. C. 1876) Fed. Cas. No. 7,073. He will not be permitted to convey away his property after the filing of the petition in bankruptcy. Muschel v. Austern (1904) 43 Misc. Rep. 352, 87 N. Y. Supp. 235. If he thereafter delivers property in his possession to a third person, on the pretense that the latter is the owner of the property and the bankrupt only a bailee, it is a contempt of the court of bankruptcy and may be dealt with as such. In re Potteiger (D. C. 1910) 181 Fed. 640, 24 Am. Bankr. Rep. 648. It may be proper to enjoin the bankrupt from disposing even of his exempt property, where the creditor moving for the writ claims the property because of a waiver of exemptions. Floyd v. Johnson (1914) 142 Ga. 833, 83 S. E. 943.

A creditor of a bankrupt who receives a payment in money from him after the institution of the proceedings violates the spirit and purpose of the bankruptcy law, and if he does this knowingly and fraudulently, he may be proceeded against criminally and punished on conviction, under the twenty-ninth section of the act. Knapp & Spencer Co. v. Drew (1908) 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355.

9. Restraining interference with property by third persons.—The filing of a bankruptcy petition is supposed to give notice to all the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property and as an injunction restraining all persons from intermeddling with it. Mueller v. Nugent (1902) 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; In re Krinsky (D. C. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535; In re Breslauer (D. C. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; In re Mertens (D. C. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698; In re Reynolds (D. C. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758. Besides this implied injunction, it is within the authority of the court of bankruptcy to issue its actual injunction, for the purpose of preserving the estate intact until a trustee can be appointed to take charge of it, forbidding any third person whomsoever from interfering with the property, taking possession of any portion of it, selling it, or otherwise disturbing the status quo. In re Lineberry (D. C. 1910) 183 Fed. 338, 25 Am. Bankr. Rep. 164; In re Berkowitz (D. C. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; Beach v. Macon Grocery Co. (1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Smith (D. C. 1902) 113 Fed. 993, 8 Am. Bankr. Rep. 55; In re Moses (D. C. 1872) 6 N. B. R. 181, Fed. Cas. No. 9,869; In re Ulrich (D. C. 1873) 8 N. B. R. 15, Fed. Cas. No. 14,328; Hyde v. Bancroft (D. C. 1873) 8 N. B. R. 24, Fed. Cas. No. 6,966; In re Muller (D. C. 1869) 3 N. B. R. 329, Fed. Cas. No. 9,912; Johnson v. Price (C. C. 1876) 13 N. B. R. 523, Fed. Cas. No. 7,407.

Removal or concealment by third persons of property, in contemplation of the appointment of a receiver or trustee in bankruptcy, after the filing of the petition, is in fact a contempt of the court; and any third person who has interfered with personalty which was in the bankrupt's possession when the petition in bankruptcy was filed, has the burden of showing the right under which he removed the property, and on his failure to make such showing, he is properly directed to surrender to the trustee possession of everything shown to have been in the bankrupt's possession. In re Iron Clad Mfg. Co. (D. C. 1912) 193 Fed. 781.

Where the debtor had made an assignment for the benefit of his creditors (which is alleged as the act of bankruptcy upon which the petition is founded), and the assignee is in possession of the estate and is about to make sale thereof, the court of bankruptcy has jurisdiction to enjoin such assignee from proceeding further with the administration of the estate. In re Gutwillig (1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117. Pending the adjudication on an involuntary petition, the court of bankruptcy may enjoin any person from conveying away, disposing of, or interfering with any property once owned by the debtor and claimed to have been fraudulently transferred by him and concealed, upon prima facie proof of the fraud. In re Abbott (D. C. 1869) Fed. Cas. No. 10; In re Holland (D. C. 1875) 12 N. B. R. 403, Fed. Cas. No. 6,605; In re Fendley (D. C. 1874) 10 N. B. R. 250, Fed. Cas. No. 4,728. The authority of the court of bankruptcy to preserve the property intact until the proper person can be vested with its possession and control extends to cases where any portion of the bankrupt's estate is in the custody of an officer of a state court, who has levied a writ thereon. The sale or other disposition of such property, under the officer's authority may be stayed until a trustee in bankruptcy can intervene for the protection of the rights of the general creditors, or make out a case against the validity of the levy.

Chapman v. Brewer (1885) 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; In re Schloerb (D. C. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Lutfy (D. C. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614. But see In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671.

After a receiver is appointed, if he finds goods in the possession of a third person, which creditors claim as a part of the bankrupt's estate, but which the holder claims as his own, under a title set up in good faith and supported by a prima facie case, the receiver cannot have him enjoined from selling or removing the property; he must proceed by a plenary action. In re Glenn (D. C. 1911) 185 Fed. 554, 25 Am. Bankr. Rep. 806. And see In re Ward (D. C. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215.

In order to justify the issuance of an injunction, it must appear that a proceeding in bankruptcy has been commenced by the filing of a petition and is pending. In re Goldberg (D. C. 1902) 117 Fed. 692, 9 Am. Bankr. Rep. 156. If any power exists in either a state or a federal court to impound the assets of an insolvent debtor and hold them until bankruptcy proceedings against him can be instituted, it can only be exercised in a very strong case and where there is absolutely no other remedy. Vietor v. Lewis (1898) 24 Misc. Rep. 515, 53 N. Y. Supp. 944, affirmed (1898) 34 App. Div. 631, 54 N. Y. Supp. 1118. A court of bankruptcy has no power to enjoin third persons from interfering with property within its territorial jurisdiction but claimed as assets of an estate in bankruptcy which is being administered in the federal court in another district. In re Dempster (C. C. A. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751. Such an injunction cannot be made to apply to persons who are outside of the jurisdiction of the court and who do not come within the district to participate in the administration of the estate. In re Isaac Harris Co. (D. C. 1909) 173 Fed. 735, 23 Am. Bankr. Rep. 237.

An injunction to restrain third persons from interfering with the bankrupt's estate may be granted at the instance of creditors other than the petitioning creditors. Depauli v. Espitallier (1906) 3 Cal. App. 239, 84 Pac. 999. Or at the instance of their attorney acting in their behalf. In re Goldberg (D. C. 1902) 117 Fed. 692, 9 Am. Bankr. Rep. 156. Or at the instance of the bankrupt himself. In re Wallace (D. C. 1868) 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728; Blake v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; Brock v. Terrell (D. C. 1869) 2 N. B. R. 643, Fed. Cas. No. 1,914; Jones v. Leach (D. C. 1868) 1 N. B. R. 595, Fed. Cas. No. 7,475. But this power will not be exercised in aid of a purchaser of lands at a bankruptcy sale, who has been put in possession, and who, long after the estate is fully administered, is threatened with executions issued by a state court on judgments against the bankrupt. Sargent v. Helton (1885) 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412. No judgment can be rendered against a third person for contempt in disobeying an injunction issued in aid of the proceedings in bankruptcy, without proper proceedings taken against him, distinct from those against the bankrupt. Creditors v. Cozzens (D. C. 1869) 3 N. B. R. 281, Fed. Cas. No. 3,378.

10. Enjoining levy or judicial sale.—After the filing of a petition in bankruptcy, if judgment creditors are threatening to levy executions or attachments on property of the bankrupt, they will be enjoined from so doing. Samson v. Burton (D. C. 1870) 4 N. B. R. 1, Fed. Cas. No. 12,285; In re Eastern Commission & Importing Co. (D. C. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; Dittemore v. Cable Milling Co. (1909) 16 Idaho, 298, 101 Pac. 593, 133 Am. St. Rep. 98. If a sheriff has an execution in his hands, he will be enjoined from levying on the goods, or if he has already levied, the court of bankruptcy may restrain him from making a sale. Chapman v. Brewer (1885) 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; In re Goldberg (D. C. 1902) 117 Fed. 692, 9 Am. Bankr. Rep. 156; Blake, Moffitt & Towne v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; In re Wallace (D. C. 1868) 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Bowie (D. C. 1868) 1 N. B. R. 628, Fed. Cas. No. 1,728; Brock v. Terrell (D. C. 1869) 2 N. B. R. 643, Fed. Cas. No. 1,914; Jones v. Leach (D. C. 1868) 1 N. B. R. 595, Fed. Cas. No. 7,475; In re Atkinson (D. C. 1872) 7 N. B. R. 143, Fed. Cas. No. 606; In re Mallory (D. C. 1871) 6 N. B. R. 22, Fed. Cas. No. 8,991; In re Mellor (D. C. 1842) Fed. Cas. No. 9,402. Or the sheriff may be allowed to sell the property, but under the supervision and control of the court of bankruptcy, being then required to hold the proceeds subject to the order of that court. Allen v. Montgomery (1873) 48 Miss. 101; In re Jackson (D. C. 1881) 9 Fed. 493. The sheriff may be thus allowed to sell under his writ where a majority of the creditors desire it and it does not appear that the property is likely to be sacrificed or that the interests of the minority creditors will be injured. In re Edward Ellsworth Co. (D. C. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284.

After process of execution issuing from a state court has been executed by a sale of the bankrupt's property, it is too late for the bankruptcy court to interfere by injunction or otherwise,

the purchaser having acquired a good title. In re Fuller (D. C. 1870) Fed. Cas. No. 5,148. In this case, the court of bankruptcy will not have jurisdiction over the proceeds of the sale remaining in the hands of the sheriff, and he cannot be enjoined from paying over the same to the execution creditor. In re Easley (D. C. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715.

11. Enjoining seizure under replevin.—After the commencement of the proceedings in bankruptcy, though a trustee has not yet been appointed, property scheduled as a part of the bankrupt's estate cannot rightfully be seized by an officer acting under a writ of replevin from a state court. If it is so taken, the officer will be forbidden, by injunction, to sell the property under his writ, or deliver it to the claimant, or otherwise dispose of it, and will be ordered to restore it to the custody of the court of bankruptcy, and the consequences of his disobedience will recoil upon those who may have instigated his disregard of the authority of the court of bankruptcy. In re Schloerb (D. C. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Walsh Bros. (D. C. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Alton Mfg. Co. (D. C. 1908) 158 Fed. 367, 19 Am. Bankr. Rep. 805; In re Gutwillig (D. C. 1898) 90 Fed. 481; In re Wilk (D. C. 1907) 155 Fed. 943, 19 Am. Bankr. Rep. 178.

12. Restraining proceedings in state courts.—Where particular creditors are alleged to have gained an unlawful preference by means of attachments levied on the debtor's property, the appointment of a receiver, and the sale of the property, the proceeds remaining in the hands of the receiver, they may be enjoined from taking proceedings in the state court for the distribution of the fund so held, at least where the necessity of prompt action is shown and it appears that the money would be lost by the policy of waiting until a trustee subsequently to be appointed could sue them for the avoidance of the alleged preference and the recovery of its fruits. In re Ogles (D. C. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671. So where a building leased by the bankrupt and containing his stock in trade passes into the possession of a receiver in bankruptcy, and its occupation is necessary to the proper settlement of the estate, the landlord will not be allowed to prosecute an action of ejectment in a state court to recover the building, but will be enjoined, and remitted to his proper remedy in the court of bankruptcy. In re Chambers, Calder & Co. (D. C. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; In re Kleinhans (D. C. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604.

The power to stay actions pending in the state court against a bankrupt is given only for the benefit of the bankrupt's estate, and, if the estate has no interest in the suit, it cannot properly be stayed. In re Federal Biscuit Co. (1913) 203 Fed. 37, 121 C. C. A. 373. A showing of the amounts secured by mortgages against a bankrupt's property, without a showing of the amount due, does not show that the bankruptcy court abused its discretion in enjoining the proceedings to foreclose the mortgage. Pugh v. Loisel (1915) 219 Fed. 417, 135 C. C. A. 221. Injunction will not be granted as of course, on the filing of an involuntary bankruptcy petition, restraining proceedings under a judgment recovered against the bankrupt in the state court. In re Penn Development Co. (D. C. 1915) 220 Fed. 222.

13. Indemnity bond by petitioning creditors.—When application is made for the appointment of a receiver pending the adjudication of bankruptcy, the creditors must furnish the indemnifying bond required by the statute, and the authority of the court to grant their application is conditioned on this being done. Beach v. Macon Grocery Co. (1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Haff (1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 354. Where an order appointing a receiver requires the petitioner to give a bond, but fails to fix the time when the bond shall be filed, or fails to require such filing before the receiver is directed to take possession of the property, it is erroneous. In re Haff (1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 354. If bond given on appointment of receiver, is insufficient, held, that alleged bankrupt may apply to the court to require an additional bond. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194, 265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528.

The creditors' bond protects a receiver in bankruptcy for his outlay in excess of the amount collected by him, but it is only in cases where the proceedings, resulting in a receivership, were instituted improvidently or without probable cause, or without good faith, or the like, that the petitioning creditors are liable for the payment of the excess of the cost of the receivership over the assets. In re Metals Extraction & Refining Co. (C. C. A. 1912) 195 Fed. 226, 27 Am. Bankr. Rep. 11. The court, in a proper case, may require the bond to contain as one of its conditions that the creditors will pay the expenses of the receivership if sufficient assets applicable to that purpose are not discovered. In re McKane (D. C. 1907) 152 Fed. 733. There is ordinarily no liability, on a bond of this kind, in the way of damages to the bankrupt, unless the creditors acted maliciously and without

probable cause, and in that case the remedy is a suit in the nature of an action of malicious prosecution. In re Moehs & Rechnitzer (D. C. 1909) 174 Fed. 165, 22 Am. Bankr. Rep. 286. Where the condition in a bond given to a trustee in bankruptcy provides for the payment to legal creditors of "whatever pro rata sum may be adjudged to be due them," there is no basis for a judgment permitting a recovery for breach thereof, when no rate of distribution was fixed by the bankruptcy court. Bausman v. Mead (1913) 182 Ill. App. 35.

If the order appointing the receiver is set aside, that is sufficient to show that the taking possession of the debtor's property was "wrongful," within the meaning of the statute, without showing malice, fraud, or lack of probable cause; and it is not necessary, to sustain an action in a state court, that the costs and damages should first have been fixed by the court of bankruptcy. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1911) 250 Ill. 242, 95 N. E. 150.

As to the bond required when the property of the bankrupt is to be seized by the marshal under a warrant, that is only given as a prerequisite to the taking of the property of an alleged bankrupt at the instance of the petitioners pending adjudication; and where property had already been seized under an execution, a bond given to secure an injunction restraining the sale is not within this provision of the statute. In re Hines (D. C. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538. The liability on such a bond only runs in favor of the respondent or respondents who were such when it was given, any persons subsequently becoming respondents, if they desire to be protected, being required to move for an additional bond. In re Spalding (C. C. A. 1906) 150 Fed. 120, 17 Am. Bankr. Rep. 667. There is a right of recovery on the bond when the petition, being against several persons as partners, is dismissed as to one or more of them. In re Nixon (D. C. 1901) 110 Fed. 633, 6 Am. Bankr. Rep. 693. Though the bond covers "all costs, counsel fees, expenses, and damages occasioned by such seizure," the bankrupt is entitled to only one allowance which must include all such items as he claims, and if he makes no claim for damages, he cannot afterwards make a further claim therefor against the petitioners and their bondsmen. Nixon v. Fidelity & Deposit Co. (1907) 150 Fed. 574, 80 C. C. A. 336, 18 Am. Bankr. Rep. 174. Upon the appointment of a receiver on the application of a creditor of an alleged bankrupt, the alleged bankrupt can be indemnified only by the provisions of section 3e (ante, § 9587), and the bond there required is the only bond he can look to, to recover his damages and expenses upon the discharge of the receiver. T. E. Hill Co. v. United States Fidelity & Guaranty Co. (1914) 107 N. E. 194, 265 Ill. 534, affirming judgment (1914) 184 Ill. App. 528. The costs, expenses, and damages to be recovered are such as are incident to the taking and detention of the property, not including costs, expenses, and damages incident to the institution of the bankruptcy proceedings. Where the marshal, while in possession of the property, allowed certain water pipes thereon to freeze and burst, it was held that the bankrupt was entitled to recover the resultant damages, although he had free access to the premises, since the petitioning creditors, on taking possession of the property, assumed full responsibility for its care. Selkregg v. Hamilton Bros. (D. C. 1906) 144 Fed. 557.

14. Forthcoming bond by bankrupt.—Where property of an alleged bankrupt is seized on a warrant to the marshal, upon the filing of a petition and before adjudication, and the bankrupt obtains the release of the property by giving the bond authorized by this section, if the adjudication is afterwards made, the condition of the bond requires the immediate surrender of the property, and it is not a good plea in an action on the bond that an appeal from the adjudication has been taken, without showing whether the appeal is still pending or has been determined. It is a defense to such an action that the property has been actually surrendered to some one authorized to receive it, as a step in the bankruptcy proceeding, but it must be shown that such person possessed and acted in an official capacity, as, a receiver appointed in voluntary bankruptcy proceedings afterwards instituted by the bankrupt. Moore Bros. v. Cowan (1911) 173 Ala. 536, 55 South. 903. The court of bankruptcy has jurisdiction of a proceeding against the sureties on a forthcoming bond of this kind, and such a proceeding may be based on a summary petition. In re Mayo (C. C. 1882) Fed. Cas. No. 9,353a.

§ 9654. (Act July 1, 1898, c. 541, § 70, as amended, Act Feb. 5, 1903, c. 487, § 16.) Title to property.

Title to Property.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him. (30 Stat. 565. 32 Stat. 800.)

In this section, as originally enacted, subdivision e thereof did not contain the provision at the end thereof as set forth here, beginning with the words "For the purpose of such recovery," etc. Said provision was added at the end of said subdivision by Act Feb. 5, 1903, c. 487, § 16, cited above.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

This act contained further provisions, immediately following this section, under a separate heading, in two subdivisions, a and b, as follows:

"The Time When This Act Shall Go into Effect.

"a This act shall go into full force and effect upon its passage: Provided, however, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

"b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it."

These provisions are omitted, as temporary merely.

Two new sections, sections 71 and 72, added to the act by amendment by Act Feb. 5, 1903, c. 487, §§ 17, 18, are set forth as amended by Act June 25, 1910, c. 412, § 13, post, §§ 9655, 9656.

Notes of Decisions

I. Property vesting in trustee

1. Nature and extent of trustee's title.
2. —— Effect of amendment of 1910.
3. —— Estoppels and contracts binding on trustee.
4. —— Trustee taking title by operation of law.
5. Date of accrual of trustee's title.
6. Assets in bankruptcy in general.
7. —— Property not scheduled.
8. —— Books, papers, and records.
9. —— Property subject to judicial process.
10. —— Nature of bankrupt's title.
11. —— Stock in corporations.
12. Situation of property.
13. Burdensome interests.
14. —— Trustee's election to accept or abandon property.
15. Property in bankrupt's possession.
16. Property in custody of the law.
17. Interests in real estate.
18. —— Equity of redemption.
19. —— Leased property.
20. —— Remainders and expectant estates.
21. —— Estates by curtesy and community property.
22. —— Estates of vendor and vendee under executory contract.
23. —— Settlers' rights and improvements on public lands.
24. —— Resulting trusts.
25. —— Power of appointment.
26. Growing crops.
27. Patents and patent rights.
28. Copyrights.
29. Trade-marks and trade-names.
30. Franchises and licenses.
31. Membership in stock exchange.
32. Executory contracts.
33. Good will of business.
34. Debts due to bankrupt.
35. —— Claims against government.
36. Rights of action.
37. —— For personal injuries and other torts.
38. —— For usury.
39. Legacies and inheritances.
40. Property held in trust for bankrupt.
41. —— Testamentary trusts and annuities.
42. Policies of life insurance.
43. —— Meaning of "cash surrender value."
44. —— Endowment, tontine, and annuity policies.
45. —— Rights of beneficiaries.
46. —— Interest claimable by trustee—Liens.
47. —— Effect of death of bankrupt.
48. —— Indemnity and accident insurance.
49. Wife's personalty and choses in action.
50. Acquisitions of minor children.
51. Dower rights.
52. Property of third persons in bankrupt's possession.
53. —— Goods sold to bankrupt.
54. —— Estoppel of bankrupt to assert title.
55. —— Remedies of owner.
56. —— Laches of claimant.
57. Property held by bankrupt as trustee.
58. —— Claims to, and identification of, trust funds.
59. —— Trust receipt to secure advances.
60. —— Deposits in bank.
61. Property held by bankrupt as agent or bailee.
62. —— Goods consigned to bankrupt for sale.
63. —— Proceeds of goods already sold.
64. —— Transaction as disguise for sale on credit.
65. Money or collateral in hands of bankrupt as stockbroker.
66. Property held under conditional sale.
67. —— Effect of state law as to filing or recording.
68. —— Effect of amendment of 1910.
69. Property held under executory or option contracts of sale.
70. Property procured by bankrupt by fraud.
71. —— Essential elements of fraud.
72. Property sold by bankrupt.
73. —— Delivery and passing of title.
74. Goods pledged by bankrupt.
75. Equitable rights of third persons.
76. After-acquired property.
77. Partnership and individual property.

II. Assets of bankrupt corporation

78. Franchises as assets.
79. Assessment on unpaid stock.
80. —— Proceedings for assessment or call.
81. —— Proceedings to collect assessment.
82. —— Persons liable.
83. —— Set-off against assessment.
84. Statutory liability of stockholders and directors.

III. Rights of trustee as against prior assignee for creditors

85. Effect of adjudication in bankruptcy on previous assignment.
86. Assignment more than four months before bankruptcy.
87. Enjoining action by assignee.
88. Setting aside assignment.
89. Recovery of assets by trustee.
90. Requiring surrender of property by assignee.
91. Nature of trustee's title to assigned property.
92. Estate partly settled by assignee.
93. Rights of purchasers from assignee and paid creditors.
94. Appointment of assignee as trustee.
95. Credits and allowances to assignee.
96. —— Compensation for services.
97. —— Fees of assignee's attorney.
98. —— Allowance and payment of charges.

IV. Time of taking effect of act

99. Date of approval of act.
100. —— Fractions of a day.

V. Effect of act on state insolvency laws

101. Validity of state insolvency laws.
102. Suspension of insolvency laws by bankruptcy act.
103. What state laws affected.
104. —— Winding up insolvent corporations.
105. —— Foreclosure and receivership.
106. Cases not covered by bankruptcy law.
107. Laws regulating assignments for creditors.
108. Effect of suspension of state insolvency laws.
109. Pending proceedings under state laws.

I. PROPERTY VESTING IN TRUSTEE

1. Nature and extent of trustee's title.—A trustee in bankruptcy does not occupy the technical position of an innocent purchaser for value without notice. In re Scruggs (D. C. 1913) 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Charles Town Light & Power Co. (D. C. 1912) 199 Fed. 846, 29 Am. Bankr. Rep. 721; In re Interstate Paving Co. (D. C. 1912) 197 Fed. 371, 28 Am. Bankr. Rep. 573; First Nat. Bank v. Bacon (1906) 113 App. Div. 612, 98 N. Y. Supp. 717; Ellison v. Ganiard (1906) 167 Ind. 471, 79 N. E. 450; Goodyear Rubber Co. v. Schreiber (1902) 29 Wash. 94, 69 Pac. 648; Chace v. Chapin (1881) 130 Mass. 128; F. A. Ames Co. v. Slocomb Mercantile Co. (1910) 166 Ala. 99, 51 South. 994; In re Bozeman, 1 Nat. Bankr. News, 479.

Trustees in bankruptcy, except in the case of liens or transfers which are fraudulent or void under the statute, take only such rights and interests as the bankrupt himself had and could himself claim and assert at the time of his bankruptcy, and they take the property subject to and affected with all those claims, liens, and equities which were valid against it in the hands of the bankrupt, and which would affect and bind him if he were asserting those rights and interests. Zartman v. First Nat. Bank (1910) 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418, 23 Am. Bankr. Rep. 635; York Mfg. Co. v. Cassell (1906) 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Hewit v. Berlin Machine Works (1904) 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Bacon v. International Bank (1881) 131 U. S. ccxvi, 26 L. Ed. 439; Yeatman v. New Orleans Sav. Inst. (1877) 95 U. S. 764, 24 L. Ed. 589; Gage Lumber Co. v. McEldowney (1913) 207 Fed. 255, 124 C. C. A. 641; In re Snelling (D. C. 1912) 202 Fed. 259; In re Place (D. C. 1915) 224 Fed. 778; Galbraith v. First Nat. Bank (1915) 221 Fed. 386, 137 C. C. A. 194; In re Scruggs (D. C. 1913) 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Thompson (D. C. 1913) 205 Fed. 556, 30 Am. Bankr. Rep. 576; In re Interstate Paving Co. (D. C. 1912) 197 Fed. 371, 28 Am. Bankr. Rep. 573; In re E. M. Newton & Co. (1907) 153 Fed. 841, 83 C. C. A. 23, 18 Am. Bankr. Rep. 567; In re Walsh Bros. (D. C. 1912) 195 Fed. 576, 28 Am. Bankr. Rep. 243; In re Peacock (C. C. 1910) 178 Fed. 851, 24 Am. Bankr. Rep. 159; Walter A. Wood Co. v. Eubanks (1909) 169 Fed. 929, 95 C. C. A. 273, 22 Am. Bankr. Rep. 307; In re Blake (C. C. A. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; In re Kellogg (1902) 118 Fed. 1017, 56 C. C. A. 383; Duplan Silk Co. v. Spencer (1902) 115 Fed. 689, 53 C. C. A. 321, 8 Am. Bankr. Rep. 367; Chattanooga Nat. Bank v. Rome Iron Co. (C. C. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; Mitchell v. Winslow (C. C. 1843) Fed. Cas. No. 9,673; Ex parte Newhall (C. C. 1842) Fed. Cas. No. 10,159; Fletcher v. Morey (C. C. 1843) Fed. Cas. No. 4,864; In re Rockford, R. I. & St. L. R. Co. (D. C. 1869) Fed. Cas. No. 11,978; Ex parte Dalby (D. C. 1870) Fed. Cas. No. 3,540; Williamson v. Colcord (D. C. 1875) Fed. Cas. No. 17,752; Mattocks v. Baker (D. C. 1880) 2 Fed. 455; In re Dow (C. C. 1871) 6 N. B. R. 10, Fed. Cas. No. 4,036; Webber v. Clark (1891) 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Union Brewing Co. v. Interstate Bank & Trust Co. (1909) 240 Ill. 454, 88 N. E. 997; Hardy v. Weyer (1908) 42 Ind. App. 343, 85 N. E. 731; Wick v. Hickey (Iowa, 1905) 103 N. W. 469; Exchange & Deposit Bank v. Stone (1882) 80 Ky. 109; Linthicum v. Fenley (1875) 74 Ky. (11 Bush) 131; Chambers v. Northern Bank of Kentucky (1883) 5 Ky. Law Rep. 123; Clarke v. Rosenda (1843) 5 Rob. (La.) 27; Blank v. Blank (1909) 124 La. 832, 50 South. 745; Kenney v. Ingalls (1879) 126 Mass. 488; Upton v. National Bank of South Reading (1876) 120 Mass. 153; Dugan v. Nichols (1878) 125 Mass. 43; Chace v. Chapin (1881) 130 Mass. 128; Lockwood v. Noble (1897) 113 Mich. 418, 71 N. W. 856; Davis v. Lumpkin (1879) 57 Miss. 506; Abbey v. Commercial Bank of New Orleans (1857) 34 Miss. 571, 69 Am. Dec. 401; South End Imp. Co. v. Harden (N. J. Eq. 1902) 52 Atl. 1127; Hunt v. Osborn (1904) 180 N. Y. 508, 72 N. E. 1143; First Nat. Bank v. Zartman (1907) 189 N. Y. 553, 82 N. E. 1126; Van Heusen v. Van Heusen Charles Co. (1911) 74 Misc. Rep. 292, 131 N. Y. Supp. 401; Crane Co. v. Smythe (1904) 94 App. Div. 53, 87 N. Y. Supp. 917; White v. O'Brien (1900) 31 Misc. Rep. 770, 64 N. Y. Supp. 387; Woodin v. Frazee (1874) 38 N. Y. Super. Ct. 190; Godwin v. Murchison Nat. Bank (1907) 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; Walker v. Taylor (Tex. Civ. App. 1912) 142 S. W. 31; Eason v. Garrison (1904) 36 Tex. Civ. App. 574, 82 S. W. 800; Beall v. Walker (1885) 26 W. Va. 741; Ferguson v. Bauernfeind (1909) 140 Wis. 42, 121 N. W. 647; Claridge v. Evans (1908) 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Kimball v. Baker Land & Title Co. (1913) 152 Wis. 441, 140 N. W. 47; Lyttle v. National Surety Co. (1915) 43 App. D. C. 136; Williams v. Noyes & Nutter Mfg. Co. (1914) 112 Me. 408, 92 Atl. 482; Palmer v. Welch (Mo. App. 1913) 154 S. W. 433; Southern Trust Co. v. Wilkins (1915) 101 S. C. 457, 86 S. E. 26; Walkof v. Fox (Sup. 1915) 153 N. Y. Supp. 27; Coggan v. Ward (1913) 215 Mass. 13, 102 N. E. 336; Chicago Title & Trust Co. v. National Storage Co. (1913) 260 Ill. 485, 103 N. E. 227.

The effect of an adjudication in bankruptcy in divesting the title of the bankrupt and transferring it to the

trustee is within the terms of a policy of insurance rendering the contract void in case of an "alienation" or "transfer" of the property covered, or a "change in the title or possession" without the consent of the insurer. Perry v. Lorillard Fire Ins. Co. (1874) 61 N. Y. 214; Adams v. Rockingham Ins. Co. (1849) 29 Me. 292; Starkweather v. Cleveland Ins. Co. (C. C. 1872) Fed. Cas. No. 13,309.

2. —— **Effect of amendment of 1910.** —The amendatory act of 1910, providing that "as to all property in the custody or coming into the custody of the bankruptcy court," the trustee "shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied," enlarges the powers of the trustee in bankruptcy and strengthens his title as to certain kinds of transactions which would have been valid as against the bankrupt himself, though voidable as to lien creditors. In re Chotiner (D. C. 1914) 216 Fed. 916; In re Gehris-Herbine Co. (D. C. 1911) 188 Fed. 502, 26 Am. Bankr. Rep. 470; In re Butterwick (D. C. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; Thomas v. Taggart (1908) 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710; Crawford v. Mandell (1912) 173 Mich. 409, 138 N. W. 705. Under the act as thus amended, the trustee's rights depend upon the law of the state, as the "rights of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of state law. In re Floyd-Scott Co. (D. C. 1915) 224 Fed. 987.

The trustee cannot hold real estate against a third person who claims under an earlier and unrecorded conveyance made to him by the bankrupt. In re Rutland-Perry Co. (D. C. 1913) 205 Fed. 200; Goss v. Coffin (1877) 66 Me. 432, 22 Am. Rep. 585. A trustee in bankruptcy succeeds to the title of the bankrupt, but liens not avoided by the bankruptcy law are unaffected, except so far as the remedy of enforcement is limited by the property passing into the custody of the court. In re Reading Hat Mfg. Co. (D. C. 1915) 224 F. 786. The trustee has not a lien superior to mortgage recorded within four months and before any other creditor had acquired a lien. Martin v. Commercial Nat. Bank of Macon, Ga. (C. C. A. 1916) 228 Fed. 651. The right of a trustee to property in the possession of the bankrupt is superior to that of a mortgagee holding under an unrecorded mortgage, good as between the bankrupt and the mortgagee. In re Social Circle Cotton Mills (D. C. 1914) 213 Fed. 994. Where the United States paid over to a receiver appointed by the court the balance due on a contract, and thereafter a trustee in bankruptcy on the contractor intervenes and claims the fund, and it is admitted by the trustee that the surety company's lien on the fund is a valid one, and also that the surety company is entitled to be subrogated to the rights of the United States in respect to the security of the fund, the fund will not be turned over to the trustee for administration in the bankruptcy court. Lyttle v. National Surety Co. (1915) 43 App. D. C. 136.

When the trustee brings his bill to set aside a sale of the bankrupt's realty, made under a deed of trust, and for leave to redeem, he has no greater rights than the bankrupt himself would have under the circumstances, and any defense that would be available against the bankrupt may be urged against the trustee. Jenkins v. Pierce (1881) 98 Ill. 646. So where the bankrupt had borrowed money to pay for certain real estate, and it was orally agreed that, on payment of a note given for the loan, the title should be conveyed to him, he took merely an equitable title subject to a lien in favor of the holder of the note, and his trustee in bankruptcy occupies no more advantageous position. Beer v. Wisner (1905) 74 Neb. 437, 104 N. W. 757. So where a purchaser of personal property under a conditional sale sold the property to the bankrupt, the latter's trustee will acquire no better title than the bankrupt had. Crocker-Wheeler Co. v. Genesee Recreation Co. (1910) 140 App. Div. 726, 125 N. Y. Supp. 721.

3. —— **Estoppels and contracts binding on trustee.**—Estoppels effective against the bankrupt may also bind his trustee, as, for example, with reference to ostensible membership in a firm, when the question concerns the rights of creditors who relied thereon. Kelly v. Scott (1872) 49 N. Y. 595. Or with reference to the merger of a lien in the legal title to the property. In re Standard Laundry Co. (1902) 116 Fed. 476, 53 C. C. A. 644, 8 Am. Bankr. Rep. 538; Palmer v. Welch (1913) 171 Mo. App. 580, 154 S. W. 433. Where none of the creditors of a bankrupt extended credit to him in reliance on his ownership of property which, while standing in his name, was in fact held by him in trust for others, his trustee takes no greater interest or right therein than he himself had, and if the trust was enforceable in equity against him, it is equally so against his trustee. In re Coffin (1907) 152 Fed. 381, 81 C. C. A. 507, 18 Am. Bankr. Rep. 127.

As a court of bankruptcy is a court of equity, trustees in bankruptcy will sometimes be ordered to do full justice even in cases where the circumstances give rise to no legal right, nor even, perhaps, to a right which could be enforced in a court of equity as against an ordinary litigant. In re Chase

(1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677.

Where the business of the bankrupt is the retailing of a patented article under a license from the patentee, which license requires him to sell only at a fixed price and gives him the privilege of returning any of the articles not sold, the trustee in bankruptcy is also bound by the terms of the license, and, as to the stock on hand when he takes possession, he must either sell the articles at the fixed price or return them. In re S. Spitzel & Co. (D. C. 1909) 168 Fed. 156, 21 Am. Bankr. Rep. 729.

4. —— Trustee taking title by operation of law.—The title of a trustee in bankruptcy resembles that of an executor. Dillard v. Collins (1874) 25 Grat. (Va.) 343. In another case it is said that assignees in bankruptcy do not take the whole legal title in the bankrupt's property as heirs and executors do. Nothing vests in them, even at law, but such estate as the bankrupt had a beneficial as well as a legal interest in. Ontario Bank v. Mumford (1848) 2 Barb. Ch. (N. Y.) 596. Proceedings in bankruptcy may be regarded as an equitable attachment, and the equitable interest vested in the trustee in bankruptcy for the benefit of all the creditors. In re Hinds (D. C. 1869) 3 N. B. R. 351, Fed. Cas. No. 6,516. The trustee's title is a title cast upon him by operation of law, at least coextensive with the title of the bankrupt and in some respects wider or stronger, and not held for his own benefit or advantage, but in trust for those entitled to share in the distribution of the estate. Brown v. Frenken (1908) 87 Ark. 160, 112 S. W. 207; Aiken v. Edrington (C. C. 1876) 15 N. B. R. 271, Fed. Cas. No. 111. The only object of its creation is to enable the trustee to collect and distribute the assets among the creditors. Bracklee Co. v. O'Connor (1910) 67 Misc. Rep. 599, 122 N. Y. Supp. 710. The title of the trustee is exclusive and he is the only person who can sue for the recovery of assets. Schnurman's Ex'x v. Biddle & Co. (1909) 109 Va. 702, 64 S. E. 977. The trustee may maintain replevin for the recovery of specific personal property, or trover for damages for its conversion. Haughey v. Albin (D. C. 1869) Fed. Cas. No. 6,222; Foster v. Hackley (C. C. 1869) 2 N. B. R. 406, Fed. Cas. No. 4,971; McLeish v. Tylee (1848) 3 Strob. (S. C.) 287. No creditor can pursue, and subject to the payment of his claim, assets of the bankrupt which existed at the time of the adjudication and passed to the trustee, unless the latter has abandoned them. Starr v. Whitcomb (1907) 150 Mich. 491, 114 N. W. 345; Jenkins v. Pilcher (1910) 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423. Where a trustee in bankruptcy has taken possession, the property is in the custody of the law and cannot be removed therefrom by any private person or by any process out of any court, except one having a supervisory control or superior jurisdiction in the premises. Williams v. Noyes & Nutter Mfg. Co. (1914) 92 A. 482, 112 Me. 408. Where H. acquired property 10 days before his death, and turned it over to his sons to be handled by them under the firm name of H. & Sons, and his heirs made no claim thereto until the bankruptcy of the firm, the administrator cannot, after the bankruptcy, claim the property as individual property. In re F. W. Hall & Sons (D. C. 1913) 208 Fed. 578.

The title of the trustee is not in any way affected by the discharge of the bankrupt or by his failure to obtain a discharge. In re Cheney (C. C. 1842) Fed. Cas. No. 2,636. The trustee has no control over the interests of others in the property, except as expressly given by law to protect the bankrupt's interests for the benefit of the creditors. Goddard v. Weaver (C. C. 1872) Fed. Cas. No. 5,495. The title of a trustee in bankruptcy to a patent is not of the kind that must be recorded; and the transfer of the patent to the trustee by the adjudication in bankruptcy, though not recorded in the patent office, will prevail over a recorded assignment of the patent from the administrator of the bankrupt made after the bankruptcy. Prime v. Brandon Mfg. Co. (C. C. 1879) Fed. Cas. No. 11,421. The title of the trustee cannot be divested except by the order of the court which has control of the administration of the estate, and until this has been done, all other courts must respect the trustee's title, at least until he has been discharged. May v. New Orleans & C. R. Co. (1892) 44 La. Ann. 444, 10 South. 769.

5. Date of accrual of trustee's title.—Under the explicit provision of the statute, the title of the trustee in bankruptcy takes effect, by relation, from the date of the adjudication of bankruptcy. In re Butterwick (D. C. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; In re Fulton (D. C. 1907) 153 Fed. 664, 18 Am. Bankr. Rep. 591; Currie v. Look (1906) 14 N. D. 482, 106 N. W. 131; Bennett v. Ætna Ins. Co. (1909) 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414; Simpson v. Miller (1908) 7 Cal. App. 248, 94 Pac. 252; Williams v. Noyes & Nutter Mfg. Co. (1914) 112 Me. 408, 92 Atl. 482. The condition of a bankrupt's property, after the adjudication and before the appointment of a trustee, is analogous to the condition of the personal property of a decedent before the appointment of an executor or administrator. Bankruptcy, like death, divests the title of the owner. It becomes thereupon in custodia legis. Upon the appointment of a trustee, he takes title by relation back as of the date of the adjudication. In re Frazin & Oppenheim (D. C. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289. And see In re Gutwillig (D. C. 1898) 90 Fed.

475, 1 Am. Bankr. Rep. 78. The provision of the act requiring the trustee to file a certified copy of the adjudication in every county where the bankrupt holds real estate does not affect the rule as to the time of accrual of the trustee's title, and such filing is not necessary to complete his title to given real property. Hull v. Burr (1911) 61 Fla. 625, 55 South. 852. The trustee may maintain trover for property converted before his appointment, if the conversion occurred after the adjudication. Mitchell v. McKibbin (D. C. 1872) 8 N. B. R. 548, Fed. Cas. No. 9,-666.

The title of the trustee to specific property vests as of the date of the adjudication of bankruptcy, and not as of the date of the filing of the petition in bankruptcy. Hiscock v. Varick Bank (1907) 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1; In re Rose (D. C. 1913) 206 Fed. 991; Christopherson v. Harrington (1912) 118 Minn. 42, 136 N. W. 289, 41 L. R. A. (N. S.) 276. CONTRA, In re Judson (C. C. A. 1912) 192 Fed. 834, 27 Am. Bankr. Rep. 704; Glidden v. Massachusetts Hospital Life Ins. Co. (1905) 187 Mass. 538, 73 N. E. 538; St. Louis County v. Watson (1877) 3 Mo. App. 599; Cornelius v. Boling (1907) 18 Okl. 469, 90 Pac. 874; Miller v. Barto (1910) 247 Ill. 104, 93 N. E. 140; Sargent v. Blake (1908) 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Potter v. Martin (1899) 122 Mich. 542, 81 N. W. 424; Toof v. City Nat. Bank (C. C. A. 1913) 206 Fed. 250, 30 Am. Bankr. Rep. 79; Kopplin v. Ludwig (Tex. Civ. App. 1914) 170 S. W. 105. But by virtue of the amendment of 1910 the trustee takes the status of a creditor holding a lien as of the time when the petition in bankruptcy was filed. Bailey v. Baker Ice Mach. Co. (1915) 36 Sup. Ct. 50; In re Federal Contracting Co. (1914) 212 Fed. 688, 129 C. C. A. 224; Big Four Implement Co. v. Wright (C. C. A. 1913) 207 Fed. 535.

The rule as to the date when the trustee's title attaches is not affected by the provision of the statute that he shall be vested with title to property which, prior to the petition, the bankrupt could have transferred, since this refers merely to the class of property which passes to the trustee. Gray v. Chase (1903) 184 Mass. 444, 68 N. E. 676. The trustee cannot maintain trover to recover the value of mortgaged personal property of which the mortgagee had taken possession and appropriated the same to his own use before the adjudication in bankruptcy. Jones v. Miller (C. C. 1877) 17 N. B. R. 316, Fed. Cas. No. 7,482. Where a chose in action has been assigned by a bankrupt before the adjudication, an action thereon must be brought in the name of the bankrupt, and not in that of his trustee. Hynson v. Burton (1844) 5 Ark. 492. The lien of a bankrupt's trustee does not relate to a point four months prior to the institution of the proceedings, nor can it antedate the time the proceedings were instituted. In re Jacobson & Perrill (D. C. 1912) 200 Fed. 812.

The fact that the bankrupt obtains his discharge does not bar the right of the trustee to recover property subsequently discovered. Maybin v. Raymond (C. C. 1877) 15 N. B. R. 353, Fed. Cas. No. 9,338. If the discharge be set aside, and bankrupt's assignment of life policies be voided, their status, as regards the trustee's interest, is of the date of adjudication, though bankrupt has died. In re Levy (D. C. 1915) 227 Fed. 1011.

6. Assets in bankruptcy in general.— Assets in bankruptcy are property of the bankrupt, or the proceeds thereof, coming into the hands of the trustee and applicable to the payment of debts. In re Wilson (C. C. 1875) Fed. Cas. No. 17,782.

The enumeration in this section of certain classes or kinds of property which shall pass to the trustee in bankruptcy is not to be construed as exclusive of other assets not therein described, and if there be other kinds of property owned by the bankrupt and applicable to his debts, they will also vest in the trustee. In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

The trustee in bankruptcy will be entitled to claim money in bank to the credit of the bankrupt. Wagner v. Citizens' Bank & Trust Co. (1909) 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869. And rents accruing from his property. Keenan v. Shannon (C. C. 1874) 9 N. B. R. 441, Fed. Cas. No. 7,640; In re Dole (D. C. 1901) 110 Fed. 926, 7 Am. Bankr. Rep. 21. And removable trade fixtures. Montello Brick Co. v. Trexler (C. C. A. 1909) 167 Fed. 482, 21 Am. Bankr. Rep. 896. A stock of intoxicating liquors held to vest in trustee of licensed dealer, notwithstanding claim that trustee could not sell them. Strub v. Gamble (1915) 221 Fed. 253, 137 C. C. A. 258. Under Laws N. Y. 1910, c. 348, § 25, as amended by Laws 1911, c. 393, trustee in bankruptcy of private bankers held entitled to amount of their bond. In re Deutsche Bros. (D. C. 1915) 220 Fed. 532. Pending bankruptcy proceeding, judgment creditor of bankrupt held not entitled to proceed under the Bankruptcy Act or under Code Civ. Proc. N. Y. § 1391, against bankrupt's pension as retired city employé. In re Hoag (D. C. 1915) 227 Fed. 480.

7. —— Property not scheduled. — Though the bankrupt is required to file a schedule of his property, the extent of the trustee's title does not de-

pend upon it, but the latter will take title to any property which he may discover and which properly constitutes assets of the estate, though omitted from the schedule. In re Levy (D. C. 1915) 227 Fed. 1011; Jones v. Barnes (Miss. 1914) 66 South. 212; Chachere v. Bloch (1894) 46 La. Ann. 1386, 16 South. 176; Hallyburton v. Slagle (1902) 130 N. C. 482, 41 S. E. 877; Ledoux v. Samuels (1907) 116 App. Div. 726, 102 N. Y. Supp. 43; Leist v. Dierssen (1906) 4 Cal. App. 634, 88 Pac. 812; Juden v. Nebham (Miss. 1912) 60 South. 45.

8. —— **Books, papers, and records.**—The trustee is entitled to the possession of all the bankrupt's books of account, business papers, contracts, securities, and other documents relating to his business. In re Hess (D. C. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559. In the case of the bankruptcy of a corporation, its trustee is entitled to the possession of the corporate records and stock books. Babbitt v. Dutcher (1910) 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402. But if the bankrupt's books of account have been transferred by him before the commencement of the proceedings in bankruptcy, in such a way as to give the holder an apparent legal title to them, the trustee must resort to plenary proceedings for their recovery. Rogers v. Winsor (D. C. 1872) 6 N. B. R. 246, Fed. Cas. No. 12,023.

9. —— **Property subject to judicial process.**—A bankrupt's trustee is vested with the bankrupt's title to all property which either he could have transferred, or which might have been levied on and sold under judicial process, except property exempt under the laws of the state. In re T. C. Burnett & Co. (D. C. 1912) 201 Fed. 162. Whether particular property could have been levied on and sold under judicial process is to be determined according to the local law. Rosenbluth v. De Forest & Hotchkiss Co. (1911) 85 Conn. 40, 81 Atl. 955. Transferability is the test of the title of a trustee in bankruptcy under the provision of the bankruptcy act that all property which the bankrupt could have transferred, or which could have been levied on or sold under judicial proceedings, shall pass to his trustee. In re Packer's Estate (1914) 92 A. 70, 246 Pa. 116. The clause relating to property which could be "levied upon and sold under judicial process" will include all property to which the bankrupt had title as between himself and his creditors. Chesapeake Shoe Co. v. Seldner (1903) 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466; Boone v. Hall (1870) 7 Bush (Ky.) 66, 3 Am. Rep. 288; In re Millbourne Mills Co. (D. C. 1908) 162 Fed. 988, 20 Am. Bankr. Rep. 748; Patterson v. Boyd (Tenn. 1912) 150 S. W. 424; In re T. C. Burnett & Co. (D. C. 1912) 201 Fed. 162, 29 Am. Bankr. Rep. 872. Where personal property is held by a third person under a lease from the bankrupt, although the local law would not subject it to attachment or execution at the suit of the lessor's creditors, yet if it could be reached by trustee process, subject to the rights of the lessee, it is assets of the estate in bankruptcy. Clark v. Williams (1906) 190 Mass. 219, 76 N. E. 723.

10. —— **Nature of bankrupt's title.**—There must be some definitely fixed or ascertainable title or estate, in which the bankrupt has a beneficial as well as a legal interest. Ontario Bank v. Mumford (1848) 2 Barb. Ch. (N. Y.) 596; In re Twaddell (D. C. 1901) 110 Fed. 145, 6 Am. Bankr. Rep. 539. But the fact that his interest is defeasible or contingent does not necessarily prevent it from being transferable or assignable and therefore assets in bankruptcy. In re Wright (C. C. A. 1907) 157 Fed. 544, 19 Am. Bankr. Rep. 454; In re Judson (D. C. 1911) 188 Fed. 702, 26 Am. Bankr. Rep. 775. The trustee will be entitled to claim money which was placed in the bankrupt's hands and was converted by him under circumstances such as to make his act larcenous. Lord v. Seymour (1903) 177 N. Y. 525, 69 N. E. 1126. But the case is different in regard to property which is held by the bankrupt under no real title, but by virtue of a conveyance which was fraudulent and void as against the grantor's creditors. It is the latter, the grantor's creditors, who will be entitled to it, and not the trustee in bankruptcy of the grantee. Manning v. Drake (1847) 1 Mich. 34; Gunther v. Greenfield (1870) 8 Abb. Prac. N. S. (N. Y.) 191, 3 N. B. R. 730.

Where the bankrupt is not the sole owner of property, but jointly interested in it with others, the trustee will take only the bankrupt's share or interest. Goddard v. Weaver (C. C. 1872) Fed. Cas. No. 5,495. But on the bankruptcy of a person who was in fact the sole owner of a business, though it was conducted in the name of himself and another as partners, the property and assets of the business will pass to his trustee as his individual property, without regard to any liability of the ostensible partner to the creditors. In re Gibson (D. C. 1911) 191 Fed. 665, 27 Am. Bankr. Rep. 401.

11. —— **Stock in corporations.**—The trustee in bankruptcy is entitled to shares of corporate stock standing in the name of the bankrupt. Wilson v. Atlantic & St. L. R. Co. (D. C. 1880) 2 Fed. 459. And to the interest of the bankrupt in a stock pool organized to advance the market in a certain stock and then sell to the public. In re Lathrop, Haskins & Co. (D. C. 1910) 184 Fed. 534, 24 Am. Bankr. Rep. 911.

The trustee in bankruptcy of a corporate stockholder acquires nothing but the rights and remedies of the stockholder. Chicago Railway Equipment Co. v. National Hollow Brake Beam Co. (1912) 173 Ill. App. 573. As to corporate stock, the trustee has a right to have the certificate transferred to him or to have a new one issued, if it is beyond his power to compel a transfer from the bankrupt. Wilson v. Atlantic & St. L. R. Co. (D. C. 1880) 2 Fed. 459. And probably to vote the stock at stockholders' meetings, though if he allows the bankrupt to do this, the other stockholders have no right to object. State v. Ferris (1875) 42 Conn. 560. But while shares of corporate stock pass to the trustee, for whatever they may be currently worth, a stockholder's interest in the accumulated but undivided profits of the company is not "property," and therefore the trustee cannot recover dividends declared on the stock after the bankrupt's discharge. Bryan v. Sturgis Nat. Bank (1905) 40 Tex. Civ. App. 307, 90 S. W. 704. And although the bankrupt may be employed by a given corporation, all the stock of which stands in the name of his wife, and its prosperity may be chiefly due to his efforts, it does not follow that any part of its property can be claimed as assets of his estate. Campbell v. Thompson (1902) 18 Colo. App. 93, 70 Pac. 161.

The individual liability of a stockholder in a corporation does not descend upon his trustee in bankruptcy, nor attach to the assets in his hands, at least where the trustee has not accepted the stock or consented to become a stockholder in the corporation. American File Co. v. Garrett (1884) 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Garrett v. Sayles (C. C. 1880) 1 Fed. 371.

12. Situation of property.—All property of the bankrupt situated anywhere within the United States passes to and vests in his trustee in bankruptcy, without regard to the territorial limits of the jurisdiction of the court which made the adjudication of bankruptcy. Knauth, Nachod & Kuhne v. Latham & Co. (1915) 219 Fed. 721, 135 C. C. A. 419; In re Granite City Bank (1905) 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; In re Wilka (D. C. 1904) 131 Fed. 1004, 12 Am. Bankr. Rep. 727; Ward v. Hargett (1909) 151 N. C. 365, 66 S. E. 340; Cannon v. Wellford (1872) 22 Grat. (Va.) 195.

By another part of the act (section 7, cl. 5 [ante, § 9591]), it is made the duty of the bankrupt to "execute to his trustee transfers of all his property in foreign countries," because a decree in bankruptcy would not be sufficient in itself to invest the trustee with title to real property of the bankrupt situated in a foreign country. Oakey v. Bennett (1850) 11 How. 33, 13 L. Ed. 593; Chaison v. McFaddin (Tex. Civ. App. 1910) 132 S. W. 524; In re Delehanty's Estate (1908) 11 Ariz. 366, 95 Pac. 109, 21 Ann. Cas. 1038.

13. Burdensome interests.—Though title to all the bankrupt's property descends upon his trustee, the latter is not bound to accept or to administer any portion of it or any item of assets which he may decide to be worthless, or likely to cost more than it will yield, or to be more of a burden than a benefit to the estate. In the exercise of his judgment and discretion on this point, he may reject, abandon, or refuse to take charge and possession of, any such property, and so free himself from any duty or responsibility in regard to it. Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; American File Co. v. Garrett (1884) 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Sessions v. Romadke (1892) 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; In re Schiermann (D. C. 1900) 2 Nat. Bankr. News, 118; Taylor v. Irwin (C. C. 1884) 20 Fed. 615; Kimberling v. Hartly (C. C. 1880) 1 Fed. 571; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336; Copeland v. Stephens, 1 Barn. & Ald. 603; Smith v. Gordon (D. C. 1843) Fed. Cas. No. 13,052; Glenn v. Howard (1886) 65 Md. 40, 3 Atl. 895; Griswold v. Morse (1879) 59 N. H. 211; Berry v. Gillis (1845) 17 N. H. 9, 43 Am. Dec. 584; Briggs v. Avary (1907) 47 Tex. Civ. App. 488, 106 S. W. 904; Fleming v. Courtenay (1903) 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; In re Zehner (D. C. 1912) 193 Fed. 787, 27 Am. Bankr. Rep. 536; McCarty v. Light (1913) 155 App. Div. 36, 139 N. Y. Supp. 853; Dow v. Bradley (1913) 110 Me. 249, 85 Atl. 896; In re Scruggs (D. C. 1913) 205 Fed. 673. While a trustee in bankruptcy is vested in a qualified sense with all the assets of the bankrupt, he may decline to take such property as he deems burdensome and worthless, and title thereto remains in the bankrupt. Dow v. Bradley (Me. 1913) 85 A. 896. Although the title to land passes to the trustee in bankruptcy by the proceedings in bankruptcy, if he so elects, he is not required to accept it, if in his opinion it is worthless or will be unprofitable. McCarty v. Light (1913) 139 N. Y. S. 853, 155 App. Div. 36.

If the trustee finds property of the bankrupt so heavily burdened with mortgages or other liens that he considers it impossible to realize anything out of the equity of redemption for the benefit of the general creditors, he may refuse to administer it and abandon it to the secured creditor, and it is in fact his duty to do so whenever it is certain that the general estate would derive no benefit from a sale of the property. In re Zehner (D. C. 1912) 193 Fed. 787, 27 Am. Bankr. Rep. 536; In re Jersey Island Packing Co. (1905) 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am.

Bankr. Rep. 689; In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529. He is not bound to accept any property which may involve him in litigation, when the probability is that the estate would be taxed with costs and expenses in excess of any sum eventually realized. Oldmixon v. Severance (1907) 119 App. Div. 821, 104 N. Y. Supp. 1042.

If creditors are not satisfied with the trustee's decision to reject an item of property as onerous or unprofitable, they may apply to the court of bankruptcy for an order requiring him to take charge of the property and administer it. Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915. Where a trustee refuses to accept property which he deems will be a burden, it reverts to the bankrupt, and the remedy of creditors is to apply to the bankruptcy court to compel the trustee to accept the property. People's Nat. Bank of Independence v. Maxson (1915) 150 N. W. 601.

If the trustee's decision to abandon the property is acquiesced in, or not overruled, the effect is to restore to the bankrupt the title and possession of the property and the right to deal with it as his own, and the trustee cannot thereafter interfere with it or claim any proceeds arising from the sale or other disposition of the property or any advantage accruing from it. Fleming v. Courtenay (1903) 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Burton v. Perry (1893) 146 Ill. 71, 34 N. E. 60; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336; Kimberling v. Hartley (C. C. 1880) 1 Fed. 571; Smith v. Gordon (D. C. 1843) Fed. Cas. No. 13,052; Haley v. Boston Belting Co. (1885) 140 Mass. 73, 2 N. E. 785. Where the bankrupt was carrying some policies of life insurance, the trustee decided that they were not of any value to the estate, and hence did not have them appraised or make any provision for paying the premiums, but abandoned them to the bankrupt, with the approval of the court. But the beneficiaries in the policies or the bankrupt himself kept up the premiums, and the bankrupt died before the estate was closed. It was held that the trustee was not entitled to recover the proceeds of the policies from the insurance companies or from the beneficiaries. Meyers v. Josephson (1903) 124 Fed. 734, 59 C. C. A. 650, 10 Am. Bankr. Rep. 687. So, when the trustee declines to take a debt or claim due to the bankrupt, it becomes the latter's right to sue upon it himself, and in this case it is immaterial whether or not the trustee's right to sue would be barred, as that does not affect the bankrupt. Buckingham v. Buckingham (1880) 36 Ohio St. 68. Where registered holder of bonds was adjudged a bankrupt, but trustee did not claim the bonds, right to enforce payment was in registered holder. Shaffer v. Federal Cement Co. (D. C. 1915) 225 Fed. 893. Trustee in bankruptcy, surrendering lease held as asset for several months, does not lose right to collect rent for interval on doctrine of relation. Citizens' Savings & Trust Co. v. Rogers (1915) 155 N. W. 155.

14. —— Trustee's election to accept or abandon property.—The trustee cannot be held to have rejected or abandoned an asset of the bankrupt unless it is shown that he had either actual knowledge of the property in question or sufficient means of obtaining full information. Dushane v. Beall (1896) 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; Atwood v. Bailey (1903) 184 Mass. 133, 68 N. E. 13; Buckingham v. Buckingham (1880) 36 Ohio St. 68. Title to a claim for usurious interest paid to a national bank cannot be asserted by a bankrupt upon the termination of the bankruptcy proceedings where he returned no assets to the trustee, and failed to notify either the trustee or the creditors of the existence of the claim. First Nat. Bank v. Lasater (1905) 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408. If the trustee assumes control over the property with reasonable promptness, after learning of its existence, no previous inaction on his part will count for anything or prejudice his rights in any way. Hammond v. Whittredge (1907) 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; In re Wiseman & Wallace (D. C. 1908) 159 Fed. 236, 20 Am. Bankr. Rep. 293.

The trustee must be accorded a reasonable length of time in which to inform himself as to any particular item or asset, and to make his election whether he will claim and administer it or abandon it. Briggs v. Avary (1907) 47 Tex. Civ. App. 488, 106 S. W. 904; Whittredge v. Sweetser (1905) 189 Mass. 45, 75 N. E. 222. If he pursues a policy of mere neglect and inaction, and this continues for an unreasonable length of time, it will give rise to a presumption that he has abandoned the property, and will estop him to assert any interest in it, at least as against rights or liens subsequently acquired by third persons, such as a purchaser from the bankrupt, or a creditor who has independently taken steps to subject the property to the payment of his debt. Sessions v. Romadka (1892) 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Taylor v. Irwin (C. C. 1884) 20 Fed. 615; Rugely v. Robinson (1851) 19 Ala. 404; Smith v. Gordon (D. C. 1843) 6 Law Rep. 313, Fed. Cas. No. 13,052; Fleming v. Courtenay (1903) 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414. The courts will not permit the trustee to wait indefinitely in order to see whether an item of property, now apparently val-

ueless, may eventually become sufficiently valuable to justify him in taking possession of it for the benefit of the estate. Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915.

The trustee's election not to take the property may be manifested formally, as where he gives a written waiver of his right, title, and interest in the property, containing also permission to the bankrupt to deal with it as owner. Briggs v. Avary (1907) 47 Tex. Civ. App. 488, 106 S. W. 904. Or he may obtain an order of court directing him to pursue this course, or approving nunc pro tunc an abandonment of the property already made. In re Josephson (D. C. 1903) 121 Fed. 142, 9 Am. Bankr. Rep. 345. The abandonment of the property by the trustee may be conclusively presumed, not only from unreasonable delay in claiming it, but also from any conduct on his part which is plainly inconsistent with an election to retain it or to administer it. Sessions v. Romadka (1892) 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Fleming v. Courtenay (1904) 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Laing v. Fish (1905) 119 Ill. App. 645.

15. Property in bankrupt's possession.—All property of a bankrupt in his actual possession at the time of the adjudication passes into the hands of the trustee immediately upon his appointment, except such as is exempt by law. In re Vogel (C. C. 1869) Fed. Cas. No. 16,982. A private banker under the laws of Missouri being subjected to adjudication as a bankrupt, the property employed in the business vests in the trustee. In re Sage (D. C. 1915) 224 Fed. 525. Trustee in bankruptcy of a private banker held entitled to the assets of the bank as against common unsecured creditors. Ledgerwood v. Dashiell (Tex. Civ. App. 1915) 177 S. W. 1010.

Where a deficit is shown in the assets of the bankrupt's estate, he must account for it by a satisfactory explanation or pay the amount of the deficit to the trustee. In re Goodman (D. C. 1912) 196 Fed. 566, 27 Am. Bankr. Rep. 697; In re Peltasohn (C. C. 1877) Fed. Cas. No. 10,912. If the bankrupt attempts to conceal or withhold any property which is in his possession or under his own control or the control of those who are holding it merely as his agents or bailees, he may be compelled, by order of the court of bankruptcy, to surrender it to his trustee, and punish for his failure to obey. In re Kreuger (D. C. 1912) 197 Fed. 124, 28 Am. Bankr. Rep. 890; In re Karp (D. C. 1912) 196 Fed. 998, 28 Am. Bankr. Rep. 559; In re Weber Co. (1912) 200 Fed. 404, 118 C. C. A. 556, 29 Am. Bankr. Rep. 217; Lessaius v. Goodman (1908) 165 Fed. 889, 91 C. C. A. 567, 21 Am. Bankr. Rep. 446; In re Jablin (D. C. 1912) 194 Fed. 228, 28 Am. Bankr. Rep. 54.

16. Property in custody of the law.—A trustee in bankruptcy is entitled to possession of all the bankrupt's property and to administer the same, although it may be subject to liens or in the possession of a state court in proceedings to enforce a lien. In re Kaplan (D. C. 1905) 144 Fed. 159, 16 Am. Bankr. Rep. 267. Whether administration of mortgaged stock of merchandise should be left to the state court, which had taken jurisdiction, or be brought into bankruptcy, held for the determination of the United States district judge. Bank of Dillon v. Murchison (1914) 213 Fed. 147, 129 C. C. A. 499.

If property of the bankrupt's estate is in the possession of a receiver appointed by a state court, the trustee in bankruptcy will apply to the state court for an order directing the surrender of the property by its receiver, and if this is refused, the trustee must intervene in the pending suit. Kennedy v. American Tanning Co. (1913) 81 N. J. Eq. 109, 85 Atl. 812; A. H. Alden & Co. v. New York Commercial Co. (1913) 157 App. Div. 872, 142 N. Y. Supp. 772. If property, or money arising from its sale, is in the hands of a sheriff, the trustee may claim it, provided the lien under which the sheriff seized the property was one dissolved by the adjudication in bankruptcy, otherwise it must be treated as in the custody of the court, and a proper application made for its surrender. In re Farrell (C. C. A. 1912) 201 Fed. 338; Bristol v. Mills (1900) 14 Pa. Super. Ct. 107.

17. Interests in real estate.—Upon an adjudication in bankruptcy against the owner of land, the situation as to the title to the land is the same as it would have been under a deed from the bankrupt to his trustee. Hough v. City of North Adams (1907) 196 Mass. 290, 82 N. E. 46. The title to all real estate of the bankrupt passes to and vests in his trustee. Pearce v. Foreman (1874) 29 Ark. 563. The trustee may, if necessary, maintain ejectment for its recovery. Beach v. Beach (1842) 14 Vt. 28, 39 Am. Dec. 204; Essex Co. v. Durant (1860) 14 Gray (Mass.) 447.

Any interest which the bankrupt may have in real property will constitute assets of his estate, provided it is a beneficial interest and one which he might have transferred by his own deed, or which might have been subjected to the claims of his creditors outside of the bankruptcy proceedings. Merrill v. Hussey (1906) 101 Me. 439, 64 Atl. 819; Wright v. Green (1912) 239 Mo. 449, 144 S. W. 437. Although the title to realty may be in another, yet if the bankrupt has an interest in it, that interest will be available under the administration of the trustee. In re

Sanderson (D. C. 1906) 149 Fed. 273, 17 Am. Bankr. Rep. 871. The trustee is entitled to a decree adjudging a lien on the property of the bankrupt's wife to the amount of the money expended by the bankrupt in improvements on the property. McKay v. Weager (1911) 134 N. Y. Supp. 66. Where the bankrupt is nominally the owner of land, but in reality has an undivided interest in it, that interest will be an asset of his estate. In re Throckmorton (1906) 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856. Where an estate is devised unconditionally to two persons, and after the death of the testator but before the probate of the will, one of the devisees is adjudged bankrupt, the estate so devised will pass to his trustee in bankruptcy. Ex parte Fuller (C. C. 1842) Fed. Cas. No. 5,147.

A life estate vested in the bankrupt at the date of the adjudication is an asset of his estate and may be sold by the trustee. Adair v. Adair's Trustee (1907) 30 Ky. Law Rep. 857, 99 S. W. 925. But not so a life estate which did not vest until after the adjudication of bankruptcy. Hackett's Executors v. Hackett's Trustee (Ky. 1909) 118 S. W. 377.

A conveyance of land on condition of the payment of an annual sum to the grantor during his life gives the grantee a title which will pass to his trustee in bankruptcy. Atwood v. Kittell (D. C. 1878) Fed. Cas. No. 641. The trustee does not take title to exempt property, but he may claim land once occupied as a homestead but since voluntarily abandoned by the bankrupt. Martin v. Smith (1907) 31 Ky. Law Rep. 882, 104 S. W. 310. Where the bankrupt was the owner in fee of a public street in a city, subject only to the public easement of passage, the right of the owner therein will pass to his trustee in bankruptcy. Kinzie v. Winston (1870) 56 Ill. 56. A mere usufruct in property, not capable of being transferred by sale except with the owner's permission, is not assets in bankruptcy. In re O'Dowd (D. C. 1873) 8 N. B. R. 451, Fed. Cas. No. 10,439.

Furniture of a sanitarium conducted by a bankrupt held not to have passed as fixtures under a deed to the realty, which was not owned by the bankrupt, or under a mortgage made thereon by the owner. In re Dr. Riegel Sanitarium Co. (D. C. 1913) 206 Fed. 319. Evidence held to make a question for the jury whether certain store fixtures built and installed by defendant were accepted by a bankrupt, so as to acquire title prior to its bankruptcy. Murphy v. John Hofman Co. (1913) 141 N. Y. S. 900, 157 App. Div. 88.

18. —— **Equity of redemption.**—When real property of the bankrupt is incumbered by a mortgage, valid as to creditors and not voidable under the bankruptcy act, the trustee takes title to the bankrupt's equity of redemption in the premises. In re Kellogg (D. C. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623; Bryar's Appeal (1886) 111 Pa. 81, 2 Atl. 344; Robinson v. Denny (1877) 57 Ala. 492; Winslow v. Clark (1872) 47 N. Y. 261; In re Stewart (D. C. 1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529. This applies not only to a common-law mortgage in the ordinary form, but to equitable mortgages and various other anomalous forms, such as a conveyance of land which, though absolute in form, is intended as security for a debt and is accompanied by an unrecorded agreement of defeasance. Moore v. Albro (1880) 129 Mass. 9. And to an instrument in the form of a deed of trust but meant to secure a debt. In re Jersey Island Packing Co. (1905) 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689. And to a mortgage of personal property which authorizes the debtor to sell the items covered. In re Hull (D. C. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302. And to an assignment of a judgment, absolute in form, but intended as security for the price of goods sold or to be sold to the assignor. English v. Ross (D. C. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370.

Where the local law allows a certain period of time for redemption from a sale of real estate under execution, this right may be exercised by the debtor's trustee in bankruptcy, provided the appointed time has not expired when he is appointed, though it will not be enlarged by the intervening bankruptcy. In re Goldman (D. C. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100.

A trustee in bankruptcy will be entitled to collect and receive the rents of mortgaged property of the bankrupt, at least until the mortgagee shall have taken proper steps to secure their application on his debt. Alter v. Clark (D. C. 1911) 193 Fed. 153; Hunter v. Hays (C. C. 1877) 7 Biss. 362, Fed. Cas. No. 6,906. But if a mortgage on land of the bankrupt has actually been paid, the property will pass to the trustee in bankruptcy free from the incumbrance, although the mortgage has been assigned to a third person instead of being canceled. McMaster v. Campbell (1879) 41 Mich. 513, 2 N. W. 836.

19. —— **Leased property.**—If the bankrupt is a tenant of leased premises, his interest in the unexpired term of the lease will constitute assets of his estate in bankruptcy and pass to the trustee. Crowe v. Baumann (D. C. 1911) 190 Fed. 399, 27 Am. Bankr. Rep. 100; In re Frazin & Oppenheim (D. C. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289; Olden v. Sassman (1905) 68 N. J. Eq. 799, 64 Atl. 1134; Wildman v. Taylor (D. C. 1870) Fed. Cas. No. 17,654. And see Lyon v. Moore (1913) 259 Ill. 23, 102 N. E. 179. It is the duty of the trustee either to fix an upset price for the sale of the leasehold sufficient to pay the lessor the entire

rental for the remaining term of the lease and pay over such amount to the lessor, or else to require a bond with ample security, obliging the purchaser to conform strictly to all the terms of the lease, and if bids cannot be obtained subject to these conditions, the trustee should surrender the lease to the landlord. In re Gutman (D. C. 1912) 197 Fed. 472, 28 Am. Bankr. Rep. 643. If notice to quit has been served on the tenant before his bankruptcy, it will serve as notice to the trustee, who takes only such rights as the bankrupt had at the time of the adjudication, and a new notice is not necessary. Lindeke v. Associates Realty Co. (1906) 146 Fed. 630, 77 C. C. A. 56, 17 Am. Bankr. Rep. 215. And see In re Van Da Grift Motor Car Co. (D. C. 1912) 192 Fed. 1015, 27 Am. Bankr. Rep. 474. If a suit to cancel the lease is pending, which finally results in favor of the landlord, but meanwhile the lessee's trustee in bankruptcy has remained in the use and occupation of the premises, his possession pendente lite will be that of a trespasser under a claim of title. In re St. Louis & Kansas Oil & Gas Co. (D. C. 1908) 168 Fed. 934, 22 Am. Bankr. Rep. 56. Where at the time of bankruptcy the bankrupt was in possession of real property under leases which had more than 10 years to run, trade fixtures held real property and subject to judgments recovered against it more than four months before bankruptcy. In re J. L. Kesner Co. (1914) 219 Fed. 512, 135 C. C. A. 262.

20. —— **Remainders and expectant estates.**—A vested estate in remainder in real property is an asset which will vest in the trustee in bankruptcy, as in the ordinary case of an estate limited to one for life, with remainder to his surviving child or children and their heirs. Here, if the life-tenant is still living and the bankrupt is his child, the latter has a vested estate which will pass to his trustee in bankruptcy. In re McHarry (1901) 111 Fed. 498, 49 C. C. A. 429, 7 Am. Bankr. Rep. 83; In re Haslett (D. C. 1902) 116 Fed. 680; In re Twaddell (D. C. 1901) 110 Fed. 145, 6 Am. Bankr. Rep. 539; In re St. John (D. C. 1900) 105 Fed. 234, 5 Am. Bankr. Rep. 190; In re Wood (D. C. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572; Loomer v. Loomer (1904) 76 Conn. 522, 57 Atl. 167; Simpson v. Miller (1908) 7 Cal. App. 248, 94 Pac. 252.

A vested interest in a contingent remainder will pass to a trustee in bankruptcy, at least where the contingency relates to the event and not to the person. Putnam v. Story (1882) 132 Mass. 205; Belcher v. Burnett (1879) 126 Mass. 230; In re Churchman (1887) 4 Pa. Co. Ct. R. 237; Bodenhamer v. Welch (1883) 89 N. C. 78; Clark v. Grosh (1912) 81 Misc. Rep. 407, 142 N. Y. Supp. 966; Clowe v. Seavey (1913) 208 N. Y. 496, 102 N. E. 521; In re Twaddell (D. C. 1901) 110 Fed. 145, 6 Am. Bankr. Rep. 539; Martin v. Maxwell (1910) 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012. Under Real Property Law N. Y. §§ 36, 40, 59, declaring that an expectant estate is descendible, devisable, and alienable, the interest of a granddaughter under her grandfather's will, which will vest in possession on her surviving her father, is alienable, and passes on her bankruptcy to her trustee in bankruptcy, who may sue to set aside a fraudulent transfer thereof. Clowe v. Seavey (1913) 102 N. E. 521, 208 N. Y. 496, affirming judgment (1912) 135 N. Y. S. 1105, 151 App. Div. 912. Under Real Property Law N. Y. §§ 35, 36, 37, 40, where testatrix devised property to a daughter for life with remainder to a son, or if he did not survive the daughter to his children living at the daughter's death, the interest of a child of the son was an expectant estate assignable under section 59, and hence passed to a trustee in bankruptcy under Bankruptcy Act, § 70. Clark v. Grosh (1912) 142 N. Y. S. 966, 81 Misc. Rep. 407. An expectation of succeeding to an estate, fixed as to the person but contingent on his surviving one or more previous takers or life tenants, is nothing more than a mere possibility, and not of such a nature that it could be reached by a creditors' bill, and therefore not vesting in the trustee in bankruptcy. Van Heusen v. Van Heusen Charles Co. (1911) 74 Misc. Rep. 292, 131 N. Y. Supp. 401; Clarke v. Fay (1910) 205 Mass. 228, 91 N. E. 328, 27 L. R. A. (N. S.) 454; Smith v. Kearney (1848) 2 Barb. Ch. (N. Y.) 533; Lutgen v. Tiffany (R. I. 1915) 93 Atl. 182.

Under a devise to the use of one for life, with power of appointment by will, and, in case of failure to exercise the power, the property to go to the surviving next of kin of the testator, one who is next of kin does not take such an interest in the estate in remainder as will pass to his trustee in bankruptcy. In re Wetmore (D. C. 1900) 102 Fed. 290, 4 Am. Bankr. Rep. 335, affirmed (1901) 108 Fed. 520, 47 C. C. A. 477, 6 Am. Bankr. Rep. 210.

21. —— **Estates by courtesy and community property.**—An estate by the curtesy, consummate by the death of the wife, will pass to the trustee in bankruptcy of the husband. Elmore v. Symonds (1903) 183 Mass. 321, 67 N. E. 314; Conoly v. Gayle (1875) 54 Ala. 269; Beamish v. Hoyt (1864) 2 Rob. (N. Y.) 307. A bankrupt under the law of Virginia held to have no interest as tenant by the curtesy in land of his deceased wife, which he caused to be conveyed to her and for which he paid the consideration. Cox v. Wallace (1914) 219 Fed. 126, 134 C. C. A. 562. An estate by the curtesy initiate by the

birth of issue will pass to the trustee in bankruptcy of the husband, if regarded as property of a transferable nature under the local law. In re McKenna (D. C. 1881) 9 Fed. 27. Under the laws of Massachusetts, such an estate is not property which the husband could convey or assign, nor is it a power which he might exercise for his own benefit, and therefore it will not pass to his trustee in bankruptcy. Hesseltine v. Prince (D. C. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600; Parks v. Tirrell (1861) 3 Allen (Mass.) 15.

Where an estate is devised to a man and his wife absolutely and forever as tenants by entireties, the trustee in bankruptcy of the husband is not entitled, during the life of the wife, to any part of the property, or, in the case of personalty, to any part of the principal or income. In re Meyer's Estate (1911) 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205, Ann. Cas. 1912C, 1240.

As to community property, it has been held that, where funds belonging to the community estate of husband and wife were used by the husband in the erection of improvements on the wife's separate real estate, and the fund remained to that extent community property, the husband's trustee in bankruptcy was entitled to recover the amount of the community funds so expended, to be paid out of the proceeds of the sale of the improvements. Collins v. Bryan (1905) 40 Tex. Civ. App. 88, 88 S. W. 432. Under the Bankruptcy Act, and Rem. & Bal. Code Wash. § 5918, the bankruptcy court has jurisdiction to determine the disposition of funds in the hands of the trustee arising from a sale of community property. Gibbons v. Goldsmith (1915) 222 Fed. 826, 138 C. C. A. 252.

22. —— **Estates of vendor and vendee under executory contract.**—Where a purchaser of lands under an uncompleted contract becomes bankrupt, whatever interest he has in the lands will pass to his trustee, who is thereafter the proper party to maintain a bill in equity for the specific performance of the contract, and, on the other hand, is the proper defendant in a suit to enforce the vendor's lien. Rea v. Richards (1876) 56 Ala. 396; McDonald v. McMahon (1880) 66 Ala. 115; Smith v. Hornesby (1877) 58 Ga. 529; Duffield v. Dosh (1904) 124 Iowa, 286, 99 N. W. 1074. And see Christopherson v. Harrington (1912) 118 Minn. 42, 136 N. W. 289, 41 L. R. A. (N. S.) 276. And though a parol contract for the sale of land is void under the local law, yet if the purchaser under such a contract goes into possession and improves the property with the consent of the vendor, he has an equity in the land which can be subjected to the claims of creditors in bankruptcy proceedings. Overcast v. Lawrence (1910) 141 Ky. 25, 131 S. W. 1029. Whatever interest may remain in the vendor of land under an executory contract will vest in his trustee in bankruptcy, and the latter may maintain ejectment on failure of the vendee to pay the price. Clements v. Taylor (1880) 65 Ala. 363. And see In re Sayed (D. C. 1910) 185 Fed. 962, 26 Am. Bankr. Rep. 444. But since the bankruptcy act does not give the trustee any greater right or estate than the bankrupt had, a purchaser under an oral contract of purchase, and who was entitled prior to the bankruptcy of the vendor to compel a conveyance by the vendor, may compel the trustee to convey. In re Snelling (D. C. 1912) 202 Fed. 259, 29 Am. Bankr. Rep. 818.

23. —— **Settlers' rights and improvements on public lands.**—A pre-emption claimant upon the public lands who has done all that is required of him, and is fully entitled to receive a patent, has such an equitable title as will pass to and vest in his trustee in bankruptcy, though a patent has not been issued. Colorado Co. v. Commissioners (1877) 95 U. S. 259, 24 L. Ed. 495; Myers v. Croft (1871) 13 Wall. 291, 20 L. Ed. 562; Hutchings v. Low (1872) 15 Wall. 77, 21 L. Ed. 82; Carroll v. Safford (1845) 3 How. 441, 11 L. Ed. 671; Webster v. Bowman (C. C. 1885) 25 Fed. 889; U. S. v. Freyberg (C. C. 1886) 32 Fed. 195; Boggan v. Reid (1889) 1 Wash. 514, 20 Pac. 425. A settler's improvements upon the public lands are property available to his creditors in bankruptcy. French v. Carr (1845) 7 Ill. 664. But not after they have been forfeited by the cancellation of the sale to him by the national or state government. Snodgrass v. Posey (1902) 30 Tex. Civ. App. 584, 70 S. W. 984.

24. —— **Resulting trusts.**—Though the legal title to real property may stand in the name of a third person, yet if the bankrupt has an equitable interest in it by virtue of a resulting trust in his favor, that interest will vest in his trustee as assets of the estate in bankruptcy. In re Dunavant (D. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41. Where the bankrupt paid the entire consideration for property, but the deed was taken in the name of another, the bankrupt's interest will vest in his trustee. Carr v. Hilton (C. C. 1852) Fed. Cas. No. 2,436; Gove v. Lawrence (1853) 26 N. H. 484. Where two parties purchase property, each paying part of the purchase money, and title is taken in the name of one, the trustee in bankruptcy of the legal owner cannot claim a greater interest than the bankrupt actually had. Jones v. Dugan (1914) 92 A. 775, 124 Md. 346. The trustee will take title notwithstanding a previous levy of execution on the bankrupt's equitable interest and a sale thereunder, where, by the law of the state, a resulting trust is not such

property as can be sold on execution. In re Dunavant (D. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41.

Although the bankrupt swore on his schedules that he owned no real estate at the time of filing the petition, neither he nor his heirs will be estopped by that oath from asserting their claim to property fraudulently procured from him by his vendee, and after the death of the bankrupt, the heirs at law may file a bill to recover such property, and their recovery will inure to the trustee in bankruptcy. Ferguson v. Dent (C. C. 1885) 24 Fed. 412.

25. —— **Power of appointment.**—A trustee in bankruptcy of a life devisee with power to appoint the remainder by will, and in default of will to his heirs at law, though vested with all powers which the bankrupt or a creditor had, may not exercise the power of appointment, whether the bankrupt is alive or dead. Montague v. Silsbee (1914) 105 N. E. 611, 218 Mass. 107.

26. **Growing crops.**—When the bankrupt is the owner of agricultural land, crops sown and growing thereon at the time of the filing of the petition will pass to the trustee along with the land and as a part of it, and the trustee may sell the crops with the land, or claim them as assets of the estate when grown and severed. Hebert v. Crawford (1913) 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800, 30 Am. Bankr. Rep. 24; In re T. C. Burnett & Co. (D. C. 1912) 201 Fed. 162, 29 Am. Bankr. Rep. 872; In re Eastman (D. C. 1899) 2 Nat. Bankr. News, 86; Carney v. Averill (1912) 110 Me. 172, 85 Atl. 494. So where the bankrupt was tenant of a farm under a contract reserving to the landlord, as rent, one-fourth of the crops raised on the land, the bankrupt's interest in the growing crops, though they are immature and unsevered at the commencement of the proceeding in bankruptcy, is property which he might have transferred at that date, within the meaning of the statute, and therefore vests in his trustee as assets of the estate; and after the crops have been severed, the bankrupt must surrender them to the trustee or else account for the proceeds. In re Place (D. C. 1915) 224 Fed. 778; In re Barrow (D. C. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

Crops not sown at the time of the adjudication do not become a part of the bankrupt's estate and the trustee has no interest in them. Bank of Nez Perce v. Pindel (C. C. A. 1912) 193 Fed. 917, 28 Am. Bankr. Rep. 69; Jackson v. Jetter (Iowa, 1913) 142 N. W. 431.

Physical possession of a crop, first by the bankrupts and later by the trustee, brought the property within the exclusive jurisdiction of the bankruptcy court as assets of the estate. Hebert v. Crawford (1913) 33 Sup. Ct. 484, 228 U. S. 204, 57 L. Ed. 204.

27. **Patents and patent rights.**—A trustee in bankruptcy will take title, as of the date of the adjudication, to interests then owned by the bankrupt in patents already issued and in force, whether as patentee, assignee of the patent, or holder of rights acquired under a patent to a third person, such as licenses or manufacturing rights. In re McDonnell (D. C. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92. But the trustee takes no title to a patent for an invention granted to the bankrupt after the date of the adjudication, although the application for the patent was made before the bankruptcy and was pending at the time of the adjudication. In re McDonnell (D. C. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92; In re Dann (D. C. 1904) 129 Fed. 495, 12 Am. Bankr. Rep. 27. CONTRA, In re Cantelo Mfg. Co. (D. C. 1911) 185 Fed. 276, 26 Am. Bankr. Rep. 57.

28. **Copyrights.**—Where an existing copyright has been assigned by the author to a third person, absolutely and unconditionally, it constitutes property of the assignee which will pass to his trustee in bankruptcy. In re Howley-Dresser Co. (D. C. 1904) 132 Fed. 1002, 13 Am. Bankr. Rep. 94. A contract between an author and a publisher for the publication and sale of a work having only a limited circulation among a special class of readers, who constitute the special clientele of the publisher, which contract contemplates the taking out of copyright in the name of the publisher and the payment of a royalty to the author, is in the nature of a personal engagement. And where the contract expressly provides that it shall not be transferred without the author's consent, and that, on failure to carry out its provisions, the copyright shall revert to the author, such copyright cannot be sold by a trustee in bankruptcy as an asset of the publisher's estate, against the objection of the author, but the latter is entitled, on petition therefor, to have the copyright assigned to him by the trustee in accordance with the contract. In re D. H. McBride & Co. (D. C. 1904) 132 Fed. 285, 12 Am. Bankr. Rep. 81.

29. **Trade-marks and trade-names.**—A trade-mark or trade-name, consisting of a man's individual name prefixed to the title of the article he manufactures, is not property which will vest in his trustee in bankruptcy. Helmbold v. Helmbold Mfg. Co. (1877) 53 How. Prac. (N. Y.) 453; Mattingly v. Stone (Ky. 1890) 14 S. W. 47. The right to use trade-marks, in connection with a manufacturing or mercantile business, which are not personal in their character, but are descriptive titles or fanciful appellations, or which merely designate the place or establishment at which the goods are made, or the pro-

cess employed, will pass to and vest in an assignee in insolvency of the owner. Warren v. Warren Thread Co. (1883) 134 Mass. 247; Bradley v. Norton (1865) 33 Conn. 157, 87 Am. Dec. 200.

30. Franchises and licenses.—A license for the sale of intoxicating liquors issued by the authorities of a state or municipality or by a court, and which may be transferred on written application of the holder and subject to the approval of such authorities, which approval is ordinarily granted, and which for the purpose of sale and transfer has a recognized and actual money value, conditioned upon the acceptance of the transferee by the authorities, is property of the licensee, which is available as assets of his estate in bankruptcy, and he may be required by the court of bankruptcy to sign the necessary application for a transfer or to execute whatever other instrument in the nature of a transfer may be necessary to enable his trustee to convert it into money. In re Benz (1914) 218 Fed. 50, 134 C. C. A. 26; Fisher v. Cushman (1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; In re Wiesel (D. C. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59; In re Brodbine (D. C. 1899) 93 Fed. 643, 2 Am. Bankr. Rep. 53; In re Becker (D. C. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; In re Fisher (D. C. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406. Compare E. S. Bonnie & Co. v. Perry's Trustee (1904) 117 Ky. 459, 78 S. W. 208. Where bankrupts had an unexpired liquor license at the time of their adjudication, which was sold by the receiver, the right to the unexpired term, with its inseparable incident, the contingent right to a renewal, passed to the purchaser, and the bankrupts could properly be compelled to join in such proceedings as were necessary to make the sale effective. In re John F. Doyle & Son (1913) 209 Fed. 1, 126 C. C. A. 143, reversing order (D. C. 1913) 205 Fed. 543. A bankrupt will not be compelled to assign his liquor license or assist the trustee in disposing of it for the benefit of the estate, unless it appeared that it was the custom of the licensing board to allow licensee to surrender his certificate and nominate his successor or to issue a new license in place of the one surrendered and, having done so, to grant a refund. In re Beahn (D. C. 1912) 212 Fed. 762.

Though a license to occupy a particular stall in a city market may be revocable at the pleasure of the city authorities, and cannot be assigned to another person without their written permission, yet if it has an ascertainable market value as an article of sale and can be transferred without any practical difficulty, it is an asset in the hands of the holder's trustee in bankruptcy, and such holder may be required to take such steps as are necessary and usual to effect a transfer. In re Gallagher (C. C. 1879) 16 Blatchf. 410, Fed. Cas. No. 5,192; In re Emrich (D. C. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89.

Where a contract by an amusement park company granting a license to a concessionaire to conduct a bar provides that it must not be assigned or transferred without the consent of the park company, on the concessionaire becoming bankrupt the license does not pass to his trustee in bankruptcy. Day v. Luna Park Co. (1912) 174 Ill. App. 477.

31. Membership in stock exchange.—A membership in a stock exchange or other similar body is an asset of the member which will pass to and vest in his trustee in bankruptcy, provided that it has an actual and substantial money value for purposes of sale and can be transferred to a purchaser without practical difficulty; and this, notwithstanding the fact that the transfer of a membership may be restricted by the rules of the exchange—as where the membership is limited and the purchaser of a seat must pass the scrutiny of a committee and be elected by ballot—and notwithstanding the rules provide that the proceeds of a member's seat shall first be applied in liquidation of any indebtedness of his to the exchange itself or to other members of it; and if the rules or customs of the exchange require the execution of an assignment or other transfer by the bankrupt member, in order to make an effectual transfer of the seat to a purchaser from the trustee, he may be compelled by the court of bankruptcy to execute such assignment. Page v. Edmunds (1903) 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277; Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 34 L. Ed. 915; Hyde v. Woods (1876) 94 U. S. 523, 24 L. Ed. 265; O'Dell v. Boyden (1906) 150 Fed. 731, 80 C. C. A. 397, 17 Am. Bankr. Rep. 751; In re Hurlbutt, Hatch & Co. (1905) 135 Fed. 504, 68 C. C. A. 216, 13 Am. Bankr. Rep. 50; In re Page (1901) 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94, 5 Am. Bankr. Rep. 707; In re Gaylord (D. C. 1901) 111 Fed. 717, 7 Am. Bankr. Rep. 195; In re Page (D. C. 1900) 102 Fed. 746, 4 Am. Bankr. Rep. 467; In re Werder (C. C. 1883) 15 Fed. 789; In re Ketchum (D. C. 1880) 1 Fed. 840; Wrede v. Clark (1909) 132 App. Div. 293, 117 N. Y. Supp. 5; Platt v. Jones (1884) 96 N. Y. 24; Powell v. Waldron (1882) 89 N. Y. 328, 42 Am. Rep. 301; Ritterband v. Baggett (1877) 4 Abb. New Cas. (N. Y.) 67; McCabe v. Emmons (1885) 51 N. Y. Super. Ct. 219; Londheim v. White (1884) 67 How. Prac. (N. Y.) 467; Grocers' Bank v. Murphy (1881) 60 How. Prac. (N. Y.) 426; Eliot v. Merchants' Exchange (1883) 14 Mo. App. 234; Habenicht v. Lissak (1889) 78 Cal. 351, 20 Pac. 874, 5 L. R. A.

713, 12 Am. St. Rep. 63; Clute v. Loveland (1885) 68 Cal. 254, 9 Pac. 133. CONTRA, In re Sutherland (D. C. 1876) Fed. Cas. No. 13,637; Barclay v. Smith (1883) 107 Ill. 349, 47 Am. Rep. 437; Weaver v. Fisher (1884) 110 Ill. 146; Thompson v. Adams (1879) 93 Pa. 55; Pancoast v. Gowen (1879) 93 Pa. 66. An order requiring the bankrupt to transfer his seat on the stock exchange to his trustee cannot be made after he has obtained his discharge in bankruptcy, as he is not then subject to the summary jurisdiction of the court; but semble, that the trustee could proceed by bill in equity. In re Nichols (D. C. 1880) 1 Fed. 842; Platt v. Jones (1884) 96 N. Y. 24; Powell v. Waldron (1882) 89 N. Y. 328, 42 Am. Rep. 301.

The trustee, knowing that the bankrupt holds a membership in a stock exchange, must claim it with reasonable promptness, and cannot wait indefinitely for the seat to increase in value or for the bankrupt to clear it from preferred debts, and an unreasonable delay will be held an abandonment of the seat to the bankrupt or an election not to take it. Sparhawk v. Yerkes (1891) 142 U. S. 1, 12 Sup. Ct. 104, 34 L. Ed. 915.

A rule of a stock exchange that, upon the insolvency of a member, the proceeds of a sale of his seat shall first be applied to his indebtedness to the exchange, and then to debts due from him to fellow members, to the exclusion of outside creditors, will be recognized as valid in the bankruptcy proceedings, and when the trustee in bankruptcy sells the seat, he will be entitled, as the representative of the general creditors, only to such surplus of the purchase price as may remain after satisfying the preferred debts mentioned. Page v. Edmunds (1903) 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277; Hyde v. Woods (1876) 94 U. S. 523, 24 L. Ed. 266; In re Currie (1911) 185 Fed. 263, 107 C. C. A. 369, 26 Am. Bankr. Rep. 345; In re Gregory (1909) 174 Fed. 629, 98 C. C. A. 383, 23 Am. Bankr. Rep. 270; Cohen v. Budd (1906) 52 Misc. Rep. 217, 103 N. Y. Supp. 45.

32. **Executory contracts.**—The trustee does not take title to such executory contracts of the bankrupt as cannot be made available for the payment of the debts. Nor to those which would be onerous or unprofitable, or more of a burden than a benefit to the estate. Streeter v. Sumner (1855) 31 N. H. 542. Nor those which depend upon the future personal services of the bankrupt, where his special knowledge or skill or adaptability to the employment, or special trust and confidence reposed in him, constitute an essential part of the contract, so that it could not be performed by a third person to the equal satisfaction of the employer. Id. But the fact that a contract for the personal services of the bankrupt is not assignable as a whole does not prevent the trustee from claiming compensation already earned under the contract, provided that compensation is apportionable and not dependent upon the future completion of the entire contract. In re Wright (C. C. A. 1907) 157 Fed. 544, 19 Am. Bankr. Rep. 454; Buckingham v. Buckingham (1880) 36 Ohio St. 68; In re Jones (D. C. 1871) 4 N. B. R. 347, Fed. Cas. No. 7,448.

Where the bankrupt had rendered certain services for a third person, for which that person was to pay him a fixed sum in case he succeeded in a pending suit in chancery, which event happened during the administration of the estate in bankruptcy, held, that the trustee was entitled to recover the compensation. Burton v. Lockert (1849) 9 Ark. 411. Where the bankrupt's interest in a contract is a right to share in the profits resulting from it, his interest will pass to and vest in his trustee in bankruptcy, in so far as profits have accrued, or the bankrupt's right to share in future profits has become fixed, at the time of the bankruptcy. Sherman v. International Bank (C. C. 1878) Fed. Cas. No. 12,765; Fraser v. Gates (1885) 118 Ill. 99, 1 N. E. 817. An interest in the business of another, which the bankrupt conducts in his own name, receiving half the profits as compensation, is not property which will pass to his trustee. In re Beardsley (D. C. 1868) 1 N. B. R. 457, Fed. Cas. No. 1,184.

33. **Good will of business.**—It is the duty of a trustee in bankruptcy to ascertain whether the good will of the bankrupt's going business has any market value, and if so, to realize it for the benefit of the estate. In re Long (D. C. 1868) Fed. Cas. No. 8,477. The value of the good will may be taken into account, as an asset of the alleged bankrupt, in determining the question of his solvency or insolvency. Bell v. Ellis (1867) 33 Cal. 620. A good will which rests only on the voluntary forbearance of those who are engaged in a particular trade, whereby they refrain from inaugurating an enterprise which would rival that already set on foot by another, though they are under no legal obligation so to refrain, is not property in any sense known to the law. Sheldon v. Houghton (C. C. 1865) Fed. Cas. No. 12,748.

34. **Debts due to bankrupt.**—Upon an adjudication in bankruptcy, all debts and claims due to the bankrupt pass to his trustee, and the latter thereafter is alone entitled to collect and receive payment of the same. Pullman v. Upton (1877) 96 U. S. 328, 24 L. Ed. 818; Stow v. Yarwood (1858) 20 Ill. 497; Rogers v. Union Stone Co. (1883) 134 Mass. 31; Ex parte Goodwin, 1 Atk. Ch. 100. See In re Smyth (D. C. 1909) 167 Fed. 871, 21 Am. Bankr. Rep. 853;

First Nat. Bank v. Guarantee Title & Trust Co. (1910) 178 Fed. 187, 101 C. C. A. 507, 24 Am. Bankr. Rep. 330. Payment of a debt directly to the bankrupt, made after the institution of the bankruptcy proceedings, though made in good faith, and even in the usual course of business, and without any other notice than such constructive notice as the filing of a bankruptcy petition is supposed to impart to all concerned, is not effectual to discharge the debt, and is no protection against a suit for its recovery subsequently brought by the trustee in bankruptcy. Mays v. Manufacturers' Nat. Bank (1870) 64 Pa. 74, 4 N. B. R. 660, 3 Am. Rep. 573; Stevens v. Mechanics' Sav. Bank (1869) 101 Mass. 109, 3 Am. Rep. 325; Howard v. Crompton (C. C. 1877) Fed. Cas. No. 6,758; In re Hayden (D. C. 1872) 7 N. B. R. 192, Fed. Cas. No. 6,257; Ex parte Goodwin, 1 Atk. Ch. 100. But see In re Zotti (1911) 186 Fed. 84, 108 C. C. A. 196, 26 Am. Bankr. Rep. 234; Galvin v. Boyd (C. C. 1877) Fed. Cas. No. 5,208; Mersfelder v. Peters Cartridge Co. (1910) 32 Ohio Cir. Ct. R. 187. A payment made in bad faith, or with knowledge of the pending proceeding, and with the purpose of evading or defeating the operation of the bankruptcy act in any way, is void as against the trustee. Babbitt v. Burgess (C. C. 1873) Fed. Cas. No. 693. If the trustee dies or becomes bankrupt, the right to receive payment of outstanding debts due to the estate in his charge does not vest in his personal representatives or trustee, but passes to a new trustee to be appointed in the original bankruptcy. In re Merrick (1842) 5 Watts & S. (Pa.) 9.

The trustee in bankruptcy is entitled to recover money borrowed from the bankrupt after the filing of the petition and before the adjudication. Crompton v. Conkling (D. C. 1877) Fed. Cas. No. 3,407. And to a judgment rendered in the bankrupt's favor before the adjudication. First Nat. Bank v. Cook (1878) 154 U. S. 628, 14 Sup. Ct. 481, 24 L. Ed. 916; Brown v. Wygant (1892) 21 D. C. 16; Hale v. Christy (1888) 24 Neb. 746, 40 N. W. 295; Simmons v. Heman (1885) 17 Mo. App. 444; Moore v. Jones (D. C. 1848) 23 Vt. 739, Fed. Cas. No. 9,768. And to a claim against a sheriff for failing to make the money on an execution issued on such a judgment. Gary v. Bates (1847) 12 Ala. 544. And to rent due and accrued for premises owned by the bankrupt. Brock v. Weiss (1882) 44 N. J. Law, 241. A covenant made by a landlord to return a deposit made by the tenant as security to carry out the lease is collateral and personal and does not pass to the tenant's assignee as against his trustee in bankruptcy. Sanford v. Zimmern (1912) 76 Misc. Rep. 434, 134 N. Y. Supp. 1116. The trustee is entitled to claim the amount due to the bankrupt from another estate in bankruptcy. In re Ellis (D. C. 1871) Fed. Cas. No. 4,399. Or from the estate of a decedent in process of administration in a probate court. Collier v. Hunter (1871) 27 Ark. 74. The trustee is entitled to a claim under a policy of fire insurance for the loss by fire of property of the bankrupt covered by such policy. Home Ins. Co. v. Hollis (1875) 53 Ga. 659. And to a claim against a city for damages to the bankrupt's real property occasioned by a change in the grade of a street, where the property was injured but not taken. In re Torchia (D. C. 1911) 185 Fed. 576, 26 Am. Bankr. Rep. 188. And to money received by the administrator of a bankrupt who dies after the adjudication and pending the proceedings. In re Matschke (D. C. 1912) 193 Fed. 284, 27 Am. Bankr. Rep. 770.

The bankrupt was managing agent for a life insurance company, under a contract having several years to run, which entitled him to an interest in renewal premiums on policies previously written, when collected, so long as the contract was in force, but subject to the right of the company to terminate such interest if dissatisfied or if the bankrupt failed to comply with the contract. In case of his death, his widow or estate was entitled to receive such interest for five years, subject to a fee for collection. It was held that this interest was property which the bankrupt could have transferred, and which therefore vested in his trustee in bankruptcy. In re Wright (C. C. A. 1907) 157 Fed. 544, 19 Am. Bankr. Rep. 454. But an agreement between a debtor and his surety that property held in trust by the surety as indemnity shall be applied to the payment of the debt, does not constitute a demand against the surety which will pass to the trustee in bankruptcy of the debtor, as it is not a money demand, but merely a right to require performance of an obligation or duty. White v. Crew (1854) 16 Ga. 416. Where the payee of a note or duebill sells it before his bankruptcy, the purchaser takes title as against the seller's trustee, though the indorsement is made after the bankruptcy. Smoot v. Morehouse (1845) 8 Ala. 370, 42 Am. Dec. 644; Hersey v. Elliot (1878) 67 Me. 526, 24 Am. Rep. 50. If the bankrupt holds a promissory note, an agreement on his part to accept payment of it in labor or care of himself or in his own support, made without any new consideration, will not be valid as against his general creditors where the contract was not fulfilled before the institution of bankruptcy proceedings. In re Powers, 1 Nat. Bankr. News, 135.

35. —— **Claims against government.** —Claims against a government, even though they cannot be enforced, constitute property, and pass to one's assignee in bankruptcy, notwithstanding the statute restraining the transfer of claims against the government. Erwin

v. United States (1878) 97 U. S. 392, 24 L. Ed. 1065; Phelps v. McDonald (1878) 99 U. S. 298, 25 L. Ed. 478; Id. (1876) 2 MacArthur (D. C.) 375, 16 N. B. R. 217; Comegys v. Vasse (1828) 1 Pet. 193, 7 L. Ed. 108.

Claims against the United States pass to the claimant's trustee in bankruptcy even before congress has made any provision for the payment of such claims, and even though the claim is only a right to share in the distribution of a fund received by the United States from a foreign government to be apportioned as compensation among its own injured citizens, though both the accrual of the claim and the bankruptcy of the claimant preceded the making of the treaty under which such fund eventually became available. Williams v. Heard (1891) 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550; Phelps v. McDonald (1878) 99 U. S. 298, 25 L. Ed. 478; Erwin v. U. S. (1877) 13 Ct. Cl. 49: Leonard v. Nye (1878) 125 Mass. 455; Williamson v. Colcord (D. C. 1875) 13 N. B. R. 319, Fed. Cas. No. 17,752.

A trustee in bankruptcy does not take title to a claim against the United States where it is not of such a nature that it would be legally enforceable against an individual, and where its recognition and payment are wholly optional with congress, being a matter of grace or favor and not of moral obligation. Dockery v. U. S. (1891) 26 Ct. Cl. 148.

A mere expectation of receiving a reward from the Treasury department for furnishing information concerning violations of the revenue laws, which has been applied for by the informer but not yet passed upon by the Secretary of the Treasury, whose action in the matter is discretionary, is not property of such a nature as to vest in the claimant's trustee in bankruptcy. In re Ghazal (1909) 174 Fed. 809, 98 C. C. A. 517, 23 Am. Bankr. Rep. 178.

Under R. S. § 3477, ante, § 6383, forbidding the assignment of a claim against the United States, unless it has been previously allowed and a warrant issued for its payment, an assignment of such a claim, not yet allowed, has no effect against the trustee in bankruptcy of the claimant, and he takes it as an asset of the estate, free from any right or interest on the part of the assignee. National Bank of Commerce v. Downie (1910) 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 25 Am. Bankr. Rep. 199, affirming (1908) 161 Fed. 839, 88 C. C. A. 657, 20 Am. Bankr. Rep. 531; Guarantee Title & Trust Co. v. First Nat. Bank (1911) 185 Fed. 373, 107 C. C. A. 429, 26 Am. Bankr. Rep. 85.

36. Rights of action.—A trustee in bankruptcy is entitled to claim, and to enforce for the benefit of the estate, a promissory note of a third person belonging to the bankrupt at the time of the filing of the petition. In re Duncan (D. C. 1906) 148 Fed. 464, 17 Am. Bankr. Rep. 283. And a claim of the bankrupt against a third person for goods sold to the latter, to the extent of their value where no price was fixed at the time of the sale. Leist v. Diersen (1906) 4 Cal. App. 634, 88 Pac. 812. And a claim against an insolvent estate pending in the probate court. Miller v. Parker (1872) 47 Ala. 312. And the right to contest the account of the administrator of the bankrupt's ancestor. In re Clute, 1 Nat. Bankr. News, 386. Where an agent, importing goods for his principal, became a bankrupt, and the United States filed its claim for duties, the estate suffered a loss for which the trustee in bankruptcy could recover from the principal, though the duties had not been paid. Walkof v. Fox (1915) 153 N. Y. S. 27, judgment affirmed Walkoff v. Same (1915) 155 N. Y. S. 1146. The trustee takes a right of action for land in dispute and held in adverse possesson by a third person. Pope v. Davenport (1879) 52 Tex. 206. And he may maintain an action to set aside the cancellation of a real-estate mortgage which was fraudulently procured from the bankrupt. Alexander v. Berney (1877) 28 N. J. Eq. 90. The trustee is vested with the right of action on a policy of fire insurance for the destruction of insured property of the bankrupt occurring after the adjudication, though before the appointment of the trustee. Fuller v. New York Fire Ins. Co. (1903) 184 Mass. 12, 67 N. E. 879. But not where the claim against the insurance company has been transferred to a creditor of the bankrupt, before the bankruptcy, in such a way as to constitute an accord and satisfaction between them and a novation of the debt. In re Haynes Son & Co. (D. C. 1915) 224 Fed. 269. The trustee is vested with a right of action against a sheriff for failing to make money on an execution, or for selling the property on credit and failing to collect the amount of the bid. In re Geiser (D. C. 1904) 129 Fed. 237, 12 Am. Bankr. Rep. 298; Sullivan v. Bridge (1805) 1 Mass. 511. The bankrupt's right to file a notice of and to enforce a mechanic's lien passes to his trustee in bankruptcy. Held v. Burke (1903) 83 App. Div. 509, 82 N. Y. Supp. 426. A claim transferred by a bankrupt as a credit on a pre-existing indebtedness, on the day on which he filed his petition in bankruptcy, may be sold by the trustee, although the transfer is only voidable and not void. Keller v. Faickney (1906) 42 Tex. Civ. App. 483, 94 S. W. 103. See In re Thomas (D. C. 1912) 199 Fed. 214, 29 Am. Bankr. Rep. 945.

A personal claim of the bankrupt, which there is no legal power to enforce, though an award upon it has been made by arbitrators, does not pass

to his trustee in bankruptcy. Tallman v. Tallman (1850) 5 Cush. (Mass.) 325. A claim of a wife for alimony is not a property right, and property awarded to her as alimony, or arrears of alimony accruing, after her adjudication in bankruptcy, do not constitute a part of her estate. In re Le Claire (D. C. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; Bolton v. Bolton (N. J. 1914) 89 Atl. 1014.

A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense or counterclaim to which they would have been liable in the hands of the bankrupt. Nebraska Moline Plow Co. v. Blackburn (1905) 74 Neb. 246, 104 N. W. 178. A trustee in bankruptcy had no greater rights on a note payable to the bankrupt, the signer of which added to his signature words indicating that he signed as treasurer of a corporation, than the bankrupt himself had. Jump v. Sparling (1914) 105 N. E. 878, 218 Mass. 324. The trustee in bankruptcy of a corporation stands in no better position to attack an arrangement between the corporation's selling agent and a purchaser whereby the agent was to pay his debt to the purchaser by paying part of the purchase price, which was ratified by the corporation, than would the bankrupt company. Grollman v. Montgomery Ward & Co. (1913) 181 Ill. App. 598. Where property of the bankrupt covered by insurance has been destroyed by fire, but he has lost his right to sue on the policy by failing to render a statement forthwith, as required by the policy, his trustee in bankruptcy cannot sue on it. Bennett v. Ætna Ins. Co. (1909) 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414.

37. —— **For personal injuries and other torts.**—If the bankrupt has an unliquidated claim for damages against a common carrier or other person, for negligence or wrongful act which caused injury to his person, it does not vest in his trustee in bankruptcy and the latter has no interest in it. Sibley v. Nason (1907) 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938; Hanson v. First Nat. Bank (Tex. Civ. App. 1910) 128 S. W. 1147; Rand v. Fleishman (1879) 6 Wkly. Notes Cas. (Pa.) 497; Dillard v. Collins (1874) 25 Grat. (Va.) 343; Stone v. Boston & M. R. Co. (1856) 7 Gray (Mass.) 539; Beechwood v. Joplin-Pittsburg Ry. Co. (Mo. App. 1913) 158 S. W. 868. But a similar claim for the value of property of the bankrupt, lost or damaged in consequence of the negligence or wrongful act of a carrier or other person, is an asset of his estate and passes to the trustee. Borden v. Bradshaw (1880) 68 Ala. 362.

The trustee in bankruptcy cannot claim a right of action for damages growing out of an assault and battery upon the bankrupt. Hudson v. Pletts (1844) 11 Paige (N. Y.) 180. Or for slander or libel against him. Dillard v. Collins (1874) 25 Grat. (Va.) 343; Irion v. Knapp (1913) 132 La. 60, 60 South. 719, 43 L. R. A. (N. S.) 940. Or for malicious prosecution and false imprisonment. In re Haensell (D. C. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286; Noonan v. Orton (1874) 34 Wis. 259, 17 Am. Rep. 441; Stanly v. Duhurst (1793) 2 Root (Conn.) 52.

Malicious attachment is an injury to property, and not to the person, and the right of action will vest in the trustee in bankruptcy. Hansen Mercantile Co. v. Wyman, Partridge & Co. (1908) 105 Minn. 491, 117 N. W. 926, 21 L. R. A. (N. S.) 727. A right of action for deceit, based on false and fraudulent representations, whereby the plaintiff was induced to sign a contract, enter into a partnership, buy property at an excessive price, or extend credit to a third person, to his pecuniary loss, is a "right of action arising from an injury to his property," within the meaning of the statute, and therefore passes to the trustee. In re Gay (D. C. 1910) 182 Fed. 260, 25 Am. Bankr. Rep. 111; In re Harper (D. C. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918; Hyde v. Tufts (1879) 45 N. Y. Super. Ct. 56. A right of action for damages, given by a state statute to any person injured by the operation of any "trust," (as, for instance, for a conspiracy whereby the plaintiff was driven out of business), is held to be for an injury to business, employment, or property, and therefore such as will vest in the trustee in bankruptcy. Cleland v. Anderson (1902) 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136; Id. (1905) 75 Neb. 273, 105 N. W. 1092, 5 L. R. A. (N. S.) 136. Under the statutes giving a right of action for the wrongful killing of a human being, the recovery to be for the benefit of the next of kin, where a father is entitled to the entire amount to be recovered for the wrongful killing of his son, his right thereto constitutes an asset of his estate in bankruptcy. In re Burnstine (D. C. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596. Where profits of the business of a corporation are wrongfully appropriated to his own use by an officer of the company, under the guise of a salary, the trustee in bankruptcy of the corporation may recover the same. Fillebrown v. Haywood (1906) 190 Mass. 472, 77 N. E. 45. A trustee in bankruptcy of a trading corporation succeeds to any right which it may have to sue directors for loss from a breach of duty. McEwen v. Kelly (1913) 79 S. E. 777, 140 Ga. 720.

38. —— **For usury.**—A right of action under a state statute to recover back usurious interest paid (or double the amount of it, or a penalty for exacting it, as the case may be) will vest

in the trustee in bankruptcy of the borrower, since the injury done by the usurer is an injury to the property or estate of the borrower and not a personal tort. Reed v. American-German Nat. Bank (C. C. 1907) 155 Fed. 233, 19 Am. Bankr. Rep. 140; Lasater v. First Nat. Bank (1903) 96 Tex. 345, 72 S. W. 1057; Wheelock v. Lee (1873) 15 Abb. Prac. N. S. (N. Y.) 24, 10 N. B. R. 363; Moore v. Jones (D. C. 1848) Fed. Cas. No. 9,768. CONTRA, Lafountain v. Burlington Sav. Bank (1883) 56 Vt. 332. The right of action against a national bank, to recover twice the amount of usurious interest paid to it, under the act of Congress in that behalf (R. S. § 5198), will pass to and vest in the trustee in bankruptcy of the borrower, who is the "legal representative" of the borrower, within the meaning of that statute, for although the action thereon is one to recover a penalty, yet it is distinguishable from causes of action for damages growing out of mere personal torts. Wright v. First Nat. Bank (C. C. 1878) 18 N. B. R. 87, Fed. Cas. No. 18,078; Markson v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 9,097; Crocker v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 3,397; Monongahela Bank v. Overholt (1881) 96 Pa. 327. CONTRA, Barnett v. Muncie Nat. Bank (C. C. 1876) Fed. Cas. No. 1,026; Bromley v. Smith (D. C. 1871) 5 N. B. R. 152, Fed. Cas. No. 1,922.

39. Legacies and inheritances.—Property coming to a bankrupt as his distributive share of the estate of one dying intestate, or as a legacy or devise, will pass to and vest in his trustee in bankruptcy. Watkins v. Bigelow (1904) 93 Minn. 361, 101 N. W. 497; Ex parte Newhall (C. C. 1842) Fed. Cas. No. 10,159; Dohner v. Dohner (Pa.) 1 Am. Law J. N. S. 78. It is immaterial that the legacy or devise is as yet undetermined in respect to its extent. In re Mosier (D. C. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268. Or that it may consist of an undivided interest. In re Kane (D. C. 1908) 161 Fed. 633, 20 Am. Bankr. Rep. 616. Where the death of the testator and the filing of the petition in bankruptcy occurred on the same day, the fractions of that day will be inquired into for the purpose of fixing the status of the property, and if the filing of the petition was the later event, the trustee in bankruptcy may claim the inheritance. In re Stoner (D. C. 1901) 105 Fed. 752, 5 Am. Bankr. Rep. 402; In re McKenna (D. C. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4. Where the bankrupt's interest in a legacy is contingent, and becomes vested by the happening of the event or contingency after his adjudication in bankruptcy, it will then become available as an asset of his estate. Churchman's Appeal (Pa. 1888) 12 Atl. 600. Where the estate devised includes both real and personal property, the administrator of the decedent will have no right or interest in the real property as against the trustee in bankruptcy, though he may be entitled to possession of the personal property pending its administration. In re Kane (D. C. 1908) 161 Fed. 633, 20 Am. Bankr. Rep. 616. If there are no local creditors to be protected, the probate court will be justified in turning over to a foreign trustee in bankruptcy of the heir or next of kin the bankrupt's share in the personal estate. In re Delehanty's Estate (1908) 11 Ariz. 366, 95 Pac. 109, 21 Ann. Cas. 1038.

40. Property held in trust for bankrupt.—When property is held in trust for the bankrupt under a mere passive trust, with no direction as to accumulation and no discretion in the trustee to devote the fund or the income to any person other than the bankrupt, it constitutes assets of the latter's estate and may be recovered by the trustee, who need not give notice to the holder of the trust in order to complete his title. Whittredge v. Sweetser (1905) 189 Mass. 45, 75 N. E. 222, affirmed in Hammond v. Whittredge (1907) 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; Wallace v. Everett (Ky. 1910) 125 S. W. 745. A trustee in bankruptcy may enforce a resulting trust in land in favor of the bankrupt. In re Dunavant (D. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; Currie v. Look (1906) 14 N. D. 482, 106 N. W. 131. The trustee in bankruptcy may enforce a trust in the avails of personal property or choses in action in favor of the bankrupt. In re Perley (D. C. 1846) Fed. Cas. No. 10,992. Compare Butler v. Merchants' Ins. Co. (1848) 14 Ala. 777. A trustee in bankruptcy may recover chattels, taken by a mortgagee thereof more than a year after the original filing of the chattel mortgage, where no renewal statement of the mortgage was filed, as required by Lien Law N. Y. § 235. Benedict v. Zutes (1914) 150 N. Y. S. 147, 88 Misc. Rep. 214. Property which is in the possession of a third person, who holds it merely as the agent or bailee of the bankrupt, must be surrendered to the trustee in bankruptcy. In re Cole (1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302. Where municipal corporations held funds payable to a bankrupt contractor under improvement contracts, and notices to retain were given as provided by Code Civ. Proc. Cal. § 1184, the municipalities, though having no personal interest in the fund, had a noncolorable claim to retain the same pursuant to the notices, and the bankruptcy court could not compel payment thereof to the bankrupt's trustee. In re Cotton (D. C. 1913) 209 Fed. 124.

When a trust created by a will or deed confers upon the trustee an authority to chose or change the beneficiary, or gives him a discretion which he

is not obliged to exercise in favor of the bankrupt, the latter's expectation of benefiting by the trust is not an interest which will pass to his trustee in bankruptcy. Nichols v. Eaton (1875) 91 U. S. 716, 23 L. Ed. 254. Trustee in bankruptcy take no higher or greater estate than the bankrupt himself possessed when the trustee was appointed; and hence where the conditions upon which the bankrupt was to become entitled to a trust fund were not performed until after his adjudication, and after his debts had been extinguished by his discharge, his trustee had no title thereto for the use of creditors. Hull v. Palmer (1913) 140 N. Y. S. 811, 155 App. Div. 636. Property conveyed to holder of legal title by the wife of an insolvent, such wife having held in trust for her grantee, held not subject to trust in favor of such insolvent's creditors after his adjudication in bankruptcy. Arbury v. De Niord (1915) 152 N. Y. S. 763.

41. —— **Testamentary trusts and annuities.**—Whether or not the provisions of a will create such a trust as will prevent a fund bequeathed from passing to the trustee in bankruptcy of the beneficiary or legatee, is to be determined by the law of the particular state. In re McKay (D. C. 1906) 143 Fed. 671, 16 Am. Bankr. Rep. 238.

Where property is devised to trustees, with directions to pay the income therefrom into the hands of a named beneficiary during his life, the latter has no such interest or estate either in the corpus of the property or in the income as will pass to and vest in his trustee in bankruptcy, as his rights or interesta are not alienable by any sale or assignment on his part. In re McKay (D. C. 1906) 143 Fed. 671, 16 Am. Bankr. Rep. 238; Spindle v. Shreve (C. C. 1880) 4 Fed. 136; In re Hoadley (D. C. 1900) 101 Fed. 233, 3 Am. Bankr. Rep. 780; Degraw v. Clason (1844) 11 Paige (N. Y.) 136; Munroe v. Dewey (1900) 57 N. E. 340, 176 Mass. 184, 79 Am. St. Rep. 304, 2 Nat. Bankr. News, 840; Boston Safe Deposit & Trust Co. v. Luke (1915) 220 Mass. 484, 108 N. E. 64. Where the income of a trust fund is directed to be applied to the support of a designated beneficiary and his wife and children, the trustee in bankruptcy of the beneficiary cannot claim such income, and the court cannot apportion the income, as between the bankrupt himself and his family, so as to give the trustee an aliquot share. Durant v. Hospital Life Ins. Co. of Mass. (D. C. 1877) 16 N. B. R. 324, Fed. Cas. No. 4,188. Compare Rugely v. Robinson (1846) 10 Ala. 702. It is competent for a testator to direct that the income of the trust fund shall cease to be paid to the named beneficiary if he shall become bankrupt, and that it shall in that event be paid to his wife or children or to other specified beneficiaries. Such a provision is not contrary either to the general policy of the law or to that of the bankruptcy act in particular, and it leaves nothing for the trustee in bankruptcy to claim for the estate. Nichols v. Eaton (1875) 91 U. S. 716, 23 L. Ed. 254, affirming (C. C. 1873) Fed. Cas. No. 10,241. A trustee in bankruptcy held not entitled to aid of a court of equity to reach trust property; the testamentary trustee having an absolute discretion, and any interest of the bankrupt as heir having already passed to the trustee in bankruptcy by the adjudication. Brown v. Lumbert (1915) 108 N. E. 1079, 221 Mass. 419.

When the law provides that where a trust is created by which the trustee is to receive and collect the income from property and apply it to the use and benefit of a named beneficiary during his life, the latter shall not take any legal estate or interest in the property, and can only enforce the trust in equity, and cannot transfer his rights, but that, if no valid direction for accumulation is given, the surplus of such income, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution, the surplus of an income so settled may be claimed by the trustee in bankruptcy of the beneficiary as assets of his estate. In re Tiffany (D. C. 1904) 133 Fed. 799, 13 Am. Bankr. Rep. 310; In re Baudouine (D. C. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55. See the latter case on appeal (1900) 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651, where, however, the decision was not on the merits, but on the question whether the trustee in bankruptcy must bring a plenary suit. See, also, Graff v. Bonnett (1865) 31 N. Y. 9, 88 Am. Dec. 236; Brown v. Barker (1902) 68 App. Div. 592, 74 N. Y. Supp. 43; Jenks v. Title Guarantee & Trust Co. (Sup. 1915) 156 N. Y. Supp. 478. CONTRA, Butler v. Baudouine (1903) 177 N. Y. 530, 69 N. E. 1121. And see McNaboe v. Marks (1906) 51 Misc. Rep. 207, 99 N. Y. Supp. 960; Cuthbert v. Chauvet (1893) 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745; Wetmore v. Wetmore (1896) 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; Mills v. Husson (1893) 140 N. Y. 99, 35 N. E. 422. Where a testator gives property to trustees for the benefit of a designated beneficiary, but with the direction that they shall hold it and the accumulations until the beneficiary reaches a certain age, later than the ordinary age of majority, and the beneficiary is adjudged bankrupt before attaining the age mentioned in the will, his trustee in bankruptcy is entitled to claim the fund from the testamentary trustees. Sanford v. Lackland (C. C. 1871) Fed. Cas. No. 12,312. And see Loomer v. Loomer (1904) 76 Conn. 522, 57 Atl. 167.

As to a testamentary annuity, created

by a will which directs trustees to pay a fixed annual sum to a named beneficiary during his life, it is held that the right of the beneficiary is property which he could assign and which could be followed by his creditors, and therefore will vest in his trustee in bankruptcy, to be sold by the latter for its present value. In re Burtis (D. C. 1911) 188 Fed. 527, 26 Am. Bankr. Rep. 680; Degraw v. Clason (1844) 11 Paige (N. Y.) 136; Graves v. Dolphin (1826) 1 Simons, 66; Brandon v. Robinson (1811) 18 Ves. 429. Although it may not pass any estate or interest in the particular lands which are expected to furnish the income out of which the annuity shall be paid. De Haven v. Sherman (1889) 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745. Where property is devised in trust, the income to be paid to a named person for life, and the principal, after his death, to his executor in trust for the use of such person as he may appoint by will, and the first taker executes the power, the property appropriated is deemed in equity part of his assets and subject to the demand of his creditors, in preference to the claims of his voluntary appointees or legatees, and hence it should be available as assets of his estate in bankruptcy. Clapp v. Ingraham (1879) 126 Mass. 200.

42. **Policies of life insurance.**—Under the provisions of this section, insurance policies having a surrender or disposable value are assets passing to the bankrupt's trustee, if not exempt. In re Phillips & Goldman (D. C. 1912) 192 Fed. 1020; In re Churchill (D. C. 1912) 198 Fed. 711, 29 Am. Bankr. Rep. 153; In re Whelpley (D. C. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433. It is the intention of the provision to exclude from the estate in bankruptcy all insurance policies except such as may have a surrender value. Burlingham v. Crouse (1913) 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 30 Am. Bankr. Rep. 6, affirming (1910) 181 Fed. 479, 104 C. C. A. 227, 24 Am. Bankr. Rep. 632; In re Josephson (D. C. 1908) 121 Fed. 142, 9 Am. Bankr. Rep. 345, affirmed in Meyers v. Josephson (1903) 124 Fed. 734, 59 C. C. A. 650, 10 Am. Bankr. Rep. 687; In re Churchill (1913) 209 Fed. 766, 126 C. C. A. 490; Grems v. Traver (Sup. 1914) 148 N. Y. Supp. 200. Though the policy in question may have no surrender value in cash, yet if it has any actual value (such as an inchoate value, or a value for the purpose of being pledged as collateral, or a paid-up insurance value), the trustee may claim it as an asset of the estate, since it is property which the bankrupt himself could have transferred and is therefore within the broader clause of the statute. Partridge v. Andrews (C. C. A. 1911) 191 Fed. 325, 27 Am. Bankr. Rep. 388; In re Orear (1910) 178 Fed. 632, 102 C. C. A. 78, 24 Am. Bankr. Rep. 343; In re Coleman (1905) 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; In re Welling (1902) 113 Fed. 189, 51 C. C. A. 151, 7 Am. Bankr. Rep. 340; In re Dolan (D. C. 1910) 182 Fed. 949, 25 Am. Bankr. Rep. 145; In re Hettling (C. C. A. 1910) 175 Fed. 65, 23 Am. Bankr. Rep. 161; Clark v. Equitable Life Assur. Soc. (C. C. 1906) 143 Fed. 175, 16 Am. Bankr. Rep. 137; Van Kirk v. Vermont Slate Co. (D. C. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239; Gould v. New York Life Ins. Co. (D. C. 1904) 132 Fed. 927, 13 Am. Bankr. Rep. 233. A policy which has no surrender value, and no cash value to the estate, and in fact no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt in case the premiums are kept paid, does not constitute an asset of the estate in bankruptcy. In re Buelow (D. C. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; Gould v. New York Life Ins. Co. (D. C. 1904) 132 Fed. 927, 13 Am. Bankr. Rep. 233; King v. Miles (Miss. 1915) 67 South. 182.

43. —— **Meaning of "cash surrender value."**—In order that a policy may have a cash surrender value, within the meaning of this section, it is not necessary that the policy should contain an express agreement or stipulation to that effect; it is sufficient if it possesses an actual value, either in cash or for the purchase of a paid-up policy, which would be recognized and paid by the insurer on the surrender of the policy, as a matter of settled and usual practice, or even as a concession in the particular case. Holden v. Stratton (1905) 198 U. S. 214, 25 Sup. Ct. 656, 49 L. Ed. 1022, 14 Am. Bankr. Rep. 94; Hiscock v. Mertens (1907) 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, 17 Am. Bankr. Rep. 483; Equitable Life Assur. Soc. v. Miller (C. C. A. 1911) 185 Fed. 98, 25 Am. Bankr. Rep. 560; In re Herr (D. C. 1910) 182 Fed. 716, 25 Am. Bankr. Rep. 142; In re Coleman (1905) 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; In re Boardman (D. C. 1900) 103 Fed. 783, 4 Am. Bankr. Rep. 620. But compare Pulsifer v. Hussey (1903) 97 Me. 434, 54 Atl. 1076.

44. —— **Endowment, tontine, and annuity policies.**—An endowment policy on the life of the bankrupt, payable to him with accumulated dividends if he survives the term, or to his wife in case of his death before its maturity, if it has a cash surrender value, will vest in the trustee in bankruptcy unless redeemed by the bankrupt. Remley v. Travelers' Ins. Co. (1909) 108 Minn. 31, 121 N. W. 230; In re Schofield (D. C. 1905) 147 Fed. 862, 15 Am. Bankr. Rep. 824; In re Young (D. C. 1912) 208 Fed. 373, 31 Am. Bankr. Rep. 29; In re Dreuil & Co. (D. C. 1915) 221 Fed. 796. Where the amount of such a policy is considerable, and it will mature before the estate can be closed,

the trustee may, with the sanction of the court and the assent of the creditors, retain it, and pay the remaining premiums as they mature, and in case the amount is realized, the creditors will be entitled to at least the proportion equitably to the credit of the policy at the date of the adjudication, with the outlay for premiums. In re Slingluff (D. C. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76; In re Mertens (D. C. 1904) 131 Fed. 972, 12 Am. Bankr. Rep. 712. The same rule as to paying premiums and claiming the bankrupt's interest in the policy applies to the "tontine" and "semi-tontine" forms of policies. Hiscock v. Mertens (1907) 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, 17 Am. Bankr. Rep. 483; In re Welling (1902) 113 Fed. 189, 51 C. C. A. 151, 7 Am. Bankr. Rep. 340; In re Mertens (D. C. 1904) 131 Fed. 972, 12 Am. Bankr. Rep. 712. A paid-up policy insuring the bankrupt's life, under an agreement to pay him an annuity for life after twenty years, which term has not expired, and to pay his widow a fixed sum on his death, vests in his trustee in bankruptcy, but only as to the bankrupt's interest in the annuity, and not as to the entire present value of the policy. In re Schaefer (D. C. 1910) 189 Fed. 187, 26 Am. Bankr. Rep. 340.

45. —— **Rights of beneficiaries.**—A policy of insurance on the life of the bankrupt, but payable to his wife, is her property, and is not an asset of his estate in bankruptcy. In re Flanigan (D. C. 1915) 228 Fed. 339; In re Jamison Bros. & Co. (D. C. 1915) 222 Fed. 92; Grems v. Traver (1914) 148 N. Y. Supp. 200; In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549; In re Pfaffinger (D. C. 1908) 164 Fed. 526, 21 Am. Bankr. Rep. 255; In re Bear (D. C. 1875) 11 N. B. R. 46, Fed. Cas. No. 1,178; Pace v. Pace (1882) 19 Fla. 438; Haskell v. Equitable Life Assur. Soc. (1902) 181 Mass. 341, 63 N. E. 899; Pulsifer v. Hussey (1903) 97 Me. 434, 54 Atl. 1076. But see In re White (1909) 174 Fed. 333, 98 C. C. A. 205, 23 Am. Bankr. Rep. 90; In re Holden (1902) 114 Fed. 650, 52 C. C. A. 346. Compare In re Young (D. C. 1912) 208 Fed. 373, 31 Am. Bankr. Rep. 29; In re Loveland (1912) 200 Fed. 136, 118 C. C. A. 310, 29 Am. Bankr. Rep. 560. A policy on the life of a bankrupt payable to his wife if she survived him, otherwise to his estate or any designated beneficiary, and which he was authorized at a specified time to surrender for cash or paid-up insurance, was property which passed to his trustee. In re Draper (D. C. 1914) 211 Fed. 230. The beneficial interest in insurance policies on the life of a bankrupt held to pass to his trustee, notwithstanding Act Pa. April 15, 1868 (P. L. 103), and that the policies named the bankrupt's daughter as beneficiary. In re Shoemaker (D. C. 1915) 225 Fed. 329.

Where the policy is on the life of the bankrupt, but is payable to a named beneficiary, it does not become an asset of his estate in bankruptcy because he has the right, with the consent of the company, to change the beneficiary, if he has not done so. In re Flanigan (D. C. 1915) 228 Fed. 339; In re Pfaffinger (D. C. 1908) 164 Fed. 526, 21 Am. Bankr. Rep. 255; Grems v. Traver (1914) 148 N. Y. Supp. 200. CONTRA, In re Jamison Bros. & Co. (D. C. 1915) 222 Fed. 92. The bankrupt cannot be compelled to substitute himself as beneficiary in a life insurance policy payable to his wife, and borrow the loan value thereof for the benefit of his creditors. In re L. Hammel & Co. (1915) 221 Fed. 56, 137 C. C. A. 80.

The trustee cannot claim a policy which was originally payable to the personal representatives of the bankrupt, but which was assigned to his wife more than four months before the bankruptcy, where nothing appears to impugn the good faith of the transaction. In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549. Compare South Side Trust Co. v. Wilmarth (1912) 199 Fed. 418, 117 C. C. A. 650, 29 Am. Bankr. Rep. 29. Any interest, in policy reserving right to change beneficiary, remaining in insured after assignment, held to pass to his trustee in bankruptcy, and to a purchaser from the trustee. Mutual Ben. Life Ins. Co. v. Swett (1915) 222 Fed. 200, 137 C. C. A. 640. The trustee cannot claim a policy assigned by the bankrupt to his wife or a third person where, at the time of the assignment, it had no surrender value in cash. Morris v. Dodd (1900) 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129.

Where the policy provides that the principal sum shall be paid to the assured himself at the end of a stipulated term of years if he is then living, or to his wife if he dies before the expiration of the term, its surrender value is payable to the assured, and it becomes a part of his estate in bankruptcy. In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549; Brigham v. Home Ins. Co. (1881) 131 Mass. 319. But the mere expectancy of one who is named as the beneficiary in a policy of insurance on the life of another is not an asset in his estate in bankruptcy, where the policy also gives the assured the unqualified right to change the beneficiary at will, as this is not property which he could have transferred or which could have been levied on and sold. In re Hogan (C. C. A. 1912) 194 Fed. 846, 28 Am. Bankr. Rep. 166; In re McDonnell (D. C. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92. But where the assured in such a case dies shortly after the adjudication in bankruptcy, leaving the bankrupt as the last designated benefi-

ciary, the interest of the latter in the policy becomes fixed and unalterable, and passes to his trustee. In re Hogan (D. C. 1911) 186 Fed. 537. And so, where a wife holds a policy of insurance on the life of her husband, by the terms of which she is bound to pay the premiums and is entitled to receive the proceeds of the policy, such policy will become a part of the assets of her estate in bankruptcy, unless she secures or pays to her trustee its surrender value. In re Steele (D. C. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549.

46. —— **Interest claimable by trustee —Liens.**—The only interest which the trustee can claim is the surrender value of the policy at the time of the bankruptcy, and if that is paid or secured to him, the bankrupt remains the owner of the policy and of whatever interest or value may thereafter accrue under it. In re Dreuil & Co. (D. C. 1915) 221 Fed. 796; Pulsifer v. Hussey (1903) 97 Me. 434, 54 Atl. 1076. The policy, so far as respects any future insurance under it, would be a burden to the estate rather than a benefit, which the trustee would not be authorized to continue. In re McKinney (D. C. 1883) 15 Fed. 535. But if the bankrupt does not redeem the policy, as authorized by the statute, it is for the court of bankruptcy to determine in what way the trustee shall treat the bankrupt's interest in it, whether by sale or by postponement of any action until the policy shall fall due. Waldron v. Becker (1900) 33 Misc. Rep. 182, 68 N. Y. Supp. 402.

The trustee takes the surrender value of the policy subject to any valid existing liens upon it, as, for example, an equitable lien in favor of the bankrupt's wife for the amount of premiums which she has paid out of her own money in past years in order to keep the policy alive. In re Diack (D. C. 1900) 100 Fed. 770, 3 Am. Bankr. Rep. 723; Waldron v. Becker (1900) 33 Misc. Rep. 182, 68 N. Y. Supp. 402.

Or the lien of one to whom the policy had previously been pledged as collateral security for a loan. In re Wolff (D. C. 1908) 165 Fed. 984, 21 Am. Bankr. Rep. 452; King v. Miles (Miss. 1915) 67 South. 182. And if the insurance company itself has loaned the bankrupt a sum equal to the full surrender value of the policy, holding the policy as security, there is nothing for the trustee in bankruptcy to take. Burlingham v. Crouse (C. C. A. 1910) 181 Fed. 479, 24 Am. Bankr. Rep. 632.

47. —— **Effect of death of bankrupt.** —The time when the petition in bankruptcy is filed, and not the date of the adjudication, fixes the cash surrender value of a policy on the bankrupt's life, and the death of the bankrupt between the filing of the petition and the adjudication does not make the proceeds of the policy, above the cash surrender value, assets in the hands of the trustee, but the right to redeem on paying the surrender value may be exercised by the bankrupt's executors. Everett v. Judson (1913) 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 30 Am. Bankr. Rep. 1, affirming (1912) 192 Fed. 834, 113 C. C. A. 158, 27 Am. Bankr. Rep. 704; Andrews v. Partridge (1913) 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929, 30 Am. Bankr. Rep. 4, reversing (1911) 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123, 27 Am. Bankr. Rep. 388; Sanders v. Ætna Life Ins. Co. (1913) 95 S. C. 36, 78 S. E. 532. If bankrupt's assignment, with his wife, of policies on his life, was void, the wife may, on their return, after his death, in 30 days after determination of their surrender value, at date of adjudication, redeem. In re Levy (D. C. 1915) 227 Fed. 1011. Where the bankrupt's death occurs by suicide, and the policy thereupon becomes void, but the insurance company returns premiums paid under the policy, the money belongs to the trustee, as being a refund of the bankrupt's own money. In re Judson (D. C. 1911) 188 Fed. 702, 26 Am. Bankr. Rep. 775, affirmed (1912) 192 Fed. 834, 113 C. C. A. 158, 27 Am. Bankr. Rep. 704.

48. —— **Indemnity and accident insurance.**—Where an employer of labor holds a policy undertaking to indemnify him against loss sustained by accident to an employé, and pays a judgment recovered by an employé against him, and becomes bankrupt, his claim against the insurance company under the policy for reimbursement will pass to his trustee in bankruptcy as an asset of his estate. Travelers' Ins. Co. v. Moses (1901) 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663. The trustee in bankruptcy is entitled, as against the bankrupt's widow, to the proceeds of a policy of insurance against permanent disability. In re Matschke (D. C. 1912) 193 Fed. 284, 27 Am. Bankr. Rep. 770.

49. **Wife's personalty and choses in action.**—Where the rule of the common law has not been changed or abrogated by statute, the personal property of the wife of a bankrupt, owned by her at the time of the marriage, and not excluded from the control of the husband by any trust, and also her choses in action reduced to his possession, are assets of his estate in bankruptcy. In re Boyd (D. C. 1871) 5 N. B. R. 199, Fed. Cas. No. 1,745; In re Grant (C. C. 1842) Fed. Cas. No. 5,693; Butler v. Merchants' Ins. Co. (1845) 8 Ala. 146; Gayle v. Randall (1882) 71 Ala. 469; Smith v. Chandler (1855) 3 Gray (Mass.) 392; In re Hammond (D. C. 1899) 98 Fed. 845. But courts of equity have always recognized the wife's right to a settlement—that is, to

an adequate provision for her support to be made out of her own property—and have enforced it whenever it became necessary for the husband to resort to chancery in order to reach her property or rights of action, and courts of bankruptcy will take the same course. Clark v. Hezekiah (D. C. 1885) 24 Fed. 663; In re Brandt (C. C. 1872) Fed. Cas. No. 1,811; In re Campbell (D. C. 1877) 17 N. B. R. 4, Fed. Cas. No. 2,348; Shaw v. Mitchell (D. C. 1843) Fed. Cas. No. 12,722; Bell v. Bell (1847) 1 Ga. 637. Where the husband and wife were jointly prosecuting a suit in respect to a chose in action of the wife, and during its pendency the husband is adjudged bankrupt, his trustee should join with the wife in the further conduct of the suit, and his recovery therein will inure to the benefit of the husband's creditors. In re Boyd (D. C. 1871) 5 N. B. R. 199, Fed. Cas. No. 1,745.

But the trustee is not entitled to a chose in action of the bankrupt's wife, where there is nothing to show that the bankrupt ever asserted his marital right thereto or made any attempt to reduce it to his possession. Wickham v. Valle (C. C. 1875) 11 N. B. R. 83, Fed. Cas. No. 17,613; In re Snow (D. C. 1842) Fed. Cas. No. 13,142; Shay v. Sessaman (1849) 10 Pa. 432. And merely including it in his schedule of assets filed in the bankruptcy proceedings is not such a reduction to possession as to give his trustee or creditors a claim upon it. Poor v. Hazleton (1844) 15 N. H. 564. A legacy to the bankrupt's wife, dependent on her surviving another person, is a mere possibility and does not pass to the husband's trustee. Krumbaar v. Burt (C. C. 1809) Fed. Cas. No. 7,944.

Where the wife's separate property is secured to her by statute, the husband's trustee in bankruptcy has no claim to any personal property or chose in action acquired and owned by her before the marriage, such, for instance, as stock in a corporation. Bryan v. Sturgis Nat. Bank (1905) 40 Tex. Civ. App. 307, 90 S. W. 704. And the fact that the wife allows her husband to have and use her money in his own business indefinitely does not prevent her from reclaiming it, as against other creditors, in his subsequent bankruptcy. Van Kleeck v. Miller (D. C. 1879) 19 N. B. R. 484, Fed. Cas. No. 16,860; In re Westervelt (D. C. 1880) Fed. Cas. No. 17,445a; Shippen's Appeal (1876) 80 Pa. 391, 15 N. B. R. 553. But see Keating v. Keefer (C. C. 1871) 5 N. B. R. 133, Fed. Cas. No. 7,635. But this is not so if the statutory law of the state expressly precludes her from asserting ownership as against creditors. In re Hemstreet (D. C. 1903) 139 Fed. 958, 14 Am. Bankr. Rep. 823. Or if such law raises a presumption that a gift of the money was intended. Teter v. Viquesney (1910) 179 Fed. 655, 103 C. C. A. 213, 24 Am. Bankr. Rep. 242. The property or profits which the husband may have accumulated in business transactions, using his wife's money as capital, but adding his own skill and energy, constitute his own assets and not hers, and vest in his trustee. Muirhead v. Aldridge (C. C. 1876) 14 N. B. R. 249, Fed. Cas. No. 9,904.

Either money or other property given by a man to his wife, at a time when he is solvent and entertains no fraudulent purpose, passes out of his ownership into hers, and cannot be reclaimed for the benefit of his creditors when he afterwards becomes insolvent and bankrupt. In re Brandt (C. C. 1872) Fed. Cas. No. 1,811; In re Ludlow (D. C. 1843) Fed. Cas. No. 8,599. Although it is a general rule that money saved by a wife out of an allowance made by her husband for the expenses of the household belongs to him and not to her, yet where the wife, during the twelve years of her marriage, managed, by doing her own work, to save from the allowance a considerable sum, which she deposited in bank in her own name, besides on different occasions expending considerable sums, which fact was probably known to her husband, the presumption is that he intended such savings as a gift to her; and where he was solvent at all times until his death, the trustee in bankruptcy of the surviving partner of a firm of which he had been a member, on its bankruptcy, after his death, cannot claim such money. In re Simon (D. C. 1912) 197 Fed. 102, 28 Am. Bankr. Rep. 616.

50. Acquisitions of minor children.—The property of minor children, accumulated by their sole exertions with their father's consent, and which he has not reduced to his own possession but which has always stood in their names, does not pass to his trustee in bankruptcy. Ex parte Tebbets (D. C. 1842) Fed. Cas. No. 13,816. Where a father, although himself insolvent, has expressly emanicipated his minor son, the earnings of the latter, thenceforward and during the remainder of his minority, or property purchased with the same, do not belong to the father and cannot be claimed by his creditors as assets of his estate in bankruptcy. In re Dunavant (D. C. 1899) 96 Fed. 542, 8 Am. Bankr. Rep. 41.

51. Dower rights.—A woman's inchoate right of dower in the lands of her husband is not such property as will pass to and vest in her trustee in bankruptcy. Lucas v. Bennett (1876) 42 Iowa, 703. But when a wife's contingent interest in her husband's lands has been transformed into a vested right by the event of his death, she cannot then divest it by parol without consideration, as against her creditors, and consequently, if she has not parted

with it prior to her bankruptcy, it will constitute an asset of her estate. Watterson's Appeal (1880) 95 Pa. 312.

52. **Property of third persons in bankrupt's possession.**—Property surrendered or turned over by a bankrupt to his trustee, which belongs to a third person, is not an asset of the estate in bankruptcy, but the trustee must take charge of it until it is reclaimed by the rightful owner, and cannot surrender it to any other person. In re Condon (1912) 198 Fed. 480, 117 C. C. A. 212, 28 Am. Bankr. Rep. 851; In re Cox (D. C. 1912) 199 Fed. 952, 29 Am. Bankr. Rep. 456; In re Thompson (D. C. 1913) 205 Fed. 556, 30 Am. Bankr. Rep. 64; In re Walsh Bros. (D. C. 1912) 195 Fed. 576, 28 Am. Bankr. Rep. 243; Cooper v. White (1856) 19 Ga. 554. This includes real property as to which the joint owners (one of whom became bankrupt) had previously effected a partition as between themselves by cross deeds. Ludvigh v. Umstadter (D. C. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774. The trustee takes no title to cans in which a manufacturer's goods were shipped to the bankrupt retailer, where the latter was bound to return the cans and was charged a certain amount for each as a means of securing such return. In re Woodman (D. C. 1910) 186 Fed. 533. A claimant, which advanced money to bankrupt for purchase of cotton seed to be shipped to it, held entitled to reclaim seed remaining in storage and not shipped at time of bankruptcy, although an unknown part of it had been paid for by bankrupt. Southern Cotton Oil Co. v. Elliotte (1914) 218 Fed. 567, 134 C. C. A. 295. A check, sent by defendant to a bankrupt in order to assist the bankrupt in paying a check he had previously given to defendant, held not an asset of the bankrupt's estate which the trustee could enforce. Burnes v. Epstein (D. C. 1913) 201 Fed. 393. The trustee takes no title to personal property which was in the possession of the bankrupt under a contract of lease, although he may have had an option to buy it at a stated price, which he never exercised. McEwen v. Totten (C. C. A. 1908) 164 Fed. 837, 21 Am. Bankr. Rep. 336; In re Kay-Tee Film Exchange (D. C. 1911) 193 Fed. 140.

Property of a third person in the possession of the bankrupt must be reclaimed by the owner himself; the bankrupt cannot withhold any property actually in his possession and set up in defense to the trustee's demand for it that the title is in a stranger. In re Moses (D. C. 1880) 1 Fed. 845. But if money has been paid to the bankrupt by mistake, and he has turned it over to the person entitled to it, the trustee cannot maintain a suit to recover it back. Jackman v. Eau Claire Nat. Bank (1905) 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955, affirmed Eau Claire Nat. Bank v. Jackman (1907) 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596.

53. —— **Goods sold to bankrupt.**—Where certain goods were sold to the bankrupt on open account, the title vested at once, and the relation of debtor and creditor was created, so that on bankruptcy intervening the seller was not entitled to rescind and reclaim. In re Caldwell Machinery Co. (D. C. 1914) 215 Fed. 428. Where goods sold prior to bankruptcy were shipped after election of trustee and not reclaimed seller held not entitled to full payment of the purchase price. In re Nicol (D. C. 1915) 221 Fed. 82. Where defendant, having a bill of sale conveying a right to cut timber from certain land, agreed to assign the same to the bankrupt, and delivered the bill of sale to it, such act was sufficient to transfer the title. Cullen v. Armstrong (D. C. 1913) 209 Fed. 704. The seller of property to a bankrupt may reclaim and recover the property when there has been no delivery of it of such a character as to pass title. In re Kingston Realty Co. (D. C. 1907) 157 Fed. 303, 19 Am. Bankr. Rep. 703; Kellogg-Mackey-Cameron Co. v. Curtice (1912) 162 Mo. App. 124, 144 S. W. 152. Where the bankrupt, on receipt of property which he had contracted to purchase, objected to its quantity and quality, and stored it separately, and refused to pay for it except at a reduced price, which had not been agreed to when he became bankrupt, title had not passed and the property was not a part of the estate in bankruptcy. In re Planett Mfg. Co. (C. C. A. 1907) 157 Fed. 916, 19 Am. Bankr. Rep. 729. The seller may reclaim the goods where the contract was for an absolute sale and payment of the price in cash was a condition precedent to the passing of title, and payment has not been made. Hauck v. Frey (D. C. 1916) 228 Fed. 779; Roth v. Smith (C. C. A. 1914) 215 Fed. 82; Southern Pine Co. v. Savannah Trust Co. (1905) 141 Fed. 802, 73 C. C. A. 60, 15 Am. Bankr. Rep. 618; In re Smith (D. C. 1903) 119 Fed. 1004, 9 Am. Bankr. Rep. 590; In re Burkle (D. C. 1902) 116 Fed. 766, 8 Am. Bankr. Rep. 542. This rule applies where payment has been tendered in a medium which the seller refused to accept, such as an uncertified check which is afterwards dishonored. In re Tracy (D. C. 1911) 185 Fed. 844; In re Selman Heating & Plumbing Co. (D. C. 1913) 203 Fed. 777. Under contract between automobile manufacturer and dealer, held, that there was no bona fide reservation of title to automobile parts, and that the manufacturer could not reclaim such parts from the dealer's trustee in bankruptcy. Flanders Motor Co. v. Reed (C. C. A. 1915) 220 Fed. 642, affirming judg-

ment In re Harrington (D. C. 1914) 212 Fed. 542.

The fact that a merchant ships goods to a customer, but consigned to himself, is not conclusive proof of his assertion that he reserved title in himself for the purpose of a future scrutiny of the customer's financial condition, if there are other facts tending to show an actual sale and a resort to this equivocal method for the purpose of denying a sale in case of the customer's bankruptcy; there must be good faith, and no sinister design, in the transaction. In re Leeds Woolen Mills (D. C. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136; In re Levin (D. C. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 446. See Grange Co. v. Farmers' Union & Milling Co. (1906) 3 Cal. App. 519, 86 Pac. 615.

54. —— **Estoppel of bankrupt to assert title.**—Bankrupts had agreed to build a locomotive engine for a railroad company. They notified the company that the engine was finished and dispatched, whereupon the price was paid. No such engine then existed, but two engines, either of which would answer the contract, were afterwards finished, and one of them was delivered to a third person before the bankruptcy. At the date of the bankruptcy, the other remained in the bankrupts' shop. It was held that the railroad company had a title to the engine as against the bankrupts and their trustee by estoppel. Ex parte Rockford, R. I. & St. L. R. Co. (D. C. 1869) 3 N. B. R. 50, Fed. Cas. No. 11,978. And see In re Cantelo Mfg. Co. (D. C. 1911) 185 Fed. 276, 26 Am. Bankr. Rep. 57; Lovell v. Isidore Newman & Son (C. C. 1911) 188 Fed. 534, 26 Am. Bankr. Rep. 660.

55. —— **Remedies of owner.**—When property in the possession of a bankrupt, but which belongs to a stranger, passes into the hands of the trustee in bankruptcy, the proper remedy of the owner, desiring to reclaim it, is to file his petition in the court of bankruptcy setting forth the facts and his claim, and the referee has authority summarily to call the parties in interest before him and to hear and determine the claim, and if it is admitted or established by proof, to make an order for the restoration of the property to the claimant. Mound Mines Co. v. Hawthorne (1909) 173 Fed. 882, 97 C. C. A. 394, 23 Am. Bankr. Rep. 242; In re Squier (D. C. 1908) 165 Fed. 515, 21 Am. Bankr. Rep. 346; In re Pierce (C. C. A. 1907) 157 Fed. 757, 19 Am. Bankr. Rep. 664; In re Schloerb (D. C. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; Keegan v. King (D. C. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re Anderson (D. C. 1885) 23 Fed. 482; In re Clark (C. C. 1872) 6 N. B. R. 410, Fed. Cas. No. 2,802; In re Havens (D. C. 1875) Fed. Cas. No. 6,230. That claimant, having claim on open account and right to retake property, was described in petition to set aside order of sale as a creditor for the full amount, held not to prevent reclamation. In re Midland Motor Co. (1915) 224 Fed. 368, 140 C. C. A. 54. Where trustee in bankruptcy refused to surrender property in possession of bankrupt belonging to claimant, held, that he and the estate were liable for such of the property as subsequently disappeared, whether he was negligent or without fault. In re Reeves (D. C. 1915) 227 Fed. 711.

Property in the possession of a trustee in bankruptcy, but which belongs to a third person, cannot be taken from the trustee by the rightful owner on a writ of replevin. In re Schloerb (D. C. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Clark (C. C. 1872) 6 N. B. R. 410, Fed. Cas. No. 2,802; Erb v. Perkins (1877) 32 Ark. 428. Compare Leighton v. Harwood (1872) 111 Mass. 67, 15 Am. Rep. 4, 12 N. B. R. 360. And see Kennedy v. Strong (1813) 10 Johns (N. Y.) 289. Nor by a suit in a state court against the trustee to establish his title and restrain the trustee from selling the property. Keegan v. King (D. C. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79. See In re Litchfield (D. C. 1882) 13 Fed. 863. Nor by an attempted exercise of the right of stoppage in transitu. In re Allen (D. C. 1910) 178 Fed. 879, 24 Am. Bankr. Rep. 574. Property in the possession of the trustee is not liable to be levied on and taken in execution by a sheriff at the suit of a creditor of the person who claims title thereto as against the bankrupt. In re Clark (C. C. 1872) 6 N. B. R. 410, Fed. Cas. No. 2,802. See Hill v. Fleming (1869) 39 Ga. 662. Certificates of deposit, as to which prima facie showing of individual ownership by officer of bankrupt corporation was made, held not to be impounded, so as to be available to satisfy judgment which might be obtained against the officer by the trustee. In re McGinley (1915) 219 Fed. 159, 135 C. C. A. 57.

56. —— **Laches of claimant.**—Where certain stocks which had been pledged by a bankrupt firm of brokers as collateral, some of which they held for customers under various arrangements, were released and turned over to their receiver, and an omnibus notice was published requiring all claimants to any of such stocks to file their claims by a stated time or they would be barred, the court is not required to consider a claim filed more than two years after the expiration of such time, in the absence of allegation and proof that the claimant did not have actual knowledge of the notice. In re Ennis (1912) 198 Fed. 381, 117 C. C. A. 257.

57. **Property held by bankrupt as trustee.**—Property held by a bankrupt by a mere naked legal title, and purely

in trust for another, is no part of his estate in bankruptcy and does not pass to his trustee. Lowell v. International Trust Co. (1907). 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Coffin (1907) 152 Fed. 381, 81 C. C. A. 507, 18 Am. Bankr. Rep. 127; Clark v. Wilson (1876) 53 Miss. 119, 16 N. B. R. 356; Welch v. Polley (1904) 177 N. Y. 117, 69 N. E. 279; Butler v. Merchants' Ins. Co. (1848) 14 Ala. 777; Starr v. Keefer (1873) 1 MacArthur (D. C.) 166; Pickerell v. Zell (1875) 2 MacArthur (D. C.) 65; Pugh v. Holliday (1854) 3 Ohio St. 284; Bailey v. Wood (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Blin v. Pierce (1847) 20 Vt. 25; Shryock v. Waggoner (1857) 28 Pa. 430; Ludwig v. Highley (1847) 5 Pa. 132. Compare Carr v. Gale (C. C. 1847) Fed. Cas. No. 2,435. See Hatch v. Curtin (1907) 154 Fed. 791, 83 C. C. A. 495, 19 Am. Bankr. Rep. 82. In cases where the trust has been virtually terminated by such acts or conduct on the part of the cestui que trust as would estop him to claim any benefit from it, the estoppel is equally available to the trustee in bankruptcy as it would have been to the bankrupt himself. In re Coffin (D. C. 1906) 146 Fed. 181, 16 Am. Bankr. Rep. 682. The trustee in bankruptcy will have the right to claim for the benefit of creditors any interest which the bankrupt himself had in the subject of the trust, whether by way of compensation for his services or as a part owner or distributee. Appling v. Bailey (1870) 44 Ala. 333; Rankin v. Bancroft (1885) 114 Ill. 441, 3 N. E. 97. See Clark v. Snelling (C. C. A. 1913) 205 Fed. 240, 30 Am. Bankr. Rep. 50.

Where merchandise is by mistake delivered to a factor to whom it was not consigned, and is sold by a warehouseman and the proceeds deposited in bank to the credit of the factor, the money is held in trust for the owner and does not pass to the factor's trustee in bankruptcy. In re Woods & Malone (D. C. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615. So, where a husband has, by fraud or mistake, been invested with the title to land inherited by his wife, equity will treat him as trustee of the wife, and a court of bankruptcy will not subject the land to the claims of the husband's creditors. In re Anderson (C. C. 1874) Fed. Cas. No. 351. Where a bankrupt held certain real property as trustee for his mother at the time of bankruptcy, and, holding the legal title, might have transferred the same to a bona fide purchaser, such title passed to the trustee in bankruptcy, but, so far as such section was concerned, the trustee took no different title than the bankrupt. Clark v. Snelling (1913) 205 Fed. 240, 123 C. C. A. 430, affirming judgment In re Snelling (D. C. 1912) 202 Fed. 259. Where a bankrupt's mother fraudulently conveyed property to him, and he used it to purchase a hotel, the mother's transfer having been set aside as fraudulent against her creditors, and the hotel property having been sold in bankruptcy proceedings against the son, the mother's creditor held entitled to receive the balance of the proceeds, after satisfying a lien of the landlord on the furniture, fixtures, etc., and of a bank on the leasehold. In re Benz (1914) 218 Fed. 50, 134 C. C. A. 26. Land which the bankrupt holds upon an implied trust for another is not an asset of his estate, although no declaration of trust has been made or recorded. Low v. Welch (1885) 139 Mass. 33, 29 N. E. 216. Compare Putnam v. Southworth (1908) 197 Mass. 270, 83 N. E. 887. Although one who has given a bond to convey becomes, in equity, a trustee for the purchaser, yet if he has not received the whole of the purchase money, he is not a mere naked trustee, and his interest in the property will pass to his trustee in bankruptcy. Swepson v. Rouse (1871) 65 N. C. 34, 6 Am. Rep. 735. The bankruptcy of a vendor under a parol contract of sale, followed by the exclusive possession by the purchaser for ten years under a claim of right under the contract, does not give the trustee the rights of a judgment creditor who has levied without notice, but he will be compelled to convey to the purchaser. In re Snelling (D. C. 1912) 202 Fed. 259.

58. —— **Claims to, and identification of, trust funds.**—If trust funds have been intermingled with the general funds of the trustee so as to render their identification impossible, still a court of bankruptcy will follow them and decree restitution to the cestui que trust, if the unlawful appropriation of them resulted in increasing the assets of the bankrupt as they come into his trustee's possession, as where the trust money is mingled with the bankrupt's own by being deposited in his name in bank, but the amount of the deposit at all times equals or exceeds the amount of the trust fund. In re M. E. Dunn & Co. (D. C. 1912) 193 Fed. 212, 28 Am. Bankr. Rep. 127; In re Royea's Estate (D. C. 1906) 143 Fed. 182, 16 Am. Bankr. Rep. 141; In re Woods & Malone (D. C. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615; In re A. O. Brown & Co. (D. C. 1911) 189 Fed. 432; In re City Bank of Dowagiac (D. C. 1910) 186 Fed. 250, 25 Am. Bankr. Rep. 236; Ex parte Hobbs (D. C. 1876) 14 N. B. R. 495, Fed. Cas. No. 6,549. CONTRA, Hosmer v. Jewett (D. C. 1872) Fed. Cas. No. 6,713; Illinois Trust & Sav. Bank v. First Nat. Bank (C. C. 1883) 15 Fed. 858; In re Vetterlein (D. C. 1886) 26 Fed. 145; In re Richard (D. C. 1900) 104 Fed. 792; In re Janeway (D. C. 1870) 4 N. B. R. 100, Fed. Cas. No. 7,208. See Hotchkiss v. National City Bank (D. C. 1911) 200 Fed. 287. To charge a bankrupt estate with liability for a trust fund, it must

be clearly traced. In re Leigh (D. C. 1913) 208 Fed. 486. Persons seeking to recover trust funds in the possession of the trustee's trustee in bankruptcy must prove title, and if the identification is doubtful that doubt must be resolved in favor of the trustee in bankruptcy. Schuyler v. Littlefield (1914) 34 S. Ct. 466, 232 U. S. 707, 58 L. Ed. 806, affirming decrees In re Brown (1912) 193 Fed. 24, 113 C. C. A. 348, and In re A. O. Brown & Co. (1912) 193 Fed. 30, 113 C. C. A. 354. In order to trace an alleged trust fund into the hands of the bankrupts' trustee and recover same, it is insufficient to show that it went in a general way to swell the bankrupts' entire estate, but complainants are bound to trace the money to the trustee's possession or to show that it went into or paid for property of which the trustee acquired possession from the bankrupts. Knauth, Nachod & Kuhne v. Lovell (D. C. 1914) 212 Fed. 337.

Where a trustee has intermingled trust funds with his own and becomes bankrupt, if, before the date of the bankruptcy so much of the money on deposit is withdrawn as to leave less in bank than the amount of the trust fund, the cestui que trust cannot establish a lien on the whole or any part of the balance. In re Mulligan (D. C. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8. And if the whole of the money is withdrawn from the bank, his right to reclaim his specific fupds will not be restored by the subsequent deposit of other money obtained from other sources to the credit of the account. In re M. E. Dunn & Co. (D. C. 1912) 193 Fed. 212, 28 Am. Bankr. Rep. 127. Where the bankrupt took the trust funds and added some of his own money and placed the sum in the hands of a broker for investment in stocks, and most of it was lost, the cestui que trust cannot claim a lien on any of the stocks remaining in the hands of the broker and recovered by the trustee in bankruptcy, unless he can prove that they were bought with his money and not with that of the bankrupt. In re Mulligan (D. C. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8.

59. —— **Trust receipt to secure advances.**—Where a bank (or an individual) advances money to a merchant to enable him to buy or import a stock of goods, and the merchant executes a trust receipt, by which he agrees to hold the goods in trust for the one so advancing the funds and as the latter's property, but with liberty to sell the same in the course of trade, and binding him to pay over the proceeds of such sales as fast as received until the advances are repaid, the title to the goods, before such repayment, does not vest in the merchant in such sense that they will be assets of his estate in bankruptcy, but the cestui que trust will be entitled to reclaim the goods from the trustee in bankruptcy, or their proceeds if sold. In re Cattus (1910) 183 Fed. 733, 106 C. C. A. 171, 26 Am. Bankr. Rep. 348; Charavay & Bodvin v. York Silk Mfg. Co. (C. C. 1909) 170 Fed. 819; In re E. Reboulin Fils & Co. (D. C. 1908) 165 Fed. 245, 21 Am. Bankr. Rep. 296; In re Emerson, Marlow & Co. (1912) 199 Fed. 99, 117 C. C. A. 639, 29 Am. Bankr. Rep. 179. And the same rule is applied where, instead of an advance of cash, the goods are directly supplied to the merchant by a manufacturer or wholesaler, under the same form of trust receipt. Walter A. Wood Co. v. Eubanks (1909) 169 Fed. 929, 95 C. C. A. 273, 22 Am. Bankr. Rep. 307; Corbitt Buggy Co. v. Ricaud (1909) 169 Fed. 935, 95 C. C. A. 279, 22 Am. Bankr. Rep. 316; In re J. V. Lindsley & Co. (D. C. 1910) 185 Fed. 684, 25 Am. Bankr. Rep. 239; Webster v. Stearns (1910) 75 N. H. 451, 75 Atl. 983. But see Ungewitter v. Von Sachs (D. C. 1870) 3 N. B. R. 723, Fed. Cas. No. 14,343. On bankruptcy of importers under letters of credit, bankers furnishing credit, who were unable to trace proceeds of sales into trustee's hands, held not entitled to an equal amount from the general estate. In re K. Marks & Co. (1915) 222 Fed. 52, 137 C. C. A. 590.

60. —— **Deposits in bank.**—The relation between a bank and a depositor is simply that of debtor and creditor, and in the absence of any agreement to the contrary, deposits are not special but become the property of the bank, which does not occupy the position of a trustee, so that upon its bankruptcy, an ordinary depositor cannot claim to be repaid the amount of his balance but must take his place with all other creditors. In re Smith (D. C. 1877) 15 N. B. R. 459, Fed. Cas. No. 12,990; Bank of Republic v. Millard (1869) 10 Wall. 152, 19 L. Ed. 897; Claflin Co. v. Eason, 1 Nat. Bankr. News, 360.

The creditor claimed to have deposited 72 $20 gold pieces, as a special deposit, with the bankrupt, who was a banker. It was alleged that this money was sewed up in a belt, with the owner's name attached, and the bankrupt was directed to keep it, deliverable only to the owner or to some person specially authorized by him to receive it. The creditor petitioned to have his debt paid in full out of the general assets. The trustee refused to pay, stating that no such belt was found, and that he was not able to say whether these particular gold coins were among the gold received as part of the bankrupt's assets. It was held that the creditor could only share pro rata with the other creditors and was not entitled to payment in full. In re King, 9 N. B. R. 140.

The mere fact that money is deposited for a specific purpose, as, to pay a mortgage note when presented, does not stamp it as a trust fund, or make the

banker a fiduciary. In re Hosie (D. C. 1873) 7 N. B. R. 601, Fed. Cas. No. 6,-711. And those who deposit money in a bank after it has suspended payment and then resumed business, on the strength of an advertisement by the bank that it will keep the old and new accounts separate, are not entitled to a preference on its subsequent bankruptcy. In re Mutual Building Fund Society & Dollar Sav. Bank (D. C. 1876) Fed. Cas. No. 9,976. A creditor of a bank which collects money for him and fails to pay it over has no priority over other creditors in the bankruptcy of the bank. Bank of Commerce v. Russell (C. C. 1873) Fed. Cas. No. 884. A check or note deposited with a bank for collection, and against which the depositor is not allowed to draw until payment, does not become the property of the bank, and may be reclaimed from its trustee in bankruptcy. In re Havens (D. C. 1875) Fed. Cas. No. 6,230. But not so where the note or check is at once passed to the credit of the depositor's general account, especially if the account was then overdrawn. In re Bank of Madison (D. C. 1874) Fed. Cas. No. 890. Where one bank agrees to become the agent of another, for clearing house purposes, and in that capacity agrees to pay all the checks of the latter which come to it through the clearing house, and in pursuance of this arrangement the latter bank sends funds to the former from time to time, which are passed to its credit but not kept separate, the relation of the two banks is simply that of debtor and creditor, and the funds cannot be considered as clothed with a trust, but will, on failure of the bank receiving them, pass to its trustee. Phelan v. Iron Mountain Bank (C. C. 1877) Fed. Cas. No. 11,069.

61. Property held by bankrupt as agent or bailee.—Property in the possession of a bankrupt, which he holds only as agent or bailee for another, does not pass to the trustee in bankruptcy. L. C. Smith & Bro. Typewriter Co. v. Alleman (1912) 199 Fed. 1, 117 C. C. A. 577, 28 Am. Bankr. Rep. 699; In re Marx Tailoring Co. (D. C. 1912) 196 Fed. 243, 28 Am. Bankr. Rep. 147; In re Wright-Dana Hardware Co. (C. C. A. 1914) 211 Fed. 908. This rule applies to money received by an attorney for his client, and which he kept separate and distinct from his own funds. Schoolfield's Adm'r v. Rudd (1848) 9 B. Mon. (Ky.) 291. And to bonds or stocks or other securities in the hands of a broker for sale on account of his customer, or the proceeds of such sales if capable of identification. Hamilton v. National Loan Bank (C. C. 1875) Fed. Cas. No. 5,987; Voight v. Lewis (C. C. 1876) Fed. Cas. No. 16,-989. And to raw material or unfinished products placed in the hands of the bankrupt for manufacture or completion or for repairs. In re Susquehanna Roofing Co. (D. C. 1909) 173 Fed. 150, 23 Am. Bankr. Rep. 5; Safford v. Burgess (C. C. 1877) 16 N. B. R. 402, Fed. Cas. No. 12,213; In re Oberhoffer (D. C. 1878) 17 N. B. R. 546, Fed. Cas. No. 10,396; Stow v. Yarwood (1858) 20 Ill. 497. But see In re Sassman (D. C. 1909) 167 Fed. 419, 21 Am. Bankr. Rep. 893; Chisholm v. Eagle Ore Sampling Co. (1906) 144 Fed. 670, 75 C. C. A. 472, 16 Am. Bankr. Rep. 423. Compare In re MacDonald (D. C. 1905) 138 Fed. 463, 14 Am. Bankr. Rep. 797. This rule applies also to grain stored with a warehouseman, provided it is kept separate or in such a manner as to be capable of identification or separation. Adams v. Meyers (D. C. 1870) Fed. Cas. No. 62. And a right of action upon a contract made by the bankrupt in his own name, but as agent for an undisclosed principal, in which the bankrupt has no beneficial interest, does not vest in his trustee. Rhoades v. Blackiston (1871) 106 Mass. 334. Where an agent agrees to be liable to his principal for any damage by fire to the latter's property in his hands, the money due from an insurance company to the agent on account of loss under its policy, is not a trust fund for the benefit of the principal, but a debt due to the agent, which becomes a part of his general estate in bankruptcy. David Bradley Co. v. Brown (1907) 78 Neb. 836, 112 N. W. 331, 13 L. R. A. (N. S.) 152, 126 Am. St. Rep. 647.

62. —— Goods consigned to bankrupt for sale.—A contract by which goods are consigned to a factor or agent, to be sold for the account of the consignor, and to remain his property until sold, the agent to account for the proceeds of sales, is a valid contract, and constitutes a bailment and not a conditional sale, and, on the bankruptcy of the factor or agent, the principal is entitled to reclaim from the trustee in bankruptcy all of the goods remaining unsold and the proceeds of any sold by the trustee. General Electric Co. v. Brower (1915) 221 Fed. 597, 137 C. C. A. 321; In re Reynolds (D. C. 1912) 203 Fed. 162; In re Chalmers (D. C. 1913) 206 Fed. 143; In re Caldwell Machinery Co. (D. C. 1914) 215 Fed. 428; Thomas v. Field-Brundage Co. (C. C. A. 1914) 215 Fed. 891; In re Reeves (D. C. 1915) 227 Fed. 711; In re National Home & Hotel Supply Co. (D. C. 1915) 226 Fed. 840; In re Marx Tailoring Co. (D. C. 1912) 196 Fed. 243, 28 Am. Bankr. Rep. 147; In re Smith (D. C. 1911) 192 Fed. 574, 27 Am. Bankr. Rep. 647; In re Monongahela Distillery Co. (D. C. 1910) 186 Fed. 220; In re Fabian (D. C. 1907) 151 Fed. 949, 18 Am. Bankr. Rep. 488; In re Smith & Nixon Piano Co. (1906) 149 Fed. 111, 79 C. C. A. 53, 17 Am. Bankr. Rep. 636; Franklin v. Stoughton Wagon Co. (1909) 168 Fed. 857, 94 C. C. A. 269, 22 Am. Bankr. Rep. 63; Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory (1909) 171

Fed. 375, 96 C. C. A. 331, 22 Am. Bankr. Rep. 740; In re Galt (1903) 120 Fed. 64, 56 C. C. A. 470, 13 Am. Bankr. Rep. 575; In re Pierce (C. C. A. 1907) 157 Fed. 757, 19 Am. Bankr. Rep. 664; In re Bailey (D. C. 1910) 176 Fed. 628, 23 Am. Bankr. Rep. 876; Price v. Ralston (Pa. 1790) 2 Dall. 60, 1 L. Ed. 289, 1 Am. Dec. 260. The rule is otherwise if such a contract of consignment for sale is made fraudulent and void as to creditors by any provision of the local statute. Gallaspy v. International Harvester Co. (Miss. 1915) 67 South. 904; Chesapeake Shoe Co. v. Seldner (1903) 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466.

63. —— **Proceeds of goods already sold.**—Where goods are consigned to a factor or agent for sale, who afterwards becomes bankrupt, the consignor is entitled to the possession and benefit of any notes, checks, or specific uncollected debts for goods of his sold prior to the bankruptcy. In re McGehee (D. C. 1909) 166 Fed. 928, 21 Am. Bankr. Rep. 656; Hutchinson v. Reed (N. Y. 1840) 1 Hoff. Ch. 316; In re Taft (1904) 133 Fed. 511, 66 C. C. A. 385, 13 Am. Bankr. Rep. 417. And to the cash proceeds of any sale which can be traced and specifically distinguished from the general mass of the agent's property. In re Bank of Madison (D. C. 1874) Fed. Cas. No. 890; Nutter v. Wheeler (D. C. 1874) Fed. Cas. No. 10,384. If the proceeds of such sales of the principal's goods have swelled the funds coming to the trustee in bankruptcy, and such funds have at all times equalled or exceeded the amount due to the principal, equity will follow the goods into their proceeds and decree his reimbursement. In re Northrup (D. C. 1907) 152 Fed. 763, 18 Am. Bankr. Rep. 335; In re Kurtz (D. C. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129. Proceeds of flour belonging to claimants and sold by the bankrupts on commission held not recoverable as a preferred claim from the bankrupts' estate, where the money was entirely dissipated in paying the bankrupts' debts and running expenses before adjudication. In re Larkin & Metcalf (D. C. 1912) 202 Fed. 572.

64. —— **Transaction as disguise for sale on credit.**—Where the transaction is really a sale of goods on credit to the bankrupt, but the device of a consignment of the goods to the bankrupt as an agent or factor is resorted to for the purpose of protecting the seller in case of the buyer's bankruptcy, the seller will not be allowed to reclaim goods unsold or the proceeds of any sales. In re Cozatsky (D. C. 1914) 216 Fed. 920; In re Carpenter (D. C. 1903) 125 Fed. 831, 11 Am. Bankr. Rep. 147; In re Rabenau (D. C. 1902) 118 Fed. 471, 9 Am. Bankr. Rep. 180; In re Landsberger (D. C. 1910) 177 Fed. 443, 24 Am. Bankr. Rep. 107; In re Linforth (C. C. 1877) 16 N. B. R. 435, Fed. Cas. No. 8,369; In re A. Gaglione & Son (D. C. 1912) 200 Fed. 81, 28 Am. Bankr. Rep. 694.

To make out a case of agency contract for sale, it must appear that the goods were at all times subject to the owner's control, both as to the selling price and the manner in which the goods should be sold, that there was a strict accounting between the bankrupt and the owner at the periods called for in the contract, giving the names of purchasers and all other details of sales, and, if sales were made otherwise than for cash, that the notes and accounts had either been forwarded to the owner or accounted for by the bankrupt, and held subject to the owner's orders, to be forwarded on demand. In re Agnew (D. C. 1909) 178 Fed. 478, 23 Am. Bankr. Rep. 360. Where the consignee is at liberty to sell the goods at any price and on any terms he pleases, accounting at a fixed price to the consignor, and is to pay taxes and insurance and is responsible for the loss of the goods, and is to pay for such as remain unsold at a fixed time, he is not an agent or factor, but the contract is one of conditional sale. In re Rabenau (D. C. 1902) 118 Fed. 471, 9 Am. Bankr. Rep. 180; In re Wells (D. C. 1905) 140 Fed. 752, 15 Am. Bankr. Rep. 419. If the contract contains no provisions for commissions on sales, nor for the return of goods under any circumstances, and they are billed as sold, it is a sale on credit and not a consignment for sale. In re Martin-Vernon Music Co. (D. C. 1904) 132 Fed. 983, 13 Am. Bankr. Rep. 276. If the consignee is made liable to buy and pay for all of the goods which may remain unsold at a given time, it is a sale and not a contract of factorage. Parlett v. Blake (1911) 188 Fed. 200, 110 C. C. A. 72, 26 Am. Bankr. Rep. 25. An agreement between woolen manufacturers and a corporation representing a firm of dealers in woolens held a bailment in the nature of a consignment arrangement with the net proceeds to be accounted for by the consignor and with a right to return the unsold goods, which agreement is good as against creditors in the event of the bankruptcy of the firm. Ludvigh v. American Woolen Co. of New York (1913) 34 Sup. Ct. 161, 231 U. S. 522, 58 L. Ed. 345, affirming decree (1911) 188 Fed. 30, 110 C. C. A. 180. Where flour was shipped to the bankrupts for sale on commission, and they never promised to pay or assume any personal responsibility therefor, the flour before sale and the proceeds thereafter remained the property of the claimants. In re Larkin & Metcalf (D. C. 1912) 202 Fed. 572. Where a merchant is charged a fixed price for the goods sent to him, including the cases and bottles in which they are contained, but allowed a "rebate" for empty cases and bottles re-

turned, the contract is not one of bailment as to the cases and bottles, but of sale and return, and such as remain in his hands at the time of his bankruptcy are assets of his estate. In re Allen (D. C. 1910) 183 Fed. 172, 25 Am. Bankr. Rep. 722.

65. Money or collateral in hands of bankrupt as stockbroker.—Where a stockbroker has in his possession, at the time of his bankruptcy, certificates of stock placed in his hands by a customer but not yet sold, or stock bought for a customer but not yet delivered to him, he holds the same as an agent or bailee, and the stock may be reclaimed by the owner from his trustee in bankruptcy. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889; In re James Carothers & Co. (D. C. 1910) 182 Fed. 501. And if the bankrupt had a larger quantity of that particular stock on hand at the time of his failure, it will be presumed that part of it was the stock belonging to such customer. In re Graff (D. C. 1902) 117 Fed. 343, 8 Am. Bankr. Rep. 744; Gorman v. Littlefield (1908) 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, 30 Am. Bankr. Rep. 266. And see Richardson v. Shaw (1908) 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717; Sexton v. Kessler & Co. (1912) 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, 28 Am. Bankr. Rep. 85. Where stockbrokers who had purchased stock for customers and who had charged themselves on their books with the stock as "long" became bankrupts, each customer for that kind of stock was entitled to a pro rata share of the stock in the brokers' possession at the time of the bankruptcy. In re H. B. Hollins & Co. (D. C. 1914) 212 Fed. 317.

But if a broker has converted stock purchased for a customer, other stock of the same kind, found in his possession at the time of his bankruptcy and bought by him after the conversion cannot be claimed by the customer, to the exclusion of general creditors, unless he can show that the proceeds of his own converted stock went to its purchase. In re Brown (1911) 184 Fed. 454, 106 C. C. A. 536. Compare In re A. O. Brown & Co. (D. C. 1909) 171 Fed. 254, 22 Am. Bankr. Rep. 659. Or unless there has been some express act on the part of the broker setting it apart for him. In re A. O. Brown & Co. (D. C. 1911) 189 Fed. 440. Where a bankrupt stockbroker did not have in his possession free and clear stock for all customers, none of them could reclaim any part of the stock on hand or any equity in such loans as had among their collateral the remaining stock. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889; In re Hollins (1914) 219 Fed. 544, 135 C. C. A. 312. Customers of bankrupt stockbrokers were only general creditors, except so far as they might be able to trace and identify the stock purchased for them by the brokers. In re Hollins (1914) 219 Fed. 544, 135 C. C. A. 312. A customer of a bankrupt stockbroker, unable to trace his stock by certificate number into a loan, held not entitled to reclaim any stock. In re J. F. Pierson, Jr., & Co. (D. C. 1915) 225 Fed. 889.

A deposit of securities with a broker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge and does not create the relation of debtor and creditor, and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee. In re Jacob Berry & Co. (1906) 149 Fed. 176, 79 C. C. A. 124, 17 Am. Bankr. Rep. 467, affirmed Thomas v. Taggart (1908) 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710; United Nat. Bank v. Tappan (1911) 33 R. I. 1, 79 Atl. 946; In re T. A. McIntyre & Co. (C. C. A. 1910) 181 Fed. 955, 24 Am. Bankr. Rep. 626. And the court should not require him to make good losses for which he would have been liable, if the stocks pretended to have been bought for him had really been bought and carried, as a condition to his recovery of the securities deposited as collateral. In re Ennis (1901) 187 Fed. 726, 109 C. C. A. 474. But a claimant who remitted money to brokers to purchase stocks, which were bought and paid for by the brokers but afterwards converted to their own use, cannot rescind the whole transaction and recover the money so remitted, from the trustee in bankruptcy of the brokers, as a trust fund, although he may follow the proceeds of the stocks, if sold by the brokers, and if such proceeds can be traced into the hands of the trustee. In re Brown (1910) 175 Fed. 769, 99 C. C. A. 345, 23 Am. Bankr. Rep. 423; In re A. O. Brown & Co. (D. C. 1910) 185 Fed. 972. Where the customer does not remit to the broker the entire price of the stock to be bought for him, but a margin, and the broker buys and carries the stock, the latter holds it as a pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the general creditors. Kean v. Dickinson (1907) 152 Fed. 1022, 82 C. C. A. 667; In re Bolling (D. C. 1906) 147 Fed. 786, 17 Am. Bankr. Rep. 399.

Where a broker, having in his possession stock bought for a customer and paid for, or stock placed in his hands as security for a customer's ac-

count, but without authority to use or hypothecate the same, pledges it as collateral security for his own debt to a third person, the pledgee has a lien on the stock for repayment of his advances, but if his debt is satisfied from other sources and the stock surrendered to the broker's trustee in bankruptcy, the customer may then reclaim it, or if the stock remains in the hands of the pledgee, the customer may be subrogated to the rights of the bankrupt and so recover it. In re T. A. McIntyre & Co. (1911) 189 Fed. 46, 110 C. C. A. 610, 26 Am. Bankr. Rep. 771; In re Ennis (1911) 187 Fed. 720, 109 C. C. A. 468; In re A. O. Brown & Co. (D. C. 1910) 183 Fed. 861, 25 Am. Bankr. Rep. 800; In re Meadows, Williams & Co. (D. C. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124. But the claimant must be able to trace his own stock, or to show, at least with a reasonable degree of certainty, that some portion of the stock in the trustee's hands is the identical stock which belonged to him and which the bankrupt wrongfully hypothecated, or represents its proceeds. In re Ennis (1911) 187 Fed. 728, 109 C. C. A. 476; In re T. A. McIntyre & Co. (C. C. A. 1910) 181 Fed. 960, 25 Am. Bankr. Rep. 93.

Where the broker has sold his customer's securities, or they have been sold by a third person to whom he pledged them, the customer may still claim full reimbursement out of the proceeds if he can trace his money into a particular fund, and this can be done—on the doctrine of the commingling of funds—if he can show that the bankrupt broker's balance in bank, or the amount due to him from the party to whom the customer's stock was sold or pledged, has been, at all times since the conversion, equal to or greater than the amount realized on the sale of the customer's securities. In re Swift (D. C. 1901) 108 Fed. 212; In re Graff (D. C. 1902) 117 Fed. 343, 8 Am. Bankr. Rep. 744; In re A. O. Brown & Co. (D. C. 1911) 189 Fed. 432; In re Brown (C. C. A. 1910) 185 Fed. 766; In re James Carothers & Co. (D. C. 1910) 182 Fed. 501. Where a customer directed the broker to sell certain stock on his account, and, on being advised that the sale had been made, delivered to the broker his certificate for the stock and received in exchange a check which proved to be worthless, and the broker's bankruptcy followed, and it was shown that the broker had made a sale of so many shares of the stock as directed by his customer, but had delivered stock of his own and received payment, held, that the customer had the right to recover the proceeds of his stock from the bankrupt's trustee, if they had not been dissipated, and if they had been, to rescind the delivery and reclaim his stock. In re A. O. Brown & Co. (D. C. 1911) 189 Fed. 442.

66. Property held under conditional sale.—Except in so far as the matter may be regulated by a local statute, the rule is that property in the possession of a bankrupt under a contract of conditional sale, the condition not having been performed (as, where he bought under a written contract stipulating that the title should remain in the vendor until the goods were fully paid for), does not vest in the trustee in bankruptcy, and he is not entitled to hold it as against the unpaid vendor. In re Remsen Mfg. Co. (D. C. 1915) 227 Fed. 207; Breakstone v. Buffalo Foundry & Machine Co. (1915) 167 App. Div. 62, 152 N. Y. Supp. 394; In re Wegman Piano Co. (D. C. 1915) 227 Fed. 128; In re White's Express Co. (C. C. A. 1914) 215 Fed. 894; Southern Hardware & Supply Co. v. Clark (1912) 201 Fed. 1, 119 C. C. A. 339; Davis v. Crompton (1907) 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53; In re Regealed Ice Co. (D. C. 1911) 191 Fed. 931; In re Gartman (D. C. 1911) 186 Fed. 349; In re Forse (D. C. 1910) 182 Fed. 212, 25 Am. Bankr. Rep. 134; In re C. K. Hutchins Co. (D. C. 1910) 179 Fed. 864, 24 Am. Bankr. Rep. 647; In re Pittsburgh Industrial Iron Works (D. C. 1910) 179 Fed. 151, 25 Am. Bankr. Rep. 221; In re Atlanta News Pub. Co. (D. C. 1907) 160 Fed. 519, 20 Am. Bankr. Rep. 193; Sprague Canning Mach. Co. v. Fuller (1908) 158 Fed. 588, 86 C. C. A. 46, 20 Am. Bankr. Rep. 157; Dunlop v. Mercer (C. C. A. 1907) 156 Fed. 545, 19 Am. Bankr. Rep. 361; In re McKay, 1 Nat. Bankr. News, 133; In re Gregg (D. C. 1868) 3 N. B. R. 529, Fed. Cas. No. 5,796; In re Pusey (D. C. 1871) 6 N. B. R. 40, Fed. Cas. No. 11,477; Ex parte General Assignee (D. C. 1842) Fed. Cas. No. 5,306; Rogers v. Whitehouse (1880) 71 Me. 222; Andre v. Murray (Ind. 1913) 101 N. E. 81. But compare In re Garcewich (1902) 115 Fed. 87, 53 C. C. A. 510, 8 Am. Bankr. Rep. 149; In re Galt (D. C. 1903) 120 Fed. 443, 9 Am. Bankr. Rep. 682. And see Ex parte Flannagans (D. C. 1875) 12 N. B. R. 230, Fed. Cas. No. 4,855. Modification of the terms of payment for a machine sold under a conditional sale contract, may not be a waiver of the reservation of title, so as to prevent the seller, on the buyer's bankruptcy, from enforcing the condition. Colonial Trust Co. v. Thorpe (1912) 194 Fed. 390, 114 C. C. A. 308, 27 Am. Bankr. Rep. 451. A seller of property to a bankrupt by a contract of conditional sale, which provided that it should be insured for his benefit, will be entitled to the proceeds of the insurance where the property was burned within four months prior to the bankruptcy, although the bankrupt insured in his own name. In re Zitron (D. C. 1913) 203 Fed. 79, 30 Am. Bankr. Rep. 172. The purchase by a bankrupt of a

plant containing two heavy drop forges held by its vendor under a duly recorded conditional sale contract providing that the forges should remain personalty and the property of the seller until paid for, and the substitution of bankrupt for its vendor by means of a similar contract, held not to change the status of the property as between the seller and the bankrupt and its creditors. In re Superior Drop Forge & Mfg Co. (D. C. 1913) 208 Fed. 813.

If the bankrupt, receiving property under a contract of conditional sale of it to him, has paid a part of the price, the vendor has a good and valid lien upon it for the unpaid balance of the purchase money, which the trustee in bankruptcy must recognize. Southern Hardware & Supply Co. v. Clark (C. C. A. 1912) 201 Fed. 1. And if it is likely to result in benefit to the estate, the trustee may pay such balance, and thereby become invested with full title to the property. In re Lyon (D. C. 1872) 7 N. B. R. 182, Fed. Cas. No. 8,644. Or the trustee may be ordered to sell the property at public auction, and out of the proceeds pay to the vendor the balance due him on the contract. In re Azule Natural Seltzer Water Co. (1900) 2 Nat. Bankr. News, 639; Allen v. Whittemore (D. C. 1876) 14 N. B. R. 189, Fed. Cas. No. 241. If the property in question is valuable in the use (such as machinery) and was to have been paid for in monthly installments called "rent," the vendor cannot recover such contract rentals for the time the property remained in the possession of the trustee pending the determination of his rights, but if the trustee used the property without his consent, he may recover the reasonable value of such use. In re Daterson Pub. Co. (1911) 188 Fed. 64, 110 C. C. A. 134, 26 Am. Bankr. Rep. 582. See Haskell v. Merrill (1901) 179 Mass. 120, 60 N. E. 485.

The preliminary question whether the contract between the vendor and the bankrupt was one of conditional sale, absolute sale, sale and return, or lease or bailment, is a question of local law, and is to be determined in accordance with the decisions of the highest court of the state. Mishawaka Woolen Mfg. Co. v. Westveer (1911) 191 Fed. 465, 112 C. C. A. 109, 27 Am. Bankr. Rep. 345. citing Thompson v. Fairbanks (1905) 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; York Mfg. Co. v. Cassell (1906) 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Bryant v. Swofford (1909) 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111; Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re E. M. Newton & Co. (1907) 153 Fed. 841, 83 C. C. A. 23, 18 Am. Bankr. Rep. 567; Bradley, Alderson & Co. v. McAfee (D. C. 1906) 149 Fed. 254, 17 Am. Bankr. Rep. 495; In re Butterwick (D. C. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536. This is also true of the question of the validity of the contract, assuming it to be one of conditional sale. First Nat. Bank v. Guarantee Title & Trust Co. (1910) 178 Fed. 187, 101 C. C. A. 507, 24 Am. Bankr. Rep. 330; Davis v. Crompton (1907) 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53; In re Great Western Mfg. Co. (1907) 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259; In re Lutz (D. C. 1912) 197 Fed. 492, 28 Am. Bankr. Rep. 649; In re Osborn (C. C. A. 1912) 196 Fed. 257; In re Nelson (D. C. 1911) 191 Fed. 233, 27 Am. Bankr. Rep. 272; In re Dunn Hardware & Furniture Co. (D. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147. Where a conditional sale contract provided for the delivery of goods in the Indian Territory, there being no local law therein inhibiting such contracts, the question whether the fact that they were furnished to the buyer for resale in the usual course of business invalidated the contract must be tested in bankruptcy proceedings against the buyer in accordance with the general law. In re Gray (D. C. 1908) 170 Fed. 638, 21 Am. Bankr. Rep. 375. Where a contract of conditional sale of personal property is made in one state, but provides for the delivery of the chattels in another state and their use there by the purchaser, it is to be governed, in a contest between the vendor and the trustee in bankruptcy of the vendee, by the law of the latter state, not the former. In re Legg (D. C. 1899) 96 Fed. 326; In re Gehris-Herbine Co. (D. C. 1911) 188 Fed. 502, 26 Am. Bankr. Rep. 470. If the contract was originally one of conditional sale, but the local law would make the reservation of title in the vendor ineffective as against creditors, it cannot be turned into a contract of bailment, or of lease, or of factorage, after the buyer has become insolvent or especially after he has been adjudged bankrupt. In re Poore (D. C. 1905) 140 Fed. 786, 15 Am. Bankr. Rep. 407; In re Martin-Vernon Music Co. (D. C. 1904) 132 Fed. 983, 13 Am. Bankr. Rep. 276; In re Rinker (D. C. 1909) 174 Fed. 490, 23 Am. Bankr. Rep. 62; In re Tweed (D. C. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648.

67. —— **Effect of state law as to filing or recording.**—Where the law of the of the state requires a contract of conditional sale to be cast in the form of a chattel mortgage, or to be filed or recorded, in order to be good against creditors, if the vendor complies with such a provision, it will be effective to preserve his rights as against the purchaser's trustee in bankruptcy. In re Farmers' Co-operative Co. (D. C. 1913) 202 Fed. 1005, 30 Am. Bankr. Rep. 187;

Woods v. Brunswick-Balke-Collender Co. (1911) 190 Fed. 935, 111 C. C. A. 569, 27 Am. Bankr. Rep. 172; In re Canuet Lumber Co. (D. C. 1910) 178 Fed. 340.

Prior to the amendatory act of 1910, many of the decisions held that a contract of conditional sale, which was void as to creditors for want of filing or recording under the laws of the state, would be equally void as against the purchaser's trustee in bankruptcy, so that the vendor could not reclaim the property. Augusta Grocery Co. v. Southern Moline Plow Co. (1914) 213 Fed. 786, 130 C. C. A. 444; In re Fitzhugh Hall Amusement Co. (D. C. 1915) 228 Fed. 169; In re M. L. B. Sturkey Co. (D. C. 1915) 224 Fed. 251; In re National Home & Hotel Supply Co. (D. C. 1915) 226 Fed. 840; Liquid Carbonic Co. v. Quick (1910) 182 Fed. 603, 105 C. C. A. 141, 25 Am. Bankr. Rep. 394; In re Faulkner (D. C. 1910) 181 Fed. 981, 25 Am. Bankr. Rep. 416; In re G. & K. Trunk Co. (D. C. 1910) 176 Fed. 1007, 23 Am. Bankr. Rep. 914; In re Penny & Anderson (D. C. 1909) 176 Fed. 141, 23 Am. Bankr. Rep. 115; In re Rinker (D. C. 1909) 174 Fed. 490, 23 Am. Bankr. Rep. 62; Chilberg v. Smith (1909) 174 Fed. 805, 98 C. C. A. 513; McElvain v. Hardesty (1909) 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; In re Burke (D. C. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; In re Fish Bros. Wagon Co. (C. C. A. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149; In re Burt (D. C. 1907) 155 Fed. 267, 19 Am. Bankr. Rep. 123; In re Perkins (D. C. 1907) 155 Fed. 237, 19 Am. Bankr. Rep. 134; In re George O. Hassam & Son (D. C. 1907) 153 Fed. 932, 18 Am. Bankr. Rep. 745; In re Franklin Lumber Co. (D. C. 1906) 147 Fed. 852, 17 Am. Bankr. Rep. 443; In re Tice (D. C. 1905) 139 Fed. 52, 15 Am. Bankr. Rep. 97; In re Poore (D. C. 1905) 139 Fed. 862, 15 Am. Bankr. Rep. 174; In re Ducker (1905) 134 Fed. 43, 67 C. C. A. 117, 13 Am. Bankr. Rep. 760; In re Smith & Shuck (D. C. 1904) 132 Fed. 301, 13 Am. Bankr. Rep. 103; In re Tweed (D. C. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; In re Carpenter (D. C. 1903) 125 Fed. 831, 11 Am. Bankr. Rep. 147; In re Pekin Plow Co. (1901) 112 Fed. 308, 50 C. C. A. 257, 7 Am. Bankr. Rep. 369; In re Howland (D. C. 1901) 109 Fed. 869, 6 Am. Bankr. Rep. 495; In re Legg (D. C. 1899) 96 Fed. 326, 2 Am. Bankr. Rep. 805; Press Post Printing Co. v. Landon Printing & Pub. Co., 2 Nat. Bankr. News, 774; Logan v. Nebraska Moline Plow Co. (1902) 3 Neb. (Unof.) 516, 92 N. W. 129; McFarlan Carriage Co. v. Wells (1903) 99 Mo. App. 641, 74 S. W. 878. Under Rem. & Bal. Code Wash. § 3670, a memorandum of conditional sale containing printed name of seller, with nothing to show its adoption as signature of the seller, held not to reserve title in him as against buyer's trustee in bankruptcy. In re Frankel (D. C. 1915) 225 Fed. 129. But other decisions held that if the contract was free from actual fraud and good as between the parties, it would be equally good and binding upon the purchaser's trustee in bankruptcy, although not acknowledged or recorded as required by the state law, and whatever might have been the rights of creditors outside of the bankruptcy proceedings, for the reason that a trustee in bankruptcy has no higher or stronger rights in property in the bankrupt's possession than the bankrupt himself. In re Brown Wagon Co. (D. C. 1915) 224 Fed. 266; Jennings v. Swartz (1915) 86 Wash. 202, 149 Pac. 947; Bryant v. Swofford Bros. Dry Goods Co. (1909) 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111; Nauman Co. v. Bradshaw (1912) 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565; In re Anson Mercantile Co. (D. C. 1911) 203 Fed. 871; In re Ferguson Contracting Co. (D. C. 1910) 183 Fed. 880; Crucible Steel Co. of America v. Holt (1909) 174 Fed. 127, 98 C. C. A. 101, 23 Am. Bankr. Rep. 302; York Mfg. Co. v. Brewster (1909) 174 Fed. 566, 98 C. C. A. 348, 23 Am. Bankr. Rep. 474; John Deere Plow Co. v. Anderson (1909) 174 Fed. 815, 98 C. C. A. 523, 23 Am. Bankr. Rep. 480; In re Hager (D. C. 1909) 166 Fed. 972; In re Pickens Mfg. Co. (D. C. 1905) 166 Fed. 585; In re Cavagnaro (D. C. 1906) 143 Fed. 668, 16 Am. Bankr. Rep. 320; Mishawaka Woolen Mfg. Co. v. Smith (D. C. 1908) 158 Fed. 885, 20 Am. Bankr. Rep. 317; In re Pierce (C. C. A. 1907) 157 Fed. 755, 19 Am. Bankr. Rep. 662; In re Kellogg (1902) 118 Fed. 1017, 56 C. C. A. 383; In re Hinsdale (D. C. 1901) 111 Fed. 502, 7 Am. Bankr. Rep. 85; In re Sewell (D. C.) 111 Fed. 791, 7 Am. Bankr. Rep. 133; Buckwalter Stove Co. v. Stratton (1907) 118 App. Div. 915, 103 N. Y. Supp. 118; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co. (1911) 152 Mo. App. 401, 133 S. W. 412; John Deere Plow Co. v. Edgar Farmer Store Co. (Wis. 1913) 143 N. W. 194. Where the state law provides for the filing of contracts of conditional sale, but makes an unfiled contract of that kind void only as to those creditors who have fastened upon the property by some specific lien, an adjudication in bankruptcy is not the equivalent of a judgment or attachment, so as to operate as a lien in favor of the trustee as against the conditional vendor of property sold to the bankrupt, because of failure to comply with the state law. York Mfg. Co. v. Cassell (1906) 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Hewit v. Berlin Machine Works (1904) 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed.

986, 11 Am. Bankr. Rep. 709. Compare In re Press-Post Printing Co. (D. C. 1901) 134 Fed. 998, 13 Am. Bankr. Rep. 797; Chesapeake Shoe Co. v. Seldner (1903) 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466; In re Fraizer (D. C. 1902) 117 Fed. 746, 9 Am. Bankr. Rep. 21. But this does not apply where actual fraud entered into the arrangement between the parties or where the transaction was merely colorable. In re Fitzgerald (D. C. 1911) 188 Fed. 763, 26 Am. Bankr. Rep. 104.

68. —— **Effect of amendment of 1910.** —The 1910 amendment to the bankruptcy act, giving the trustee in bankruptcy the rights of a creditor armed with a lien, was intended to protect the general creditors of a bankrupt against holders of unrecorded mortgages and conditional sales, and since its passage the right of the trustee in bankruptcy to hold and administer the property held by the bankrupt under an unrecorded contract of conditional sale is superior to the right of the seller. Potter Mfg. Co. v. Arthur (1915) 220 Fed. 843, 136 C. C. A. 589; In re Kreuger (D. C. 1912) 199 Fed. 367, 27 Am. Bankr. Rep. 623; In re Dancy Hardware & Furniture Co. (D. C. 1912) 198 Fed. 336, 28 Am. Bankr. Rep. 444; In re Farmers' Supply Co. (D. C. 1912) 196 Fed. 990, 28 Am. Bankr. Rep. 535; In re Nelson (D. C. 1911) 191 Fed. 233, 27 Am. Bankr. Rep. 272; In re J. S. Appel Suit & Cloak Co. (D. C. 1912) 198 Fed. 322, 28 Am. Bankr. Rep. 818; In re Hartdagen (D. C. 1911) 189 Fed. 546, 26 Am. Bankr. Rep. 532; In re Calhoun Supply Co. (D. C. 1911) 189 Fed. 537, 26 Am. Bankr. Rep. 528; In re Gehris-Herbine Co. (D. C. 1911) 188 Fed. 502, 26 Am. Bankr. Rep. 470; In re Franklin Lumber Co. (D. C. 1911) 187 Fed. 281, 26 Am. Bankr. Rep. 37; In re Williamsburg Knitting Mill (D. C. 1911) 190 Fed. 871, 27 Am. Bankr. Rep. 178. See In re Rutland-Perry Co. (D. C. 1913) 205 Fed. 200, 30 Am. Bankr. Rep. 383. The amendatory act confers on the trustee an absolute right to attack the unrecorded lien of a conditional seller, without reference to whether the trustee represents creditors who have in fact acquired liens by legal or equitable proceedings against the bankrupt. In re Bazemore (D. C. 1911) 189 Fed. 236, 26 Am. Bankr. Rep. 494. But property delivered to a bankrupt under an unrecorded contract of conditional sale, but retaken by the seller prior to the bankruptcy, though within four months, is not recoverable by the trustee, since it never became the bankrupt's property. Hart v. Emmerson-Brantingham Co. (D. C. 1913) 203 Fed. 60, 30 Am. Bankr. Rep. 218.

The amendatory act of 1910 was not retroactive and did not enable the trustee to invalidate a contract of conditional sale made prior to its passage and otherwise valid. Arctic Ice Mach. Co. v. Armstrong County Trust Co. (1911) 192 Fed. 114, 112 C. C. A. 458, 27 Am. Bankr. Rep. 562; In re Schneider (D. C. 1913) 203 Fed. 589, 29 Am. Bankr. Rep. 469. Section 47a (2), as amended by Act June 25, 1910, § 8 (ante, § 9631), held not to give a trustee the right to property in possession of the bankrupt under a conditional sale contract recorded prior to the bankruptcy. In re Farmers' Co-operative Co. of Barlow, N. D. (D. C. 1913) 202 Fed. 1005. Under section 47 (ante, § 9631), giving to the trustee the rights of a judgment creditor, the lien of a bankrupt's trustee, has no priority over a claim under a contract of conditional sale executed in good faith prior to the four-months period, but recorded within such period. In re Brown Wagon Co. (D. C. 1915) 224 Fed. 266. Where a conditional sale contract did not identify the property, and there was no identification of invoices of goods sold as the goods intended to be covered, the contract was void as against the buyer's trustee in bankruptcy exercising the rights of a lien creditor under Act June 25, 1910, § 8 (ante, § 9631). Meier & Frank Co. v. Sabin (1914) 214 Fed. 231, 130 C. C. A. 605. The term "creditors," as used in Rev. St. Tex. 1895, art. 3327, relating to conditional sale contracts, having been defined to mean persons with a fixed lien, a bankrupt's trustee held not within that class prior to adjudication under Act Cong. June 25, 1910 (ante, § 9631), and hence registration of a conditional sale contract before adjudication is valid as against the buyer's trustee in bankruptcy. In re Anson Mercantile Co. (D. C. 1911) 203 Fed. 871.

The liens of execution creditors on property held by the insolvent judgment debtor under a contract of conditional sale, as they existed when the petition in bankruptcy was filed, cannot be subsequently destroyed so as to prevent the court of bankruptcy from preserving them for the benefit of the estate, by the act of the conditional vendor in retaking the property. Rock Island Plow Co. v. Reardon (1912) 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, 27 Am. Bankr. Rep. 492.

69. **Property held under executory or option contracts of sale.**—Property delivered to the bankrupt under a contract of lease with an option to purchase it on making certain specified payments, the title meanwhile to remain in the lessor or vendor, but which has not been paid for at the time of bankruptcy, does not vest in the trustee, but may be claimed from him by the vendor, or its proceeds if sold. Colonial Trust Co. v. Thorpe (C. C.

A. 1912) 194 Fed. 390, 27 Am. Bankr. Rep. 451; In re Kay-Tee Film Exchange (D. C. 1911) 193 Fed. 140; Nylin v. American Trust & Sav. Bank (1908) 166 Fed. 276, 92 C. C. A. 194, 21 Am. Bankr. Rep. 533. If some of the payments have been made, while others are in default, and the lessor has not attempted to forfeit the contract or retake the property, the trustee in bankruptcy may tender the amount remaining due under the contract and so acquire title to the property. In re Palatable Distilled Water Co. (D. C. 1907) 154 Fed. 531, 18 Am. Bankr. Rep. 833. In determining whether contract with retail dealer, adjudged a bankrupt, was one of agency and consignment, or sale with reservation of title, the court must consider the contract intended, and the manner in which the parties carried it out. In re National Home & Hotel Supply Co. (D. C. 1915) 226 Fed. 840.

Where goods were delivered to a bankrupt on memorandum, the understanding being that, if he signified his desire to keep them within thirty days after delivery, they should be charged to him, otherwise they should be returned, the contract was one of delivery with option to purchase, and the title remained in the seller until the expiration of the buyer's option, so that, on his becoming bankrupt, the seller was entitled to a return of all such goods as had been delivered to the bankrupt within thirty days before the filing of the petition in bankruptcy. In re Schindler (D. C. 1907) 158 Fed. 458, 19 Am. Bankr. Rep. 800. But see In re Miller & Brown (D. C. 1905) 135 Fed. 868, 14 Am. Bankr. Rep. 439. On the other hand, where property is delivered to the bankrupt on the agreement that he is to put it into use and test and try it for a limited time, and that he shall have the privilege of returning it if it proves unsatisfactory, it is a sale with privilege of rescission and return, under which the title passes to the bankrupt on delivery, though subject to be divested if he should elect to return the goods, and therefore the seller cannot reclaim the goods from the trustee but simply becomes a creditor for the price. In re Landis (D. C. 1907) 151 Fed. 896, 18 Am. Bankr. Rep. 483. But compare In re Froelich Rubber Refining Co. (D. C. 1905) 139 Fed. 201, 15 Am. Bankr. Rep. 72. Where a wholesaler sends to a merchant a large assortment of goods of a certain line, and the merchant selects those which he wishes to keep and places them in his stock, but keeps the rest separate, in their original packages, and marks them to be returned, the transaction, so far as regards the goods to be returned, is not a "sale and return," but a bailment, and those goods may be reclaimed by the seller from the merchant's trustee in bankruptcy. In re Miller & Brown (D. C. 1905) 135 Fed. 871, 14 Am. Bankr. Rep. 443. The vendor is entitled to reclaim property which was to be paid for when installed, but which had not been installed or even unpacked when bankruptcy intervened, as the title had not passed from him. Pridmore v. Puffer Mfg. Co. (C. C. A. 1908) 163 Fed. 496, 20 Am. Bankr. Rep. 851. If the bankrupt wrongfully gets possession of property which was not to be delivered to him until paid for, and mingles it with his own goods of like kind, the seller will be entitled to recover from the trustee in bankruptcy the value of so much of his property as came into the trustee's hands. Erie R. Co. v. Dial (1905) 140 Fed. 689, 72 C. C. A. 183, 15 Am. Bankr. Rep. 559. But otherwise, where the goods are delivered to the purchaser to be sold by him in the usual course of his business, and the seller attempts to reserve title until payment with the right to take possession at any time, such a contract being fraudulent and void as against purchasers and creditors. In re Rasmussen's Estate (D. C. 1905) 136 Fed. 704, 13 Am. Bankr. Rep. 462. The trustee acquires no title to land, the contract for which the bankrupt has forfeited before the bankruptcy, for failure of performance on his part. Norton v. Hood (1888) 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 264.

70. Property procured by bankrupt by fraud.—If one obtains goods from another on credit, with no intention of paying for them, or at least with no reasonable expectation of being able to pay for them, and the sale was induced by his false and fraudulent representations as to his financial condition, on which the seller relied, or would not have been made but for his fraudulent concealment of his insolvency, the seller has the right to rescind the sale and recover his property, and this right is not lost by the bankruptcy of the purchaser. Though the latter has a title to the goods, and though this title passes to his trustee in bankruptcy, it is no more than a defeasible title, and if the goods have not lost their identity nor ceased to be distinguishable from others, the seller may follow them into the hands of the trustee in bankruptcy and reclaim and recover them. Donaldson v. Farwell (1876) 93 U. S. 631, 33 L. Ed. 993; Montgomery v. Bucyrus Machine Works (1875) 92 U. S. 257, 23 L. Ed. 656; In re Midland Motor Co. (1915) 224 Fed. 368, 140 C. C. A. 54; In re New York Commercial Co. (C. C. 1915) 228 Fed. 120; In re Gold (C. C. A. 1913) 210 Fed. 410; In re Watmough (D. C. 1913) 210 Fed. 539; In re Henry Siegel Co. (D. C. 1915) 223 Fed. 369; In re Selman Heating & Plumbing Co. (D. C. 1913) 203 Fed. 777; Halsey v. Diamond Distilleries Co. (1911) 191 Fed.

498, 112 C. C. A. 142, 27 Am. Bankr. Rep. 333; Bloomingdale v. Empire Rubber Mfg. Co. (D. C. 1902) 114 Fed. 1016, 8 Am. Bankr. Rep. 74; In re J. S. Patterson & Co. (D. C. 1903) 125 Fed. 562, 10 Am. Bankr. Rep. 748; In re Salmon (D. C. 1906) 145 Fed. 649, 16 Am. Bankr. Rep. 623; William Openhym & Sons v. Blake (C. C. A. 1907) 157 Fed. 536, 19 Am. Bankr. Rep. 639; Haywood Co. v. Pittsburgh Industrial Iron Works (D. C. 1908) 163 Fed. 799, 19 Am. Bankr. Rep. 780; In re McPeck (1900) 2 Nat. Bankr. News, 172; Davis v. Stewart (C. C. 1881) 8 Fed. 803; Donaldson v. Farwell (C. C. 1873) Fed. Cas. No. 3,983; Purviance v. Union Nat. Bank (C. C. 1873) 8 N. B. R. 447, Fed. Cas. No. 11,475; Goodyear Rubber Co. v. Schreiber (1902) 29 Wash. 94, 69 Pac. 648; Richardson v. Vick (1910) 125 Tenn. 532, 145 S. W. 174. The seller may recover the proceeds of the goods if they have been sold by the trustee in bankruptcy, provided the money arising from the sale of those particular goods can be distinguished from other funds in his hands. Gillespie v. J. C. Piles & Co. (1910) 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re Weil (D. C. 1901) 111 Fed. 897, 7 Am. Bankr. Rep. 90. This right of reclamation on the part of a defrauded vendor is not affected by the 1910 amendment to the bankruptcy act, giving the trustee in bankruptcy the rights and remedies of a creditor holding a lien. In re J. S. Appel Suit & Cloak Co. (D. C. 1912) 198 Fed. 322, 28 Am. Bankr. Rep. 818. Compare In re Whatley Bros. (D. C. 1912) 199 Fed. 326, 29 Am. Bankr. Rep. 64. And although an attachment levied within four months before bankruptcy is avoided by the adjudication, yet if a creditor takes this method of recovering the goods from his fraudulent vendee, and pursues his process through a long and costly litigation for several years, without interference on the part of the trustee, it will be too late for the latter to have the attachment vacated. Jacobson v. Sims (1877) 60 Ala. 185.

An unpaid seller of goods, who was induced to sell and deliver them to the bankrupt by the latter's false and fraudulent representations, and who desires to rescind the sale and reclaim the goods from the hands of the trustee in bankruptcy, must act with reasonable promptness. In re Mertens (D. C. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698. And he must sustain the burden of proving by clear and satisfactory evidence all the essential elements of his case, particularly the alleged false representation or concealment, its influence in inducing him to make the sale, and the buyer's knowledge of his own financial condition and the seller's ignorance of it. In re K. Marks & Co. (1914) 218 Fed. 453, 134 C. C. A. 253; In re Davis (D. C. 1901) 112 Fed. 294, 7 Am. Bankr. Rep. 276; In re O'Connor (D. C. 1901) 112 Fed. 666, 7 Am. Bankr. Rep. 428; In re Stewart (D. C. 1910) 178 Fed. 463, 24 Am. Bankr. Rep. 474; In re Rose (D. C. 1905) 135 Fed. 888, 14 Am. Bankr. Rep. 345; In re American Knit Goods Mfg. Co. (D. C. 1907) 155 Fed. 906, 19 Am. Bankr. Rep. 212. Where the seller of goods to a bankrupt elected to rescind for fraud, it was not bound to return to the bankrupt's trustee the amount received beyond the purchase price, which amount would have been greater than the value of the goods returned. In re Underwood & Daniel (D. C. 1914) 215 Fed. 279; In re Midland Motor Co. (1915) 224 Fed. 368, 140 C. C. A. 54. After the bankruptcy of the buyer, who had wrongfully rejected the goods, the seller cannot reconsider his previous refusal of a rescission and thereby revest the title in himself. Murphy v. John Hofman Co. (N. Y. 1915) 109 N. E. 101, reversing judgment (1913) 141 N. Y. S. 900, 157 App. Div. 88. Where a seller in one state delivered goods to a buyer in another state, title thereto, as between the seller and the trustee in bankruptcy of the buyer, is governed by the laws of the state of the buyer. In re O'Callaghan (D. C. 1914) 225 Fed. 133.

As to real estate, if the bankrupt has been the recipient of a conveyance made in fraud of the creditors of the grantor, although such a conveyance is voidable at the instance of those creditors, yet, as between the grantor and grantee (the bankrupt) it operates to pass title to the latter, and hence it gives him an estate which he must include in his schedule and which will vest in his trustee. In re O'Bannon (D. C. 1868) 2 N. B. R. 15, Fed. Cas. No. 10,394; Aiken v. Edrington (C. C. 1876) 15 N. B. R. 271, Fed. Cas. No. 111.

71. —— **Essential elements of fraud.** —To entitle a defrauded vendor to the right of reclamation spoken of above, some decisions hold it necessary to show that the purchaser was insolvent at the time of the purchase. In re Sol. Aarons & Co. (C. C. A. 1912) 193 Fed. 646, 28 Am. Bankr. Rep. 399. Others hold that this is not essential where specific false statements as to assets and concealment of debt are brought home to the purchaser and shown to have induced the sale. In re Bendall (D. C. 1910) 183 Fed. 816, 25 Am. Bankr. Rep. 698; Grant v. Feldman (1912) 171 Ill. App. 473. The purchaser must have had an actual intention not to pay for the goods when he acquired them. In re Sol. Aarons & Co. (1912) 193 Fed. 646, 113 C. C. A. 514, 28 Am. Bankr. Rep. 399; In re Levi & Pickard (D. C. 1906) 148 Fed. 654, 16 Am. Bankr. Rep. 756. CONTRA, no such actual intention is necessary if he knew at the time that he could

not then pay for them and had no reasonable expectation of ever being able to do so. In re Hamilton Furniture & Carpet Co. (D. C. 1902) 117 Fed. 774, 9 Am. Bankr. Rep. 65; In re Berg (D. C. 1910) 183 Fed. 885, 25 Am. Bankr. Rep. 170.

It is a sufficient case of fraud if the purchaser merely conceals his insolvency or financial embarrassment, being well aware of it himself. In re Spann (D. C. 1910) 183 Fed. 819, 25 Am. Bankr. Rep. 551. CONTRA, In re Davis (D. C. 1901) 112 Fed. 294, 7 Am. Bankr. Rep. 276. Where the creditor sold goods to the bankrupt in an assumed name, extending credit to the man rather than to the name, the bankrupt cannot be said to have obtained the goods by fraud merely because he did not disclose his true name. In re McUlta (D. C. 1911) 189 Fed. 250, 26 Am. Bankr. Rep. 480. The false representations or statements must have been made to the particular vendor, and it is not enough for him to show a general scheme to defraud creditors. In re O'Connor (D. C. 1901) 112 Fed. 666, 7 Am. Bankr. Rep. 428. Where goods were sold to a bankrupt on credit, the seller relying entirely on a commercial rating which was based on information given by the bankrupt orally to the commercial agency's representative, which was false, the seller was entitled to reclaim the goods. In re Johnson (D. C. 1913) 208 Fed. 164. The seller will have no right to rescind the sale and reclaim the goods if he delivered them with knowledge that the buyer was in failing circumstances. In re Sweeney (1909) 168 Fed. 612, 94 C. C. A. 90, 21 Am. Bankr. Rep. 866. Or if he fairly understood the bankrupt's financial condition. In re Hess (D. C. 1905) 138 Fed. 954, 14 Am. Bankr. Rep. 635. Or where he admits that he might have sold the goods if the representations claimed had not been made. In re Davis (D. C. 1901) 112 Fed. 294, 7 Am. Bankr. Rep. 276. Where the seller continues to rely for a period of three months on financial statements of the bankrupt, satisfactory when made, this is not necessarily such negligence as to preclude him from rescinding the sale. In re J. S. Patterson & Co. (D. C. 1903) 125 Fed. 562, 10 Am. Bankr. Rep. 748. Where a bankrupt, at the time of purchasing certain materials from claimant on cash terms, intended to pay promptly, and reasonably expected to be able to do so, the seller was not entitled to a preference on the theory that the purchase was fraudulent. Cincinnati Ry. Supply Co. v. Hartlieb (1914) 214 Fed. 177, 130 C. C. A. 525.

72. Property sold by bankrupt.—Property actually sold or assigned by the bankrupt, without fraud, before the adjudication, and the title to which has passed, cannot be claimed or recovered by the trustee nor retained by him, as against the purchaser, if it comes into his possession. Rode & Horn v. Phipps (1912) 195 Fed. 414, 115 C. C. A. 316, 27 Am. Bankr. Rep. 827; Pyle v. Texas Transport & Terminal Co. (D. C. 1911) 192 Fed. 725, 27 Am. Bankr. Rep. 225; Lovell v. Isidore Newman & Son (C. C. A. 1912) 192 Fed. 753, 27 Am. Bankr. Rep. 746; Scammon v. Bowers (D. C. 1873) Fed. Cas. No. 12,431; Green v. Holmes (1878) 125 Mass. 46, note; Gill v. Bell's Knitting Mills (1908) 128 App. Div. 691, 113 N. Y. Supp. 90; Carr v. Phillips (1878) 39 Mich. 319; Hall v. Keating Implement & Machine Co. (1903) 33 Tex. Civ. App. 526, 77 S. W. 1054; Eason v. Garrison & Kelly (1904) 36 Tex. Civ. App. 574, 82 S. W. 800. But those acquiring rights to the bankrupt's property subsequent to the adjudication are not bona fide purchasers, at least where they had knowledge of sufficient facts to put them on inquiry. Hull v. Burr (1911) 61 Fla. 625, 55 South. 852. Property of a partnership contributed by its members to the capital of another partnership of which they became members held to have passed to the new partnership and to be subject to its debts in bankruptcy as against the trustee of the former owner and its members. Warner v. Grafton Woodworking Co. (1913) 210 Fed. 12, 126 C. C. A. 592. If the transfer constituted a voidable preference, the remedy of the trustee is by action, but meanwhile the purchaser is entitled to the possession of the property. In re Blake (D. C. 1909) 171 Fed. 298, 22 Am. Bankr. Rep. 612. A bankrupt's trustee is vested with all the rights, remedies, and powers of a judgment creditor having an execution returned unsatisfied, and may set aside a fraudulent transfer and apply the proceeds to the payment of debts. In re Downing (1912) 201 Fed. 93, 119 C. C. A. 431, affirming order (D. C. 1912) 192 Fed. 683; Globe Bank & Trust Co. v. Martin (1915) 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583; Buttz v. James (N. D. 1916) 156 N. W. 547. Proceeds of the insurance on a building on land conveyed to insured in fraud of the grantor's creditors do not take the place of the property destroyed by fire, and the trustee in bankruptcy of the grantor may not recover them. Trenholm v. Klinker (Miss. 1914) 66 So. 738.

An adjudication in bankruptcy operates to dissolve the lien of an execution levied within four months prior thereto, but if a sale has been held under an execution and the property delivered to the purchaser at such sale, his title is not affected by the subsequent adjudication of the debtor, and the latter's trustee cannot take the property from him. In re Weitzel (D. C. 1911) 191 Fed. 463, 27 Am. Bankr. Rep. 370; Nelson v. Svea Pub. Co. (D. C. 1910)

178 Fed. 136. The same rule applies where a sale has been made under a chattel mortgage. Stewart v. Platt (1879) 101 U. S. 731, 25 L. Ed. 816.

73. —— **Delivery and passing of title.**—As between the trustee in bankruptcy and one claiming to have purchased property from the bankrupt, the question whether title had passed before the adjudication in bankruptcy depends on the intention of the parties, to be gathered from the contract, and if not expressly stated, then by inference or presumption from its terms. In re Clairfield Lumber Co. (D. C. 1911) 194 Fed. 181; Gage Lumber Co. v. McEldowney (C. C. A. 1913) 207 Fed. 255, 30 Am. Bankr. Rep. 251.

The question whether title has passed may depend on the fact of delivery or nondelivery of the goods. In re National Boat & Engine Co. (D. C. 1912) 198 Fed. 407; Lovell v. H. Hentz & Co. (C. C. 1910) 181 Fed. 555; Allen v. Hollander (C. C. 1904) 128 Fed. 159, 11 Am. Bankr. Rep. 753; Weeks v. Fowler (1902) 71 N. H. 518, 53 Atl. 543. Whether delivery of property sold by a bankrupt was sufficient to pass the title is to be determined by the law of the state. In re Waite-Robbins Motor Co. (D. C. 1911) 192 Fed. 47, 27 Am. Bankr. Rep. 541. Where a buyer of a hop crop at a specified price per pound, to be delivered by the seller at a railroad station, inspected, weighed, and accepted a part of the crop at the buyer's ranch before bankruptcy of the seller, title passed, as to such part of the crop, as against the seller's trustee in bankruptcy. Williamson v. Richardson (1913) 205 Fed. 245, 123 C. C. A. 427. Transfer of logs cut from a debtor's homestead under an oral agreement held to have been followed by an immediate delivery and change of possession as against the trustee in bankruptcy, within Rev. Codes Idaho, § 3170. In re McCartney (D. C. 1914) 218 Fed. 717. Where bankrupts had set aside cotton, and weighed, marked, and shipped it to a steamship for a purchaser's account before bankruptcy, held, that there was a delivery whereby it passed beyond the control of the bankrupt. Hiller v. Cornille & De Blonde (C. C. A. 1915) 228 Fed. 670. Where complainant purchased lumber from the bankrupt to be manufactured, making advances thereon, title to lumber sawed and piled in the millyards, intended by the bankrupt to be applied to the contract at the time bankruptcy intervened, had not passed to complainant, so as to entitle it to recover the value thereof as against the bankrupt's trustee. Gage Lumber Co. v. McEldowney (1913) 207 Fed. 255, 124 C. C. A. 641, reversing decree In re Clairfield Lumber Co. (D. C. 1911) 194 Fed. 181.

In the case of personal property, sold by the bankrupt to a third person before the adjudication, the title may pass by delivery of the key to a room where the goods are stored. In re Cole (D. C. 1909) 171 Fed. 297, 22 Am. Bankr. Rep. 611. Or by the delivery of warehouse receipts covering the property in question. Taney v. Penn Nat. Bank (1911) 187 Fed. 689, 109 C. C. A. 437; Chicago Title & Trust Co. v. First Nat. Bank (1912) 174 Ill. App. 339.

In the case of land, the title may be considered as passing upon the delivery of a deed to the purchaser. Mason v. Perkins (1904) 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Congleton v. Schreihofer (N. J. Eq. 1903) 54 Atl. 144. Where a bankrupt corporation was engaged in conducting a sanitarium, and title to the building and the furniture therein had previously been vested in the same person, who conveyed the personal property to the bankrupt, and the real estate later to another corporation, which was organized at the time for the purpose of holding the same, and such corporation executed a mortgage thereon, and neither the deed nor the mortgage contained any reference to the personal property, nor to the purpose for which the realty was used, held, that neither conveyed the furniture as fixtures, the title thereto having been previously vested in the bankrupt. In re Dr. Riegel Sanitarium Co. (D. C. 1913) 206 Fed. 319.

A conveyance of real property which is intended as security only, though in form an absolute deed, is no more than a mortgage, and though it creates an enforceable lien, yet the property itself is an asset of the mortgagor's estate in bankruptcy. In re Moore (D. C. 1906) 146 Fed. 187, 17 Am. Bankr. Rep. 164. In the case of a mortgage regular in form, the mortgagee is not generally entitled to uncollected rents, but they must go to the trustee in bankruptcy. In re Dole (D. C. 1901) 110 Fed. 926, 7 Am. Bankr. Rep. 21; Elmore v. Symonds (1903) 183 Mass. 321, 67 N. E. 314.

74. **Goods pledged by bankrupt.**—Goods pledged by the bankrupt to secure a debt or claim, supposing that there is nothing fraudulent or preferential in the contract, are equally beyond the reach of the trustee, who can recover them and make them available as assets only on condition of redeeming from the pledge. In re Dreuil & Co. (D. C. 1913) 205 Fed. 573, 31 Am. Bankr. Rep. 69; Bank of Brodhead v. Smith (1912) 199 Fed. 703, 118 C. C. A. 141; Lovell v. Isidore Newman & Son (1912) 192 Fed. 753, 113 C. C. A. 39, 27 Am. Bankr. Rep. 746; In re Macauley (D. C. 1907) 158 Fed. 322, 18 Am. Bankr. Rep. 459; Van Kirk v. Vermont Slate Co. (D. C. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239; Bush v. Export Storage Co. (C. C. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; Lamb v. Hall (1905) 147 Cal. 44, 81 Pac. 288; King v. Cram (1904) 185 Mass. 103, 69 N. E. 1049.

See Bank of North America v. Penn Motor Car Co. (1912) 235 Pa. 194, 83 Atl. 622; Commercial Nat. Bank v. Hiller (C. C. A. 1914) 211 Fed. 337. But the bailment, to have this effect, must be in all respects valid and binding under the laws of the state, and if an actual change of possession is necessary to constitute a valid pledge, the claimant must be able to show that this has taken place, or else he cannot hold the goods as against the trustee in bankruptcy of the pledgor. In re Gebbie & Co. (D. C. 1909) 167 Fed. 609, 21 Am. Bankr. Rep. 694; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee (1909) 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442; In re A. P. Wilson & Co. (D. C. 1910) 176 Fed. 652, 23 Am. Bankr. Rep. 907; Godwin v. Murchison Nat. Bank (1907) 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; French v. White (1905) 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479; Goodrich v. Dore (1907) 194 Mass. 493, 80 N. E. 480. See In re Zinner (C. C. A. 1912) 202 Fed. 197, 29 Am. Bankr. Rep. 860; In re Shulman (D. C. 1913) 206 Fed. 129, 30 Am. Bankr. Rep. 238; In re Stiger (D. C. 1913) 202 Fed. 791. A pledge of certain warehouse receipts for whisky belonging to a corporation executed first by one who was permitted to act as president of the corporation, though not duly elected, and afterwards renewed by him when he had been elected president, held valid as against the corporation's trustee in bankruptcy. In re Miller Pure Rye Distilling Co. of Pennsylvania (1914) 214 Fed. 189, 130 C. C. A. 537.

75. Equitable rights of third persons.—A trustee in bankruptcy takes the property of the bankrupt subject not only to specific liens, but also to equities in favor of third persons, whether arising out of the act of the bankrupt or by operation of law, which are not invalid as to creditors. In re Sherwoods (C. C. A. 1913) 210 Fed. 754; Triumph Electric Co. v. Patterson (C. C. A. 1914) 211 Fed. 244; Gage Lumber Co. v. McEldowney (C. C. A. 1913) 207 Fed. 255, 30 Am. Bank. Rep. 251; In re M. E. Dunn & Co. (D. C. 1912) 193 Fed. 212, 28 Am. Bankr. Rep. 127; In re McConnell (D. C. 1912) 197 Fed. 438, 28 Am. Bankr. Rep. 659; Goodnough Mercantile & Stock Co. v. Galloway (D. C. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; In re Chantler Cloak & Suit Co. (D. C. 1907) 151 Fed. 952, 18 Am. Bankr. Rep. 498; Crosby v. Ridout (1906) 27 App. D. C. 481; Blake v. Meadows (1909) 225 Mo. 1, 123 S. W. 868, 30 L. R. A. (N. S.) 1; Kimball v. Baker Land & Title Co. (1913) 152 Wis. 441, 140 N. W. 47. See Hotchkiss v. National City Bank (D. C. 1911) 200 Fed. 287. A subcontractor who failed to perfect his lien is not entitled, as against the trustee in bankruptcy of the general contractor, to a lien on the balance due him, paid into court by the general contractor. Furst-Kerber Cut Stone Co. v. Wells (Va. 1914) 81 S. E. 22.

One having a claim against a fund by an equitable assignment from a bankrupt may assert it against the trustee in bankruptcy. In re Hanna (D. C. 1900) 105 Fed. 587, 5 Am. Bankr. Rep. 127. A check on a bank where the drawer has sufficient funds to meet it operates as an equitable assignment pro tanto of the money as between the holder of the check and the trustee in bankruptcy of the drawer. First Nat. Bank v. Coates (C. C. 1881) 8 Fed. 540; Fourth Nat. Bank v. City Nat. Bank (1873) 68 Ill. 398. But it is otherwise if the statutory law of the state has established a different rule. In re Grive (D. C. 1907) 151 Fed. 711, 18 Am. Bankr. Rep. 202. If the drawer of a draft, having no funds to meet it at the time it is presented, afterwards makes a remittance for the specific purpose of taking up the draft, the holder has an equitable claim upon the fund thus set apart. Dickey v. Harmon (C. C. 1804) Fed. Cas. No. 3,894; Seligman v. Wells (C. C. 1880) 1 Fed. 302. An order given by the bankrupt on his attorney directing the latter to pay the holder out of the proceeds of notes collected by him for the bankrupt constitutes an equitable assignment, available against the trustee in bankruptcy. In re Smith (D. C. 1877) 16 N. B. R. 399, Fed. Cas. No. 12,992. And this is true of an order on the bankrupt's agent to pay the holder out of rents collected by the agent for the bankrupt. In re Oliver (D. C. 1904) 132 Fed. 588, 12 Am. Bankr. Rep. 694. But a mere promise to pay out of a particular fund when received, the promisor retaining control of the fund, and no notice being given to the person who is to pay, does not create any lien or charge upon the fund or any equity in it. Ex parte Tremont Nail Co. (D. C. 1877) 16 N. B. R. 448, Fed. Cas. No. 14,168. Nor does an order directing an insurance agent to pay the holder part of an insurance loss due to the bankrupt, where no notice is given to the insurance company and the agent has no authority from the company to comply with such an order. In re The Leader (D. C. 1911) 190 Fed. 624, 26 Am. Bankr. Rep. 668. One who holds funds of the bankrupt in the character of a trustee, or as security for his own debt, has no power to bind the trustee in bankruptcy by a promise given to a creditor to pay him out of the fund. In re Ballantine (1911) 186 Fed. 91, 109 C. C. A. 203, 26 Am. Bankr. Rep. 275. See In re Kessler & Co. (D. C. 1908) 165 Fed. 508, 21 Am. Bankr. Rep. 583.

Where plaintiff, being a member of a stock exchange, is in the habit of executing orders for a brokerage firm not a member, and the firm accepts orders of customers, which it directs plaintiff

to execute, such customers, though unknown to plaintiff, sustain the relation to him of debtor and creditor, and he will be required to pay them the funds he may have from their business done on the firm's orders, before he pays anything to the firm's trustee in bankruptcy. Doucette v. Baldwin (1907) 194 Mass. 131, 80 N. E. 444.

An equitable right or claim in favor of a third person may also grow out of circumstances which would raise an estoppel against the bankrupt to claim particular property as his own. Generally, such an estoppel will be equally effective against the trustee in bankruptcy. Aldine Trust Co. v. Smith (C. C. A. 1910) 182 Fed. 449, 25 Am. Bankr. Rep. 608. And conversely, the trustee may claim an estoppel against one who fails to assert his claims at the proper season, provided that positive and clear loss has resulted. In re Loll (D. C. 1908) 162 Fed. 79, 20 Am. Bankr. Rep. 548. But the advantage derived from a mistake made by a bankrupt when reducing to writing a contract made by him, is not an asset in the hands of his trustee, for the latter is not a bona fide purchaser for value in such sense as to bar the reformation of the contract in equity. Zartman v. First Nat. Bank (1910) 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418. But, on the other hand, circumstances under which a court of equity might permit a rescission of a contract of sale, on the ground of mistake, where the parties could be restored to their original position, may not warrant such relief after the purchaser has become bankrupt and the rights of creditors have intervened, and especially where the specific property cannot be restored. In re American Knit Goods Mfg. Co. (D. C. 1907) 155 Fed. 906, 19 Am. Bankr. Rep. 212.

76. After-acquired property.—Whatever property vests in the bankrupt after the date of the adjudication is his own and is free from the claims of the trustee and the creditors. Wilkins v. Tourtellott (1889) 42 Kan. 176, 22 Pac. 11; In re Lighthall (D. C. 1915) 221 Fed. 791; Cohen v. Bacharach (C. C. A. 1916) 229 Fed. 385. Salary earned by a bankrupt after adjudication and pending discharge does not belong to his estate unless affected by a garnishee levy, and prior assignments of such salary to creditors are ineffective. In re Green (D. C. 1914) 213 Fed. 542; In re Gillespie (D. C. 1913) 209 Fed. 1003. Wages of a bankrupt earned after adjudication are not properly a part of the assets to be administered. Progressive Building & Loan Co. v. Hall (1914) 220 Fed. 45, 135 C. C. A. 613.

Rents accruing after the adjudication of bankruptcy on mortgaged property of the bankrupt which comes into the possession of the trustee, and before the mortgagee has taken such action as to entitle him to the possession of the property, belong to the estate in bankruptcy. In re Dole (D. C. 1901) 110 Fed. 926, 7 Am. Bankr. Rep. 21. Where an item of the bankrupt's assets consists in a judgment in his favor, rendered before the adjudication in bankruptcy, but which was inadvertently entered for an amount less than the verdict, and it is amended by order of the court, after the adjudication, so as to cover the full amount, the trustee in bankruptcy may claim the full amount of the judgment as finally ascertained, not merely the sum for which it was entered originally. Zantzinger v. Ribble (1872) 36 Md. 32.

77. Partnership and individual property.—Where only one partner of a firm is adjudged a bankrupt, the bankruptcy court does not draw to itself the administration of the partnership estate, except by consent of the solvent partner, who is entitled to administer the business, accounting to the bankrupt's trustee only for the bankrupt's interest in the business. Marnet Oil & Gas Co. v. Staley (1914) 218 Fed. 45, 133 C. C. A. 108. Intervening trustee in bankruptcy held not entitled to the fund garnisheed, where it appeared that the fund was obtained from the assets of the partnership, which had not been adjudicated a bankrupt, and not from the assets of the bankrupt partner. Foot, Schulze & Co. v. Porter (Minn. 1915) 154 N. W. 1078. The act of a bankrupt partner in surrendering to his trustee property belonging to the firm did not enlarge the jurisdiction of the bankruptcy court to administer the partnership property, where the solvent partner did not consent or waive its right to administer such property. Marnet Oil & Gas Co. v. Staley (1914) 218 Fed. 45, 133 C. C. A. 108.

On the adjudication of a firm as a bankrupt, the assets of all the partners must be turned into the proceeding for administration. Abbott v. Anderson (1914) 106 N. E. 782, 265 Ill. 285, affirming judgment (1914) 184 Ill. App. 598. An individual partner not adjudged a bankrupt may be required to turn over his separate estate to the trustee of the firm in bankruptcy, where the partnership and individual estate was not enough to pay the partnership debts, where the partner had not objected that he should have been put into bankruptcy, and where such partner has never objected to the administration of the firm property by the trustee. Francis v. McNeal (1913) 33 Sup. Ct. 701, 228 U. S. 695, 57 L. Ed. 1029; Id. (1911) 186 Fed. 481, 108 C. C. A. 459. A bankruptcy court in proceedings against a partnership has no jurisdiction to administer the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent. In re Samuels (C. C. A. 1914) 215 Fed. 845, reversing decree In re Samuels & Lesser (D. C. 1913) 207 Fed. 195. Where a partnership and one

member individually are adjudged bankrupt, the bankruptcy court may administer the other member's property to the extent necessary to pay partnership debts; Bankr. Act, § 5h (ante, § 9589), being inapplicable, and limited to cases where the partnership is not adjudged bankrupt. Armstrong v. Fisher (1915) 224 Fed. 97, 139 C. C. A. 653. Where a firm is dissolved, and a partner sells his interest to a copartner, who is adjudged a bankrupt, firm creditors may apply firm property to payment of debts in settlement of the bankrupt's estate. In re Young (D. C. 1915) 223 Fed. 659.

II. ASSETS OF BANKRUPT CORPORATION

78. Franchises as assets.—The franchises of a bankrupt corporation vest in its trustee in bankruptcy, like its other property, and are subject to sale by him. Adams v. Boston, H. & E. R. Co. (D. C. 1870) 4 N. B. R. 314, Fed. Cas. No. 47; Sweatt v. Boston, H. & E. R. Co. (C. C. 1871) 5 N. B. R. 234, Fed. Cas. No. 13,684. But parties who purchase the property and franchises of a corporation from its assignee in bankruptcy do not thereby become its corporators and acquire the corporate entity. Metz v. Buffalo, C. & P. R. Co. (1874) 58 N. Y. 61, 17 Am. Rep. 201, 12 N. B. R. 559. A water supply company, engaged in the business of obtaining, transporting, and supplying pure water for municipal and domestic use, is not exempt from the operation of the bankruptcy law on the ground of its being a quasi public corporation and subserving a public use, if its franchise is assignable, so that its functions might be exercised by any transferee to whom its powers might pass through proceedings in bankruptcy. In re New York & W. Water Co. (D. C. 1909) 98 Fed. 711, 3 Am. Bankr. Rep. 508.

79. Assessment on unpaid stock.—When the assets of a bankrupt corporation are not sufficient to pay its debts, the court of bankruptcy has power and authority to levy an assessment upon the stockholders and call upon them to make good the unpaid balance of their subscriptions to the capital stock of the company, to an amount not exceeding in the aggregate the deficiency of the other assets as compared with the debts. Ogilvie v. Knox County Ins. Co. (1859) 22 How. 380, 16 L. Ed. 349; Sanger v. Upton (1875) 91 U. S. 56, 23 L. Ed. 220; Scovill v. Thayer (1881) 105 U. S. 155, 26 L. Ed. 968; Turnbull v. Payson (1877) 95 U. S. 418, 24 L. Ed. 437; In re Munger Vehicle Tire Co. (1908) 168 Fed. 910, 94 C. C. A. 314, 21 Am. Bankr. Rep. 395; In re Remington Automobile & Motor Co. (1907) 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; In re Miller Electrical Maintenance Co. (D. C. 1901) 111 Fed. 515, 6 Am. Bankr. Rep. 701; In re Eureka Furniture Co. (D. C. 1909) 170 Fed. 485, 22 Am. Bankr. Rep. 395; In re Monarch Corporation (1910) 177 Fed. 464, 24 Am. Bankr. Rep. 428; Glenn v. Soule (C. C. 1884) 22 Fed. 417; In re Crystal Spring Bottling Co. (D. C. 1899) 96 Fed. 945, 3 Am. Bankr. Rep. 194; In re Republic Ins. Co. (D. C. 1873) Fed. Cas. No. 11,704; Payson v. Stoever (C. C. 1873) Fed. Cas. No. 10,863; Upton v. Burnham (D. C. 1873) Fed. Cas. No. 16,799; Upton v. Jackson (C. C. 1874) Fed. Cas. No. 16,802; Wilbur v. Stockholders (D. C. 1878) 18 N. B. R. 178, Fed. Cas. No. 17,636; Myers v. Seeley (D. C. 1874) 10 N. B. R. 411, Fed. Cas. No. 9,994; Upton v. Hansbrough (D. C. 1873) 10 N. B. R. 368, Fed. Cas. No. 16,801; Lane v. Nickerson (1881) 99 Ill. 284. A provision in the subscription and in the stock certificate that the unpaid balance was to be paid on the call of the directors "when ordered by a vote of a majority of the stockholders themselves," does not prevent the effectual exercise of this power by the court of bankruptcy. Upton v. Hansbrough (D. C. 1873) Fed. Cas. No. 16,801. The directors of the corporation cannot relieve the stockholders from this liability by refusing to issue a call; and where the charter provided that the company should commence business with the full amount of its capital stock paid in, the fact that it actually commenced business is enough for the trustee in bankruptcy to show, in an action against stockholders for unpaid balances, without showing any call for their subscriptions. Rathbone v. Ayer (1903) 84 App. Div. 186, 82 N. Y. Supp. 235.

Liability of subscribers for unpaid balances, up to the full par value of their stock, is an asset of the corporation itself, not a remedy available to creditors. It is in the character of an asset of the corporation that it vests in the trustee in bankruptcy, and he is thereupon solely invested with the right to maintain actions against the stockholders who are in arrear. Rathbone v. Ayer (1903) 84 App. Div. 186, 82 N. Y. Supp. 235; Stoddard v. Lum (1899) 159 N. Y. 272, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; Stocker v. Davidson (1906) 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Harris v. Wells (1907) 57 Misc. Rep. 172, 108 N. Y. Supp. 1078; Falco v. Kaupisch Creamery Co. (1903) 42 Or. 422, 70 Pac. 286; In re Remington Automobile & Motor Co. (1907) 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; Foote v. Greilick (1911) 166 Mich. 636, 132 N. W. 473; Commercial Bank of Augusta v. Warthen (1904) 119 Ga. 990, 47 S. E. 536; Perkins v. Cowles (1910) 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; Babbitt v. Read (D. C. 1914) 215 Fed. 395. Where the statute provides (as in New York) that holders of stock in a corporation which is not fully paid shall be personally liable to certain classes of creditors to

the extent of the amount unpaid on their stock, this gives the corporation itself no claim or right of action against such stockholders, and therefore no right of action thereunder passes to the trustee in bankruptcy of the corporation. In re Jassoy Co. (1910) 178 Fed. 515, 101 C. C. A. 641, 23 Am. Bankr. Rep. 622; Courtney v. Georger (D. C. 1915) 221 Fed. 502. So, if stock was issued in exchange for patent rights or other property, and the corporation itself cannot claim that it was not fully paid, neither can its trustee in bankruptcy. Sternbergh v. Duryea Power Co. (C. C. A. 1908) 161 Fed. 540, 20 Am. Bankr. Rep. 625. And see In re Beachy & Co. (D. C. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538; In re Jassoy Co. (1910) 178 Fed. 515, 101 C. C. A. 641, 23 Am. Bankr. Rep. 622.

80. —— Proceedings for assessment or call.—The trustee of a bankrupt corporation cannot levy an assessment for unpaid stock on his own motion; there must be either corporate action to fix the liability of the stockholders or a judicial ascertainment of their liability. Payson v. Brooke (D. C. 1874) Fed. Cas. No. 10,857.

Where a formal assessment and call are necessary, the proper practice is for the trustee to file his petition in the court of bankruptcy, asking for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts. On the hearing of this petition, the court will decide the necessary preliminary questions, such as the question whether particular stock has or has not been fully paid, whether the corporation is indebted in excess of its assets, and what is the amount of its indebtedness. But the order should not be so framed as to authorize the issue of an execution against any named stockholder for the amount considered to be due from him. The trustee should proceed against each in a plenary action. In re Remington Automobile & Motor Co. (1907) 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; citing Scovill v. Thayer (1881) 105 U. S. 143, 26 L. Ed. 968. A formal assessment or call is necessary only where it is not certain that the whole amount of the unpaid subscriptions to stock will be needed to pay the debts of the company, or when no time was fixed for the payment of the successive installments on the stock, but they were to be called in by order of the directors from time to time. Rathbone v. Ayer (1903) 84 App. Div. 186, 82 N. Y. Supp. 235; Phœnix Warehousing Co. v. Badger (1876) 67 N. Y. 294; Ross-Mehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co. (C. C. 1896) 72 Fed. 957; Scovill v. Thayer (1881) 105 U. S. 143, 26 L. Ed. 968; Citizens' & Miners' Sav. Bank v. Gillespie (1887) 115 Pa. 564, 9 Atl. 73; Tiger Shoe Mfg. Co.'s Trustee v. Shanklin (1907) 102 S. W. 295, 31 Ky. Law Rep. 298. A stock subscription contract and note given in part payment for the stock held not of such conditional character or on such special terms as to preclude the trustee in bankruptcy of the corporation from recovering on the note. Bailey v. Anderson (Ga. 1914) 82 S. E. 290.

81. —— Proceedings to collect assessment.—An assessment on unpaid stock of a bankrupt corporation having been levied, compliance with a call for its payment may be enforced by a suit in equity in the federal court in which the estate of the corporation is being adminstered. In re Crystal Spring Bottling Co. (D. C. 1899) 96 Fed. 945, 3 Am. Bankr. Rep. 194. A referee in bankruptcy has jurisdiction of a proceeding to compel the officers of a bankrupt corporation to pay over the proceeds of sales of its stock alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares. In re Kornit Mfg. Co. (D. C. 1911) 192 Fed. 392, 27 Am. Bankr. Rep. 244. In suits to enforce the collection of the assessment, the validity of the action of the bankruptcy court in making the levy cannot be brought into question. Clevenger v. Moore (1904) 71 N. J. Law, 148, 58 Atl. 88; Payson v. Stoever (C. C. 1873) Fed. Cas. No. 10,863; Michener v. Payson (C. C. 1875) 13 N. B. R. 49, Fed. Cas. No. 9,524. Compare Lamb v. Lamb (D. C. 1875) 13 N. B. R. 17, Fed. Cas. No. 8,018. A stockholder of a bankrupt corporation, although he is a nonresident and cannot be brought within the jurisdiction of the court, is bound by the result of proceedings for assessment of stockholders if he voluntarily appears and contests the same. In re Newfoundland Syndicate (1913) 201 Fed. 917, 120 C. C. A. 255, modifying order (D. C. 1912) 196 Fed. 443.

A stockholder of the bankrupt corporation, sued for an assessment on his unpaid stock, cannot defend on the ground that the proceedings to increase the stock of the corporation (his subscription being made for such increase) were irregular or invalid. Chubb v. Upton (1877) 95 U. S. 665, 24 L. Ed. 523. Nor on the ground that his subscription for the stock and agreement to pay for it were based on an express understanding that he was to receive the stock for two-thirds of its par value. Flinn v. Bagley (D. C. 1881) 7 Fed. 785. Nor on the ground that he was ignorant of the condition of the company at the time the subscription was made. Payson v. Withers (C. C. 1873) Fed. Cas. No. 10,864. Nor on the ground that he was fraudulently misled and induced to believe that there was no personal liability for the unpaid balance and that the amount thereof could not be assessed against him. Upton v. Tribilcock (1875) 91 U. S. 45, 23 L. Ed. 203; Michener v. Payson (C.

C. 1875) 13 N. B. R. 49, Fed. Cas. No. 9,524. Nor on the ground that the word "non-assessable" was written across the face of his certificate of stock. Upton v. Burnham (D. C. 1873) Fed. Cas. No. 16,799. Under Gen. St. Minn. 1913, § 6193, as construed by Minnesota Supreme Court, where a corporation agreed that stock would be nonassessable, unpaid balance of par value held not recoverable by trustee in bankruptcy. Courtney v. Georger (C. C. A. 1915) 228 Fed. 859. The fact that a call for unpaid subscriptions was for more than was necessary to pay the debts of the company cannot be tried in an action by the trustee against an individual stockholder. Upton v. Hansbrough (D. C. 1873) Fed. Cas. No. 16,801. The court of bankruptcy has authority to determine the necessity for an assessment on stock subscriptions, and to direct the trustee to make the assessment, notwithstanding a dispute as to whether anything was unpaid. In re M. Stipp Const. Co. (1915) 221 Fed. 372, 137 C. C. A. 180.

The provision of the statute that suits shall not be brought by or against a trustee in bankruptcy subsequent to two years after the estate has been closed, applies to an action by a trustee to enforce against stockholders the payment of their unpaid shares. Walker v. Towner (C. C. 1877) Fed. Cas. No. 17,089; Payson v. Coffin (C. C. 1878) Fed. Cas. No. 10,859; Scovill v. Shaw (C. C. 1878) Fed. Cas. No. 12,552.

82. —— **Persons liable.**—The fact that the defendant's name appears on the books of the corporation as a stockholder is presumptive evidence that he is the owner of the stock, and proof that he received a dividend on the stock renders the presumption conclusive. Turnbull v. Payson (1877) 95 U. S. 418, 24 L. Ed. 437. The transferee of stock is liable on such an assessment, unless it appears that the transfer has not been accepted by him, in which case the transferror alone is liable. Wilbur v. Stockholders (D. C. 1878) Fed. Cas. No. 17,636.

83. —— **Set-off against assessment.**—Under the doctrine that the capital of a corporation constitutes a trust fund for the benefit of its creditors, it is held that a stockholder who is indebted to the bankrupt corporation for unpaid shares cannot set off against his liability thereon a debt due to him by the corporation. The fund arising from such unpaid stock must be equally divided among all the creditors. Sawyer v. Hoag (1873) 17 Wall. 610, 21 L. Ed. 731; Jenkins v. Armour (D. C. 1875) 14 N. B. R. 276, Fed. Cas. No. 7,260. The fact that stockholders of a bankrupt corporation are also holders of its bonds, and as such entitled to share in the distribution of its estate, does not entitle them to set off their claims on the bonds in a suit against them by the trustee to recover unpaid subscriptions. Babbitt v. Read (C. C. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254. Nor will a delinquent stockholder be permitted to prove his claim against the estate of the corporation in bankruptcy until he has paid the balance remaining due on his subscription. In re Wiener & Goodman Shoe Co. (D. C. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

84. **Statutory liability of stockholders and directors.**—The trustee in bankruptcy of a corporation acquires no right to enforce, for the benefit of the estate or of creditors, a liability imposed by the law of the state upon the stockholders for the payment of the debts of the company, or a similar liability imposed upon directors for violations of the corporation laws of the state or for derelictions of duty or misfeasance in their office. In re Beachy & Co. (D. C. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538; In re Crystal Spring Bottling Co. (D. C. 1899) 96 Fed. 945, 3 Am. Bankr. Rep. 194; Jacobson v. Allen (C. C. 1882) 12 Fed. 454; Bristol v. Sanford (C. C. 1874) 13 N. B. R. 78, Fed. Cas. No. 1,893; Dutcher v. Marine Nat. Bank (C. C. 1875) 11 N. B. R. 457, Fed. Cas. No. 4,203; Rathbone v. Ayer (1903) 84 App. Div. 186, 82 N. Y. Supp. 235; John V. Farwell Co. v. Jackson Stores (1911) 137 Ga. 174, 73 S. E. 13; Tiger Shoe Mfg. Co.'s Trustee v. Shanklin (1907) 31 Ky. Law Rep. 298, 102 S. W. 295. Compare Mohr v. Minnesota Elevator Co. (1889) 40 Minn. 343, 41 N. W. 1074. In the case of Main v. Mills (C. C. 1874) Fed. Cas. No. 8,974, it was held that if the directors of a corporation spend its capital stock in declaring and paying dividends, when there are no actual profits to be divided, and the company is adjudged bankrupt, the trustee in bankruptcy may recover the amount so paid in dividends, at least from any officer of the corporation who was bound to know the condition of its affairs, and that he had no right to receive the dividends. The fact that directors of the bankrupt corporation have made themselves thus liable under the state law is not a circumstance which will prevent the trustee from calling upon stockholders for the unpaid balance of their stock. In re Crystal Spring Bottling Co. (D. C. 1899) 96 Fed. 945, 3 Am. Bankr. Rep. 194. Proceedings in bankruptcy against a corporation will not prevent a judgment creditor of the corporation from pursuing in a state court his remedy upon the statutory individual liability of stockholders or directors. Allen v. Ward (N. Y. 1873) 4 Jones & S. 290, 10 N. B. R. 285. And see Jacobson v. Allen (C. C. 1882) 12 Fed. 454.

Where officers or directors of a corporation are alleged to have appropriated its property to their own use, or to have wasted or lost its assets by a

violation of their duties or abuse of their powers, the right of action against them is in favor of the corporation, not the creditors, and hence it vests in the corporation's trustee in bankruptcy as part of its assets and may be enforced by him. In re Swofford Bros. Dry Goods Co. (D. C. 1910) 180 Fed. 549, 25 Am. Bankr. Rep. 282; Rathbone v. Ayer (1903) 84 App. Div. 184, 82 N. Y. Supp. 239.

III. RIGHTS OF TRUSTEE AS AGAINST PRIOR ASSIGNEE FOR CREDITORS

85. Effect of adjudication in bankruptcy on previous assignment.—A general assignment for the benefit of creditors, though an act of bankruptcy and liable to be avoided by the subsequent adjudication of the assignor as a bankrupt, is not void originally, but only voidable; it remains valid unless and until such an adjudication is made. In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; Ostrander v. Meunch (C. C. 1881) 12 Fed. 562; Barnes v. Rettew (C. C. 1871) Fed. Cas. No. 1,019; Maltbie v. Hotchkiss (1871) 38 Conn. 80, 9 Am. Rep. 364, 5 N. B. R. 485; Cook v. Rogers (1875) 31 Mich. 391, 13 N. B. R. 97; Thrasher v. Bentley (1874) 59 N. Y. 649; Bostwick v. Burnett (1878) 74 N. Y. 317. Until an assignment for the benefit of creditors is expressly accepted, it is a mere power and therefore revocable, and the bankruptcy of the assignor operates as a revocation. Ashley v. Robinson (1856) 29 Ala. 112, 65 Am. Dec. 387. Potentially it is a fraud upon the bankruptcy law and upon the creditors, since its necessary effect (if allowed to stand) is to defeat the operation of the bankruptcy law and to deprive creditors of the benefit of all the provisions of that act which are made for their protection and meant to secure a speedy and equal distribution of the estate. In re Gutwillig (1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Id. below (D. C. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78. The assignment is voidable at the instance of the creditors, provided a sufficient number of them, owning a sufficient amount of claims, will join in a petition in bankruptcy. In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117. An assignee for the benefit of creditors is charged with knowledge that he is acting under an instrument which of itself is an act of bankruptcy, and that if the assignor, in bankruptcy proceedings commenced within four months of the assignment, is adjudicated a bankrupt, he will hold the assigned estate merely for the use of the bankrupt's creditors, to be administered in the bankruptcy court. In re Bombino (Utah, 1914) 138 P. 1155.

When a debtor who has previously made a general assignment for the benefit of his creditors is adjudged bankrupt, the adjudication ipso facto annuls or dissolves the assignment and subjects the assigned property to the exclusive and complete jurisdiction of the court of bankruptcy. Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Gutwillig (D. C. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Smith (D. C. 1869) 3 N. B. R. 377, Fed. Cas. No. 12,974; Hobson v. Markson (C. C. 1871) Fed. Cas. No. 6,555; Globe Ins. Co. v. Cleveland Ins. Co. (C. C. 1876) 14 N. B. R. 311, Fed. Cas. No. 5,486; Waring v. Buchanan (D. C. 1879) 19 N. B. R. 502, Fed. Cas. No. 17,176; In re Croughwell (D. C. 1878) 17 N. B. R. 337, Fed. Cas. No. 3,440; Dolson v. Kerr (N. Y. 1877) 52 How. Prac. 481, 16 N. B. R. 405; Cohen v. American Surety Co. (1908) 192 N. Y. 227, 84 N. E. 947. It is immaterial that proceedings have been taken in a state court to have the administration of the assigned estate take place under its supervision and control. The pendency of such proceedings, or the making of orders or decrees by the state court, will not prevent an adjudication of bankruptcy, but on the contrary, when the adjudication is made, it ousts the jurisdiction of the state court and establishes the jurisdiction of the bankruptcy court, which is exclusive and which relates back to the commission of the act of bankruptcy, that is, the making of the assignment. In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1; In re Lengert Wagon Co. (D. C. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535; In re Curtis (D. C. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440, affirmed (1899) 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226. And if the assignment falls to the ground in consequence of the adjudication in bankruptcy, so also do all rights and interests created by it or growing out of it. The various rights of creditors thereafter are to be determined according to the provisions of the bankruptcy law, not according to the deed of assignment nor according to the state insolvency law under which it may have been made. In re Bousfield & Poole Mfg. Co. (D. C. 1878) 17 N. B. R. 153, Fed. Cas. No. 1,704. And the money and property are to be distributed by the trustee in bankruptcy, and not by the assignee. Sedgwick v. Place (D. C. 1869) 3 N. B. R. 302, Fed. Cas. No. 12,623. If the deed of assignment created any liens or trusts, they are annulled by the adjudication, and the property is not subject to them as it passes into the hands of the trustee in bankruptcy. In re Slomka (1903) 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635. So also, if the assignment gives a preference to any

creditor, it is avoided in bankruptcy, and the preferred creditor can claim no advantage from it. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.

86. Assignment more than four months before bankruptcy.—The bankruptcy law does not attempt to supervise or inquire into proceedings under an assignment for creditors or under state insolvency laws begun more than four months before the institution of bankruptcy proceedings. In re Boner (D. C. 1909) 169 Fed. 727, 22 Am. Bankr. Rep. 151. If one is adjudged bankrupt more than four months after making an assignment for the benefit of his creditors, the assignment cannot be set aside at the instance of the trustee in bankruptcy, and the trustee will not be entitled to the possession and administration of the assigned estate as against the voluntary assignee, but will take only such rights as the bankrupt himself had or could claim at the date of the bankruptcy. Mayer v. Hellman (1875) 91 U. S. 496, 23 L. Ed. 377; In re Kimball (D. C. 1877) 16 N. B. R. 188, Fed. Cas. No. 7,770; In re Arledge (D. C. 1873) 1 N. B. R. 644, Fed. Cas. No. 533; Hoague v. Cumner (1905) 187 Mass. 296, 72 N. E. 956; Mathews v. Stewart (1880) 44 Mich. 209, 6 N. W. 633. The trustee in bankruptcy may claim any property remaining undistributed in the hands of the assignee at the date of the adjudication in bankruptcy. In re Carver (D. C. 1902) 113 Fed. 138, 7 Am. Bankr. Rep. 539. The trustee in bankruptcy is not entitled to an accounting from a former assignee for creditors of the bankrupt, who had sold the assigned property and paid the money to creditors more than four months prior to bankruptcy. In re Martinez (D. C. 1915) 223 Fed. 433.

87. Enjoining action by assignee.—When an insolvent debtor makes a general assignment for the benefit of his creditors, and, within four months thereafter, a petition in bankruptcy against him is filed, it is within the power and jurisdiction of the court of bankruptcy to make an order, pending the hearing on such petition, enjoining the assignee from disposing of or interfering with the property transferred to him under the assignment, or exercising any acts of ownership or control, particularly when it appears that the assignee is about to make a sale of the property or to pay out money in his hands, so that, if an adjudication in bankruptcy is ultimately made, assets of the estate might thus be withdrawn from the reach of the trustee. In re Gutwillig (1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Skoll (D. C. 1877) 16 N. B. R. 175, Fed. Cas. No. 12,926. See Ex parte Nightingale (D. C. 1842) Fed. Cas. No. 10,263, holding that a mere possibility of waste or misapplication of the bankrupt's estate by the assignee will not justify an injunction. After a decree of adjudication is made, and pending the appointment of a trustee in bankruptcy, the court may enjoin the voluntary assignee from disposing of the property or exercising any of the powers given him by the assignment, except merely to hold possession of the property and preserve it. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704. And if the circumstances warrant such a course, the court of bankruptcy, pending a determination on the petition, may appoint a receiver (or the marshal) to take the property out of the hands of the assignee and hold it until the dismissal of the petition or the appointment of a trustee. In re Etheridge Furniture Co. (D. C. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; Sedgwick v. Place (D. C. 1869) 3 N. B. R. 139, Fed. Cas. No. 12,619. If, pending a hearing on the petition in bankruptcy, the creditors go into a state court and there protest against any further proceedings under the assignment, this will not have the effect of a writ of injunction from the court of bankruptcy. In re Scholtz (D. C. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782. Bankrupt's assignee held to act at his peril in carrying on business, selling it out, and winding it up, or doing anything beyond what is necessary to preserve property after filing of petition. In re Karp (D. C. 1915) 228 Fed. 798.

88. Setting aside assignment.—An assignment for the benefit of creditors is avoided by the adjudication of the assignor as a bankrupt within four months afterwards, and the trustee becomes invested with title to the assigned property, not as the successor of the assignee but as the successor of the bankrupt, and no suit or proceeding on his part is necessary to avoid the assignment, but the assignee may be summarily cited to appear in the bankruptcy proceedings and surrender the property in his hands. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Comingor v. Louisville Trust Co. (1908) 108 S. W. 950, 33 Ky. Law Rep. 53; In re Stokes (D. C. 1901) 106 Fed. 312; In re Thompson (D. C. 1903) 122 Fed. 174, 10 Am. Bankr. Rep. 242;

In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; Bryan v. Bernheimer (1901) 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; Whitlesey v. Philip Becker & Co. (1911) 142 App. Div. 313, 126 N. Y. Supp. 1046; Rogers v. Abbot (1910) 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

89. Recovery of assets by trustee.—When a voluntary assignment for the benefit of creditors is avoided by the subsequent adjudication of the assignor in bankruptcy, the trustee in bankruptcy becomes entitled to the possession and administration of the estate covered by the assignment and may require the assignee to account to him and to surrender the property in his hands. Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1; Hobson v. Markson (C. C. 1871) Fed. Cas. No. 6,555; Comingor v. Louisville Trust Co. (1908) 108 S. W. 950, 33 Ky. Law Rep. 53. A petition by the trustee in bankruptcy for an order requiring the surrender of property by the assignee need not allege a previous demand. Comingor v. Louisville Trust Co. (1908) 108 S. W. 950, 33 Ky. Law Rep. 53. Although the law of the state may require such assignments to be carried out under the direction or supervision of a state court, and the property assigned is in process of administration in the manner prescribed by the law, this does not make a case of concurrent jurisdiction, nor give the state court such a prior right of possession as will prevent the court of bankruptcy from assuming exclusive jurisdiction of the bankrupt's estate. In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9. But if the assignee alleges that he is under the control and direction of the state court, there is nothing to prevent the trustee from applying to that court for an order directing the surrender of the property to him, just as he would do in the case of a receiver. See Cragin v. Thompson (C. C. 1873) 12 N. B. R. 81, Fed. Cas. No. 3,320. If the state statute does not go to the length of making such an assignee an officer of the state court, property in his hands is not in the custody of the law or the possession of the court. Jones v. McCormick Harvesting Mach. Co. (1897) 82 Fed. 295, 27 C. C. A. 133; Lehman v. Rosengarten (C. C. 1885) 23 Fed. 642. So, if the assignee is cited to account in a state court, he may show, in bar of the proceeding, that the property has been taken from him under a decree of the court of bankruptcy and that he has accounted in the latter court. Burkholder v. Stump (D. C. 1871) 4 N. B. R. 597, Fed. Cas. No. 2,165. Nor is the pendency of an action of replevin against him any excuse for his failure to surrender to the trustee in bankruptcy that portion of the estate affected by the proceeding. In re Solomon, 2 Nat. Bankr. News, 460. If the assignee is prosecuting an action to recover property of the assigned estate, when a trustee in bankruptcy is appointed, the latter may intervene in the action and assume control of it, and need not begin a new suit. Collateral Security Bank v. Fowler (1875) 42 Md. 393. The assignee may be required to execute any conveyance which may be necessary to show a clear title in the trustee or enable him more effectually to proceed with the collection of the assets. Burkholder v. Stump (D. C. 1871) 4 N. B. R. 597, Fed. Cas. No. 2,165. If the assignee neglects or refuses to account for the money or property in his hands, on being cited and ordered to do so, the trustee in bankruptcy has a right of action against the surety on the assignment bond. Cohen v. American Surety Co. (1908) 192 N. Y. 227, 84 N. E. 947.

90. Requiring surrender of property by assignee.—When a debtor who has made a general assignment for the benefit of his creditors is adjudged bankrupt within four months thereafter, the court of bankruptcy has jurisdiction and power to make an order requiring the assignee to submit his accounts and to turn over to the trustee in bankruptcy all money and property in his hands, and this does not require a plenary suit at law or in equity, but may be done in a summary proceeding. In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Stokes (D. C. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; In re Thompson (D. C. 1903) 122 Fed. 174, 10 Am. Bankr. Rep. 242, affirmed (1904) 128 Fed. 575, 63 C. C. A. 217, 11 Am. Bankr. Rep. 719. A contrary decision in Re Abraham (1899) 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266, was reversed in Bryan v. Bernheimer (1901) 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623. The assignee in such a case is not an adverse claimant. He is merely the agent of the assignor for the distribution of the proceeds of the property, and, as such agent, his possession is that of his principal. In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348.

An order requiring the surrender of property by the assignee cannot be made on the ex parte application of the trustee without bringing in the assignee or affording him an opportunity to show cause against the petition. If these conditions are not fulfilled, an order for the surrender of property is without jurisdiction, and the assignee cannot be punished for failure to obey it. Smith v. Belford (1901) 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291; In re Banzai Mfg. Co. (1910) 183 Fed. 298, 105 C. C. A. 510, 25 Am.

Bankr. Rep. 497; In re Manning (D. C. 1903) 123 Fed. 179, 10 Am. Bankr. Rep. 497.

The assignee cannot be adjudged in contempt for failure to pay over money of the estate to the trustee in bankruptcy, as ordered, where he shows that he has paid it out in counsel fees or other necessary disbursements, or that he retained a portion of the money as his own commission, and has spent such sum and is unable to replace it. Louisville Trust Co. v. Comingor (1902) 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Sinsheimer v. Simonson (1901) 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. 537; In re Klein (D. C. 1902) 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; In re Banzai Mfg. Co. (1910) 183 Fed. 298, 105 C. C. A. 510, 25 Am. Bankr. Rep. 497.

91. Nature of trustee's title to assigned property.—The trustee in bankruptcy does not succeed the voluntary assignee in title or estate, and does not take the estate subject to any preferences or priorities created by the deed of assignment or by the acts of the assignee. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Alexander v. Galt (D. C. 1881) 9 Fed. 149. CONTRA, under the act of 1867, see In re Beisenthal (D. C. 1878) 18 N. B. R. 120, Fed. Cas. No. 1,235; Johnson v. Rogers (D. C. 1876) 15 N. B. R. 1, Fed. Cas. No. 7,408; In re Beadle (D. C. 1879) Fed. Cas. No. 1,155; Reeser v. Johnson (1875) 76 Pa. 313. A title or lien acquired by the voluntary assignee, which would be to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but, upon the order of the court of bankruptcy, it may be retained by the trustee for the benefit of the creditors. In re Fish Bros. Wagon Co. (C. C. A. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149.

92. Estate partly settled by assignee.—Where an assignee, appointed in insolvency proceedings under a state law, or by a general deed of assignment, has taken charge of the debtor's property, sold it, and distributed the proceeds to creditors, acting in all respects in entire good faith and in conformity to the state law and the orders of the state court, and afterwards proceedings in bankruptcy against the assignor are had and a trustee appointed, the assignee is not to be held personally liable to the trustee in bankruptcy for the value of the property or its proceeds. In such a case the trustee must seek his remedy against those who have received payments from the defendant in contravention of the bankruptcy act. Cragin v. Thompson (C. C. 1873) Fed. Cas. No. 3,320; In re Walker (D. C. 1877) 18 N. B. R. 56, Fed. Cas. No. 17,063. This rule holds good even if the assignee has paid out the money of the estate to creditors preferred by the deed of assignment. Their preferences may be unlawful under the bankruptcy law and voidable by the trustee, but the amount cannot be recovered from the assignee personally. Jones v. Kinney (D. C. 1871) Fed. Cas. No. 7,473. If, after the trustee's demand for the property, the assignee pays it out in the form of dividends to creditors, he is personally liable to replace it, and it is immaterial that the trustee did not sue out an injunction to restrain him from disposing of the estate, a mere demand for it being enough. Ostrander v. Meunch (C. C. 1881) 12 Fed. 562.

93. Rights of purchasers from assignee and paid creditors.—A sale of property by an assignee for the benefit of creditors to a purchaser in good faith for a valuable consideration conveys a title which will prevail against the claims of a trustee in bankruptcy of the assignor subsequently appointed, and the latter cannot recover the property from the purchaser. Goldsmith v. Hapgood (C. C. 1875) Fed. Cas. No. 5,522. If there was no more than an uncompleted agreement for a sale, the purchaser not having made any payment on the property, it is avoided by the adjudication in bankruptcy and the trustee may claim the property. In re Knight (D. C. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 1. One who buys property from the assignee after the filing of the petition in bankruptcy and with knowledge thereof, cannot be called a purchaser in good faith, and he acquires no title superior to that of the trustee; but his equities in respect to the property or the money which he has paid for it may depend on many circumstances, and can be settled in the court of bankruptcy, which may, if necessary, bring in the assignee. Bryan v. Bernheimer (1901) 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623.

The trustee may force the restitution of money paid to creditors by the voluntary assignee, if they were granted preferences by the terms of the assignment, and knew or had reasonable cause to believe, when receiving the money from the assignee, that it was in pursuance of the debtor's intention to prefer them. In re Meyer (D. C. 1869) 2 N. B. R. 422, Fed. Cas. No. 9,515. The trustee may recover money disbursed in satisfaction of a lien of such a character as to be dissolved by the adjudication in bankruptcy. Linder v. Lewis (D. C. 1880) 4 Fed. 318.

94. Appointment of assignee as trustee.—A referee in bankruptcy may properly refuse to approve the selection of the bankrupt's common-law as-

signee as trustee in bankruptcy, the assignment being the act of bankruptcy relied on by the petitioning creditors, and the assignee having an unsettled account and a claim for compensation for his services. In re Kellar (C. C. A. 1912) 192 Fed. 830. A common-law assignee may be appointed as temporary receiver of the estate in bankruptcy, and if he turns over to himself, as such receiver, the funds in his hands as assignee, without retaining any sum therefrom as compensation for his past services, he submits both the fund and himself to the jurisdiction of the court of bankruptcy with respect to his right to an allowance for such services. In re Klein (D. C. 1902) 116 Fed. 523, 8 Am. Bankr. Rep. 559.

95. Credits and allowances to assignee.—When an assignee for the benefit of creditors is required to surrender the estate committed to him by the assignment, at the instance of a trustee in bankruptcy subsequently appointed, and in order that the property may be administered in bankruptcy, he is entitled to an allowance for the actual and necessary expenses incurred by him in collecting, caring for, and preserving the property from the time he took charge of it as assignee up to the date of the adjudication in bankruptcy. In re Mays (D. C. 1902) 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum (D. C. 1901) 112 Fed. 50, 7 Am. Bankr. Rep. 52; Burkholder v. Stump (D. C. 1871) 4 N. B. R. 597, Fed. Cas. No. 2,165; Wehl v. Wald (C. C. 1881) 6 Fed. 163; In re Pauly, 1 Nat. Bankr. News, 405. Compare In re Stubbs (D. C. 1870) 4 N. B. R. 376, Fed. Cas. No. 13,557. Thus, where the assignee, during the time the property remained in his care, and before the adjudication in bankruptcy, collected bills due to the bankrupt, continued insurance on the property, arranged for guarding the same, collected outstanding goods, conducted correspondence, made an inventory, and incurred a liability for rent, it was held that he had a lien on the assets for these necessary disbursements. In re Chase (1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677. So he should be reimbursed for money paid for rent of the premises and for wages paid to clerks, workmen, and servants. Eichholz v. Polack (1910) 140 App. Div. 551, 125 N. Y. Supp. 1108. And for taxes paid on the property, the same being a valid lien which the trustee would have had to discharge if the assignee had not done so. In re Cohn (D. C. 1873) 6 N. B. R. 379, Fed. Cas. No. 2,966. And he may be allowed the costs and expenses of a sale of the property or a portion of it, if it appears that the sale was an advantageous one and beneficial to the estate. In re Scholtz (D. C. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782; In re Cohn (D. C. 1873) 6 N. B. R. 379, Fed. Cas. No. 2,966; Clark v. Marx (D. C. 1872) Fed. Cas. No. 2,830; Jackson v. McCulloch (C. C. 1871) 13 N. B. R. 283, Fed. Cas. No. 7,140.

Neither the assignee nor his attorney will be entitled to claim any compensation for services or expenses rendered or incurred in unsuccessfully attempting to resist the adjudication in bankruptcy or in the endeavor to maintain his own title and possession. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; Platt v. Archer (D. C. 1876) Fed. Cas. No. 11,214; Clark v. Marx (D. C. 1872) Fed. Cas. No. 2,830. The assignee cannot claim an allowance for any items which will result in subjecting the estate to double charges for the same thing. In re Kurth (D. C. 1878) 17 N. B. R. 573, Fed. Cas. No. 7,948.

The assignee under a common-law assignment which is avoided by the adjudication of the debtor as a bankrupt, who was permitted by the creditors to continue in possession of the property and to operate the business, is not necessarily to be charged with a resulting loss, either before or after the filing of the petition in bankruptcy; but he is liable for a loss in carrying on the business, in the absence of a finding that it was good judgment to continue the business, or of a showing as to how much of the loss was incurred before the filing of the petition. In re Karp (D. C. 1915) 228 Fed. 798.

96. —— Compensation for services.—The allowance to be made to an assignee for creditors, on surrendering the estate to the trustee in bankruptcy, must be restricted to money actually disbursed, and cannot include any commissions or compensation for his own services. In re Congdon (D. C. 1904) 129 Fed. 478, 11 Am. Bankr. Rep. 219; In re Mays (D. C. 1902) 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum (D. C. 1901) 112 Fed. 50, 7 Am. Bankr. Rep. 52; Wilbur v. Watson (D. C. 1901) 111 Fed. 493, 7 Am. Bankr. Rep. 54; In re Peter Paul Book Co. (D. C. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105; Stearns v. Flick (D. C. 1900) 103 Fed. 919, 4 Am. Bankr. Rep. 723; Hunker v. Bing (D. C. 1881) 9 Fed. 277; In re Cohn (D. C. 1873) 6 N. B. R. 379, Fed. Cas. No. 2,966; In re Stubbs (D. C. 1870) 4 N. B. R. 376, Fed. Cas. No. 13,557; In re Pauly, 1 Nat. Bankr. News, 405. If there was nothing inherently fraudulent or illegal in the assignment and the assignee was not a party to any actual fraud, he should not be deprived of compensation for his services rendered under the assignment, in so far as the same were beneficial to the estate, merely because of the fact that the assignment was an act of bankruptcy on which creditors could, if they chose, institute proceed-

ings. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1. And see Macdonald v. Moore (D. C. 1876) 15 N. B. R. 26, Fed. Cas. No. 8,763; White v. Hill (1889) 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer (1890) 151 Mass. 64, 23 N. E. 726; Perry-Mason Shoe Co. v. Sykes (1894) 72 Miss. 390, 17 South. 171, 28 L. R. A. 277; In re Stewart (1910) 179 Fed. 222, 102 C. C. A. 348; In re Chase (1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677; Summers v. Abbott (1903) 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Klein (D. C. 1902) 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Scholtz (D. C. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782; Wald v. Wehl (C. C. 1881) 6 Fed. 163; Jackson v. McCulloch (C. C. 1871) 13 N. B. R. 283, Fed. Cas. No. 7,140; Catlin v. Foster (C. C. 1870) 3 N. B. R. 540, Fed. Cas. No. 2,519.

97. —— **Fees of assignee's attorney.**—In so far as counsel's services rendered to an assignee for creditors were beneficial to the estate, an allowance may be made for them on the surrender of the estate to a trustee in bankruptcy, and if the assignee has paid the attorney's fees, he may claim reimbursement, and if not, the attorney may claim a lien on the assets for the reasonable value of his services. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Summers v. Abbott (1903) 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Scholtz (D. C. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782; Platt v. Archer (D. C. 1876) Fed. Cas. No. 11,-214; In re Marble Products Co. (D. C. 1912) 199 Fed. 668, 29 Am. Bankr. Rep. 384. CONTRA, see In re Cohn (D. C. 1873) 6 N. B. R. 379, Fed. Cas. No. 2,966; Eichholz v. Polack (1910) 140 App. Div. 551, 125 N. Y. Supp. 1108. An attorney's charge for preparing the deed of assignment is not entitled to preference, though it may be proved as an unsecured claim against the bankrupt's estate. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1.

98. —— **Allowance and payment of charges.**—Where an assignment for the benefit of creditors is made within four months prior to the assignor's adjudication in bankruptcy, all the state court can do is to preserve the property to be administered by the bankruptcy court, and it is thereafter without power to allow any claim for services to any one except such as may in good faith have been rendered before proceedings in bankruptcy. The state court may make allowances for compensation for services rendered under an assignment for the benefit of creditors, before bankruptcy proceedings against the assignor were instituted, if the claim therefor is presented before adjudication of bankruptcy. In re Bombino (Utah, 1914) 138 P. 1155.

The assignee has a lien on the assets in his hands for his necessary expenses and the value of his services which were beneficial to the estate, and is entitled to a preference in payment. Randolph v. Scruggs (1903) 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Chase (1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677. Compare In re Lains (D. C. 1877) 16 N. B. R. 168, Fed. Cas. No. 7,989; In re Rogers (D. C. 1902) 116 Fed. 435, 8 Am. Bankr. Rep. 723. If he submits himself to the jurisdiction of the court of bankruptcy, and that court makes an order requiring him to surrender to the trustee the assets in his hands, it may expressly except from the operation of the order such sums as he may be entitled to claim by way of credit or allowance. Neill v. Jackson (D. C. 1881) 8 Fed. 144. If he is sued by the trustee in bankruptcy for the surrender of the estate, he may set off his claim for compensation and expenses against the amount demanded of him by the trustee. Catlin v. Foster (C. C. 1870) Fed. Cas. No. 2,-519. In respect to such credits and allowances, the assignee must be considered as occupying the position of an "adverse claimant." And therefore the court of bankruptcy has no jurisdiction to adjudicate the merits of his claim to retain out of the estate money disbursed by him, or which he claims on account of his commission as assignee, unless he consents to the exercise of such jurisdiction. Louisville Trust Co. v. Comingor (1902) 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421.

IV. TIME OF TAKING EFFECT OF ACT

99. **Date of approval of act.**—In view of the declaration of the bankruptcy act of 1898 that it "shall go into full force and effect upon its passage," and that proceedings under state insolvency laws commenced "before the passage of this act" shall be saved, it is held that its operation in suspending the insolvency laws of the states, and depriving the courts of jurisdiction thereunder, is to be dated from the day of its approval, July 1st, and not from November 1st, the day when petitions in involuntary cases could first be filed. In re Bruss-Ritter Co. (D. C. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58, holding also that the postponement of the right to file petitions in involuntary cases until four months after the passage of the bankruptcy act did not authorize state courts, in the interval, to take jurisdiction of proceedings begun under state insolvency laws (on the

ground that the creditor would otherwise be without a remedy), being a mere regulation of procedure, and not a denial or impairment of the rights of suitors. And see Parmenter Mfg. Co. v. Hamilton (1898) 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

The statute took effect from the date of its approval, rather than from the date when proceedings under it might be commenced, as to all acts done in fraud of the purpose of the statute, such as the giving of preferences or the transfer or conveyance of property in fraud of creditors, or the commission of an act of bankruptcy. Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Blake, Moffitt & Towne v. Francis-Valentine Co. (D. C. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372.

100. —— Fractions of a day.—Where the endeavor is made to save the validity of a transfer or mortgage of property recorded on the same day on which the bankruptcy act was approved, evidence is admissible to show that the instrument in question was actually placed on the record several hours before the President approved the act by his signature. In re Wynne (C. C. 1868) Fed. Cas. No. 18,117. But in the absence of evidence to show at what hour on the first day of July, 1898, the President signed his approval to the bankruptcy act, it will be presumed to have taken effect from the earliest moment of that day; and therefore, under the provision that "no petition for involuntary bankruptcy shall be filed within four months of the passage" of the act, such a petition, filed on the first day of November, 1898, was not premature. Leidigh Carriage Co. v. Stengel (1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

V. EFFECT OF ACT ON STATE INSOLVENCY LAWS

101. Validity of state insolvency laws.—Insolvency laws may be passed by the several states, regulating the distribution of the estates of insolvent debtors, on their own petition or on compulsory proceedings against them, and authorizing the discharge of debtors from their obligations and liabilities on just and reasonable terms, and the same will be operative in the absence of a national bankruptcy law. Butler v. Goreley (1892) 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; Day v. Bardwell (1867) 97 Mass. 246; Pettitt v. Seaman (Conn. 1795) 2 Root 178; Pugh v. Bussell (Ind. 1831) 2 Blackf. 394.

102. Suspension of insolvency laws by bankruptcy act.—All state insolvency laws in force at the time of the enactment of a national bankruptcy law must yield to it, and can no longer operate upon the persons or cases within the purview of the federal statute. The latter does not repeal or destroy the state laws on the same subject, but it supersedes them and suspends their operation for the time being. Sturges v. Crowninshield (1819) 4 Wheat. 122, 4 L. Ed. 529; Ogden v. Saunders (1827) 12 Wheat. 213, 6 L. Ed. 606; Baldwin v. Hale (1863) 1 Wall. 223, 17 L. Ed. 531; In re Pickens Mfg. Co. (D. C. 1908) 158 Fed. 894, 20 Am. Bankr. Rep. 202; In re F. A. Hall Co. (D. C. 1903) 121 Fed. 992, 10 Am. Bankr. Rep. 88; Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; In re Curtis (1899) 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226; Torrens v. Hammond (C. C. 1882) 10 Fed. 900; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re John A. Etheridge Furniture Co. (D. C. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; In re Bruss-Ritter Co. (D. C. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58; In re Richard (D. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; Perry v. Langley (D. C. 1868) 1 N. B. R. 559, Fed. Cas. No. 11,006; In re Mallory (D. C. 1871) 6 N. B. R. 22, Fed. Cas. No. 8,991; In re Atkinson (D. C. 1872) 7 N. B. R. 143, Fed. Cas. No. 606; In re Temple (D. C. 1879) Fed. Cas. No. 13,826; Ex parte Eames (C. C. 1842) Fed. Cas. No. 4,237; In re Barrow (D. C. 1868) 1 N. B. R. 481, Fed. Cas. No. 1,057; In re Bunster (D. C. 1871) 5 N. B. R. 82, Fed. Cas. No. 2,136; In re Merchants' Ins. Co. (D. C. 1871) 6 N. B. R. 43, Fed. Cas. No. 9,441; In re Independent Ins. Co. (C. C. 1872) 6 N. B. R. 260, Fed. Cas. No. 7,017; In re Safe-Deposit & Sav. Inst. (D. C. 1872) 7 N. B. R. 392, Fed. Cas. No. 12,211; Freelander v. Holloman (D. C. 1873) 9 N. B. R. 331, Fed. Cas. No. 5,081; In re Green Pond R. Co. (D. C. 1876) 13 N. B. R. 118, Fed. Cas. No. 5,786; Harbaugh v. Costello (1900) 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; First Nat. Bank v. Ware (1901) 95 Me. 388, 50 Atl. 24; Parmenter Mfg. Co. v. Hamilton (1898) 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; Foley-Bean Lumber Co. v. Sawyer (1899) 76 Minn. 118, 78 N. W. 1038; Armour Packing Co. v. Brown (1899) 76 Minn. 465, 79 N. W. 522; E. C. Wescott Co. v. Berry (1899) 69 N. H. 505, 45 Atl. 352; Potts v. Smith Mfg. Co. (1904) 25 Pa. Super. Ct. 206; Hickman v. Parlin-Orendorf Co. (1909) 88 Ark. 519, 115 S. W. 371; Rosenfeld v. Siegfried (1901) 91 Mo. App. 169; Mauran v. Crown Carpet Lining Co. (1901) 23 R. I. 324, 50 Atl. 331; Hoover v. Ober (1910) 42 Pa. Super. Ct. 308; Martin v. Berry (1869) 37 Cal. 208; Barber v. Rodgers (1872) 71 Pa. 362; Hudson v. Bigham (Tenn. 1873) 12 Heisk. 58, 8 N. B. R. 494; Rowe v. Page (1874) 54 N. H. 190, 13 N. B. R. 366; In re McKee (Ky.) 1 Nat. Bankr. News, 139;

In re Reynolds (1867) 8 R. I. 485, 9 N. B. R. 50, 5 Am. Rep. 615; Lavender v. Gosnell (1875) 43 Md. 153, 12 N. B. R. 282; Steelman v. Mattix (1873) 36 N. J. Law, 344; Fisk v. Montgomery (1869) 21 La. Ann. 446; Van Nostrand v. Carr (1869) 30 Md. 128; Boese v. Locke (N. Y. 1877) 53 How. Prac. 148; Commonwealth v. O'Hara (Pa. 1867) 6 Phila. 402. CONTRA, In re Scholtz (D. C. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782.

A state insolvency law, being only superseded by the enactment of a national bankruptcy law, is revived by the repeal of the federal statute, without the necessity of its being re-enacted as a law of the state. Butler v. Goreley (1892) 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; Tua v. Carriere (1886) 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Wright (D. C. 1899) 95 Fed. 807, 2 Am. Bankr. Rep. 592; Lothrop v. Highland Foundry Co. (1880) 128 Mass. 120; Ward v. Proctor (Mass. 1843) 7 Metc. 318, 39 Am. Dec. 782; Lavender v. Gosnell (1875) 43 Md. 153, 12 N. B. R. 282; Orr v. Lisso (1881) 33 La. Ann. 476. The legislation of Congress on the subject of bankruptcy does not annul that of a state in any such sense that the state law may not be amended without re-enactment after its operation is revived by the repeal of the act of Congress. Torrens v. Hammond (C. C. 1882) 10 Fed. 900. Where a court of bankruptcy refuses to grant a discharge to a bankrupt before it, his creditors, after the repeal of the bankruptcy law, may take proceedings against him under the state insolvency law and prove their claims against his estate. Fisher v. Currier (Mass. 1844) 7 Metc. 424. A state insolvency law, suspended during the operation of a national bankruptcy law and revived by its repeal, may take cognizance of all acts within its provisions done while it was so suspended, and will apply to contracts made during that time. Palmer v. Hixon (1883) 74 Me. 447. A conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvency law of the state, while the federal bankruptcy act is in force, is a sufficient cause for instituting proceedings in insolvency against the debtor after the repeal of the bankruptcy act. Lothrop v. Highland Foundry Co. (1880) 128 Mass. 120.

It is competent for a state legislature to enact, amend, or repeal a state insolvency law while the bankruptcy act is in force. A state law of this character, passed while the federal act is operative, will not come into effect at once, but this does not make it void ab initio. The legislature has the power to make the time when its enactment shall take effect depend upon the happening of some future event. This event being the repeal of the bankruptcy law, the postponement of the efficiency of the state law until it occurs may be implied, and until that time the insolvency law will remain in abeyance. Tua v. Carriere (1886) 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Wright (D. C. 1899) 95 Fed. 807, 2 Am. Bankr. Rep. 592; Damon's Appeal (1879) 70 Me. 153; Boedefeld v. Reed (1880) 55 Cal. 299; Lewis v. County Clerk (1880) 55 Cal. 604; Seattle Coal Co. v. Thomas (1881) 57 Cal. 197; In re Peckham's Assigned Estate (1908) 35 Pa. Super. Ct. 330.

103. What state laws affected.—A state law which authorizes proceedings against a debtor which are distinctly in the nature of insolvency proceedings is superseded by the national bankruptcy law. Capital Lumber Co. v. Saunders (1914) 26 Idaho, 408, 143 Pac. 1178.

A state law which provides for administration upon the effects of an insolvent debtor and their distribution among the creditors is an "insolvency law," so as to be superseded by the national bankruptcy law, though it does not authorize a discharge of the debtor from his liabilities. In re Merchants' Ins. Co. (D. C. 1871) Fed. Cas. No. 9,441. Compare Ex parte Rank (D. C. 1842) Fed. Cas. No. 11,566. Or although it only authorizes a state officer to recommend to the creditors of the defendant that they should release him from further liability. Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29. Under Civ. Code La. art. 3098, if creditors accept the debtor's propositions and grant him a respite, the proceeding is not in the nature of an insolvency proceeding, and there is no conflict with the bankruptcy law. But if they reject the proposal and vote for the appointment of a syndic to collect and administer his property under the state insolvency law, this is incompatible with the bankruptcy law, and the state law in such a case must give way. Duffy v. His Creditors (1909) 122 La. 600, 48 South. 120.

A state law which merely protects the person of a debtor from imprisonment, without affecting the debt or contract or the other means for its enforcement, or which provides only for the release of poor debtors arrested on civil process, is not of such a nature as to be suspended by the bankruptcy law. Sullivan v. Hieskill (D. C. 1843) Fed. Cas. No. 13,594; Ex parte Jacobs (N. Y. 1871) 12 Abb. Prac. N. S. 273; Jordan v. Hall (1869) 9 R. I. 220, 11 Am. Rep. 245. The bankruptcy act does not affect the general laws of the states providing for the settlement of the estates of insolvent deceased persons. Hawkins v. Learned (1874) 54 N. H. 333. The bankruptcy law does not suspend a state law enabling a creditor to prevent the departure of his debtor from the state. Gottschalk v. Meyer (1876) 28 La. Ann. 885. Or one which authorizes the arrest and imprisonment of a judgment debtor on a showing

that he is about to remove or has concealed property with intent to defraud his creditors, though it also provides that he may be released on giving bond to apply for the benefit of the state insolvency law and comply with its requirements. Ex parte Crawford (1907) 154 Fed. 769, 83 C. C. A. 474, 18 Am. Bankr. Rep. 618. A statute designed to prevent debtors, in contemplation of insolvency, from giving preferences to favored creditors, is not a bankruptcy law and is not suspended by the act of Congress. Grunsfeld Bros. v. Brownell (1904) 12 N. M. 192, 76 Pac. 310. A statute which confers on resident creditors priority in the distribution of the assets of foreign corporations doing business within the state is not suspended by the national bankruptcy law. In re Standard Oak Veneer Co. (D. C. 1909) 173 Fed. 103, 22 Am. Bankr. Rep. 883. An action brought by a receiver in proceedings supplementary to execution is not a proceeding commenced under a state insolvency law, within the meaning of the saving clause of the bankruptcy act regarding such proceedings pending at the time of its taking effect. In re Meyers, 1 Nat. Bankr. News, 293.

104. —— Winding up insolvent corporations.—When proceedings are begun under a state statute to dissolve an insolvent corporation or forfeit its charter, and to wind up its affairs and distribute its assets, the attempt is made to cover the same ground and administer the same relief that would be obtained under the bankruptcy law, and if a proceeding in bankruptcy against the corporation is thereupon commenced in the proper federal court within four months, this will displace the proceedings in the state court and put an end to its jurisdiction. In re Watts (1903) 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, 10 Am. Bankr. Rep. 113. And see In re Standard Fuller's Earth Co. (D. C. 1911) 186 Fed. 578, 26 Am. Bankr. Rep. 862; In re Standard Cordage Co. (D. C. 1910) 184 Fed. 156, 30 Am. Bankr. Rep. 448; In re Storck Lumber Co. (D. C. 1902) 114 Fed. 360, 8 Am. Bankr. Rep. 86; Chandler v. Siddle (C. C. 1874) 10 N. B. R. 236, Fed. Cas. No. 2,594; French v. O'Brien (N. Y. 1876) 52 How. Prac. 394; Barber v. International Co. (1901) 73 Conn. 587, 48 Atl. 758; Moody v. Port Clyde Development Co. (1907) 102 Me. 365, 66 Atl. 967; Watson v. Citizens' Sav. Bank (S. C. 1851) 5 Rich. 159; State v. Superior Court of King County (D. C. 1912) 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; In re Weedman Stave Co. (D. C. 1912) 199 Fed. 948, 29 Am. Bankr. Rep. 460; Continental Building & Loan Ass'n v. Superior Court (1912) 163 Cal. 579, 126 Pac. 476. The persons whom the state court has placed in charge of the corporation for the purpose of winding it up, whether called receivers, commissioners, liquidators, or by any other name, cannot successfully oppose its adjudication in bankruptcy on the ground of the pending proceedings in the state court; and if the state law is to be regarded as an insolvency law, their appointment must be treated as void by the bankruptcy court, and they have no standing in the latter court to be heard on the petition for adjudication in bankruptcy. Thornhill v. Bank of Louisiana (C. C. 1870) 5 N. B. R. 367, Fed. Cas. No. 13,992. And see In re Salmon & Salmon (D. C. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122.

The bankruptcy law does not necessarily deprive a state court of jurisdiction conferred by a state law to dissolve a local corporation, even though the reason for exercising such jurisdiction be the insolvency of such corporation. Nothing in the bankruptcy act prevents the winding up of a defunct corporation under a state statute and by a state court, where bankruptcy proceedings are not seasonably instituted. The jurisdiction of a state court to appoint a receiver of, and to wind up, an insolvent corporation, is not affected by bankruptcy proceedings, instituted more than four months after the appointment of the receiver, in pursuance of the provisions of the bankruptcy act. Lyon v. Russell (1914) 41 App. D. C. 554.

105. —— Foreclosure and receivership.—Where the main purpose of a suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy. But where the main purpose is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident thereto will not save the case from the nullifying effect of bankruptcy proceedings on pending insolvency proceedings. Merry v. Jones (1904) 119 Ga. 643, 46 S. E. 861. An action to cancel certain deeds and subject the land to liens, when converted by amendment into a proceeding to subject the debtor's equity in the land to the liens, not being a general insolvency proceeding, was unaffected by the debtor's subsequent adjudication as a bankrupt more than four months after the liens were obtained. Virginia-Carolina Chemical Co. v. Rylee (1913) 78 S. E. 27, 139 Ga. 669.

106. Cases not covered by bankruptcy law.—As to any cases not covered by the bankruptcy law, or expressly or impliedly omitted from its operation, the insolvency laws of the several states are not superseded, but may be put into effect. Johnson v. Crawford (C. C. 1907) 154 Fed. 761, 18 Am. Bankr. Rep. 608; In re Wilmington Hosiery Co. (D. C. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; In re Worces-

ter County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Reynolds (1867) 8 R. I. 485, 9 N. B. R. 50, 5 Am. Rep. 615; Singer v. National Bedstead Mfg. Co. (1903) 65 N. J. Eq. 290, 55 Atl. 868; Appeal of Geery (1876) 43 Conn. 289, 21 Am. Rep. 653; Pugh v. Bussel (Ind. 1831) 2 Blackf. 394; Fisk v. Montgomery (1869) 21 La. Ann. 446; Simpson v. City Sav. Bank (1876) 56 N. H. 466, 15 N. B. R. 385, 22 Am. Rep. 491; Steelman v. Mattix (1873) 36 N. J. Law, 344. Prior to the amendment of 1910, the bankruptcy act made no provision for the voluntary bankruptcy of corporations, but excluded them from taking the benefit of the act in that form, and it was held that it did not prevent a state court from taking jurisdiction of a stockholder's suit for the appointment of a receiver and for winding up the affairs of the corporation, in the absence of proceedings in involuntary bankruptcy against it. Roberts Cotton Oil Co. v. F. E. Morse & Co. (1911) 97 Ark. 513, 135 S. W. 334; Keystone Driller Co. v. Superior Court of San Francisco (1903) 138 Cal. 738, 72 Pac. 398. If proceedings under a state insolvency law, or under a law for the winding up of insolvent corporations, are commenced against a corporation which is not amenable to the bankruptcy law, but which is within the terms of the state law, such proceedings are not contrary to the bankruptcy law nor suspended by it. State Nat. Bank v. Syndicate Co. of Eureka Springs (C. C. 1910) 178 Fed. 359; Dille v. People (1905) 118 Ill. App. 426; Rogers v. Boston Club (1910) 205 Mass. 261, 91 N. E. 321, 28 L. R. A. (N. S.) 743; R. H. Herron Co. v. Superior Court of San Francisco (1902) 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124; Simpson v. City Sav. Bank (1876) 56 N. H. 466, 15 N. B. R. 385, 22 Am. Rep. 491. Since the bankruptcy act forbids the institution of involuntary proceedings against "a wage-earner or a person engaged chiefly in farming or the tillage of the soil," the insolvency law of the state is not suspended as to such persons, but may be put into operation against them if they come within its terms. Old Town Bank v. McCormick (1903) 96 Md. 341, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; Hoover v. Ober (1910) 42 Pa. Super. Ct. 308; Citizens' Nat. Bank v. Gass (1905) 29 Pa. Super. Ct. 125; Miller v. Jackson (1907) 34 Pa. Super. Ct. 31; In re Rittenhouse's Insolvent Estate (1906) 30 Pa. Super. Ct. 468; Lace v. Smith (1912) 34 R. I. 1, 82 Atl. 268. The field of voluntary bankruptcy of one engaged chiefly in farming being covered by the bankruptcy act of 1898, it supersedes the state insolvency laws as to voluntary assignment of such a person, so that the state court has no jurisdiction to administer his assigned estate. Rockville Nat. Bank v. Latham (1914) 89 A. 1117, 88 Conn. 70. The national bankruptcy law does not supersede a state insolvency law in cases where the insolvent debtor owes debts less than $1,000 in amount. Landis Machine Co. v. Cooper (1913) 53 Pa. Super. Ct. 416; Appeal of Shepardson (1869) 36 Conn. 23; Corner v. Miller, 1 N. B. R. 403. CONTRA, Littlefield v. Gay (1902) 96 Me. 422, 52 Atl. 925. The act of congress does not suspend state insolvency laws so far as concerns debts and claims of a nature not to be dischargeable in bankruptcy. Johnson v. Crawford (C. C. 1907) 154 Fed. 761, 18 Am. Bankr. Rep. 608; In re Winternitz (1870) 7 Phila. 380, 18 Pittsb. Leg. J. (N. S.) 61. The bankruptcy does not supersede or suspend the operation of poor debtor laws and those which provide for the release of insolvent convicts, the bankruptcy law having no provision adapted to these cases. Johnson v. Crawford (C. C. 1907) 154 Fed. 761, 18 Am. Bankr. Rep. 608.

A state law which provides for the sequestration of the entire estate of an absconding or concealed debtor, on a writ of attachment, for the appointment of trustees to be vested with title to such estate, and for its distribution to creditors, is not in conflict with the bankruptcy law, and is not suspended or superseded by it. McCullough v. Goodhart, 1 Nat. Bankr. News, 512. And see Scully v. Kirkpatrick (1876) 79 Pa. 324.

107. Laws regulating assignments for creditors.—An assignment for the benefit of creditors, made as at common law, and not under a state insolvency law, will be valid unless it is impeached and overthrown by proceedings in bankruptcy begun within the statutory time. In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; Pogue v. Rowe (1908) 236 Ill. 157, 86 N. E. 207; Thompson v. Shaw (1908) 104 Me. 85, 71 Atl. 370; Cook v. Rogers (1875) 31 Mich. 391, 13 N. B. R. 97; In re Hawkins (1868) 34 Conn. 548, 2 N. B. R. 378; Haas v. O'Brien (1876) 66 N. Y. 597, 16 N. B. R. 508; Von Hein v. Elkus, 15 N. B. R. 194. A creditor who does not assent to an assignment for the benefit of creditors is entitled to attack it in any appropriate proceeding, and is not required to resort to a petition in bankruptcy as a means of avoiding it. Moore v. Cushing (1911) 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913A, 816. Bankruptcy act recognizes right of bankrupt to make voluntary assignment of his property to avoid attachments thereon and secure an equal distribution among all creditors. Bell v. Blessing (C. C. A. 1915) 225 Fed. 750. The national bankruptcy act suspended state laws concerning assignments for the benefit of creditors, leaving such assignments to be governed by the common law. Sabin v. Chrisman (Or. 1916) 154 P. 908.

Statutes which provide that any assignment, mortgage, or deed of trust, made by a debtor in contemplation of insolvency and for the purpose of giving a preference, shall operate as an assignment and transfer of all his property and inure to the benefit of all his creditors pro rata, if proceedings for that purpose are begun within a limited time, are not insolvency laws in such sense as to be suspended or superseded by the bankruptcy law. Linthicum v. Fenley (Ky. 1875) 11 Bush, 131; Ebersole v. Adams (Ky. 1873) 10 Bush, 83, 13 N. B. R. 141; Downer v. Porter (1903) 116 Ky. 422, 76 S. W. 135; Louisville Dry Goods Co. v. Lanman (1909) 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451. See Martin v. Hausman (C. C. 1882) 14 Fed. 160.

Statutes which require an assignment for the benefit of creditors to be recorded, and give to a state court the control of the settlement and administration of the estate, and which require the assignee to file a bond and an inventory, and provide that creditors who wish to claim under the assignment must present their claims within a stated time, and authorize the collection of assets by the assignee by suit, and his discharge on settlement of the trust, and provide for the distribution of the assigned estate among the creditors pro rata, are not necessarily insolvency laws, and proceedings commenced under them are not void merely by reason of the existence of a national bankruptcy law, though they are liable to be avoided at the instance of a trustee in bankruptcy of the insolvent assignor appointed in the bankruptcy proceedings in a proper federal court. Mayer v. Hellman (1875) 91 U. S. 496, 13 N. B. R. 440, 23 L. Ed. 377; In re Gutwillig (D. C. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Farrell (1910) 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; Peck v. Parker (1870) 65 Pa. 262, 3 Am. Rep. 625; Strong v. Carrier (1845) 17 Conn. 319; Duryea v. Guthrie (1903) 117 Wis. 399, 94 N. W. 365; Binder v. McDonald (1900) 106 Wis. 332, 82 N. W. 156; Patty-Joiner & Eubank Co. v. Cummins (Tex. Civ. App. 1900) 59 S. W. 297.

State statutes which treat an assignment for the benefit of creditors as an act of insolvency, and direct the administration of the estate to proceed as would be the case in voluntary proceedings under an insolvency law, and provide that any creditor who has not proved his claim shall be debarred from prosecuting an action on it, thus granting an insolvent a discharge from his provable debts, are in effect insolvency laws and their operation is suspended by the enactment of the national bankruptcy law. In re Curtis (D. C. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; Lyman v. Bond (1881) 130 Mass. 291; Baxter County Bank v. Copeland (Ark. 1914) 169 S. W. 1180; Pelton v. Sheridan (Or. 1914) 144 Pac. 410; First Nat. Bank of Bandon v. Manassa (Or. 1915) 150 Pac. 258. The statute of Indiana (Rev. St. 1881, §§ 2662–2683, inclusive; 2 Burns' Rev. St. 1894, §§ 2899–2920, inclusive) regulating assignments for the benefit of creditors, and investing the circuit courts of the state with jurisdiction and control over the administration of estates so assigned, including the proof and allowance of claims, the collection and distribution of assets, and the discharge of the assignee, is an insolvency law, and its operation was suspended by the enactment of the bankruptcy act of 1898. In re Smith (D. C. 1899) 92 Fed. 135. A decision of the supreme court of a state that a statute of that state regulating the administration and distribution of estates under general assignments for the benefit of creditors is an insolvency law, will be followed by the federal courts of bankruptcy in deciding upon the effect of the enactment of the national bankruptcy law upon the operation of such a statute. In re Curtis (D. C. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440.

If no proceedings are instituted in a court of bankruptcy within the time limited, for the adjudication of the assignor as a bankrupt, and for the purpose of securing the administration of the property in that court, the assignment will be valid, at least for the purpose of securing an equal distribution of the estate among the creditors; that is, it will be valid as at common law, though not as an attempt to invoke the state insolvency law. Boese v. King (1883) 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; Johnson v. Crawford (C. C. 1907) 154 Fed. 761, 18 Am. Bankr. Rep. 608; Ostrander v. Meunch (C. C. 1881) 12 Fed. 562; Wald v. Wehl (C. C. 1881) 6 Fed. 163; Boese v. King (1879) 78 N. Y. 471; Pogue v. Rowe (1908) 236 Ill. 157, 86 N. E. 207; Armour Packing Co. v. Brown (1899) 76 Minn. 465, 79 N. W. 522; Binder v. McDonald (1900) 106 Wis. 332, 82 N. W. 156; Patty-Joiner & Eubank Co. v. Cummins (1900) 93 Tex. 598, 57 S. W. 566; Hilliard v. Burlington Shoe Co. (1903) 76 Vt. 57, 56 Atl. 283; Hoague v. Cumner (1905) 187 Mass. 296, 72 N. E. 956; Louisville Dry Goods Co. v. Lanman (1909) 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451; Lucas v. Lucas' Assignee, 76 S. W. 371, 25 Ky. Law Rep. 822; Barnes v. Rettew (C. C. 1871) Fed. Cas. No. 1,019; Sparhawk v. Drexel (C. C. 1874) 12 N. B. R. 450, Fed. Cas. No. 13,204; Seaman v. Stoughton (N. Y. 1848) 3 Barb. Ch. 344; Strong v. Carrier (1845) 17 Conn. 319; Cook v. Rogers (1875) 31 Mich. 391; Bostwick v. Burnett (1878) 74 N. Y. 317; Malt-

bie v. Hotchkiss (1871) 38 Conn. 80, 5 N. B. R. 485, 9 Am. Rep. 364; Atkins v. Spear (Mass. 1844) 8 Metc. 490; Sadler v. Immel (1880) 15 Nev. 265; Thrasher v. Bentley (1874) 59 N. Y. 649; Williams v. Pitts (N. Y. 1878) 55 How. Prac. 331.

A general assignment by an insolvent debtor, though made for the equal and common benefit of all his creditors, without preferences, and without any actual fraudulent intent, either as to creditors or as to the evasion of the bankruptcy law, is an act of bankruptcy, upon which the assignor may be adjudged bankrupt, if proceedings are begun within four months thereafter, and if the other requisites as to jurisdiction are found to exist. Boese v. King (1883) 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; Cragin v. Thompson (C. C. 1873) 12 N. B. R. 81, Fed. Cas. No. 3,320; Perry v. Langley (D. C. 1868) 1 N. B. R. 559, Fed. Cas. No. 11,006; In re Pierce (D. C. 1869) 3 N. B. R. 258, Fed. Cas. No. 11,141; In re Smith (D. C. 1869) 3 N. B. R. 377, Fed. Cas. No. 12,974; Barnes v. Rettew (C. C. 1871) Fed. Cas. No. 1,019; Barton v. Tower (D. C. 1842) Fed. Cas. No. 1,085; In re Burt (C. C. 1870) Fed. Cas. No. 2,210; In re Chamberlain (D. C. 1870) 3 N. B. R. 710, Fed. Cas. No. 2,574; In re Croft (D. C. 1878) 17 N. B. R. 324, Fed. Cas. No. 3,404; Jones v. Sleeper (D. C. 1843) Fed. Cas. No. 7,496; In re Kasson (D. C. 1878) 18 N. B. R. 379, Fed. Cas. No. 7,617; In re Romanow (D. C. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; Spicer v. Ward (D. C. 1870) 3 N. B. R. 512, Fed. Cas. No. 13,241; In re Randall (D. C. 1869) 3 N. B. R. 18, Fed. Cas. No. 11,551.

The complete jurisdiction of the court of bankruptcy over the estate of the bankrupt is not affected by the fact that an assignment for the benefit of creditors under the state law had been made prior to the adjudication. The trustee in bankruptcy takes title to the whole of the estate, including that assigned; the assignment is voidable at his instance; and he may recover the property or its proceeds from the assignee. Davis v. Bohle (1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Gutwillig (1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; In re Sievers (D. C. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Gutwillig (D. C. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Smith (D. C. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Troth (C. C. 1880) 1 Fed. 405; Pool v. McDonald (C. C. 1877) 15 N. B. R. 560, Fed. Cas. No. 11,268; Cragin v. Thompson (C. C. 1873) 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Temple (D. C. 1876) 17 N. B. R. 345, Fed. Cas. No. 13,825; Macdonald v. Moore (D. C. 1876) 15 N. B. R. 26, Fed. Cas. No. 8,763; Boese v. Locke (N. Y. 1879) 17 Hun, 270. Compare Morning Telegraph Pub. Co. v. S. B. Hutchinson Co. (1906) 146 Mich. 38, 109 N. W. 42; Scott v. Grinstead (1881) 4 Ky. Law Rep. 614. Where a chattel mortgagor assigned for the benefit of creditors under Comp. St. Wyo. 1910, §§ 3366–3396, specific prior lien of mortgagee was enforceable against the property in the hands of the assignee claiming under the state insolvency law, suspended by the national bankruptcy act of 1898. Hasbrouck v. La Febre (Wyo. 1915) 152 P. 168.

If the debtor is adjudged bankrupt, and a trustee appointed, but not until more than four months from the making of the assignment, the latter will not have the right to set aside the assignment, nor will he be entitled to the possession and administration of the estate as against the voluntary assignee. In such a case, the trustee in bankruptcy, saving questions of fraud, will take only such rights as the bankrupt had and could himself claim at the time of the bankruptcy. Mayer v. Hellman (1875) 91 U. S. 496, 13 N. B. R. 440, 23 L. Ed. 377; In re Arledge (D. C. 1873) 1 N. B. R. 644, Fed. Cas. No. 533; In re Kimball (D. C. 1877) 16 N. B. R. 188, Fed. Cas. No. 7,770.

108. Effect of suspension of state insolvency laws.—A national bankruptcy law being in existence, it is the right and duty of state courts to refuse to take jurisdiction of proceedings attempted to be instituted under the state insolvency law, and when an insolvent files a petition in a state court seeking the benefit of that law, the court should dismiss the petition. Van Nostrand v. Carr (1869) 30 Md. 128, 2 N. B. R. 485; Harbaugh v. Costello (1900) 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; Barber v. International Co. of Mexico (1901) 73 Conn. 587, 48 Atl. 758.

In a case where proceedings are pending in a state court under the state insolvency law and in a federal court under the bankruptcy law, against the same debtor, the federal court may stay the action in the state court, and if an assignee has been appointed under the state law, he may be enjoined from taking possession of the property of the insolvent or required to surrender it to the trustee in bankruptcy. Ex parte Eames (C. C. 1842) Fed. Cas. No. 4,237.

During the existence of a national bankruptcy law, all proceedings under a state insolvency law are null and void for all purposes. Thornhill v. Bank of Louisiana (C. C. 1870) 5 N. B. R. 367, Fed. Cas. No. 13,992; Littlefield v. Gay (1902) 96 Me. 422, 52 Atl. 925; Martin v. Berry (1869) 37 Cal. 208, 2 N. B. R. 629; Comm. v. O'Hara, 1 N. B. R. 86. A discharge granted to the insolvent under the state law, as the re-

sult of proceedings had while the national bankruptcy law was operative and would have been applicable to his case, is entirely inoperative and constitutes no defense to an action subsequently brought against him by a domestic creditor. Shears v. Solhinger (N. Y. 1870) 10 Abb. Prac. N. S. 287; Cassard v. Kroner (Md.) 4 N. B. R. 569. An assignee under the state law has no title or claim to the property of the debtor such as will enable him to maintain an action for its recovery against a third person, the existence of the bankruptcy law, which would be applicable to the debtor, being a full defense to such an action; and this, although no proceedings under the federal statute are ever had against the insolvent. Griswold v. Pratt (Mass. 1845) 9 Metc. 16. Compare Shryock v. Basehore (1876) 82 Pa. 159, 15 N. B. R. 283. The trustee in insolvency acquires no such interest in the insolvent's estate as will entitle him to maintain an action to set aside a fraudulent and preferential conveyance, although no adjudication of bankruptcy has been had against the insolvent in the federal courts. Ketcham v. McNamara (1900) 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641. The invalidity of proceedings had under a state insolvency law, including the invalidity of the pretended title of the assignee under such law, by reason of the existence at the time of a national bankruptcy law, may be asserted, with effect, in a contest between attaching creditors and such assignee. Rowe v. Page (1874) 54 N. H. 190, 13 N. B. R. 366; Shryock v. Basehore (1876) 82 Pa. 159, 15 N. B. R. 283. Compare Cook v. Rogers (1875) 31 Mich. 391, 13 N. B. R. 97; Reed v. Taylor (1871) 32 Iowa, 209, 4 N. B. R. 710, 7 Am. Rep. 180.

Numerous cases hold that proceedings may be had and jurisdiction exercised under the state laws until their authority is called in question by the bankruptcy courts; that judicial action taken, and titles accruing, under the insolvency laws are voidable at the most; and that they are not to be avoided unless proceedings in bankruptcy are instituted, and then only at the instance of the trustee in bankruptcy. Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; Boston Mercantile Co. v. Ould-Carter Co. (1905) 123 Ga. 458, 51 S. E. 466; Patty-Joiner & Eubank Co. v. Cummins (1900) 93 Tex. 598, 57 S. W. 566; State v. Superior Court of King County (1899) 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; Jensen-King-Byrd Co. v. Williams (1904) 35 Wash. 161, 76 Pac. 934; Lavender v. Gosnell (1875) 43 Md. 153, 12 N. B. R. 282; Steelman v. Mattix (1873) 36 N. J. Law, 344; Reed v. Taylor (1871) 32 Iowa, 209, 4 N. B. R. 710, 7 Am. Rep. 180; Cook v. Rogers (1875) 31 Mich. 391, 13 N. B. R. 97; Ebersole v. Adams (Ky. 1873) 10 Bush, 83, 13 N. B. R. 141; Maltbie v. Hotchkiss (1871) 38 Conn. 80, 5 N. B. R. 485, 9 Am. Rep. 364. Notwithstanding the existence of a bankruptcy law which would be applicable to the case the parties interested may, by consent, use the state law as a means of collecting and distributing the debtor's estate. Should proceedings in bankruptcy be instituted and the federal court claim the administration of the estate, the state courts would yield; but in the absence of such a claim, the mere fact that a federal law is in existence, under which proceedings might be taken, is no objection to the jurisdiction of the state court. Maltbie v. Hotchkiss (1871) 38 Conn. 80, 9 Am. Rep. 364. Where a state insolvency law gives priority of payment out of insolvents' estates to a certain class of debts, the same debts will be entitled to priority of payment out of bankrupts' estates. In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496. Where the main purpose of a suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession of the property mortgaged will not be affected by a subsequent adjudication in bankruptcy. Nelson v. Spence (1907) 129 Ga. 35, 58 S. E. 697.

Where the debtor refuses to file his voluntary petition in bankruptcy, and yet refrains from committing any act of bankruptcy on which his creditors could proceed, there is no possibility of conflict between courts; and proceedings under the state law, even though compulsory in their nature, may be sustained for the purpose of securing an equal distribution of the debtor's property among his creditors. Appeal of Geery (1876) 43 Conn. 289, 21 Am. Rep. 653.

109. Pending proceedings under state laws.—The bankruptcy law does not deprive the state courts of the jurisdiction necessary to the final administration of the estate of an insolvent against whom, or by whom voluntarily, proceedings under the state insolvency law had been instituted before the passage of the federal statute, but the state court may proceed with the case to its final conclusion, and its action in the matter will be as valid as if no national bankruptcy law had been enacted. First Nat. Bank v. Ware (1901) 95 Me. 388, 50 Atl. 24; Hood v. Blair State Bank (1902) 3 Neb. (Unof.) 432, 91 N. W. 701; Osborn v. Fender (1903) 88 Minn. 309, 92 N. W. 1114; Meekins v. Creditors (1867) 19 La. Ann. 497, 3 N. B. R. 511; Martin v. Berry (1869) 37 Cal. 208, 2 N. B. R. 629; Lavender v. Gosnell (1875) 43 Md. 153, 12 N. B. R. 282; Longis v. Creditors (1868) 20 La. Ann. 15; In re Holmes (D. C. 1842) Fed. Cas. No. 6,633; In re Horton (C. C. 1842) Fed. Cas. No. 6,708. When a state insolvency law provides that the insolvent, on being convicted

of fraud, shall be "forever" deprived of the benefit of laws passed in favor of insolvent debtors in the state, the most that can be adjudged against an insolvent in this situation is to deprive him of the benefit of the particular state law under which the proceedings are had, that is, to deny him a discharge. Longis v. Creditors (1868) 20 La. Ann. 15. The pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, where it appears that one or more of the creditors scheduled by the bankrupt are citizens of other states than that in which the insolvency proceedings were instituted, because in this case the bankruptcy law can afford the debtor a more extensive relief than he could obtain under the state law. In re Mussey (D. C. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592. Where proceedings in insolvency against a partnership and the individuals composing it were begun in a state court, before the passage of the bankruptcy act, and remained pending at the time one of the partners was individually adjudged bankrupt, but no discharge had been granted or applied for under the state law, it was held that a debt of the partnership was provable in the bankruptcy proceedings, notwithstanding the fact that it had been proved and allowed in the insolvency proceedings and that there were assets of the firm for distribution in the state court; but such debt could not share in the individual assets of the bankrupt until his separate creditors had been paid. In re Bates (D. C. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56.

§ 9655. (Act July 1, 1898, c. 541, § 71, as amended, Act Feb. 5, 1903, c. 487, § 17.) Bankruptcy records; duty of clerks to keep; inspection.

The clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. (32 Stat. 800.)

This section was added, as a new section, to the Bankruptcy Act of July 1, 1898, c. 541, by amendment by Act Feb. 5, 1903, c. 487, § 17, cited above.

Section 19 of said amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

§ 9656. (Act July 1, 1898, c. 541, § 72, as amended, Act Feb. 5, 1903, c. 487, § 18, and Act June 25, 1910, c. 412, § 13.) Restriction of compensation of referees, receivers, marshals, and trustees.

Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act. (32 Stat. 800., 36 Stat. 842.)

This section was added, as a new section, to the Bankruptcy Act of July 1, 1898, c. 541, by amendment by Act Feb. 5, 1903, c. 487, § 18, cited above.

The amendment of this section by Act June 25, 1910, c. 412, § 13, last cited above, included receivers and marshals in the restriction of compensation, the provision originally enacted having been applicable to referees and trustees only.

Section 19 of said first amendatory Act Feb. 5, 1903, c. 487, 32 Stat. 801, provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act.

Section 14 of said second amendatory Act June 25, 1910, c. 412, 36 Stat. 842, also provided that the act should not apply to bankruptcy cases pending when it took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act as previously amended.

TITLE LXII

NATIONAL BANKS

Chap.		Sec.
1.	Organization and powers	9657
2.	Obtaining and issuing circulating notes	9697
2A.	National currency associations	9729
3.	Regulation of the banking business	9744
3A.	Federal reserve banks	9785
4.	Dissolution and receivership	9806

CHAPTER ONE

Organization and Powers

Sec.
9657. The "national-bank act."
9658. Formation of national banking associations.
9659. Requisites of organization certificate.
9660. How certificate shall be acknowledged and filed.
9661. Corporate powers of associations.
9662. Change of name or location.
9663. Effect of change of name on debts, liabilities, etc.
9664. Liabilities and suits not affected by change of name.
9665. Extension of period of corporate succession.
9666. Procedure.
9667. Examination and issue of certificate of approval by Comptroller.
9668. Corporate powers upon extension of period of succession; jurisdiction of suits by or against national banks.
9669. Withdrawal of dissenting shareholders.
9670. Redemption of circulating notes issued prior to extension of period of succession.
9671. Dissolution of banks not extending period of succession.
9672. Reservation of power to amend, alter or repeal act.
9673. Additional extension of period of corporate succession.
9674. Power to hold real property.
9675. Requisite amount of capital.
9676. Shares of stock and transfers.
9677. How payment of the capital stock must be made and proved.
9678. Proceedings if shareholder fails to pay installments.
9679. Increase of capital stock.
9680. Increase of capital stock.
9681. Reduction of capital stock.
9682. Right of shareholders to vote.
9683. Election of directors.
9684. Requisite qualifications of directors.
9685. Oath required from directors.
9686. Filling vacancies.
9687. Proceedings where no election is held on the proper day.
9688. Election of president of the board.
9689. Individual liability of shareholders; effect of transfer of shares.
9690. Executors, trustees, etc., not personally liable.
9691. Duties and liabilities when designated as depositaries of public moneys.
9692. Provisions relating to reserves of national banks not to apply to deposits of public moneys in designated depositaries.
9693. Rate of interest on special and additional deposits in national banks designated as depositaries.
9694. Organization of State banks as national banking associations.
9695. State banks having branches.
9696. Reservation of rights of associations organized under act of 1863.

§ 9657. (Act June 20, 1874, c. 343, § 1.) The "national-bank act."

The act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as "the national-bank act." (18 Stat. 123.)

This was the first section of the Currency Act of 1874, entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes."

Section 2 of the act, providing that the amount of lawful-money reserve to

be kept on hand by the banks should be determined by the amount of their deposits, is set forth post, § 9748.

Section 3 of the act, relating to deposits in the Treasury of the United States for redemption of circulating notes, is set forth post, § 9751.

Section 4 of the act, authorizing the withdrawal of circulating notes in whole or in part, is set forth post, § 9707.

Section 5 of the act, requiring the charter-number of each association to be printed on each of its notes, is set forth post, § 9715.

Section 6 of the act, limiting the circulation of United States notes, is set forth ante, § 6563.

Section 7 of the act repealed part of R. S. § 5179, and provided for the withdrawal of a certain amount of the circulating notes to secure an equitable distribution thereof around the several states; section 8 thereof provided for the sale of bonds deposited to secure the circulation in case of a refusal or neglect to comply with the requisitions made by the Comptroller for the withdrawal of circulating notes as provided by § 7; and section 9 thereof provided for a redistribution of the currency withdrawn. Said sections 7–9 were superseded by the repeal of provisions for withdrawal and redistribution of national-bank currency, and other provisions made by the Resumption Act of Jan. 14, 1875, c. 15, § 3, post, § 9720.

Act June 3, 1864, c. 106, 13 Stat. 99, mentioned in this section and designated by it "the National-Bank Act," was entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." It was incorporated, with subsequent amendatory and additional provisions relating to national banks, into this Title of the Revised Statutes which included sections 5133–5243 thereof.

Notes of Decisions

Construction and operation of act.— This act does not repeal or affect section 6572 et seq., ante, making the coins of the United States legal tender (1881) 17 Op. Atty. Gen. 144.

Cited without definite application, Austin v. Boston (1868) 7 Wall. 694, 699, 19 L. Ed. 224; Leather Manufacturers' Nat'l Bank v. Cooper (1887) 7 Sup. Ct. 777, 120 U. S. 778, 30 L. Ed. 816.

§ 9658. (R. S. § 5133.) Formation of national banking associations.

Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

Act June 3, 1864, c. 106, § 5, 13 Stat. 100.

The conversion of national gold banks into currency banks, authorized by this section, was provided for by Act Feb. 14, 1880, c. 25, post, § 9727.

Notes of Decisions

Construction and validity of act.— Congress has power to incorporate a bank. McCulloch v. Maryland (1819) 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579.

The constitutionality of the act of 1864 is unquestioned, and rests on the same principle as the act creating the second Bank of the United States. Farmers' & M. Nat. Bank v. Dearing (1875) 91 U. S. 29, 33, 23 L. Ed. 196.

A construction of the act of 1864 establishing national banks, which would bring it in conflict with state laws, would render it unconstitutional. First Nat. Bank v. Lamb (1872) 50 N. Y. 95, 10 Am. Rep. 438.

When bank becomes corporation.— From the time the comptroller of the currency issues the certificate to the bank, certifying to its constitution, it becomes a body corporate with the powers of the banking institution, and its shares of capital stock become subject to sale, the purchasers of which thereby become shareholders of the bank, and the payment of 50 per centum of the capital stock is an act subsequent to the organization of the bank. Wallace v. Hood (C. C. 1898) 89 Fed. 11, 19, affirmed (1899) 97 Fed. 865, 38 C. C. A. 510.

A national bank does not become a corporation until the articles and organization certificate are filed. Regester v. Medcalf (1889) 18 Atl. 966, 71 Md. 528.

Cited without definite application, First Nat. Bank v. Lanier (1870) 11 Wall. 369, 376, 20 L. Ed. 172; Bullard v. National Eagle Bank (1873) 18 Wall. 589, 21 L. Ed. 923; Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662; Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 256, 192 U. S. 243, 48 L. Ed. 425; Earling v. Emigh (1909) 30 Sup. Ct. 672, 674, 218 U. S. 27, 54 L. Ed. 915.

§ 9659. (R. S. § 5134.) Requisites of organization certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

National banks were authorized to change their names or locations by Act May 1, 1886, c. 73, §§ 2-4, post, §§ 9662-9664.

Notes of Decisions

Name.—Use of the title "national," see § 9835, post.

Right of bank to adopt any name, see Third National Bank of Baltimore v. Teal (C. C. 1881) 5 Fed. 503.

The stockholders of an expiring association may organize a new one, and adopt for the latter the name of the former (1882) 17 Op. Atty. Gen. 288.

Presumption of organization from use of name, see Slaughter v. First National Bank (1895) 19 South. 430, 109 Ala. 157.

Place.—As to domicile, see note under § 9661, post.

"The place where its operations of discount and deposits are to be carried on" means the town or city, and not the office or building. McCormick v. Market Nat. Bank (1896) 162 Ill. 100, 44 N. E. 381, affirming (1895) 61 Ill. App. 33.

Proof of incorporation.—See notes under § 9711, post.

Corporate existence may be shown by parol. Yakima National Bank v. Knipe (1893) 33 Pac. 834, 6 Wash. 348; National Bank of Commerce v. Galland (1896) 45 P. 35, 14 Wash. 502.

The certificate of organization is competent evidence of the incorporation. National Bank of Commerce v. Galland (1896) 45 P. 35, 14 Wash. 502.

Pleading.—See, also, note under § 9661, post.

Allegation of organization see Third Nat. Bank of Baltimore v. Teal (C. C. 1881) 5 Fed. 503.

Allegation of place of business, see Farmers' & Mechanics' Nat. Bank of Buffalo v. Rogers (Super. Buff. 1888) 1 N. Y. S. 757.

Validity of organization—Estoppel.—When person is estopped to deny validity of organization, see Casey v. Galli (1876) 94 U. S. 674, 24 L. Ed. 168; Keyser v. Hitz (1883) 2 (13 D. C.) Mackey, 473; Wheelock v. Kost (1875) 77 Ill. 296; Huffaker v. Nat. Bank of Monticello (Ky. 1876) 12 Bush, 287; Davis' Estate v. Watkins (1898) 76 N. W. 575, 56 Neb. 288; Bank of Metropolis v. Orcutt (N. Y. 1867) 48 Barb. 256; National Bank of Fairhaven v. Phœnix Warehousing Co. (N. Y. 1875) 6 Hun, 71.

National banks in territories.—Under existing legislation relating to the establishment of national banking associations, and in the present condition of Oklahoma (being without a government and system of laws), such banking associations cannot lawfully be authorized and established in the territory known by that name. (1889) 19 Op. Atty. Gen. 315.

The effect of certain provisions in the treaties with the Creek Nation of Indians of August 28, 1856, and August 11, 1866, which render inoperative in the Creek territory the various national banking laws, considered. (1889) 19 Op. Atty. Gen. 342.

A national bank cannot be lawfully established at Muskogee a town in the territory of the Creek Nation. Id.

In view of the provisions of the act of May 2, 1890 (26 Stat. 81), entitled "An act to provide a temporary government for the territory of Oklahoma," etc., there no longer exists any obstacle to the establishment of national banking associations in the Indian Territory. (1890) 19 Op. Atty. Gen. 585.

The laws relating to national bank-

ing associations are by virtue of the act of May 17, 1884 (23 Stat. 24), in force in the territory of Alaska, and such associations may be lawfully organized in that territory. (1890) 19 Op. Atty. Gen. 678.

By virtue of section 14 of the act of April 12, 1900 (31 Stat. 77), the laws of the United States relative to the organization and powers of national banks were extended to Porto Rico. (1900) 23 Op. Atty. Gen. 169.

The act of April 30, 1900 (31 Stat. 141), extended the national banking laws of the United States to the territory of Hawaii, and the Comptroller of the Currency is authorized to grant permission for the organization of national banks therein. (1900) 23 Op. Atty. Gen. 177.

The act of April 30, 1900 (31 Stat. 141), extended the national banking laws of the United States to the territory of Hawaii, and the Comptroller of the Currency is authorized to grant permission for the organization of national banks therein. Id.

Cited without definite application, Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 595, 139 U. S. 438, 35 L. Ed. 210; Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 256, 192 U. S. 243, 48 L. Ed. 425; Earling v. Emigh (1909) 30 Sup. Ct. 672, 674, 218 U. S. 27, 54 L. Ed. 915.

§ 9660. (R. S. § 5135.) How certificate shall be acknowledged and filed.

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

Copies of organization certificates certified and authenticated by the Comptroller of the Currency were made evidence in all courts and places within the United States of the existence of the association, and of all matters which could be proved by the originals, by R. S. § 885, ante, § 1497.

§ 9661. (R. S. § 5136.) Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

Act June 3, 1864, c. 106, § 8, 13 Stat. 101.

Provisions for the extension of corporate succession were made by Act July 12, 1882, c. 290, §§ 1–7, post, §§ 9665–9671.

Notes of Decisions

I. "Body corporate"

1. When perfected.
2. Pleading.
3. Domicile.

II. Nature and powers of national banks

4. In General.

III. Actions by and against banks

5. In general.
6. Jurisdiction.

IV. By-laws

7. In general.
8. Transfer of stock.
9. Lien on stock.

V. Officers, directors, and agents

10. "Other officers."
11. Eligibility.
12. Powers, duties, and liabilities.
13. —— Directors.
14. —— President.
15. —— Vice president.
16. —— Cashier.
17. —— Agent.
18. —— Liability of persons dealing with officers.
19. —— Liability of bank.
20. Ratification of official acts.
21. Official bonds.
22. Tenure of office.

VI. Discounting and negotiating evidences of debt

23. Acts authorized by statute.
24. Ultra vires acts.

VII. Deposits

25. Receipt of deposits and rights of depositors.

VIII. Coin in pledge

26. Power to assign.

IX. Loans and security

27. Loans.
28. Security.
29. —— Mortgages.
30. —— Corporate stock as security.

X. "Incidental powers"

31. Powers necessary to carry on business.
32. Repair and sale of realty.
33. Collections.
34. Unauthorized transactions in general.
35. Contracts.
36. Borrowing money.
37. Special deposits and bailments.
38. Contracts of guaranty and suretyship.
39. Dealings in stocks, bonds, and options.
40. Bank acting as broker.

XI. Guaranty of deposits

41. State guaranty laws.

XII. Insurance of assets

42. Insurance contract.

XIII. Ultra vires acts—Pleading and defenses

43. Right to plead.
44. Action against bank.
45. Action by bank.

XIV. Transactions preliminary to organization

46. Leases and other contracts.

XV. State legislation

47. Legal scope.
48. Construction and operation.

I. "BODY CORPORATE"

1. When perfected.—See note under § 9658, ante.

2. Pleading.—As to pleading relative to corporate character of national banks, see Third Nat. Bank of Baltimore v. Teal (C. C. 1881) 5 Fed. 503; Joseph Holmes Fuel & Feed Co. v. Commercial Nat. Bank of Denver (1896) 47 P. 289, 23 Colo. 210.

One who has accepted, as payee, a note made payable at a bank which the parties to the note style a "national bank," and who has sold said note to the bank, cannot put in issue the organization of such institution by merely averring want of knowledge or information sufficient to form a belief as to whether it is a body corporate organized under act of congress. Huffaker v. National Bank of Monticello (1876) 75 Ky. (12 Bush.) 287.

A denial that plaintiff "is a corporation duly organized as a national bank under the act of June 3, 1864, or any other act," does not put in issue the plaintiff's corporate existence. First Nat. Bank v. Gibson (1900) 84 N. W. 259, 60 Neb. 767.

In an action by a national bank on a draft discounted for defendant, the latter may deny plaintiff's existence as a corporation. Bank of Metropolis v. Orcutt (N. Y. 1867) 48 Barb. 256.

Under Code Civ. Proc. N. Y. § 1775, requiring a corporation to allege whether it is a foreign or domestic corporation, a national bank incorporated under act of congress, when beginning suit, must allege whether it is a foreign or domestic corporation, in view of section 18, defining corporations created under the laws of the United States located in the state as domestic corporations, and those located outside of the state as foreign corporations. First Nat. Bank v. Doying (N. Y. 1886) 13 Daly, 509.

A complaint by a national bank, which states that it is duly organized

under the national banking act, but does not state directly where it is located and doing business, or whether a domestic or foreign corporation, is sufficient, on demurrer, where it is described as a national bank of a city in the state, and that it has done business in that city for more than 10 years, under Code Civ. Proc. N. Y. § 1775, providing that, in suits by or against corporations, the complaint must state whether it is a domestic or foreign corporation, and, if the latter, in what state or country it was organized. Farmers' & Mechanics' Nat. Bank v. Rogers (Super. Buff. 1888) 1 N. Y. Supp. 757, 15 Civ. Proc. R. 250.

A complainant designating itself as the "Citizens' National Bank," instead of "Citizens' National Bank of Watertown," under which title it was incorporated, is not prevented from maintaining its suit where it sufficiently appears that the complainant was the bank to which the certificate of incorporation was issued. Citizens' Nat. Bank v. Great Western Elevator Co. (1900) 82 N. W. 186, 13 S. D. 1.

An allegation that plaintiff is a national banking corporation incorporated under and by virtue of the national banking laws is a sufficient compliance with the statutory requirement of an allegation that it is duly incorporated. Gill v. First Nat. Bank (Tex. Civ. App. 1898) 47 S. W. 751.

3. Domicile.—A national bank located in a state is a domestic, not a foreign, corporation. Hummel v. First Nat. Bank (1892) 2 Colo. App. 571, 32 Pac. 72; Market Bank v. Pacific Nat. Bank (N. Y. 1882) 64 How. Prac. 1, 2 Civ. Proc. R. 330.

II. NATURE AND POWERS OF NATIONAL BANKS

4. In general.—A national bank is a corporation, the powers of which are defined and limited by the acts of Congress authorizing the creation of such institutions. First Nat. Bank v. Murray (1914) 212 Fed. 140, 128 C. C. A. 652; Hansford v. National Bank of Tifton (1912) 73 S. E. 405, 10 Ga. App. 270; Roberts v. Same (1912) 73 S. E. 407, 10 Ga. App. 272; Matthews v. Skinker (1876) 62 Mo. 329, 21 Am. Rep. 425. They have only those powers specified in the act and such other powers as are necessarily incidental thereto. McBoyle v. Union Nat. Bank (Cal. 1912) 122 P. 458.

National banking corporations are agencies or instruments of the general government, designed to aid in the administration of an important branch of the public service, and are an appropriate constitutional means to that end. Pollard v. State (1880) 65 Ala. 628; Tarrant v. Bessemer Nat. Bank (Ala. App. 1913) 61 So. 47.

As instrumentalities of the federal government, they are necessarily under the paramount authority of the United States. State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations. Easton v. Iowa (1903) 23 Sup. St. 289, 293, 188 U. S. 220, 47 L. Ed. 452.

The decisions of the United States Supreme Court are ultimate and paramount authority as to the powers and liabilities of national banks. Hansford v. National Bank of Tifton (Ga. App. 1912) 73 S. E. 405; Roberts v. Same (Ga. App. 1912) 73 S. E. 407. See, also, notes under Const. art. 6, cl. 2.

The powers of a national bank under the national banking act are essential matters for federal construction and interpretation, and whatever rules may obtain in the several states as to the powers of corporations under such statutes, all state courts must yield to the decisions of the Supreme Court of the United States construing the powers of national banks under the national banking act. First Nat. Bank v. American Nat. Bank (1903) 173 Mo. 153, 72 S. W. 1059.

III. ACTIONS BY AND AGAINST BANKS

5. In general.—Suits may be brought by national banks as well as against them. Kennedy v. Gibson (1869) 75 U. S. (8 Wall.) 498, 19 L. Ed. 476.

A national banking association after the appointment of a receiver may sue and be sued in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 400, 20 L. Ed. 840.

This section subjects banks to actions as fully as natural persons, and nowhere in the Banking Act is there evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the legality of actions founded on local things. Casey v. Adams (1880) 102 U. S. 66, 67, 26 L. Ed. 52.

National banks are the creatures of congressional legislation and their right to sue and be sued in the United States courts is a matter purely of congressional legislation. National Bank v. Fore (C. C. 1885) 25 Fed. 209, 210.

A national bank, once chartered and continuing to do business, is a de facto corporation, and, though its charter has expired, its right to sue cannot be questioned. First Nat. Bank of Kansas City, Mo., v. Pennig (Cal. App. 1915) 151 P. 1153.

National banks can sue and be sued, the same as natural persons. Tal-

madge v. Third Nat. Bank of New York (N. Y. 1882) 27 Hun, 61.

Banks have power to employ attorneys to prosecute or defend suits, and the president may agree as to their compensation. Guthrie Nat. Bank v. Earl (1895) 2 Okl. 617, 39 Pac. 391.

6. Jurisdiction.—See note under § 9668, post.

This section and R. S. § 5198 (see section 9759, post), modified Judiciary Act 1789, § 9 (R. S. §§ 563, 711, ante, §§ 991, 1233), as to jurisdiction of actions against national banks for penalties, and give concurrent jurisdiction to the state courts. First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 38, 132 U. S. 141, 33 L. Ed. 282.

IV. BY-LAWS

7. In general.—A repealed statute cannot be retained by a by-law. First Nat. Bank v. Lanier (1870) 11 Wall. 369, 374, 20 L. Ed. 172.

A by-law of a national bank, though indorsed on a stock certificate, prohibiting a stockholder who is indebted to the bank from transferring his certificate, is void, as in contravention of § 9762. Feckheimer v. National Exch. Bank (1884) 79 Va. 80.

8. Transfer of stock.—The directors of a national bank have authority to forbid any stockholder indebted to the bank, whether as principal or surety, to transfer his stock without the consent of a majority of the directors. Knight v. Old Nat. Bank (C. C. 1871) Fed. Cas. No. 7,885.

The power conferred upon national banks by the national banking act of congress, to enact by-laws, is broad enough to authorize a by-law declaring that no shares shall be transferred while the holder is indebted to the bank; and such a by-law is reasonable and valid, and any attempted transfer by the shareholder while indebted to the bank is void. Young v. Vough (1873) 23 N. J. Eq. (8 C. E. Green) 325.

The articles of association of a national bank provided that the bank might make by-laws to prohibit the transfer of stock owned by a stockholder liable to it either as principal debtor or otherwise. Certificates of stock were issued, which did not state that they were not transferable by the holder while liable to the bank, but which stated that they were transferable only on the books of the bank on surrender of the certificates. Held that, though the stock was not negotiable paper in the legal sense of the term, the fact that the bank had put it in the power of the stockholder to transfer the stock estopped it from objecting to a bona fide transfer on the ground that the original holder was indebted to the bank. Lee v. Citizens' Nat. Bank (Ohio, 1872) 2 Cin. R. 298.

A national bank made a by-law permitting a transfer of stock by signing a blank form of indorsement on a stock certificate, which provided that the shares were transferable only on the books of the bank on surrender of the certificate, but contained no notice of another by-law prohibiting a stockholder indebted to the bank from transferring his stock. Held, that a bona fide transferee of such a certificate from a stockholder indebted to the bank had an equity in the shares of the stock superior to the bank. Lee v. Citizens' Bank (1872) 5 Ohio Dec. 21.

A national bank has the power to make by-laws providing that the shares of its capital stock shall be transferable only on its books; that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank, without the assent of its directors; and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due from such stockholder, and may be sold at public auction for the satisfaction of such debt, on default of payment thereof. Lockwood v. Mechanics' Nat. Bank (1869) 9 R. I. 308, 11 Am. Rep. 253.

9. Lien on stock.—A national bank has no lien, through its by-laws, on its own stock for a debt due from a stockholder to the bank. Second Nat. Bank v. National State Bank (1874) 73 Ky. (10 Bush) 367; Delaware, L. & W. R. Co. v. Oxford Iron Co. (1884) 38 N. J. Eq. 340; Goodbar v. City Nat. Bank (1890) 78 Tex. 461, 14 S. W. 851.

A national bank cannot, even by provisions framed with a direct view to that effect in its articles of association, and by direct by-laws, acquire a lien on its own stock held by persons who are its debtors. A by-law giving to a bank a lien on stock of its debtors is not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," within the meaning of the national banking act of 1864, and therefore not such a regulation as, under the act, national banks have a right to make. Bullard v. National Eagle Bank (1873) 85 U. S. (10 Wall.) 589, 21 L. Ed. 923.

A national bank may, by a by-law, subject the shares of a stockholder to a lien for his debt to the bank, so as to prevent a transfer on the books until such debt is paid. Bath Sav. Inst. v. Sagadahoc Nat. Bank (1897) 36 A. 996, 89 Me. 500.

Unless the articles of association of a banking corporation expressly authorize the directors by a by-law to make the stock of any of its stockholders subject to a lien in favor of the bank, as security for a debt due by him to the bank, no such lien can be thus created. Rosenback v. Salt Springs Nat. Bank (N. Y. 1868) 53 Barb. 495.

A provision in the by-laws and stock certificates of a national bank that the stock was not transferable until all the former stockholder's liabilities to the bank were paid is void, and will not

give the bank a lien on its stock for a debt due from the stockholder arising from collections made by him for the bank. A debt arising from the proceeds of such collection amounts to a loan, within the prohibition of the act. Conklin v. Second Nat. Bank of Oswego (1871) 45 N. Y. 655, 53 Barb. 512, note.

V. OFFICERS, DIRECTORS, AND AGENTS

10. "Other officers."—A "solicitor of business" is not within the clause "and other officers." Case v. First Nat. Bank (1908) 109 N. Y. S. 1119, 59 Misc. Rep. 269.

11. Eligibility.—The board of directors of a national bank may by a by-law restrict their choice of a president to its own members, even if others are eligible under the national banking law. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591.

12. Powers, duties, and liabilities.—Managers of a savings bank—such as National Savings Bank of the District of Columbia—have no right to profits, as such. Huntington v. Savings Bank (1877) 96 U. S. 388, 24 L. Ed. 777.

Under this section the directors may empower the president, or cashier, or both, to indorse the papers of the bank. Auten v. U. S. Nat. Bank (1899) 19 Sup. Ct. 628, 637, 174 U. S. 125, 43 L. Ed. 920.

The executive officers of a national bank may legitimately borrow money for the bank's use, in the usual course of business without special authority from their board of directors. Rankin v. City Nat. Bank of Kansas City, Mo. (1908) 28 Sup. Ct. 346, 208 U. S. 541, 52 L. Ed. 610, affirming judgment Cherry v. City Nat. Bank of Kansas City, Mo. (1906) 144 Fed. 587, 75 C. C. A. 343.

When a bank has long been in the habit of rediscounting its bills receivable in large amounts, all other banks in the same locality pursuing the same practice, and the president and cashier of such bank propose to its regular correspondent a rediscount of its bills, and there are no circumstances attending such proposal to arouse suspicion, the bank to which it is made may safely act upon it, without further inquiry, on the assumption that the act has either been specially authorized, or that the officers are acting within the purview of their general powers. United States Nat. Bank v. First Nat. Bank (1897) 79 Fed. 296, 24 C. C. A. 597.

When a loss has been caused to a national bank by the appropriation of its funds to a purpose unauthorized by law, or by culpable negligence or conversion of its funds, the officers who participated in or consented to the act are jointly and severally liable for the entire amount. Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402.

The officers of a national bank may borrow money of the bank the same as other persons. Blair v. First Nat. Bank (C. C. 1877) Fed. Cas. No. 1,-485.

The president or other officer of a national bank may borrow money of the bank, giving his note therefor. Id.

The officers of an insolvent national bank cannot be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and, as they thought at the time, for the best interests of the bank, merely because such loans and discounts appear to have been unwise and hazardous when looked back upon. Witters v. Sowles (C. C. 1887) 31 Fed. 1.

An officer of a national bank has no authority to agree to receive anything but money in payment of a nonnegotiable note indorsed to it. First Nat. Bank v. Alexander (Ala. 1907) 44 So. 866.

Since there is no implied warranty by an agent that his principal has authority to contract, an officer or agent of a national bank, acting within the scope of his authority, cannot be held personally liable upon a contract of guaranty made on behalf of the bank, but which is in excess of the power of the bank to make. Thilmany v. Iowa Paper-Bag Co. (1899) 79 N. W. 261, 108 Iowa, 357, 75 Am. St. Rep. 259.

The receiving of securities or other property as custodian or bailee, either gratuitously or for hire, is not within the ordinary business of a bank, and it is not within the scope of the general powers or apparent authority of the executive and ministerial officers of such a corporation to bind the corporation by a contract for such a bailment. First Nat. Bank v. Ocean Nat. Bank (1875) 60 N. Y. 278, 19 Am. Rep. 181.

A discount clerk has no authority by virtue of his office or his agency resulting from assignment to him of a bond and mortgage for use of the bank to secure a debt due to it to bind it by stipulation in a suit to which it is not a party, to the effect that he was holder and owner, where he had executed an unrecorded assignment to the bank. Slade v. Bennett (1909) 118 N. Y. S. 278, 133 App. Div. 666.

An agreement made by the president or cashier of a national bank to indemnify the indorser of a draft for the bank's accommodation is binding upon the bank. First Nat. Bank v. Sullivan (Pa. 1882) 11 Wkly. Notes Cas. 362.

13. —— Directors.—As to liability of directors, see § 9831, post.

Directors of a national bank are not empowered, without action of the stockholders, to levy the assessment ordered by the Comptroller for the purpose of restoring its capital and enabling it to continue in business. Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 192 U. S. 243, 48 L. Ed. 425, affirming judgment Weinhard v. Com-

mercial Nat. Bank (1902) 68 P. 806, 41 Or. 359.

Concealment by directors, of the bank's embarrassment, is no breach of duty, unless the embarrassment is such as to demand immediate suspension. Robinson v. Hall (C. C. 1894) 59 Fed. 648, decree reversed (1894) 63 Fed. 222, 12 C. C. A. 674.

The directors of a national bank are regarded as trustees for the stockholders, and the strictest performance of their duties as such is required. First Nat. Bank v. Doherty (1913) 161 S. W. 211, 156 Ky. 386. It is their duty to exercise a general supervision and control over its affairs, and they are required, in the performance of such duty, to act in good faith, with ordinary diligence and intelligence, the measure of the care required being a question of fact, under the particular circumstances of each case. While they cannot devest themselves of such duty of general supervision by committing it to the cashier, they may properly intrust him with all discretionary powers which appertain to the immediate management of the business, including the discounting of paper; and they are not liable for losses occurring through his malversations, unless their own proper care would have prevented such losses. Nor are they required to take measures of unusual precaution, when they have no reason to distrust the integrity or efficiency of the cashier or other employés. Warner v. Penoyer (1898) 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761, reversing decree (C. C. 1897) 82 Fed. 181. Directors are not guilty of negligence for failure to examine the books where the cashier, who is universally believed to be honest and capable, has the entire management of the affairs of the bank, which appears to be in a prosperous condition, and there are no grounds of suspicion known to the directors. Id. The only powers conferred on them by statute are vested in them as a board, and when acting as a unit; and therefore the assent of a majority of the individual members of the board, acting separately and singly, is not the assent of the bank, and is not binding upon it. First Nat. Bank v. Drake (1886) 35 Kan. 564, 11 Pac. 445.

14. —— President.—The president of a national bank has power, by virtue of his office: To compromise or release a debt due the bank. Farmers' Nat. Bank v. Templeton (Tex. Civ. App. 1896) 40 S. W. 412. To indorse negotiable paper in the ordinary transaction of its business. United States Nat. Bank v. First Nat. Bank (1897) 79 Fed. 296, 24 C. C. A. 597.

When he has the actual management of its operations, he is authorized: To procure the discount of its paper. Hanover Nat. Bank of City of New York v. First Nat. Bank of Burlingame, Kan. (1901) 109 Fed. 421, 48 C. C. A. 482. To purchase real estate for the bank to secure payment of suspended paper or a doubtful debt, in order to save the debt, or a portion of it, from loss. Libby v. Union Nat. Bank (1881) 99 Ill. 622. And to do other acts within the authority of ministerial officers. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591.

The president has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred on him by the board of directors, either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice. National Bank of Commerce v. Atkinson (C. C. 1893) 55 Fed. 465, judgment affirmed National Bank of Commerce v. First Nat. Bank (1894) 61 Fed. 809, 10 C. C. A. 87.

In the absence of special authority, conferred by the directors of a bank by resolution, acquiescence, or implied assent, the president of a bank has no authority to draw drafts on its funds in payment of personal debts. Lamson v. Beard (1899) 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822.

The president of a national bank has no authority to subscribe money for the bank on condition that certain parties would erect a paper mill in the town. Robertson v. Buffalo County Nat. Bank (1894) 40 Neb. 235, 58 N. W. 715.

The president of a national bank has not necessarily, by virtue of his office, power to draw checks against an account kept by his bank with another bank. Putnam v. U. S. (1896) 16 Sup. Ct. 923, 162 U. S. 687, 40 L. Ed. 1118.

A president of a national bank has no power, in the ordinary course of business, to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity; and hence the bank cannot be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate. American Surety Co. of New York v. Pauly (1898) 18 Sup. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment (1896) 72 Fed. 470, 18 C. C. A. 644.

The president of a national bank, who owned a majority of its stock, and exercised full control of its affairs, with the acquiescence of the directors obtained a loan for the bank at a time when it was in fact insolvent, though it was not known or believed to be so by the lender. As security the president executed a deed to the bank building and lot; producing what purported to be a certified copy of the minutes of the action of the board of directors authorizing the conveyance, though no such action had in fact been taken. Held that, it being consistent with the course of decision in the state, the deed

though insufficient as a legal conveyance by the bank, would be upheld as an equitable mortgage. Stapylton v. Stockton (1899) 91 Fed. 326, 33 C. C. A. 542.

A finding that money of a bank, appropriated by the president to his personal use by means of drafts, was wrongfully taken by him, is equivalent to a finding that he had no authority to draw and use the drafts. Lamson v. Beard (1899) 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822.

The president of a national bank discounted his note with a correspondent bank under an agreement by which the latter placed the proceeds to the credit of his own bank in a special account which was not subject to check, but was to be held to meet the note at its maturity. The books of his bank showed the amount as a deposit in its general account with the correspondent, the purpose being to deceive the examiner. On the failure of his bank the correspondent charged the note to the special account in accordance with the agreement. Held, that the amount to the credit of the insolvent bank in such amount did not in fact belong to it, but remained the property of the pretended lender; the whole transaction being merely a subterfuge, and that its application to the payment of the note was not a conversion. Cherry v. City Nat. Bank of Kansas City, Mo. (1906) 144 Fed. 587, 75 C. C. A. 343, judgment affirmed Rankin v. Same (1908) 28 Sup. Ct. 346, 208 U. S. 541, 52 L. Ed. 610.

If the transaction be regarded as a real, and not a pretended, loan, it was one made for the benefit of the borrowing bank, and not of its president, and its application to the payment of his note, which was in reality that of the bank, was within the right of the lender. Id.

A bank which, in order to deceive a bank examiner, discounts the note of a president of another national bank and places the proceeds to the credit of his bank in a special account, not subject to check, does not, by charging the note against the account, in accordance with the agreement, without knowledge of the other bank's failing condition, become liable to the receiver of such other bank as for a conversion, on the theory that, because such president drew his check on the other bank for the full amount, and deposited it to his credit in his own bank, and, by means of a corresponding check against his personal account, removed from the assets of his bank certain notes objected to by the bank examiner, the transaction must be regarded as really a loan to the president, secured by an attempted pledge of the funds of his bank. Rankin v. City Nat. Bank of Kansas City, Mo. (1908) 28 Sup. Ct. 346, 208 U. S. 541, 52 L. Ed. 610, affirming judgment Cherry v. City Nat. Bank of Kansas City, Mo. (1906) 144 Fed. 587, 75 C. C. A. 343.

The act of the president of a national bank in making a note of a corporation by himself as treasurer, crediting the corporation with the amount, paying the corporation and another sums of money thereon, was his act as its president and a breach of his official duty. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591.

The president of a national bank, being in failing health, was anxious to resign his position, but, at the suggestion of a majority of the directors, consented to take a year's leave of absence, and during such absence, and without any fault on his own part, losses were sustained by the bank, and it became insolvent. Held, in a suit by the receiver to charge the directors with such losses, that he was not liable. Movius v. Lee (C. C. 1887) 30 Fed. 298, decree affirmed Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662.

In an action by the receiver of an insolvent national bank against a correspondent of the bank to recover money deposited by the bank with its correspondent, the evidence showed that the directors of the bank left it to the president to negotiate loans, and to make such contracts as to repayment and security as were lawful and usual. Held, that the evidence was sufficient to establish the president's authority to pledge the deposit with the correspondent as security for loans made by the latter. Bell v. Hanover Nat. Bank (C. C. 1893) 57 Fed. 821.

The authority of the president of a national bank to guaranty notes of third parties, held and sold by the bank, will be presumed in favor of a purchaser without notice to the contrary. Thomas v. City Nat. Bank (1894) 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Id. (1896) 46 Neb. 861, 65 N. W. 895.

The president of a national bank, who requests the cashier to make advances to a minor, verbally promising that he will see them repaid, is liable to the bank for any loss sustained by reason of said loans, as having been guilty of a breach of trust. Brown v. Farmers' & Merchants' Nat. Bank (1895) 88 Tex. 265, 31 S. W. 285.

Under the national banking law, which authorizes banks to elect boards of directors to which are committed the management and control of the bank, and which are empowered to select one of their number as president, in the absence of any by-law or any other fact extending the authority of the president elected by the directors, a statement by him that a note which was in fact a forgery was properly signed by the purported signer is without authority from the bank and not binding upon it. Commercial Nat. Bank v. First Nat. Bank (1904) 80 S. W. 601, 97

Tex. 536, 104 Am. St. Rep. 879, judgment reversed (Tex. Civ. App. 1903) 77 S. W. 239.

Where the president of a bank certified a noncommercial instrument for the accommodation of the drawers solely in his official capacity and ultra vires the bank's powers, he was not individually liable on such certification. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App. 1908) 106 S. W. 782.

15. —— **Vice president.**—The vice president and general executive officer of a national bank has no power to borrow so large a sum as $200,000 at four months' time for the bank in the absence of special authority from the board of directors, and persons dealing with him are presumed to know the extent of his powers in this regard. Western Nat. Bank v. Armstrong (1894) 14 Sup. Ct. 572, 152 U. S. 346, 38 L. Ed. 470.

Where, by general usage between correspondent banks, money is frequently borrowed by one from another,—the executive officers of the borrowing bank acting in its behalf, and no other authority being furnished or demanded,—the directors of a national bank will be presumed to have knowledge of such usage; and in the absence of contrary provision, or notice to its correspondents, its vice president is authorized to borrow money from a correspondent on its behalf. Armstrong v. Chemical Nat. Bank (1897) 83 Fed. 556, 27 C. C. A. 601, affirming decree Chemical Nat. Bank v. Armstrong (C. C. 1896) 76 Fed. 339.

A vice president of a national bank, who is the acting president, may, in conformity with established custom, without special authority from the board of directors, borrow money on behalf of the bank from another bank. Chemical Nat. Bank v. Armstrong (C. C. 1896) 76 Fed. 339, distinguishing Bank v. Armstrong (1894) 14 Sup. Ct. 572, 152 U. S. 346, 38 L. Ed. 470.

In an action on a note representing a loan made by plaintiff national bank to defendant, where it appeared that the negotiations for the loan were carried on by one M., plaintiff's vice president, and that as a result of such negotiations the loan was made to defendant, M. was an agent of the bank, and evidence as to what officers regularly had authority to make loans was immaterial. National Bank of North America in New York v. Thomas (R. I. 1910) 74 A. 1092.

16. —— **Cashier.**—The acts of the cashier in receiving special deposits are binding on a national bank. American Nat. Bank v. E. W. Adams & Co. (1914) 143 P. 508, 44 Okl. 129, L. R. A. 1915B, 542. But a national bank is not bound by its cashier's acts beyond the scope of his authority. American Nat. Bank v. E. W. Adams & Co. (Okl. 1914) 143 P. 508.

A cashier's guaranty that a stock of shoes which he allows to be stored in the bank will be delivered to the proper party on compliance with stipulated conditions held not binding on the bank. American Nat. Bank v. E. W. Adams & Co. (1914) 143 P. 508, 44 Okl. 129, L. R. A. 1915B, 542.

The cashier of a national bank has power to transfer notes and bills receivable, payable to the bank, without special authority from the directors. Memphis Cotton Oil Co. v. Gist (Tex. Civ. App. 1915) 179 S. W. 1090. Where he has actual authority to employ a real estate broker to find a customer for lands belonging to the bank, he binds the bank by a misstatement to the broker as to the identity of lands owned by it, as the ownership of the lands is a matter within the peculiar knowledge of the cashier and of which the broker is ignorant. Arnold v. National Bank of Waupaca (1905) 105 N. W. 828, 126 Wis. 362, 3 L. R. A. (N. S.) 580. And where he is the active executive officer and is intrusted with the duty of selling lands acquired by the bank in satisfaction of debts, and has authority to employ a broker to sell such lands, he acts within the scope of his authority in designating to the broker the lands to be offered for sale, and a mistake in such designation is likewise within the scope of his authority, and is in effect the act of the bank, for which it is responsible. Arnold v. National Bank of Waupaca (1905) 105 N. W. 828, 126 Wis. 362, 3 L. R. A. (N. S.) 580.

The cashier of a bank, who, in addition to his usual powers, is, in the absence of the president, running the bank under the advice of the executive committee, has authority to bind the bank by a contract to renew notes, in consideration of the release by the indorser of a lien on the maker's property. Bank of Commerce v. Bright (1896) 77 Fed. 949, 23 C. C. A. 586.

It is error to give instructions authorizing the jury, in determining whether a transaction by which the cashier of a national bank obtained possession of some of its funds was a misapplication thereof, to consider the fact that his indebtedness to the bank exceeded 10 per cent. of its capital. Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584.

The cashier of a national bank in Boston held to have no authority to certify checks, either by usage or otherwise. Merchants' Nat. Bank v. State Nat. Bank (C. C. 1868) Fed. Cas. No. 9,449.

In contemplation of law, the leasing of property belonging to a national banking association is not within the ordinary powers and duties of the cashier of the bank. Spongberg v. First

Nat. Bank (1910) 110 P. 716, 18 Idaho, 524.

Defendant wrote on a letter head of a national bank, of which he was cashier, requesting plaintiff to sign a replevin bond for a third person, who had brought suit in plaintiff's county, and that they would indemnify plaintiff from all harm, defendant adding the word "Cashier," after his signature to the letter. Held, that as the bank could not enter into such agreement, and as the letter did not clearly show that defendant was acting for the bank, with no intention of binding himself, he would be liable. Knickerbocker v. Wilcox (1890) 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

The cashier of a national bank is the proper person to make the affidavit of the true amount of the indebtedness for which the bank brings suit. Parkhurst v. Citizens' Nat. Bank (1883) 61 Md. 254.

The cashier of a bank has no implied authority to make a representation on behalf of the bank as to the solvency of one of its debtors, so as to estop the bank by reason of such a representation made by him in reply to an inquiry. Crawford v. Boston Store Mercantile Co. (1890) 67 Mo. App. 39.

Where a note was part of assets of state bank which became a national bank, after the change such note could be transferred by the cashier without authority from the directors, irrespective of Rev. St. Mo. 1909, § 1112. Gill v. Newhouse (Mo. 1915) 178 S. W. 495.

The cashier of a national bank is presumed to have the same authority as cashiers of other banks of discount in respect to receiving evidences of debt for collection. Hanson v. Heard (1897) 38 A. 788, 69 N. H. 190.

Where a bank cashier guarantees that a stock of goods, which he allows to be stored in the bank, will be duly delivered on compliance with certain stipulations, he is liable as bailee for a breach thereof. American Nat. Bank v. E. W. Adams & Co. (1914) 143 P. 508, 44 Okl. 129, L. R. A. 1915B, 542.

The rule that payment to an agent acting within the scope of his authority is payment to the principal, and that the principal thereby becomes responsible for the default of his agent, applied in case of a payment to a cashier of a national bank; and therefore the person paying the money cannot sue the cashier for a misappropriation of the money. Wilson v. Rogers (1872) 1 Wyo. 51.

17. —— Agent.—Where a national bank authorized an agent to sell cattle subject to a mortgage to the bank it contending that specified cattle were included, the agent's contract of sale of such cattle was within the agency, in absence of knowledge of the purchaser of any limitation of agent's authority. Dupree v. First Nat. Bank (Tex. Civ. App. 1912) 146 S. W. 608.

18. —— Liability of persons dealing with officers.—Where the cashier in his official capacity draws checks on the bank's correspondent in favor of his own creditor, and to be applied to his individual use, the payee will be liable to the bank for the money thus wrongfully applied, unless authority to the cashier to so apply the bank's funds is affirmatively shown. Anderson v. Kissam (C. C. 1888) 35 Fed. 699, judgment reversed Kissam v. Anderson (1892) 12 Sup. Ct. 960, 145 U. S. 435, 36 L. Ed. 765.

Neither the cashier of a national bank nor a member of the discount board owning a majority of the stock, nor the two conspiring together, can give away the funds of the bank, nor use them to pay their individual debts, and if they conspire to pay the stockholder's debt by the entry of credits on the bank books in favor of his creditor based on fictitious notes, and the creditor checks out the amount of the credit without the sanction of the directors, the creditor is liable to the bank for the money so drawn, though he may have had no knowledge of the fraud of the officers. Cobe v. Coughlin Hardware Co. (1910) 112 P. 115, 83 Kan. 522.

19. —— Liability of bank.—The fact that a bank lost, through a burglary, certain funds intrusted to it, will not, by itself, prove negligence on the part of the bank. Wylie v. Northampton Nat. Bank (1886) 7 Sup. Ct. 268, 119 U. S. 361, 30 L. Ed. 455, affirming judgment (C. C. 1883) 15 Fed. 428.

Where a bank was broken into by burglars, and property belonging to it and to others was taken, it is competent for the bank to take measures for the recovery of its own; and if deemed best it might lawfully undertake to act for others jointly concerned; and want of proper skill and care in the performance of such an undertaking would be ground of liability in damages for failure. Id.

Where the offer of bank officials, to a meeting of depositors, to appoint a joint committee to recover certain deposits lost by a bank robbery, is rejected by the depositors, and the bank proceeds to undertake the recovery on its own account, there is no evidence to sustain the allegation of a petition, brought against the bank by depositors, that the depositors were induced to abandon individual efforts at recovery by the bank's undertaking to act as the depositors' agents in the recovery. Id.

Stockholder in a national bank cannot recover damages for tearing down its old building and constructing a new one during action by him to restrain it from doing so. Wingert v. First Nat. Bank (1912) 32 Sup. Ct. 391, 223 U. S. 670, 56 L. Ed. 605, dismissing ap-

peal (1909) 175 Fed. 739, 99 C. C. A. 315.

The receiver of an insolvent national bank is liable for money borrowed by the president of the bank without special authority, when it appears that the bank actually received the money and appropriated it to its own use. Blanchard v. Commercial Bank (1896) 75 Fed. 249, 21 C. C. A. 319, distinguishing Western Nat. Bank v. Armstrong (1894) 14 Sup. Ct. 572, 152 U. S. 346, 38 L. Ed. 470.

A national bank is not bound by the unauthorized guaranty by its cashier of a bond and mortgage sold by it to one who had reason to know that it was acting only as a broker, where he made no inquiry as to the cashier's authority, and the bank received none of the proceeds of the sale. Farmers' & Merchants' Nat. Bank v. Smith (1896) 77 Fed. 129, 23 C. C. A. 80.

Where an accommodation note was made to a national bank and collaterals were attached thereto to secure the bank for a debt due from its cashier, the president's interest in the transaction was not adverse to the bank, so that his knowledge with respect to the transaction was imputable to the bank. Skud v. Tillinghast (1912) 195 Fed. 1, 115 C. C. A. 83.

Where the president of a national bank instructed its correspondent bank to charge up against the bank of which he was president the amount of a note given by him in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside. the transaction. Burton v. Burley (C. C. 1880) 13 Fed. 811.

The responsibility of a bank, in the absence of express authority to do a particular act, is limited to the acts of its officers and agents performed in the discharge of their ordinary duties in the usual course of business and within the sphere and scope of such duties, and acts within the ordinary sphere and scope of business are presumed to be by authority and within the knowledge of the directors. National Bank of Commerce v. Atkinson (C. C. 1893) 55 Fed. 465, 472.

A national bank is liable for fraudulent representations by its cashier to another bank as to the financial responsibility of a customer. Nevada Bank v. Portland Nat. Bank (C. C. 1893) 59 Fed. 338.

The directors of a national bank made reports and issued a statement falsely representing the bank to be in good condition. Held, that the bank could not thereby be made liable for deceit to a stranger, who, in reliance upon such reports and statement, had loaned money on the stock of the bank. Merchants' Nat. Bank v. Armstrong (C. C. 1895) 65 Fed. 932.

A national bank is not liable for the misapplication by its president of the proceeds of checks intrusted to him by a depositor as the agent of the depositor. Stallo v. Wagner (D. C. 1914) 220 Fed. 360.

The diversion of the proceeds of a check given a bank in payment of a note by its president which would not appear in the depositor's statement, entitles him to recover either the note or the amount of the check from the receiver of the bank. Id.

The failure of a depositor to protest against the diversion of funds from his bank account, amounting practically to theft by the president, held to preclude him from enforcing his claim for that amount against the receiver. Id.

Evidence held insufficient to charge the receiver of an insolvent national bank with the proceeds of the sale of certain bonds, which complainant delivered to the president of the bank, taking his individual receipt therefor. Id.

Evidence held to show that the transfer of items from the account of a depositor of a national bank to other accounts was authorized by the depositor, so as not to entitle him to a claim against the receiver. Id.

Evidence held to show that notes and drafts, which a depositor sought to charge against the receiver of a national bank were given for the accommodation of the president of the bank. Stallo v. Wagner (D. C. 1914) 220 Fed. 360.

As to the outside world and persons dealing with a national bank, its cashier is its authorized agent to indorse negotiable paper owned by the bank, and the bank is not relieved from liability as indorser of a note by reason of the fraud of the cashier, unless the indorsee had notice of the fraud. Auten v. Manistee Nat. Bank (1899) 54 S. W. 337, 67 Ark. 243, 47 L. R. A. 329.

Since neither the directors, officers, nor agents of a national bank have authority to institute prosecutions for violations of the public criminal laws, nor to cause requisition papers to be issued for alleged criminals, no liability attaches against the bank for such acts on the part of its directors, officers, or agents. Hansford v. National Bank of Tifton (Ga. App. 1912) 73 S. E. 405; Roberts v. Same (Ga. App. 1912) 73 S. E. 407.

A company indebted to a national bank on a note, and also to its president and cashier on indorsements made for it, turned over to such officers its property, to be sold, and the proceeds applied on such indebtedness, the surplus, if any, to be paid to the company. Held, that, regardless of the question of the liability of the officers, the bank, as such, was liable to the company for a surplus which it received and

used in its business. Paxton v. Vincennes Mfg. Co. (1898) 50 N. E. 583, 20 Ind. App. 253.

A national bank is not responsible for any false representations made by its teller to induce a person to purchase railroad bonds, the selling of such bonds not being within the authorized business of the bank. Weckler v. First Nat. Bank (1875) 42 Md. 581, 20 Am. Rep. 95.

The loss of a special deposit through the theft of the cashier or clerks of a bank, does not render the bank liable, in the absence of evidence of negligence in the selection of such cashier or clerks, or in permitting them to be retained after notice of unfitness. Smith v. First Nat. Bank (1868) 99 Mass. 605, 47 Am. Dec. 59.

A. shipped a cargo of sugar to B., and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B., and that the sugar was deliverable to his order, and made no mention of any agency. B. indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors at a meeting at which B. was present. Held, that B.'s knowledge of the fraud was not imputable to the bank, and that an action by A. against the bank for the conversion of the sugar could not be maintained. Innerarity v. Merchants' Nat. Bank (1885) 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

In an action for money deposited with its cashier, on agreement that the money should be invested in stocks and bonds, a broker testified that his firm bought certain shares for defendant bank, taking the certificate in plaintiff's name, and that his firm had had another account for several years. Held, that a receipt for shares of said stock in plaintiff's name from the witness' firm signed by defendant's cashier as such, previous to the transaction in suit, was admissible on the issue whether plaintiff dealt with the cashier individually. L'Herbette v. Pittsfield Nat. Bank (1894) 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

In an action against a bank to recover the proceeds of bonds, held, that the transaction was with the bank, and not with the president individually, and that plaintiff could recover. Van Leuvan v. First Nat. Bank (N. Y. 1871) 6 Lans. 373, affirmed in (1873) 54 N. Y. 671.

A national bank was held liable for the wrongful act of the cashier in transferring to his own name, and hypothecating for his own debt, stocks which plaintiff, according to the previous course of business of the bank, and with the consent of the president, had intrusted to the cashier, in his capacity as such, to sell, and place the proceeds to plaintiff's credit. Williamson v. Mason (N. Y. 1877) 12 Hun, 97.

A bank held not liable for fraud of its president in connection with the unauthorized purchase and sale of its stock. Prosser v. First Nat. Bank (1887) 106 N. Y. 677, 13 N. E. 287.

Where a cashier of a national bank bought and sold stocks for customers in the name of the bank, with the knowledge of the directors, the bank is liable for stocks embezzled by the cashier, though the bank was unauthorized to deal in stock. Searle v. First Nat. Bank (Pa. 1885) 2 Walk. 395.

Where all the negotiations for a loan by a national bank to defendant were conducted by the bank's vice president acting for the bank, the facts material to the transaction as to the ownership of property by defendant which came to the knowledge of the vice president were notice to the bank, and it was immaterial whether the vice president communicated his knowledge to other officers of the bank, or whether he remained an officer until the time an attachment issued in a suit on the note. National Bank of North America in New York v. Thomas (1910) 74 A. 1092, 30 R. I. 294.

A national bank is not liable in its corporate capacity for the undertaking of an individual touching its organization, unless the bank, after its organization, adopt in some manner the contract. McDonough v. First Nat. Bank (1870) 34 Tex. 309.

Knowledge of cashier that a draft was the proceeds of mortgaged sheep held not imputable to the bank. Rock Springs Nat. Bank v. Luman (1894) 5 Wyo. 159, 38 P. 678.

20. Ratification of official acts.—The indorsement by a bank officer of a guaranty on transferring a note is presumed to be made by authority, which the bank, retaining and enjoying the proceeds of the transaction, is estopped to deny. People's Bank v. Manufacturers' Nat. Bank (1879) 101 U. S. 181, 183, 25 L. Ed. 907.

The borrowing of money on behalf of a national bank from its correspondent by one of its officers is ratified by the passing without objection of a monthly statement of the lending bank, showing the loan, and sent according to usage, where such statement was received by employés who were not concerned in making the loan. Armstrong v. Chemical Nat. Bank (1897) 83 Fed. 556, 27 C. C. A. 601, affirming decree Chemical Nat. Bank v. Armstrong (C. C. 1896) 76 Fed. 339.

A national bank cannot authorize or ratify an act absolutely ultra vires, committed by its agents or officers. Hansford v. National Bank of Tifton (Ga. App. 1912) 73 S. E. 405; Rob-

erts v. Same (Ga. App. 1912) 73 S. E. 407.

Acts and conduct of board of directors held a ratification of the action of the cashier, which rendered the lease contract entered into by him the contract of the bank. Spongberg v. First Nat. Bank (1910) 110 P. 716, 18 Idaho, 524, 31 L. R. A. (N. S.) 736, Ann. Cas. 1912A, 95.

The cashier, a bank's agent in general routine business, accepted a deed in its behalf, which by grantor's direction he placed on record. Held an acceptance by the bank. Hall v. Farmers' & Merchants' Bank (1898) 46 S. W. 1000, 145 Mo. 418.

The retention by a national bank of the proceeds of the sale and guaranty of notes owned by the bank is a ratification of the president's act in such selling, whether he was authorized to execute the guaranty or not. Thomas v. City Nat. Bank (1894) 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Id. (1896) 46 Neb. 861, 65 N. W. 895.

Where the president of a national bank had actual authority to represent it in specified negotiations, his ratification of a contract made by an agent in such transaction was the ratification of the bank. Dupree v. First Nat. Bank (Tex. Civ. App. 1912) 146 S. W. 608.

Where the directors allowed the cashier, who was the principal stockholder and thereafter became president, to assume complete control over a bank, the bank is bound by his acts in acquiring land for its benefit. First Nat. Bank of Kennewick v. Conway (Wash. 1915) 151 P. 1129.

21. **Official bonds.**—A bond conditioned for the proper performance by a cashier of his duties "for and during all the time he shall hold the said office" binds the sureties for all such time, irrespective of the fact that he is reappointed at the beginning of each year. Westervelt v. Mohrenstecher (1896) 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477.

In an action on a cashier's bond for damages arising from breach thereof by his misappropriation of money and making of excessive loans, the fact that the bank and its receiver have sued and obtained judgment upon notes taken by the cashier for such misappropriated money and excessive loans is no defense. Id.

The making of a loan exceeding 10 per cent. of a national bank's capital, in the absence of fraud, is not a breach of the cashier's bond. Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584.

It is no defense to an action on the bond of a national bank officer, on the theory that the principal had made a note of $3,000 without authority for a corporation, that the receiver of the bank sued the corporation on the note, on the theory that the principal had authority to make it. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591.

Directors have a discretion whether or not to require bonds of their officers; and the omission to take a bond of a cashier who is a man of good repute and character, and of some visible property, does not of itself render them personally liable for losses caused by his misconduct. Robinson v. Hall (C. C. 1894) 59 Fed. 648, decree reversed (1894) 63 Fed. 222, 12 C. C. A. 674.

A plea by a surety on the bond of a cashier, in an action for the breach of the covenants in such bond, that charges no fraud or complicity against the president or directors, but simply a neglect of duty in not themselves discovering what the sureties covenanted the cashier should reveal, is bad. Frelinghuysen v. Baldwin (D. C. 1883) 16 Fed. 452, following Minor v. Mechanics' Bank (1828) 1 Pet. 46, 7 L. Ed. 47.

A plea that substantially alleges that a cashier's bond is invalid, as against the sureties, because the corporation did not volunteer information of the fact that the cashier was also a director of the bank, is also bad. Id.

The sureties on a cashier's bond are not released from liability for a default of the cashier because such default was permitted by the negligence and misconduct of the president and directors. Phillips v. Bossard (D. C. 1888) 35 Fed. 99.

22. **Tenure of office.**—Mere suspension of a national bank by an examiner did not effect a retirement of the cashier, especially where he actually continued to render service until the appointment of a receiver by the comptroller. American Surety Co. v. Pauly (1898) 18 Sup. Ct. 552, 558, 170 U. S. 133, 42 L. Ed. 977.

Retirement of a national bank president from its service is not effected by the mere suspension of the bank and taking possession thereof by an examiner; but, in the absence of some other action, the president continues in his service until at least a receiver is appointed by the comptroller of the currency. Id.

Since the national bank act expressly provides that the cashier of a national bank shall hold his office subject to the pleasure of the board of directors, a by-law providing that a cashier shall hold his office for one year, and shall be elected annually, is nugatory, as is a reappointment in accordance with such by-law at the beginning of each year. Westervelt v. Mohrenstecher (1896) 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477.

The office of cashier of a national bank is not an annual office, but the term of the incumbent continues until he resigns or until he is removed or a successor is appointed by the board of directors of the bank. Id.

Subject to the free exercise by its

board of directors of its power to remove him at its pleasure, a national bank may fix the term of office of its president or other officer. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591.

Even if provision of articles of association and by-laws, restricting the power of removal of the president to a two-thirds' vote, was void, other terms of the provision, that the board should elect one of its members president, who should hold office for the term for which he was elected a director, were valid. Id.

The directors of a national bank have power to remove the president, both under the act of congress relative to national banks and under the articles of association, where such articles give express authority to remove; and it makes no difference that the bank has never adopted any by-laws. Taylor v. Hutton (N. Y. 1864) 43 Barb. 195, 18 Abb. Prac. 16.

VI. DISCOUNTING AND NEGOTIATING EVIDENCES OF DEBT

23. Acts authorized by statute.—As to penalties imposed for violation of this section, see notes under § 9831, post.

The discount of commercial paper is the form according to which national banks are authorized to make their loans, and the terms "loans" and "discounts" are synonymous. National Bank of Gloversville v. Johnson (1881) 104 U. S. 271, 277, 26 L. Ed. 742.

National banks have the power "to carry on the business of banking by discounting and negotiating" notes, etc., and a note taken in the usual course of business may be deemed to have been "discounted," although the term "purchase" may be applied to the transaction. First Nat. Bank v. Sherbourne (1884) 14 Ill. App. (14 Bradw.) 566.

A national bank has authority to take and hold interest coupons not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer. First Nat. Bank v. Bennington (C. C. 1879) Fed. Cas. No. 4,807. It also has authority: To purchase checks, whether payable to order or bearer. First Nat. Bank v. Harris (1871) 108 Mass. 514. To purchase bonds issued by the board of education of a city. Newport Nat. Bank v. Board of Education of Newport (1902) 70 S. W. 186, 24 Ky. Law Rep. 876, 114 Ky. 87. To acquire title to commercial paper, although it may be unable to show that it has made a profit upon the purchase of the paper. Blairsville Nat. Bank v. Crabbs (1910) 44 Pa. Super. Ct. 454. To purchase at a discount notes or bills of third persons owned by and available to one dealing with the bank. Smith v. Exchange Bank of Pittsburg (1875) 26 Ohio St. 141. To buy a draft accompanying a bill of lading, the draft being drawn in favor of the bank by a seller of goods upon a buyer. Union Nat. Bank v. Rowan (1885) 23 S. C. 339, 55 Am. Rep. 26. To purchase notes at less than their face value. Morris v. Third Nat. Bank (1905) 142 Fed. 25, 73 C. C. A. 211, writ of certiorari denied (1906) 26 Sup. Ct. 762, 201 U. S. 649, 50 L. Ed. 905. To authorize, through the board of directors, the president of the bank to discount commercial paper, and do any other act within the power of the cashier, or of any other officer of the bank. Rankin v. Tygard (1912) 198 Fed. 795, 119 C. C. A. 591. And to enter into an agreement to exchange nonregistered United States bonds for registered bonds. Yerkes v. National Bank of Port Jervis (1877) 69 N. Y. 382, 25 Am. Rep. 208.

In an action by a national bank to recover on a note held by it, it alleged in the petition that the holder of the note "sold, assigned, transferred, and discounted" the note to the plaintiff. Held, that the words "sold" and "discounted" were intended by the pleader to have the same meaning the word "sold" being used to convey the idea of a transfer by discount, according to the usages of business and the regular rates of discount, rather than a barter and sale. Ridgway v. National Bank of New Castle (1890) 12 Ky. Law Rep. 216.

The purchase of a note from the payee, with the latter's indorsement, is a purchase by discounting in the usual course of business, and is not a purchase by barter and sale, as would be the case if the note was taken without indorsement, or by indorsement without recourse. Nicholson v. National Bank (1891) 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223.

Where a national bank purchases a negotiable note from the payee upon his indorsement before maturity, it is a purchase by discount, and not by barter and sale. The transaction is, therefore, within the powers of such bank, and is not subject to the plea of the maker that the purchase was ultra vires, and the note still subject to the defenses which were available against the payee. Id.

Evidence that a note acquired by a national bank was in the hands of the indorser's agent, who consulted the indorser about the rate of interest before giving it to the bank, and that the money paid by the bank was paid to the indorser less the agent's commission, warrants, if it does not require, a finding that the bank discounted the note for the indorser. Prescott Nat. Bank v. Butler (1893) 157 Mass. 548, 32 N. E. 909.

Where the cashier of a national bank, who was also a director of an insurance company, received several notes, ag-

gregating $25,000, from subscribers to the stock of the insurance company, entered them on the books of the company as discounted paper, and passed them at their face value to the credit of the insurance company, the fact that the interest was not deducted in advance, nor the money delivered, but entered as a cash credit, does not support a contention that the notes were neither discounted nor negotiated. The act of the cashier was, therefore, one that the bank could itself do or ratify. Ellerbe v. National Exch. Bank (1892) 109 Mo. 445, 19 S. W. 241.

A national bank can properly and legally engage in the business of dealing in and exchanging government securities. Van Leuven v. First Nat. Bank (1873) 54 N. Y. 671.

The words, "by discounting and negotiating promissory notes, drafts, bills of exchange," do not limit the mode of exercising the "incidental powers" necessary to carry on the business of banking, so that under that section a national bank may carry on banking "by discounting and negotiating promissory notes, drafts, bills of exchange," etc., and may exercise "all such incidental powers as shall be necessary" for that purpose. Shinkle v. First Nat. Bank (1872) 22 Ohio St. 516.

24. Ultra vires acts.—A national bank cannot acquire title to a note by purchase. Ridgway v. National Bank of New Castle (1890) 12 Ky. Law Rep. 216. Or purchase negotiable paper, except from surplus capital. Lazear v. National Union Bank (1879) 52 Md. 78, 36 Am. Rep. 355. Or to discount negotiable paper only intended such discounts as were contemplated by the commercial law and the customs and usages of banks in general, a national bank has no authority to discount a note containing a provision for attorney's fees. Merchants' Nat. Bank v. Sevier (N. Y. 1882) 27 Alb. Law J. 447.

This section confers no authority on national banks to acquire notes, drafts, etc., otherwise than by way of discount, for the term "negotiating" merely concerns disposal by a bank of the notes, etc., it may have acquired, and authorizes the transfer thereof. Danforth v. National State Bank (1891) 48 Fed. 271, 274, 1 C. C. A. 62, 17 L. R. A. 622. They cannot deal in promissory notes, as choses in action, for the purposes of private gain and profit alone, or acquire title thereto by purchase, other than in the way of discount. First Nat. Bank v. Pierson (1877) 24 Minn. 140, 31 Am. Rep. 341.

Three days before the maturity of a note for $260, bearing no interest, a national bank obtained title to it by giving therefor $259. The bank's rate of discount was 8 per cent., but the cashier testified that he did not calculate interest on the note, but gave a lump sum therefor to the holder. Held, that the bank acquired the note by purchase, and not by discount, and, being a national bank, its act was ultra vires, and it acquired no title. Ridgway v. National Bank of New Castle (1890) 12 Ky. Law Rep. 216.

A contract made by a national bank to sell stock in another corporation, title to which had not been acquired on foreclosure of a pledge, was ultra vires and unenforceable. Hotchkin v. Third Nat. Bank of Syracuse, N. Y. (1914) 106 N. E. 974, 219 Mass. 234.

A national bank may buy drafts with bills of lading attached, but not bills of lading. First Nat. Bank of Mifflintown v. First Nat. Bank of New Kensington (1915) 92 A. 1076, 247 Pa. 40.

The procurement of a signature to a note for another bank, in order that it may lend money to a third person, and a representation that the signature is genuine, are not within the powers of a national bank, and it is not liable where the note turns out to be a forgery. Commercial Nat. Bank v. First Nat. Bank (1904) 80 S. W. 601, 97 Tex. 536, 104 Am. St. Rep. 879, reversing judgment (Civ. App. 1903) 77 S. W. 239.

A bank had no power to certify an instrument by which the drawers agreed to pay their surety any amount the surety might be legally required to pay by virtue of such suretyship, not exceeding $10,159, the check to be void in the absence of such liability; such instrument not being a commercial check, drawn in the ordinary course of banking business. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App. 1908) 106 S. W. 782.

VII. DEPOSITS

25. Receipt of deposits and rights of depositors.—A national bank is liable for damages occasioned by the loss, through gross negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors. Carlisle First Nat. Bank v. Graham (1879) 100 U. S. 699, 25 L. Ed. 750.

Where a bank, drawer of a foreign bill of exchange, represents to plaintiff, to whose order it is made payable, that one W. is a bona fide holder of the bill, as purchaser or remitter, for his use in trading with K., and plaintiff, relying on such representation, takes the bill on deposit from K. knowing that he has received it from W., places it to his credit as cash, and pays his checks, the drawing bank or its receiver is estopped, in an action on the bill, to show that W. was not a bona fide holder. Armstrong v. American Exch. Nat. Bank (1890) 10 Sup. Ct. 450, 133 U. S. 433, 33 L. Ed. 747.

To receive deposits is among the powers specially delegated to national banks. Eastern Tp. Bank v. Vermont

Nat. Bank (C. C. 1884) 22 Fed. 186, 188.

If, for the purpose of making a showing of money in a national bank, to deceive an examiner, money is left with the bank in a sack to be returned in the same condition without mingling with the bank's funds, this is not a deposit which may be entered as such on the books. U. S. v. Peters (C. C. 1898) 87 Fed. 984.

Where a state treasurer places state funds in a national bank, subject to check, the bank giving security therefor, and agreeing to pay interest on daily balances, the transaction is a deposit, and not a loan to the bank. State of Nebraska v. First Nat. Bank (C. C. 1898) 88 Fed. 947.

Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, the burden of proof was on the receiver to show that the purchase of stock was actually made. Somerset Nat. Banking Co.'s Receiver v. Adams (1903) 72 S. W. 1125, 24 Ky. Law Rep. 2083.

The fact that the depositor proved his deposit account before the receiver, without including the part sued for, did not estop him from denying that he subscribed for the stock. Id.

A national bank receiving money from depositors for investment, under an agreement to pay a fixed rate of interest thereon, is a debtor to the depositors for the deposits and interest, for the interest agreed to be paid on the money received is not in the nature of a dividend of profits realized from the successful management of the bank, but the depositors' security depends on the general solvency of the bank. State v. People's Nat. Bank (1908) 70 A. 542, 75 N. H. 27.

Defendant, depositor in insolvent bank, sued by the receiver as indorser on notes, held entitled to set off against his liability as indorser the amount of his deposit. Curtis v. Davidson (1915) 109 N. E. 481, 215 N. Y. 395.

The burden of proof is on a depositor in an insolvent bank, indorser on notes held by it, in proceedings to have amount of his deposit set off against his indorser's liability, to show that he cannot indemnify himself against the maker. Id.

Where, at the time a national bank was placed in the hands of a receiver, another corporation had on deposit therein a certain sum of money, and was also liable to the bank on distinct contracts, such other corporation had the right to direct the application of the money so on deposit. Tourtelot v. Whithed (1900) 84 N. W. 8, 9 N. D. 407.

The deposits of a national bank constitute loans to it and confer on the depositor a mere chose in action. State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

VIII. COIN IN PLEDGE

26. Power to assign.—A bank having coin in pledge may sell and assign its special property, and the assignee will become vested with the legal rights of the assignor. Merchants' Nat. Bank v. State Nat. Bank (1870) 10 Wall. 604, 643, 19 L. Ed. 1008.

IX. LOANS AND SECURITY

27. Loans.—A national bank may lend money in good faith, without any fraudulent intent, to its directors as well as to others, provided the amount so loaned does not exceed the limitation of one-tenth of the capital stock actually paid in. National Bank of Commerce v. National Bank of Missouri (C. C. 1878) Fed. Cas. No. 18,310.

One national bank, which loans money to another, knowing that the latter intends to loan the same to its directors, may recover the same from the borrowing bank, if it had no knowledge of any fraudulent intent in making the loans to the directors, even though the directors failed to repay the same. Id.

Where, in evidence of a loan actually made to a bank, the loaning bank accepts from the borrowing bank a note signed by the latter's cashier personally and indorsed by the borrowing bank, to avoid disclosing on the face of the transaction an excessive loan, the borrowing bank is not thereby relieved from its obligation as a debtor. First Nat. Bank v. State Bank of Northwood (N. D. 1906) 109 N. W. 61.

28. Security.—A national bank receiving a note of a third person for the debt of its cashier who pledged collaterals attached to the note must be deemed to have contracted to keep the securities for the benefit of the maker, and its failure to do so was a breach of contract. Skud v. Tillinghast (1912) 195 Fed. 1, 115 C. C. A. 83.

Since the bank could not receive the benefit of the note without bearing the burden of the knowledge of its officers that the note was secured by the collaterals, it was liable for the loss of such collaterals. Id.

The omission of the officer of a national bank to exact security for moneys lent cannot be made a ground of defense to an action brought by the bank to recover such loan. Union Min. Co. v. Rocky Mt. Nat. Bank (1873) 2 Colo. 248.

A bank held to have power to take elevator as security for debt. German Nat. Bank v. Meadowcroft (1879) 4 Ill. App. (4 Bradw.) 630.

Evidence held to show that president of bank, after selling collateral security and paying secured debt, held the balance in trust for the payment of other debts due the bank from the pledgor.

Frazee v. Phœnix Nat. Bank (1914) 170 S. W. 532, 161 Ky. 175.

The original demand having been transferred to a national bank, the question whether the bank could lawfully take the collateral security will not be determined in an action to foreclose the mortgage to which the bank is not made a party. Briggs v. Hannowald (1877) 35 Mich. 474.

A married woman indorsed upon a promissory note: "I hereby charge my separate and personal estate for the payment of the within note." Held not to be a mortgage, in any sense, but simply a personal security, which a national bank is not prohibited from taking. Third Nat. Bank v. Blake (1878) 73 N. Y. 260.

A national bank has power: To loan money on the personal note of the borrower, secured by the pledge of a warehouse receipt. Cleveland v. Shoeman (1883) 40 Ohio St. 176. To enter into a contract whereby bonds are deposited with it as collateral security for call loans. Third Nat. Bank v. Boyd (1876) 44 Md. 47, 22 Am. Rep. 35. To take notes and mortgages in the name of a third person for the purpose of securing its claims. Shinkle v. First Nat. Bank (1872) 22 Ohio St. 516. To take a pledge of chattels as security for money lent. Pittsburgh Locomotive & Car Works v. State Nat. Bank (C. C. 1875) Fed. Cas. No. 11,-198. And to take an assignment of the money due and to become due from a city on a contract for paving a street, from the contractors, to secure an existing, bona fide indebtedness by the contractor to the bank. First Nat. Bank v. City of Ottawa (1890) 43 Kan. 294, 23 Pac. 485. But it has no authority to lend its credit on personal security. Johnston v. Charlottesville Nat. Bank (C. C. 1879) Fed. Cas. No. 7,425.

29. —— **Mortgages.**—A national bank may take a chattel mortgage to secure a previously contracted debt, and may enforce the same. Gaar v. Centralia Bank (1886) 20 Ill. App. (20 Bradw.) 611; Spafford v. First Nat. Bank (1873) 37 Iowa, 181; First Nat. Bank v. Elmore (1879) 52 Iowa, 541, 3 N. W. 547; Montgomery Nat. Bank v. McCleaster (Com. Pl. 1893) 2 Pa. Dist. R. 546. Such mortgages are only voidable, and the government alone can object. Graham v. National Bank of New York (1880) 32 N. J. Eq. (5 Stew.) 804.

Mortgages void under a state insolvency law are not freed from its operation because owned by a national bank. Witters v. Sowles (C. C. 1887) 32 Fed. 758.

Where the issue is not raised by the pleadings, the court will not presume that the mortgage sought to be foreclosed by a national bank was taken or held by the bank in contravention of the national currency act, or that the same was invalid. First Nat. Bank v. Kidd (1873) 20 Minn. 234 (Gil. 212).

As to loans on real estate security, see notes under § 9674, post.

30. —— **Corporate stock as security.**—The national bank act does not prohibit loans secured by stock in another bank as collateral. Germania Nat. Bank v. Case (1878) 99 U. S. 628, 633, 25 L. Ed. 448.

A national bank has power to lend money upon the note or other personal obligation of the borrower, secured by a pledge of stock of a corporation as collateral security. Shoemaker v. National Mechanics' Bank (C. C. 1869) Fed. Cas. No. 12,801.

The cashier of a national bank held to have authority to sell stock purchased by it in insolvency proceedings against the pledgor after it had been pledged as security for a loan. McBoyle v. Union Nat. Bank (Cal. 1912) 122 P. 458.

A national bank may acquire stock, to be afterwards converted into money, provided such acquisition is not for the purpose of speculation, but merely to avert or diminish an apprehended loss on account of a claim to which the bank has been subjected. First Nat. Bank v. National Exch. Bank (1874) 39 Md. 600.

A national bank, which in the ordinary course of business receives stock as collateral security for a loan, may protect itself from loss by taking the stock in payment of the loan. Westminster Nat. Bank v. New England Electrical Works (1906) 62 A. 971, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637.

While a national bank cannot deal in stocks, it may loan money on shares of other corporations, and to collect the debt may purchase the stock, or may acquire it to protect itself against loss in compromising a doubtful liability. Fourth Nat. Bank of Nashville v. Stahlman (1915) 178 S. W. 942, 132 Tenn. 367, L. R. A. 1916A, 568.

As incidental to the power of loaning money on personal security, a national bank, in the usual course of business, may accept stock of another corporation as collateral; and by the enforcement of its rights become owner thereof, and liable as a stockholder. Fulton v. National Bank of Denison (1901) 62 S. W. 84, 26 Tex. Civ. App. 115.

A national bank making loans and taking corporate stock as collateral security therefor, in the usual course of business, may enforce its rights against the stock. Corn Exch. Nat. Bank v. Kaiser (1915) 151 N. W. 259, 160 Wis. 199.

X. "INCIDENTAL POWERS"

31. **Powers necessary to carry on business.**—A national bank may make a valid sale or assignment of a judgment in its favor. Emory v. Joice

(1879) 70 Mo. 537. And may accept an assignment of a judgment for collection, and agree to hold the proceeds subject to assignor's order. Miller v. King (1912) 32 Sup. Ct. 243, 223 U. S. 505, 56 L. Ed. 528. It may intrust to its agents such authority as is required to meet the legitimate demands of its authorized business and to conduct its affairs within the scope of its charter. Ricker Nat. Bank v. Stone (Okl. 1908) 97 P. 577. It may employ a solicitor of business for a year. Case v. First Nat. Bank (1908) 109 N. Y. S. 1119, 59 Misc. Rep. 269. It may acquire and hold stock in a building corporation as part of a transaction for renting desirable banking quarters. Fourth Nat. Bank of Nashville v. Stahlman (1915) 178 S. W. 942, 132 Tenn. 367, L. R. A. 1916A, 568. It may receive, before maturity, payment of debts owing to the bank, although such debts bear a high rate of interest, if the money is needed for the legitimate business of the bank. Keyser v. Hitz (D. C. 1883) 2 Mackey, 513. It may be designated by the mayor and council of a city as the depository for city funds, under a law authorizing them to designate the depository, and may lawfully agree to pay interest on the deposits and to give a bond for their security. Interstate Nat. Bank v. Ferguson (1892) 48 Kan. 732, 30 Pac. 237. And it may covenant to pay on demand a lien on land acquired by it. Mutual Life Ins. Co. of New York v. Yates County Nat. Bank (1898) 54 N. Y. S. 743, 35 App. Div. 218.

Authority is given by this section to transact a banking business, and all incidental powers necessary to carry it on are granted. This power necessarily implies the right of a bank to incur liabilities in the regular course of business, as well as to become a creditor of others, and the power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Compromises to avoid or reduce losses come within the general scope of the powers of the board of directors, and except to the extent to which they are restrained by the charter and by-laws the directors and officers are authorized to use their judgment and discretion in effecting these compromises. First Nat. Bank v. Nat. Exch. Bank (1875) 92 U. S. 122, 127, 23 L. Ed. 679.

Even if a national bank does not get the legal title to a note purchased in the market, it may maintain an action thereon, as the holder, against the maker and indorsers. Prescott Nat. Bank v. Butler (1893) 157 Mass. 548, 32 N. E. 909.

A national bank empowered by charter to provide necessary real estate for its business may make a contract to prevent the erection of buildings on adjacent land so as to secure light and air for its banking house. First Presbyterian Church v. National State Bank (1894) 57 N. J. Law, 27, 29 Atl. 320, affirmed in (1895) 58 N. J. Law (29 Vroom) 406, 36 Atl. 1129.

A national bank holding a mortgage on cattle was authorized to contract to obtain from the mortgagor the title to the cattle, and resell them to a third person, or to foreclose and buy at the sale, applying its bid on the debt. Dupree v. First Nat. Bank (Tex. Civ. App. 1912) 146 S. W. 608.

32. Repair and sale of realty.—A bank may sell its realty. New Orleans Nat. Bank v. Raymond (1877) 29 La. Ann. 355, 29 Am. Rep. 335; First Nat. Bank v. Kidd (1874) 20 Minn. 234 (Gil. 212).

When a bank has lawfully acquired real estate or other property, it may sell it and convert it into money; and to do so it may clean it, make reasonable repairs on it, and put it in presentable condition to attract purchasers, in the same way that an individual of sound judgment and prudence would do if he desired to sell. The authority to do these things is an incidental power vested in the corporation under this section. Cooper v. Hill (1899) 94 Fed. 582, 585, 36 C. C. A. 402.

A national bank has the power to enter into an agreement to accept personal property in payment for its real estate, which it has disposed of. First Nat. Bank v. Reno (1887) 73 Iowa, 145, 34 N. W. 796.

As to dealings in realty, see, also, § 9674, post.

33. Collections.—A national bank acts within scope of its power where it accepts assignment of judgment for collection, subject to order of assignor, and where the attorney pays the amount to a third person, the bank may sue in its own name under the local law, to recover the proceeds from the attorney. Miller v. King (1912) 32 Sup. Ct. 243, 223 U. S. 505, 56 L. Ed. 528, affirming judgment King v. Miller (1908) 97 P. 542, 53 Or. 53.

Collecting commercial paper is a part of the regular business of banking, and a national bank will be liable for negligence in collecting a draft, the same as any other bank or agent. Mound City Paint & Color Co. v. Commercial Nat. Bank (1886) 4 Utah, 353, 9 Pac. 709.

A national bank has power to receive a note for collection, or protest if not paid, and hence it is liable for neglect to protest. White v. Third Nat. Bank (Ohio, 1879) 4 Wkly. Law Bul. 791. It may take an absolute assignment of a claim for collection, and agree to pay the proceeds or part thereof to another, and by such transfer the legal title passes to the bank, and its agent to collect the money thereon cannot refuse to pay it to the bank, on the ground that it had no legal right

to own such claim. King v. Miller (Or. 1908) 97 P. 542.

34. **Unauthorized transactions, in general.**—A bank has no right to operate a mill acquired in satisfaction of a debt. Cockrill v. Abeles (1898) 86 Fed. 505, 512, 30 C. C. A. 223. Or to loan the money of other persons. Grow v. Cockrill (1897) 39 S. W. 60, 63 Ark. 418, 36 L. R. A. 89. Or to be a member of a partnership, or become liable as a partner. Merchants' Nat. Bank v. Wehrmann (1903) 68 N. E. 1004, 69 Ohio St. 160, reversed (1906) 26 Sup. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036. Or to agree to procure a person applications for insurance if he will procure for it a customer. Dresser v. Traders' Nat. Bank (1896) 165 Mass. 120, 42 N. E. 567. Or to contract to undertake the business of the recovery of the stolen property of special depositors. Wylie v. Northampton Nat. Bank (C. C. 1883) 15 Fed. 428, judgment affrmed (1886) 7 Sup. Ct. 268, 119 U. S. 361, 30 L. Ed. 455. Nor has it power to prosecute a mining business on property which it has acquired,—much less, to expend its funds in prospecting for mineral on such property. Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402.

A transaction held not one of banking, but one in which defendant was merely the agent for both parties which relationship was not changed by the fact that it was expected that proceeds of drafts would be mingled by defendant with its own funds. Greer v. The Dalles Nat. Bank (C. C. 1899) 98 Fed. 681.

Where consignments of liquor are made to fictitious persons, and the bills of lading, with drafts attached, are sent to a bank with such instructions that the goods are delivered to anybody who will pay the draft and accept the goods, even though the person to whom the goods are delivered has not previously ordered the liquor, such a transaction would constitute a sale by the bank, and the bank in such a case would be amenable to discipline by the state for selling liquor contrary to the state law, and also to discipline by the federal authorities for selling liquor without compliance with the provisions of the internal revenue laws. (1911) 29 Op. Atty. Gen. 59. Such a business, moreover, is clearly beyond the powers of a national bank, and if the Secretary of the Treasury is satisfied that there is any considerable amount of dealing of that character by banks, he might well issue a general warning to them against engaging in such ultra vires transactions. Id.

Prima facie, a national bank has no right to make a donation to keep a manufacturing company from moving its plant from the city. McCrory v. Chambers (1892) 48 Ill. App. 445.

A national bank is not a savings bank, and it cannot transact the same kind of business that a savings bank is incorporated to do, and, though a national bank has a savings department, it does not receive deposits to be invested in specified securities under the supervision of the bank commissioners, and it does not hold the deposits on a trust creating the relation of trustee and cestui que trust, but on a contract creating the relation of debtor and creditor. State v. People's Nat. Bank (1908) 70 A. 542, 75 N. H. 27.

If a national bank attempts to compete with a savings institution, the latter should appeal to the law to prevent the national bank from seeking savings deposits. (Err. & App. 1904) Barrett v. Bloomfield Sav. Inst. (1904) 57 A. 1131, 66 N. J. Eq. 431, affirming order (1903) 54 Atl. 543, 64 N. J. Eq. 425.

The fact that the transfer to a national bank of bills of lading attached to drafts on a purchaser of hay amounted to a sale of the hay would not entitle the final purchaser to recover from the bank for deficiency in the quality of the hay, since the transaction would be ultra vires. Lewis Leonhardt & Co. v. W. H. Small & Co. (Tenn. 1906) 96 S. W. 1051, 6 L. R. A. (N. S.) 887.

A national bank is liable in a civil action for fraud perpetrated under the guise of a partnership agreement, though it had no power to make such an agreement. Pronger v. Old Nat. Bank (1899) 56 P. 391, 20 Wash. 618.

35. **Contracts.**—An agreement between a national bank and the state to pay on the basis of average deposits, the tax imposed under P. S. Vt. 804–820, on interest-bearing deposits, and relieve its depositors from making returns, is not ultra vires of the bank. Clement Nat. Bank v. State of Vermont (1913) 34 Sup. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment State v. Clement Nat. Bank (1911) 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

A contract between two national banks that the proceeds of paper, discounted by one for the other, should not be drawn on in advance of the maturity of such paper, is not affected by the subsequent fraud of the bank obtaining the discount, in reporting such proceeds to the comptroller of the currency as part of its cash reserve. Fisher v. Tradesmen's Nat. Bank (1894) 64 Fed. 706, 12 C. C. A. 409.

A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not ultra vires, but is within its powers conferred by statute to conduct a general banking business. Schofield v. State Nat. Bank (1899) 97 Fed. 282, 38 C. C. A. 179.

Section 9764, post, limits the power conferred by subdivision 3 of this sec-

tion to make contracts. Eastern Tp. Bank v. Vermont Nat. Bank (C. C. 1884) 22 Fed. 186, 188.

This section does not relieve a national bank interested in such a transaction from the operation of Acts Ga. 1853–54, p. 56, providing that, where cotton has been sold under a cash contract, the title shall not pass to the buyer until the price has been paid. National Bank of Augusta v. Augusta Cotton & Compress Co. (1898) 30 S. E. 888, 104 Ga. 403; South Carolina & G. R. Co. v. Same (1898) 30 S. E. 891, 105 Ga. 486.

It is not ultra vires for a national bank to promise to honor a draft upon a patron. Farmers' & Merchants' Nat. Bank v. Illinois Nat. Bank (1908) 146 Ill. App. 136.

An agreement by a national bank to pay taxes on its stock transferred to it, and assessed at the time against the sellers, in consideration of being allowed to retain unpaid dividends and surplus, is not illegal, although the taxes are not properly assessed. Lull v. Anamosa Nat. Bank (1900) 81 N. W. 784, 110 Iowa, 537.

A national bank may purchase wheat where the purchase is necessary to protect its interests. First Nat. Bank v. Bannister (1898) 54 P. 20, 7 Kan. App. 787.

A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank by such other corporation is not ultra vires as to the bank when, at the time of making the contract, such corporation is financially embarrassed, and unable to meet its commercial obligations as they mature. Such contract is directly incidental to the proper exercise of the powers for which the bank was chartered. Tourtelot v. Whithed (1900) 84 N. W. 8, 9 N. D. 407.

The national banking laws do not prevent a national bank from selling on credit grain owned by it, and acquiring a seed-grain lien for the price, under a state statute. First Nat. Bank v. Peavy Elevator Co. (1897) 72 N. W. 402, 10 S. D. 167.

A contract between a national bank and the promoter of a building corporation, whereby the promoter was to purchase from the bank stock subscribed for by it, held not ultra vires of the bank. Fourth Nat. Bank of Nashville v. Stahlman (Tenn. 1915) 178 S. W. 942.

36. **Borrowing money.**—Under this section a bank can exercise by its board of directors and officers all such incidental powers as are necessary to carry on the business, and while the power to borrow money or issue notes is not expressly given them, a bank could, under proper circumstances, temporarily borrow money, but the person making the loan would be required to see that the officer acting for the bank had special authority to borrow. Aldrich v. Chemical Nat. Bank (1900) 20 Sup. Ct. 498, 501, 176 U. S. 618, 44 L. Ed. 611.

A rediscount by a bank of its bills receivable, though it indorses the same, and becomes contingently liable for their payment, is not a borrowing of money by the bank, but has more the characteristics of a sale. United States Nat. Bank v. First Nat. Bank (1897) 79 Fed. 296, 24 C. C. A. 597.

A national bank has power to borrow money on call for the purposes of its business. Chemical Nat. Bank v. Armstrong (C. C. 1896) 76 Fed. 339. Though there is no emergency. Byron v. First Nat. Bank of Roseburg (1915) 146 P. 516, 75 Or. 296. It may borrow for the purpose of lending to others with a view to making a profit. National Bank of Commerce v. National Bank of Missouri (C. C. 1878) Fed. Cas. No. 18,310. And may make a binding oral agreement to repay money it borrows, and to pay notes it procures to be discounted. Hanover Nat. Bank of City of New York v. First Nat. Bank of Burlingame, Kan. (1901) 109 Fed. 421, 48 C. C. A. 482.

The president of a national bank has no authority from his position to borrow money for the bank, though the creditor may hold the bank on such a transaction on the ground of estoppel. Byron v. First Nat. Bank of Roseburg (Or. 1915) 146 P. 516.

37. **Special deposits and bailments.**—A national bank may receive as a gratuitous bailee a special deposit of securities for safe-keeping, and thereupon becomes liable to the depositor if the securities are lost through its gross negligence. Chattahoochee Nat. Bank v. Schley (1877) 58 Ga. 369; Pattison v. Syracuse Nat. Bank (N. Y. 1879) 17 Hun, 419 (affirmed in [1880] 80 N. Y. 82, 36 Am. Rep. 582); Pattison v. Syracuse Nat. Bank (1880) 80 N. Y. 82, 36 Am. Rep. 582 (limiting First Nat. Bank v. Ocean Nat. Bank [1875] 60 N. Y. 278, and disapproving Wiley v. First Nat. Bank [1875] 47 Vt. 546, 19 Am. Rep. 122); First Nat. Bank v. Rex (1879) 89 Pa. St. 308, 33 Am. Rep. 767; Whitney v. First Nat. Bank (1877) 50 Vt. 389.

Where a national bank is accustomed to take special deposits, with the knowledge and acquiescence of its depositors, it is liable to the same extent as though such deposits were authorized by charter. First Nat. Bank v. Zent (1883) 39 Ohio St. 105; First Nat. Bank v. Graham (1875) 79 Pa. St. (29 P. F. Smith) 106.

City which had special deposit in insolvent national bank, and for which bank had also collected draft, held entitled to apply the amount of the bank's bond as depositary on the special deposit, and the balance only on the other account, as to which it was claimed the

bank was a trustee. City of Centralia v. United States Nat. Bank of Centralia, Wash. (D. C. 1915) 221 Fed. 755.

Where a bank organized under the federal banking law receives on deposit United States bonds of one class, under promise or agreement to exchange them for those of another, it will not be regarded as a mere mandatory or bailee, acting without compensation, but, on the contrary, held to the terms of the contract, and liable to the depositor for the value of the bonds on its refusal to deliver them. An undertaking or transaction of this character on the part of the bank, is within the scope of its powers to do a general banking business, conferred by the act of congress authorizing the creation of those banks. Leach v. Hale (1870) 31 Iowa, 69, 7 Am. Rep. 112.

Where a bank organized under the federal banking law receives on deposit United States bonds of one class, under promise or agreement to exchange them for those of another, it will not be regarded as a mere mandatory or bailee acting without compensation, but, on the contrary, held to the terms of the contract, and liable to the depositor for the value of the bonds on its refusal to deliver them. Id.

In an action against a national bank, by the senior member of a firm, to recover the value of his bonds that had been deposited with the bank as collateral security for "call loans" to the firm, but, at a time when the firm was not indebted to the bank, had been stolen by burglars, held, that the contract entered into by the bank was not a mere gratuitous bailment. Third Nat. Bank v. Boyd (1876) 44 Md. 47, 22 Am. Rep. 35.

The receiving securities or other property as custodian or bailee, either gratuitously or for hire, is not within the ordinary business of a banking corporation, and it is not within the scope of the general powers or apparent authority of the executive and ministerial officers of such a corporation to bind the corporation by a contract for such a bailment. And in the absence of proof that special authority has been delegated by its board of directors, or has been exercised with their sanction or knowledge, or of evidence that it has been the habit and practice of the corporation to receive property for safe-keeping, it is not responsible for property so received by its cashier. First Nat. Bank v. Ocean Nat. Bank (1875) 60 N. Y. 278, 19 Am. Rep. 181.

A circular, issued by a national banking corporation, inviting the correspondence of other banks, and offering to buy and sell securities for them, is no evidence of a consent, on its part, to become a general bailee and depository of such securities for its correspondents. Id.

A national bank has power to accept a deposit to be held by it as collateral security for the performance of a contract between the depositor and another. Bushnell v. Chautauqua County Nat. Bank (N. Y. 1877) 10 Hun, 378, affirmed in (1878) 74 N. Y. 290.

Where a national bank has been accustomed to receive bonds on special deposit gratuitously, it is liable for a loss occurring through want of ordinary care. First Nat. Bank v. Zent (1883) 39 Ohio St. 105, 15 Chi. Leg. News, 285, 4 Ky. Law Rep. 1013.

A demand on a bank for bonds held on special deposit, and refusal to deliver the same, with no other explanation than the statement that the bank has no such bonds in its possession, is prima facie evidence of loss by negligence. Id.

Where a national bank, without compensation, receives bonds as a special deposit for safe-keeping, it is liable for loss thereof, where it occurred through want of ordinary care. Lancaster County Nat. Bank v. Smith (1869) 62 Pa. St. (12 P. F. Smith) 47.

Bonds deposited in a national bank for safe-keeping were stolen by the bank's teller. After he had absconded, it was discovered that for two years he had been embezzling funds of the bank. The owner of the bonds claimed that the bank had been negligent in not examining the teller's books, and discovering his frauds. Held, that such negligence did not enter into the cause of the loss, and could, therefore, be no ground of recovery. Scott v. Chester Val. Nat. Bank (1873) 72 Pa. St. (22 P. F. Smith) 471, 13 Am. Rep. 711.

Where a national bank receives a special deposit without compensation, and the same is stolen by a teller, the only ground on which the bank can be held liable is that the teller was an unfit person to be retained in its employment, and that the bank had knowledge of this fact. Id.

A bank is liable to a special depositor for the loss of his deposit through its diversion by the bank's officers. El Paso Nat. Bank v. Fuchs (Tex. Civ. App. 1895) 34 S. W. 203.

National banks cannot bind themselves or the corporators by accepting specific valuables on special deposit for safe-keeping and return on demand. Wiley v. First Nat. Bank (Vt. 1875) 14 Am. Law Reg. (N. S.) 342.

The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks. Wiley v. First Nat. Bank (1875) 47 Vt. 546, 19 Am. Rep. 122.

The taking of special deposits to keep merely for the accommodation of the depositor is not within the authorized business of national banks, and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking. Id.

A national bank has not implied pow-

er, as incidental to the purpose of its organization, to receive government bonds as a special deposit, though the forty-sixth section of the banking act allows such banks, while winding up their affairs, to deliver special deposits. Whitney v. First Nat. Bank (1877) 50 Vt. 388, 28 Am. Rep. 503.

A national bank has power to receive special deposits. First Nat. Bank v. Zent (1883) 39 Ohio St. 105, 15 Chi. Leg. N. 285, 4 Ky. Law Rep. 1013.

38. **Contracts of guaranty and suretyship.**—Under the national banking act, giving every bank the right, by its board of directors, to exercise such powers as shall be necessary to carry on the business of the bank by negotiating and discounting notes and other evidence of debt, a bank has the power to guaranty payment of a discounted note. People's Bank v. National Bank (1879) 101 U. S. 181, 25 L. Ed. 907.

The president of a national bank has no power in the ordinary course of business to certify to the fidelity or integrity of the cashier. Hence the bank cannot be deemed, by virtue of such act, to have any knowledge of the giving of such certificate by its president. American Surety Co. v. Pauly (1898) 18 Sup. Ct. 552, 558, 170 U. S. 133, 42 L. Ed. 977.

A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statutes. Citizens' Cent. Nat. Bank of New York v. Appleton (1910) 30 Sup. Ct. 364, 216 U. S. 196, 54 L. Ed. 443, affirming judgment Appleton v. Citizens' Cent. Nat. Bank of New York (1908) 83 N. E. 470, 190 N. Y. 417.

The act of congress authorizing the organization of national banks confers upon them no authority to guaranty the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature are necessarily ultra vires. Commercial Nat. Bank v. Pirie (1897) 82 Fed. 799, 27 C. C. A. 171.

A national bank has no power to lend its credit to any person or corporation, or to become guarantor of the obligations of another, except in the case of the transfer of promissory notes discounted, which is in the ordinary course of banking. Bowen v. Needles Nat. Bank (1899) 94 Fed. 925, 36 C. C. A. 553, affirming judgment (C. C. 1898) 87 Fed. 430.

A national bank advised plaintiff that it would pay all checks of a third person, although such person had no funds on deposit, as was known to both plaintiff and the bank. In reliance on such promise, plaintiff cashed checks of such person, and transmitted them to the bank for payment. The bank issued and sent to plaintiff its drafts on a correspondent for the amount of the checks, which drafts were refused payment. Held, that the contract was one purely of guaranty, and was ultra vires on the part of the bank, and the transaction gave plaintiff no right of action against it on the drafts. Id.

The fact that a director of a national bank, whose presence was necessary to constitute a quorum at a meeting where, by the action of the directors, in which he participated, a contract by the bank to assume and pay the liabilities of another bank was ratified, was also a stockholder in such other bank, in the absence of any allegation of fraud in the transaction, is not sufficient to render the contract invalid. Schofield v. State Nat. Bank (1899) 97 Fed. 282, 38 C. C. A. 179.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of obligations which it rediscounts or sells, but it cannot lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being ultra vires, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. Merchants' Bank of Valdosta v. Baird (1908) 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526.

A national bank has no power to guarantee the obligation of a person on the deposit of collateral security. Seligman v. Charlottesville Nat. Bank (C. C. 1879) Fed. Cas. No. 12,642.

A national bank cannot loan its credit or become an accommodation indorser. National Bank of Commerce v. Atkinson (C. C. 1893) 55 Fed. 465, judgment affirmed National Bank of Commerce v. First Nat. Bank (1894) 61 Fed. 809, 10 C. C. A. 87.

The cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft. Flannagan v. California Nat. Bank (C. C. 1893) 56 Fed. 959, 23 L. R. A. 836.

An agreement by a national bank, to guaranty the payment of a debt of a third party, solely for his benefit, is ultra vires. Bowen v. Needles Nat. Bank (C. C. 1898) 87 Fed. 430.

Accommodation indorsements or acceptances by a national bank are ultra vires, and void in the hands of holders with notice. Id.

Giving bond to secure funds deposited with it is within the power of a national bank, and sureties on such bond

are liable. State of Nebraska v. First Nat. Bank (C. C. 1898) 88 Fed. 947.

Where a national bank, in order to induce complainant to purchase certain steamship stocks owned by it, agreed to take complainant's note for $50,000 for the stock and hold the stock as collateral security, and to guarantee plaintiff against any loss in the transaction from the execution and delivery of the note, such guaranty was not an ordinary commercial guaranty, but one outside the ordinary business of banking, and ultra vires. Barron v. McKinnon (C. C. 1910) 179 Fed. 759.

While a national bank in negotiating its paper can bind itself for the payment thereof by its indorsement thereon, it cannot guarantee payment of paper of others, or become surety thereon, solely for such other's benefit. First Nat. Bank v. Monroe (1911) 69 S. E. 1123, 135 Ga. 614.

The execution of a bond by a national bank as surety in a replevin suit is beyond its powers and void. Bailey v. Farmers' Nat. Bank (1901) 97 Ill. App. 66.

Where a bank directs a letter to a person, stating that it will guarantee fulfillment of the obligations of another person to the former for a certain amount of goods for a certain time, and it does not appear that the second person purchased the letter or deposited any security therefor, or that the bank had any interest in the transaction, the letter, considered either as a guaranty or letter of credit, is void, and the bank is not liable thereon. Thilmany v. Iowa Paper-Bag Co. (1899) 79 N. W. 68, 108 Iowa, 333.

A guaranty against loss or liability for signing as sureties, given by a bank president in his own name, and without authority from the directors, to those whom he had solicited thus to sign a note given to a bank to retire a prior note held by it against their principal, if considered as made by and binding upon the bank, would be a bar to any suit by it against the sureties; and it is doubtful whether, under the general banking law, a national bank could give such a guaranty in a case where the effect would be to make the paper discounted the paper of one party only, secured by mortgage on real estate. First Nat. Bank v. Bennett (1876) 33 Mich. 520.

A national bank may guaranty the payment of commercial paper as incidental to the exercise of its power to buy and sell the same. Thomas v. City Nat. Bank (1894) 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263.

A national bank cannot guarantee a building contract between third persons. Norton v. Derry Nat. Bank (1882) 61 N. H. 589, 60 Am. Rep. 335.

A national bank cannot indorse a note for the maker's accommodation, and on the credit of such indorsement procure the note to be discounted by another bank, charging a commission for such loan of its credit. National Bank v. Wells (1880) 79 N. Y. 498.

No action will lie on the promise of the cashier of a national bank to pay the draft of a third person on one of of its customers, to be drawn at a future day. Bank of Barnwell v. Sixth Nat. Bank (1905) 28 Pa. Super. Ct. 413.

A national bank has no power or authority to become a mere accommodation indorser or guarantor of the payment of a debt of another, without benefit to the bank. Id.

A national bank has no power to guaranty the draft of a third person on one of its customers to be drawn on a future day. National Bank of Brunswick v. Sixth Nat. Bank (1905) 61 A. 889, 212 Pa. 238.

The agreement of a national bank to pay drafts to be made on a third person against bills of lading was an agreement of guaranty and ultra vires; there being no intent on the part of the bank to purchase the drafts. Id.

Since a national bank has no power to lend its credit, or to become the guarantor of another's obligation, except in the ordinary course of banking, a national bank's promise that, if the drawee would pay drafts held by it for collection, it would pay his drafts on the drawers for the amount he claimed that such drafts were overdrawn, was unenforceable against the bank. Groos v. Brewster (Tex. Civ. App. 1900) 55 S. W. 590.

A bank cannot bind itself by contracts of suretyship or guaranty made for the sole benefit of others. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App. 1908) 106 S. W. 782.

39. Dealings in stocks, bonds, and options.—Though the national bank act does not authorize a bank to enter into a contract to buy certain bonds and return them to the seller at the purchase price, yet when the amount which it paid for the bonds is tendered back to it, and their surrender demanded, its authority to retain them no longer exists; and the fact that the contract under which it obtained them may be illegal will not prevent the seller from maintaining an action for their value, as such action is not in affirmance of the contract, but in disaffirmance of it, and to prevent the bank from retaining the benefit which it has derived from its unlawful act. Logan County Nat. Bank v. Townsend (1891) 11 Sup. Ct. 496, 139 U. S. 67, 35 L. Ed. 107, affirming (Ky. 1887) 3 S. W. 122.

A national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security. California Nat. Bank v. Kennedy (1897) 17

Sup. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

The purchase by a national bank of the stock of another corporation, not as incidental to its banking business, being void, cannot be ratified, and therefore the bank is not estopped to deny its liability for the debts of such corporation, although it has received dividends on the stock. Id.

A national bank is without power to purchase, as an investment, with its surplus funds, and to hold as such, shares of stock in another national bank. First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 174 U. S. 364, 43 L. Ed. 1007, reversing judgment (1897) 79 Fed. 51, 24 C. C. A. 444.

A national bank has no power to invest its surplus fund in the stock of another national bank, and cannot be assessed thereon as a stockholder, although it actually made the purchase and held and received dividends on the stock. Shaw v. National German-American Bank of St. Paul, Minn. (1905) 26 Sup. Ct. 750, 199 U. S. 603, 50 L. Ed. 328, affirming judgment (1904) 132 Fed. 658, 65 C. C. A. 620.

A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold. Merchants' Nat. Bank of Cincinnati v. Wehrmann (1906) 26 Sup. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

It is ultra vires of a national bank to take stock in a corporation organized to embark in the purely speculative business of buying and selling the stocks and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business, although the bank takes such stock in exchange for a claim against the insolvent corporation. First Nat. Bank v. Converse (1906) 26 Sup. Ct. 306, 200 U. S. 425, 50 L. Ed. 537.

Want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder. Id.

Purchase of national bank stock for speculation by a national bank is ultra vires. Metropolitan Trust Co. of New York v. McKinnon (1909) 172 Fed. 846, 97 C. C. A. 194.

A purchase of corporate stock by a national bank for the purpose of selling the same at a profit was ultra vires and voidable as between the parties. Barron v. McKinnon (1912) 196 Fed. 933, 116 C. C. A. 483.

A bank has no power to deal in stocks. Baker v. Old Nat. Bank (C. C. 1898) 86 Fed. 1006, 1009.

Under the facts stated, held that the bank had not acquired the stock as collateral, as authorized by the national banking act. Chemical Nat. Bank v. Havermale (1898) 52 P. 1071, 120 Cal. 601, 65 Am. St. Rep. 206.

Questions as to the power of a national bank to purchase or own stock in other corporations must be determined from the statutes of the United States as construed by the United States supreme court. Id.

A national bank has no power to deal in stocks of another corporation. Id.

Under the act of Congress, national banks have no power to deal in stocks for speculation or investment, though they may be taken to satisfy a disputed or doubtful claim, or under foreclosure of pledge. McBoyle v. Union Nat. Bank (Cal. 1912) 122 P. 458.

The mere fact that a national bank and a person engaged in buying grain arrange that the contracts of sales for future delivery into which such person has entered shall be transferred to the bank as security for advances made or to be made by it, and that the proceeds derived from the sales of grain shipped and sold by the bank for the benefit of such person should be applied in protecting his contracts for future delivery, does not render the bank a dealer in board of trade options, so as to make the transactions ultra vires. Morris v. Dixon Nat. Bank (1894) 55 Ill. App. 298.

The president of a national bank who largely controlled its policies purchased stock in violation of his duty so as to make him liable to the bank for the resulting loss. The National Treasury Department after an examination required the bank to immediately dispose of the stock which could not then be done without loss, whereupon, pursuant to an arrangement with the department, the president and his son executed a bond to the bank, prepared by the Treasury Department conditioned to be void if within two years the bank should sell the stocks and realize therefrom, their cost, whereupon the Treasury Department withdrew its demand for the immediate sale of the stock. Held, that the execution of the bond was not an agreement by the bank not to sell the stocks for two years whatever might be their market fluctuations, thereby making the bank to speculate in stocks, so as to be ultra vires on the part of the bank, especially when considered as a covenant as prescribed in Code Civ. Proc. § 1915, providing that a bond in a penal sum containing a condition to the effect that it is to be void upon the performance of any act has the same effect for the purpose of maintaining an action thereon as if it contained a covenant to perform the act specified in the condition. First Nat. Bank v. Jenkins (1911) 130 N. Y. S. 947, 73 Misc. Rep. 277.

A customer of a national bank, being largely indebted to it, and being in failing circumstances, and being the owner of 9 shares in a partnership consisting of 40 shares, each evidenced by a cer-

tificate transferable on the books of the firm, transferred his 9 shares to the bank to secure payment of his indebtedness; the bank becoming the owner of such shares. Held not to make the bank a partner, but a part owner in severalty of the property then owned by the partnership, and liable for 9/40 of the debts and expenses in purchasing, improving, and disposing of the firm property. Merchants' Nat. Bank v. Wehrmann (1903) 68 N. E. 1004, 69 Ohio St. 160, reversed (1906) 26 Sup. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

Defendant national bank received from plaintiff, a depositor, railroad stock to be sold for his account on his direction, and transmitted it to brokers, who, on the order of plaintiff, given to defendant, and communicated by it to them, sold the stock. They then sent their check for amount of the proceeds to defendant, payable to its order. Defendant credited plaintiff's account on its books with the amount of the check, and then sent the check, with others, for collection for its account; but payment was refused, the brokers having failed before its presentation. In the meantime defendant had given plaintiff notice of the credit on his account, and he had thereupon drawn out an amount in excess thereof. Held, that the bank being in the matter of the bonds merely an agent to sell, and its acceptance of the check in payment not having been ratified by plaintiff, it was liable for the amount thereof, and could not charge it back against plaintiff's account. Pepperday v. Citizens' Nat. Bank (1898) 38 A. 1030, 183 Pa. St. 519, 41 W. N. C. 343, 39 L. R. A. 529, 63 Am. St. Rep. 769.

40. Bank acting as broker.—A national bank which itself purchased notes it had been authorized by the owner to sell to a third party, and which thus became, under general principles of law, liable for their value as for conversion, is not protected from such liability by the national banking act, even though it was not within its powers to act as agent for the sale of the notes. First Nat. Bank v. Anderson (1899) 19 Sup. Ct. 284, 172 U. S. 573, 43 L. Ed. 558.

A national bank has no power to engage in the business of selling mortgage bonds on commission. Farmers' & Merchants' Nat. Bank v. Smith (1896) 77 Fed. 129, 23 C. C. A. 80.

A national bank has no authority to engage in the business of selling the bonds of railroad companies on commission. Weckler v. First Nat. Bank (1875) 42 Md. 581, 20 Am. Rep. 95.

A national bank cannot act as broker in lending its depositors' money to third persons. Byron v. First Nat. Bank of Roseburg (Or. 1915) 146 P. 516.

A national bank has no incidental, charter, or statutory powers to enable it to act as broker or agent in the purchase of bonds and stocks. First Nat. Bank v. Hoch (1879) 89 Pa. St. 324, 33 Am. Rep. 769.

A national bank cannot act as broker for the sale of state bonds on commission. Smith v. Philadelphia Nat. Bank (Pa. 1879) 1 Walk. 318.

A national bank is not authorized to sell stocks on commission for its customers. Searle v. First Nat. Bank (Pa. 1885) 2 Walk. 395.

XI. GUARANTY OF DEPOSITS

41. State guaranty laws.—National banks are not unconstitutionally discriminated against by the Kansas bank depositors' guaranty law of March 6, 1909, because it may make the state banks more attractive to the public than national banks, which cannot avail themselves of the scheme and remain national banks. Abilene Nat. Bank of Abilene v. Dolley (1913) 33 Sup. Ct. 409, 228 U. S. 1, 57 L. Ed. 707.

It is illegal for the officers of any national bank in Oklahoma to enter into an agreement to contribute to the guaranty fund provided for by the Oklahoma state banking act, and persistent action on the part of any such bank in accepting or conforming to the provisions of section 4 of that act would be just cause for the forfeiture of its charter. (1908) 27 Op. Atty. Gen. 37.

National banks in the state of Kansas cannot avail themselves of the provisions of section 13 of the bank depositors' guaranty law of March 6, 1909, of that state, and participate in the assessments and benefits of that act upon the same terms and conditions as apply to the state banks. Congress alone can confer such power upon national banks. (1909) 27 Op. Atty. Gen. 272.

XII. INSURANCE OF ASSETS

42. Insurance contract.—The Attorney General approves of a form of policy of insurance guaranteeing the assets of a national bank against loss, provided certain modifications which he suggests are made. (1909) 27 Op. Atty. Gen. 324.

It is entirely within the powers of a national bank to enter into such a contract, but the contract must not subject the bank to periodical examination by representatives of the insurance company. Id.

XIII. ULTRA VIRES ACTS—PLEADING AND DEFENSES

43. Right to plead.—Where a bill of lading is issued to a national bank as security for money advanced on a draft for the price of the goods, a creditor of the shipper, who subsequently attached the goods, cannot object that the bank had no authority to take goods as security for a loan. Ayres, Weatherwax & Reed Co. v. Dorsey Produce Co. (1897) 70 N. W. 111, 101 Iowa, 141, 63 Am. St. Rep. 376.

The loaning by a national bank to an

individual of more than the national banking law allows cannot be taken advantage of either by the debtor or another creditor of his. McCartney v. Kipp (1895) 171 Pa. St. 644, 33 Atl. 233.

In an action to rescind for fraud a contract as a part of which a national bank agreed to discount notes and renew them from time to time until they were discharged as provided, it was immaterial whether the agreement by the bank was beyond its powers under the federal statutes; the action being not to enforce, but to rescind, the contract. Baker v. Berry Hill Mineral Springs Co. (1909) 65 S. E. 656, 109 Va. 776.

44. Action against bank.—An act of a national bank, void because ultra vires, cannot be made good by estoppel. Merchants' Bank of Valdosta v. Baird (1908) 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526.

An agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction; such securities having been received by such maker as trustee for the bank. Tillinghast v. Carr (C. C. 1897) 82 Fed. 298.

When a national bank enters into a contract which is beyond its powers, it cannot be estopped from pleading ultra vires, by the performance of the contract by the other party. First Nat. Bank v. American Nat. Bank (1903) 72 S. W. 1059, 173 Mo. 153.

When a bank is sued on its contract to pay a draft drawn on its customer, it can plead ultra vires. First Nat. Bank v. American Nat. Bank (1903) 72 S. W. 1059, 173 Mo. 153.

In an action against a national bank for breach of contract, a plea that defendant was a national bank, and had no authority to carry out the contract on its part, was good. Metropolitan Stock Exch. v. Lyndonville Nat. Bank (1904) 57 A. 101, 76 Vt. 303.

In an action for breach of an agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, the bank may set up the defense of ultra vires. Dresser v. Traders' Nat. Bank (1896) 165 Mass. 120, 42 N. E. 567.

In an action of deceit against a national bank to recover damages for the alleged false representations of its teller in the sale to the plaintiff of certain railroad bonds, held, that the selling of railroad bonds on commission was not within the authorized business of a national bank; and, being thus beyond the scope of its corporate powers, the defense of ultra vires was open to it. Weckler v. First Nat. Bank (1875) 42 Md. 581, 20 Am. Rep. 95.

Where the president and cashier of a bank had no authority to certify a noncommercial instrument, by which the drawers sought to indemnify their surety on a building contractor's bond for any liability the surety might sustain by virtue of such bond, the bank was not estopped to plead that the certification of such instrument was ultra vires and void. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App. 1908) 106 S. W. 782.

A national bank, which as a matter of fact purchased, and held as an investment, shares of stock in a second national bank, and received dividends thereon, is not thereby estopped to plead the unlawfulness of its action in defense to an action by the receiver of the second bank, after its insolvency, to collect an assessment made on the shareholders by the comptroller. The contract by which it assumed to become a shareholder, being ultra vires and in contravention of the policy of the statute, was not merely voidable, but void, and could not be given validity, nor made the foundation of any right of action, by any subsequent ratification or act of performance. First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 741, 174 U. S. 364, 43 L. Ed. 1007.

If it be conceded that the liability of a shareholder in a national bank to respond to an assessment in case of insolvency is statutory, and not contractual, such fact does not affect the question of the liability of another national bank, holding stock in the insolvent bank as an investment, without authority of law, for such an assessment, as congress cannot reasonably be presumed to have intended to subject the stockholders and creditors of the defendant bank to a liability, the power to assume which it had denied to the bank for their protection. First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 742, 174 U. S. 364, 43 L. Ed. 1007.

A national bank which deals in stocks of another corporation, in violation of the national banking law, may urge its want of power in avoidance of liability as a stockholder; and this, though it accepted dividends on such stock. Chemical Nat. Bank v. Havermale (1898) 52 P. 1071, 120 Cal. 601, 65 Am. St. Rep. 206.

Conceding that a national bank cannot acquire title in the stock of a corporation which is pledged to it, the pledgor cannot recover the stock without satisfying the bank for its advances. Fulton v. National Bank of Denison (1901) 62 S. W. 84, 26 Tex. Civ. App. 115.

Want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder. First Nat. Bank v. Converse (1906) 26 Sup.

Ct. 306, 311, 200 U. S. 425, 50 L. Ed. 537.

An owner of mortgaged property cannot sue to enjoin sale under foreclosure, on the ground that defendant national bank had taken an assignment of the decree as a speculation, in contravention of the national banking act. Buchanan v. Saunders County Nat. Bank (1903) 94 N. W. 631, 4 Neb. (Unof.) 410.

A national bank which uses in its business money obtained by its vice president as a loan to it from another national bank cannot escape liability to account therefor upon the ground that the loan was not negotiated by it or by its direction, or that it could not itself have legally borrowed the money. Aldrich v. Chemical Nat. Bank (1900) 20 Sup. Ct. 498, 176 U. S. 618, 44 L. Ed. 611, affirming decree Armstrong v. Chemical Nat. Bank (1897) 83 Fed. 556, 27 C. C. A. 601.

A bank having appropriated the proceeds of goods, held estopped to set up, in a suit for the price, a want of power to buy them. American National Bank v. National Wall-Paper Co. (1896) 77 Fed. 85, 93, 23 C. C. A. 33.

It is no defense to an action against a national bank for money had and received that the collateral security it gave to plaintiff was issued without authority of law. Williams v. American Nat. Bank (1898) 85 Fed. 376, 29 C. C. A. 203.

The fact that a contract made by a national bank to receive and collect securities and reinvest the proceeds for the owner contained provisions which were ultra vires does not relieve the bank of the legal obligation to return the securities or account to the owner for their value. Emmerling v. First Nat. Bank (1899) 97 Fed. 739, 38 C. C. A. 399.

A national bank, which has received money equitably belonging to another, cannot defend against a suit for its recovery on the ground that it was received through a contract made by it which was ultra vires. National Bank of Commerce in St. Louis v. Equitable Trust Co. of New York (1915) 227 Fed. 526, 142 C. C. A. 158.

A national bank cannot escape liability to a depositor for money which he placed in its hands by pleading that it made with him an ultra vires agreement to pay out the money to some third person on deposit of collaterals for his benefit, when the evidence shows it paid out the money without taking the collaterals agreed on. First Nat. Bank v. Henry (Ala. 1906) 49 So. 97.

A bank is liable to the owner of a lot of whisky intrusted to it for shipment and sale, for the proceeds, independently of the question whether national banks are by their charters authorized to sell produce on commission. First Nat. Bank v. Priest (1869) 50 Ill. 321.

A national bank, having taken as security for a pre-existing debt a conveyance of a warehouse or elevator for storing grain, placed parties in charge to continue the business as its agents. A., who held a receipt from former custodians of the elevator for a certain quantity of grain stored therein, and mixed, as was customary, with other grain of the same quality, made a demand on the bank therefor, and, delivery of the same being refused, brought suit for its conversion. It appeared that when the bank took possession of the elevator there was enough grain therein of the kind described in A.'s receipt to cover all receipts for such grain then outstanding. Held, that the bank had power to take the elevator as security for its debt, and, even admitting that carrying on the warehouse business was ultra vires, still it was its duty to hold the grain therein for the proper owners, and that it was, therefore, liable. German Nat. Bank v. Meadowcroft (1879) 4 Ill. App. (4 Bradw.) 630.

A national bank which, to secure its claims, takes possession, by its cashier, of goods under a chattel mortgage, and disposes of them, cannot claim immunity from liability for any surplus remaining after payment of its claims, on the ground that its cashier, being an officer of a national bank, exceeded his powers, and acted ultra vires. Cooper v. First Nat. Bank (1888) 40 Kan. 5, 18 Pac. 937.

Where one sells bonds to a national bank at a certain price, the bank agreeing to resell the bonds to the vendor at the same price or less, but, the bonds subsequently appreciating in value, the bank refused to resell them, held, in a suit by the vendor for the breach of contract, that the bank cannot escape liability by setting up that it had no authority, under the national bank act, to buy the bonds, as it might have discharged its obligation by returning the bonds, and receiving back the purchase money; and to permit it to retain the bonds would be to allow it to profit by its own violation of the act. Logan County Nat. Bank v. Townsend (Ky. 1887) 3 S. W. 122.

A national bank, which has purchased notes, and paid therefor, with the intention of taking title thereto, cannot recover back the money on the ground that the purchase was ultra vires. Attleborough Nat. Bank v. Rogers (1878) 125 Mass. 339.

The cashier of a national bank, on behalf of the bank, received a deposit under the agreement that it was to be invested by the bank in stocks and bonds for the benefit of the depositor. Held, that the bank was liable for the return of the money, notwithstanding the agreement on which it was received may have been ultra vires; and the fact that the cashier embezzled the money does not affect the bank's lia-

bility. L'Herbette v. Pittsfield Nat. Bank (1894) 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

In absence of evidence that the president and cashier of a national bank were agents of a depositor in transferring to their account money of the depositor, which they agreed to loan on real estate, and that the depositor knew they were acting for her in that capacity, the bank and its receiver are liable for her funds so transferred, though it could not loan on such security. Short v. Butler (1909) 117 S. W. 114, 136 Mo. App. 356.

Where a national bank has received benefit from a contract by one of its officers guarantying a building contract between third persons, an action may be maintained against the bank for recovery to the extent of such benefit. Norton v. Derry Nat. Bank (1882) 61 N. H. 589, 60 Am. Rep. 335.

The act of a national bank in accepting a deposit to be held by it as collateral security for the performance of a contract between the depositor and another is not illegal, and it would be estopped to set up the defense of ultra vires against one making such a contract with it relying thereon. Bushnell v. Chautauqua County Nat. Bank (N. Y. 1877) 10 Hun, 378, affirmed in (1878) 74 N. Y. 290.

Where a national bank warranted to another bank payment of a loan made to an individual in order that the national bank might obtain from the amount loaned a sum in which the individual was indebted to it, conceding that the guaranty was ultra vires, it was liable thereon to the amount actually received by it under the transaction. Appleton v. Citizens' Cent. Nat. Bank of New York (1908) 83 N. E. 470, 190 N. Y. 417, reversing judgment (1907) 105 N. Y. S. 1105, 119 App. Div. 889.

A complaint alleged that defendant, a national bank, by letter agreed that a draft drawn by plaintiff, not to exceed a certain sum, on a certain firm, for goods shipped to them by plaintiff, should be paid, and that in consideration of such guaranty plaintiff shipped the goods to such firm, but that the draft had not been paid, and defendant refused to pay it. Held, that where a corporation has entered into a contract not illegal, which the other party has performed, it will not be heard to claim ultra vires to avoid performance on its part, and, since the national banking act does not prohibit such a contract, the complaint stated a cause of action and a demurrer thereto should be overruled. Hutchins v. Planters' Nat. Bank (1901) 38 S. E. 252, 128 N. C. 72.

A national bank which assumed to sell for another certain notes owned by him, but which, instead of selling them to a third person, without his knowledge sold them to itself, violated its duty to the owner, the same as if it had full power under the law to act as such agent; and was, therefore, guilty of a conversion of such notes, notwithstanding its agency was ultra vires. Anderson v. First Nat. Bank (1896) 5 N. D. 451, 67 N. W. 821.

Where a cashier of a national bank bought and sold stocks for customers in the name of the bank, with the knowledge of the directors, the bank is liable for stocks embezzled by the cashier, though the bank was unauthorized to deal in stock. Searle v. First Nat. Bank (Pa. 1885) 2 Walk. 395.

Where money is deposited in a national bank under a contract obligating the bank to pay it to a third person on the performance of certain work by the latter, the bank cannot, after the performance of the work, object to the payment of the money to the person entitled thereto on the ground that the national banking act did not empower it to enter into such a contract. Sykes v. First Nat. Bank (1891) 2 S. D. 242, 49 N. W. 1058.

A national bank, which has received and retained the benefits resulting from its contract to pay for goods sold on its credit and delivered to a depositor in pursuance of the contract, cannot avoid liability thereon on the ground that the contract was ultra vires. First Nat. Bank v. Greenville Oil & Cotton Co. (1901) 60 S. W. 828, 24 Tex. Civ. App. 645.

Where a national bank took over the operation of a creamery corporation which was largely indebted to it, and continued the operation of the creamery until a receiver was appointed for the bank, at which time it held certain funds actually identified in trust for the patrons of the creamery, it was no answer to the receiver's obligation to pay over such funds that the bank had no power to engage in the creamery business. Emigh v. Earling (Wis. 1908) 115 N. W. 128.

45. **Action by bank.**—A national bank, which, in the usual course of its business, has become the owner of notes secured by mortgage, may lawfully agree with others holding conflicting mortgages on the same property, to represent all in an action to enforce the security, their respective rights in the proceeds to be subsequently determined, where such action was deemed best for its own interests, and, when vested with title to the other mortgages by proper assignments, its right to maintain the suit cannot be questioned by the defendant on the ground that its agreement was ultra vires. Morris v. Third Nat. Bank (1905) 142 Fed. 25, 73 C. C. A. 211, writ of certiorari denied (1906) 26 Sup. Ct. 762, 201 U. S. 649, 50 L. Ed. 905.

The fact that a contract made by a national bank is ultra vires, as contrary to the national bank act, cannot

be set up in defense to an action growing out of such contract. Voltz v. National Bank of Illinois (1895) 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155, affirming (1894) 57 Ill. App. 360, following National Bank v. Matthews (1879) 98 U. S. 621, 25 L. Ed. 188.

The defense cannot be urged, to defeat securities given for a loan made by a national bank, that the loan was for an amount in excess of the restriction of the United States statute upon the amount of loans which may be made by such banks. Mills County Nat. Bank v. Perry (1887) 72 Iowa, 15, 33 N. W. 341.

The defense of ultra vires is not available either to one who has borrowed money of a national bank on security upon which it is not allowed by law to loan, or to a creditor of his, who has obtained possession of the property, and is chargeable with knowledge of the facts. Farmers' Nat. Bank v. Robinson (1898) 53 P. 762, 59 Kan. 777.

The fact that the purchase, by a national bank, of a promissory note from an indorsee was ultra vires, does not prevent the bank from maintaining in its own name an action against a prior party thereto. National Pemberton Bank v. Porter (1878) 125 Mass. 333, 28 Am. Rep. 235.

Where a national bank purchases a promissory note, indorsed by the payee, the latter cannot set up as defense, in an action by the bank, a contract made by the bank with a third person at the time of the purchase, which contract was ultra vires and the subject-matter of which was the note. Id.

A national bank which purchases a promissory note from an indorsee may maintain an action thereon in its own name against a prior party thereto, without regard to the question whether the purchase was one which it was authorized by law to make. Atlas Nat. Bank v. Savery (1879) 127 Mass. 75.

Even if the purchase of a note by such a bank is ultra vires, it is an ordinary contract, not being made penal or expressly forbidden, and the maker or indorser cannot defend on the ground that the bank has acquired no title. The violation of the law can be availed of only in proceedings against the bank, in the interest of the public, to deprive it of its charter. Prescott Nat. Bank v. Butler (1893) 157 Mass. 548, 32 N. E. 909.

A recovery by a national bank upon promissory notes purchased by it cannot be defeated by the plea that such purchase was ultra vires. Merchants' Nat. Bank v. Hanson (1884) 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5, overruling First Nat. Bank v. Pierson (1877) 24 Minn. 140, 31 Am. Rep. 341.

In an action by a national bank on railroad aid bonds, the United States alone can complain that the bank was not authorized to hold such bonds. Town Council of Lexington v. Union Nat. Bank (1897) 22 So. 291, 75 Miss. 1.

It is no defense to the maker of a nonnegotiable note, discounted with a national bank, that such banks have no right to deal in that kind of paper. First Nat. Bank v. Gillilan (1880) 72 Mo. 77.

Though a national bank is forbidden to lend money on real-estate security, it can enforce such security, if taken; and, where it takes a note without knowledge that it is so secured, it may claim and enforce the same when afterwards discovered. George v. Somerville (1899) 54 S. W. 491, 153 Mo. 7.

Even if it appeared that the act of plaintiff national bank in acquiring title to the special tax bill sued on was ultra vires, such fact would be no defense, the purchase being only voidable, and its validity being assailable only in a direct proceeding by the government. First Nat. Bank v. Shewalter (Mo. App. 1911) 134 S. W. 42.

One who has borrowed money of a national bank cannot defend proceedings for a sale of securities pledged, on the ground that the bank has violated the banking law by taking such securities. Union Nat. Bank v. Touzalin Imp. Co. (1901) 95 N. W. 489, 1 Neb. (Unof.) 116.

A national bank indorsed a certain note for the accommodation of the maker, and when it became due the bank paid it, and brought suit against the maker, who set up as a defense that the bank had no power to so indorse. Held that, even if the indorsement be void, the note is valid, and the bank is entitled to recover. Gloversville Nat. Bank v. Wells (N. Y. 1878) 15 Hun, 51.

To a suit brought by a national bank on a renewal note it is no defense that the original loan was for a larger sum than the bank was, by its charter, authorized to make; the debt upon the renewal being reduced within the limited maximum. Allen v. First Nat. Bank (1872) 23 Ohio St. 97.

Where a national bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the national banking act, the borrower is not estopped to defend against a recovery of interest. Bank of Cadiz v. Slemmons (1877) 34 Ohio St. 142, 32 Am. Rep. 364.

Want of authority in plaintiff national bank to purchase a negotiable note cannot be pleaded by the maker of the note in defense. First Nat. Bank v. Smith (1895) 8 S. D. 7, 65 N. W. 437, 439.

A national bank, having joined with other persons in a partnership to operate a mill, cannot be prevented from recovering moneys loaned to the firm, on the ground that it had no power to become a partner in a mill. Cameron v. First Nat. Bank (Tex. Civ. App.

1896) 34 S. W. 178, affirming (Tex. Civ. App. 1893) 23 S. W. 334.

XIV. TRANSACTIONS PRELIMINARY TO ORGANIZATION

46. Leases and other contracts.—A lease by a national bank before receiving the authorization provided for in the last clause of this section, of a bank building, is ultra vires, and will not support an action for rent or for anything beyond the value of what the bank has actually received and enjoyed. McCormick v. Market Nat. Bank (1897) 17 Sup. Ct. 433, 436, 165 U. S. 538, 41 L. Ed. 817, affirming (1896) 44 N. E. 381, 162 Ill. 100.

Correspondence between one bank and the person who become the president of a bank afterwards formed cannot constitute an agreement controlling the business between the banks, but may be referred to, in connection with other evidence, to show what was their understanding. First Nat. Bank v. Armstrong (C. C. 1890) 42 Fed. 193.

An arrangement made by the officers of the bank before the date of its certificate of authorization, of providing for the cashing by another bank of checks drawn upon it, is invalid. Armstrong v. Second Nat. Bank (D. C. 1889) 38 Fed. 883.

Where a national bank executed a lease before the comptroller of currency had authorized it to do business, the directors and stockholders are not liable thereon where they are not named as parties, and there are no words to bind them to its covenants. Seeberger v. McCormick (1899) 53 N. E. 340, 178 Ill. 404, affirming judgment McCormick v. Seeberger (1898) 73 Ill. App. 87.

XV. STATE LEGISLATION

47. Legal scope.—Congress may confer on national banks such powers and immunities as it sees fit, and the states can in no manner interfere therewith except as permitted by congress. Farmers' & Mechanics' Nat. Bank v. Dearing (1875) 91 U. S. 29, 23 L. Ed. 196.

National banks are subject to state legislation, except where it conflicts with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation. Waite v. Dowley (1876) 94 U. S. 527, 533, 24 L. Ed. 181.

So far as Code Iowa, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks. Easton v. State of Iowa (1903) 23 Sup. Ct. 288, 188 U. S. 220, 47 L. Ed. 452, reversing judgment State v. Easton (1901) 85 N. W. 795, 113 Iowa, 516, 86 Am. St. Rep. 389.

A national bank is a part of the general government's financial system, and state statutes relating to banks cannot control national banks. Lucas County v. Jamison (C. C. 1909) 170 Fed. 338.

National banks are instrumentalities of the federal government, and any action of a state which impairs their efficiency as such governmental agencies, or interferes with their legitimate business as banks, is unconstitutional and void. Larabee v. Dolley (C. C. 1909) 175 Fed. 365, order reversed Dolley v. Abilene Nat. Bank of Abilene, Kan. (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065, and decree affirmed Assaria State Bank of Assaria v. Dolley (1910) 31 Sup. Ct. 189, 219 U. S. 121, 55 L. Ed. 123.

It is not within the power of a state legislature to alter, modify, add to, or diminish the powers, duties, or liabilities created in or conferred upon banking associations established under a law of the United States. (1869) 13 Op. Atty. Gen. 56.

Such associations cannot be merged or in any manner identified with similar corporations created by state legislation, without the authority of Congress. Id.

Acts 18th Gen. Assem. Iowa, c. 153, §§ 1, 2, making it a felony for "any officer" of a bank to receive deposits with knowledge that the bank is insolvent, are not void, in so far as they apply to national bank officers, as an attempt to control and regulate the operations of national banks. State v. Fields (1895) 98 Iowa, 748, 62 N. W. 653.

The state is without authority to enact laws, either in the form of constitution or statute, that in any manner conflict with the national banking act, or interfere with or undertake to regulate or control the business that national banks are authorized by such act to carry on. First Nat. Bank of Elizabethtown v. Commonwealth (1911) 137 S. W. 518, 143 Ky. 816, 34 L. R. A. (N. S.) 54.

National banks, as federal agencies, are exempted from state legislation only so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve the national government. Thomas v. Farmers' Bank (1877) 46 Md. 43.

The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from state laws as are necessary to enable it to effect the legitimate national objects for which it is created. First Nat. Bank v. Lamb (1872) 50 N. Y. 95, 10 Am. Rep. 438.

National banks are responsible alone to the national government, and are as independent of state legislation or interference as the army, navy, mint, or

judicial tribunals of the United States. Pittsburgh v. First Nat. Bank (1867) 55 Pa. St. (5 P. F. Smith) 45.

The rule that a state can exercise no control over a national bank, or in any manner affect its operation except as Congress may permit, excepts the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government. State v. Clement Nat. Bank (1911) 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

48. Construction and operation.—An action in attachment against a national bank is to be conducted and governed by the laws of the state applicable to attachment suits against natural persons. First Nat. Bank v. Colby (1871) 46 Ala. 435.

Acts 18th Gen. Assem. Iowa, c. 153, §§ 1, 2, making it a felony for "any officer," of a bank to receive deposits with knowledge that the bank is insolvent, apply to officers of national as well as other banks. State v. Fields (1895) 98 Iowa, 748, 62 N. W. 653.

Laws Kan. 1891, c. 43, § 16, relating to the receiving of deposits by officers of insolvent banks, and imposing a punishment therefor, does not apply to officers of national banks. State v. Menke (1895) 56 Kan. 77, 42 Pac. 350.

The provisions of Laws Kan. 1879, c. 47, entitled "An act making officers of banking institutions responsible for the reception of deposits or the creation of debts, when such bank is insolvent, or in a failing condition," are not applicable to national banks and their officers. Stout v. Lusk (1900) 59 P. 603, 9 Kan. App. 694.

Ky. St. 1903, § 483, placing notes payable and negotiable at banks organized in the state under the state or federal laws, and indorsed to, or discounted by, any such bank on the same footing as foreign bills of exchange, violates no rights secured to national banks by acts of Congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit. Merchants' Nat. Bank v. Ford (1907) 99 S. W. 260, 30 Ky. Law Rep. 558.

The purpose of Laws N. H. 1907, c. 112, providing that no person, corporation, or association, except savings banks incorporated in the state, etc., shall make use of words indicating that a place of business is the office of a savings bank, nor make use of any printed or written matter having words indicating that a business is the business of a savings bank, nor receive deposits and transact business in the manner of a savings bank, etc., is to prevent the obtaining of the money of depositors on a false representation that the party receiving it is authorized to do and is doing a business like that of a savings bank, and the act does not interfere with the general business of investment by banking institutions of deposits received from their customers on which they agree to pay interest, and the act, so construed, is intended to apply to and includes national banks. State v. People's Nat. Bank (1908) 70 A. 542, 75 N. H. 27.

1 Rev. St. N. Y. (2d Ed.) p. 708, §§ 6, 7, prohibiting all corporations not authorized by the laws of this state from keeping an office of discount or deposit in the state, includes national banks organized and doing business in another state; and therefore, if such bank discounts a note at an office kept within this state without first complying with its laws, it cannot maintain an action thereon. National Bank of Fairhaven v. Phœnix Warehousing Co. (N. Y. 1875) 6 Hun, 71.

Purd. Dig. Pa. p. 333, § 93, prohibiting bank cashiers from engaging in any other occupation, does not apply to cashiers of national banks. Allen v. Carter (1888) 119 Pa. 192, 13 Atl. 70.

Section 4, c. 866, Act Aug. 13, 1888, declaring that national banks, "for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located," refers exclusively to civil actions, and the right of the state to punish a national bank for a violation of its police laws cannot be predicated upon it. State v. First Nat. Bank (1892) 2 S. D. 568, 51 N. W. 587, 780.

CITED WITHOUT DEFINITE APPLICATION

Case v. Citizens' Bank (1879) 100 U. S. 446, 448, 25 L. Ed. 695; U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; Butler v. Coleman (1888) 8 Sup. Ct. 718, 721, 124 U. S. 721, 31 L. Ed. 567; Fritts v. Palmer (1889) 10 Sup. Ct. 93, 95, 132 U. S. 282, 33 L. Ed. 317; Fourth Nat. Bank v. American Mills Co. (1890) 11 Sup. Ct. 52, 137 U. S. 234, 34 L. Ed. 655; Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 927, 928, 141 U. S. 132, 35 L. Ed. 662; Petri v. Commercial Nat. Bank (1892) 12 Sup. Ct. 325, 326, 142 U. S. 644, 35 L. Ed. 1144; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; McClellan v. Chipman (1896) 17 Sup. Ct. 85, 87, 164 U. S. 347, 41 L. Ed. 461; Ex parte Jones (1897) 17 Sup. Ct. 222, 223, 164 U. S. 691, 41 L. Ed. 601; California Nat. Bank v. Thomas (1898) 19 Sup. Ct. 4, 5, 171 U. S. 441, 43 L. Ed. 231; Seeberger v. McCormick (1899) 20 Sup. Ct. 128, 129, 175 U. S. 274, 44 L. Ed. 161; Continental National Bank of Memphis v. Buford (1903) 24 Sup. Ct. 54, 55, 191 U. S. 119, 48 L. Ed. 119; Earling v. Emigh (1909) 30 Sup. Ct. 672, 674, 218 U. S. 27, 54 L. Ed. 915; Simons v. Fisher (1893) 55 Fed. 905, 912, 5 C. C. A. 311, 20 L. R. A. 554 (dissenting opinion); Sioux City Ter-

minal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 135, 27 C. C. A. 73 (affirmed [1899] 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628); St. Louis Nat. Bank v. Brinkman (C. C. 1880) 1 Fed. 45; Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 376; Merchants' Nat. Bank v. Sevier (C. C. 1882) 14 Fed. 662; Scott v. Pequonnock Nat. Bank (C. C. 1883) 15 Fed. 494; U. S. v. National Bank (C. C. 1896) 73 Fed. 379, 381; National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10, 12; Hulitt v. Bell (C. C. 1898) 85 Fed. 98, 99; In re Headley (D. C. 1899) 97 Fed. 765.

§ 9662. (Act May 1, 1886, c. 73, § 2.) Change of name or location.

Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same. (24 Stat. 18.)

This section and the two sections next following were part of an act entitled "An act to enable national banking associations to increase their capital stock and to change their names or locations."

Section 1 of the act, authorizing increase of the capital stock of such banks, is set forth post, § 9680.

Notes of Decisions

Change of location.—Where a national bank located in a suburb outside the corporate limits of Oklahoma City, having a population of not to exceed 3,000, was chartered with a capital of $25,000, and, after the suburb had been included in the city, the Comptroller refused permission to move the bank's place of business into the business section of the city unless it increased its capital to at least $200,000 and agreed to comply with the law regulating reserves in reserve cities, of which Oklahoma City was one, the alteration of the city's boundaries did not entitle the bank to so remove without compliance with the Comptroller's conditions, and, it having removed without fulfilling such conditions, the Comptroller was entitled to maintain a suit for the forfeiture of its charter. First Nat. Bank v. Murray (1914) 212 Fed. 140, 128 C. C. A. 652.

Cited without definite application, Fritts v. Palmer (1889) 10 Sup. Ct. 93, 95, 132 U. S. 282, 33 L. Ed. 317.

§ 9663. (Act May 1, 1886, c. 73, § 3.) Effect of change of name on debts, liabilities, etc.

All debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name. (24 Stat. 19.)

§ 9664. (Act May 1, 1886, c. 73, § 4.) Liabilities and suits not affected by change of name.

Nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested. (24 Stat. 19.)

§ 9665. (Act July 12, 1882, c. 290, § 1.) Extension of period of corporate succession.

Any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided,

extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed. (22 Stat. 162.)

This was the first section of the Currency Act of 1882, entitled "An act to enable national-banking associations to extend their corporate existence, and for other purposes."

Sections 2–7 of the act are set forth post, §§ 9666–9671.

Section 8 of the act, relating to the amount of bonds deposited as security for circulating notes and to reduction of amount and retirement of such notes, is set forth post, § 9708.

Section 9 of the act, providing for withdrawal of circulating notes on the deposit of lawful money, and the withdrawal of bonds held as security therefor, is set forth post, § 9709.

Section 10 of the act repealed R. S. §§ 5171, 5176, and prescribed and regulated the issue of circulating notes. It was superseded by Act March 14, 1900, c. 41, § 12, post, § 9713.

Section 11 of the act, provided for the exchange, for outstanding three and one-half per cent. bonds of the United States, of three per cent. bonds. It is omitted as temporary and executed.

Section 12 of the act, authorizing the issue of gold certificates upon the deposit of gold coin, is set forth ante, § 6566.

Section 13 of the act, providing for the punishment of bank officers, etc., for falsely certifying checks, is set forth post, § 9771.

Section 14 of the act, reserving to Congress power to amend, etc., or repeal this and acts of which it is amendatory, is set forth post, § 9672.

Act Feb. 25, 1863, c. 58, 12 Stat. 665, mentioned in this section, was repealed by the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, also mentioned therein, which was incorporated into this Title of the Revised Statutes. See notes to Act June 20, 1874, c. 343, § 1, ante, § 9657.

Act Feb. 14, 1880, c. 25, also mentioned in this section, is set forth post, § 9727.

The Comptroller of the Currency was authorized to extend, under the provisions of this act, for a further period of 20 years, the charter of any national banking association extended under the provisions of this act, by Act April 12, 1902, c. 503, post, § 9673.

Notes of Decisions

Opinion under former statute.—See (1882) 17 Op. Atty. Gen. 288.

Cited without definite application, Leather Manufacturers' Nat'l Bank v. Cooper (1887) 7 Sup. Ct. 777, 120 U. S. 778, 30 L. Ed. 816; Scott v. Deweese (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822.

§ 9666. (Act July 12, 1882, c. 290, § 2.) Procedure.

Such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by the president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association. (22 Stat. 162.)

Notes of Decisions

Certificate—Presumption and proof.—Where a national bank continued its existence and performed the functions of such an association after the expiration of its original corporate existence for a long period of time, it would be presumed to have accepted the benefit of a certificate executed by the Comptroller of a Currency extending its corporate existence. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907)

27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of this act and declared that the bank was authorized to have succession until November 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the national bank act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter. Id.

Cited without definite application, Leather Manufacturers' Nat. Bank v. Cooper (1887) 7 Sup. Ct. 777, 120 U. S. 778, 30 L. Ed. 816.

§ 9667. (Act July 12, 1882, c. 290, § 3.) Examination and issue of certificate of approval by Comptroller.

Upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise, it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval. (22 Stat. 163.)

§ 9668. (Act July 12, 1882, c. 290, § 4.) Corporate powers upon extension of period of succession; jurisdiction of suits by or against national banks.

Any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed. (22 Stat. 163.)

Provisions relating to the citizenship of national banks for purposes of actions by or against them, and to the jurisdiction of the district courts of suits against national banks, etc., were made by Jud. Code, § 24, par. 16, ante, § 991(16).

Notes of Decisions

Construction and operation of proviso.—For other provisions as to the jurisdiction of suits by or against national banking associations, see notes under § 991(16), ante.

Act Aug. 13, 1888, c. 866, § 4, was intended to displace and be a substitute for the proviso of this section. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, affirmed (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742. But has been held not to supersede it. Levitan v. Houghton Nat. Bank (Mich. 1913) 140 N. W. 1019.

Suits against private persons after a national bank has been found to be insolvent, and for the exclusive benefit of its creditors, by a receiver, do not come within this proviso. Price v. Abbott (C. C. 1883) 17 Fed. 506. Its object was to deprive the United States courts of jurisdiction of cases by or against national banks in all cases where state banks or banks organized under state laws could not likewise sue or be sued in United States courts. Id. It refers only to suits brought after its passage. First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 132 U. S. 141, 33 L. Ed. 282; Morgan v. First Nat. Bank (1885) 93 N. C. 352. And relates to the jurisdiction of state, not federal, courts in actions by or against national banks. Levitan v. Houghton Nat. Bank (1913) 140 N. W. 1019, 174 Mich. 566.

The clause of section 9834, post, forbidding state courts to grant preliminary injunctions against national banks, was not repealed by this section, nor by Act Aug. 13, 1888, c. 866, § 4, declaring them, for the purpose of suit, citizens of their respective states, and federal jurisdiction so far the same for them as for individuals. Freeman Mfg. Co. of North Adams v. National Bank of the Republic (1894) 160 Mass. 398, 35 N. E. 865.

An application by a stockholder of a national bank, who has lost her certificate of stock, for the issuance of a new one, held to be a "suit" within this section. In re Hayt (1902) 79 N. Y. S. 845, 39 Misc. Rep. 356.

In an action by a national bank before a state court to collect an indebtedness, defendant set up a counterclaim founded on usury. Held, that under this section the defense was a proper one. Wachovia Nat. Bank v. Ireland (1898) 29 S. E. 835, 122 N. C. 571.

—— **Jurisdiction in general.**—Actions, local in their nature, may be maintained in the proper state court against a national banking association in a county or a city other than that where it is established. Casey v. Adams (1880) 102 U. S. 66, 26 L. Ed. 52.

To give the supreme court jurisdiction to review the decision of a state supreme court under the banking act, the plaintiff in error must be by the judgment below denied some right, title, or immunity specially claimed under said act, and such claim must be for himself, and not for a third person, in whose title he has no interest. Miller v. National Bank of Lancaster (1883) 106 U. S. 542, 1 Sup. Ct. 536, 27 L. Ed. 289.

A judgment of a state court awarding a bank possession of land held not to deny to plaintiff in error, ousted from possession, any "title, right, privilege, or immunity," and a writ of error would not lie to the supreme court. Id.

A federal court has no jurisdiction of a suit by a stockholder against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by their illegal conduct. Whittemore v. Amoskeag Nat. Bank (1890) 10 Sup. Ct. 592, 134 U. S. 527, 33 L. Ed. 1002, reversing decree (C. C. 1885) 26 Fed. 819.

Banks cannot sue or be sued in the federal courts, except where the suit is based on the diversity of citizenship of the parties. Petri v. Commercial Nat. Bank (1892) 12 Sup. Ct. 325, 142 U. S. 644, 35 L. Ed. 1144; Ex parte Jones (1897) 17 Sup. Ct. 222, 164 U. S. 691, 41 L. Ed. 601.

A suit in a federal court by a national bank located in another state, will not lie where declaration fails to show diverse citizenship, and the record nowhere supplies the omission. Thomas v. National Bank of D. O. Mills (1901) 106 Fed. 438, 45 C. C. A. 407.

A suit which may be brought in a federal Circuit Court by or against a citizen of a state, because it arises under the Constitution, laws or treaties of the United States, may, for the same reason, be brought in such court by or against a national bank located in the same state, notwithstanding this act. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Wallace (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

The jurisdiction of the federal circuit court on a creditors' bill against a national bank, for discovery and other relief upon allegations of fraud by the officers, is not superseded by the appointment of a receiver by the comptroller. McElhenny v. First Nat. Bank (C. C. 1879) Fed. Cas. No. 8,779.

A bank, attempting to sue in a federal court for a district other than the one in which the bank is established, is subject to the jurisdictional limits as to the amount in controversy in actions by natural persons. St. Louis Nat. Bank v. Brinkman (C. C. 1880) 1 Fed. 45, 47.

A national bank as such is not authorized to sue in a federal court outside the district in which it is located, but a bank located in one state is authorized to sue a citizen in another in a United States court held in the district where the defendant resides; since, for the purpose of determining the jurisdiction of a federal court, a national bank will be regarded as a citizen of the state where it is established or located. St. Louis Nat. Bank v. Allen (C. C. 1881) 5 Fed. 551.

A United States circuit court has jurisdiction of an action by a national bank to enjoin the collection of an excessive tax levied by a county in which it is located; since such suit involves the construction and application of section 9784, post, giving a state authority to tax national banks, but providing that such taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state; which is a matter involving federal authority. Union Nat. Bank v. Miller (C. C. 1883) 15 Fed. 703.

This section placed national and other banks, as to their right to sue in the federal courts, on the same footing, and consequently a national bank cannot sue in such courts, unless the subject-matter involves an element of federal jurisdiction. Id.

This act leaves suits brought by and against national banks, "except suits between them and the United States, or its officers and agents," to the jurisdiction of the state courts, unless

the domicile of the parties is such as to give the federal court jurisdiction. Price v. Abbott (C. C. 1883) 17 Fed. 506.

A national bank cannot now institute and maintain a suit against residents of its own state and judicial district in United States courts. National Bank v. Fore (C. C. 1885) 25 Fed. 209.

The right of a national bank to make use of the United States courts is not a vested right, which cannot be defeated by legislation subsequent to the act giving the courts jurisdiction. National Bank v. Fore (C. C. 1885) 25 Fed. 209, 210.

Federal courts have jurisdiction of an action between a national bank located in one state and a citizen of another state. First Nat. Bank v. Forest (C. C. 1889).40 Fed. 705.

This act does not deprive a circuit court of the United States of the jurisdiction conferred by prior statutes over suits brought by receivers of such banks, without regard to the citizenship of the parties. Earle v. McCartney (C. C. 1901) 109 Fed. 13, decree affirmed McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392.

This act deprives the federal courts of jurisdiction of suits by or against national banks by reason of their national incorporation, leaving such jurisdiction dependent on diversity of citizenship alone, unless a federal question is otherwise involved. American Nat. Bank of Washington v. Tappan (C. C. 1909) 174 Fed. 431, judgment affirmed (1910) 30 Sup. Ct. 697, 217 U. S. 600, 54 L. Ed. 897.

Jurisdiction of an action on contract against a national bank is not prohibited to a state court of a county other than that in which it is situated. Fresno Nat. Bank v. Superior Court (1890) 83 Cal. 491, 24 Pac. 157.

National banks, like any other corporations, and the receivers of the same, may sue and be sued in the state courts of their domicile. Adams v. Daunis (1877) 29 La. Ann. 315.

State courts have jurisdiction to compel officers of a national bank to permit a stockholder's examination of its records and documents for a proper purpose. Woodworth v. Old Second Nat. Bank (1908) 117 N. W. 893, 15 Detroit Leg. N. 773, 154 Mich. 459.

A state court had jurisdiction of an action for breach of contract against a national bank located in another state. Holmes v. Wilmington Nat. Bank (1882) 18 S. C. 31, 44 Am. Rep. 558.

Jurisdiction of receiver's action to enforce stockholders' liability held not taken away by this act. Stephens v. Bernays (D. C. 1890) 41 Fed. 401.

See, also, notes under § 991 (16), ante.

—— **Removal of causes.**—Since this act, a cause to which a national bank is a party cannot be removed from a state to a federal court, as a cause arising under the laws of the United States, on the mere ground that a national bank is a party, or on the ground alone that it is a federal corporation. Leather Manufacturers' Nat. Bank v. Cooper (1887) 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816, affirming Cooper v. Leather Manufacturers' Nat. Bank (1886) 29 Fed. 161.

The effect of this section was to place national banks, for jurisdictional purposes, on the same footing as other banking institutions, and to prevent the removal of cases by national banks because of their organization as federal corporations. Speckert v. German Nat. Bank (1899) 98 Fed. 151, 153, 38 C. C. A. 682, appeal dismissed (1901) 21 Sup. Ct. 688, 181 U. S. 405, 45 L. Ed. 926.

See, also, Gerner v. Mosher (1899) 58 Neb. 135. And see notes under §§ 991 (16) and 1010, ante.

—— **Attachment.**—No right to attachment against a national bank before judgment in a suit in a state court is given by this section. Van Reed v. People's Nat. Bank (1905) 25 Sup. Ct. 775, 776, 198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154, affirming judgments (1903) 66 N. E. 16, 173 N. Y. 314, 105 Am. St. Rep. 666, and (1901) 73 N. Y. S. 514, 67 App. Div. 75.

Since any nonresident person, natural or artificial, who brings attachment in a local court, may be sued in that court on his attachment bond, a national bank cannot claim any exception. Continental Nat. Bank v. Folsom (1887) 78 Ga. 449, 3 S. E. 269.

An attachment cannot be issued by a state court against the property of a solvent national bank located in another state. McDonald v. First Nat. Bank (1891) 41 Ill. App. 368.

Jurisdiction under prior laws.—See Bank of United States v. Deveaux (1809) 9 U. S. (5 Cranch) 85, 3 L. Ed. 38; Osborn v. Bank of United States (1824) 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204; Bank of United States v. Planters' Bank of Georgia (1824) 22 U. S. (9 Wheat.) 904, 6 L. Ed. 244; Same v. Martin (1831) 30 U. S. (5 Pet.) 478, 8 L. Ed. 198; Wilson County v. Third Nat. Bank (1880) 103 U. S. 770, 26 L. Ed. 488; Shoemaker v. National Mechanics' Bank (C. C. 1869) Fed. Cas. No. 12,801; Union Nat. Bank v. Chicago (C. C. 1871) Fed. Cas. No. 14,374; Cadle v. Tracy (C. C. 1873) Fed. Cas. No. 2,279; First Nat. Bank v. Douglas County (C. C. 1873) Fed. Cas. No. 4,809; Commercial Nat. Bank v. Simmons (C. C. 1876) Fed. Cas. No. 3,062; Main v. Second Nat. Bank (D. C. 1874) Fed. Cas. No. 8,976.

Cited without definite application, Schuyler Nat. Bank v. Bollong (1893) 14 Sup. Ct. 24, 25, 150 U. S. 85, 37 L. Ed. 1008.

§ 9669. (Act July 12, 1882, c. 290, § 5.) Withdrawal of dissenting shareholders.

When any national-banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: Provided, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association. (22 Stat. 163.)

Notes of Decisions

Withdrawal of shareholder.—A shareholder ceases to be such on giving notice of withdrawal within the required time. Kimball v. Apsey (1908) 164 Fed. 830, 90 C. C. A. 634, judgment affirmed Apsey v. Kimball (1911) 31 Sup. Ct. 695, 221 U. S. 514, 55 L. Ed. 834.

Shareholder of national bank, who gave written notice at expiration of its charter of her desire to withdraw, held not entitled to dividend declared after such notice, the greater part of which had been earned while she was a shareholder. Smith v. Phillips Nat. Bank (Me. 1915) 96 A. 217.

Shareholder's demand for and acceptance of dividend declared by national bank after her notice of withdrawal held a waiver of her withdrawal. Id.

—— **Appraisement.**—A committee appointed to appraise the value of the shares of shareholders may amend a mere clerical error in their award at any time before appeal therefrom to the comptroller of the currency, although the shareholder has been notified of the award, and has accepted it in its original form. First Nat. Bank v. Brenneman (1886) 114 Pa. St. 315, 7 Atl. 910.

Liability after withdrawal.—Shareholders in a national bank which has extended its corporate existence, conformably to this act, ceased to be such upon the expiration of the original term of the bank's corporate life, and therefore could not thereafter be chargeable with personal liability for its debts, where they took the steps required of nonassenting stockholders, by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares. Apsey v. Kimball (1911) 31 Sup. Ct. 695, 698, 221 U. S. 514, 55 L. Ed. 834, affirming judgments Same v. Whittemore (1908) 85 N. E. 91, 199 Mass. 65, and Kimball v. Apsey (1908) 164 Fed. 830, 90 C. C. A. 634.

Where a stockholder in a national bank served notice of withdrawal on a renewal of its charter, as required by this section, appointed an appraiser on his behalf and took all reasonable steps to obtain an appraisal of and payment for his shares as therein provided, and thereafter refused to accept dividends on his stock, he cannot be held liable for an assessment, made on the subsequent insolvency of the bank, on the ground of estoppel, although through a failure of duty on the part of the bank and its officers no appraisal was made, and his name was retained on the stockbook, and because of such failure to act his certificate of stock had not been actually surrendered. Kimball v. Apsey (1908) 164 Fed. 830, 90 C. C. A. 634, affirmed Apsey v. Kimball (1911) 31 Sup. Ct. 695, 221 U. S. 514, 55 L. Ed. 834.

Where defendant within 30 days after

the extension of the charter of a national bank gave notice of her election to withdraw, the appraisers failing for a little less than two years to act, before the failure of the bank, defendant having in the meantime refused to accept dividends or act as a stockholder, she was a creditor, and not a stockholder, of the bank, and was not liable for assessments levied on the stock previously owned by her. Apsey v. Whittemore (1908) 85 N. E. 91, 199 Mass. 65. It was not material that defendant in the meantime had retained possession of the stock certificates, which she was not required to surrender until payment of their appraised value, nor that dividends declared on such stock were credited to her account on her refusal to accept the same. Id.

§ 9670. (Act July 12, 1882, c. 290, § 6.) Redemption of circulating notes issued prior to extension of period of succession.

The circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An act fixing the amount of United States notes, providing for redistribution of national-bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: Provided, however, That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it. (22 Stat. 163.)

Act June 20, 1874, c. 343, § 3, mentioned in this section, relating to the redemption of circulating notes, is set forth post, § 9751.

The method of destroying bank notes by burning, as provided in R. S. §§ 5184, 5225, was superseded by Act June 23, 1874, c. 455, § 1, ante, § 6560, requiring all bank notes, etc., to be macerated instead of burned.

§ 9671. (Act July 12, 1882, c. 290, § 7.) Dissolution of banks not extending period of succession.

National-banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed. (22 Stat. 164.)

Notes of Decisions

Corporation continued to close affairs.—An objection that a national bank whose charter had expired had no corporate existence for the purpose of

being sued by a stockholder and cestui que trust of a special trust fund for the appointment of a receiver is without merit, under this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

A bank may, after the expiration of its charter, continue under its corporate name the prosecution of suits brought by it before the expiration of its corporate existence. City of Louisville v. Bank of United States (1842) 42 Ky. (3 B. Mon.) 138.

National banking association held entitled to continue to elect officers and directors for the purpose of effecting the liquidation. Richards v. Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

A national bank, after expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs are completely settled. Farmers' Nat. Bank v. Backus (1898) 77 N. W. 142, 74 Minn. 264.

§ 9672. (Act July 12, 1882, c. 290, § 14.) Reservation of power to amend, alter or repeal act.

Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory. (22 Stat. 166.)

This was the last section of the Currency Act of 1882, cited above.

See notes to section 1 of the act, ante, § 9665, and references therein to the other sections of the act.

§ 9673. (Act April 12, 1902, c. 503.) Additional extension of period of corporate succession.

The Comptroller of the Currency is hereby authorized, in the manner provided by, and under the conditions and limitations of, the Act of July twelfth, eighteen hundred and eighty-two, to extend for a further period of twenty years the charter of any national banking association extended under said Act which shall desire to continue its existence after the expiration of its charter. (32 Stat. 102.)

This was an act entitled "An act to provide for the extension of the charters of national banks."

The Currency Act of July 12, 1882, c. 290, mentioned in this act, is set forth or referred to ante, §§ 9665–9672.

§ 9674. (R. S. § 5137.) Power to hold real property.

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Act June 3, 1864, c. 106, § 28, 13 Stat. 107.

Notes of Decisions

Dealings in realty in general.—See note under § 9661, ante, "Incidental powers—Power to repair and sell realty."

The want of authority of a national bank to become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold, is a valid defense to an action against it founded upon its liability for the partnership debts. Merchants' Nat. Bank of Cincinnati v. Wehrmann (1906) 26 Sup. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

Validity of bank's acquisition of realty.—A national bank may hold real estate actually purchased for security of the debt, although in excess thereof. Mapes v. Scott (1878) 88 Ill. 352; Libby v. Union Nat. Bank (1881) 99 Ill. 622; Upton v. National Bank of South Reading (1876) 120 Mass. 153.

Where a national bank, in order to secure the same debt, purchases other real estate not mortgaged to it, it does not affect the title to the land it was

authorized to purchase. Reynolds v. Crawfordsville First Nat. Bank (1884) 5 Sup. Ct. 213, 217, 112 U. S. 405, 28 L. Ed. 733.

Where a national bank has lawfully acquired an interest in real property, in satisfaction of a debt, it may purchase other undivided interests therein or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage. Cockrill v. Abeles (1898) 86 Fed. 505, 30 C. C. A. 223.

A purchase of real estate by a national bank for a purpose other than that specified by this section is voidable only, and not void. Barron v. McKinnon (1912) 196 Fed. 933, 116 C. C. A. 483; Baker v. Schofield (1915) 221 Fed. 322, 136 C. C. A. 320, affirming decree Schofield v. Baker (D. C. 1914) 212 Fed. 504.

National banks may hold real estate security acquired by subrogation from a holder of a negotiable note. Mathews v. Abbott (D. C. 1878) Fed. Cas. No. 9,275.

A national bank lawfully owning uplands, and thereby having under state laws a preference right to purchase tidelands of the state, may purchase tidelands, and receiver acquiring tidelands with the approval of the Comptroller of the Currency may not challenge the right to acquire the same, and his holding can be questioned only by the government. Schofield v. Baker (D. C. 1914) 212 Fed. 504.

It is no objection to a national bank's holding real estate for one of the authorized purposes that it acquired it by assignment of a certificate of purchase at a sheriff's sale on execution, and by a subsequent deed from the sheriff. Turner v. First Nat. Bank (1881) 78 Ind. 19.

Where a national bank loans money to enable the borrower to purchase land at a judicial sale, a subsequent conveyance of such land to the bank is in discharge of a debt previously contracted. Id.

This section does not validate a conveyance to a national bank which is prohibited by the statute of the state relating to insolvency. Chipman v. McClellan (1893) 159 Mass. 363, 34 N. E. 379, affirmed (1896) 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461.

In the absence of affirmative evidence of some contravention of the national currency act, a national bank may lawfully purchase, hold, and convey real estate. First Nat. Bank v. Kidd (1873) 20 Minn. 234 (Gil. 212).

National banks may hold and convey such real estate as they shall purchase at sales under decrees and judgments. Wherry v. Hale (1882) 77 Mo. 20.

National banks have no power to acquire and hold title to real estate, except for the purposes expressed in or necessarily implied from their charters, and the power to acquire and hold title to real estate in trust merely is not among the express powers, nor is it implied from the language used. Hall v. Farmers' & Merchants' Bank (1898) 145 Mo. 418, 46 S. W. 1000.

A national bank may acquire the land of a debtor for the purpose of protecting itself from loss. First Nat. Bank of Kennewick v. Conway (Wash. 1915) 151 P. 1129. Thus, where it has loaned money on timber land, it may, to protect itself and collect the debt, purchase the land at foreclosure sale, and cut and sell the timber. Roebling v. First Nat. Bank (D. C. 1887) 30 Fed. 744. And where it holds a second mortgage given to secure a debt, it may purchase the land at a foreclosure sale under the first mortgage. Heath v. Second Nat. Bank (1880) 70 Ind. 106.

Leases and improvements.—The power conferred on national banks by this section includes the power to lease real estate for such purpose, and a bank does not exceed its powers by leasing ground for a term of years under an agreement with the owner that it will erect a building thereon for its use, providing it acts in good faith, and for the purpose of obtaining an eligible location and a suitable building in which to conduct its business. Nor is it limited to the construction of a building only sufficient for its own use; but, where it has acquired property by purchase or lease for the purpose authorized by the statute, it may improve the same in any manner that other prudent owners would do, so as to render it most productive. Brown v. Schleier (1902) 118 Fed. 981, 55 C. C. A. 475, affirming decree (C. C. 1901) 112 Fed. 577, which is affirmed (1904) 24 Sup. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

A lease of property by a national bank for 99 years is not ultra vires and void because the term will outlast its corporate life. Being authorized by the statute to purchase real estate in fee simple for specified purposes, it may acquire any lesser estate or interest which is vendible. Id.

A lessor of real estate to a national bank for a long term, in which the bank covenants to erect a bank building which shall become part of the realty, cannot be held accountable to the stockholders or creditors of the bank because it may have exceeded its powers by expending more money in the erection of the building than it was authorized to do under the law, and more than was required by the terms of the lease; nor can such excessive expenditure be charged as a lien upon the property in favor of creditors after the same has passed into the hands of the lessor. Id.

A contract by which a national bank leased ground for 99 years, agreeing to pay a monthly rental therefor, does not create an indebtedness for the full

amount of the rental accruing during the term. Id.

A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration of its charter, even though the lease is assignable only by consent of the lessor. Weeks v. International Trust Co. (1903) 125 Fed. 370, 60 C. C. A. 236, reversing judgment International Trust Co. v. Weeks (C. C. 1902) 116 Fed. 898, and writ of error dismissed (1904) Id. 24 Sup. Ct. 853, 193 U. S. 667, 48 L. Ed. 839.

Where a national bank in flourishing condition had been for many years the rightful owner of a lot improved by its bank building, it had power to alter and enlarge the improvement thereon so as to furnish better accommodation for the bank's business, and at the same time provide offices which could be rented to tenants. Wingert v. First Nat. Bank of Hagerstown, Md. (1909) 175 Fed. 739, 99 C. C. A. 315, appeal dismissed (1912) 32 Sup. Ct. 391, 223 U. S. 670, 56 L. Ed. 605.

The purchase of stock, by a national bank, in a corporation one of the objects of which is the improvement of real estate, is not within the inhibition upon national banks to engage in the improvement of real estate not necessary for their own use. Western Imp. Co. v. Des Moines Nat. Bank (1897) 72 N. W. 657, 103 Iowa, 455.

A national bank may acquire and hold stock in a building corporation as part of a transaction for renting desirable banking quarters. Fourth Nat. Bank of Nashville v. Stahlman (1915) 178 S. W. 942, 132 Tenn. 367, L. R. A. 1916A, 568.

Loans and real estate security.—The power of a national bank to take a mortgage of real estate executed in good faith, to secure pre-existing indebtedness, is not affected by the fact that at the same time an old note representing the debt is taken up, and a new one given. Oldham v. First Nat. Bank (1881) 85 N. C. 240; Farmers' & Merchants' Nat. Bank v. Wallace (1887) 45 Ohio St. 152, 12 N. E. 439; Howard Nat. Bank v. Loomis (Vt. 1879) 51 Vt. 349.

A. executed a promissory note to B., and, to secure the payment thereof, a deed of trust of lands, which was, in effect, a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B., who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A. filed his bill to enjoin the sale, upon the ground that the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. Held, that the bank was entitled to enforce the collection of the note by a sale of the lands. Union Nat. Bank v. Matthews (1878) 98 U. S. 621, 25 L. Ed. 188.

A national bank may enforce against the mortgagee, and parties claiming under him with notice, a mortgage of lands executed to it as collateral security for his then existing indebtedness to it and such as he might thereafter incur. An objection to the taking of such a mortgage as security for future advances can only be urged by the United States. National Bank v. Whitney (1880) 103 U. S. 99, 26 L. Ed. 443.

A loan of money made by a national bank on the security of a mortgage is not in violation of the National Bank Act and may be enforced. An objection to the taking by the bank of a mortgage lien as security for future advances can only be made by the United States. Fortier v. New Orleans Nat. Bank (1884) 5 Sup. Ct. 234, 112 U. S. 439, 28 L. Ed. 764.

This section, by specifying the purposes for which a national bank might purchase, hold, and convey real estate, did not make void mortgages taken for other purposes by a banking association authorized to transact business. McCormick v. Market Nat. Bank (1897) 17 Sup. Ct. 433, 437, 165 U. S. 538, 41 L. Ed. 817.

A national bank may take from a customer, as collateral security, the note and mortgage of a third person, and may foreclose the same if the borrower becomes insolvent, and the personal security fails. Merchants' Nat. Bank v. Mears (C. C. 1878) Fed. Cas. No. 9,450.

A national bank which lawfully holds a second mortgage may buy in the first one to protect its interest. Holmes v. Boyd (1883) 90 Ind. 332.

A national bank refused to negotiate a loan upon the responsibility of a firm, but agreed to and did make the loan upon a note made by one member of the firm to the other, and indorsed by the latter to the bank, the maker giving a bond and mortgage upon separate property to secure the indorser against liability upon his indorsement, with an agreement that, in case of default, the security should inure to the bank. Held, that the bond and mortgage were not within the prohibition of this section, and that the same were therefore legal and binding, and might be enforced for the benefit of the bank. First Nat. Bank v. Haire (1873) 36 Iowa, 443.

The defendant owed a large sum of money to a national bank. To partially secure the payment thereof, he gave a mortgage to the bank on some property owned by him in Chicago, Ill. There was a prior lien of $2,000 on the Chicago property, which the defendant agreed to pay. Five hundred dollars of the same became due, and the bank, in order to save and protect its own lien on said Chicago property, and at the request of the defendant, paid said sum of $500, and then took the note and mortgage now sued on for that

amount on property situated in Crawford county, Kan. Held, that the taking of the last-mentioned mortgage was not a violation of the national banking law, and that the mortgage was valid. Ornn v. Merchants' Nat. Bank (1876) 16 Kan. 341.

Though a national bank is not authorized to take mortgages upon real estate, it may be substituted to the rights of a surety who has taken such a mortgage. Magoffin v. Boyle Nat. Bank (1902) 69 S. W. 702, 24 Ky. Law Rep. 585.

Where a bank sells any immovable it owns, it may reserve a mortgage and vendor's privilege on it. New Orleans Nat. Bank v. Raymond (1877) 29 La. Ann. 355, 29 Am. Rep. 335.

A mortgage taken by a national bank upon real estate, in violation of the national banking act, is not invalid. Fifth Nat. Bank v. Pierce (1898) 75 N. W. 1058, 117 Mich. 376, 5 Detroit Leg. N. 251.

Where a national bank sells realty on credit, it may take a mortgage to secure the unpaid purchase money. First Nat. Bank v. Kidd (1873) 20 Minn. 234 (Gil. 212).

A loan by a national bank on the stock of a corporation as collateral security is not a violation of the provision of the national banking act that such banks shall not loan money on a mortgage of real estate, though the property of the corporation whose stock is pledged consists wholly of real estate. Baldwin v. Canfield (1879) 26 Minn. 43, 1 N. W. 261; Id. (1879) 26 Minn. 62, 1 N. W. 585.

If a note secured by a deed of trust on real estate be discounted by a national bank, the security passes to the bank and may be enforced by it. Thornton v. National Exch. Bank (1879) 71 Mo. 221.

The acceptance of a deed of trust by a national bank, though ultra vires, does not render the conveyance void, but only voidable. The sovereign alone can interfere. Hall v. Farmers' & Merchants' Bank (1898) 46 S. W. 1000, 145 Mo. 418.

Where notes secured by mortgage on land have been assigned to a national bank, and by it to a bona fide purchaser, the latter is entitled to enforce the security, even though the bank could not have done so, as in case the assignment to it was for other than a debt previously contracted. Richards v. Kountze (1876) 4 Neb. 200.

A national bank, organized from a state bank, may take an assignment of a note with mortgage security from the latter, and enforce collection by foreclosure. Scofield v. State Nat. Bank (1879) 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412.

A national bank may take an assignment of a mortgage as collateral security. Weir v. Birdsall (1898) 50 N. Y. S. 275, 27 App. Div. 404.

A national bank may enforce a real estate mortgage assigned to an employé for its benefit, though it is subject to liability to the federal government for exceeding its powers. Slade v. Bennett (1909) 118 N. Y. S. 278, 133 App. Div. 666.

It is competent for a national bank to purchase a note in favor of a third party, and thereby acquire incidentally a mortgage on land which had been given to secure it; and the claim so evidenced may be incorporated with other indebtedness, and a new mortgage on real estate taken to secure the whole sum. Oldham v. First Nat. Bank (1881) 85 N. C. 240.

In an action by a national bank on a note given by defendant, where defendant's property was attached, statements made to plaintiff at the time of the loan regarding defendant's ownership of certain land were material to the transaction, and were notice to plaintiff, though under the provisions of the banking act a national bank may not loan money on real estate security given directly to the bank. National Bank of North America in New York v. Thomas (1910) 74 A. 1092, 30 R. I. 294.

This section does not imply a negation of corporate power of banks organized under it to loan money on real estate, does not annul any loan made, nor release or discharge any deed of trust or mortgage taken to secure payment. Wroten's Assignee v. Armat (Va. 1879) 31 Grat. 228.

—— **Pre-existing debts.**—This section does not prohibit national banks from taking an assignment of notes secured by trust deed on real estate as collateral security for pre-existing debts due them. Reynolds v. First Nat. Bank (1884) 5 Sup. Ct. 213, 112 U. S. 405, 28 L. Ed. 733; Worcester Nat. Bank v. Cheeney (1878) 87 Ill. 602; Richards v. Kountze (1876) 4 Neb. 200.

—— **Debts incurred in præsenti and in futuro.**—A mortgage to a bank to secure debts previously contracted may be made to secure future advances also. National Bank of Genesee v. Whitney (1880) 103 U. S. 99, 100, 26 L. Ed. 443.

A mortgage upon real estate, given to a bank to secure a contemporaneous loan or future advances, is valid between the parties and may be enforced. Winton v. Little (1880) 94 Pa. St. 64 (overruling all previous decisions in conflict with Union Bank v. Matthews [1878] 98 U. S. 621, 25 L. Ed. 188); Hanover Nat. Bank v. First Nat. Bank (1901) 109 Fed. 421, 426, 48 C. C. A. 482; Waterbury v. McKinnon (1906) 146 Fed. 737, 77 C. C. A. 294.

A mortgage of real estate, securing a contemporaneous loan of money advanced by a national bank, is valid inter partes. John Warner v. De Witt County Nat. Bank (1879) 4 Ill. App. (4 Bradw.) 305; First Nat. Bank v. Elmore (1879) 52 Iowa, 541, 3 N. W. 547;

First Nat. Bank v. Grosshans (1901) 85 N. W. 542, 61 Neb. 575; Myers v. Campbell (1899) 44 A. 863, 64 N. J. Law, 186.

A national bank may lawfully take a mortgage to secure future indebtedness. Simons v. First Nat. Bank (1883) 93 N. Y. 269.

A national bank has power to take an assignment of a mortgage on land to secure a loan made at the time of the assignment. First Nat. Bank v. Andrews (1893) 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

Mortgages given to a national bank to secure contemporaneous loans of money by discounting commercial paper in the usual course of business are not void. Graham v. National Bank of New York (1880) 32 N. J. Eq. (5 Stew.) 804.

In earlier cases, however, it was held that a national bank cannot take real estate as security for a debt concurrently created or for future advances. See Kansas Val. Nat. Bank v. Rowell (C. C. 1873) Fed. Cas. No. 7,611; Fridley v. Bowen (1877) 87 Ill. 151; Matthews v. Skinker (1876) 62 Mo. 329, 21 Am. Rep. 425; Swope v. Leffingwell (1877) 4 Mo. App. 525; Crocker v. Whitney (1877) 71 N. Y. 161 (reversed in [1880] 103 U. S. 99, 26 L. Ed. 443); Fowler v. Scully (1872) 72 Pa. St. (22 P. F. Smith) 456, 13 Am. Rep. 699; Woods v. People's Nat. Bank (1876) 83 Pa. St. 57.

Where a bank takes an assignment of notes secured by a mortgage it will not be presumed, in the absence of evidence, that the debt for which the assignment was taken was incurred in præsenti. Richards v. Kountz (1876) 4 Neb. 200.

Right to question bank's power.—The validity of a mortgage upon realty executed to a national bank can only be questioned by the federal government. Weber v. Spokane Nat. Bank (1894) 64 Fed. 208, 210, 12 C. C. A. 93; Camp v. Land (1898) 54 P. 839, 122 Cal. 167; Warner v. De Witt County Nat. Bank (1879) 4 Ill. App. (4 Bradw.) 305; State Nat. Bank v. Flathers (1892) 45 La. Ann. 75, 12 South. 243, 40 Am. St. Rep. 216; Thornton v. National Exch. Bank (1879) 71 Mo. 221; Riesterer v. Horton Land & Lumber Co. (1901) 61 S. W. 238, 160 Mo. 141; Graham v. National Bank of New York (1880) 32 N. J. Eq. (5 Stew.) 804; Oldham v. First Nat. Bank (1881) 85 N. C. 240; First Nat. Bank v. Messner (N. D. 1913) 141 N. W. 999; Wroten's Assignee v. Armat (Va. 1879) 31 Grat. 228; Taylor v. Davidson (Tex. Civ. App. 1909) 120 S. W. 1018.

Questions as to the powers of a national bank to buy or hold real estate can be raised by the federal government only. Kerfoot v. Farmers' & Merchants' Bank (1910) 31 Sup. Ct. 14, 218 U. S. 281, 54 L. Ed. 1042 (affirming decree Hall v. Same [1898] 46 S. W. 1000, 145 Mo. 418); Baker v. Schofield (1915) 221 Fed. 322, 136 C. C. A. 320 (affirming decree Schofield v. Baker [D. C. 1914] 212 Fed. 504); Mapes v. Scott (1880) 94 Ill. 379; De Witt County Nat. Bank v. Mickelberry (1910) 91 N. E. 86, 244 Ill. 77; Hennessy v. City of St. Paul (1893) 54 Minn. 219, 55 N. W. 1123; Minneapolis Threshing Mach. Co. v. Jones (1905) 103 N. W. 1017, 95 Minn. 127; Wherry v. Hale (1882) 77 Mo. 20.

Conflict of laws.—Pub. St. Mass. c. 157, §§ 96, 98, which invalidate transfers of property made with a view to a preference by any one insolvent, or in contemplation of insolvency, where this fact is known to the transferee, does not conflict with this section. McClellan v. Chipman (1896) 17 Sup. Ct. 85, 87, 164 U. S. 347, 41 L. Ed. 461.

Escheat.—Where a national bank held real estate, not necessary to its business, for more than five years, the property was subject to escheat under the state law; it appearing that it would not impair the efficiency of the bank. First Nat. Bank of Elizabethtown v. Commonwealth (1911) 137 S. W. 518, 143 Ky. 816, 34 L. R. A. (N. S.) 54.

Cited without definite application, First Nat. Bank v. National Exch. Bank (1875) 92 U. S. 122, 23 L. Ed. 679; U. S. v. Britton (1883) 2 Sup. Ct. 512, 522, 107 U. S. 655, 27 L. Ed. 520; Lantry v. Wallace (1901) 21 S. Ct. 878, 884, 182 U. S. 536, 45 L. Ed. 1218; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002; Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 135, 27 C. C. A. 73 (affirmed [1899] 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628); Allen v. Luke (C. C. 1908) 163 Fed. 1018.

§ 9675. (R. S. § 5138, as amended, Act March 14, 1900, c. 41, § 10.) Requisite amount of capital.

No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the

population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

Act June 3, 1864, c. 106, § 7, 13 Stat. 101. Act March 14, 1900, c. 41, § 10, 31 Stat. 48.

This section, as enacted in the Revised Statutes, did not contain the exception at the end of the first sentence of the section as set forth here, beginning with the words "and except that banks," and ending with the words "three thousand inhabitants." That clause was inserted by amendment by Act March 14, 1900, c. 41, § 10, cited above, making the section read as set forth here.

Notes of Decisions

Capital stock.—Act June 3, 1864, c. 106, and Act March 3, 1865, c. 78, while limiting the aggregate amount of bank note circulation authorized thereby, place no restriction, either expressly or impliedly, upon the aggregate amount of the capital of banks which may be organized thereunder. (1865) 11 Op. Atty. Gen. 334.

Under the law as it was July 15, 1874, national banks with a capital of $50,000 could (notwithstanding the proviso in the fourth section of the act of June 20, 1874, c. 343) still be organized, as heretofore, upon a deposit of $30,000 in bonds, and those with a capital of not less than $150,000 upon a deposit of one-third of their capital stock in bonds. (1874) 14 Op. Atty. Gen. 415.

The capital stock of a national bank is the sum on which it is authorized to do business, constituting the permanent basis of its credit, and does not include the deposits of the bank. State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

§ 9676. (R. S. § 5139.) Shares of stock and transfers.

The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Act June 3, 1864, c. 106, § 12, 13 Stat. 102.

Notes of Decisions

1. Construction and operation in general.
2. Rescission of subscription.
3. Transfer of stock.
4. —— Validity and right.
5. —— Rights of assignee.
6. —— Transfer on books.
7. —— By-laws.
8. —— Estoppel.
9. Rights of creditors.
10. Persons liable as stockholders.
11. State laws.
12. Federal question.

1. Construction and operation in general.—An amendment of the articles providing for an increase of the number of directors would not be inconsistent with this section. (1882) 17 Op. Atty. Gen. 288.

2. Rescission of subscription.—A subscription to the stock of a national bank, though induced by false representations of its officers, is not void, but voidable only, at the election of the subscriber; and where he continues for years, and until the bank has been placed in liquidation, to remain and act as a stockholder, and to receive dividends as such, though without knowledge of the fraud, or means of ascertaining it, he cannot then exercise his option to rescind the contract of subscription as against the bank's creditors, whatever his rights might be as against the corporation. Scott v. Latimer (1898) 89 Fed. 843, 33 C. C. A. 1.

A subscription to stock induced by fraud may be rescinded after, as well as before, the bank ceases to be a going concern, where no considerable time has elapsed since the subscription, if the subscriber has taken no active part in the management, has been diligent in discovering the fraud and in taking steps to rescind, and where no considerable amount of corporate indebtedness has been created since the subscription, and is still unpaid. Wallace v. Bacon (C. C. 1898) 86 Fed. 553.

One induced to purchase stock of a national bank by fraudulent representations of the bank, which was in fact the owner of the stock and received the price, cannot make an effectual tender of rescission which will support an action at law to recover the purchase price after the appointment of a receiver for the bank, as neither the bank nor the receiver then has authority to rescind and make restitution of the purchase money. Wallace v. Hood

(C. C. 1898) 89 Fed. 11, judgment affirmed Hood v. Wallace (1899) 97 Fed. 983, 38 C. C. A. 692.

In exceptional cases, where there is no ground for an inference that credit was extended to a national bank on the faith of the ownership of stock by a defendant, he should be permitted to rescind his agreement of subscription after insolvency of the bank, where it was induced by fraud as well when there are creditors as when there are none. There should be no presumption of law to overcome the fact capable of proof in such a case. Stufflebeam v. De Lashmutt (C. C. 1900) 101 Fed. 367.

3. Transfer of stock.—The power to prescribe the manner of transfer only extends to prescribing the conditions essential to protect the association against fraudulent transfers, or such as may be designed to evade the responsibility of the stockholders, and is to be exercised reasonably. Johnston v. Laflin (1880) 103 U. S. 800, 803, 26 L. Ed. 532.

Under the pretense of prescribing the manner of transfer, the association cannot clog it with useless restrictions, or make it dependent on consent of directors or other stockholders. Id.

As between the seller and purchaser of national bank shares, the sale is complete when the certificate is delivered duly assigned, with power of transfer on the books of the bank, and payment received therefor. Johnson v. Laflin (C. C. 1878) Fed. Cas. No. 7,393.

A national bank held bound, under the local law, to recognize a transfer of its stock by a foreign executor duly appointed in another state, when not in conflict with its by-laws or articles of association. Hobbs v. Western Nat. Bank (C. C. 1880) Fed. Cas. No. 6,-551a.

The rules which regulate the transfer of the stock of national banks are to be found in the statutes of the United States. The national banking act prescribes no exclusive method of transfer, but authorizes every association to do so. The decisions of the courts of the state in which the bank may be located do not control it. Scott v. Pequonnock Nat. Bank (C. C. 1883) 15 Fed. 494.

Certificates of stock attached to an executed blank assignment and power to transfer are now regarded by the federal courts as approximating negotiable securities, though neither in form nor in character negotiable. Id.

The power conferred upon national banks by the national banking act of congress, to enact by-laws, is broad enough to authorize a by-law declaring that no shares shall be transferred while the holder is indebted to the bank; and such a by-law is reasonable and valid, and any attempted transfer by the shareholder while indebted to the bank is void. Young v. Vough (1873) 23 N. J. Eq. (8 C. E. Green) 325.

This section does not limit the right to pass title to stock certificates by assignment, it being enacted for the protection of the banks, and the corporation being entitled to waive its provisions. Gray v. Fankhauser (Or. 1911) 115 P. 146.

4. —— Validity and right.—In a proceeding in equity by the receiver of a national bank against a former stockholder, alleging a collusive and colorable transfer of his stock to an insolvent in order to avoid personal liability as stockholder, it appeared that defendant, having learned of the precarious condition of the bank, in a confidential interview with the officers thereof, immediately made a transfer of his stock of the par value of $13,000 to the mother of his deceased wife, a person without means, and who, in testifying, was unable to specify any other consideration than an alleged indebtedness for services in the charge of defendant's household for a period of two and a half years, at the rate of $1,000 per year, for all the stock, which she claimed to have received at 50 cents on the dollar. Defendant himself was not sworn as a witness. Held sufficient evidence of the collusive character of the transfer, and that the defendant was liable to the receiver for the amount of his stock. Bowden v. Johnson (1883) 2 Sup. Ct. 246, 107 U. S. 251, 27 L. Ed. 386.

The insolvency of the purchaser of shares of stock of a national bank which subsequently suspends business does not render the sale void as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller. Earle v. Carson (1903) 23 Sup. Ct. 254, 188 U. S. 42, 47 L. Ed. 373, affirming judgment (1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 266.

A bona fide sale of stock of a national bank, made in the exercise of the power given to stockholders by this section to transfer their stock "like other personal property," was not void as a fraud on the bank's creditors because it was insolvent at the time of transfer, in the sense that its assets were then insufficient to discharge its liabilities, if such fact were not known to the seller at the time of sale. Id.

A national bank is impliedly precluded from forbidding any transfer of its shares of stock, without the consent of the directors, by a stockholder while he is indebted to the bank, because of the repeal of the provisions of Act Feb. 25, 1863, c. 58 (12 Stat. 665), subjecting transfer of stock in a national bank to debts due by the stockholders to the bank, or permitting the board of directors to provide to that effect. Third Nat. Bank v. Buffalo German Ins. Co. (1904) 24 Sup. Ct. 524, 193 U. S. 581, 48 L. Ed. 801, affirming judgment Buf-

make by-laws providing that the shares of its capital stock shall be transferable only on its books; that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank, without the assent of its directors; and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due from such stockholder, and may be sold at public auction for the satisfaction of such debt, on default of payment thereof. Lockwood v. Mechanics' Nat. Bank (1869) 9 R. I. 308, 11 Am. Rep. 253.

A by-law of a national bank, though indorsed on a stock certificate, prohibiting a stockholder who is indebted to the bank from transferring his certificate, is void. Feckheimer v. National Exch. Bank (1884) 79 Va. 80.

8. —— **Estoppel.**—The articles of association of a national bank provided that the bank might make by-laws to prohibit the transfer of stock owned by a stockholder liable to it either as principal debtor or otherwise. Certificates of stock were issued, which did not state that they were not transferable by the holder while liable to the bank, but which stated that they were transferable only on the books of the bank on surrender of the certificates. Held that, though the stock was not negotiable paper in the legal sense of the term, the fact that the bank had put it in the power of the stockholder to transfer the stock estopped it from objecting to a bona fide transfer on the ground that the original holder was indebted to the bank. Lee v. Citizens' Nat. Bank (Ohio, 1872) 2 Cin. R. 298.

9. **Rights of creditors.**—The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. Merrill v. Florida Land & Imp. Co. (1893) 60 Fed. 17, 8 C. C. A. 444, reaffirming Florida Land & Imp. Co. v. Merrill (1892) 52 Fed. 77, 2 C. C. A. 629.

Where no specified acts are by positive requirement made prerequisite to the vesting of a valid new title, creditors of a national bank take the stock subject to all bona fide liens and equitable transfers. Scott v. Pequonnock Nat. Bank (C. C. 1883) 15 Fed. 494.

10. **Persons liable as stockholders.**—See McDonald v. Dewey (1906) 26 Sup. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419, 736; Hayes v. Shoemaker (C. C. 1889) 39 Fed. 319, 320; Sykes v. Holloway (C. C. 1897) 81 Fed. 432; Laing v. Burley (1881) 101 Ill. 591; Beal v. Essex Savings Bank (1895) 67 Fed. 816, 15 C. C. A. 128. See, also, note under § 9689, post.

11. **State laws.**—It is not competent for state legislation to limit or interfere with the transferable quality of national bank stock as the same is left by the statutes of the United States. Doty v. First Nat. Bank (1892) 3 N. D. 9, 53 N. W. 77, 17 L. R. A. 259.

The state legislature may authorize the sale, under execution, of national bank stock. In re Braden (1895) 165 Pa. St. 184, 30 Atl. 746, 35 Wkly. Notes Cas. 497.

12. **Federal question.**—A decision that by a donatio causa mortis the equitable title in national bank shares passed to the donee, under general principles of law, involves no federal question, and is not reviewable by the supreme court, though this section makes such shares transferable on the books of the bank in such manner as may be prescribed by the by-laws, and the by-laws of the particular bank made the shares transferable only on its books. Leyson v. Davis (1898) 18 Sup. Ct. 500, 170 U. S. 36, 42 L. Ed. 939.

Cited without definite application, Whitney v. Butler (1886) 7 Sup. Ct. 61, 62, 118 U. S. 655, 30 L. Ed. 266; Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 165 U. S. 606, 41 L. Ed. 844; Hamilton v. Loeb (1911) 186 Fed. 7, 108 C. C. A. 109 (certiorari denied [1911] 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629); Young v. McKay (C. C. 1892) 50 Fed. 394, 395; Sowles v. National Union Bank (C. C. 1897) 82 Fed. 696, 697.

§ 9677. (R. S. § 5140.) How payment of the capital stock must be made and proved.

At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

Act June 3, 1864, c. 106, § 14, 13 Stat. 103.

Notes of Decisions

Stock subscriptions—Rights and liabilities of subscribers.—The maker of a subscription note transferred to the bank with his knowledge cannot defend

against an action by the bank's receiver on the ground of failure of consideration, because of the bank's insolvency, where he has been fully indemnified against loss by the payee. Myers v. Hettinger (1899) 94 Fed. 370, 37 C. C. A. 369.

The receiver can recover on a stock subscription note. Hepburn v. Kincannon (1897) 21 South. 569, 74 Miss. 691.

That plaintiff had subscribed to the capital stock of a national bank did not prevent him from suing the bank for breach of contract. Wilson v. Bank of Cheyenne (1873) 1 Wyo. 108.

Nonpayment of stock.—The directors of a bank may compel the payment of the 50 per centum of the capital stock against subscribers, and any subsequent purchaser of stock from the bank, on failure of the directors to take the necessary action to enforce payment of the stock, may protect himself against the dereliction of duty. Wallace v. Hood (C. C. 1898) 89 Fed. 11, 19, affirmed (1899) 97 Fed. 865, 38 C. C. A. 510.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; McDonald v. Williams (1899) 19 Sup. Ct. 743, 744, 174 U. S. 397, 43 L. Ed. 1022; Wingate v. Orchard (1896) 75 Fed. 241, 242, 21 C. C. A. 315; Scott v. Latimer (1898) 89 Fed. 843, 846, 33 C. C. A. 1, affirmed (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822.

§ 9678. (R. S. § 5141.) Proceedings if shareholder fails to pay installments.

Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

Act June 3, 1864, c. 106, § 15, 13 Stat. 103.

Notes of Decisions

Appointment of receiver.—A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

State statute.—Code Ala. 1907, § 3744, authorizing a judgment creditor of a corporation to enforce payment by a stockholder of his unpaid subscription, is not available to a judgment creditor of a national bank, as its enforcement would impair the remedy given the bank by this section. McQuiddy v. King (1915) 67 So. 1015, 191 Ala. 205.

Cited without definite application, Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; McDonald v. Williams (1899) 19 Sup. Ct. 743, 744, 174 U. S. 397, 43 L. Ed. 1022.

§ 9679. (R. S. § 5142.) Increase of capital stock.

Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But

the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

Act June 3, 1864, c. 106, § 13, 13 Stat. 103.

Other provisions for the increase of capital stock were made by Act May 1, 1886, c. 73, § 1, post, § 9680.

Notes of Decisions

Purpose and operation of statute.—This section does not create a condition which renders shares subscribed and paid for in full invalid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid up in full to render it valid; the amount of the proposed increase approved by the comptroller merely fixing the maximum amount within which any increase, if paid up, will be valid. Scott v. Latimer (1898) 89 Fed. 843, 33 C. C. A. 1, affirmed (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822.

The primary object of this section is to prevent banking business being done on the basis of an increased capital not in fact existing. Lyons v. Westwater (1910) 181 Fed. 681, 104 C. C. A. 663.

Increase of capital stock.—Stock cannot be lawfully increased before the entire amount of new capital has been paid in and the comptroller has certified to the increase and to the fact of payment in the mode prescribed by this section. McFarlin v. First Nat. Bank (1895) 68 Fed. 868, 872, 16 C. C. A. 46.

The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by the directors, with an understanding that they were not to be paid, is in violation of this section, and the directors of the bank participating are liable for all losses resulting to the creditors. Cockrill v. Abeles (1898) 86 Fed. 505, 30 C. C. A. 223.

The effect of a resolution of the shareholders of a national banking association, proposing to increase the capital stock from $200,000 to $500,000, and authorizing the president and cashier, whenever $50,000 of the increase was subscribed and paid, to certify the same to the comptroller, was to render valid and binding on the subscribers, when paid and approved by the comptroller, any increase amounting to $50,000, or any multiple thereof, not exceeding $300,000 in all. Brown v. Tillinghast (1899) 93 Fed. 326, 35 C. C. A. 323.

National banks can increase their capital stock only as provided by this section and Act May 6, 1886; and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase, and the certificate and approval of the comptroller of the currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase cannot be enforced. Winters v. Armstrong (C. C. 1889) 37 Fed. 508.

Where the articles provide for an increase of capital, and the maximum of such increase is once fixed by the determination of the comptroller of the currency, both his power and that of the association over the subject are exhausted. A further increase and a new maximum cannot be effected by an amendment of the articles. (1882) 17 Op. Atty. Gen. 288.

Certificate as to increase.—The certificate of the comptroller of the currency that the capital stock of a bank has been increased to a certain amount is conclusive of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and cannot be questioned in any collateral proceeding. Columbia Nat. Bank v. Mathews (1898) 85 Fed. 934, 29 C. C. A. 491 (reversing judgment Matthews v. Columbia Nat. Bank [C. C. 1897] 79 Fed. 558); Bailey v. Tillinghast (1900) 99 Fed. 801, 40 C. C. A. 93 (affirming decree Tillinghast v. Bailey [C. C. 1897] 86 Fed. 46); Brown v. Tillinghast (1899) 93 Fed. 326, 35 C. C. A. 323; Latimer v. Bard (C. C. 1896) 76 Fed. 536; Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

There could be no valid increase of the capital stock of a national bank until the comptroller of the currency approved thereof and issued his certificate. Charleston v. People's Nat. Bank (1873) 5 S. C. 103, 22 Am. Rep. 1.

Reduction of proposed increase.—Where a national bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount actually paid; the amount of increase within the maximum being always subject to the discretion of the bank. Delano v. Butler (1886) 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260; Mills v. Same (1886) 7 Sup. Ct. 47, 118 U. S. 655, 30 L. Ed. 266.

The statute is not violated where the proposed increase is reduced to the amount actually paid in, and the latter is the amount of increase specified in the notice. Aspinwall v. Butler (1890) 10 Sup. Ct. 417, 133 U. S. 595, 33 L. Ed. 779, affirming judgment Butler v. Aspinwall (C. C. 1887) 33 Fed. 217.

Where a subscription to a part of the increased stock of a national bank has become complete and binding, under the terms of the original resolution of increase, its validity is not affected by any subsequent action looking to a limitation of the increase authorized. Brown v. Tillinghast (1899) 93 Fed. 326, 35 C. C. A. 323.

Action of the stockholders in reducing amount of increase held legal, and that of the comptroller in approving the increase under the circumstances proper. Bailey v. Tillinghast (1900) 99 Fed. 801, 40 C. C. A. 93, affirming decree Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

Subscriber for proposed increase.—Where a person subscribed to a proposed increase of stock and paid his subscription, he is bound thereby, though the bank, under the provisions of its by-laws to "determine what disposition shall be made of the privilege of subscribing for the new stock" when it has not been subscribed for in the time given in its notice, limits the amount of the increase to the amount paid in. Aspinwall v. Butler (1890) 10 Sup. Ct. 417, 133 U. S. 595, 33 L. Ed. 779.

Where a subscriber for a proposed increase in the capital stock of a bank pays and receives a receipt therefor, and is entered on the stock books as a stockholder, she becomes a stockholder, though her certificate of stock, which was made out for her when she should call for it, was not called for or sent to her. Pacific Nat. Bank of Boston v. Eaton (1891) 11 Sup. Ct. 984, 141 U. S. 227, 35 L. Ed. 702. Her position was not affected by the fact that subsequently thereto, by due proceedings, but unknown to her, the amount of the proposed increase was reduced. Id.

Plaintiffs subscribed for certain shares in a bank to increase the capital, and, after paying installments thereon, consented that the bank be consolidated with a national bank, and that the capital of the latter be increased, and that their subscriptions should stand as subscriptions to the increased capital of the national bank, and paid installments on their subscriptions. Some preliminary steps were taken by the national bank to increase its stock, but the comptroller of the currency refused to consent to the full increase, and before the amount of increase allowed by him was paid in, and a certificate therefor issued by him, the national bank was placed in the hands of a receiver. Held, that plaintiffs never became stockholders in the national bank. McFarlin v. First Nat. Bank (1895) 68 Fed. 868, 16 C. C. A. 46.

One who subscribes to a proposed increase of stock with knowledge that the stockholders had by a resolution authorized the officers, with the approval of the comptroller, to increase the capital stock in any multiple of $50,000 up to $300,000, as the subscriptions shall be paid in, is estopped from questioning the regularity of the proceedings after the certificate of the comptroller to such an increase is obtained. Columbia Nat. Bank v. Mathews (1898) 85 Fed. 934, 29 C. C. A. 491, reversing judgment Matthews v. Columbia Nat. Bank (C. C. 1897) 79 Fed. 558.

A subscriber to an issue of increased stock authorized by a national bank, who was given original stock instead, which fact appeared on the face of the certificate and by the books of the bank, who retains such stock, without objection, for three years, and until after the bank has become insolvent, will be presumed to have known and assented to such change, and is precluded from thereafter asking to be relieved from liability as a stockholder on that ground. Bailey v. Tillinghast (1900) 99 Fed. 801, 40 C. C. A. 93, affirming decree Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank, subsequent to defendants' subscriptions, and with their knowledge, represented to the public by means of circulars, letter heads, etc., that its capital stock had been so increased, and that defendants allowed their names to remain "upon the list of those subscribing for and entitled to such new or increase of stock," but without alleging that the public gave credit to the bank on the faith that defendants were part owners of such increase of stock, or that they allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase. Winters v. Armstrong (C. C. 1889) 37 Fed. 508.

Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase, and on the compliance by the corporation with all the requirements of the statute necessary to make the increase of stock valid. And in case of noncompliance with such requirements there is a failure of consideration. Id.

A subscriber who has made payments on his subscription to the proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands. Id.

Subscribers to a duly-authorized in-

creased issue of stock by a national bank, who accept certificates therefor, vote the stock by proxy, and take dividends thereon, cannot question the validity of such stock, as against the receiver, after the bank has become insolvent. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

A national bank determined in due form to increase its capital stock, but, owing to the entire amount not being taken up, advertised an additional increase, which was not authorized by vote of the stockholders, and never approved or certified by the United States comptroller, as required by law. Held, that a subscriber for shares of the original increase was not a stockholder, and, upon the bank's insolvency, was entitled to be treated as a creditor to the amount paid in by him. Schierenberg v. Stephens (1888) 32 Mo. App. 314; Nichols v. Same, Id. 330.

Where a proposed increase of the capital stock of a national bank has not been authorized by the comptroller of the currency, a stockholder who has paid the amount of his subscription towards such increase is upon the insolvency of the bank entitled to have such amount set off pro tanto against a note held against him by the bank. Armstrong v. Law (Ohio 1892) (Super. Ct. Cin.) 27 Wkly. Law Bul. 100.

Liability of stockholders.—See Scott v. Deweese (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822. See also, note under § 9689, post.

Cited without definite application, Westwater v. Lyons (1912) 193 Fed. 817, 113 C. C. A. 617; Morrison v. Price (C. C. 1885) 23 Fed. 217, 218 (affirmed [1886] 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260).

§ 9680. (Act May 1, 1886, c. 73, § 1.) Increase of capital stock.

Any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided. (24 Stat. 18.)

This was the first section of an act entitled "An act to enable national banking associations to increase their capital stock and to change their names or locations."

The other sections of the act, sections 2–4 thereof, are set forth ante, §§ 9662–9664.

§ 9681. (R. S. § 5143, as amended, Act Dec. 23, 1913, c. 6, § 28.) Reduction of capital stock.

Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and by the Federal Reserve Board, or by the organization committee pending the organization of the Federal Reserve Board.

Act June 3, 1864, c. 106, § 13, 13 Stat. 103. Act Dec. 23, 1913, c. 6, § 28, 38 Stat. 274.

This section, as enacted in the Revised Statutes, was as follows:

"Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

It was amended by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 28, cited above, to read as set forth here.

Notes of Decisions

Operation of statute in general.—This section could not be made applicable to a state of facts showing that a bank, on notice of increase of capital to $1,-

000,000, increased it to $961,000. Morrison v. Price (C. C. 1885) 23 Fed. 217, 219, affirmed (1886) 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260.

Reduction of capital stock, in general.—The only method by which a national bank can reduce its stock being that prescribed in this section, and the possibility of ownership of its own stock being recognized by section 9762, post, the unlawful ownership of its own shares by a national bank did not constitute a pro tanto reduction of its corporate stock, and hence was improperly omitted from the bank's statements of assets. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

Stockholders in a national bank, to meet an impairment of $75,000 in the capital stock arising from the insolvency of a borrower and the apparent worthlessness of the collaterals, reduced the capital stock $75,000, at the same time voting to take the depreciated securities, which were the cause of the impairment of the capital, from the assets, and place them in the hands of trustees for the benefit of stockholders. Held, that as it must be presumed that the comptroller of the currency, in determining the amount of impairment, took into consideration any value that these collaterals had, they could not thus be withdrawn, as such withdrawal would thereby further impair the capital. McCann v. First Nat. Bank (1892) 131 Ind. 95, 30 N. E. 893.

A national bank, having reduced its capital stock, must return the whole capital thus set free to its stockholders, and a resolution requiring stockholders to relinquish a pro rata amount of their shares to correspond to the reduction in capital stock, upon the payment of less than the amount of their interest in the capital set free, is void. Seeley v. New York Nat. Exch. Bank (N. Y. 1878) 8 Daly, 400, affirmed in (1879) 78 N. Y. 608.

Approval by comptroller.—A reduction of the capital of a national bank is not effective until approved by the comptroller, but his certificate is proof of reduction. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

Under an averment, in a complaint by an original stockholder of a national bank, for the appointment of a receiver, that a certain fund was set apart for the benefit of the original stockholders when they consented to a reduction of capital and by direction of the Comptroller of the Currency, an objection that no special trust fund ever existed, because the directors had no authority to make it, is without merit, since no reduction in capital could have been made under this section without the approval of the Comptroller, and it was fairly within his authority to condition his approval on the adoption of such measures as he might think proper to do justice to the holders of the original shares. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

Effect of certificate as evidence, see Brown v. Ellis (D. C. 1900) 103 Fed. 834. See, also, note under § 9689, post.

Proceeds of assets set apart.—The stockholders of record when capital stock is reduced pursuant to this section, and not those at the expiration of the bank's charter, are entitled to the proceeds of the doubtful assets set apart at the time of reduction, pursuant to the requirement of the comptroller of the currency requiring such assets to be set aside for the benefit of persons then stockholders. Jerome v. Cogswell (1907) 27 Sup. Ct. 241, 243, 204 U. S. 1, 51 L. Ed. 343.

Cited without definite application, Rankin v. Fidelity Insurance Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 554, 189 U. S. 242, 47 L. Ed. 792; Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 256, 192 U. S. 243, 48 L. Ed. 425; Burrows v. Niblack (1898) 84 Fed. 111, 114, 28 C. C. A. 130; Morse v. U. S. (1909) 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, certiorari denied (1909) 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346.

§ 9682. (R. S. § 5144.) Right of shareholders to vote.

In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

Act June 3, 1864, c. 106, § 11, 13 Stat. 102.

Notes of Decisions

Right to vote.—After the expiration of the term of its charter, the stock of a national banking association is not transferable, so as to give the transferee the right to share in the election of directors. Richards v. Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

—— **Liability.**—The "liability" is limited to liability for unpaid subscriptions to stock. U. S. v. Barry (C. C. 1888) 36 Fed. 246.

§ 9683. (R. S. § 5145.) Election of directors.

The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

Act June 3, 1864, c. 106, §§ 9, 10, 13 Stat. 102.

Notes of Decisions

Resignation of director.—This section does not prohibit resignations of directors within the year for which they were appointed, but is intended to make the term of office conform to the time of the new election, and not to absolutely require every director to serve the full term. Movius v. Lee (C. C. 1887) 30 Fed. 298, 301, affirmed Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662.

Since this section does not provide the time when and the methods by which a director may resign, the common law controls, and a verbal resignation by a director given to the president, to whom he at the same time sells his stock, with a power of attorney for its transfer, is effective to release the director from responsibility for the subsequent conduct of the bank's affairs. Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662.

A director of a national bank, who before the expiration of his term sells his stock, and orally resigns his office to the president in his place of president at the bank, and afterwards receives the money for his stock, prior to the sustaining of losses by the bank, ceases to be a director, and cannot be held liable for subsequent losses caused by the negligence of the directors. Movins v. Lee (C. C. 1887) 30 Fed. 298, decree affirmed Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662.

Authority of directors.—The board of directors are authorized to transact the usual and ordinary business of the bank, but their authority does not extend to levying assessments upon the stockholders for the purpose of restoring the capital of the bank and enabling it to continue in business under R. S. § 5205, ante, § 9767. Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425.

Assent of a majority of the board of directors acting separately is not binding on the bank. Ft. Scott First Nat. Bank v. Drake (1886) 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

Quo warranto.—An information in the nature of a quo warranto will not lie in a state court to try the right to the office of director. State v. Curtis (1868) 35 Conn. 374, 95 Am. Dec. 263.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; Earling v. Emigh (1910) 30 Sup. Ct. 672, 675, 218 U. S. 27, 54 L. Ed. 915.

§ 9684. (R. S. § 5146, as amended, Act Feb. 28, 1905, c. 1163.) Requisite qualifications of directors.

Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own in his own right at least five shares of such capital stock. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

Act June 3, 1864, c. 106, §§ 9, 10, 13 Stat. 102. Act Feb. 28, 1905, c. 1163, 33 Stat. 818.

This section, as enacted in the Revised Statutes, was as follows:

"Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents there-

in during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

It was amended by Act Feb. 28, 1905, c. 1163, cited above, as to the qualifications required of directors, so as to read as set forth here.

Interlocking directorates in specified cases were prohibited by the Clayton Act of Oct. 15, 1914, c. 323, § 8, as amended by Act May 15, 1916, c. 120, ante, § 8835h.

Notes of Decisions

Eligibility to be director.—One purpose of this enactment is to confine the management of each bank to persons who live in the neighborhood and know the trustworthiness of its officers and the character and financial ability of those seeking to borrow money. Concord First Nat. Bank v. Hawkins (1899) 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007.

A transferee of stock transferred after the expiration of the term of its charter, not being a stockholder, is ineligible as a director. Richards v. Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

Liability of shareholders.—See Finn v. Brown (1891) 12 Sup. Ct. 136, 139, 142 U. S. 56, 35 L. Ed. 936. See, also, note under § 9689, post.

Cited without definite application, Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662; First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 741, 174 U. S. 364, 43 L. Ed. 1007; Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 7, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433; Sigua Iron Co. v. Greene (1898) 88 Fed. 207, 214, 31 C. C. A. 477.

§ 9685. (R. S. § 5147.) Oath required from directors.

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his Office.

Act June 3, 1864, c. 106, § 9, 13 Stat. 102.

Notes of Decisions

Liability of shareholders.—See Finn v. Brown (1891) 12 Sup. Ct. 136, 139, 142 U. S. 56, 35 L. Ed. 936. See, also, note under § 9689, post.

Liability of directors.—See Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662. See, also, note under § 9831, post.

Cited without definite application, Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 643, 206 U. S. 158, 51 L. Ed. 1002; Spurr v. U. S. (1898) 87 Fed. 701, 707, 31 C. C. A. 202 (reversed [1899] 19 Sup. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150); Sigua Iron Co. v. Greene (1898) 88 Fed. 207, 214, 31 C. C. A. 477; U. S. v. Neale (C. C. 1882) 14 Fed. 767, 770; Gibbons v. Anderson (C. C. 1897) 80 Fed. 345, 346.

§ 9686. (R. S. § 5148.) Filling vacancies.

Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

Act June 3, 1864, c. 106, § 10, 13 Stat. 102.

Cited without definite application, Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662.

§ 9687. (R. S. § 5149.) Proceedings where no election is held on the proper day.

If, from any cause, an election of directors is not made at the time

appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

Act June 3, 1864, c. 106, § 10, 13 Stat. 102.

§ 9688. (R. S. § 5150.) Election of president of the board.

One of the directors, to be chosen by the board, shall be the president of the board.

Act June 3, 1864, c. 106, § 9, 13 Stat. 102.

Notes of Decisions

President of board.—No by-laws need be adopted before a president is chosen or removed and another appointed in his place. Taylor v. Hutton (N. Y. 1864) 43 Barb. 195.

(R. S. § 5151. Superseded.)

This section was as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this Title."

The provisions of the section remaining operative were superseded by the provisions as to liability of shareholders of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 23, post, § 9689. See notes to that section.

§ 9689. (Act Dec. 23, 1913, c. 6, § 23.) Individual liability of shareholders; effect of transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (38 Stat. 273.)

This section was part of the Federal Reserve Act of 1913, cited above.

See notes to section 1 of the act, post, § 9785.

The enforcement of the liability prescribed by R. S. § 5151, by a creditors'

bill or bill in equity in cases of voluntary liquidation under R. S. § 5220, post, § 9806, was authorized by Act June 30, 1876, c. 156, § 2, post, § 9825.

The liability of the shareholders of the federal reserve banks was prescribed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786.

Notes of Decisions

1. Construction and operation.
2. Persons liable as stockholders.
3. —— Apparent owners and owners where transfer ineffective.
4. —— Real and record owners.
5. —— Subscriber.
6. —— Transferror.
7. —— Transferee.
8. —— Pledgor and pledgee.
9. —— Married women.
10. —— Heirs and representatives.
11. Nature and extent of liability.
12. Determination of comptroller.
13. Enforcement of liability.
14. —— Accrual of cause of action.
15. —— Prerequisites to suit.
16. —— Jurisdiction.
17. —— Remedies.
18. —— Receiver.
19. —— Agent.
20. —— Limitations.
21. —— Pleading.
22. —— Variance.
23. —— Evidence.
24. —— Burden of proof.
25. —— Defense.
26. —— Estoppel.
27. —— Bankruptcy.
28. —— Set-off and counterclaim.
29. —— Judgment.
30. —— Costs.
31. Successive assessments.
32. Recovery of assessment paid.
33. Preferences.
34. Assignment for benefit of creditors.

1. Construction and operation.—The general rule of liability under this section is not qualified by section 9690. Parker v. Robinson (1895) 71 Fed. 256, 257, 18 C. C. A. 36.

The term "shareholder" is to be considered as used in its ordinary legal signification, and intended to describe a class of persons who occupy the status and relation of members toward the corporation, and of contributions toward creditors. In Vermont a married woman may become a stockholder and charge her separate property. Witters v. Sowles (C. C. 1889) 38 Fed. 700, 701.

A national bank's covenant of warranty held to be a "contract" and "engagement." McLean v. Moore (Tex. Civ. App. 1912) 145 S. W. 1074.

2. Persons liable as stockholders.—A stockholder held not entitled to enjoin the receiver from enforcing his individual liability as a stockholder, on the ground that increase of capital was void, and that a voluntary assessment relieved the stockholders of individual responsibility. Morrison v. Price (C. C. 1885) 23 Fed. 217, affirmed Delano v. Butler (1886) 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260.

A "shareholder" is one who has a proportionate interest in its assets, and is entitled to take part in its control and receive its dividends. Beal v. Essex Sav. Bank (1895) 15 C. C. A. 128, 67 Fed. 816, writ of error dismissed (1897) 18 Sup. Ct. 940, 42 L. Ed. 1210.

If it be conceded that the liability of a shareholder in a national bank to respond to an assessment in case of insolvency is statutory, and not contractual, such fact does not affect the question of the liability of another national bank, holding stock in the insolvent bank as an investment, without authority of law, for such an assessment, as congress cannot reasonably be presumed to have intended to subject the stockholders and creditors of the defendant bank to a liability, the power to assume which it had denied to the bank for their protection. First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 174 U. S. 364, 43 L. Ed. 1007, reversing judgment (1897) 75 Fed. 51, 24 C. C. A. 444.

The statute merely attaches conditions to the ownership of stock in national banks, and a purchaser accepts the conditions, and the acts are then completed, which give the obligation imposed on shareholders existence in a contractual form. Aldrich v. McClaine (1901) 106 Fed. 791, 45 C. C. A. 631.

Where one subscribes for part of an increased issue of national bank stock, but actually receives original stock instead, and holds it for several years, receiving dividends and paying assessments thereon, he will be liable, upon failure of the bank, to assessment on such stock by the comptroller of the currency. Rand v. Columbia Nat. Bank (C. C. 1898) 87 Fed. 520.

A religious society purchasing national bank shares with a bequest of money is an ordinary stockholder, liable to assessment for debts. Davis v. First Baptist Society (D. C. 1877) Fed. Cas. No. 3,633.

3. —— Apparent owners and owners where transfer ineffective.—A stockholder in a national bank remains liable to creditors so long as the stock stands in his name on the books, although he may have sold it and delivered the certificate to the purchaser, unless he has done all that he can reasonably do to have the same transferred, by seeing that the certificate is delivered to the bank, with the proper power of attorney and data to enable the officers to make the transfer. McDonald v. Dewey (1905) 134 Fed. 528, 67 C. C. A. 408, decree reversed (1906) 26 Sup. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

When bank stock is sold, but not transferred on the books of the bank, and the bank afterwards fails, the executors of the person in whose name the stock stood on the books are liable

for assessment, although said stock had been paid for by a purchaser buying at the request of the president of the bank, who gave him a cashier's check for that purpose, placing the money so furnished to the credit of said purchaser on the books of the bank as a temporary loan, the intention being ultimately to transfer said shares to a third party, as part of a larger proposed investment in stock, for which funds had been placed in the hands of the president of the bank. Price v. Whitney (C. C. 1886) 28 Fed. 297.

A person who is entered on the books of a national bank as the owner of stock, but who is admitted to hold the stock in trust for the true owner, is not liable as a stockholder for the debts of the bank, when the true owner has been adjudged so liable, although nothing is realized upon the judgment. Yardley v. Wilgus (C. C. 1893) 56 Fed. 965.

One buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders, so as to bind themselves to the liabilities thereof. Foster v. Chase (C. C. 1896) 75 Fed. 797.

The father's liability on stock bought in name of minor child is not affected by the fact that after the assessment, but before suit was brought to recover it, the son became of age, and assented to holding the stock. Id.

A purchaser of stock in a national bank cannot, after the appointment of a receiver, have his purchase rescinded. Salter v. Williams (D. C. 1914) 219 Fed. 1017.

Defendant, who was the owner of stock in a national bank, which, under its by-laws, was transferable only on the books of the bank, sold the same, and, after executing a written assignment to the purchaser, and a power of attorney in blank to make the transfer, indorsed on her certificate of stock, delivered the certificate to the president of the bank, who promised to make the proper transfer on its books, but failed to do so, though the certificate was thereafter treated and used by the bank as the property of the purchaser. Held, that defendant was not liable as a stockholder. Cox v. Elmendorf (1896) 37 S. W. 387, 97 Tenn. 518.

4. —— **Real and record owners.**—One who permits himself to appear on the books of a national bank as a stockholder is liable to creditors as a shareholder whether he be the absolute owner or merely a pledgee, and if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person for the purpose of escaping liability, the transaction is void as to creditors. Anderson v. Philadelphia Warehouse Co. (1884) 4 Sup. Ct. 525, 527, 111 U. S. 479, 28 L. Ed. 478.

If one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the shares on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by this section, causes the shares to be transferred on such books to another under an agreement that they are to be held as security for the debt due from the real owner to the creditor, such creditor, acting in good faith, and for the purpose only of securing payment of the debt without incurring the responsibilities of a shareholder, will not, although the real owner may, be treated as a shareholder, within the meaning of this section. Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 470, 165 U. S. 606, 41 L. Ed. 844.

The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of this section. Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 470, 165 U. S. 606, 41 L. Ed. 844; Houghton v. Hubbell (1899) 91 Fed. 453, 455, 33 C. C. A. 574.

Stockholders of record are liable under this section for unpaid installments, though in fact they may have parted with their stock, or held it for others. Rankin v. Fidelity Insurance, Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 555, 189 U. S. 242, 47 L. Ed. 792.

As a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended. Hulitt v. Ohio Valley Nat. Bank (1905) 137 Fed. 461, 69 C. C. A. 609, judgment affirmed (1907) Ohio Valley Nat. Bank v. Hulitt (1907) 27 Sup. Ct. 179, 204 U. S. 162, 51 L. Ed. 423.

The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency, and the receiver may bring an action at law for the collection of such assessment directly against him, without regard to the liability of the agent. Houghton v. Hubbell (1899) 91 Fed. 453, 33 C. C. A. 574.

The owners of stock in a national bank are liable, and those who, though not record shareholders, hold themselves out, or allow themselves to be held out, as owners of stock, are also liable for the debts of the bank, whether they own stock or not. Case v. Small (C. C. 1881) 10 Fed. 722.

A person who appears upon the records of a national bank to be a stockholder at the time the bank becomes in-

solvent is subject to statutory personal liability of shareholder, although he has previously in good faith sold his stock. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, decree reversed Richmond v. Irons, 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

In fixing liability for assessments against stock of an insolvent bank, the court should try to ascertain who is the actual owner, releasing the apparent owner if he has done nothing to deceive or mislead. Lucas v. Coe (C. C. 1898) 86 Fed. 972, 974.

Though a person may have been induced by fraudulent representations to purchase stock of a national bank, the contract is voidable only at his option; and, where he has not discovered the fraud nor made his election at the time the bank passes into the hands of a receiver, he is apparently a stockholder, and can only escape liability as such by affirmatively alleging and proving the fraud, acts of diligence which negative any charge of negligence, and that no debt was created nor credit given the bank after he became such stockholder. Wallace v. Hood (C. C. 1898) 89 Fed. 11, judgment affirmed Hood v. Wallace (1899) 97 Fed. 983, 38 C. C. A. 692.

Those may be treated as shareholders within this section who are the real owners of stock, or who hold themselves out or allow themselves to be held out as owners in such way and under such circumstances as on principles of fair dealing will estop them as against creditors from claiming that they were not, in fact, owners. Tourtelot v. Stolteben (C. C. 1900) 101 Fed. 362, 364.

5. —— **Subscriber.** — Subscribers to the capital stock of a national bank previously organized and carrying on business, who accepted certificates of stock representing a portion of the original capital stock, obtained by the bank in some manner from the former holders, are estopped, after the lapse of five years, during which they retained the stock, received two dividends, and paid one assessment thereon, to deny that they are stockholders, in a suit by the receiver to collect a further assessment, on the bank's insolvency, on the ground that they supposed they were purchasing a part of an issue of increased stock which the bank had voted to issue, but the issuance of which had not then been authorized by the comptroller. Rand v. Columbia Nat. Bank (1899) 94 Fed. 349, 36 C. C. A. 292.

A national bank received subscriptions to increase its capital stock, but before completing the proceeding, and before obtaining the approval of the comptroller, it became insolvent, and a receiver was appointed, who brought action to enforce the subscriptions. Held, that the receiver can assert no rights against the subscribers which the bank could not have asserted, and therefore, as no valid stock can issue to the subscribers, there can be no recovery. Winters v. Armstrong (C. C. 1889) 37 Fed. 508.

One who subscribes and pays for a specified number of shares of a "proposed increase" of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a "shareholder" within the meaning of this section. Stephens v. Follett (C. C. 1890) 43 Fed. 842.

6. —— **Transferror.** — Individual liability for the debts of a national bank cannot be escaped by a transfer of stock to a person pecuniarily irresponsible, by a purchaser who remains the actual owner. Davis v. Stevens (C. C. 1879) Fed. Cas. No. 3,653; Man v. Cheeseman (D. C. 1874) Fed. Cas. No. 9,-002a.

Where the holder of stock in a bank, possessed of information showing good ground to apprehend its failure, colludes with an irresponsible transferee, with the design of substituting the latter in his place, and thus leaving no one with ability to respond for the individual liability imposed by this section, and transfers his shares to him, the transaction will be decreed a fraud on the bank's creditors, and the transferrer held to the same liability as before the transfer. Bowden v. Johnson (1883) 2 Sup. Ct. 246, 253, 107 U. S. 251, 27 L. Ed. 386.

Where, upon the failure of a national bank, a suit is brought by a receiver for an assessment upon a shareholder made by the comptroller of the currency to meet the debts of the bank, and it appears that, before the suspension of the bank, such shareholder had made a bona fide sale of his stock and surrendered his certificates, and delivered to its president a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the bank to the purchaser, the receiver cannot recover. Whitney v. Butler (1886) 7 Sup. Ct. 61, 118 U. S. 655, 30 L. Ed. 266.

A stockholder who sold stock several months before the bank's insolvency, but did not make the transfer on the bank's books until the date of the bank's failure, incurred the statutory liability. Richmond v. Irons (1887) 7 Sup. Ct. 788, 802, 121 U. S. 27, 30 L. Ed. 864.

If the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by this section, on shareholders, such own-

er may be treated, for the purposes of the section, as a shareholder, and liable as therein prescribed. Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 470, 165 U. S. 606, 41 L. Ed. 844.

A stockholder in a national bank who knows of its existing or impending insolvency cannot escape liability for assessment by transferring the stock with intent to avoid such liability, though the transfer is absolute and to a solvent transferee, able to pay the assessments. Under such circumstances the intent with which the transfer is made is material. Stuart v. Hayden (1898) 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639, affirming (1895) 72 Fed. 402, 18 C. C. A. 618.

The real owner cannot exonerate himself from responsibility under this section by making a colorable transfer of the stock, with the understanding that, at his request, it will be retransferred. Rankin v. Fidelity Insurance, Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 554, 189 U. S. 242, 47 L. Ed. 792.

One who, with knowledge of the insolvency of a national bank, transfers his stock to an irresponsible vendee with intent to evade his liability for the debts of the bank, can only be held responsible for the unsatisfied debts existing when the fraudulent transfer was made. McDonald v. Dewey (1906) 26 Sup. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419, reversing decree (1905) 134 Fed. 528, 67 C. C. A. 408.

A stockholder in a national bank cannot evade his liability for the debts of the bank, by a transfer of his shares of stock to a person financially irresponsible, provided he knew or should have known at the time that the bank was then insolvent. Id.

A colorable transfer of shares of stock in a national bank, made for the benefit of the registered owner, cannot relieve the latter from his liability as a shareholder for the debts of the bank. Id.

Evidence held to justify a finding that transfer of stock was made to escape individual liability as stockholder. Stuart v. Hayden (1895) 72 Fed. 402, 18 C. C. A. 618, decree affirmed (1898) 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

S. subscribed for stock in a national bank, borrowing the money to pay for his shares from C., the cashier, to whom he indorsed and delivered the certificate as collateral. Shortly after, he sold the stock to C., who retained the certificate, but did not have the stock transferred on the books. C. collected the dividends for some years. The bank having become insolvent, and S. being sued for an assessment, held, that it might be inferred, as a fact, that the bank had notice of the transfer, from which a legal presumption would follow that it would do what it was called on to do, and that the jury should be permitted to draw such inference. Snyder v. Foster (1896) 73 Fed. 136, 19 C. C. A. 406.

To hold liable for an assessment one who has transferred his stock to an irresponsible person, the transferror need not have had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer to relieve himself from liability. Cox v. Montague (1897) 78 Fed. 845, 24 C. C. A. 364.

Title of C. to stock in a bank held devested, so as to relieve him of liability for an assessment levied four years thereafter. Earle v. Coyle (1899) 97 Fed. 410, 38 C. C. A. 226, affirming judgment (C. C. 1899) 95 Fed. 99.

An owner of shares in a national bank, who sold the same in good faith, without knowledge or reason to believe that the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, cannot be treated as a shareholder, and held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify it where the seller has exercised due diligence, and has acted in the transaction with fairness and good faith. Earle v. Carson (1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 266, judgment affirmed (1903) 23 Sup. Ct. 254, 188 U. S. 42, 47 L. Ed. 373.

To establish the liability of a stockholder in a national bank to creditors, on its failure, after he has made an actual out-and-out sale of his stock, and the same has been transferred on the books, although the sale may have been made for the purpose of avoiding liability, three things must concur: (1) The bank must have been insolvent when the sale was made; (2) the seller must have known such fact, or be chargeable with knowledge of it; and (3) the transfer must have been made to one who was insolvent or unable to respond to an assessment, and whose financial condition was known, or ought to have been known, to the seller. McDonald v. Dewey (1905) 134 Fed. 528, 67 C. C. A. 408, decree reversed (1906) 26 Sup. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

The transferror of national bank stock cannot be made liable for an assessment upon the stock on the ground that the bank was insolvent at the time of the transfer, unless he knew of such insolvency, and intended to evade his

liability. Vandagrift v. Rich Hill Bank (1908) 163 Fed. 823, 90 C. C. A. 129.

That a stockholder in a national bank having a capital of $200,000, at the time he sold and transferred his stock, was a director and was dissatisfied with the management, will not charge him with knowledge of its insolvency, so as to render him liable for a subsequent assessment, though it was in fact insolvent, where its assets on their face largely exceed its liabilities, and it appeared that the directors were deceived as to their value. Fowler v. Crouse (1910) 175 Fed. 646, 99 C. C. A. 200.

The sale and transfer by defendant of stock in an insolvent national bank held not shown to have been with intent to avoid the double liability thereon, and therefore fraudulent, where he did not have knowledge of the insolvency, and his sale was made at the instance of a broker, who made him an offer for his stock, and apparently to persons who were responsible. Id.

A stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a bona fide transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud. Id.

A transfer of national bank shares, with intent to relieve the transferror from liability to creditors, is void as against the creditors. Bowden v. Santos (C. C. 1877) Fed. Cas. No. 1,716.

A shareholder in a national bank, who sold his shares through a broker to the president of the bank, executing blank transfers, without knowledge of the real purchaser or the insolvency of the bank, and received in payment the broker's check on the bank, which was paid out of the bank's funds, held not liable for the amount to the receiver of the bank. Johnson v. Laflin (C. C. 1878) Fed. Cas. No. 7,393.

A shareholder, after having done all that a prudent and careful business man should do, will not be held liable under this section because of the neglect and carelessness of an officer of the bank to transfer his stock on the books of the bank. Hayes v. Shoemaker (C. C. 1889) 39 Fed. 319, 320.

In an action by the receiver to enforce an assessment against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal; that he indorsed the same, and requested the broker to inform the cashier of the transaction, and to have the stock transferred; that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate." Held, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. Young v. McKay (C. C. 1892) 50 Fed. 394, following Whitney v. Butler (1886) 7 Sup. Ct. 61, 118 U. S. 655, 30 Fed. 266, and distinguishing Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

A transfer of stock, though without consideration and to an irresponsible person, cannot be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank. Sykes v. Holloway (C. C. 1897) 81 Fed. 432.

A stockholder in a national bank, with knowledge that the bank is in a failing condition, cannot make a voluntary transfer of his stock to one financially irresponsible, and thereby escape liability for assessments. Baker v. Reeves (C. C. 1898) 85 Fed. 837.

A person who sold his stock held not bound to see that the transfer was actually made, and not liable for an assessment made by the comptroller on the stock that the bank became insolvent. Earle v. Coyle (C. C. 1899) 95 Fed. 99, judgment affirmed (1899) 97 Fed. 410, 38 C. C. A. 226.

Defendant prior to the failure of a national bank in which his son was a director, owned certain shares of the bank's stock, which he sold to his son, receiving in payment a demand note, secured by certain collateral. At the time of the sale the son promised that he would see that the shares were properly transferred but he failed to do so. Defendant made no attempt to see that the stock was transferred, and it stood in his name on the books of the bank at the time of its failure. Held, that the son was prima facie the father's agent to transfer the shares, and that in the absence of proof that the transfer was in good faith, and of a prompt attempt to have the stock transferred on the books of the bank, the father was liable to assessment thereon. Schofield v. Twining (C. C. 1904) 127 Fed. 486.

Where a father voluntarily declared a trust of certain shares in a national bank for the benefit of his children in good faith, and not for the purpose of evading liability, and did not hold himself out as the owner of the stock individually, he was not personally liable as a stockholder on the failure of the bank. Fowler v. Gowing (C. C. 1907) 152 Fed. 801, judgment affirmed (1908) 165 Fed. 891, 91 C. C. A. 569.

A transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children, under

five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency. Aldrich v. Bingham (D. C. 1904) 131 Fed. 363.

7. —— **Transferee.**—A national bank having accepted and caused to be transferred to it, as collateral security for a loan, certain shares of stock in another national bank, made a colorable transfer of the same to one of its clerks. On the insolvency of the latter bank, the former was sued as a stockholder therein. Held, that such a loan was not prohibited by law, and that the defendant was liable. National Bank v. Case (1878) 99 U. S. 628, 25 L. Ed. 448.

One who is informed of a transfer of shares to her, and who receives dividends, or who in any way acquiesces in such transfer is liable as a shareholder. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 293, 133 U. S. 138, 33 L. Ed. 531.

A person who was elected a director, and on the same day appointed vice president and acting cashier, and who served as such for about two months, must be conclusively presumed to have had knowledge of the fact that 50 shares of stock were standing in his name on the books at the time of his election, and during the period of his service; and, the bank having become insolvent, he could not escape individual liability for an assessment of 100 per cent., as the owner thereof, by showing that in fact he had no knowledge that the shares stood in his name until some 20 days before the bank closed its doors, when he at once repudiated their ownership,—especially so as the shares were still allowed to stand in his name until the bank closed. Finn v. Brown (1891) 12 Sup. Ct. 136, 142 U. S. 56, 35 L. Ed. 936, affirming Brown v. Finn (C. C. 1888) 34 Fed. 124.

One who was notified that shares in a national bank had been transferred into his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency. Kenyon v. Fowler (1910) 30 Sup. Ct. 409, 215 U. S. 593, 54 L. Ed. 341, affirming judgment (1907) 155 Fed. 107, 83 C. C. A. 567.

Stock of a bank was purchased by defendants, of the president thereof, at a time when there was no overissue, and when the amount purchased was credited to him on the books. At the time, or shortly afterwards, the stock, by his direction, was transferred from his account to theirs, on the stock journal and stock ledger and new certificates were issued to them. Thereafter they were treated by the bank as the lawful owners of the stock, and were allowed to vote the same and receive dividends thereon. The bank having failed, suit was brought to collect an assessment made against defendants as shareholders. Held, that they were estopped from claiming that they were not stockholders, although the president neglected to cancel the old certificates, and afterwards hypothecated part of them, thereby creating an overissue. Burt v. Bailey (1896) 73 Fed. 693, 19 C. C. A. 651.

One to whom shares of national bank stock are transferred as collateral security, but under a transfer made absolute in due form on its books, is liable to its creditors as a stockholder. Bowden v. Farmers' & Merchants' Bank (C. C. 1877) Fed. Cas. No. 1,714; Moore v. Jones (C. C. 1877) Fed. Cas. No. 9,769.

After a national bank has become insolvent and has closed its doors for business, its shareholders' liability to creditors is so far fixed that any transfer of their shares must be held fraudulent and inoperative as against the creditors of the bank. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

Where a shareholder of a national bank makes a bona fide sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency to pay the bank's debts. Hayes v. Shoemaker (C. C. 1889) 39 Fed. 319.

A transfer held to have been made by transferror in contemplation of the liability, and that both he and his transferees were liable for the assessment, the latter because the liability was cast upon them by law when they became stockholders. Foster v. Lincoln (C. C. 1896) 74 Fed. 382.

A transfer of stock, though without consideration and to an irresponsible person, cannot be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank. Sykes v. Holloway (C. C. 1897) 81 Fed. 432.

One who is induced by fraud to purchase stock of an insolvent national bank, and have it transferred to him on the books of the bank, and who, upon discovery of the fraud, takes prompt action to rescind the contract, is not liable to assessment on such stock, except on behalf of persons who extended credit to the bank, after the transfer, without knowledge of the fraud.

Stuffiebeam v. De Lashmutt (C. C. 1897) 83 Fed. 449.

The owner by assignment of stock in a national bank at the time of its failure is liable for assessments thereon, though his assignor, who transferred it knowing that the bank was in a failing condition, is also liable. Baker v. Reeves (C. C. 1898) 85 Fed. 837.

Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. Held, that the receiver could recover from defendant an assessment on said stock, though he might have proceeded against those in whose names the shares appeared on the bank's stock register. Hubbell v. Houghton (C. C. 1898) 86 Fed. 547.

Where, on an issue as to whether defendant was liable as a stockholder of an insolvent national bank, it appears from an agreed statement as to what the bank books and reports show that, at the time the four shares in question purported to have been transferred to him by the president, the latter's stock was all pledged, it must be held that defendant acquired no stock, and never in reality became a legal shareholder, and hence is not subject to a shareholder's liabilities. Burt v. Richmond (D. C. 1901) 107 Fed. 387.

A transferee of stock in a bank after the bank had become insolvent is liable as a stockholder, though, by the bank's charter, the assignor of the stock is still liable thereon. Robison v. Beall (1858) 26 Ga. 17.

Where the legal title to stock is taken by a transferee, who receives it as security for a loan made by him to the bank, he becomes liable as a stockholder to the bank's creditors. Wheelock v. Kost (1875) 77 Ill. 296.

A person who has accepted a transfer of shares of bank stock, and to whom a certificate has been issued by the banking association, is subject to the liability imposed upon shareholders, although the transfer has never been recorded on the books of the association. Laing v. Burley (1882) 101 Ill. 591.

The transferee of stock or shares in a national bank at the time of the failure of the bank is, where the transfer appears to be absolute on the books of the bank, liable for the debts of the association to the extent of the shares held by him, notwithstanding he holds them by transfer or assignment as collateral security for a loan to the shareholder from whom he received the transfer. Hale v. Walker (1871) 31 Iowa, 344, 7 Am. Rep. 137.

8. —— **Pledgor and pledgee.**—It is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment, instead of the owner, upon whom the legal obligation rests. Frater v. Old Nat. Bank of Providence (1900) 101 Fed. 391, 42 C. C. A. 133; Williamson v. American Bank (1911) 185 Fed. 66, 107 C. C. A. 286; Baker v. Old Nat. Bank (C. C. 1898) 86 Fed. 1006; Hayes v. Fidelity Ins. Trust & Safe-Deposit Co. (C. C. 1900) 105 Fed. 160.

For the purposes of the national banking act, the pledgor of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another. Hulitt v. Ohio Valley Nat. Bank (1905) 137 Fed. 461, 69 C. C. A. 609, judgment affirmed Ohio Valley Nat. Bank v. Hulitt (1907) 27 Sup. Ct. 179, 204 U. S. 162, 51 L. Ed. 423.

Defendant bank held stock of a national bank as collateral security for a note at the time the maker of the note died leaving it unpaid. Subsequently defendant caused the stock, which was indorsed in blank by the pledgor, to be transferred on the books of the bank to one of its employés who was irresponsible, and who paid no consideration for the transfer, but in fact held the stock for defendant. Defendant then made an indorsement on the note of a sum as proceeds of a sale of the stock made on the day of the transfer, and proved the balance due on the note against the estate of the pledgor, and was paid dividends thereon. Held, that such transaction operated to transfer the ownership of the stock from the pledgor's estate to defendant, which was liable for an assessment thereon on the subsequent failure of the issuing bank. Hulitt v. Ohio Valley Nat. Bank (1905) 137 Fed. 461, 69 C. C. A. 609, judgment affirmed Ohio Valley Nat. Bank v. Hulitt (1907) 27 Sup. Ct. 179, 204 U. S. 162, 51 L. Ed. 423.

A pledgee of national bank stock which he took as collateral security for a loan is not chargeable with the personal liability for the debts of the bank imposed on "shareholders," unless he has either become the owner of the shares in fact, or has held himself out to be the owner, and thereby estopped himself to deny his personal liability as such. Rankin v. Fidelity Ins., Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 189 U. S. 242, 47 L. Ed. 792, affirming judgment Higgins v. Fidelity Ins. Trust & Safe Deposit Co. (1901) 108 Fed. 475, 46 C. C. A. 509.

In the absence of evidence of actual fraud or bad faith, the mere pledgee of stock of a national bank is not liable to its creditors as a stockholder, in the event of its failure, where he is not registered as owner, although he has procured a transfer of the stock to an irresponsible person, with the avowed purpose of avoiding such liability. An-

derson v. Philadelphia Warehouse Co. (1884) 4 Sup. Ct. 525, 111 U. S. 479, 28 L. Ed. 478, affirming judgment (C. C. 1880) 4 Fed. 130.

One who appears on the official list of the names and residences of the shareholders of a national bank only as "pledgee" of a given number of shares of the capital stock of such bank, nothing else appearing, is not a shareholder, and is not subject to the liability imposed upon shareholders. Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 472, 165 U. S. 606, 41 L. Ed. 844, affirming (1893) 58 Fed. 666, 7 C. C. A. 422.

A bank which receives as collateral security for a note the stock of a national bank and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank and the debtor, who claims that the sale is invalid the stock continues to be held merely as collateral for his debt. Robinson v. Southern Nat. Bank, of New York (1901) 21 Sup. Ct. 383, 180 U. S. 295, 45 L. Ed. 536.

Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock was retained, is a question for the jury. Rankin v. Fidelity Ins. Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 189 U. S. 242, 47 L. Ed. 792, affirming judgment Higgins v. Fidelity Ins., Trust & Safe Deposit Co. (1901) 108 Fed. 475, 46 C. C. A. 509.

Liability under this section may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. Id.

A corporation which holds national bank stock as security for a loan, and is carried on the registry of the bank as the holder of such stock "as pledgee," is not subject to the statutory liability of a stockholder. Pauly v. State Loan & Trust Co. (1893) 58 Fed. 666, 7 C. C. A. 422, affirming judgment (C. C. 1893) 56 Fed. 430, which is affirmed (1897) 17 Sup. Ct. 465, 165 U. S. 606, 41 L. Ed. 844.

A corporation which receives shares of national bank stock in pledge, with power to use and sell, and which, in good faith, without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employés, merely because it is unwilling they should stand in the name of the original owners, remains a mere pledgee, and is not liable, as a shareholder, to assessment on the stock. National Park Bank v. Harmon (1897) 79 Fed. 891, 25 C. C. A. 214.

A pledgee of stock of a national bank, who sells it in accordance with the terms of the pledge, and becomes the purchaser, but never has it transferred on the books of the bank, is not liable for an assessment. Robinson v. Southern Nat. Bank (1899) 94 Fed. 964, 36 C. C. A. 584.

A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a stockholder, cannot be treated as one, and subjected to an assessment on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt. Wilson v. Merchants' Loan & Trust Co. of Chicago, Ill. (1900) 98 Fed. 688, 39 C. C. A. 231.

A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employé, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor. Higgins v. Fidelity Ins., Trust & Safe-Deposit Co. (1901) 108 Fed. 475, 46 C. C. A. 509, judgment affirmed (1903) Rankin v. Same (1903) 23 Sup. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

A pledgee of shares of stock in a national bank, who does not appear, by the books of the bank or otherwise, to be the owner, is not liable for an assessment on the shares on the insolvency of the bank. Welles v. Larrabee (C. C. 1888) 36 Fed. 866, 2 L. R. A. 471.

Persons who hold stock in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in the contemplation of the national banking act, stockholders, and, so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. Magruder v. Colston (1876) 44 Md. 349, 22 Am. Rep. 47.

9. —— **Married women.**—A married woman who owns stock in a national bank is not exempt, on account of her coverture, from the liability imposed by the national-currency acts upon all stockholders in such banks. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 133 U. S. 138, 33 L. Ed. 531; Anderson v. Line (C. C. 1880) 14 Fed. 405; In re First Nat. Bank (C. C. 1891) 49 Fed. 120.

The coverture of the legatee of shares of stock in a national bank when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise. Christopher v. Norvell (1906) 26 Sup. Ct. 502, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740, affirming judgment (1905) 134 Fed. 842, 67 C. C. A. 438.

This section applies to a married woman who is a shareholder, without regard to the manner in which the stock was acquired. Witters v. Sowles (C. C. 1887) 32 Fed. 767; Id. (C. C. 1888) 35 Fed. 640.

The liability of a shareholder is not one on "a promise to pay the debt or answer for the default or liability of another," within Rev. St. N. J. 1874, p. 469, § 5, relating to the liability of married women, so as to exempt a married woman from liability as a shareholder. Hobart v. Johnson (C. C. 1881) 8 Fed. 493.

The contracts of a bank are not contracts of the individual stockholders; and where an assessment was made upon the shareholders of a national bank to satisfy a contractual liability, a married woman who held stock in such bank could claim no immunity from the assessment on the ground that she had no legal capacity to contract. Witters v. Sowles (C. C. 1887) 32 Fed. 767.

Where one residing in Maryland subscribes for stock of a national bank of another state, and then transfers it to his wife, also a resident of Maryland, she becomes owner thereof, and is subject to stockholders' liability, without regard to the laws of the other state relative to contract by married women. Kerr v. Urie (1897) 37 Atl. 789, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493.

10. —— Heirs and representatives.— See note under § 9690, post.

11. Nature and extent of liability.— The sum to be paid by stockholders being liquidated, and due and payable when the comptroller's order therefor is made, the amount bears interest from the date of the order. Casey v. Galli (1876) 94 U. S. 673, 677, 24 L. Ed. 168.

"In addition to the amount invested in the shares," the holders thereof, after the exhaustion of the assets of the association, are, to a sum not exceeding the par value of the shares, "individually responsible, equally and ratably, and not one for another," for its outstanding debts. The liability is several, and is not affected by the failure of any other shareholder to pay the amount assessed against him. U. S. v. Knox (1880) 102 U. S. 422, 26 L. Ed. 216.

As the liability of the stockholders of a national bank is for the contracts, debts, and engagements of the bank, and as these would draw interest as against the bank, it is not error to allow interest thereon, as against the stockholders, in enforcing the personal liability of the latter. Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864, reversing decree Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591.

The officers of a bank which has gone into liquidation, having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes, shall not be discharged by the release of the principal debtor, creates no liability on the part of the stockholders. Schrader v. Manufacturers' Nat. Bank (1890) 10 Sup. Ct. 238, 241, 133 U. S. 67, 33 L. Ed. 564.

The liability of a shareholder to an assessment is not a contractual liability flowing from his acquisition of the shares, but a liability arising by force of the statute. First Nat. Bank v. Hawkins (1897) 79 Fed. 51, 24 C. C. A. 444.

The liability created by this section is for the benefit of creditors, and no action on the part of the bank can estop the creditors from enforcing their rights, and the liability is not dependent on the terms or existence of a contract of subscription to the capital stock of the bank. Scott v. Latimer (1898) 89 Fed. 843, 853, 33 C. C. A. 1, affirmed (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822.

The stockholders are not guarantors or sureties one for another as to the amount which each may be required to pay, and the insolvency of one stockholder does not in any way affect the liability of another. Aldrich v. Campbell (1899) 97 Fed. 663, 38 C. C. A. 347.

A shareholder shall pay, in such amounts as the comptroller of currency shall demand, the debts of the bank; and hence a judgment in favor of the receiver of an insolvent national bank for the recovery of an assessment made by the comptroller on a shareholder does not preclude him from maintaining a second action against the same shareholder for another assessment which had not been made when the first action was commenced. Deweese v. Smith (1901) 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971, judgment affirmed Smith v. Brown (1902) 23 Sup. Ct. 845, 187 U. S. 637, 47 L. Ed. 344.

No portion of the liability of a stockholder of a national bank for the pay-

ment of its debts becomes due or enforceable before the comptroller decides that it is necessary to collect it and fixes the time for its payment. Id.

In the absence of this statute, no personal liability would have rested on the shareholders of national banks beyond the ordinary contractual liability for the payment of the par value of the shares subscribed for by them. Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1, affirming (C. C. 1901) 109 Fed. 36, 37.

Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stockholders were liable. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Same (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

This section does not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely imposes a secondary liability for those debts which themselves remain distinct and to which he is not a party; his liability is collateral and statutory. McClaine v. Rankin (1905) 25 Sup. Ct. 410, 412, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

The liability which shareholders in national banks incur is that of principals, not of sureties. Hobart v. Johnson (C. C. 1881) 8 Fed. 493.

The statute makes the stockholders of national banks equally and ratably liable and not one for another. Witters v. Sowles (C. C. 1885) 25 Fed. 168, 169.

The liability of the shareholders under this section attaches when the contracts, debts and engagements of the bank are entered into. Foster v. Lincoln (C. C. 1896) 74 Fed. 382, affirmed (1897) 79 Fed. 170, 24 C. C. A. 470.

The liability of shareholders attaches when the contracts are made, debts created, or engagements entered into by the bank, and it is an original liability. Witters v. Sowles (C. C. 1887) 32 Fed. 130, 137.

A person who becomes a stockholder in a national bank thereby submits himself to the provisions of the national bank act, and becomes liable to be assessed to the extent of his statutory liability for all debts of the bank existing while he holds his stock. Young v. Wempe (C. C. 1891) 46 Fed. 354.

No definite time within which the comptroller of the currency must levy an assessment on stockholders to enforce their liability is fixed, and there is nothing payable on the liability of a shareholder until the comptroller has ascertained a fixed sum to be collected on each share of stock. Aldrich v. Yates (C. C. 1899) 95 Fed. 78, 81.

Where a stockholder takes his stock, this statute in contemplation of law is regarded as written into his subscription and constitutes his undertaking, and, when proceeded against to enforce the liability, it is essentially a declaration on a contract. Deweese v. Smith (C. C. 1899) 97 Fed. 309.

The liability of a stockholder in a national bank, who has made full payment for his stock, to pay assessments for the benefit of the bank's creditors, is not contractual, but is a conditional liability imposed by law as an incident to ownership of the stock. Aldrich v. Skinner (C. C. 1899) 98 Fed. 375.

It was the intention of congress to make the excess of the cost of the stock of a national bank, up to the par value, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, in case the property of a bank is insufficient to pay its debts. Whoever becomes a stockholder assumes this liability as an element of his contract. Irons v. Manufacturers' Nat. Bank (D. C. 1884) 21 Fed. 197.

The double liability of stockholders of national banks is the resultant of the contract by which they acquire the stock and of the statute. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

The sole stockholders of a national bank in taking over its property exceeding in value the bank's liabilities on its voluntary liquidation held to assume responsibility for the bank's covenant of warranty. McLean v. Moore (Tex. Civ. App. 1912) 145 S. W. 1074.

Persons who assumed the liabilities of a national bank on its voluntary liquidation are liable on a breach of warranty occurring after the assumption of liability. Id.

12. Determination of comptroller.—The amount to be paid by the stockholders rests in the judgment and discretion of the comptroller, and his determination cannot be controverted by the stockholders in suits against them. Casey v. Galli (1876) 94 U. S. 673, 677, 24 L. Ed. 168.

The action of the comptroller of the currency in ordering an assessment against the stockholders of an insolvent national bank, whether a first assessment or one made subsequently, is a judicial determination of the necessity for such assessment, which is conclusive on the stockholders, and cannot be questioned by them in any litigation which may ensue, either at law or in equity. Aldrich v. Campbell (1899) 97 Fed. 663, 38 C. C. A. 347.

A levy by the Comptroller on the stock of an insolvent bank, was not vacated by a letter approving a sale of the bank's bonds, and stating that such sale would probably make an assessment unnecessary. Pepper v. Springfield Institution for Savings (1915) 218 Fed. 814, 134 C. C. A. 502.

The action of the comptroller of the currency in making an assessment against the stockholders of an insolvent national bank is conclusive as to the necessity for such assessment, and cannot be questioned collaterally. Aldrich v. Yates (C. C. 1899) 95 Fed. 78.

The ultimate liability of a shareholder is for the full amount of the par value of the stock, and a mistake of the comptroller of the currency in making an estimate of the amount of a needed assessment does not release the shareholder from full liability. Id.

The action of the comptroller of the currency in ordering an assessment upon the stockholders of an insolvent national bank involves a determination of the necessity for such assessment, which is quasi judicial, and is conclusive on the stockholders. De Weese v. Smith (C. C. 1899) 97 Fed. 309.

The ordering of the making and enforcement of an assessment on the stockholders of an insolvent national bank by the comptroller is a quasi judicial act, which exhausts the power and jurisdiction conferred upon him by the statute, and he is without authority to make a second assessment. Id.

The Comptroller of the Currency has power to appoint a receiver for an insolvent national bank, and to call for a ratable assessment upon stockholders, without a previous judicial ascertainment of the necessity for such action. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

13. Enforcement of liability.—Enforcement of stockholder's liability by receiver, see, also, § 9821, post; enforcement in case of voluntary liquidation, see, also, § 9807, post.

A suit to recover a dividend wrongfully paid and received is not a suit based on the liability imposed by this section. Lawrence v. Greenup (1899) 97 Fed. 906, 38 C. C. A. 546.

The added liability imposed on stockholders by this section must be ascertained and enforced in the statutory mode. Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1, affirming (C. C. 1901) 109 Fed. 36, 37.

In a suit to enforce the liability created by this section, it is essential that the entire status of the affairs of the bank be investigated, and a reference had to determine what proportional part of the shareholders' liability will be necessary to be enforced against them equally and ratably to provide for the payment of the creditors. Id.

It is of the utmost importance that the liability of the stockholders should be rigorously enforced, but the court should not treat them with exceptional severity and apply to their transfers different rules from those which obtain in other business transactions. Hayes v. Shoemaker (C. C. 1889) 39 Fed. 319, 320.

14. —— Accrual of cause of action.—The right of a receiver of a national bank in liquidation to enforce the liability of shareholders does not accrue until such liability matures by the act of the court in determining the amount to be paid. King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

A cause of action to recover an assessment from a stockholder of an insolvent national bank does not accrue until the receiver is authorized by law to bring suit therefor, which is not until the assessment has been ordered by the comptroller, and the time fixed for its payment, before it shall become delinquent, has expired. Aldrich v. Skinner (C. C. 1899) 98 Fed. 375.

15. —— Prerequisites to suit.—Action of the comptroller is an indispensable prerequisite to enforcing the liability of the shareholder under this section. Gerner v. Thompson (C. C. 1896) 74 Fed. 125, 131.

The original order of the comptroller of the currency levying an assessment on the shares of a national bank, over his official signature and seal, proves itself, and fixes the liability of the shareholders from its date, no demand being necessary. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

Demand of, or notice to, stockholders of an insolvent national bank by the Comptroller of the Currency or receiver is not a prerequisite to the maintenance of a suit to enforce the stockholders' statutory liability. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

16. —— Jurisdiction.—A case arising under the laws of the United States, of which a federal circuit court has jurisdiction, without reference to diversity of citizenship, is presented by a bill filed by the holder of a nonnegotiable note given by a national bank which afterwards went into voluntary liquidation to exact in behalf of himself and all other creditors of the bank the stockholder's liability imposed by this section, may be enforced by a bill in the nature of a creditors' bill whenever the bank has availed itself of the provisions of section 9806, post, for voluntary liquidation. Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738.

An action by a citizen of another state on an assigned nonnegotiable note of a national bank which had gone into voluntary liquidation to subject assets to the payment thereof, and to enforce the liability of stockholders, was properly brought in the federal Circuit Court, in so far as the enforcement of the stockholders' liability was concerned. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Wallace (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

Under Act June 30, 1876, no new lia-

bility on the part of the stockholders was created; nor did such act provide for enforcing such liability against stockholders under circumstances not permitting its enforcement before the act was passed, but it may be construed as limiting the tribunal in which such proceedings are to be instituted to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

Where, in suit to enforce statutory liability of stockholder of national bank, a recovery is sought only of a fractional part of the total liability, the suit is within the equitable jurisdiction of the court. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

17. —— **Remedies.**—Pendency of a suit to enforce the liability under this section is not a bar to suit by plaintiff on his claim against the bank. Central Nat. Bank v. Connecticut Mut. L. Ins. Co. (1881) 104 U. S. 54, 76, 26 L. Ed. 693.

This section and section 9831, post, exclude banking associations and receivers from none of the remedies for the collection of debts, claims, and dues of the bank or its creditors provided by the general rules and principles of law and equity, but they impose on shareholders and directors additional liabilities and subject them to proper remedies for their enforcement. Hayden v. Thompson (1895) 71 Fed. 60, 67, 17 C. C. A. 592.

Where a national bank goes into voluntary liquidation, the only authorized procedure for the enforcement of the individual liability of its stockholders is by a suit in equity in the nature of a creditors' suit brought on behalf of all creditors in a court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the court of original jurisdiction, and brought by a receiver or other person appointed by such court. Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1, affirming decree (C. C. 1901) 109 Fed. 36.

The remedy of a creditors' suit to enforce the liability of shareholders of national banks in voluntary liquidation is cumulative, and not exclusive. King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

The provisions of the general banking law for winding up national banks under the direction of the comptroller of the currency are not exclusive of the remedy by creditors' suit, and the appointment of a receiver. Wright v. Merchants' Nat. Bank (C. C. 1876) Fed. Cas. No. 18,084.

Liability of stockholders of national bank is several, and a suit at law is the proper remedy to enforce a specific assessment ordered by the comptroller. Bailey v. Sawyer (C. C. 1877) Fed. Cas. No. 744.

A creditors' bill was filed against a national bank before the passage of Act June 13, 1876, § 3 (19 Stat. 63), and a receiver was appointed. An amended bill was filed after the passage of that act, to which all the stockholders were made parties. Subsequently the comptroller of the currency appointed a receiver to wind up the affairs of the bank, who brought this suit against one of the stockholders. On demurrer to a plea in abatement, it was held that, as the stockholder's liability can be completely enforced in the equity suit, he should not be vexed by two suits in the same jurisdiction for the same cause of action. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

The act of June 30, 1876, did not create any new liability on the part of the stockholders, or provide for enforcing such liability against them under circumstances where it could not have been enforced before that act was passed. This act is not retroactive, and does not create rights which did not exist prior to its passage, as against existing stockholders, though it may be construed as limiting the tribunal in which proceedings are to be instituted for enforcing the stockholder's liability to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

The liability of a married woman to respond to an assessment against her as shareholder in an insolvent bank cannot be enforced by a bill in equity, as the remedy at law is adequate. Witters v. Sowles (C. C. 1887) 32 Fed. 767, 769.

The fact of an assessment by the comptroller upon the stockholders of a national bank does not conclude such stockholders as to the validity of the debts to pay which the assessment is made, and they are entitled to their day in court upon that question before being required to pay the assessment in an action against them by the receiver. Where the defendants in such an action assert the invalidity of a judgment against the bank which is the basis of the assessment, the appropriate procedure would seem to be for them to file a bill in equity to determine the validity of such judgment, and to enjoin the action against them, giving bond for the payment of the judgment therein in case the injunction should be dissolved after hearing. Moss v. Whitsel (C. C. 1901) 108 Fed. 579.

18. —— **Receiver.**—See note under § 9821, post.

19. —— **Agent.**—An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, as he has no greater powers than those conferred upon the receiver. Church v. Ayer (D. C. 1897) 80 Fed. 543; see, also, note under § 9827, post.

20. —— **Limitations.**—A demand which starts the running of the statute of limitations against the right of a receiver of a national bank to enforce the statutory liability of its shareholders is shown by the allegations of the bill filed by the receiver to enforce such liability, that on a specified date the Comptroller of the Currency made an assessment upon the shareholders of such bank, and "did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. McDonald v. Thompson (1901) 22 Sup. Ct. 297, 299, 184 U. S. 71, 46 L. Ed. 437.

The objection that limitations does not bar the right of creditors of a national bank to enforce the individual liability of its shareholders so long as there are outstanding claims against the bank cannot be raised by the receiver in an action brought by him under this section to recover an assessment upon a stockholder in which a demurrer to the bill on the ground that it sets forth a ground of action barred by the limitations has been sustained. Id.

An action brought by a receiver of a national bank to enforce the individual liability of a shareholder is not an action upon a "contract or promise in writing," within the meaning of the Nebraska statute of limitations, but is governed by the provision of that statute requiring actions "upon a contract not in writing, express or implied," or "upon a liability created by statute," to be begun within four years. McDonald v. Thompson (1902) 22 Sup. Ct. 297, 184 U. S. 71, 46 L. Ed. 437, affirming judgment (1900) 100 Fed. 1002, 40 C. C. A. 685, and affirming decree (1900) 101 Fed. 183, 41 C. C. A. 290.

The personal liability of shareholders in a national bank for the contracts, debts, and engagements of the bank cannot be regarded as a contract liability, for the purpose of making applicable the limitation prescribed by Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." McClaine v. Rankin (1905) 25 Sup. Ct. 410, 411, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500, reversing judgment (1902) 119 Fed. 110, 56 C. C. A. 160.

The liability of a stockholder to respond to an assessment on his stock in case of insolvency of the bank is contractual, since an assent to the liability attached to the ownership of bank stock is implied by his voluntary act of acquiring it; and if he is a resident of Washington, and the bank is located there, a suit to enforce such liability is governed by Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, which provides that an action on a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument may be commenced within three years after the cause of action shall have accrued. Aldrich v. McClaine (1901) 106 Fed. 791, 45 C. C. A. 631.

The statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of the liability of the shareholder of a national bank to pay its debts until the time when the comptroller has declared the entire liability or the particular portion of it in issue to be due. Deweese v. Smith (1901) 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971, judgment affirmed Smith v. Brown (1902) 23 Sup. Ct. 845, 187 U. S. 637, 47 L. Ed. 344.

Limitations do not run against an action by a receiver to enforce the liability of a shareholder of a national bank while proper liquidation proceedings are pending in a court of equity. King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

A bill filed by a creditor of a national bank, against stockholders of such bank, to enforce their individual liability, is for the benefit of all creditors of the bank, although it does not contain an averment of that fact; and filing such a bill stops the running of the statute of limitations upon all claims against the bank. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, decree reversed Richmonds v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

Actions by the receiver of a national bank against stockholders for assessments on the stock are subject to the state statutes of limitations. Butler v. Poole (C. C. 1890) 44 Fed. 586.

The statute runs against an action to enforce the liability of shareholders of national banks from the date the assessment by the comptroller becomes due. Thompson v. German Ins. Co. (C. C. 1896) 76 Fed. 892.

An action by a national bank receiver to enforce stockholders' liability may be barred by state statutes of limitation. Id.

On a bill by the receiver of an insolvent national bank to collect an assessment by the comptroller from a former

stockholder, on the ground that to escape liability, he had transferred his shares, within six months of the bank's failure, to one having no means, it appeared that the transfer was made on the books of the bank, no concealment thereof being attempted, and that the receiver made no inquiry as to the nature of the transfer, and took no action against defendant until the assessment had become barred. Held, that equity would not relieve against the bar of the statute. Thompson v. German Ins. Co. (C. C. 1896) 77 Fed. 258.

A right of action by the receiver of an insolvent national bank against a stockholder to recover an assessment does not arise until the necessity for the assessment has been determined and the assessment made by the comptroller, if it in fact accrues before demand and refusal to pay; hence limitation runs against such an action only from that time. Aldrich v. Yates (C. C. 1899) 95 Fed. 78.

The liability of the stockholders of a national bank to an assessment on the bank's insolvency is so far conditioned upon the sufficiency of the general assets to pay its indebtedness that the receiver is only authorized to proceed against a stockholder after the comptroller has determined the necessity of the assessment, and the amount required; hence the statute of limitations does not commence to run against an action to enforce the stockholder's liability until such determination has been made. De Weese v. Smith (C. C. 1899) 97 Fed. 309.

No limit of time having been prescribed by the federal statutes within which an action must be brought to enforce an assessment against a stockholder in an insolvent national bank, such an action is governed, as to limitation, by the statute of the state where it is brought, by virtue of section 1538. Aldrich v. Skinner (C. C. 1899) 98 Fed. 375.

2 Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, prescribing the limitation of three years for actions "upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument," is applicable only to actions upon contracts, or growing out of contracts, and does not include an action against a stockholder of an insolvent national bank to recover an assessment, which is governed by section 4805, fixing two years as the general limitation for all actions not otherwise provided for. Id.

Under the statute of limitations of Washington (2 Ballinger's Ann. Codes & St. §§ 4796–4805), an action against a stockholder of an insolvent national bank to recover an assessment must be brought within two years after such assessment has been made by the comptroller, and has become delinquent. Aldrich v. McClaine (C. C. 1899) 98 Fed. 378.

Limitations will not run against the right of action to enforce the statutory liability of stockholders of national banks until the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

21. —— **Pleading.**—The bill alleging that the married woman is possessed of property in her own right sufficient to pay the assessment, and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee, or executor, the case is one of equitable cognizance. Bundy v. Cocke (1888) 9 Sup. Ct. 242, 128 U. S. 185, 32 L. Ed. 396.

A judgment creditor of a national bank filed a creditors' bill to enforce payment of his judgment, and the court appointed a receiver. Pending the proceedings, congress, by Act June 30, 1876, amending the national banking law, provided that stockholders' individual liability could be enforced by any creditor by a bill in equity in the nature of a creditors' bill. Held, that complainant in the pending suit could, after passage of the act, amend his bill so as to make a case for the enforcement of the stockholders' individual liability. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

An original bill by a judgment creditor of a national bank against the bank for the appointment of a receiver, filed before the passage of the act of June 30, 1876, is not made multifarious by an amendment, after such passage, asking for the relief afforded by the act. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

The bill contemplated by the second section of the act of June 30, 1876, to enforce the individual liability of stockholders in a national banking association that has gone into liquidation, need not purport expressly on its face to be filed by the complainant on behalf of himself and all other creditors, for the law would give it that effect, and the court would so treat it; but, if this was necessary, the bill might be amended in that respect by leave of the court. Id.

An allegation following, "that by virtue of the premises, and of the statutes in such case made and provided, the defendant became and is indebted to your petitioner in the sum of," etc., sufficiently shows that defendant had become indebted in the sum named, and also that such indebtedness still continued when the petition was filed, and is equivalent to an allegation of nonpayment. Welles v. Stout (C. C. 1889) 38 Fed. 67.

In an action by the receiver of a national bank against a shareholder to recover an assessment ordered by the comptroller, an allegation in the petition that on a day named "the comp-

troller of the currency, in order to pay the liabilities of" the bank, "made an assessment upon all the said shares of the capital stock of said" bank of 100 per cent. upon its par value, "and ordered the stockholders to pay the same on or before" a day named, is sufficient to show that the requisite action was had by the comptroller, not only as to determining upon the necessity of an assessment, but also as to the enforcement thereof by suit against the delinquent stockholders. Id.

In an action by the receiver of a national bank against its stockholders to collect an assessment made by the comptroller of the currency the complaint need only allege that the comptroller determined that the assessment was necessary and levied it, since such an assessment is conclusive as against the stockholders. Young v. Wempe (C. C. 1891) 46 Fed. 354.

In an action by the receiver of a national bank to enforce the individual liability of a stockholder, an allegation in the complaint that on a given date the comptroller, having ascertained and determined that the assets, property, and credits of the bank were insufficient to pay its debts and liabilities, and as provided by the act of congress, made an assessment and requisition on the shareholders of the said bank of a given sum upon each share held and owned by them, respectively, at the time of its default, and directed the receiver to take all necessary steps to enforce the liability, is sufficient. Nead v. Wall (C. C. 1895) 70 Fed. 806, distinguishing Kennedy v. Gibson (1869) 8 Wall. 498, 19 L. Ed. 476.

An answer seeking to rescind a subscription to stock of an insolvent national bank, on the ground that it was obtained by fraud, must show that the creditors for whose benefit the assessment sought to be enforced was levied did not become such during the time defendant held such stock, and allege facts showing that defendant has not been guilty of laches. Wallace v. Bacon (C. C. 1898) 86 Fed. 553.

22. —— **Variance.**—Where a complaint in an action against a national bank as a stockholder in another corporation alleged that it acquired such stock in a particular manner, evidence that it was acquired in a different manner held not a fatal variance. First Nat. Bank v. Montgomery County Nat. Bank (1902) 67 P. 458, 64 Kan. 134.

23. —— **Evidence.**—A letter addressed to the receiver of a national bank, and signed by the comptroller of the currency, directing the receiver to institute legal proceedings to enforce, against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute, is sufficient evidence that the comptroller decided, before the suit was brought, that it was necessary to enforce the personal liability of the stockholders. Bowden v. Johnson (1883) 2 Sup. Ct. 246, 107 U. S. 251, 27 L. Ed. 386.

The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank. Earle v. Carson (1903) 23 Sup. Ct. 254, 188 U. S. 42, 47 L. Ed. 373, affirming judgment (1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 266.

A letter from the comptroller of the currency is not sufficient evidence to establish the liability of a stockholder of a national bank to contribute the entire amount of his stock to meet its liabilities. Bowden v. Morris (C. C. 1876) Fed. Cas. No. 1,715.

Where it is admitted by the defendants that they were shareholders in an insolvent national bank, but the number of shares respectively held by them is not admitted, the names of the shareholders and the number of shares held by each, as shown by the stock ledger and stubs of the stock certificates, and the dividend sheets of the bank on which they respectively drew the last dividends, will be prima facie proof of the number of shares held, and, unless rebutted, sufficient. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

If a stock register of a bank is to be taken as a criterion for determining who are stockholders, it must be taken as a whole, and all entries throwing light on the ownership of particular stock must be considered. Tourtelot v. Stolteben (C. C. 1900) 101 Fed. 362, 367.

In an action by the receiver of an insolvent bank against the executrix of a deceased shareholder to recover assessments on the stock, the certificate of the comptroller of the currency, issued to a national bank, approving a reduction of its capital stock, is in itself proof of such reduction. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

24. —— **Burden of proof.**—One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment. McDonald v. Dewey (1906) 26 Sup. Ct. 731, 736, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419, reversing decree (1905) 134 Fed. 528, 67 C. C. A. 408.

In an action by receiver of consolidated bank to recover an assessment, in which he alleged that defendant had

purchased and become the owner of the stock, on the theory that its having caused the substituted stock to be issued amounted to a conversion of the collateral, held that the burden rested on the plaintiff to prove that the exchange was made without the consent of the pledgor. Wilson v. Merchants' Loan & Trust Co. of Chicago, Ill. (1900) 98 Fed. 688, 39 C. C. A. 231.

In an action by the receiver of a national bank to recover an assessment from the defendant as a stockholder, where it is admitted or proved that defendant is in fact merely a pledgee of the stock, the burden rests upon the plaintiff to show that defendant, by reason of having knowingly permitted the stock to stand in his name as owner upon the books of the bank, is estopped to deny such ownership as against its creditors. Tourtelot v. Stolteben (C. C. 1900) 101 Fed. 362.

25. —— **Defense.**—In an action by the receiver of an insolvent national bank against a shareholder, to recover an assessment made by the comptroller of the currency, where defendant contended that she did not own stock; that transfers to her on the books were made without her knowledge; and that checks for dividends which were apparently indorsed by her were not signed with knowledge of their contents,—the question of fraud in procuring the transfers and indorsements is immaterial, and instructions based thereon are erroneous, since defendant is liable if she learned of the transfers after they were made, and received dividends, or in any way acquiesced therein, and if she signed the checks she is estopped from asserting that she was ignorant of their contents, or was not the owner of the stock on which the dividends were declared. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 133 U. S. 138, 33 L. Ed. 531.

If defendant indorsed the checks over to her husband, or indorsed them in blank, it is entirely immaterial that their proceeds went to the husband's account as consul general. Id.

Defendant cannot escape liability from the fact that no new certificates were issued to her, as the transfer on the books was sufficient as between her and the bank; nor can she escape from the fact that when the bank was converted from a savings bank into a national bank no new certificates were issued, as the statute authorizing the conversion expressly declares that the shares of the old bank may continue to be for the same amount each as they were before the conversion. Id.

The payment of an assessment imposed by a bank on its shareholders in order to continue business and avoid liquidation is not a discharge of a shareholder's liability in the case of liquidation, for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares. Delano v. Butler (1886) 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260; Mills v. Same (1886) 7 Sup. Ct. 47, 118 U. S. 655, 30 L. Ed. 266.

One elected a director and on the same day appointed vice president and acting cashier and serving as such for about two months is conclusively presumed to have had knowledge that 50 shares of stock were standing in his name on the books at the time of his election and during the period of his service, so that he could not escape individual liability for an assessment as the owner thereof upon the bank's insolvency, by showing that he had no knowledge that the shares stood in his name until some 20 days before the bank closed its doors, when he repudiated ownership, especially where the shares remained in his name until the bank closed. Finn v. Brown (1891) 12 Sup. Ct. 136, 139, 142 U. S. 56, 35 L. Ed. 936.

It is not competent for national banking associations to invest any portion of their capital permanently in the stock of another corporation, and they may set up such want of power against suits to enforce liability for assessments by the Comptroller of the Currency, and while they may not be exempt from liability as shareholders where they have accepted and held stock as collateral security, there is a presumption against any intention on the part of the bank to become an owner of the collateral shares. Robinson v. Southern Nat. Bank of New York (1901) 21 Sup. Ct. 383, 389, 180 U. S. 295, 45 L. Ed. 536.

A holder of certificates of stock in a national banking association cannot escape liability as a stockholder to creditors on the ground that the shares of stock which he holds are part of an increase which was made without compliance with the statute which prohibits the increase of capital until the whole amount of such increase is paid in and the comptroller has certified to that fact, even if he has been induced to take such shares by fraud of the officers of the bank and of the comptroller. Scott v. Deweese (1901) 21 Sup. Ct. 585, 181 U. S. 202, 45 L. Ed. 822, affirming judgment Same v. Latimer (1898) 89 Fed. 843, 33 C. C. A. 1, 14.

Fraudulent representations by which a person is induced to become a stockholder of a national bank constitute no defense in an action at law by a receiver of the bank to enforce the statutory liability of the stockholders, as the defense is of an equitable nature, and must be asserted, if at all, in equity. Lantry v. Wallace (1901) 21 Sup. Ct. 878, 182 U. S. 536, 45 L. Ed. 1218, affirming judgment (1899) 97 Fed. 865, 38 C. C. A. 510.

The illegality of a purchase by a na-

tional bank of its own stock does not relieve one who subsequently buys it from the bank from liability as a stockholder. Id.

The liability of a stockholder in a national bank for assessments made by the comptroller on its insolvency is not dependent upon the contract of subscription between the stockholder and the corporation, but is created by statute for the benefit of the bank's creditors, and can neither be modified nor released by any act of the corporation. Scott v. Latimer (1898) 89 Fed. 843, 33 C. C. A. 1.

The liability of a stockholder of a national bank to assessment on the bank's insolvency is one created by statute, for the sole benefit of creditors; and one who becomes and remains a stockholder for a considerable length of time while the bank is engaged in business, and until it is declared insolvent, cannot avoid such liability on the ground that this subscription was induced by fraud which would entitle him to a rescission as between himself and the corporation, unless it is affirmatively shown that there are no creditors who became such while he was a registered stockholder. Lantry v. Wallace (1899) 97 Fed. 865, 38 C. C. A. 510.

It is incompatible with the policy and purposes of the national banking laws to permit mere irregularities or even fraudulent practices, in the organization or management of a bank created thereunder, to invalidate its action, and give ground for a stockholder to repudiate his obligations to the public. Bailey v. Tillinghast (1900) 99 Fed. 801, 40 C. C. A. 93, affirming decree Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

Officers of a national bank may not hold themselves out to the Comptroller of the Currency, the bank examiners, and the business public as original subscribers for and holders of its capital stock, which they have never paid for, and yet escape liability on obligations given for such stock by a secret agreement among them that the stock shall be considered as belonging to the bank, and not to the one to whom it is issued. Lyons v. Westwater (1910) 181 Fed. 681, 104 C. C. A. 663, reversing judgment (C. C. 1909) 173 Fed. 111.

A national bank went into liquidation November 30, 1896. An action against a stockholder to enforce an assessment was commenced November 9, 1897. Defendant's answer set up in detail the fraud by which he had been induced to subscribe and pay for the stock, alleged that he had ever since been a resident of a distant state, and that, until a short time before the filing of the complaint, he had no opportunity of discovering the fraud. Held, that diligence was not shown. Wallace v. Bacon (C. C. 1898) 86 Fed. 553.

A stockholder, by purchase in a national bank which has conducted business as such for six years, cannot defend against an assessment, on its insolvency, on the ground that the original capital stock was never paid in. Wallace v. Hood (C. C. 1898) 89 Fed. 11, judgment affirmed Hood v. Wallace (1899) 97 Fed. 983, 38 C. C. A. 692.

When the comptroller of the currency has directed the receiver of an insolvent national bank to enforce the collection of an assessment against the stockholders for an amount less than the par value of their stock, and the receiver has recovered a judgment at law thereon against a stockholder, which has been satisfied, he cannot maintain a second action against such stockholder to recover a further assessment. The cause of action to recover an assessment is one upon the stockholder's contract, which cannot be split, and the first recovery is a bar to any subsequent action on the same contract. De Weese v. Smith (C. C. 1899) 97 Fed. 309.

Defendant, sued by the receiver of an insolvent national bank for an assessment as a stockholder, was induced to purchase the stock held by him at the time the bank was closed from the president of the bank by the fraudulent representations of the president and cashier. Such fraud had been established in a suit for rescission of the contract, brought by defendant in a state court, to which the receiver was a party. The bank was in fact insolvent when the purchase was made, and was closed by the comptroller within 36 days thereafter. The defendant lived several hundred miles from the place where the bank was located, and took no part in its affairs. Held, that an answer setting up such facts as a defense was not demurrable. Stufflebeam v. De Lashmutt (C. C. 1900) 101 Fed. 367.

In suit to enforce statutory liability of stockholders of national banks, held, that laches on the part of the Comptroller in collecting assessments was not a defense. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

In suit to enforce statutory liability of stockholders of national banks, held, that it could not be shown that enforcement of assessment by the Comptroller would defeat the provision making stockholders liable equally and ratably, and not one for another; this being concluded by the Comptroller's order. Id.

A receiver of a national bank of Texas sued a domestic stockholder to recover a second assessment levied on his stock, in 1898, by the comptroller of the currency. Defendant had paid an assessment levied in 1894. Had the receiver collected all of such first assessment, and realized on the assets, all the debts as then existing might have been paid. It did not appear that he could not have done so. He had also sold a large amount of the assets for about 9 per cent. of their face value under

an order of the federal courts. Held, that these facts constituted no defense. Beckham v. Hague (1902) 78 N. Y. Supp. 79, 38 Misc. Rep. 606.

Since the receiver of insolvent national bank has authority to institute suit on the individual liability of stockholders to collect assessments ordered by the comptroller of the currency, and a satisfaction of a judgment in such suit will release the stockholder from further liability, such a stockholder cannot defend on the ground that the receiver has assigned the claim pending the suit. Schaberg's Estate v. McDonald (1900) 83 N. W. 737, 60 Neb. 493.

It is no defense to a stockholder in an insolvent national bank, who is sued by the receiver on his individual liability upon an assessment ordered by the comptroller of the currency, to say that the receiver has unlawfully disposed of such claim, so that the creditors of the bank will not receive of the proceeds thereof as much as they are entitled to, since the disposition of the fruits of the litigation is not a matter in which the stockholder is concerned. Id.

26. —— **Estoppel.**—The fact that the subscriber for the new shares received a dividend on the old shares so transferred to him does not estop him from denying his liability as a shareholder, where such dividend was received in the belief that it was paid to him by virtue of his subscription to the new stock. Stephens v. Follett (C. C. 1890) 43 Fed. 842.

Where the capital of a national bank has been increased, and defendants have received their additional stock, and for several years held themselves out as stockholders, they cannot deny their liability upon the ground that the increase of capital was fraudulent, and that they could not have discovered the fraud with ordinary care. Latimer v. Bard (C. C. 1896) 76 Fed. 536.

In an action to recover an assessment on national bank stock carried on its books in the name of an individual described as cashier of a certain other bank, neither the latter bank nor the individual is estopped from setting up that they hold the stock merely as pledgees. Baker v. Old Nat. Bank (C. C. 1898) 86 Fed. 1006.

Where, in an action by the receiver of a national bank to recover an assessment from one in whose name a certificate of stock had been issued, but who it was shown held the same only as trustee to secure an unpaid indebtedness from the actual owner of the stock to a third person, the plaintiff did not produce in evidence the list of stockholders required to be kept by the bank, or show whether or not such list was in fact kept, but relied solely on the stock certificate book, all persons must be held to have been chargeable with notice of all the facts in regard to such stock therein shown; and, conceding that defendant's liability could be established by such book alone, without producing or accounting for the list of stockholders, it is insufficient to create an estoppel which would prevent him from showing the facts where it appears therefrom that the stock was transferred to him by one to whom the previous certificate had been issued as pledgee. Tourtelot v. Stolteben (C. C. 1900) 101 Fed. 362.

27. —— **Bankruptcy.**—Where the original bill was filed February 3, 1875, before the passage of the act of June 30, 1876, and a receiver was appointed February 26, 1875, thereunder, and an amended bill, making the individual stockholders defendants, was filed October 5, 1876, and after the filing of the amended bill certain defendants were adjudged bankrupts, their pleas of bankruptcy will constitute a sufficient bar in their behalf. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

A discharge in bankruptcy releases a shareholder of a national bank from his statutory individual liability to creditors of the bank, where at the time of his discharge the claims of such creditors were provable, not merely contingent. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, 594, reversed (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

28. —— **Set-off and counterclaim.**—A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent. Wingate v. Orchard (1896) 75 Fed. 241, 21 C. C. A. 315.

In an action by the receiver of a national bank against a stockholder to recover an assessment, the defendant cannot set up, by way of counterclaim, a claim for damages against the bank for fraudulent representations made to induce his purchase of the stock. Lantry v. Wallace (1899) 97 Fed. 865, 38 C. C. A. 510.

In an action by a receiver of an insolvent bank to charge the estate of a shareholder with an assessment on his shares, the executor claimed, by way of set-off, that property belonging to the estate had been delivered to the bank, upon the understanding that it should be applied on the assessment if the bank should fail. Held not a proper subject of set-off, even though the bank examiner assented to the agreement. Witters v. Sowles (C. C. 1887) 32 Fed. 130.

In an action by the receiver of an insolvent national bank to recover of a stockholder an assessment on his shares, defendant alleged as a counterclaim that the comptroller of the currency had directed the bank to restore the value of certain securities held by it which had been reported worthless by an examiner; that certain of the stockholders, including defendant, had raised a fund, which was placed in the hands

of trustees, to apply so much as might be from time to time required by the comptroller to retire such securities; that the fund was deposited with the bank with full notice of the purpose to which it was to be applied; that a portion had been used to retire the securities designated, and that when the bank failed, the balance of the fund came into the hands of the receiver, and was now claimed by him as a part of the ordinary assets of the bank; that a certain portion of this balance belonged to defendant, which amount he asked to set off against plaintiff's demand. Held, that a general demurrer, based on the ground that no set-off or counterclaim was available in such an action, would be overruled, as the claim could be set off if it was of such a nature that the holder would be entitled to receive the full amount before distribution by the receiver to general creditors. Welles v. Stout (C. C. 1899) 38 Fed. 807.

Defendant, for the purpose of helping a bank, of which complainant was a stockholder, in a financial crisis, loaned it certain securities belonging to complainant, and when complainant was informed of the fact she did not object. She was assured by the bank's officers that if the bank was saved the securities would be returned, and if it failed the avails would be credited on her assessment as a stockholder. The bank failed, and the securities were not returned. Held, that she was not entitled, as against other creditors, to set off the value of the securities against her assessment, but was, as to such value, on the same footing as any other creditor. Sowles v. Witters (C. C. 1889) 39 Fed. 403.

In an action by the receiver of a national bank to enforce an assessment against a stockholder, the latter cannot maintain a cross petition in the nature of a counterclaim to recover the purchase price of his stock on the ground of the alleged fraud of the bank inducing its purchase by defendant. The proper proceeding in such case is by an independent bill in equity against both the receiver and the bank for a rescission, making tender of the stock. Wallace v. Hood (C. C. 1898) 89 Fed. 11, judgment affirmed Hood v. Wallace (1899) 97 Fed. 983, 38 C. C. A. 692.

A stockholder of an insolvent national bank, who happens also to be one of its creditors, cannot cancel or diminish the assessment made against him by offsetting his individual claim against it. Hobart v. Gould (D. C. 1881) 8 Fed. 57.

A stockholder could not offset against his statutory double liability the amount of his unpaid deposit account. Williams v. Rose (D. C. 1914) 218 Fed. 898.

A stockholder in a national bank in the process of liquidation cannot set off his distributive share in the assets against his liability on his stock. First Nat. Bank v. Riggins (1899) 82 S. E. 801, 124 N. C. 534.

29. —— **Judgment.**—While, in an action in the United States Circuit Court by the receiver of a national bank, to recover the 100 per cent. for which a stockholder is liable, under this section, a judgment of the Supreme Court of the state, in an action by defendant against the bank to recover the money paid for the stock, that defendant was not bound by her subscription, is admissible in bar of the receiver's action, when the judgment of the state court is reversed by the United States Supreme Court, the judgment of the circuit court based thereon will also be reversed. Butler v. Eaton (1891) 11 Sup. Ct. 985, 986, 141 U. S. 240, 35 L. Ed. 713; Thayer v. Butler (1891) 11 Sup. Ct. 987, 141 U. S. 234, 35 L. Ed. 711.

30. —— **Costs.** — In proceedings against the stockholders of a national bank that has gone into liquidation, to ascertain and recover assessments for the indebtedness, the stockholders are liable for cost as if they were co-defendants in any ordinary action. Irons v. Manufacturers' Nat. Bank (C. C. 1888) 36 Fed. 843, decree affirmed Schrader v. Manufacturers' Nat. Bank (1889) 10 Sup. Ct. 238, 133 U. S. 67, 33 L. Ed. 564.

Where proceedings are being prosecuted by one creditor, as representative of all, against the stockholders of a national bank which has gone into liquidation, and the stockholders appeal from a decree against them, which decree is reversed, with costs, the costs incurred by appellee in defense of the appeal will be deducted before any dividend will be declared. Id.

31. **Successive assessments.**—Where the comptroller of the currency assesses upon the stock of an insolvent bank a sum sufficient to discharge an indebtedness, but the receiver fails to collect a sum sufficient for that purpose, owing to the insolvency of some of the stockholders, the comptroller cannot order an additional assessment upon the stock in the hands of solvent stockholders. U. S. ex rel. Citizens' Nat. Bank v. Knox (1880) 102 U. S. 422, 424, 26 L. Ed. 216.

The comptroller has power to order successive assessments against the stockholders of an insolvent national bank, ratably on all, where the aggregate does not exceed the par value of the stock. Aldrich v. Campbell (1899) 97 Fed. 663, 38 C. C. A. 347.

The comptroller has power to order successive assessments, in the aggregate within the limit of the stockholders' full liability; and this power cannot be affected, and the purpose of the law defeated, by the fact that a receiver, in enforcing a first assessment, has sued at law rather than in equity, and has recovered a judgment which has

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§ 9690. (R. S. § 5152.) Executors, trustees, etc., not personally liable.

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name.

Act June 3, 1864, c. 106, § 63, 13 Stat. 118.

Notes of Decisions

Construction and operation. — See Whitney v. Butler (1886) 7 Sup. Ct. 61, 118 U. S. 655, 30 L. Ed. 266.

An executor is not personally liable for an assessment except as the assets of the estate in his hands may be charged for it, and where there are assets and they are taken for that purpose, the prospective share of testator's wife and residuary legatee will be lessened to the amount thereof. Witters v. Sowles (C. C. 1886) 28 Fed. 121.

This section was designed to protect persons who hold stock in a representative capacity from any personal liability, and only makes the funds in the hands or under the control of such representative liable. Irons v. Manufacturers' Nat. Bank (D. C. 1884) 21 Fed. 197.

See note under § 9689, ante.

Personal liability—Executors and administrators.—Where an administrator, who is also sole heir and next of kin of his intestate, takes into his possession bank stock belonging to the intestate, votes such stock, and draws the dividends thereon, but does not have the stock transferred to his name, he does not thereby become personally liable as owner of the stock before his duties as administrator are ended. In re Bingham (1891) 27 N. E. 1055, 127 N. Y. 296, modifying (1890) 10 N. Y. Supp. 325, 57 Hun, 586.

—— **Trustees.** — One who purchases stock in a national bank with his own money on the suggestion of another person that the latter would buy such stock as the former "could get hold of," without being under any obligation to convey the stock to the other, is not a trustee within the meaning of this section. Horton v. Mercer (1888) 71 Fed. 153, 18 C. C. A. 18.

This section applies to every one holding stock as trustee, and a father who, as trustee for his children, invested funds belonging to them in such stock, is not personally liable for an assessment thereon, although the fund invested arose from an investment of his own money previously made by him in their behalf. Fowler v. Gowing (1908) 165 Fed. 891, 91 C. C. A. 569, affirming judgment (C. C. 1907) 152 Fed. 801.

When a trustee improperly invested funds in national bank stock, the beneficiary was liable as stockholder, if she accepted the investment or lost her right to reject it by laches or acquiescence. Williams v. Cobb (1914) 219 Fed. 663, 134 C. C. A. 217.

One to whom the shares are assigned in trust as security for a debt due a third person, and following whose name on the stock book of the bank is the word "trustee," is not liable for the assessment, and is also within the provision, exempting from such liability persons holding stock as trustees. Welles v. Larrabee (C. C. 1895) 36 Fed. 866, 2 L. R. A. 471.

Under this section, where new certificates of stock were issued to a defendant who knowingly permits his name to be entered on the stock books as the owner individually, he is liable for an assessment thereon, though he held the stock as trustee. Lewis v. Switz (C. C. 1896) 74 Fed. 381, 382.

A trustee, though not appointed by a will or an order of a court or judge, is not personally liable for assessments against stock of an insolvent national bank owned by this cestui que trust, but standing in his name, where he has been guilty of no fraud, concealment, or negligence. Lucas v. Coe (C. C. 1898) 86 Fed. 972.

Where stock in a national bank at the time of its failure was held by a trustee for the benefit of his children, the fact that the trust estate was wiped out of existence, so far as value or financial responsibility was concerned, by the failure of the bank, did not charge the trustee individually as a stockholder with the additional statutory liability imposed by this and the following sections. Fowler v. Gowing (C. C. 1907) 152 Fed. 801, judgment affirmed (1908) 165 Fed. 891, 91 C. C. A. 569.

One holding shares in a national bank as trustee is personally liable for debts of the bank, unless his trusteeship appears on the bank's books. Davis v. First Baptist Society (D. C. 1877) Fed. Cas. No. 3,633.

A person appearing on the books of a national bank to be absolute owner of stock is subject to stockholders' liability, though holding it as trustee. Kerr v. Urie (1897) 37 A. 789, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493.

As to liability of creator of trust, see Fowler v. Gowing (C. C. 1907) 152

Fed. 801, judgment affirmed (1908) 165 Fed. 891, 91 C. C. A. 569.

See, also, note under § 9689, ante.

Estates of decedents.—Where a receiver representing creditors has died, and his personal representatives have entered to defend, the assets of a bank in their hands are liable as he would have been. Foster v. Lincoln (C. C. 1896) 74 Fed. 382 (affirmed [1897] 79 Fed. 170, 24 C. C. A. 470).

The estate of a stockholder of a national bank, who died prior to its insolvency, but whose stock had not been transferred at the date of the comptroller's order making an assessment, is liable therefor. Davis v. Weed (D. C. 1877) Fed. Cas. No. 3,658.

Liability of a stockholder of a national bank held to attach to his estate and become a charge or lien thereon at least from the declaration of insolvency, and not merely from the levying of the assessment by the Comptroller. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

—— Executors and administrators.—The individual liability of the stockholders is an essential element of the contract by which stockholders become members of the corporation, and therefore the obligation survives as against the personal representatives of a deceased stockholder. Richmond v. Irons (1887) 7 Sup. Ct. 788, 796, 121 U. S. 27, 30 L. Ed. 864.

Neither executors nor legatees held liable as stockholders in national bank, though executors' transfer of stock to themselves, as trustees, was unauthorized, under the rules and practice of the courts of Wisconsin and Laws Wis. 1903, c. 317. Williams v. Cobb (1914) 219 Fed. 663, 134 C. C. A. 217.

The statute makes estates in the hands of executors liable in like manner and to the same extent as the testator would be if living. Witters v. Sowles (C. C. 1885) 25 Fed. 168, 169.

National bank stock, which has been transferred without consideration to a trustee by the executor of an unsettled estate, is liable, as in the hands of the executor, to an assessment on liquidation of the bank. Id.

National bank stock in the hands of an executor is liable to an assessment upon liquidation of the bank. Id.

An executor transferred national bank stock belonging to his testator to the residuary legatee under an order of distribution which did not specifically mention the stock. A receiver was afterwards appointed for the bank, who made an assessment on the executor for these shares. Held, that the stock was no longer the property of the estate for the purposes of assessment. Id.

This section makes no distinction between real and personal property in the hands of an executor, but all property is liable. Witters v. Sowles (C. C. 1887) 32 Fed. 130, 140.

The estate of a deceased owner of national bank stock is liable to an assessment levied against his executors in consequence of the failure of the bank after his death. Wickham v. Hull (C. C. 1894) 60 Fed. 326.

An executor who receives certificates of national bank stock as part of the assets of decedent's estate, and includes them in his inventory returned to the probate court, is a shareholder, and liable as such for an assessment, subject to the relief granted by this section. Parker v. Robinson (1895) 71 Fed. 256, 18 C. C. A. 36.

Under this section a claim against an estate in the hands of an executor for assessments on national bank stock is not affected by the state laws prescribing the time for presentation of claims. Zimmerman v. Carpenter (C. C. 1898) 84 Fed. 747.

Where national bank stock was transferred by an executrix to herself individually, and she admits, before suit and again in her answer, that the transfer was without consideration and void, such admission does not vacate the transfer, and a bill in equity will lie to determine the liability of the estate for an assessment on the stock. Id.

The widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, cannot, on the ground that the estate is fully settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control. Baker v. Beach (C. C. 1898) 85 Fed. 836.

A testator directed by his will that a daughter's share in his estate should remain in the hands of his executors, and be invested by them, and the income paid to the daughter during her life, and at her death the part of the estate so "held in reserve" by the executors should revert to the general estate. The executors set apart as a portion of the daughter's share certain shares of stock in a national bank held by the testator, and caused the same to be transferred on the books of the bank to themselves as "trustee." Held, that the legal title to such shares devolved upon them as executors, and they had no power to devest themselves of such title by any transfer, and that an action to recover an assessment on the stock was properly brought against them as executors, and especially where the assessment was not made until after the daughter's death. Earle v. Rogers (C. C. 1900) 105 Fed. 208.

Under this section an executrix is liable as such for assessments made by the comptroller on shares of stock in a national bank held by her, and issued to the estate of her testator in exchange for shares held by the testator

in his lifetime, and surrendered by her on a reduction of the capital stock of the bank. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

Receiver of insolvent national bank, before enforcing liability of estate of deceased stockholder, held not required to establish his claim before the register of wills, to make demand upon the executors, or present to them an affidavit as required by the state laws. Rankin v. Miller (D. C. 1913) 207 Fed. 602.

Executors of a stockholder of a national bank, which became insolvent before distribution of the estate, although not liable as stockholders for an assessment by the Comptroller, held liable for their wrongful act in distributing the estate, so as to deprive the bank's creditors of their charge or lien thereon. Id.

The estate of an administrator, who in that capacity held stock in a national bank, and never had it transferred to himself, though he was the sole heir of intestate, is not liable to an assessment on it. In re Faulkner's Estate (1890) 10 N. Y. Sup. 325, 57 Hun, 586, judgment modified (1891) 27 N. E. 1055, 127 N. Y. 296.

—— **Beneficiaries and distributees.**—The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable to assessments on the stock in case the bank subsequently becomes insolvent. Matteson v. Dent (1900) 20 Sup. Ct. 419, 420, 176 U. S. 521, 44 L. Ed. 571, affirming judgment (1898) 75 N. W. 1041, 73 Minn. 170.

Enforcing the whole amount of an assessment on national bank stock, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate, pursuant to Gen. St. Minn. 1894, § 5918 et seq., does not violate any rights under the federal statutes. Id.

On the representations of the executor that he had more than sufficient assets in his hands to satisfy all debts and legacies, he was decreed to pay defendant S. S. her legacy, but neglected to do so until after the failure of the national bank in which the testator was a stockholder, when he delivered property to her trustee in satisfaction of the legacy. Held, that the legatee and her trustee were chargeable with an assessment upon testator's stock to meet the liabilities of the bank accruing before actual delivery to the legatee. Witters v. Sowles (C. C. 1887) 32 Fed. 130.

In a suit brought by the receiver of a national bank, to charge the assets of the estate of a testator, in the hands of the executor and devisees and legatees, with an assessment on certain shares of the capital stock of the bank, the bill was framed so as to charge defendant M. with the assets in her hands as legatee, with the payment of the assessment on the testator's stock. Held, that she could not be charged in this action as owner of the stock. Id.

Assets which have been transferred to devisees or legatees cannot be subjected to liabilities of the bank accruing after the transfer. Id.

Where bank stock is bequeathed to one for life, with remainder over, an assessment made after the death of the testator is payable by the beneficiaries of the bequest, and testator's estate cannot be made liable therefor. Blackmore v. Woodward (1895) 71 Fed. 321, 18 C. C. A. 57.

The estate of a testator, and not that of a life beneficiary, held liable for assessments on bank stock. Earle v. Rogers (C. C. 1900) 105 Fed. 208, 209.

After the estate of a deceased stockholder of a national bank was administered upon, and the assets, including the bank stock, distributed, the bank became insolvent, and a receiver was appointed. The stock was never transferred on the books of the bank to the administrator or distributees. In an action by the receiver under Gen. St. Minn. c. 77, to recover of the distributees, to the extent of assets received by them, the amount of an assessment on stockholders, held that, as the claim was a contingent one, and did not become absolute until the bank had become insolvent, and this was after the time to file claims against the estate had expired, the action can be maintained. Dent v. Matteson (1897) 73 N. W. 416, 70 Minn. 519.

Trust estates.—Where the question of the liability of a trust estate for an assessment on shares of an insolvent national bank held by the trustee depends upon the power of the trustee, under the terms of the trust, to purchase such shares for the estate, such question cannot be determined in an action at law by the bank receiver against the stockholder, though it is alleged that he holds the stock as trustee. Hampton v. Foster (C. C. 1904) 127 Fed. 468.

Wards and their estates.—Rendition of a judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of an assessment on shareholders to pay debts, on which execution was directed to issue against the estate of the wards, did not stop the running of the statute of limitations in favor of the wards, even if they were personally liable. Clark v. Ogilvie (1901) 63 S. W. 429, 23 Ky. Law Rep. 552, 111 Ky. 181.

Cited without definite application, Keyser v. Hitz (1890) 10 Sup. Ct. 290, 295, 133 U. S. 138, 33 L. Ed. 531;

Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 466, 165 U. S. 606, 41 L. Ed. 844; First Nat. Bank v. Hawkins (1897) 79 Fed. 51, 53, 24 C. C. A. 444 (reversed [1899] 19 Sup. Ct. 739, 174 U. S. 364, 43 L. Ed. 1007); Witters v. Sowles (C. C. 1887) 32 Fed. 767, 768; Brown v. Ellis (C. C. 1898) 86 Fed. 357; Aldrich v. Bingham (D. C. 1904) 131 Fed. 363, 365.

§ 9691. (R. S. § 5153, as amended, Act March 3, 1901, c. 871, § 1, Act March 4, 1907, c. 2913, § 3, Act Dec. 23, 1913, c. 6, § 27, and Act Aug. 4, 1914, c. 225.) Duties and liabilities when designated as depositaries of public moneys.

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Act June 3, 1864, c. 106, § 45, 13 Stat. 113. Act March 3, 1901, c. 871, § 1, 31 Stat. 1448. Act March 4, 1907, c. 2913, § 3, 34 Stat. 1290. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274. Act Aug. 4, 1914, c. 225, 38 Stat. 682.

This section, as enacted in the Revised Statutes, was as follows:

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary, and such depositaries may also be employed as financial agents of the Government; and they shall perform all such reasonable duties as depositaries of public moneys and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue or for loans or stocks."

It was amended by Act March 3, 1901, c. 871, § 1, cited above, by inserting, in the first sentence thereof, after the words "as may be prescribed by the Secretary," the words "but receipts derived from duties on imports in Alaska, the Hawaiian Islands, and other islands under the jurisdiction of the United States may be deposited in such depositaries subject to such regulations."

It was further amended by Act March 4, 1907, c. 2913, § 3, to read as set forth here.

By a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, this section and sections 5172, 5191, and 5214 of the Revised Statutes, which were amended by Act May 30, 1908, were re-enacted to read as such sections stood prior to May 30, 1908, subject to such amendments or modifications as were prescribed in said Federal Reserve Act.

This section was not expressly amended by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, which was obviously referred to in the provision mentioned above of the Federal Reserve Act of 1913. But said Aldrich-Vreeland Act of May 30, 1908, c. 229, § 15, post, § 9693, provided that all national banking associations designated as regular depositaries of public money should pay upon all special and additional deposits

made by the Secretary of the Treasury in such depositaries, and, all such associations designated as temporary depositaries of public moneys should pay upon all sums of public money deposited in such associations, interest at such rate as the Secretary of the Treasury should prescribe, not less than one per centum per annum upon the average monthly amount of such deposits, etc. This provision operated as a modification of this section, by requiring the payment of interest on deposits of public moneys. Such requirement of payment of interest may be superseded by the provision, mentioned above, of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 27 as amended; but, since such a construction may be questioned, said Act May 30, 1908, c. 229, § 15, is retained in this compilation, and is set forth, post, § 9693. See notes to said § 9693, post.

The provisions of R. S. § 5191, post, § 9746, relating to reserves of national banks, were made inapplicable to deposits of public moneys in designated depositaries, by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 14, post, § 9692. See notes to said § 9692, post.

Notes of Decisions

Public funds on deposit and matters related thereto.—Disbursing officers may legally make special deposits of their funds in non-specie-paying banks, if so directed by the President, where they will agree to receive the funds in that way. (1837) 3 Op. Atty. Gen. 233.

Any bank not restrained by its charter or other statutory enactments, nor by judicial process, from receiving special deposits, is competent to enter into a contract for the safe-keeping and return of a special deposit in such way and on such terms as may be agreed on. Id.

Under the order of the Treasury Department, approved by the President on the 5th October, 1833, disbursing officers may legally keep the public moneys intrusted to them on deposit in the banks heretofore selected by the Treasury, and which now have the public money. (1837) 3 Op. Atty. Gen. 233.

Where a disbursing agent of the United States had paid public money into a bank, the government will not undertake to settle incidental matters of controversy between him and the bank, but leaves all such questions to the courts of justice. (1854) 6 Op. Atty. Gen. 314.

An agent of the government cannot require it to receive the credit of a bank, or any other third party, in the place of that of himself and his sureties. Id.

A bank cannot lawfully take public funds which have been deposited with it, knowing them to be such, and divert them from a public debt to the payment of the private debt of the public agent, or to a debt contracted by him in violation of law and of his duty to the government. Id.

The Secretary of the Treasury has authority to deposit the moneys received by the sale of bonds under Act July 14, 1870, c. 256, and Act Jan. 14, 1875, c. 15, with public depositaries designated and selected by him, taking such security as the statute requires. (1877) 15 Op. Atty. Gen. 350.

Receipt of security.—The Secretary of the Treasury has authority to receive from national banking associations designated as depositaries of public money Treasury notes of the United States as security for the safe-keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the government. (1878) 16 Op. Atty. Gen. 96.

Checks drawn on depository.—Under this section and Treasury Department Circular 49, § 6, and Circular 102, checks drawn by a federal disbursing agent on a government depositary payable to a fictitious payee with the knowledge of the drawer could not be regarded as valid checks payable to bearer; the bank being chargeable with notice of the limitations on the drawer's authority. U. S. v. National Bank of Commerce of Seattle, Wash. (1913) 205 Fed. 433, 123 C. C. A. 501.

Liability of bank.—A national bank received funds of a school district which it had no right to receive as an ordinary deposit, or to mingle with its own funds, and which it undertook to hold for the special purpose of paying certain bonds of the school district, and no other. It did in fact mingle the funds with its own, and became insolvent, none of the bonds having been presented for payment. It had on hand, at the time it suspended business, cash in excess of the amount of such deposit, which came into the hands of its receiver. Held, that such deposit constituted a trust fund, which was recoverable by the school district from the receiver; the presumption being that so much of the cash on hand as equaled the deposit was the money of the school district. Merchants' Nat. Bank v. School Dist. No. 8, of Meagher County, Mont. (1899) 94 Fed. 705, 36 C. C. A. 432.

The fact that certificates of deposit issued by a national bank to a state treasurer in his official capacity, for money of the state deposited, were surrendered by his successor in office, who had the amount credited in his general account as treasurer, cannot affect the liability of the bank to the state for the money actually deposited, and which was never repaid, nor does it justify

its receiver in contesting the claim of the state or its treasurer therefor, where there is no defense to such claim on its merits. McDonald v. State of Nebraska (1900) 101 Fed. 171, 41 C. C. A. 278.

In action by United States against national depository for payments on checks drawn by government officer, who forged indorsements, the bank held not entitled to credit for moneys paid on legitimate claims in the absence of an accounting by the officer. National Bank of Commerce v. U. S. (1915) 224 Fed. 679, 140 C. C. A. 219.

A national bank, not designated as a depository of public moneys, which receives, under the permissive authority of law and the regulations of the post-office department, deposits of money made by postmasters in their official capacity, thereby assumes a fiduciary relation to the government, and becomes a bailee of the government, so as to become directly responsible to it for any moneys which it knowingly or negligently allows the postmaster to withdraw by private check, or otherwise appropriate to his own use; and where, after the removal of the postmaster, he deposits a sum to make good a shortage in his balance, the bank cannot apply it in discharge of a debt due it from him personally. U. S. v. National Bank of Asheville (C. C. 1896) 73 Fed. 379.

Liability of government.—This is a provision to attain security for the benefit of the party ultimately entitled to the money, and does not render the Government liable in case of the failure of the depository. Branch v. U. S. (1876) 12 Ct. Cl. 281.

Designating a national bank as a national depository of public moneys under General Banking Law (13 Stat. 113), § 45, does not change the character of its organization or convert its managers into public officers, or render the Government liable for its acts. Id.

When public money is deposited in a designated depository, it is not retained in kind as the special property of the government, but is mingled with other funds and becomes the property of the bank. Id.

The deposit in July, 1866, in a national bank by a clerk of a district court of the proceeds of cotton seized under the Confiscation Act was held not to be a payment of the money into the treasury binding the government to claimants for its return if the cotton was found not liable to confiscation. Branch v. U. S. (1879) 100 U. S. 673, 25 L. Ed. 759.

Cited without definite application, Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 385, 20 L. Ed. 840.

§ 9692. (Act May 30, 1908, c. 229, § 14.) Provisions relating to reserves of national banks not to apply to deposits of public moneys in designated depositaries.

The provisions of section fifty-one hundred and ninety-one of the Revised Statutes, with reference to the reserves of national banking associations, shall not apply to deposits of public moneys by the United States in designated depositaries. (35 Stat. 552.)

This section and the section next following were part of the Aldrich-Vreeland (National Currency Associations) Act of 1908, cited above.

Section 20 of said Aldrich-Vreeland Act provided that the act should expire by limitation on June 30, 1914. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, extended the provisions of said Aldrich-Vreeland Act, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, to June 30, 1915. Said last mentioned date having passed without any further extension, said Aldrich-Vreeland Act must be considered as having expired by such limitation and as having become inoperative. There may, however, be a question as to whether this section and the following section which are of general application to national banks, expired by limitation on June 30, 1914, or on June 30, 1915, or even whether it was not intended to be excepted from such limitation altogether, and meant to be left in full force and operation. Accordingly this section and the following section are included in this compilation as originally enacted. See, also, notes to Chapter Two A of this Title.

R. S. § 5191, mentioned in this section, is set forth post, § 9746.

§ 9693. (Act May 30, 1908, c. 229, § 15.) Rate of interest on special and additional deposits in national banks designated as depositaries.

All national banking associations designated as regular depositaries of public money shall pay upon all special and additional deposits made by the Secretary of the Treasury in such depositaries, and all such associations designated as temporary depositaries of public money shall pay upon all sums of public money deposited in such

associations interest at such rate as the Secretary of the Treasury may prescribe, not less, however, than one per centum per annum upon the average monthly amount of such deposits: Provided, however, That nothing contained in this Act shall be construed to change or modify the obligation of any association or any of its officers for the safe-keeping of public money: Provided further, That the rate of interest charged upon such deposits shall be equal and uniform throughout the United States. (35 Stat. 552.)

See notes to R. S. § 5193, ante, § 9691.
See, also, notes to § 9692, ante.

Notes of Decisions

Prior act.—See (1836) 3 Op. Atty. Gen. 141.

§ 9694. (R. S. § 5154, as amended, Act Dec. 23, 1913, c. 6, § 8.) Organization of State banks as national banking associations.

Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency:

Provided, however, That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of fifty-one per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed in accordance with the provisions of the statutes of the United States. When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and by the national banking Act for associations originally organized as national banking associations.

Act June 3, 1864, c. 106, § 44, 13 Stat. 112. Act Dec. 23, 1913, c. 6, § 8, 38 Stat. 258.

This section, as enacted in the Revised Statutes, was as follows:

"Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization

certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this Title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title."

Other provisions of said Federal Reserve Act, mentioned in this section, are set forth post, §§ 9785–9805.

It was amended by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 8, cited above, to read as set forth here.

State banks may not become members of federal reserve banks unless possessed of a paid-up unimpaired capital sufficient to entitle them to become national banking associations, by said Federal Reserve Act of Dec. 23, 1913, c. 6, § 19, post, § 9792.

Notes of Decisions

Operation of statute—National banks in territories.—This and following sections do not apply to banks existing in Hawaii prior to the passage of the act of April 30, 1900, but refer exclusively to banks organized under special or general laws of a state. (1900) 23 Op. Atty. Gen. 177.

—— Savings banks in District of Columbia.—Savings banks organized in the District of Columbia held entitled to become national banking associations. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 133 U. S. 138, 33 L. Ed. 531.

Savings banks in District of Columbia held entitled to become national banking associations. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 292, 133 U. S. 138, 33 L. Ed. 531.

Change from state bank to national bank.—No authority other than that conferred by congress is required to enable a bank existing under a special or a general state law to become a national banking association. Casey v. Galli (1876) 94 U. S. 673, 24 L. Ed. 168, 307.

An association may, upon the expiration of the period limited for its duration, convert itself into a state bank under the laws of the state, provided it has liquidated its affairs agreeably to the laws of Congress; and after it has thus become a state bank it may reconvert itself into a national banking association, and adopt the name of the expired corporation with the approval of the Comptroller of the Currency. (1882) 17 Op. Atty. Gen. 288.

Where a state bank under special charter is authorized by its charter to issue, in addition to its regular voting stock, nontransferable stock, the holders of which have no power of voting, a majority of the voting stockholders have the right, in the absence of state legislation, to change it to a national bank, and transfer the whole institution, capital and assets, including nontransferable stock, to the new corporation. State v. Phœnix Bank (1867) 34 Conn. 205.

The conversion of a state bank to a national bank, under this section, is not equivalent in law to a paying off in fact of its stock, so as to adeem a residuary legacy in certain shares of the bank's stock, limited on a life estate in such shares, which is to become absolute in case the bank should pay off its stock. Maynard v. Mechanics' Nat. Bank (Pa. 1867) 1 Brewst. 483.

Assent or election of stockholders.—Where a stockholder in a state bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend checks made payable by the bank to the order of such children, he was estopped to deny his liability for assessments levied on such stock by the comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank. Aldrich v. Bingham (D. C. 1904) 131 Fed. 363.

Where a state bank, under authority of its special charter, had issued, in addition to its regular or voting stock, nontransferable stock, the holders of which had no power of voting, an election, by a majority of the voting stockholders, to convert the bank into a national bank, devested the nonvoting stockholders of all their rights except the right to receive from the assets of

the old bank the value of their stock. State v. Phœnix Bank (1867) 34 Conn. 205.

Where a state bank, under authority of its special charter, had issued, in addition to its regular or voting stock, nontransferable or nonvoting stock, nonvoting stockholders, on election of a majority of the voting stockholders to become a national bank, where entitled to a full share of the assets, and could not be compelled to accept the par value of their stock, with interest. Id.

Voting stockholders having elected to act under Act 1863 absolutely, the nonvoting stockholders had no right to elect to become stockholders in the national bank. Id.

Where an election was made without pursuing strictly and technically the provision of the act, the new institution cannot exclude from becoming stockholders nonvoting stockholders of the old corporation on the ground that they have not complied technically with the act. State v. Hartford Nat. Bank (1867) 34 Conn. 240.

Where the state was a nonvoting stockholder, and the bank solicited the assent of the state treasurer to the state becoming a stockholder in the new corporation, and, acting upon the knowledge that he intended to assent, included the state as a stockholder of the new corporation, and published the certificate, the failure of the state treasurer to give notice that the state desired to become a stockholder, the notice being by the acts of the bank waived, did not forfeit its right. Id.

Where an election was made, and nonvoting stockholders of the old corporation included as stockholders of the new in its certificate of organization, without ascertaining, in the mode provided by the statute, whether they assented to become stockholders, the assumption that they had so elected, so far as it was for the benefit of such stockholders, was a waiver by the new corporation of the provisions of the statute prescribing the method in which an election should be made. Id.

Rights and liabilities of reorganized bank.—The conversion of a state bank into a national bank is not a "closing of its business," within the meaning of the New York statute of 1859 providing for the redemption of a state bank's circulation, and releasing it from liability on such notes as are not presented within six years after the giving of the prescribed notice; and any notes not so presented constitute a valid claim against the national bank. Metropolitan Nat. Bank v. Claggett (1891) 12 Sup. Ct. 60, 141 U. S. 520, 35 L. Ed. 841, affirming (1891) 26 N. E. 757.

The change of a state bank to a national bank after the making of the contract in suit does not affect the bank's right to sue. Michigan Ins. Bank v. Eldred (1892) 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162.

When a state bank has surrendered its charter to the state, and has organized as a national bank, the right of the state to continue to exact a bonus imposed by the charter for the exercise of the franchise is terminated. State v. National Bank (1870) 33 Md. 75.

Where the Farmers' Bank of Maryland was converted into the Farmers' National Bank of Annapolis, in June, 1865, on a judgment obtained by it in 1864, a scire facias could properly issue in the old corporate name of the bank against the original defendants. Thomas v. Farmers' Bank (1876) 46 Md. 43.

Under the provisions of Act Md. 1865, c. 144, a state bank organized as a national bank in June, 1865; and in 1874 it sued out, in its old corporate name, a scire facias on a judgment obtained in 1864. Held, that the new bank was substantially the plaintiff, and, as such, was therefore liable for costs in case of judgment for the defendant. Id.

Where a state bank, after paying to its president money falsely represented by him to have been paid to an agent to whom the bank was indebted, is duly changed into a national bank, the new association, upon being sued by the agent who recovers a judgment against it, can maintain an action in its own name against the president for money had and received, under St. Mass. 1870, c. 217, setting forth in the writ the fact of sale by the state bank, and purchase of the chose in action by plaintiff. Atlantic Nat. Bank v. Harris (1875) 118 Mass. 147.

When a state bank reorganizes as a national bank, under this section, the change does not relieve it from any former liabilities to individuals with whom it has had dealings. It passes from one jurisdiction to another; but its identity is not thereby necessarily destroyed. It remains substantially the same institution under another name. The transition does not disturb the relation of either the stockholders or officers of the corporation, nor enlarge or diminish the assets of the institution. These all remain the same under the national as they were under the state organization. Coffey v. National Bank (1870) 46 Mo. 140, 2 Am. Rep. 488.

A national bank, organized from a state bank, may take an assignment of a note with mortgage security from the latter, and enforce collection by foreclosure. Scofield v. State Nat. Bank (1879) 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412.

A reorganization as a national bank does not terminate a continuing guaranty to the bank of notes to be discounted by it for a certain person. City Bank v. Phelps (1881) 86 N. Y. 484, affirming (1878) 16 Hun, 158; Id. (1884) 97 N. Y. 44.

A national bank, in fact organized as

the successor of a state bank, may hold the assets of its predecessor even though in form it was organized as a new bank. Western Reserve Bank v. McIntire (1884) 40 Ohio St. 528.

The conversion of a bank, organized under the territorial laws, into a national bank transfers the assets of the former to the latter, which succeeds thereto by operation of law, and not as a purchaser. People's Nat. Bank v. Board of Com'rs of Kingfisher County (Okl. 1909) 103 P. 682, judgment affirmed (Okl. 1909) 104 P. 55.

A stockholder and director of a bank, organized under the territorial laws, having lost warrants, inadvertently mingled with its assets at time of sale of his stock, held not estopped, as against said bank suing thereon as owners, to set up title thereof, either before or after its conversion into a national bank. People's Nat. Bank v. Board of Com'rs of Kingfisher County (Okl. 1908) 103 P. 682, judgment affirmed (1909) 104 P. 55, 24 Okl. 145.

A state bank, by conversion into a national bank, does not escape liabilities incurred by it while a state bank. State v. Farmers' Nat. Bank of Cushing (Okl. 1915) 150 P. 212.

That a state bank is converted into a national bank does not discharge deferred payments of an assessment levied under Act Okl. March 11, 1909 (Sess. Laws 1909, c. 5, art. 2) § 3, relating to depositors' guaranty fund. Id.

A national bank is responsible for all the liabilities incurred by it while a state institution. Kelsey v. National Bank of Crawford Co. (1871) 69 Pa. St. (19 P. F. Smith) 426.

Directors—Oath.—Upon the conversion of a state to a national bank all the directors of the former become those of the latter, until an election or appointment by the national bank. It seems that no oath is required from these ad interim directors, the oath prescribed being designed for those regularly elected by the national bank; but, assuming its necessity, a majority of those who were the directors before its conversion is necessary to make a quorum of the board of the national bank. Lockwood v. Mechanics' Nat. Bank (1869) 9 R. I. 308, 11 Am. Rep. 253.

Liability of stockholders.—A married woman held not exempt from individual liability as shareholder. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 133 U. S. 138, 33 L. Ed. 531.

Certificate of comptroller.—A certificate of the comptroller under this section held conclusive in a suit to enforce the liability of stockholders. Casey v. Galli (1876) 94 U. S. 673, 679, 24 L. Ed. 168.

It is no objection to a certificate issuing from the office of the comptroller of the currency, and under the seal of that office, that it was given by L. as "acting" comptroller, and that such office was unknown to the law. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 133 U. S. 138, 33 L. Ed. 531.

Cited without definite application, Christopher v. Norvell (1906) 26 Sup. Ct. 502, 504, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740.

§ 9695. (R. S. § 5155.) State banks having branches.

It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Act March 3, 1865, c. 78, § 7, 13 Stat. 484.

Notes of Decisions

Operation of statute.—See note under § 9694, ante.

§ 9696. (R. S. § 5156.) Reservation of rights of associations organized under act of 1863.

Nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties,

liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act.

Act June 3, 1864, c. 106, § 62, 13 Stat. 118.

CHAPTER TWO

Obtaining and Issuing Circulating Notes

Sec.
9697. What associations are governed by chapters 2, 3, and 4.
9698. Registered bonds intended by the term "United States bonds."
9699. Increase or reduction of deposit to correspond with capital.
9700. Exchange of coupon for registered bonds.
9701. Manner of making transfers of bonds.
9702. Registry of transfers.
9703. Notice of transfer to be given to association interested.
9704. Examination of registry and bonds.
9705. Annual examination of bonds by associations.
9706. Custody of bonds, collection of interest, etc.
9707. Withdrawal of circulating notes on deposit of lawful money and withdrawal of bonds.
9708. Amount of bonds required to be on deposit; reduction of amount or retirement in full of circulating notes.
9709. Withdrawal of circulating notes on deposit of lawful money, etc., and withdrawal of bonds, or other securities.
9710. Comptroller to determine if associations can commence business.
9711. Certificate of authority to commence banking to be issued.
9712. Publication of certificate.
9713. Delivery of circulating notes.
9714. Printing, denominations, and form of the circulating notes.
9715. Charter-numbers to be printed on notes.
9716. Distinctive paper for printing notes.
9717. Plates and dies to be under control of Comptroller.
9718. Annual examination of plates, dies, etc.
9719. Limit to issue of notes under five dollars.
9720. Aggregate amount of circulating notes not limited.
9721. For what demands national bank notes may be received.
9722. Issue of other notes prohibited.
9723. Destroying and replacing worn-out and mutilated notes.
9724. Organization of associations to issue gold notes authorized.
9725. Removal of limitation on circulation of gold banks.
9726. Their lawful money reserve, and duty of receiving notes of other associations.
9727. Conversion of national gold banks into currency banks.
9728. Penalty for issuing circulating notes to unauthorized associations.

§ 9697. (R. S. § 5157.) What associations are governed by chapters 2, 3, and 4.

The provisions of chapters two, three, and four of this Title, which are expressed without restrictive words, as applying to "national banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress.

The Federal Reserve Act Dec. 23, 1913, c. 6, post, §§ 9785–9805, created a new system for the government and regulation of all national banks, and such of the state banks and trust companies as, possessing the necessary qualifications, should signify their acceptance of the act.

Notes of Decisions

Circulating notes.—The provisions of the national currency act of June 3, 1864 (chapter 106), and the amendatory act of March 3, 1865 (chapter 78) authorize the creation of banking associations without the right to obtain, issue, and circulate notes. (1865) 11 Op. Atty. Gen. 334.

The German-American Savings Bank of Washington, D. C., incorporated under a law of Congress relating to the District of Columbia, and having a capital of $126,000, is entitled to receive circulating notes. (1877) 15 Op. Atty. Gen. 606.

§ 9698. (R. S. § 5158.) Registered bonds intended by the term "United States bonds."

The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

Act June 3, 1864, c. 106, § 4, 13 Stat. 100.

(R. S. § 5159. Repealed.)

This section was as follows:

"Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this Title."

It was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268, which provided that "so much of the provisions of section fifty-one hundred and fifty-nine of the Revised Statutes of the United States * * * as require that before any national banking associations shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed." The further provisions of the section not included in said description of the provisions repealed, as they related only to the custody and disposition of the bonds required to be deposited by the repealed provisions, became temporary merely upon such repeal.

Banks having a capital of $150,000, or less, were not to be required to keep on deposit bonds in excess of one-fourth of the capital stock as security for their circulating notes, by the Currency Act of July 12, 1882, c. 290, § 8, post, § 9708. So much of said Act July 12, 1882, c. 290, § 8, as required that before any national banking association should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

Other provisions for the issue of circulating notes to members of national currency associations to be used in emergencies were made by the Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546. Such notes were authorized to be issued on any securities, including commercial paper, on approval thereof by the Secretary of the Treasury. Said act also provided for the issue of additional circulating notes to national banking associations on the security of bonds, other than United States bonds, by sections 3 and 4 thereof, 35 Stat. 548. See notes to Chapter Two A of this Title.

In bonds to defray and reimburse expenditures on account of the Panama Canal, issued under the Payne-Aldrich Tariff Act of Aug. 5, 1909, c. 6, § 39, ante, § 6828, the Secretary of the Treasury was authorized to insert a provision that such bonds should not be receivable as security for the issue of circulating notes to national banks, and bonds containing such provision were not to be receivable for that purpose, by Act March 2, 1911, c. 195, ante, § 6829.

§ 9699. (R. S. § 5160.) Increase or reduction of deposit to correspond with capital.

The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered.

Act June 3, 1864, c. 106, § 16, 13 Stat. 104.

All provisions of existing statutes, requiring that before any national banking association should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds, were repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

Notes of Decisions

Retention of bonds.—The Treasurer of the United States cannot retain, as security for a claim due the United States, the bonds deposited with him

by a national bank to secure its circulation. (1869) 12 Op. Atty. Gen. 549.

Withdrawal of bonds.—See (1882) 17 Op. Atty. Gen. 409.

See, also, note under § 9707, post.

Subsequent statute.—The provision in section 4 of the act of June 30, 1874 (chapter 343), viz. "That the amount of the bonds on deposit for circulation shall not be reduced below $50,000," is for all purposes connected therewith repugnant to the previous statutory provision requiring national banks to have and maintain with the Treasurer of the United States a bond deposit to the amount of one-third of their capital stock, and so far in effect does away with such provision. (1880) 16 Op. Atty. Gen. 663.

§ 9700. (R. S. § 5161.) Exchange of coupon for registered bonds.

To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

Act June 3, 1864, c. 106, § 16, 13 Stat. 104.

All provisions of existing statutes including R. S. § 5159, one of the two preceding sections mentioned in this section, requiring that before any national banking associations should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds, were repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

§ 9701. (R. S. § 5162.) Manner of making transfers of bonds.

All transfers of United States bonds, made by any association under the provisions of this Title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

Act June 3, 1864, c. 106, § 19, 13 Stat. 105.

See notes to R. S. § 5160, ante, § 9699.

Notes of Decisions

Set-off against proceeds of bonds.—Bonds deposited to secure the circulation of a national bank, are held by the government as a trustee, and the surplus of the proceeds thereof, after payment of the notes, cannot be set off by the government against an unsecured deposit of postal funds, but must be distributed ratably among all the creditors. Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 107 U. S. 445, 27 L. Ed. 537.

§ 9702. (R. S. § 5163.) Registry of transfers.

The Comptroller of the Currency shall keep in his Office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

Act June 3, 1864, c. 106, §§ 19, 20, 13 Stat. 105.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by national banks for the issue of the additional circulating notes authorized by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

See notes to R. S. § 5160, ante, § 9699.

§ 9703. (R. S. § 5164.) Notice of transfer to be given to association interested.

The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made, of the kind and numerical designation of the bonds, and the amount thereof so transferred.

Act June 3, 1864, c. 106, § 19, 13 Stat. 105.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by national banks for the issue of the additional circulating notes authorized by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this title.

See notes to R. S. § 5160, ante, § 9699.

§ 9704. (R. S. § 5165.) Examination of registry and bonds.

The Comptroller of the Currency shall have at all times, during office-hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office-hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer, to ascertain their amount and condition.

Act June 3, 1864, c. 106, § 20, 13 Stat. 105.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of the additional circulating notes authorized by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

See notes to R. S. § 5160, ante, § 9699.

§ 9705. (R. S. § 5166.) Annual examination of bonds by associations.

Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association.

Act June 3, 1864, c. 106, § 25, 13 Stat. 106.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by national banks for the issue of the additional circulating notes authorized by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

See notes to R. S. § 5160, ante, § 9699.

§ 9706. (R. S. § 5167.) Custody of bonds, collection of interest, etc.

The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are

redeemed, except as provided in this Title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association, for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: Provided, That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

Act June 3, 1864, c. 106, § 26, 13 Stat. 107.

This section was not modified or repealed by the Parity Act of March 14, 1900, c. 41, § 12, post, § 9713, by a proviso to that effect annexed to said section.

Provisions authorizing the deposit of lawful money, the return of bonds deposited, and the withdrawal, in whole or in part, of the circulating notes were made by the Currency Act of June 20, 1874, c. 343, § 4, post, § 9707, and the Currency Act of July 12, 1882, c. 290, § 9, post, § 9709.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by national banks for the issue of the additional circulating notes authorized by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

See notes to R. S. § 5160, ante, § 9699.

Notes of Decisions

Set-off against proceeds of bonds.—See Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 567, 107 U. S. 445, 27 L. Ed. 537.

See, also, note under § 9701, ante.

Postal and money order funds.—Where postal and money order funds have been deposited by a deputy postmaster, without security, in a bank which subsequently becomes insolvent, a bill by the United States claiming a priority over other creditors, will be dismissed. Cook County Nat. Bank v. U. S. (1882) 2 Sup. Ct. 561, 107 U. S. 445, 27 L. Ed. 537.

§ 9707. (Act June 20, 1874, c. 343, § 4.) Withdrawal of circulating notes on deposit of lawful money and withdrawal of bonds.

Any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national-bank act; and the outstanding

notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: Provided, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars. (18 Stat. 124.)

This section was part of the Currency Act of 1874, cited above.

See notes to section 1 of the act, ante, § 9657.

Section 19 of the National Bank Act of June 3, 1864, c. 106, 33 Stat. 105, referred to in this section, was incorporated into R. S. §§ 5162–5164, ante, §§ 9671–9673.

Subsequent provisions for the withdrawal of circulating notes were made by the Currency Act of July 12, 1882, c. 290, § 9, post, § 9709.

So much of this section as required that before any national banking association should be authorized to commence business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

Notes of Decisions

Amount of deposit.—National banks with a capital of $50,000 may (notwithstanding the proviso in this section) still be organized, as heretofore, upon a deposit of $30,000 in bonds, and those with a capital of not less than $150,000 upon a deposit of one-third of their capital stock in bonds. (1874) 14 Op. Atty. Gen. 415.

Lawful money.—The act of 1874 was not intended to repeal or affect the general provisions of law making the coins of the United States a legal tender in all payments. (1881) 17 Op. Atty. Gen. 144.

Silver certificates are not lawful money within the meaning of this section and section 9709, post. (1894) 20 Op. Atty. Gen. 725.

Withdrawal of notes and bonds.—National banks desiring to withdraw their circulating notes and take up the bonds deposited with the United States Treasurer as security therefor, may do so, under this section, by depositing with the Treasurer the required amount in lawful money, which may consist either of coin or of legal tender notes. (1881) 17 Op. Atty. Gen. 121.

A national bank whose charter is about to expire, but which has taken no steps toward going into liquidation, cannot withdraw all of the bonds deposited to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation, notwithstanding the provisions of section 9699, ante, and this section. (1882) 17 Op. Atty. Gen. 409.

Redemption—Retirement of circulation.—Where certain 3 per cent. bonds of the United States, held by the United States Treasurer as security for the circulating notes of a national bank, were called in for redemption and ceased to be interest bearing, advised that, unless the bank substitute interest-bearing bonds for the called bonds, the proceeds of the latter must be applied to retiring the circulation secured thereby. (1886) 18 Op. Atty. Gen. 493.

The Treasury, while privileged to redeem circulation in United States notes, has also the right to redeem the same circulation in coin. (1881) 17 Op. Atty. Gen. 144.

§ 9708. (Act July 12, 1882, c. 290, § 8.) Amount of bonds required to be on deposit; reduction of amount or retirement in full of circulating notes.

National banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States United States bonds in excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law; provided That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: Provided further, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the re-

demption of national-bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one. (22 Stat. 164.)

This section and the section next following were part of the Currency Act of 1882, cited above, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes."

See notes to section 1 of the act, ante, § 9665.

The limitation by this section of the amount of the circulating notes to not to exceed 90 per centum of the bonds deposited was superseded by the Parity Act of March 14, 1900, c. 41, § 12, post, § 9713.

Section 3 of the Currency Act of June 20, 1874, c. 343, mentioned in this section, is set forth post, § 9751.

So much of this section as required that before any national banking association should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

§ 9709. (Act July 12, 1882, c. 290, § 9, as amended, Act March 14, 1900, c. 41, § 12, Act March 4, 1907, c. 2913, § 4, and Act May 30, 1908, c. 229, § 10.) Withdrawal of circulating notes on deposit of lawful money, etc., and withdrawal of bonds or other securities.

Any national banking association desiring to withdraw its circulating notes, secured by deposit of United States bonds in the manner provided in section four of the Act approved June twentieth, eighteen hundred and seventy-four, is hereby authorized for that purpose to deposit lawful money with the Treasurer of the United States and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, to withdraw a proportionate amount of bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be so deposited during any calendar month for this purpose.

Any national banking association desiring to withdraw any of its circulating notes, secured by the deposit of securities other than bonds of the United States, may make such withdrawal at any time in like manner and effect by the deposit of lawful money or national bank notes with the Treasurer of the United States, and upon such deposit a proportionate share of the securities so deposited may be withdrawn: Provided, That the deposits under this section to retire notes secured by the deposit of securities other than bonds of the United States shall not be covered into the Treasury, as required by section six of an Act entitled "An Act directing the purchase of silver bullion and the issue of Treasury notes thereon, and for other purposes," approved July fourteenth, eighteen hundred and ninety, but shall be retained in the Treasury for the purpose of redeeming the notes of the bank making such deposit. (22 Stat. 164. 31 Stat. 49. 34 Stat. 1290. 35 Stat. 551.)

See notes to sections 1 and 8 of this act, ante, §§ 9665, 9708.

This section, as originally enacted, was as follows:

"Any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June twentieth, eighteen hundred and seventy-four, entitled 'An act fixing the amount of United States notes, providing for a redistribution of national-bank currency, and for other purposes,' or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits; and no na-

tional bank which makes any deposit of lawful money in order to withdraw its circulating notes shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: Provided, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: And provided further, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof."

The Parity Act of March 4, 1900, c. 41, § 12, 31 Stat. 49, cited above, repealed so much of this act "as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid."

The section was amended by Act March 4, 1907, c. 2913, § 4, also cited above, to read as follows:

"Any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the Act of June twentieth, eighteen hundred and seventy-four, or as provided in this Act, is authorized to deposit lawful money and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be deposited during any calendar month for this purpose: And provided further, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to withdrawal of circulating notes in consequence thereof."

It was again amended by Act May 30, 1908, c. 229, § 10, last cited above, to read as set forth here.

Said amendatory section was a part of the Aldrich-Vreeland (National Currency Associations) Act of 1908, entitled "An act to amend the national banking laws," which became inoperative by limitation on June 30, 1915. See notes to Chapter Two A of this Title.

The Currency Act of June 20, 1874, c. 343, § 4, mentioned in this section, is set forth ante, § 9707.

The Sherman Purchase of Silver Act of July 14, 1890, c. 708, § 6, also mentioned in this section, is set forth post, § 9754.

All provisions of existing statutes requiring that before any national banking association should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds, were repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 17, 38 Stat. 268.

§ 9710. (R. S. § 5168.) Comptroller to determine if associations can commence business.

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

Act June 3, 1864, c. 106, § 17, 13 Stat. 104.

Notes of Decisions

Conclusiveness of acts of comptroller.—Acts of the Comptroller of the Currency within the National Banking Law, conferring on him extensive powers of control and visitation over national banks, are not subject to review

by the courts. First Nat. Bank v. Murray (1914) 212 Fed. 140, 128 C. C. A. 652.

Remedies of comptroller.—The remedies given by the national banking law for a violation of its provisions may be pursued by the Comptroller of the Currency. (1869) 13 Op. Atty. Gen. 56.

Cited without definite application, McCormick v. Market Nat. Bank (1897) 17 Sup. Ct. 433, 436, 165 U. S. 538, 41 L. Ed. 817.

§ 9711. (R. S. § 5169.) Certificate of authority to commence banking to be issued.

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

Act June 3, 1864, c. 106, §§ 12, 18, 13 Stat. 102, 104.

Notes of Decisions

Conclusiveness of certificate.—The comptroller's certificate as to the completeness of the organization as determined by him under this section is conclusive in a suit to enforce the liability of stockholders. Casey v. Galli (1876) 94 U. S. 673, 679, 24 L. Ed. 168.

The comptroller's certificate is conclusive of the facts authorizing its issuance. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46, 47, affirmed (1900) 99 Fed. 801, 40 C. C. A. 93.

Certificate as evidence.—Comptroller's certificate as proof of organization, see Keyser v. Hitz (1890) 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; Hanover National Bank v. Johnson (1890) 8 South. 42, 90 Ala. 549; Mix v. National Bank of Bloomington (1878) 91 Ill. 20, 33 Am. Rep. 44; Washington County National Bank v. Lee (1873) 112 Mass. 521; Tapley v. Martin (1874) 116 Mass. 275; Merchants' National Bank of Bangor v. Glendon (1876) 120 Mass. 97; Thatcher v. West River National Bank (1869) 19 Mich. 196; First National Bank of Memphis v. Kidd (1874) 20 Minn. 234 (Gil. 212); Merchants' Exchange Nat. Bank v. Cardozo (1872) 35 N. Y. Super. Ct. 162; Citizens' Nat. Bank of Watertown v. Great Western Elevator Co. (1900) 82 N. W. 186, 13 S. D. 1; National Bank of Commerce of Tacoma v. Galland (1896) 45 Pac. 35, 14 Wash. 502.

The certificate of the comptroller is conclusive as to the completeness of the organization under the act of congress, in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank. Casey v. Galli (1876) 94 U. S. 673, 24 L. Ed. 168, 307.

In a suit by a national bank, as indorsee, upon a note, under the issue upon a plea of nul tiel corporation, the certificate of the comptroller of the currency issued under this section, that such association had complied with the law, etc., was admissible in evidence. Mix v. National Bank of Bloomington (1878) 91 Ill. 20, 33 Am. Rep. 44.

A comptroller's certificate of the due organization of "the Washington County National Bank of Greenwich, in the county of Washington and state of New York,"—held, in the absence of proof that there was any other bank at Greenwich so named, to warrant an inference that the plaintiff bank was duly organized, although describing itself in its declaration as "the Washington County National Bank, a corporation duly established by law, and doing business in Greenwich," etc. Washington County Nat. Bank v. Lee (1873) 112 Mass. 521.

It is no objection to the admission in evidence of the certificate of the organization of a national bank that the notary before whom it was acknowledged appears to be one of the shareholders of the bank. The comptroller's certificate of compliance with the act of congress removes any objection which might otherwise have been made to the evidence on which he acted. Thatcher v. West River Nat. Bank (1869) 19 Mich. 196.

A copy of the certificate of the organization of a national bank, certified by the comptroller of the currency, as required by the national banking act of congress, and the certificate of the comptroller authorizing it to commence business, together with other facts tending to show it had acted as a cor-

poration under the certificate, is sufficient evidence of incorporation. Merchants' Exch. Nat. Bank v. Cardozo (1872) 35 N. Y. Super. Ct. (3 Jones & S.) 162.

Such certificate is conclusive evidence of the incorporation of the association to which it is issued. Citizens' Nat. Bank v. Great Western Elevator Co. (1900) 82 N. W. 186, 13 S. D. 1.

Cited without definite application, Casey v. Galli (1876) 94 U. S. 673, 678, 24 L. Ed. 168; McCormick v. Market Nat. Bank (1897) 17 Sup. Ct. 433, 436, 165 U. S. 538, 41 L. Ed. 817.

§ 9712. (R. S. § 5170.) Publication of certificate.

The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

Act June 3, 1864, c. 106, § 18, 13 Stat. 104.

(R. S. § 5171. Repealed.)

This section, as enacted in the Revised Statutes, was as follows:

"Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market-value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum: Provided, That the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more:

"First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

"Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

"Third. To each association whose capital exceeds one million of dollars, but does not exceed three million of dollars, seventy-five per centum of such capital.

"Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital."

It was repealed by the Currency Act of July 12, 1882, c. 290, § 10, 22 Stat. 165, which further provided as follows:

"Upon a deposit of bonds as described by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, except as modified by section four of an act entitled 'An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes,' approved June twentieth, eighteen hundred and seventy-four, and as modified by section eight, of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed ninety per centum of the amount at such time actually paid in of its capital stock."

Said repealing section was superseded by the Parity Act of March 14, 1900, c. 41, § 12, post, § 9713, which prescribed the manner in which circulating notes were to be issued.

§ 9713. (Act March 14, 1900, c. 41, § 12.) Delivery of circulating notes.

Upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par

value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: Provided, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: And provided further, That the circulating notes furnished to national banking associations under the provisions of this Act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this Act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: And provided further, That the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in: And provided further, That under regulations to be prescribed by the Secretary of the Treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the Treasurer to secure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence, and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed. (31 Stat. 49.)

This section was part of the Parity Act of March 14, 1900, c. 41, cited above. See notes to section 1 of the act, ante, § 6480.

This section superseded Act July 12, 1882, c. 290, § 10, 22 Stat. 165, which repealed R. S. § 5171, and provided a substitute therefor. It also superseded so much of section 8 of said act, ante, § 9708, as limited the circulation of banks having a capital of $150,000, or less, to ninety per centum of the bonds deposited.

The denominations of circulating notes were prescribed by R. S. § 5172, post, § 9714.

The two per cent. bonds mentioned in this section were those authorized to be issued by section 11 of this act, ante, § 6825.

The provisions of the act referred to in this section as repealed thereby were part of the Currency Act of July 12, 1882, c. 290, § 9, ante, § 9709. See note under that section.

Cited without definite application, Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 564, 107 U. S. 445, 27 L. Ed. 537.

§ 9714. (R. S. § 5172, as amended, Act May 30, 1908, c. 229, § 11, Act Dec. 23, 1913, c. 6, § 27, and Act Aug. 4, 1914, c. 225.) Printing, denominations, and form of the circulating notes.

In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations en-

titled to receive the same. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct.

Act June 3, 1864, c. 106, § 22, 13 Stat. 105. Act May 30, 1908, c. 229, § 11, 35 Stat. 551. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274. Act Aug. 4, 1914, c. 225, 38 Stat. 682.

This section was amended by the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, § 11, cited above, to read as follows:

"In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, one thousand dollars, and ten thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall state upon their face that they are secured by United States bonds or other securities, certified by the written or engraved signatures of the Treasurer and Register and by the imprint of the seal of the Treasury. They shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signature of the president or vice-president and cashier. The Comptroller of the Currency, acting under the direction of the Secretary of the Treasury, shall as soon as practicable cause to be prepared circulating notes in blank, registered and countersigned, as provided by law, to an amount equal to fifty per centum of the capital stock of each national banking association; such notes to be deposited in the Treasury or in the subtreasury of the United States nearest the place of business of each association, and to be held for such association, subject to the order of the Comptroller of the Currency, for their delivery as provided by law: Provided, That the Comptroller of the Currency may issue national bank notes of the present form until plates can be prepared and circulating notes issued as above provided: Provided, however, That in no event shall bank notes of the present form be issued to any bank as additional circulation provided for by this Act."

It was re-enacted by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, cited above, to read as set forth here. Said last-mentioned section provided that R. S. § 5172, which was amended by said Act May 30, 1908, c. 229, § 11, should be re-enacted to read as such section read "prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act."

The charter-number of each banking association was required to be printed on each circulating note issued, by the Currency Act of June 20, 1874, c. 343. § 5, post, § 9715.

The paper used in printing United States notes was required to be used in printing the circulating notes, by Act March 3, 1875, c. 130, § 1, post, § 9716.

Circulating notes issued to banks after their period of corporate succession has been extended were required to be so printed as to be distinguishable from those issued before said extension, by the Currency Act of July 12, 1882, c. 290, § 6, ante, § 9670.

Provisions defining and punishing the forging and uttering of circulating notes were made by R. S. § 5415, which was incorporated into the Criminal Code, in section 149 thereof, post, § 10319, and was repealed by section 341 thereof, post, § 10515.

Provisions defining and punishing the trafficking in forged notes were made by R. S. § 5434, which was incorporated into the Criminal Code, in section 154 thereof, post, § 10324, and was repealed by section 341 thereof, post, § 10515.

Notes of Decisions

Local bond issue.—The proposed issue of interest-bearing bonds in small denominations by the county commissioners of Floyd County, Ga., will not be in conflict with the banking laws of the United States. (1894) 21 Op. Atty. Gen. 70.

Note for fractional sum.—No provision is made for a note for less than one dollar. A note for a fractional sum

is not only unknown to the law, but its issue is unlawful. The supreme court, by deciding that an obligation "payable in goods" was not illegal, has left the inference to follow almost necessarily that it was not such a note as was contemplated by the statute, and therefore not taxable. In re Aldrich (D. C. 1883) 16 Fed. 369.

Construction of vaults.—While the Secretary of the Treasury was not authorized by section 16 of the act of May 30, 1908 (35 Stat. 552), to rent vault room in the District of Columbia for the storage of certain emergency national bank notes until additional vault room can be constructed in the treasury building, he is authorized to make necessary expenditures for the construction of vaults to be used for the purposes mentioned in this section. (1909) 27 Op. Atty. Gen. 270.

Cited without definite application, Logan v. U. S. (1903) 123 Fed. 291, 292, 59 C. C. A. 476; Ex parte Houghton (D. C. 1881) 7 Fed. 657, 658.

§ 9715. (Act June 20, 1874, c. 343, § 5.) Charter-numbers to be printed on notes.

The Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter-numbers of the association to be printed upon all national-bank notes which may be hereafter issued by him. (18 Stat. 124.)

This section was part of the Currency Act of 1874, cited above.
See notes to section 1 of the act, ante, § 9657.

§ 9716. (Act March 3, 1875, c. 130, § 1.) Distinctive paper for printing notes.

The national-bank notes shall be printed under the direction of the Secretary of the Treasury, and upon the distinctive or special paper which has been, or may hereafter be, adopted by him for printing United States notes. (18 Stat. 372.)

This was a proviso annexed to an appropriation for making and issuing the national currency in the sundry civil appropriation act for the fiscal year 1876, cited above.

Any distinctive paper for use in the printing of national bank notes, which may be available, may be used for printing the federal reserve notes, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 16, post, § 9799.

§ 9717. (R. S. § 5173.) Plates and dies to be under control of Comptroller.

The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the Bureau of the Currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this Title.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Provisions requiring banks to reimburse the Treasury for the cost of engraving plates ordered by them were made by the Currency Act of June 20, 1874, c. 343, § 3, post, § 9751.

Provisions requiring banks to pay the cost of making plates for their new notes in case they extend their corporate succession were made by the Currency Act of July 12, 1882, c. 290, § 6, ante, § 9670.

§ 9718. (R. S. § 5174, as amended, Act Feb. 27, 1877, c. 69, § 1.) Annual examination of plates, dies, etc.

The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, bed-pieces, and other material from which the national-bank circulation is printed, in whole or in part, and file in his Office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of

any appropriation made by Congress for the special examination of national banks and bank-note plates.

Act March 3, 1873, c. 269, § 4, 17 Stat. 603. Act Feb. 27, 1877, c. 69, 19 Stat. 252.

This section was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by striking out, after the words "the plates, dies," the words "but pieces," and substituting therefor the word "bed-pieces," as set forth here.

This section was made applicable to the plates, etc., for the printing of the federal reserve notes, by the Federal Reserve Act of Dec. 23, 1913, c. 6, by section 16 thereof, post, § 9799.

§ 9719. (R. S. § 5175.) Limit to issue of notes under five dollars.

Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

Act June 3, 1864, c. 106, § 22, 13 Stat. 105.

Subsequent provisions relating to the limit of the issuance of circulating notes of the denomination of five dollars were made by the Parity Act of March 14, 1900, c. 41, § 12, ante, § 9713.

(R. S. § 5176. Repealed.)

This section was as follows:

"No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars."

It was repealed by the Currency Act of July 12, 1882, c. 290, § 10, 22 Stat. 165, which enacted a substitute for R. S. § 5171, which in turn was superseded by the Parity Act of March 14, 1900, c. 41, § 12, ante, § 9713.

(R. S. § 5177. Repealed.)

This section provided that the aggregate amount of circulating notes issued under Act Feb. 25, 1863, c. 58, 12 Stat. 665; Act June 3, 1864, c. 106, 13 Stat. 99; Act July 12, 1870, c. 252, § 1, 16 Stat. 251, and this Title, should not exceed $354,000,000. It was repealed by the Resumption Act of Jan. 14, 1875, c. 15, § 3, post, § 9720.

§ 9720. (Act Jan. 14, 1875, c. 15, § 3.) Aggregate amount of circulating notes not limited.

Section five thousand one hundred and seventy-seven of the Revised Statutes of the United States, limiting the aggregate amount of circulating-notes of national banking-associations, be, and is hereby, repealed; and each existing banking-association may increase its circulating-notes in accordance with existing law without respect to said aggregate limit; and new banking-associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national-bank currency among the several States and Territories are hereby repealed. (18 Stat. 296.)

This was part of the last section of the Resumption Act of 1875, cited above.

See notes to section 1 of the act, ante, § 6542.

A further provision of this section was as follows:

"And provided that whenever, and so often, as circulating notes shall be issued to any such banking association, so increasing its capital or circulating notes, or so newly organized as aforesaid, it shall be the duty of the Secretary of the Treasury to redeem the legal-tender United States notes in excess only of three hundred million of dollars, to the amount of eighty per centum of the sum of national bank notes so issued to any such banking association as aforesaid, and to continue such redemption as such circulating notes are issued until there shall be outstanding the sum of three hundred million dollars of such legal-tender United States notes, and no more."

This provision was superseded by Act May 31, 1878, c. 146, ante, § 6562, which prohibited the further cancellation and retirement of United States legal-tender notes.

The remaining provisions of this section, omitted here, relating to the redemption of legal-tender notes, and the issue and sale of bonds for that purpose, are set forth ante, § 6543.

R. S. § 5177, repealed by this section, limited the aggregate amount of circulating notes issued under certain acts to not to exceed $354,000,000.

R. S. §§ 5178, 5179, 5180, and 5181, and Act June 20, 1874, c. 343, §§ 7, 8, 9, were also repealed by this section.

Cited without definite application, Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 595, 139 U. S. 438, 35 L. Ed. 210.

See, also, note under § 5219, ante.

(R. S. §§ 5178–5181. Repealed.)

R. S. § 5178, was as follows:

"One hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population. One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and District. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion."

R. S. § 5179, was as follows:

"In order to secure a more equitable distribution of the national banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amount so withdrawn shall not exceed twenty-five million dollars: Provided, That no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the act of July twelfth, eighteen hundred and seventy, shall have been taken up."

R. S. § 5180, was as follows:

"The Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding proportionately with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days' notice thereof in one daily newspaper printed in Washington and one in New York City, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compliance with such requisition; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned; and shall pay the balance, if any, to the association."

R. S. § 5181, was as follows:

"Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall prescribe: Provided, That the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight."

These four sections were included in the repeal of "the provisions of law for the withdrawal and redistribution of national-bank currency among the several States and Territories," by the Resumption Act of Jan. 14, 1875, c. 15, § 3, ante, § 9720.

§ 9721. (R. S. § 5182.) For what demands national bank notes may be received.

After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

Act June 3, 1864, c. 106, § 23, 13 Stat. 106.

Provisions requiring the redemption of lost or stolen notes put in circulation without the signature or upon the forged signature of the proper officers are contained in Act July 28, 1892, c. 317, post, § 9755.

Notes of Decisions

Payment in notes—Circulating medium.—While a company may issue promissory notes, in the form of bank notes, in payment, they have no right to issue them for the purpose of putting them in circulation as a current circulating medium. U. S. v. Ray (C. C. 1817) Fed. Cas. No. 16,124.

A payment in bank notes issued without authority of the bank is not valid where the party paying knew that fact at the time. Cassedy v. Williams (C. C. 1843) Fed. Cas. No. 2,501.

Cited without definite application, Hollister v. Zion's Co-operative Mercantile Inst. (1884) 4 Sup. Ct. 263, 264, 111 U. S. 62, 28 L. Ed. 352; Woodruff v. Mississippi (1896) 16 Sup. Ct. 820, 823, 162 U. S. 291, 40 L. Ed. 973; Logan v. U. S. (1903) 123 Fed. 291, 292, 59 C. C. A. 476.

§ 9722. (R. S. § 5183, as amended, Act Feb. 18, 1875, c. 80, § 1.) Issue of other notes prohibited.

No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this Title.

Act June 3, 1864, c. 106, § 23, 13 Stat. 106. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 320.

This section was amended by Act Feb. 18, 1875, c. 80, § 1, cited above, by adding, after the words "shall issue," the words "post notes or," as set forth here.

Notes of Decisions

Certificates of deposit.—Certificates of deposit in the ordinary form issued by bank to depositors and payable to order, are not post notes, within the prohibition of this section. Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 505.

The issuing of certificates of deposit by a national bank is not illegal, as being in violation of this section, which forbids national banks to issue any other notes to circulate as money than such as are authorized by the provisions of the statute. Hunt v. Appellant from Decree of Judge of Probate (1886) 141 Mass. 515, 6 N. E. 554.

This section does not apply to time certificates of deposit, representing an actual loan. Logan Nat. Bank v. Williamson (1887) 2 Ohio Cir. Ct. R. 118.

Post notes do not include time certificates of deposit, representing an actual loan, which are not intended to circulate as money. Logan Nat. Bank v. Williamson (C. C. 1887) 2 Ohio Cir. Ct. R. 118, 1 O. C. D. 395.

§ 9723. (R. S. § 5184.) Destroying and replacing worn-out and mutilated notes.

It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or

surrendered to be canceled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled.

Act June 3, 1864, c. 106, § 24, 13 Stat. 106.

Provisions relating to the destruction of national bank notes by maceration, and repealing so much of this section as required such notes to be burned, were made by Act June 23, 1874, c. 455, § 1, ante, § 6560.

§ 9724. (R. S. § 5185.) Organization of associations to issue gold notes authorized.

Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.

Act July 12, 1870, c. 252, § 3, 16 Stat. 252.

Provisions relating to the removal of the limitation restricting the circulation of banking associations issuing notes payable in gold were made by Act Jan. 19, 1875, c. 19; post, § 9725.

Provisions authorizing the conversion of national gold banks into currency banks were made by Act Feb. 14, 1880, c. 25, post, § 9727.

§ 9725. (Act Jan. 19, 1875, c. 19.) Removal of limitation on circulation of gold banks.

So much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking-associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be, and the same is hereby, repealed; and each of such existing banking-associations may increase its circulating-notes, and new banking-associations may be organized, in accordance with existing law, without respect to such limitation. (18 Stat. 302.)

This was an act entitled "An act to remove the limitation restricting the circulation of banking-associations issuing notes payable in gold."

R. S. § 5185, mentioned in this section, is set forth ante, § 9724. See notes to that section.

§ 9726. (R. S. § 5186.) Their lawful money reserve, and duty of receiving notes of other associations.

Every association organized under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold-notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: Provided, That, in applying the same to associations organized for issuing gold-notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such associations shall not be within the limitation of circulation mentioned in this Title.

Act July 12, 1870, c. 252, §§ 3-5, 16 Stat. 252, 253.

§ 9727. (Act Feb. 14, 1880, c. 25.) Conversion of national gold banks into currency banks.

Any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: Provided, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank. (21 Stat. 66.)

This was an act entitled "An act authorizing the conversion of national gold banks."

R. S. §§ 5133, 5154, mentioned in this section, are set forth ante, §§ 9658, 9694.

§ 9728: (R. S. § 5187.) Penalty for issuing circulating notes to unauthorized associations.

No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

Act June 3, 1864, c. 106, § 27, 13 Stat. 107.

(R. S. §§ 5188, 5189. Repealed.)

R. S. § 5188, made punishable the imitating of national bank notes by business, etc., cards, etc., or advertisements, or writing, printing, etc., on such notes, any business, etc., card, or notice or advertisement.

R. S. § 5189, made punishable the mutilating, etc., national bank notes, etc., with intent to render the same unfit to be reissued.

These two sections were incorporated into the Criminal Code, in sections 175, 176, thereof, respectively, post, §§ 10345, 10346, and were repealed by section 341 thereof, post, § 10515.

CHAPTER TWO A

National Currency Associations

This chapter, inserted here as additional to the original chapters of this Title of the Revised Statutes, included the provisions for the issue by national currency associations of additional circulating notes, in emergencies; being parts of the Aldrich-Vreeland (National Currency Associations) Act of May 30, 1908, c. 229, 35 Stat. 546, Act Aug. 22, 1911, c. 36, § 4, 35 Stat. 553, and Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274.

Section 1 of said Act May 30, 1908, c. 229, authorized national banking associations having a certain amount of capital and surplus to form voluntary associations, to be designated as national currency associations, prescribed the method of organizing such associations, limited the number of such associations in any one city, designated the geographical locations of such associations, provided for the admission to such associations of national banks having the necessary qualifications, provided that each association should be composed exclusively of banks not members of any other association, provided for the effect of the dissolution of a member of such association and the effect of the reduction in number of members of such associations, provided for the management of the affairs of such associations, provided for the making of by-laws by such associations, prescribed the officers of such associations, prescribed the powers of the executive committees of such associations, provided for the issue

by such associations of additional circulating notes on deposit of securities, including commercial paper, and prescribed the liability of the banks belonging to such associations and their assets for the redemption of such additional circulating notes.

Section 2 of said act prescribed the procedure to be followed on the failure of any bank belonging to such associations to preserve or make good its fund for the redemption of the circulating notes issued under the provisions of section 1.

Section 3 of said act provided for the issue by national banks, under certain conditions, of additional circulating notes on deposit of bonds other than United States bonds.

Section 4 of said act provided for the disposition, etc., of the bonds deposited under section 3.

Section 5 of said act prescribed the status of the additional circulating notes issued under the act, and limited the amount of such notes which might be issued.

Section 6 of said act provided for an additional redemption fund for additional circulating notes outstanding.

Section 7 of said act provided for the distribution of the additional circulating notes proportionate to the capital and surplus of national banks in each state, and provided for emergency assignments of such circulating notes not applied for from the amounts authorized.

Section 8 of said act required the Secretary of the Treasury to obtain information as to the securities acceptable under the act and to furnish such information to national banks.

Section 9 of said act amended R. S. § 5214, post, § 9779, but said section was re-enacted to read as it stood prior to said amendment, with an amendment of a portion thereof, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682.

Section 10 of said act amended the Currency Act of July 12, 1882, c. 290, § 9, as previously amended by Act March 4, 1907, c. 2913, § 4, and is incorporated in said section as set forth ante, § 9709.

Section 11 of said act amended R. S. § 5172, and is incorporated in said section as set forth post, § 9714.

Section 12 of said act provided for the redemption by the Treasury of circulating notes of national banking associations in lawful money of the United States. It is set forth post, § 9752.

Section 13 of said act required all acts and orders of the Comptroller of the Currency and the Treasurer of the United States authorized by the act to be approved by the Secretary of the Treasury, and gave the Secretary power to make rules and regulations concerning, and exercise such control over, the organization and management of national currency associations as might be necessary to carry out the purposes of the act.

Section 14 of said act provided that the provisions of R. S. § 5191 (post, § 9746) should not apply to deposits of public moneys by the United States in designated depositaries. It is set forth ante, § 9692.

Section 15 of said act prescribed the rate of interest on special and additional deposits in national banks designated as depositaries. It is set forth ante, § 9693.

Section 16 of said act appropriated a sum sufficient to carry out the provisions of the preceding sections of the act, out of any money in the Treasury not otherwise appropriated, and was merely temporary in its legal effect.

Section 17 of said act created a National Monetary Commission.

Section 18 of said act prescribed the duties and powers of said Commission.

Section 19 of said act made an appropriaton for the expenses of the Commission.

Section 20 of said act provided that the act should expire by limitation on June 30, 1914.

Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, extended the limitation fixed by said section 20 for another year. Said section read as follows:

"The provisions of the Act of May thirtieth, nineteen hundred and eight, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, which expires by limitation under the terms of such Act on the thirtieth day of June, nineteen hundred and fourteen, are hereby extended to June thirtieth, nineteen hundred and fifteen, and sections fifty-one hundred and fifty-three, fifty-one hundred and seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and fourteen of the Revised Statutes of the United States, which were amended by the Act of May thirtieth, nineteen hundred and eight, are hereby reenacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act: Provided, however, That section nine of the Act first referred to in this section is hereby amended so as to change the tax rates fixed in said Act by making the

portion applicable thereto read as follows: National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes."

Said Act Dec. 23, 1913, c. 6, § 27, was amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, to read as follows:

"The provisions of the Act of May thirtieth, nineteen hundred and eight, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, which expires by limitation under the terms of such Act on the thirtieth day of June, nineteen hundred and fourteen, are hereby extended to June thirtieth, nineteen hundred and fifteen, and sections fifty-one hundred and fifty-three, fifty-one hundred and seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and fourteen of the Revised Statutes of the United States, which were amended by the Act of May thirtieth, nineteen hundred and eight, are hereby reenacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act: Provided, however, That section nine of the Act first referred to in this section is hereby amended so as to change the tax rates fixed in said Act by making the portion applicable thereto read as follows:

"National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes: Provided further, That whenever in his judgment he may deem it desirable, the Secretary of the Treasury shall have power to suspend the limitations imposed by section one and section three of the Act referred to in this section, which prescribe that such additional circulation secured otherwise than by bonds of the United States shall be issued only to National banks having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of the capital stock of such banks, and to suspend also the conditions and limitations of section five of said Act except that no bank shall be permitted to issue circulating notes in excess of one hundred and twenty-five per centum of its unimpaired capital and surplus. He shall require each bank and currency association to maintain on deposit in the Treasury of the United States a sum in gold sufficient in his judgment for the redemption of such notes, but in no event less than five per centum. He may permit National banks, during the period for which such provisions are suspended, to issue additional circulation under the terms and conditions of the Act referred to as herein amended: Provided further, That the Secretary of the Treasury, in his discretion, is further authorized to extend the benefits of this Act to all qualified State banks and trust companies, which have joined the Federal reserve system, or which may contract to join within fifteen days after the passage of this Act."

The date last mentioned having passed without any further extension having been made, said Act May 30, 1908, c. 229, became inoperative, and is therefore omitted from this compilation, except sections 12, 14, and 15, which are set forth post, § 9752, and ante, §§ 9692, 9693, respectively.

Act Aug. 22, 1911, c. 36, § 4, 37 Stat. 30, provided that:

"No one receiving a salary or emoluments from the Government of the United States, in any capacity, shall receive any salary or emolument as a member or employé of said commission from the date of the passage of this Act: Provided, That voluntary assistance, without compensation, may be accepted by the commission from present employés or from others whose assistance may be desired by the commission."

Said section is also omitted from this compilation for the reasons stated above.

Said Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by said Act Aug. 4, 1914, c. 225, 38 Stat. 682, is also omitted from this compilation for the reasons stated above.

The Federal Reserve Act of Dec. 23, 1913, c. 6, post, §§ 9785–9805, created a new system for the government and regulation of all national banks, and such of the state banks and trust companies as, possessing the necessary qualifications, should signify their acceptance of the act.

§§ 9729–9743. (Omitted as obsolete.)

These sections, which were Act May 30, 1908, c. 229, §§ 1–8, 13, 17–20, 35 Stat. 546, Act Aug. 22, 1911, c. 36, § 4, 37 Stat. 30, and Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, are omitted from this compilation as having expired by limitation. See notes at the beginning of this Chapter.

NOTES OF DECISIONS TO § 9729

Withdrawal from association.—A member of a national currency association duly organized under this act cannot, at its own pleasure, withdraw from such association. (1908) 27 Op. Atty. Gen. 53.

The several banks constituting a national currency association may give to each delegate to the governing body of the association the right to consent to the withdrawal of any particular bank belonging to the association, but such delegation of authority will always be revocable and cannot be permanently conferred by the by-laws of the association. Id.

NOTES OF DECISIONS TO § 9731

Purchase of municipal bonds.—A national bank may contract to buy municipal bonds. Junction City v. Central Nat. Bank of Junction City (Kan. 1915) 153 P. 28.

CHAPTER THREE

Regulation of the Banking Business

Sec.
9744. Place of business.
9745. Foreign branches.
9746. "Lawful-money reserve" prescribed.
9747. What may be counted toward the "lawful-money reserve."
9748. "Lawful-money reserve" to be determined by deposits.
9749. Additional "reserve cities" of 25,000 inhabitants.
9750. Additional "central reserve cities."
9751. Reserve in Treasury for redemption of circulation; redemption of circulating notes.
9752. Redemption by Treasury of circulating notes in lawful money.
9753. Clerical force for redemption of circulating notes.
9754. Disposition of money deposited for and redemption of circulating notes.
9755. Redemption of lost or stolen circulating notes.
9756. Place for redemption of circulating notes to be designated.
9757. National banks to receive notes of other national banks.
9758. Limitation upon rate of interest which may be taken.
9759. Consequences of taking usurious interest; jurisdiction of suits by or against national banks.
9760. Dividends.
9761. Limit to liabilities which may be incurred by any one person, etc.
9762. Associations not to loan or purchase their own stock.
9763. Loans on farm lands.
9764. Limit upon indebtedness to be incurred.
9765. Restriction upon use of circulating notes.
9766. Prohibition upon withdrawal of capital.
9767. Enforcing payment of deficiency in capital stock.
9768. Restriction upon use of notes of other banks.
9769. United States notes not to be held as collateral, etc.; penalty.
9770. Penalty for falsely certifying checks.
9771. Punishment for falsely certifying checks, etc.
9772. Embezzlement; penalty.
9773. List of shareholders, etc., to be kept.
9774. Reports to Comptroller of the Currency.
9775. Verification of reports.
9776. Report as to dividends.
9777. Penalty for failure to make reports.
9778. Reports of savings banks and savings and trust companies.
9779. Taxes on circulating notes, deposits and capital stock.
9780. Half-yearly return of circulation, deposits, and capital stock.
9781. Penalty for failure to make return.
9782. Penalty for failure to pay duties.
9783. Refunding excessive duties.
9784. State taxation.

§ 9744. (R. S. § 5190.) Place of business.

The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.

Act June 3, 1864, c. 106, § 8, 13 Stat. 101.

Provisions relating to change of place of business were made by Act May 1, 1886, c. 73, § 2, ante, § 9662.

Notes of Decisions

Place of transacting business.—A bank may purchase coin of another bank at the banking house of the latter. Merchants' Nat. Bank v. State Nat. Bank (1870) 10 Wall. 604, 651, 19 L. Ed. 1008.

The provision of this section as to the place at which the usual business of each national banking association shall be transacted refers to its usual business after obtaining the certificate from the comptroller, and to the place —that is, the city or town—in which, after it has been authorized by such certificate to commence business, its office or banking house is located. McCormick v. Market Nat. Bank (1897) 17 Sup. Ct. 433, 436, 165 U. S. 538, 41 L. Ed. 817.

There is no right to organize and carry on the business of a national bank except on the conditions and in the manner prescribed by the acts of Congress regulating national banks, of which all must take notice. First Nat. Bank v. Murray (1914) 212 Fed. 140, 128 C. C. A. 652.

Under this section a national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank. Armstrong v. Second Nat. Bank (D. C. 1889) 38 Fed. 883.

This section, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization. (1911) 29 Op. Atty. Gen. 81.

Banks created under the national banking act of the United States are not within St. § 571, providing that "all corporations, except foreign insurance companies, formed under the laws of this or any other state," shall at all times have a place of business in the state, and that no corporation shall carry on any business in the state, till it shall have filed a statement giving the location of its office and the name of its agent. First Nat. Bank v. Commonwealth (Ky. 1896) 33 S. W. 1105.

A national bank bookkeeper induced defendants to deposit funds in the bank, and from time to time received money outside the bank to be deposited for them, but so manipulated accounts as to enable him to appropriate the money to his own use; checks against the deposits being charged against other depositors. On discovery of the bookkeeper's defalcations, his surety paid the bank the shortage and took an assignment of the bank's claim against defendants, arising through the overdraft resulting from charging their checks against their account. Held that, in view of this section, as affecting defendants' liability to the surety, the bookkeeper must be deemed to have been defendants' agent, and not the bank's. Fidelity & Deposit Co. of Maryland v. Colby (Sup. 1911) 132 N. Y. Supp. 20.

Cited without definite application. Earling v. Emigh (1909) 30 Sup. Ct. 672, 674, 218 U. S. 27, 54 L. Ed. 915.

§ 9745. (Act Dec. 23, 1913, c. 6, § 25, as amended, Act Sept. 7, 1916, c. 461.) Foreign branches.

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local in-

stitutions in foreign countries, or in such dependencies or insular possessions.

Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described under subparagraph two of the first paragraph of this section shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to restrict its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being complied with, said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpœna witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the said Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." (38 Stat. 273. 39 Stat. 755.)

This section, as originally enacted, read as follows:

"Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal

agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient.

"Every national banking association which shall receive authority to establish foreign branches shall be required at all times to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and the Federal Reserve Board may order special examinations of the said foreign branches at such time or times as it may deem best. Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accruing at each branch as a separate item."

It was amended by Act Sept. 7, 1916, c. 461, cited above, to read as set forth here.

The Clayton Act of Oct. 15, 1914, c. 323, § 8, mentioned in this section, is set forth ante, § 8835h.

§ 9746. (R. S. § 5191.) "Lawful-money reserve" prescribed.

Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, § 31, 13 Stat. 108. Act March 1, 1872, c. 22, 17 Stat. 32.

This section was amended by Act June 20, 1874, c. 343, § 2, post, § 9748, by providing that the banking associations named should not be required to keep on hand any amount of money whatever by reason of the amount of their respective circulations, but that the moneys required to be kept on hand by said associations should be determined by the amount of their deposits solely, as provided by this section.

The Federal Reserve Act of Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, provided that this section and other specified sections of the Revised Statutes, which were amended by the Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, were re-enacted to read as they read prior to May 30, 1908, subject to such amendments and modifications as were prescribed in said Federal Reserve Act of 1913. This section not having been expressly amended by said Act May 30, 1908, c. 229, said provision of the Federal Reserve Act can have no effect other than to leave this section as set forth here, subject however, to any implied amend-

ments or modifications which may be found in the other provisions of said Federal Reserve Act of Dec. 23, 1913, c. 6, set forth post, §§ 9785–9805.

The provisions of this section, relating to reserves of national banks, were made inapplicable to deposits of public moneys in designated depositaries, by said Aldrich-Vreeland Act of May 30, 1908, c. 229, § 14, ante, § 9692. See notes to said § 9692, ante.

Upon application in writing by three-fourths of the national banks located in any city having a population of 50,000, asking that the name of such city be added to the cities named in this and the following section, the Comptroller of the Currency was authorized to grant the application, and every bank located in such city was required to keep on hand the reserve fund required by this section in the manner prescribed herein and by R. S. § 5195, by Act March 3, 1887, c. 378, § 1, post, § 9749.

Upon application in writing by three-fourths of the national banks in any city having a population of 200,000, asking that such city may be a "central reserve city," as provided by R. S. § 5195, the Comptroller of the Currency was authorized to grant the application, and every bank located in such city was required thereupon to have on hand twenty-five per cent. of its deposits, as provided by this section, by Act March 3, 1887, c. 378, § 2, post, § 9750.

The Federal Reserve Board was authorized to add to the number of reserve and central reserve cities, or reclassify the same, or terminate their designation as such, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 11, as amended by Act Sept. 7, 1916, c. 461, post, § 9794.

The amount of reserves to be kept by the Federal reserve banks, and their member banks, was prescribed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 19, as amended by Act Aug. 15, 1914, c. 252, post, § 9801.

Provisions for redemption of circulating notes at the Treasury were made by Act June 20, 1874, c. 343, § 3, Act March 3, 1875, c. 130, § 3, Act July 14, 1890, c. 708, § 6, post, §§ 9751, 9753, 9754.

Provisions for redemption of circulating notes of banks extending their period of corporate succession, issued prior to such extension, were made by Act July 12, 1882, c. 290, § 6, ante, § 9670.

Additional provisions for the retirement of circulating notes and the refunding of the bonds deposited as security therefor were made by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 18, post, § 9800.

The creation of Federal reserve districts, Federal reserve cities, and Federal reserve banks was provided for by said Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786.

National banks, failing to signify their acceptance of the Federal Reserve Act within a prescribed time, were required to cease to act as reserve agents, on notice to be given within the discretion of the Reserve Bank Organization Committee or the Federal Reserve Board, by said Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786.

The status of reserve cities and central reserve cities was not to be changed by the organization of Federal reserve districts, authorized by said Federal Reserve Act of Dec. 23, 1913, c. 6, post, §§ 9785–9805, except in so far as said act changed the amount of reserves that may be carried with approved reserve agents located therein, by a provision of section 2 of said act, post, § 9786.

Notes of Decisions

Operation of statute.—There is no right to organize and carry on the business of a national bank except as prescribed by the acts of Congress. First Nat. Bank v. Murray (1914) 212 Fed. 140, 128 C. C. A. 652.

Reserve prescribed—Circulating notes.—The German-American Savings Bank of Washington, D. C., incorporated under a law of Congress relating to the District of Columbia, and having a capital of $126,000, is, by virtue of section 6 of the act of June 30, 1876 (chapter 156), required to keep on hand a reserve of 25 per cent. of its deposits, and is entitled to receive circulating notes. (1877) 15 Op. Atty. Gen. 606.

Transfer of stock—Fraud of creditors.—A transfer of stock of a national bank made with knowledge that the bank's reserve was below the limit fixed by this section does not raise a presumption of bad faith avoiding the transaction as a fraud on the bank's creditors in the event of future suspension; the statute not creating a presumption of inability to continue business as a result of a reduction of the reserve below the legal requirement. Earle v. Carson (1903) 23 Sup. Ct. 254, 255, 188 U. S. 42, 47 L. Ed. 373.

Loss from bad loans.—A loss resulting to a national bank from bad loans, which were not repaid, cannot be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by this section. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

Liability of stockholders.—See Wright v. Merchants' Nat. Bank (C. C. 1876) Fed. Cas. No. 18,084.

See, also, note under § 9689, ante.

Appointment of receiver.—A stockholder of a national bank whose char-

ter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

Cited without definite application, Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 927, 141 U. S. 132, 35 L. Ed. 662; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Fisher v. Tradesmen's Nat. Bank (1894) 64 Fed. 706, 707, 12 C. C. A. 409; Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395; U. S. v. Schlierholz (D. C. 1905) 137 Fed. 616.

§ 9747. (R. S. § 5192.) What may be counted toward the "lawful-money reserve."

Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

Act June 3, 1864, c. 106, § 31, 13 Stat. 108.
See notes to R. S. § 5191, ante, § 9746.

§ 9748. (Act June 20, 1874, c. 343, § 2.) "Lawful-money reserve" to be determined by deposits.

That section thirty one of the "the national-bank act" be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section. (18 Stat. 123.)

This section was part of the Currency Act of 1874, cited above.
See notes to section 1 of this act, ante, § 9657.
Section 31 of the "national-bank act," mentioned in this section, was incorporated into R. S. §§ 5191, 5192, ante, §§ 9746, 9747.
See notes to said R. S. § 5191, ante, § 9746.
So much of this section as provided that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes should be counted as a part of its lawful reserve was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 20, post, § 9802, which also further provided that such fund of five per centum should in no case be counted by any national banking association as a part of its lawful reserve.

§ 9749. (Act March 3, 1887, c. 378, § 1, as amended, Act March 3, 1903, c. 1014.) Additional "reserve cities" of 25,000 inhabitants.

Whenever three-fourths in number of the national banks located in any city of the United States having a population of twenty-five thousand people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one

and fifty-one hundred and ninety-five of the Revised Statutes. (24 Stat. 559. 32 Stat. 1223.)

This was the first section of an act to amend R. S. §§ 5191, 5192, and for other purposes.

Section 2 of the act is set forth post, § 9750.

Section 3 of the act amended the Resumption Act of Jan. 14, 1875, c. 15, § 3, and is incorporated in the section amended as set forth ante, § 6543.

This section was amended by Act March 3, 1903, c. 1014, cited above, by reducing the limit of population of cities which may become reserve cities from 50,000 to 25,000.

R. S. §§ 5191, 5192, 5195, mentioned in this section, are set forth ante, §§ 9746, 9747, and post, § 9756.

See notes to said R. S. § 5191, ante, § 9746.

§ 9750. (Act March 3, 1887, c. 378, § 2.) Additional "central reserve cities."

Whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes. (24 Stat. 560.)

See notes to preceding section of this act, ante, § 9749, and to R. S. § 5191, ante, § 9746.

§ 9751. (Act June 20, 1874, c. 343, § 3.) Reserve in Treasury for redemption of circulation; redemption of circulating notes.

Every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars, or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating-notes so redeemed. And all notes of national banks worn, defaced, mutilated, or otherwise unfit for circulation shall, when received by any assistant treasurer or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating-notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed and re-

placed as now provided by law: Provided, That each of said associations shall re-imburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally re-imburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: And provided further, That so much of section thirty-two of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed. (18 Stat. 123.)

This section was part of the Currency Act of 1874, cited above.

See notes to section 1 of this act, ante, § 9657.

The provisions of section 32 of the National Bank Act of June 3, 1864, c. 106, 13 Stat. 109, mentioned in this section, were incorporated into R. S. § 5195, post, § 9756.

The manner of destroying circulating notes was prescribed by Act June 23, 1874, c. 455, § 1, ante, § 6560.

Provisions relating to the appointment of a clerical force to carry out the provisions of this section were made by Act March 3, 1875, c. 130, § 3, post, § 9753.

Other provisions relating to the redemption of circulating notes at the Treasury were made by the Sherman Purchase of Silver Act of July 14, 1890, c. 708, § 6, post, § 9754. Said provisions, however, are not applicable to deposits made under the requirements of this section.

Circulating notes presented to the Treasury for redemption were to be redeemed in lawful money, by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 12, post, § 9752.

In addition to the redemption fund required by this section, any national banking association having outstanding any of the additional circulating notes authorized to be issued by the Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, was required to keep on deposit in the Treasury an additional sum equal to five per cent. of such additional circulation, to be treated, held, and used in the same manner as the fund provided for by this section, by said Act May 30, 1908, c. 229, § 6, 35 Stat. 550.

So much of this section as provided that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes should be counted as a part of its lawful reserve was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 20, post, § 9802, which also further provided that such fund of five per centum should in no case be counted by any national banking association as a part of its lawful reserve.

Whenever any bank belonging to a national currency association failed to preserve or make good its redemption fund required by this section, and the national currency association failed to make good such fund, the redemption fund belonging to other banks composing the national currency association was to be applied to make good such fund, and the securities deposited by such bank were to be sold, and the proceeds of the sale deposited as a redemption fund, by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 2, 35 Stat. 548. See notes to Chapter Two A of this Title.

See, also, notes to R. S. § 5191, ante, § 9746.

Notes of Decisions

Signature to bank note.—A national bank note placed in circulation without signature of the president and cashier of the bank being redeemable under Act June 20, 1874, and Act July 28, 1892, held an obligation or security after the similitude of an "obligation or security" issued under authority of the United States, within section 10320, post. Wiggains v. U. S. (1914) 214 Fed. 970, 131 C. C. A. 266.

Redemption of circulation.—A national banking association may, under this section, deposit coin in the Treasury for the redemption of its circulation. (1881) 17 Op. Atty. Gen. 144.

—— **Bonds deposited.**—The federal circuit court has no jurisdiction of a suit in equity by a private person to interfere with or control the administration of the duties of the comptroller of the currency and of the treasurer of the United States in respect to bonds deposited with the treasurer to secure the redemption of national bank notes. Van Antwerp v. Hulburd (C. C. 1870) Fed. Cas. No. 16,826; Id. (C. C. 1871) Fed. Cas. No. 16,827.

§ 9752. (Act May 30, 1908, c. 229, § 12.) Redemption by Treasury of circulating notes in lawful money.

Circulating notes of national banking associations, when presented to the Treasury for redemption, as provided in section three of the Act approved June twentieth, eighteen hundred and seventy-four, shall be redeemed in lawful money of the United States. (35 Stat. 552.)

This section was part of the Aldrich-Vreeland (National Currency Associations) Act of 1908, cited above.

Section 20 of said Aldrich-Vreeland Act provided that the act should expire by limitation on June 30, 1914. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, extended the provisions of said Aldrich-Vreeland Act, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, to June 30, 1915. Said last-mentioned date having passed without any further extension, said Aldrich-Vreeland Act must be considered as having expired by such limitation and as having become inoperative. There may, however, be a question as to whether this section, which is of general application to national banks, expired by limitation on June 30, 1914, or on June 30, 1915, or even whether it was not intended to be excepted from such limitation altogether and meant to be left in full force and operation. Accordingly this section is included in this compilation as originally enacted. See, also, notes to Chapter Two A of this Title.

The Currency Act of June 20, 1874, c. 343, § 3, mentioned in this section, is set forth ante, § 9751.

See notes to R. S. § 5191, ante, § 9746.

Notes of Decisions

Signature to bank note.—A national bank note placed in circulation without signature of the president and cashier of the bank being redeemable under Act June 20, 1874, and Act July 28, 1892, held an obligation or security after the similitude of an "obligation or security" issued under authority of the United States, within section 10320, post. Wiggains v. U. S. (1914) 214 Fed. 970, 131 C. C. A. 266.

§ 9753. (Act March 3, 1875, c. 130, § 3.) Clerical force for redemption of circulating notes.

To carry into effect the provisions of section three of the act entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes" approved June twentieth, eighteen hundred and seventy-four, the Secretary of the Treasury is authorized to appoint the following force, to be employed under his direction, namely: In the Office of the Treasurer: * *

In the Office of the Comptroller of the Currency: * *

And at the end of each month, the Secretary of the Treasury shall re-imburse the Treasury to the full amount paid out under the provisions of this section by transfer of said amount from the deposit of the national banking-associations with the Treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the Treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which have been incurred in carrying into effect the provisions of the said section of the above-named act. (18 Stat. 399.)

This section was part of the sundry civil appropriation act for the fiscal year 1876, cited above.

The Currency Act of June 20, 1874, c. 343, § 3, mentioned in this section, is set forth ante, § 9751.

See notes to R. S. § 5191, ante, § 9746.

§ 9754. (Act July 14, 1890, c. 708, § 6.) Disposition of money deposited for and redemption of circulating notes.

Upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national

banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulations as the Secretary of the Treasury may prescribe from an appropriation hereby, created, to be known as 'National bank notes: Redemption account, but the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every National bank to keep in lawful money with the Treasurer of the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest. (26 Stat. 289.)

This section was part of the Sherman Purchase of Silver Act of 1890, cited above.

See notes to section 1 of this act, ante, § 6474.

The Currency Act of June 20, 1874, c. 343, § 3, mentioned in this section, is set forth ante, § 9751.

See notes to R. S. § 5191, ante, § 9746.

§ 9755. (Act July 28, 1892, c. 317.) Redemption of lost or stolen circulating notes.

The provisions of the Revised Statutes of the United States, providing for the redemption of national bank notes, shall apply to all national bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier. (27 Stat. 322.)

This was an act entitled "An act to amend the National Bank Act in providing for the redemption of national bank notes stolen from or lost by banks of issue."

Notes of Decisions

Forgery—Defense.—The fact that national bank notes to which the signatures have been forged, and which have been put in circulation, are made redeemable, does not relieve one who forges the names of the president and cashier of a national bank to genuine, but unsigned, notes from the crime of forging such notes. Logan v. U. S. (1903) 123 Fed. 291, 59 C. C. A. 476.

Note without signature.—A national bank note placed in circulation without signature of the president and cashier of the bank being redeemable under Act June 20, 1874, and Act July 28, 1892, held an obligation or security after the similitude of an "obligation or security" issued under authority of the United States, within section 10320, post. Wiggains v. U. S. (1914) 214 Fed. 970, 131 C. C. A. 266.

(R. S. § 5193. Repealed.)

This section authorized the Secretary of the Treasury to receive United States notes on deposit, without interest, from any national bank, in sums of not less than ten thousand dollars, and issue certificates therefor, in denominations of not less than five thousand dollars, payable on demand in United States notes at the place where the deposits were made, and provided that the notes so deposited should not be counted as part of the lawful money reserve of the association, but that the certificates issued might be so counted, and might be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made.

It was repealed by the Parity Act of March 14, 1900, c. 41, § 6, ante, § 6567.

(R. S. § 5194. Superseded.)

This section was as follows:

"The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates."

It was dependent for its operative effect on R. S. § 5193, which was repealed by Act March 14, 1900, c. 41, § 6, ante, § 6567, and therefore becomes inoperative.

§ 9756. (R. S. § 5195.) Place for redemption of circulating notes to be designated.

Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named, shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

Act June 3, 1864, c. 106, § 32, 13 Stat. 109.

That part of this section which required or permitted national banks to redeem their circulating notes elsewhere than at their own counters was repealed by the Currency Act of June 20, 1874, c. 343, § 3, ante, § 9751.

Other cities may be made "central reserve cities," by Act March 3, 1887, c. 378, § 2, ante, § 9750.

See notes to R. S. § 5191, ante, § 9746.

Notes of Decisions

Liability of stockholders.—See Wright v. Merchants' Nat. Bank (C. C. 1876) Fed. Cas. No. 18,084; note under § 9689, ante.

Cited without definite application, Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 384, 20 L. Ed. 8401; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Woodruff v. Mississippi (1896) 16 Sup. Ct. 820, 823, 162 U. S. 291, 40 L. Ed. 973; Fisher v. Tradesmen's Nat. Bank (1894) 64 Fed. 706, 707, 12 C. C. A. 409; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

§ 9757. (R. S. § 5196.) National banks to receive notes of other national banks.

Every national banking association formed or existing under this Title, shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

Act June 3, 1864, c. 106, § 32, 13 Stat. 109. Act July 12, 1870, c. 252, § 5, 16 Stat. 253.

Notes of Decisions

Notes of state bank.—A national bank is not bound to receive its own issue as a state bank, in its own proper business, the notes themselves not being a legal tender. Thorp v. Wegefarth (1867) 56 Pa. (6 P. F. Smith) 82, 93 Am. Dec. 789.

§ 9758. (R. S. § 5197.) Limitation upon rate of interest which may be taken.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Act June 3, 1864, c. 106, § 30, 13 Stat. 108.

Notes of Decisions

Interest chargeable—State laws.—This act, incorporating the bank of the United States, does not prohibit the bank from discounting promissory notes or receiving a transfer of notes, in payment of a debt due the bank, and the bank, on discounting notes and bills, may deduct the legal interest from the amount of the note or bill at the time it is discounted, but the bank may not engage in the ordinary business of a trader or merchant in buying and selling goods, etc., for profit. Fleckner v. Bank of U. S. (1823) 8 Wheat. 338, 349, 5 L. Ed. 631.

Under the laws of Missouri, 10 per cent. interest may be charged by all persons except banks of issue, which are limited to 8 per cent. Held, that a national bank in Missouri could charge 10 per cent., as the provision allowing national banks to charge the same rate as state banks of issue was intended only to apply when such banks were by law allowed to charge a higher rate than other persons. Tiffany v. National Bank of Missouri (1873) 85 U. S. (18 Wall.) 409, 21 L. Ed. 862, 1 Am. Law T. Rep. (N. S.) 158.

National banks, having been national favorites, may charge the same rate of interest that state banks are allowed to charge. Id.

The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts if there be any difference between them. National Bank of Gloversville v. Johnson (1881) 104 U. S. 271, 277, 26 L. Ed. 742.

By compounding interest oftener than is permitted by a state statute (R. S. Mo. § 3711), a national bank charges interest at a higher rate than that allowed by the laws of the state, and was in the meaning of this section, though the compounded interest was less than the state laws permit to be charged directly without compounding. Citizens' Nat. Bank v. Donnell (1904) 25 Sup. Ct. 49, 195 U. S. 369, 49 L. Ed. 238.

A national bank is entitled to the same privileges in regard to charging interest as is extended to state banks of issue in the state in which it is located. First Nat. Bank v. Duncan (C. C. 1878) Fed. Cas. No. 4,804; Same v. Tinstman (C. C. 1879) Fed. Cas. No. 4,805. CONTRA, Duncan v. First Nat. Bank (D. C. 1877) Fed. Cas. No. 4,135.

In California, the rate of interest may be agreed upon. The national banking act permits a national bank to charge the same rates of interest as state banks may charge under state laws. Held, that a national bank in California may charge such rate of interest as is agreed upon. Hinds v. Marmolejo (1882) 60 Cal. 229; Farmers' Nat. Gold Bank v. Stover, Id. 387.

Civ. Code Cal. § 1918, makes a rate of interest greater than the rate fixed by law as the legal rate, viz. 7 per cent., valid when agreed on by the parties. Held, that a national bank may contract for any rate of interest. California Nat. Bank v. Ginty (1895) 108 Cal. 148, 41 Pac. 38.

Under this section and the statute fixing a legal rate of interest, but permitting the parties to stipulate for any rate of interest, a national bank in Colorado may charge interest at any agreed rate. Rockwell v. Farmers' Nat. Bank (1894) 4 Colo. App. 562, 36 Pac. 905.

The power vested in congress to establish a bank, and to authorize it to lend money, includes the power to fix the rate of interest it may take, and to

prescribe the penalties for taking a greater. Peterborough Nat. Bank v. Childs (1882) 133 Mass. 248, 43 Am. Rep. 509.

Under this section, relating to national currency, a national bank can charge no greater rate of interest than is permitted by the banking laws of the state in which it does business, though a greater rate is allowed by the laws of that state to parties other than state banks. Shunk v. First Nat. Bank (1872) 22 Ohio St. 508, 10 Am. Rep. 762.

The legal rate of interest in Ohio is fixed at 6 per cent. by R. S. Ohio, § 3181, but a national bank there may contract for interest on a loan at the rate of 8 per cent. per annum, and reserve the same in advance, under section 3179, which provides that parties may stipulate for the payment of any rate not exceeding 8 per cent. and under this section of the federal statutes. La Dow v. First Nat. Bank (1890) 5 Ohio Cir. Ct. R. 147.

As Act 1873 (70 Ohio Laws, 178) repeals the statute fixing the rate of interest for banks of issue, a national bank may charge interest at 8 per cent., under R. S. Ohio, § 3181. La Dow v. First Nat. Bank (1894) 51 Ohio St. 234, 37 N. E. 11.

Within this section, except where, by the laws of any state, "a different rate is limited for banks of issue organized under state laws," savings and deposit banks are not "banks of issue." First Nat. Bank v. Gruber (1878) 87 Pa. 468, 30 Am. Rep. 378.

Although the Pennsylvania usury law of May 28, 1858, imposes no penalty for taking a greater rate than 6 per cent., yet no greater rate is "lawful," within this section; and, if a national bank in that state takes more than 6 per cent. interest, it becomes liable for the penalty imposed on it by the next section. Lebanon Nat. Bank v. Karmany (1881) 98 Pa. 65.

A law providing that it shall be lawful to contract for any rate of interest agreed on between the parties "allows" and "fixes" the rate, within the meaning of this section. Guild v. First Nat. Bank (1894) 4 S. D. 566, 57 N. W. 499.

This section permits national banks to charge as high a rate of interest as is allowed by state laws. Texas statutes fix a legal rate when none is specified in the obligation, but allow agreement upon any rate. Held, that national banks in Texas may contract for any rate. National Bank of Jefferson v. Bruhn (1885) 64 Tex. 571, 53 Am. Rep. 771.

Where 10 per cent. is the established legal rate of interest in a state, that amount may be recovered by a national bank as indorsee on a note stipulating such rate. Yakima Nat. Bank v. Knipe (1893) 6 Wash. 348, 33 Pac. 834.

Under this section held that, since 1 Hill's Code Wash. § 2796, and Sess. Laws Wash. 1893, p. 29, allow individuals and state banks to take any rate of ifterest agreed to in writing by the parties to the contract, national banks have the same privilege. Wolverton v. Exch. Nat. Bank (1895) 11 Wash. 94, 39 Pac. 247.

See, also, notes under § 9759, post.

Cited without definite application, Wheeler v. Union Nat. Bank (1877) 96 U. S. 268, 269, 24 L. Ed. 833; First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 132 U. S. 141, 33 L. Ed. 282; Schuyler Nat. Bank v. Bollong (1893) 14 Sup. Ct. 24, 25, 150 U. S. 85, 37 L. Ed. 1008; Brown v. Marion Nat. Bank, Ky. (1898) 18 Sup. Ct. 390, 169 U. S. 416, 42 L. Ed. 801; Hemple v. Raymond (1906) 144 Fed. 796, 75 C. C. A. 526; Reed v. American-German Nat. Bank (C. C. 1907) 155 Fed. 233.

§ 9759. (R. S. § 5198, as amended, Act Feb. 18, 1875, c. 80, § 1.) Consequences of taking usurious interest; jurisdiction of suits by or against national banks.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Act June 3, 1864, c. 106, § 30, 13 Stat. 108. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 320.

This section, as enacted in the Revised Statutes, did not contain the pro-

vision at the end thereof as set forth here, beginning with the words "That suits, actions, and proceedings," etc.

That provision was added by amendment by Act Feb. 18, 1875, c. 80, § 1, cited above.

Provisions relating to jurisdiction of actions by and against national banks were made by the Currency Act of July 12, 1882, c. 290, § 4, ante, § 9668, and by Jud. Code, § 24, par. 16, ante, § 991 (16).

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Notes of Decisions

I. Construction, operation, and validity
1. Construction.
2. Operation.
3. —— Effect of usurious discount on title to note and rights of holder.
4. Validity.

II. Forfeiture of interest
5. What and when interest forfeited.
6. —— "Knowingly."
7. Renewal notes.
8. Forfeiture enforced as defense.

III. Recovery of penalty and interest paid
9. Right of action.
10. —— "Paid."
11. —— Assignability.
12. Jurisdiction.
13. Change of venue.
14. Limitations.
15. Parties.
16. —— "Legal representative."
17. Pleading.
18. Evidence.
19. —— Burden of proof.
20. Instructions.
21. Defenses.
22. —— Set-offs.
23. Measure of recovery.
24. Questions of law.
25. New trial.
26. Review.

IV. Exclusiveness of federal remedy
27. Remedy available.
28. State laws.
29. Availability of penalty as set-off or defense.

I. CONSTRUCTION, OPERATION, AND VALIDITY

1. Construction.—This section is remedial as well as penal, and is to be liberally construed to effect the object of its enactment. Farmers' & Mechanics' Nat. Bank v. Dearing (1875) 91 U. S. 29, 35, 23 L. Ed. 196.

This statute should be liberally construed to effect the ends for which it was passed; but a forfeiture thereunder should not be declared unless the facts on which it must rest are clearly established. Wheeler v. Union Nat. Bank (1877) 96 U. S. 268, 270, 24 L. Ed. 833.

The rate of interest which a national bank may charge in Arizona is not limited to 7 per cent., although R. S. Ariz. 1887, pars. 2161, 2162, allow parties to agree upon any rate, and in default of any agreement to take 7 per cent. only, since under these statutes any rate which may be agreed upon is thereby "fixed" by the law. Daggs v. Phœnix Nat. Bank (1900) 20 Sup. Ct. 732, 734, 177 U. S. 549, 44 L. Ed. 882, affirming judgment (1898) 53 Pac. 201, 5 Ariz. 409.

This section is remedial as well as penal, and is to be liberally construed to effect its object. Ordway v. Central Nat. Bank (1877) 47 Md. 217, 28 Am. Rep. 455.

The construction placed by the Supreme Court of the United States on this section must be followed by the Supreme Court of Missouri. Haseltine v. Central Nat. Bank (1900) 155 Mo. 66, 56 S. W. 895.

This and the next preceding section do not constitute a penal statute, and need not be strictly construed. Albion Nat. Bank v. Montgomery (1898) 74 N. W. 1102, 54 Neb. 681.

2. Operation.—This section relates to transitory actions only, and not to such actions as are by law local in their character. Casey v. Adams (1880) 102 U. S. 66, 67, 26 L. Ed. 52.

The forbidden usurious transactions for which penalties are prescribed by this section refer to the prohibitions of the preceding section, and not to the laws of the state. National Bank of Gloversville v. Johnson (1881) 104 U. S. 271, 278, 26 L. Ed. 742.

A controversy as to usurious interest paid on a note held by a national bank secured by collateral note and mortgage arising in a suit to foreclose a mortgage is none the less covered by this section because the collateral note and mortgage were executed in favor of the bank president for the benefit of the bank, which was prohibited by law from taking real estate secured for a debt coincidentally contracted. Schuyler Nat. Bank v. Gadsden (1903) 24 Sup. Ct. 129, 130, 191 U. S. 451, 48 L. Ed. 258.

A stipulation of a note binding the maker "to pay an attorney's fee of ten per cent. on the amount due, if suit is brought to enforce payment, for the use of the attorney bringing the suit," is void when the note is discounted by a national bank, for the reason that the discounting of such note is in excess of the powers of the bank under its charter. Merchants' Nat. Bank v. Sevier (C. C. 1882) 14 Fed. 662, 666.

This section does not apply to voluntary payments of debts of third persons to the bank, which may be infected with usury. First Nat. Bank v. Davis

(1911) 70 S. E. 246, 135 Ga. 687, 36 L. R. A. (N. S.) 134.

That this section authorizes recovery from a national bank only, and not from a state bank, of a penalty for taking usury does not render it obnoxious to the provision of the state Constitution that all laws of a general nature shall have uniform operation; laws being of "uniform operation" if they apply to all persons in like situation. Ingraham v. Merchants' Nat. Bank of Greene (Iowa, 1911) 132 N. W. 869.

Usury by a national bank in the Indian Territory on a note executed to it did not, in view of this section, vitiate the note nor the mortgage given to secure payment thereof. Meador v. Johnson (1910) 112 P. 1121, 27 Okl. 544.

This section does not apply to the discounting by the bank for the payee of a note given in payment of an article, and stipulating for legal interest, and, if it did, would not avail the maker. Second Nat. Bank v. Morgan (1895) 165 Pa. 199, 30 Atl. 957, 35 Wkly. Notes Cas. 484, 44 Am. St. Rep. 652.

3. —— **Effect of usurious discount on title to note and rights of holder.**—An agreement in a note to pay an attorney's fee of 10 per cent. on the amount due, if suit is brought to enforce payment, for the use of the attorney bringing the suit, which is void as being a stipulation for a penalty or forfeiture, oppressive, a cover for usury, without consideration, and contrary to public policy, is also void, where the note has been discounted by a national bank, as being in excess of the powers of such bank under its charter. Merchants' Nat. Bank v. Sevier (C. C. 1882) 14 Fed. 662.

A surety, who signs a note, either payable to a national bank, or held by one as indorsee, containing a waiver of homestead and exemption, which is usurious, is not thereby discharged from liability; the Georgia statute, declaring a waiver of homestead and exemption to be void when part of a usurious contract, not being applicable. Reese v. Colquilt Nat. Bank (1913) 77 S. E. 320, 12 Ga. App. 472.

National banks in Indiana may contract for interest upon loans at the rate of 10 per cent. per annum. The reservation of more than that sum does not render void, either as to the principal or sureties, a note given for a loan. Wiley v. Starbuck (1873) 44 Ind. 298.

In an action by a national bank against the maker of a promissory note, the mere fact that the bank discounted the note at a usurious rate does not affect the title or negotiability of the note, and does not, therefore, render it subject to defenses existing between the maker and payee. Nicholson v. National Bank of New Castle (1891) 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223.

The title of a national bank to a note which it has discounted is not affected by the fact that the rate of discount was usurious. Newell v. First Nat. Bank (1892) 13 Ky. Law Rep. 775.

A national bank holding for value and innocently a bond and mortgage tainted with usury may recover the principal due. Slade v. Bennett (1909) 118 N. Y. Supp. 278, 133 App. Div. 666.

A national bank extended the time of payment at a usurious rate, taking therefor notes and a mortgage from the debtor to a third person, who indorsed the notes. Held, that the usury only avoided the interest, and that the bank acquired an equity in the mortgage which was a bona fide security to the extent of the validity of the debt. Allen v. First Nat. Bank (1872) 23 Ohio St. 97.

4. **Validity.**—The enactment of this and the next preceding section constitute a valid exercise of the power of Congress. Schlesinger v. Gilhooly (1907) 81 N. E. 619, 189 N. Y. 1, affirming judgment (Sup. 1906) 101 N. Y. Supp. 1143, 116 App. Div. 914.

II. FORFEITURE OF INTEREST

5. **What and when interest forfeited.**—Where a national bank knowingly takes, receives, or charges a usurious rate of interest, such usurious contract destroys the interest-bearing quality of the paper. Shafer v. First Nat. Bank (1894) 53 Kan. 614, 36 Pac. 998; Quint v. First Nat. Bank (1899) 58 P. 1019, 9 Kan. App. 474; Third Nat. Bank of Philadelphia v. Miller (1879) 90 Pa. 241; Guthrie v. Reid (1885) 107 Pa. 251.

A debt contracted or obligation given for a usurious loan made by a state or national bank is not void, but the forfeiture is limited to the interest. Hintermister v. First Nat. Bank (1876) 64 N. Y. 212; First Nat. Bank v. McCarthy (1904) 100 N. W. 14, 18 S. D. 218.

Where a national bank has discounted a note, reserving a greater discount than allowed by the laws of the state, it is entitled to recover the principal of the note, less the discount reserved. Farmers' & Mechanics' Nat. Bank v. Dearing (1875) 91 U. S. 29, 23 L. Ed. 196.

Where a note taken by a national bank provides for usurious interest, nothing in excess of the sums originally loaned can be recovered. Brown v. Marion Nat. Bank (1898) 18 Sup. Ct. 390, 391, 169 U. S. 416, 42 L. Ed. 801.

A national bank, which has made a 12 per cent. charge on overdrafts, where 8 per cent. is the highest rate of interest permitted by the state laws, cannot escape the forfeiture prescribed by this section, where a greater rate of interest is charged than the state laws allow, because of the trifling amount, or on the theory that the charge is a

placed as now provided by law: Provided, That each of said associations shall re-imburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally re-imburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: And provided further, That so much of section thirty-two of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed. (18 Stat. 123.)

This section was part of the Currency Act of 1874, cited above.

See notes to section 1 of this act, ante, § 9657.

The provisions of section 32 of the National Bank Act of June 3, 1864, c. 106, 13 Stat. 109, mentioned in this section, were incorporated into R. S. § 5195, post, § 9756.

The manner of destroying circulating notes was prescribed by Act June 23, 1874, c. 455, § 1, ante, § 6560.

Provisions relating to the appointment of a clerical force to carry out the provisions of this section were made by Act March 3, 1875, c. 130, § 3, post, § 9753.

Other provisions relating to the redemption of circulating notes at the Treasury were made by the Sherman Purchase of Silver Act of July 14, 1890, c. 708, § 6, post, § 9754. Said provisions, however, are not applicable to deposits made under the requirements of this section.

Circulating notes presented to the Treasury for redemption were to be redeemed in lawful money, by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 12, post, § 9752.

In addition to the redemption fund required by this section, any national banking association having outstanding any of the additional circulating notes authorized to be issued by the Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, was required to keep on deposit in the Treasury an additional sum equal to five per cent. of such additional circulation, to be treated, held, and used in the same manner as the fund provided for by this section, by said Act May 30, 1908, c. 229, § 6, 35 Stat. 550.

So much of this section as provided that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes should be counted as a part of its lawful reserve was repealed by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 20, post, § 9802, which also further provided that such fund of five per centum should in no case be counted by any national banking association as a part of its lawful reserve.

Whenever any bank belonging to a national currency association failed to preserve or make good its redemption fund required by this section, and the national currency association failed to make good such fund, the redemption fund belonging to other banks composing the national currency association was to be applied to make good such fund, and the securities deposited by such bank were to be sold, and the proceeds of the sale deposited as a redemption fund, by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 2, 35 Stat. 548.

See notes to Chapter Two A of this Title.

See, also, notes to R. S. § 5191, ante, § 9746.

Notes of Decisions

Signature to bank note.—A national bank note placed in circulation without signature of the president and cashier of the bank being redeemable under Act June 20, 1874, and Act July 28, 1892, held an obligation or security after the similitude of an "obligation or security" issued under authority of the United States, within section 10320, post. Wiggains v. U. S. (1914) 214 Fed. 970, 131 C. C. A. 266.

Redemption of circulation.—A national banking association may, under this section, deposit coin in the Treasury for the redemption of its circulation. (1881) 17 Op. Atty. Gen. 144.

—— **Bonds deposited.**—The federal circuit court has no jurisdiction of a suit in equity by a private person to interfere with or control the administration of the duties of the comptroller of the currency and of the treasurer of the United States in respect to bonds deposited with the treasurer to secure the redemption of national bank notes. Van Antwerp v. Hulburd (C. C. 1870) Fed. Cas. No. 16,826; Id. (C. C. 1871) Fed. Cas. No. 16,827.

§ 9752. (Act May 30, 1908, c. 229, § 12.) Redemption by Treasury of circulating notes in lawful money.

Circulating notes of national banking associations, when presented to the Treasury for redemption, as provided in section three of the Act approved June twentieth, eighteen hundred and seventy-four, shall be redeemed in lawful money of the United States. (35 Stat. 552.)

This section was part of the Aldrich-Vreeland (National Currency Associations) Act of 1908, cited above.

Section 20 of said Aldrich-Vreeland Act provided that the act should expire by limitation on June 30, 1914. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, extended the provisions of said Aldrich-Vreeland Act, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, to June 30, 1915. Said last-mentioned date having passed without any further extension, said Aldrich-Vreeland Act must be considered as having expired by such limitation and as having become inoperative. There may, however, be a question as to whether this section, which is of general application to national banks, expired by limitation on June 30, 1914, or on June 30, 1915, or even whether it was not intended to be excepted from such limitation altogether and meant to be left in full force and operation. Accordingly this section is included in this compilation as originally enacted. See, also, notes to Chapter Two A of this Title.

The Currency Act of June 20, 1874, c. 343, § 3, mentioned in this section, is set forth ante, § 9751.

See notes to R. S. § 5191, ante, § 9746.

Notes of Decisions

Signature to bank note.—A national bank note placed in circulation without signature of the president and cashier of the bank being redeemable under Act June 20, 1874, and Act July 28, 1892, held an obligation or security after the similitude of an "obligation or security" issued under authority of the United States, within section 10320, post. Wiggains v. U. S. (1914) 214 Fed. 970, 131 C. C. A. 266.

§ 9753. (Act March 3, 1875, c. 130, § 3.) Clerical force for redemption of circulating notes.

To carry into effect the provisions of section three of the act entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes" approved June twentieth, eighteen hundred and seventy-four, the Secretary of the Treasury is authorized to appoint the following force, to be employed under his direction, namely: In the Office of the Treasurer: * *

In the Office of the Comptroller of the Currency: * *

And at the end of each month, the Secretary of the Treasury shall re-imburse the Treasury to the full amount paid out under the provisions of this section by transfer of said amount from the deposit of the national banking-associations with the Treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the Treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which have been incurred in carrying into effect the provisions of the said section of the above-named act. (18 Stat. 399.)

This section was part of the sundry civil appropriation act for the fiscal year 1876, cited above.

The Currency Act of June 20, 1874, c. 343, § 3, mentioned in this section, is set forth ante, § 9751.

See notes to R. S. § 5191, ante, § 9746.

§ 9754. (Act July 14, 1890, c. 708, § 6.) Disposition of money deposited for and redemption of circulating notes.

Upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national

Childs (1882) 133 Mass. 248, 43 Am. Rep. 509.

In an action by a national bank against the maker of a usurious promissory note, on which payments of interest have been made, defendant may set up such payments, and have them applied on the principal. Moniteau Bank v. Miller (1880) 73 Mo. 187.

The recovery from a national bank of the penalty, under federal statutes, for taking interest on a note, does not estop the maker from pleading, in an action by the bank to foreclose the collateral mortgage, the satisfaction of the debt by payment of usurious interest on renewals before the bank came into possession of the note. Exeter Nat. Bank v. Orchard (1894) 39 Neb. 485, 58 N. W. 144.

The defense of usury is available in an action by a national bank for the recovery of unpaid interest, where the rate contracted for by it is in excess of that prescribed by the act of congress. Tomblin v. Higgins (1897) 73 N. W. 461, 53 Neb. 92, 68 Am. St. Rep. 596, reversed (Neb. 1899) 78 N. W. 620.

An amount usuriously reserved by a national bank in discounting a note is forfeited, and, if the amount so reserved has not been paid, it cannot be recovered in an action on the note. National Bank of Auburn v. Lewis (1880) 81 N. Y. 15.

In view of this section, it is competent to show, in an action by a national bank on notes discounted by it, the amount for which it bought them. First Nat. Bank v. Haulenbeek (1892) 65 Hun, 54, 19 N. Y. Supp. 567.

In an action by a national bank before a state court to collect an indebtedness, defendant set up a counterclaim founded on usury. Held that, under section 9668, ante, the defense was a proper one. Wachovia Nat. Bank v. Ireland (1898) 29 S. E. 835, 122 N. C. 571.

The discounting of a note by a national bank at a usurious rate of interest does not avoid the obligation in toto, but only to the extent of the interest. First Nat. Bank v. Garlinghouse (1872) 22 Ohio St. 492, 10 Am. Rep. 751.

Where a national bank made a usurious loan to one of its directors exceeding in amount one-tenth of its paid-up capital, in contravention of the national banking act, the borrower is not estopped to defend against a recovery of interest on the ground of usury because of the fact that he is a director of the bank. Cadiz Bank v. Slemmons (1877) 34 Ohio St. 142, 32 Am. Rep. 364.

Where a national bank makes a usurious loan in contravention of the national banking act, only the principal can be recovered, and payments made generally on a note securing such loan will be applied in satisfaction of the principal. Id.

In an action by a national bank on a promissory note on which it has received usurious interest, the borrower is not entitled to have such interest deducted, but the bank cannot recover any unpaid interest. Huntington v. Krejci (1881) 3 Ohio Dec. 532.

Where an action is brought nominally upon a promissory note, which was held as collateral by a national bank for overdrafts upon it by another bank, the suit is actually to recover the overdrafts against the makers of the note as sureties, and, if usurious interest has been charged, the makers may defalcate all the interest charged against the whole amount of overdrafts claimed. Philadelphia Bank v. Miller (1879) 90 Pa. 241.

An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest. Trabue v. Cook (Tex. Civ. App. 1910) 124 S. W. 455.

Under this section past payments of usury to a national bank cannot be offset in an action on other indebtedness. Rushing v. Citizens' Nat. Bank of Plainview (Tex. Civ. App. 1914) 162 S. W. 460.

Under this and the preceding section, usurious interest actually paid on discounting and loaning a series of notes cannot, in an action by the bank, be applied in satisfaction of the principal of the debt. Charleston Nat. Bank v. Bradford (1902) 41 S. E. 153, 51 W. Va. 255.

In an action by a national bank on a note, defendant can, under this and the preceding section, reduce the recovery by the amount of usury which the note bears on its face or which is included therein, but cannot set off usurious interest actually paid; his remedy therefor being by an action, under this section, to recover back twice the amount thereof. National Bank of Weston v. Lynch (W. Va. 1911) 71 S. E. 389.

III. RECOVERY OF PENALTY AND INTEREST PAID

9. Right of action.—This and the preceding section apply to discounts of commercial paper as well as to loans; and, therefore, where such bank discounts paper at a greater rate than 7 per cent., in the absence of a state law allowing a greater rate, it is liable for the penalty provided for taking usurious interest. National Bank v. Johnson (1881) 104 U. S. 271, 26 L. Ed. 742; Johnsen v. National Bank of Gloversville (1878) 74 N. Y. 329.

No recovery under this section of twice the amount of usurious interest paid to a national bank contrary to section 9758, ante, can be had on the theory that, because in a foreclosure decree in which the illegal interest was deducted from the sum sued for was included the remaining legal interest which under this section was subject to forfeiture, illegal interest was paid by

a sale under foreclosure on such judgment; since it is the interest charged, and not that which might be forfeited, which the statute regards as illegal. Talbot v. First Nat. Bank of Sioux City (1902) 22 Sup. Ct. 612, 613, 185 U. S. 172, 46 L. Ed. 857.

Where usurious interest has been actually paid, double the amount thereof may be recovered from a national bank under this section. Markson v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 9,097; Crocker v. Same, Id. 3,397.

In case "a rate of interest greater than is allowed" has been paid, the debtor may recover back "twice the amount of interest thus paid." Hill v. Nat. Bank of Barre (C. C. 1883) 15 Fed. 432.

If usurious interest is paid a national bank, the payor may recover back twice the total amount of interest paid. First Nat. Bank v. McInturff (1896) 3 Kan. App. 536, 43 Pac. 839.

No action lies by one who has given a note in which unlawful interest is included and less than the principal has been paid on the note. Hall v. First Nat. Bank (1890) 30 Neb. 99, 46 N. W. 150.

An action cannot be maintained against a national bank, located in this state, to recover back twice the amount of interest paid upon a usurious contract, where such contract related exclusively to the private affairs of the bank, and where, in making it, the bank was in no sense acting as the agent of the general government. This section has no application to the private contracts of national banks made in this state. Hintermister v. First Nat. Bank (N. Y. 1874) 3 Hun, 345.

A national bank in this state discounting business paper at a greater rate than 7 per cent., the lawful rate for the use of money, is liable to the penalties of this section and the preceding one, though such discounting is not usurious under state law. Johnson v. National Bank of Gloversville (1878) 74 N. Y. 329, 30 Am. Rep. 302.

Where a national bank charges usury, it at once becomes liable for the penalty prescribed by this section, without reference to payment of the principal obligation. Meredith v. American Nat. Bank of Sparta (1913) 153 S. W. 479, 127 Tenn. 90.

Assumpsit will lie for the penalty prescribed by this section. Lynch v. Merchants' Nat. Bank (1883) 22 W. Va. 554, 46 Am. Rep. 520.

10. —— "Paid."—No recovery under this section, of twice the amount of usurious interest alleged to have been paid to a national bank, can be had on the theory that because, in a decree of foreclosure, in which was deducted from the sum sued for the interest charged in excess of the legal rate, was included the remaining legal interest, which under that section was subject to forfeiture, illegal interest was paid by a sale under foreclosure on such judgment, since it is the interest charged, and not the interest as to which a forfeiture might be enforced, that the statute regards as illegal. Talbot v. First Nat. Bank of Sioux City (1902) 22 Sup. Ct. 612, 613, 185 U. S. 172, 46 L. Ed. 857, affirming judgment (1898) 76 N. W. 726, 106 Iowa, 361.

The giving of a renewal note will not sustain a recovery from a national bank, under this section on account of usurious interest in the original note, since the payment contemplated by that statute is an actual payment, and not a further promise to pay. First Nat. Bank v. Lasater (1905) 25 S. Ct. 206, 196 U. S. 115, 49 L. Ed. 408, reversing judgment Lasater v. First Nat. Bank (Tex. Civ. App. 1902) 72 S. W. 1054.

Where a national bank discounts drafts at an illegal rate, the transfer of the drafts to it is a "payment" of the interest, within the principle that a payment of usurious interest cannot be used as a set-off in a suit by the bank on the paper discounted; therefore an acceptor is liable for the face of the drafts, though the bank paid less for them. Danforth v. National State Bank (1891) 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622.

This section comprehends payment of the usurious interest by transfer of property as well as payment in money. First Nat. Bank v. Davis (1911) 70 S. E. 246, 135 Ga. 687.

To constitute a payment by transfer of property within the statute, the parties must intend that the property be accepted as a payment. Id.

This section contemplates an actual payment of the usury, and, where property is accepted as payment, its market value at the time must exceed the principal and lawful interest, to amount to payment and receipt of illegal interest. Id.

Plaintiff borrowed large sums of a national bank at usurious interest, made payments from time to time, and at his occasional settlements gave his notes for the balance due after deducting his payments from the principal and interest. Held, upon suit to recover, as penalty for usurious interest, double the amount paid, that the payments must be held to have been applied pro rata to the principal and interest. Kinser v. Farmers' Nat. Bank (1882) 58 Iowa, 728, 13 N. W. 59.

In an action against a national bank to recover usurious interest paid, and also a penalty, it appeared that various payments had been made by plaintiff, a borrower, which were deducted from old notes, and new notes given for the balances. Held, that defendant could not apply the payments first to interest, in the absence of an agreement to that effect. Id.

A payment on a note stipulating for usurious interest is a payment on the principal debt, and not of the interest, which is forfeited. First Nat. Bank v.

Turner (1895) 3 Kan. App. 352, 42 Pac. 936.

A payment to a national bank on a note bearing usurious interest is a payment on the principal debt. First Nat. Bank v. McInturff (1896) 3 Kan. App. 536, 43 Pac. 839.

Where a national bank contracts for interest at a usurious rate, it at once forfeits all interest, and unappropriated payments subsequently made by the debtor must be first applied to the principal, so that while any part of the principal remains unpaid there is no payment of usurious interest, and no right to recover the penalty for taking usury accrues, unless payments made by the debtor are specifically applied by him to usurious interest. Citizens' Nat. Bank v. Forman's Assignee (1901) 111 Ky. 206, 63 S. W. 454, 23 Ky. Law Rep. 613, 56 L. R. A. 673.

There may be payments of usurious interest as such which will entitle a debtor to recover of a national bank the penalty for taking usury, though the principal sum remains unpaid; and such a case is presented where the interest upon one note is included in the amount of another note, and the other note is subsequently paid in full. Second Nat. Bank v. Fitzpatrick (1901) 63 S. W. 459, 23 Ky. Law Rep. 610, 111 Ky. 228, 62 L. R. A. 599.

Where a borrower from a national bank under a contract providing for usurious interest made no specific appropriation of a payment to interest, the bank had no right to appropriate any part of such payment to the interest account, but was required to apply the same in extinguishment of the principal. Second Nat. Bank v. Fitzpatrick (1905) 84 S. W. 1150, 27 Ky. Law Rep. 283.

An action cannot be maintained under this section where plaintiff does not allege or prove that he has paid or tendered the principal sum due. Haseltine v. Central Nat. Bank (1900) 56 S. W. 895, 155 Mo. 66.

The payment of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid on such loan. Exeter Nat. Bank v. Orchard (1895) 43 Neb. 579, 61 N. W. 833, 834.

Under the national banking act, an action will lie against a national bank to recover back payments of usury, though the borrower has paid both principal and interest. First Nat. Bank v. Barnett (1897) 70 N. W. 937, 51 Neb. 397.

If the bank reserved a greater discount than is legal, paying the borrower the amount called for by the note, less the illegal discount, only the amount actually paid can be recovered, as in such case the interest cannot be said to have been paid. National Bank of Auburn v. Lewis (1880) 81 N. Y. 15.

The giving of a renewal note will not sustain a recovery from a national bank under this section on account of usurious interest in the original note. First Nat. Bank v. Latham (1913) 132 P. 891, 37 Okl. 286.

The right of action to recover double the amount of usurious interest paid to a national bank accrues upon the actual payment to it by the borrower of the amount of the illegal interest, and can be maintained whether the debt has been paid or not. Monongahela Bank v. Overholt (1880) 96 Pa. 327.

A charge of interest by a national bank, in excess of the legal rate, in making renewals of notes, is not equivalent to payment in cash, and does not render the bank liable to the penalty for receiving usurious interest. Osborn v. First Nat. Bank (1896) 175 Pa. 494, 34 Atl. 858, 38 Wkly. Notes Cas. 341.

To entitle a party to recover usurious interest, such interest must have actually been paid either in money or its equivalent; and the mere charging of such interest in a running account is not a payment of the same within the meaning of that section. Davey v. First Nat. Bank (1896) 8 S. D. 214, 66 N. W. 122.

Under this section a cause of action for the penalty arises immediately, and only when one who has given a bank a usurious note actually pays money thereon, which, with his knowledge and consent, it applies in payment of usurious interest, regardless of whether the principal debt has been paid. McCarthy v. First Nat. Bank (S. D. 1909) 121 N. W. 853.

The offense of taking usury is consummated when a payment is made and appropriated to usurious interest, and the right to the penalty is then fixed, and it may be recovered by the person by whom the usury was paid, though the entire debt has not been paid. Stout v. Ennis Nat. Bank (1887) 69 Tex. 384, 8 S. W. 808.

Where a note calls for usurious interest, and the maker, in order to pay the same, conveys property to one who assumes the note and pays it, the payment is to be deemed as made by the maker of the note, so as to entitle him to recover the penalty for usurious interest from the payee. Lasater v. First Nat. Bank (1903) 72 S. W. 1057, 96 Tex. 345.

A discharge of a note by a surety by giving his own note in renewal thereof does not operate as a payment by the principal in such sense as to entitle him to avail himself of the federal statute authorizing the recovery from a national bank of twice the amount of usurious interest paid to the bank, nor does the subsequent payment of the renewal note by the surety operate to give the principal a cause of action under such statute. Lasater v. First Nat. Bank (Tex. Civ. App. 1905) 88 S. W. 429.

11. —— Assignability. — Under the statute giving one who pays usurious interest, or "his legal representative," a cause of action for the recovery of a penalty from the one to whom payment is made, such a claim is subject to assignment. Lasater v. First Nat. Bank (1903) 72 S. W. 1057, 96 Tex. 345.

12. Jurisdiction.—The state courts have jurisdiction of an action authorized by this section to recover twice the amount of usurious interest paid. First Nat. Bank of Charlotte v. Morgan (1889) 10 Sup. Ct. 37, 132 U. S. 141, 33 L. Ed. 282; National Bank of Lancaster v. Johnson (1890) 11 Ky. Law Rep. 904; Henderson Nat. Bank v. Alves (1891) 91 Ky. 142, 15 S. W. 132; National Bank of Lancaster v. Johnson (1891) 91 Ky. 181, 15 S. W. 134; People v. First Nat. Bank (1894) 15 Ky. Law Rep. 748; City Nat. Bank of Paducah v. Trimble (Super. 1891) 13 Ky. Law Rep. (abstract) 204; Ordway v. Central Nat. Bank (1877) 47 Md. 217, 28 Am. Rep. 455; Endres v. First Nat. Bank (1896) 68 N. W. 1092, 66 Minn. 257; Schuyler Nat. Bank v. Bollong (1891) 32 Neb. 70, 48 N. W. 826; Schuyler Nat. Bank v. Bollong (1893) 37 Neb. 620, 56 N. W. 209; Cooke v. State Nat. Bank (1867) 50 Barb. 339, 3 Abb. Prac. (N. S.) 339 (affirmed [1873] 52 N. Y. 96); Hade v. McVay (1877) 31 Ohio St. 231; Farmers' Nat. Bank of Wewoka v. McCoy (1914) 141 P. 791, 42 Okl. 420; Bletz v. Columbia Nat. Bank (1878) 87 Pa. 87, 30 Am. Rep. 343, 18 Alb. Law J. 231; First Nat. Bank v. Gruber (1879) 91 Pa. 377; Lebanon Nat. Bank v. Karmany (1881) 98 Pa. 65; Bank v. Snyder (Pa. 1881) 2 Leg. Rec. 356; McCreary v. First Nat. Bank (1902) 70 S. W. 821, 109 Tenn. 128; Lynch v. Merchants' Nat. Bank (1883) 22 W. Va. 554, 46 Am. Rep. 520.

Under this section, the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. Claflin v. Houseman (1876) 93 U. S. 130, 23 L. Ed. 833; First Nat. Bank of Tecumseh v. Overman (1887) 22 Neb. 116, 34 N. W. 107.

A judgment for plaintiffs in the sum of $2,150.38, in an action of debt under this section brought in a United States circuit court against a national banking association within the district to recover twice the amount of interest, at the rate of 9 per cent., received by defendant upon the discounting of certain promissory notes contrary to section 5197, R. S., section 9758, ante, was insufficient in amount to give jurisdiction to the Supreme Court of the United States. Williamsport Nat. Bank v. Knapp (1886) 7 Sup. Ct. 274, 119 U. S. 357, 30 L. Ed. 446.

The exemption of national banks from suits in state courts elsewhere than in the county or city where the bank is located, which is granted by the latter act, may be waived, and a bank which submits to trial in another county cannot, on writ of error to the state supreme court, raise the objection to the jurisdiction and claim the immunity. First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 132 U. S. 141, 33 L. Ed. 282.

The jurisdiction of United States courts under this section is not exclusive of the jurisdiction of state courts. Schuyler Nat. Bank v. Bollong (1893) 14 Sup. Ct. 24, 26, 150 U. S. 85, 37 L. Ed. 1008.

The circuit courts do not have exclusive jurisdiction of actions against national banks under this section. New Orleans Nat. Banking Ass'n v. Adams (C. C. 1876) Fed. Cas. No. 10,184.

A Circuit Court of the United States has jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, in violation of this and the preceding section; such action being one arising under the laws of the United States, which might have been brought in such court by the bankrupt, regardless of the citizenship of the parties. Reed v. American-German Nat. Bank (C. C. 1907) 155 Fed. 233.

By this section and section 9661, ante, jurisdiction of an action on contract against a national bank is not prohibited to a state court of a county other than that in which it is situated. Fresno Nat. Bank v. Superior Court (1890) 83 Cal. 491, 24 Pac. 157.

State courts have jurisdiction in cases instituted for such recovery. The judiciary act of 1789, giving the United States district courts exclusive jurisdiction, only contemplates those penalties and forfeitures of a public nature which may be sued for by the government. Ordway v. Central Nat. Bank (1877) 47 Md. 217, 28 Am. Rep. 455.

An action to recover a penalty from a national bank under this section for taking or charging a rate of interest greater than is allowed by law, may be brought in any court in the city or county in which such bank is located, having jurisdiction in similar cases. Schuyler Nat. Bank v. Bollong (1888) 24 Neb. 821, 40 N. W. 411; Id. (1888) 24 Neb. 825, 40 N. W. 413; Id. (1890) 28 Neb. 684, 45 N. W. 164, following First Nat. Bank v. Overman (1887) 22 Neb. 116, 34 N. W. 107.

The provision of this section authorizing suits in state courts against national banks situated in the state is permissive, and not mandatory. The supreme court of New York has jurisdiction over an action ex contractu, brought by a citizen of New York against a national bank located in another state. Robinson v. National Bank of Newberne (1880) 81 N. Y. 385, 37 Am. Rep. 508, affirming (1880) 58 How. Prac. 306, 19 Hun, 477.

Suit is not confined to the county

where the bank is located. Talmadge v. Third Nat. Bank (1882) 27 Hun, 61.

Act July 12, 1882 (Acts 47th Cong., 1st Sess., c. 290, § 4), conferring jurisdiction upon state courts generally of suits by or against national banks, applies only to suits "hereafter brought"; and only the state courts designated in the amendment of Feb. 18, 1875, had jurisdiction of a suit against a national bank, commenced before the approval of that act, to recover the statutory penalty for taking usurious interest. Morgan v. First Nat. Bank (1885) 93 N. C. 352.

This section may be construed to apply where the right of action accrued before its passage as well as after. Lebanon Nat. Bank v. Karmany (1881) 98 Pa. 65.

A suit against a national bank for a breach of contract may be brought in a state court of a state other than that in which the bank is located. Holmes v. National Bank of Wilmington (1882) 18 S. C. 31, 44 Am. Rep. 558.

A state court was not deprived of jurisdiction of an action for breach of contract against a national bank located in another state. Id.

A bill to recover back usury cannot be maintained against a national bank in the Tennessee state courts. Hambright v. Cleveland Nat. Bank (1879) 71 Tenn. (3 Lea) 40, 31 Am. Rep. 629.

An action against a national bank to recover a penalty for charging usurious interest is a "civil action," within the meaning of Acts Tenn. 1877, c. 97, conferring on the chancery court concurrent jurisdiction with the circuit court of all civil causes of action triable in the circuit court, except in cases of unliquidated damages or injuries to person, character, or property. McCreary v. First Nat. Bank (1902) 70 S. W. 821, 109 Tenn. 128.

The state courts of Vermont have jurisdiction in assumpsit against a national bank, to recover money paid as usury. Dow v. Irasburgh Nat. Bank (1877) 50 Vt. 112, 28 Am. Rep. 493.

See, also, notes under § 991(16), ante.

13. Change of venue.—In the absence of any provision as to change of place of trial in the national banking act, authorizing suits against national banks in the state courts, the rights of the parties in that respect are to be governed by the state laws. Kinser v. Farmers' Nat. Bank (1882) 58 Iowa, 728, 13 N. W. 59.

14. Limitations.—The "usurious transaction" from the date of which the two-year limitation prescribed by this section for actions to recover back twice the amount of interest paid a national bank begins to run takes place on the date of the payment of the usurious interest, and not the date the debt was paid. McCarthy v. First Nat. Bank of Rapid City, S. D. (1912) 32 Sup. Ct. 240, 223 U. S. 493, 56 L. Ed. 523; Kinser v. Farmers' Nat. Bank (1882) 58 Iowa, 728, 13 N. W. 59; Henderson Nat. Bank v. Alves (1891) 91 Ky. 142, 15 S. W. 132; National Bank of Lancaster v. Johnson (1891) 91 Ky. 181, 15 S. W. 134; First Nat. Bank v. Smith (1893) 36 Neb. 199, 54 N. W. 254; National Bank v. Carpenter (1890) 52 N. J. Law (23 Vroom) 165, 19 Atl. 181.

The inclusion of usurious interest as principal in notes given to a national bank does not constitute a payment of interest within the meaning of this section so as to start the running of the statute against a right of action to recover twice the amount of the interest paid under this section; "the usurious transaction" from the date of which the statute begins to run being the time when the usurious interest is actually paid. National Bank of Daingerfield v. Ragland (1901) 21 Sup. Ct. 536, 537, 181 U. S. 45, 45 L. Ed. 738.

A petition to recover back usurious interest from a national bank, under this and the preceding section, which shows on its face that the action was not "commenced within two years from the time the usurious transactions occurred," as required by the latter section, cannot withstand a demurrer because of an allegation that the charge and reservation of the usurious interest were without plaintiff's knowledge or consent, since, even if the period of limitation of the statute does not begin until discovery of the wrong, the court will not indulge the presumption that plaintiff's consciousness of the wrong was not aroused until some time within two years before the commencement of the action. Talbot v. Sioux Nat. Bank (1902) 22 Sup. Ct. 621, 623, 185 U. S. 182, 46 L. Ed. 862, affirming judgment (1900) 82 N. W. 963, 111 Iowa, 583.

Usury paid more than two years before the commencement of the suit cannot be recovered nor credited upon the principal of the note. National Bank of Madison v. Davis (C. C. 1877) Fed. Cas. No. 10,038.

On a settlement between a national bank and a debtor who owed the bank some $69,000 on a number of notes, a payment was made which reduced such indebtedness to $30,000, for which a new note was given. Held that, both on general principles, in accordance with the presumed intention of the parties, and under Ky. St. § 2219, cl. 3, which provides that "partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due," all past interest, whether usurious or otherwise, must be regarded as having been paid in the settlement, and that limitation commenced to run on that date against an action under this section to recover the penalty for usury previously contracted for. Louisville Trust Co. v. Kentucky Nat. Bank (C. C. 1900) 102 Fed. 442.

Where a national bank discounts a note at a usurious rate, the maker or his legal representative, on payment of the note, is entitled to recover as a penalty, under this section, double the amount of the discount so taken, and of all interest subsequently paid on the note or its renewals, although separate payments of interest were made from time to time after its maturity, and all at legal rates; and limitation does not begin to run against an action to recover such penalty until full payment of the note or its renewals. Id.

The action against a national bank to recover a penalty for usury in the case of successive renewal notes held to accrue at the time the interest taken was applied to the principal, or when judgment is entered therefor. Duncan v. First Nat. Bank (D. C. 1877) Fed. Cas. No. 4,135.

The discounting by a national bank of a note at a usurious rate of interest is merely the "charging" or "reserving" of usury, and not the "taking" or "receiving" of usury; and the debtor's right of action under this section does not accrue when the note is discounted. Citizens' Nat. Bank v. Forman's Assignee (1901) 63 S. W. 454, 23 Ky. Law Rep. 613, 111 Ky. 206, 56 L. R. A. 673.

Under this section, where usurious interest has been paid, remedy by action within two years held exclusive, and hence more than two years after payment the borrower was not entitled to have such payment applied on the principal. Chipman v. Farmers' & Merchants' Nat. Bank (1913) 88 A. 151, 121 Md. 343; note under this section.

If suit is brought upon a note, and the forfeiture of interest provided by this section, where a national bank has received a greater rate of interest than is allowed by the laws of the state where the note was made, in violation of section 9758, ante, is sought to be availed of by way of defense, such defense is not limited to two years after the unlawful receiving of interest. The limitation of two years applies to the time within which an action must be brought to recover back twice the amount of unlawful interest paid. First Nat. Bank of Peterborough v. Childs (1881) 130 Mass. 519, 39 Am. Rep. 474; Id. (1882) 133 Mass. 248, 43 Am. Rep. 509.

The limitation of two years within which suit may be brought against a national bank to recover back usurious interest, as provided for by act of congress, does not begin to run from the time of the agreement for such interest, but from the time of the receipt of the money by the bank. Carpenter v. National Bank (1887) 50 N. J. Law (21 Vroom) 6, 11 Atl. 478.

An action in the state court to recover interest paid to a national bank in excess of what is allowed by this act is not within the state act of March 28, 1858, limiting the bringing of the suit to six months. Lucas v. Government Nat. Bank (1875) 78 Pa. (28 P. F. Smith) 228, 21 Am. Rep. 17.

An application by a national bank of a payment on a usurious note to payment of the usurious interest, with the knowledge and consent of the maker, so that the two-year limitation for recovery prescribed by this section of the penalty begins to run is shown, where on the back of the note is indorsed interest paid at a usurious rate, and such note is taken up and a new note given for the amount remaining unpaid after allowing such usurious rate. McCarthy v. First Nat. Bank (1909) 121 N. W. 853, 23 S. D. 269, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 437.

Under this section the limitation runs from the time the note is discounted and the usurious interest reserved from the proceeds. Bobo v. People's Nat. Bank (1893) 92 Tenn. 444, 21 S. W. 888.

The phrase "commenced within two years from the time the usurious transaction occurred," means two years from the time the interest was paid, without regard to payment of the principal. Lynch v. Merchants' Nat. Bank (1883) 22 W. Va. 554, 46 Am. Rep. 520.

15. Parties.—One paying usurious interest merely as the trustee of another, and with the latter's funds, is not entitled to recover the statutory penalty in his own right, although the note on which such payment was made was given by him in his individual capacity, and not as trustee. Pardoe v. Iowa State Nat. Bank (1898) 76 N. W. 800, 106 Iowa, 345.

Under this section one of the joint makers of a usurious note cannot recover the penalty where the illegal interest was paid by the other maker. First Nat. Bank v. Rowley (1893) 34 P. 1049, 52 Kan. 394.

Where each of several joint makers of a note has paid his part of the illegal interest out of his individual money they cannot unite in one action to recover the penalty. Teague v. First Nat. Bank (1897) 48 P. 603, 5 Kan. App. 300.

This and the preceding section, prohibiting a bank from exacting usurious interest, and providing for the recovery back of double the amount wrongfully exacted, do not confine the relief thereunder to natural persons, but extends to partnerships. Albion Nat. Bank v. Montgomery (1898) 74 N. W. 1102, 54 Neb. 681.

A stockholder in a national bank, who has been compelled to contribute to its debts, may maintain an action against the directors, charged by him to have caused the loss by their negligence and misconduct, the bank and its receiver having refused to bring suit, and the comptroller of the currency having re-

fused to sanction it; and such action may be brought in a state court. Nelson v. Burrows (N. Y. 1881) 9 Abb. N. C. 280.

The right given by this section to recover double the interest paid to a national bank, when the interest so paid is greater than allowed by the laws of the state, is personal to the party paying such usurious interest; and an action to recover the same can be maintained only by such person, or his or her legal representative. Lealos v. Union Nat. Bank (1899) 81 N. W. 56, 9 N. D. 60.

Two joint makers of a note to a national bank who have separately, but from a joint fund, paid usurious interest on the note, may jointly maintain an action to recover the penalty provided by this section. Merchants' & Planters' Nat. Bank of Mill Creek v. Horton (1911) 117 P. 201, 27 Okl. 689.

In Pennsylvania the term "legal representatives" means executors and administrators, in the absence of anything showing that the words are used in different sense; and an assignee for benefit of creditors cannot maintain an action in such state, in his own name, against a national bank, to recover the penalty for usurious interest paid such bank by the assignor, under this section. Osborn v. First Nat. Bank (1896) 175 Pa. St. 494, 34 Atl. 858, 38 Wkly. Notes Cas. 341, distinguishing (1880) Monongahela Nat. Bank v. Overholt, 96 Pa. St. 327.

In an action against a national bank to recover the penalty for taking usurious interest, the form of the suit, including the proper party plaintiff, must be determined by the law of the place where the action is brought. Id.

Where a partnership is the maker of a note calling for usurious interest, and one of the partners sells out his interest in the firm to another, who assumes the liabilities, such agreement does not preclude the continuing partner from recovering from the payee of the note the penalty provided by statute for receiving usurious interest. Lasater v. First Nat. Bank (1903) 72 S. W. 1057, 96 Tex. 345.

16. —— **"Legal representative."**—The indorser of a bill of exchange is not the "legal representative." Barnett v. Muncie Nat. Bank (C. C. 1876) Fed. Cas. No. 1,026, affirmed (1878) 98 U. S. 555, 25 L. Ed. 212.

The assignee in bankruptcy of a person who has paid to a national bank a greater amount of interest than that allowed by law is his "legal representative," within this section, allowing a recovery of twice the sum paid, and may sue to recover the same. Crocker v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 3,397; Markson v. Same, Id. 9,097; Wright v. Same (C. C. 1878) Fed. Cas. No. 18,078. CONTRA, Barnett v. Muncie Nat. Bank (C. C. 1876) Fed. Cas. No. 1,026; Barnits v. First Nat. Bank, Id. 1,034.

The right of a borrower on usury from a national bank to recover back twice the amount of interest received passes to his assignee in bankruptcy, he being the "legal representative" of such borrower. Crocker v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 3,397.

An assignee for the benefit of creditors under the Kentucky statutes, who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back, under this section. The assignee is the assignor's "legal representative" in the meaning of that section. Louisville Trust Co. v. Kentucky Nat. Bank (C. C. 1898) 87 Fed. 143.

A receiver of an insolvent corporation is a "legal representative" within the meaning of this section. Barbour v. National Exch. Bank (1887) 45 Ohio St. 133, 12 N. E. 5.

The right of action against a national bank for collecting usurious interest, given by this section to the person paying it "or his legal representatives," is not available to a judgment creditor of such person. Barret v. Shelbyville Nat. Bank (1887) 85 Tenn. 426, 3 S. W. 117.

17. **Pleading.**—A petition to recover usurious interest from a national bank under section 5197, R. S., section 9758, ante, and this section, which shows on its face that the transaction was not commenced within two years "from the time the usurious transactions occurred," as required by this section, is not made sufficient because of an allegation that the charge and reservation of usurious interest were without plaintiff's knowledge or consent, since the court will not presume that plaintiff did not know of the wrong until some time within two years before commencement of the action. Talbot v. Sioux National Bank (1902) 22 Sup. Ct. 621, 623, 185 U. S. 182, 46 L. Ed. 862.

As to necessity of alleging that the usury was knowingly collected, see Washington-Alaska Bank v. Stewart (1911) 184 Fed. 673, 108 C. C. A. 273.

In an action against a national bank to recover twice the amount of interest paid to the bank under a usurious contract, the petition need not refer to the statute authorizing the suit. Henderson Nat. Bank v. Alves (1891) 91 Ky. 142, 15 S. W. 132, 12 Ky. Law Rep. 722.

A petition to recover a penalty for taking, receiving, reserving, or charging a rate of interest greater than is allowed by law must charge that the act was "knowingly done." Schuyler Nat. Bank v. Bollong (1888) 24 Neb. 821, 825, 40 N. W. 411, 413.

In an action by a national bank on a draft discounted by it, an answer aver-

ring that the bank discounted the draft at a usurious rate of interest, contrary to the statute, and specifying the interest taken, is not so frivolous as to authorize a judgment for plaintiff on motion, though it does not expressly allege a corrupt intent. National Bank of Metropolis v. Orcutt (N. Y. 1867) 48 Barb. 256.

A complaint against a national bank for usury need not allege that there are no state banks of issue which are by law allowed to charge the rate claimed to be usurious, such fact, if shown to exist, being a bar to the action. Morgan v. First Nat. Bank (1885) 93 N. C. 352.

A complaint, by an executrix of the will of her deceased husband, to recover double the amount of usurious interest paid for money borrowed from a national bank by her husband during his lifetime, which shows that no payments were made thereon by the husband, and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been borrowed, with lawful interest, and that the additional payments which constituted the usury were made by her in an individual capacity, prior to qualifying as executrix, does not state a cause of action in her representative capacity, under this section. Lealos v. Union Nat. Bank (1899) 81 N. W. 56, 9 N. D. 60.

Petition in action against national bank to recover usury paid to it held sufficient as against a general demurrer. First Nat. Bank v. Langston (Okl. 1912) 124 P. 308.

Petition, in an action against a national bank for charging a usurious rate of interest held to state a cause of action. Farmers' Nat. Bank of Wewoka v. McCoy (1914) 141 P. 791, 42 Okl. 420.

A complaint which alleges that defendant knowingly and usuriously received from plaintiff, for interest, a certain sum, being at the rate of 24 per centum per annum, and gives time, amount, etc., states a good cause of action for recovery, under the national banking act. Guild v. First Nat. Bank (1894) 4 S. D. 566, 57 N. W. 499.

In an action by a national bank on a note, a cross action for the statutory penalty, for money paid the bank as usurious interest, is deficient, where the plea fails to give the amount of usurious interest so paid. Lomax v. First Nat. Bank (Tex. Civ. App. 1897) 39 S. W. 655.

18. **Evidence.**—In an action against a national bank to recover the penalty for taking usury, it appeared that the transactions between the plaintiff and the bank consisted of a large number of loans evidenced by notes, many of which had been from time to time renewed. Held, that evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious. First Nat. Bank v. Barnett (1897) 70 N. W. 937, 51 Neb. 397.

In an action by a national bank to collect a note, evidence held sufficient to authorize the presumption of payment of usurious interest. Trabue v. Cook (Tex. Civ. App. 1910) 124 S. W. 455.

Habit or custom being relevant on the question of the construction of a contract, in an action against a bank to recover the statutory penalty for usury, a bank officer was properly asked as to the custom of his bank relevant to interest, as to discounting notes similar to those in issue. Nocona Nat. Bank v. Bolton (Tex. Civ. App. 1912) 143 S. W. 242.

19. —— **Burden of proof.**—In an action against a national bank to recover double the amount of interest paid on a usurious note, defendant is not liable if it proves that it sold and assigned the note before maturity in good faith, and was acting merely as the assignee's agent in collecting it; but the burden of showing good faith is on defendant, no presumption being raised in its favor by the mere fact of assignment. First Nat. Bank v. Miltonberger (1892) 33 Neb. 847, 51 N. W. 232.

One who seeks to recover the penalty provided by this section for usury on a note to a national bank has the burden of establishing that he has paid a higher rate of interest than the legal rate, and that the bank received it knowingly. Merchants' & Planters' Nat. Bank of Mill Creek v. Horton (1911) 117 P. 201, 27 Okl. 689.

An action against a national bank for double the usurious interest paid, being governed by this section, not by Rev. Laws Okl. 1910, § 1005, it is not necessary to allege and prove demand for return of the usury claimed. Pauls Valley Nat. Bank v. Mitchell (Okl. 1916) 154 P. 1188.

20. **Instructions.**—In an action to recover the penalty given by this section, for usury on a note to a national bank, it is error to instruct that plaintiff is entitled to recover if the plaintiff has paid a greater rate of interest than the legal rate, and to refuse to instruct that the defendant must have received the usurious interest knowingly. Merchants' & Planters' Nat. Bank of Mill Creek v. Horton (1911) 117 P. 201, 27 Okl. 689.

21. **Defenses.**—A national bank which has charged 12 per cent. interest on overdrafts when 8 per cent. is the highest interest permitted by state laws cannot escape the forfeiture prescribed by this section because of the trifling amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due. Citizens'

Nat. Bank v. Donnell (1904) 25 Sup. Ct. 49, 195 U. S. 369, 49 L. Ed. 238.

Defendant is not liable if it proves that it sold and assigned the note before maturity in good faith, and was acting merely as the assignee's agent in collecting it. First Nat. Bank v. Miltonberger (1882) 33 Neb. 847, 51 N. W. 232.

Where it appeared that plaintiff in an action against a national bank to recover usurious interest was the beneficial owner of the notes discounted, the fact that a joint maker had brought suit in another court for the recovery of such usurious interest was no bar to the action. First Nat. Bank v. Gruber (1879) 91 Pa. 377.

22. —— **Set-offs.** — In an action brought by the receiver of A.'s property against a national bank, under this section, to recover penalties for taking unlawful interest, the bank cannot set off a balance due from A. on an unpaid note. Morehouse v. Second Nat. Bank (N. Y. 1883) 30 Hun, 628.

In suit against a national bank, to recover the penalty imposed by this section for taking usurious interest, defendant cannot set off a judgment or other claim held by it against plaintiff. Lebanon Bank v. Karmany (1881) 98 Pa. 65.

23. **Measure of recovery.**—The amount of penalty, recoverable in an action against banks under this section is twice the whole amount of the interest paid, and not merely twice the amount paid in excess of the legal rate. First Nat. Bank v. Watt (1902) 22 Sup. Ct. 457, 184 U. S. 151, 46 L. Ed. 475; Crocker v. First Nat. Bank (C. C. 1876) Fed. Cas. No. 3,397; Hill v. Nat. Bank of Barre (C. C. 1883) 15 Fed. 432; Louisville Trust Co. v. Kentucky Nat. Bank (C. C. 1898) 87 Fed. 143; Henderson Nat. Bank v. Alves (1891) 91 Ky. 142, 15 S. W. 132; National Bank of Lancaster v. Johnson (1891) 91 Ky. 181, 15 S. W. 134; Second Nat. Bank v. Fitzpatrick (1901) 111 Ky. 228, 62 L. R. A. 599, 63 S. W. 459, 23 Ky. Law Rep. 610; National Bank of Lancaster v. Johnson (Super. 1890) 11 Ky. Law Rep. (abstract) 904; Watt v. First Nat. Bank (1899) 79 N. W. 509, 76 Minn. 458; Schuyler Nat. Bank v. Bollong (1890) 28 Neb. 684, 45 N. W. 164; Boerner v. Traders' Nat. Bank (1897) 39 S. W. 285, 90 Tex. 443; Colgin v. City Nat. Bank (1897) 40 S. W. 634, 16 Tex. Civ. App. 346.

The sum to be recovered back is not a debt, but a penalty, and hence does not bear interest. Higley v. First Nat. Bank (1875) 26 Ohio St. 75, 20 Am. Rep. 759; Columbia Nat. Bank v. Bletz (Pa. 1882) 2 Penny. 169; McCreary v. First Nat. Bank (1902) 70 S. W. 821, 109 Tenn. 128.

The penalty recoverable from a national bank, under this section, where a greater rate of interest than is allowed by law has been actually paid to and received by it, is twice the amount of the interest paid in excess of the legal rate, not twice the amount of the entire interest. Hintermister v. First Nat. Bank (1876) 64 N. Y. 212; Bobo v. People's Nat. Bank (1892) 92 Tenn. 444, 21 S. W. 888.

The national banking act subjecting a bank to liability for taking usurious interest does not declare the contract of indorsement of collateral security to the contract void, and, no such penalty being prescribed, the courts cannot superadd it. Oates v. Montgomery First Nat. Bank (1879) 100 U. S. 239, 25 L. Ed. 580.

Where a usurious note given to a national bank is renewed, and the interest included in the principal of the new note, only the amount of the original debt can be recovered, notwithstanding the new note, on its face, bears the legal rate of interest. Farmers' & Mechanics' Bank v. Hoagland (C. C. 1881) 7 Fed. 159.

The only penalties incurred by the bank for taking usury, so far as concerns the debtor, are the forfeiture of the unpaid interest, and a penalty of twice the amount of interest that has been paid, if sued for within two years. Wiley v. Starbuck (1873) 44 Ind. 298.

Where a national bank loaned money at usurious interest, and added it into a note, which was several times renewed at the usurious rate, the bank was only entitled to recover, in an action on the last note, the principal sum originally loaned, less the partial payments made on the notes. Sydner v. Mt. Sterling Nat. Bank (1893) 94 Ky. 231, 21 S. W. 1050.

Where a national bank lends money at a usurious rate of interest, and the note therefor is renewed from time to time, usury being embraced in each renewal, the entire interest may be eliminated from the last note, so that nothing can be recovered thereon except the original principal. Peoples v. First Nat. Bank (1894) 15 Ky. Law Rep. 748.

A judgment against a national bank for twice the amount of interest paid, as a penalty for taking usury, should have allowed interest from the date of filing the petition to recover the penalty; that being the date of the first demand therefor. Second Nat. Bank v. Fitzpatrick (1901) 63 S. W. 459, 23 Ky. Law Rep. 610, 111 Ky. 228, 62 L. R. A. 599.

The party entitled to maintain an action against a national bank, under this section, to recover usurious interest paid, is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments. Hintermister v. First Nat. Bank (1876) 64 N. Y. 212.

Under this section a national bank

charging usury is liable for twice the amount of interest paid, and not twice the sum by which the interest received exceeded the lawful rate. Meredith v. American Nat. Bank of Sparta (Tenn. 1913) 153 S. W. 479.

24. Questions of law.—Where the undisputed facts show that a bank knowingly charged usurious interest, and the only possible conclusion to be derived from the evidence, taken as a whole, is that the transaction is usurious, the question is one of law for the court and not of fact for the jury. Caddo Nat. Bank v. Moore (Okl. 1911) 120 P. 1003.

25. New trial.—The jury, in finding a verdict for the amount which plaintiff was entitled to recover, under this section for alleged payments made to defendant by plaintiff of a usurious rate of discount, not having made deductions of the balance due on the notes as instructed by the court, a new trial will be ordered, unless plaintiff, within 10 days, remit from the verdict all over the amount which the jury would have found, had they followed the instructions of the court. Knapp v. Williamsport Nat. Bank (C. C. 1882) 15 Fed. 333, writ of error dismissed Williamsport Nat. Bank v. Knapp (1886) 7 Sup. Ct. 274, 119 U. S. 357, 30 L. Ed. 446.

26. Review.—These sections do not make the construction of the state usury law, in case of a loan by a national bank, a federal question. Union Nat. Bank v. Louisville, N. A. & C. R. Co. (1896) 16 Sup. Ct. 1039, 1040, 163 U. S. 325, 41 L. Ed. 177.

In an action in a state court against a national bank to recover usurious interest paid the right given to such banks by this section to charge the same rate of interest as state banks of issue, is not "specially set up or claimed" so as to render an adverse decision by the state supreme court reviewable in the United States supreme court, under section 709, when the only objection made to the complaint is that it fails to state facts sufficient to constitute a cause of action, and this question is argued and determined according to the technical rules of pleading, without any suggestion that defendant may be deprived of some right or privilege given by a statute of the United States. Schuyler Nat. Bank v. Bollong (1893) 14 Sup. Ct. 25, 150 U. S. 85, 37 L. Ed. 1008; Id., 14 Sup. Ct. 26, 150 U. S. 90, 37 L. Ed. 1010.

A decision by the highest court of a state adverse to the right claimed under this and the next section to recover back usurious interest from a national bank presents a federal question, which gives to the supreme court of the United States the right to review the judgment of such state court. Talbot v. Sioux City Nat. Bank (1902) 22 Sup. Ct. 621, 185 U. S. 182, 46 L. Ed. 862, affirming judgment (1900) 82 N. W. 963, 111 Iowa, 583.

A decision of the highest state court that certain conveyances absolute on their face are mortgages on the ground that redemption shall be granted only on condition that the grantor should be charged with the debt and interest is not reviewable in the federal Supreme Court, though the bill avers usury exacted by a national bank and prays that the entire interest shall be adjudged forfeited. Holden Land & Live Stock Co. v. Interstate Trading Co. (1914) 34 Sup. Ct. 661, 233 U. S. 536, 58 L. Ed. 1083, dismissing appeal (1912) 123 P. 733, 87 Kan. 221.

IV. EXCLUSIVENESS OF FEDERAL REMEDY

27. Remedy available.—The only remedy open to a party aggrieved by the action of a national bank in taking usurious interest is that prescribed by the act of congress,—a separate action for double the interest paid by him. Farmers' & M. Nat. Bank v. Dearing (1875) 91 U. S. 29, 23, 33, 23 L. Ed. 196; Barnet v. Muncie Nat. Bank (1878) 98 U. S. 555, 557, 25 L. Ed. 212; Haseltine v. Central Nat. Bank of Springfield (1901) 22 Sup. Ct. 50, 183 U. S. 132, 46 L. Ed. 118, affirming judgment Central Nat. Bank v. Haseltine (1900) 55 S. W. 1015, 155 Mo. 58, 85 Am. St. Rep. 531; National Exch. Bank v. Moore (D. C. 1868) Fed. Cas. No. 10,041; First Nat. Bank v. McEntire (1900) 37 S. E. 381, 112 Ga. 232; Farrow v. First Nat. Bank (1898) 47 S. W. 594, 20 Ky. Law Rep. 1413; Sowders v. Citizens' Nat. Bank (Super. 1890) 12 Ky. Law Rep. (abstract) 356; National State Bank v. Boylan (N. Y. 1877) 2 Abb. N. C. 216; Merchants' & Farmers' Nat. Bank v. Myers (1876) 74 N. C. 514; Oldham v. First Nat. Bank (1881) 85 N. C. 240; First Nat. Bank v. Garlinghouse (1872) 22 Ohio St. 492, 10 Am. Rep. 751; Huntington v. Krejci (1881) 3 Ohio Dec. 532; First Nat. Bank v. Gruber (1879) 91 Pa. 377; First Nat. Bank v. McCarthy (S. D. 1904) 100 N. W. 14; Hill v. National Bank of Barre (1884) 56 Vt. 582; National Exch. Bank v. Boylen (1885) 26 W. Va. 554; Charleston Nat. Bank v. Bradford (1902) 41 S. E. 153, 51 W. Va. 255.

A controversy respecting usurious interest paid on a note held by a national bank, secured by collateral note and mortgage, which arises in a suit to foreclose the mortgage, is none the less governed by the federal law on the subject of usury by national banks, because the collateral note and mortgage were executed in favor of the bank president for the benefit of the bank, which was prohibited by the fed-

eral law from taking real estate security for a debt coincidently contracted. Schuyler Nat. Bank v. Gadsden (1903) 24 Sup. Ct. 129, 191 U. S. 451, 48 L. Ed. 258, reversing judgment Gadsden v. Thrush (1902) 89 N. W. 403, 63 Neb. 881.

In an action in a state court by a national bank on a note due it the court has jurisdiction of the defense of usury. Pickett v. Merchants' Nat. Bank (1879) 32 Ark. 346, 1 Browne, Nat. Bank Cas. 209.

Where a national bank loans money upon a usurious contract, and attempts to enforce such contract in a state court, the plea of usury can be maintained, even though it will operate in some sense as a penalty, and suits for penalties can be enforced only in the United States courts. National Bank of Winterset v. Eyre (1879) 52 Iowa, 114, 2 N. W. 995.

This section applies as well to banks established in states where a rate is fixed by law as to banks in states where no rate is fixed. Central Nat. Bank v. Pratt (1874) 115 Mass. 539, 15 Am. Rep. 138; Davis v. Randall (1874) 115 Mass. 547, 15 Am. Rep. 146.

This section and the preceding one having prescribed as a penalty for the taking of usurious interest by a national bank that the person paying the same may recover twice the amount so paid, he can resort to no other mode or form of procedure. National Exchange Bank v. Boylen (1885) 26 W. Va. 554.

28. State laws.—A state law imposing a penalty on banks exacting usurious discounts does not apply to national banks, the penalty imposed on such banks by this section in regard to usurious discounts being exclusive. Florence R. R. & Imp. Co. v. Chase Nat. Bank (1895) 106 Ala. 364, 17 South. 720; Slaughter v. First Nat. Bank (1896) 109 Ala. 157, 19 South. 430; Wiley v. Starbuck (1873) 44 Ind. 298; Silva v. First Nat. Bank (Super. 1888) 10 Ky. Law Rep. (abstract) 365; Central Nat. Bank v. Pratt (1874) 115 Mass. 539, 15 Am. Rep. 138; Davis v. Randall (1874) 115 Mass. 547, 15 Am. Rep. 146; Norfolk Nat. Bank v. Schwenk (1895) 46 Neb. 381, 64 N. W. 1073; Barker v. Rochester Nat. Bank (1879) 59 N. H. 310; First Nat. Bank v. Lamb (1870) 57 Barb. 429, reversed (1872) 50 N. Y. 95, 10 Am. Rep. 438. But this section does not prevent the operation of the police laws of the state, making it a misdemeanor to take illegal interest. State v. First Nat. Bank (1892) 2 S. D. 568, 51 N. W. 587.

This and the preceding section supersede the state laws on the subject of usury so far as they might otherwise be applicable to such banks. Peterborough Nat. Bank v. Childs (1882) 133 Mass. 248; Importers' & Traders' Nat. Bank v. Littell (1884) 46 N. J. Law (17 Vroom) 506.

Under Act June 3, 1864, prescribing the penalty for usury by national banks, a state law imposing a higher penalty is invalid. Farmers' & Mechanics' Nat. Bank v. Dearing (1875) 91 U. S. 29, 23 L. Ed. 196.

State statutes relating to usury have no application to negotiable instruments held by national banks; the penalty fixed by this section against national banks for usury, and the remedy therefor, being exclusive. Reese v. Colquitt Nat. Bank (Ga. App. 1913) 77 S. E. 320.

It is within the constitutional power of Congress to fix the rate of interest which a national bank may take upon a loan of money and to determine the penalty to be imposed for taking a greater rate, and such power, when exercised by Congress, is exclusive of state legislation. Central Nat. Bank v. Pratt (1874) 115 Mass. 539, 15 Am. Rep. 138; Davis v. Randall (1874) 115 Mass. 547, 15 Am. Rep. 146.

No privilege of immunity from the usury laws of the states is conferred upon national banks by this act. First Nat. Bank v. Lamb (1872) 50 N. Y. 95, 10 Am. Rep. 438.

The clause in this section, providing that the taking by a national bank of a greater rate than allowed shall be a forfeiture of all interest, applies as well to a case where the state has a fixed rate as to one where there is no rate fixed by the state, congress having full power to so legislate. First Nat. Bank v. Garlinghouse (1872) 22 Ohio St. 492, 10 Am. Rep. 751.

29. Availability of penalty as set-off or defense.—Usurious interest paid on a note to a national bank cannot be set off against the principal; the remedy being an action for the statutory penalty. Fleckner v. Bank of U. S. (1823) 8 Wheat. 338, 355, 5 L. Ed. 631; Barnet v. National Bank (1878) 98 U. S. 555, 25 L. Ed. 212; Driesbach v. Second Nat. Bank (1881) 104 U. S. 52, 53, 26 L. Ed. 658; Stephens v. Monongahela Nat. Bank (1884) 4 Sup. Ct. 336, 337, 111 U. S. 197, 28 L. Ed. 399; Haseltine v. Central Nat. Bank of Springfield (1901) 22 Sup. Ct. 50, 51, 183 U. S. 132, 46 L. Ed. 118 (affirming judgment Central Nat. Bank v. Haseltine [1900] 55 S. W. 1015, 155 Mo. 58, 85 Am. St. Rep. 531); Danforth v. National State Bank (1891) 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; Farmers' & Mechanics' Bank v. Hoagland (C. C. 1881) 7 Fed. 159; Ellis v. First Nat. Bank of Olney (1882) 11 Ill. App. (11 Bradw.) 275; Wiley v. Starbuck (1873) 44 Ind. 298; First Nat. Bank v. Moore (1891) 83 Iowa, 740, 48 N. W. 1072; Fraker v. Cullum (1881) 24 Kan. 679; Marion Nat. Bank v. Thompson (1897) 40 S. W. 903, 101 Ky. 277, 19 Ky. Law Rep. 436; Slack v. First Nat. Bank (1898) 44 S. W. 354, 19 Ky. Law

Rep. 1684; Silva v. First Nat. Bank (Super. 1888) 10 Ky. Law Rep. (abstract) 365; Lazear v. National Union Bank (1879) 52 Md. 78, 36 Am. Rep. 355; Peterborough Nat. Bank v. Childs (1882) 133 Mass. 248, 43 Am. Rep. 509; Norfolk Nat. Bank v. Schwenk (1895) 46 Neb. 381, 64 N. W. 1073; Lanham v. First Nat. Bank (1896) 65 N. W. 786, 46 Neb. 663; Montgomery v. Albion Nat. Bank (1897) 70 N. W. 239, 50 Neb. 652; Importers' & Traders' Nat. Bank v. Littell (Sup. 1885) 47 N. J. Law (18 Vroom) 233; National Bank of Auburn v. Lewis (1880) 81 N. Y. 15 (modifying [1878] 75 N. Y. 516); Chase Nat. Bank v. Faurot (1896) 44 N. E. 164, 149 N. Y. 532, 35 L. R. A. 605 (affirming [1893] 72 Hun, 373, 25 N. Y. Supp. 447); Farmers' & Mechanics' Bank v. Lang (1880) 22 Hun, 372; First Nat. Bank v. Anderson (1900) 67 N. Y. Supp. 434, 55 App. Div. 570; Oldham v. First Nat. Bank of Wilmington (1881) 85 N. C. 240; Shinkle v. First Nat. Bank of Ripley (1872) 22 Ohio St. 516; Higley v. First Nat. Bank (1875) 26 Ohio St. 75, 20 Am. Rep. 759; Smith v. Exchange Bank of Pittsburg (1875) 26 Ohio St. 141; Brown v. Second Nat. Bank (1872) 72 Pa. (22 P. F. Smith) 209; Bly v. Second Nat. Bank (1875) 79 Pa. (29 P. F. Smith) 453; First Nat. Bank v. Gruber (1879) 91 Pa. 377; National Bank of Fayette County v. Dushane (1880) 96 Pa. 340; Childs v. Alexander (1884) 22 S. C. 169; First Nat. Bank v. Hunter (1902) 70 S. W. 371, 109 Tenn. 91; Huggins v. Citizens' Nat. Bank (1894) 6 Tex. Civ. App. 33, 24 S. W. 926; Lomax v. First Nat. Bank (Tex. Civ. App. 1897) 39 S. W. 655; Comanche Nat. Bank v. Dabney (Tex. Civ. App. 1898) 44 S. W. 413; Trabue v. Cook (Tex. Civ. App. 1910) 124 S. W. 455; National Exch. Bank v. Boylen (1885) 26 W. Va. 554, 53 Am. Rep. 113.

This section does not apply to the defense of usury set up in an action by a national bank on a note due it. Pickett v. Merchants' Nat. Bank (1877) 32 Ark. 346, 1 Browne, Nat. Bank Cas. 209.

It is no defense to an action on a note made to a national bank that the bank knowingly took a greater rate of interest than allowed by law; the remedy in such case is by suit to recover back twice the amount paid. Farmers' Nat. Gold Bank v. Stover (1882) 60 Cal. 387.

A surety, when sued on the last of several renewals of a note, is not entitled to credit by the usurious interest paid by the principal at the time of the several renewals, but only by the amount withheld by the bank when the original note was executed, where the right of the principal to recover the penalty is barred by a judgment dismissing, as settled, an action brought by him to recover the penalty. Faulkner v. Marion Nat. Bank (1897) 43 S. W. 249, 19 Ky. Law Rep. 1268.

This section does not prevent the maker from setting up usurious payments after two years as a defense to an action on the note. Peterborough Nat. Bank v. Childs (1881) 130 Mass. 519, 39 Am. Rep. 474.

The national banking act, providing that actions to recover usurious interest, which has been paid to national banks, shall be brought within two years, does not prevent the maker of a note from setting up such payments after two years, and having them applied on the principal, in an action by the bank on the note. Moniteau Nat. Bank v. Miller (1880) 73 Mo. 187.

A borrower, having paid usurious interest on one loan, was sued by the bank on another, against which he sought to set off the penalty for taking the usurious interest. Held, that the right to recover the usurious interest did not arise on contract, and hence was not available as a set-off. Hade v. McVay (1877) 31 Ohio St. 231.

Where a national bank sues on a note on which it has received usurious interest, the defendant may set off the excess of interest or discount paid from time to time on the usurious loan. Brown v. Second Nat. Bank (1872) 72 Pa. (22 P. F. Smith) 209.

In an action by a national bank, the defendant may set off the amount of usurious discounts on previous transactions. The interest paid by him, beyond that authorized by the bank act of 1864, belongs to him, and the bank can hold it only for his use. Lucas v. Government Nat. Bank (1875) 78 Pa. (28 P. F. Smith) 228, 21 Am. Rep. 17.

The fact that the bank which had made overdrafts charged illegal interest to customers on the notes discounted for it by the national bank affect the right of the sureties to set up, as against the national bank, its violation of the act of congress, in charging usurious interest. Philadelphia Bank v. Miller (1879) 90 Pa. 241.

Cited without definite application, Leather Manufacturers' Nat. Bank v. Cooper (1887) 7 Sup. Ct. 777, 778, 120 U. S. 778, 30 L. Ed. 816; Butler v. Coleman (1888) 8 Sup. Ct. 718, 720, 124 U. S. 721, 31 L. Ed. 567; Petri v. Commercial Nat. Bank (1892) 12 Sup. Ct. 325, 326, 142 U. S. 644, 35 L. Ed. 1144; Brown v. Marion Nat. Bank (1892) 13 Sup. Ct. 260, 261, 146 U. S. 619, 36 L. Ed. 1106; Haseltine v. Central Nat. Bank of Springfield (1901) 22 Sup. Ct. 49, 50, 183 U. S. 130, 46 L. Ed. 117; Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 107, 5 C. C. A. 432; Hemple v. Raymond (1906) 144 Fed. 796, 75 C. C. A. 526; St. Louis Nat. Bank v. Brinkman (C. C. 1880) 1 Fed. 45, 46.

§ 9760. (R. S. § 5199.) Dividends.

The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Act June 3, 1864, c. 106, § 33, 13 Stat. 109.

Notes of Decisions

"Dividend."—Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself makes or loses in lending their money, but receive a share of such profits as the bank, by lending their money, makes, after deducting expenses, etc., such share of profits is a "dividend," and not "interest." Cary v. Savings Union (1874) 89 U. S. (22 Wall.) 38, 22 L. Ed. 779.

Set-off against dividends.—A receiver winding up a national bank may set off the additional liability of a stockholder against a dividend due on the deposit account of the stockholder; and it is immaterial that the claim to the dividend has been assigned to others, or that the amount of the stockholder's liability has not been determined. Brownell v. Armstrong (Ohio, 1888) 20 Wkly. Law Bul. 465.

An assignment by the stockholder of an insolvent national bank of his deposit claim against the bank, before the direction of the comptroller to enforce his individual liability as stockholder, but after the insolvency of the bank, does not affect the right of the bank to set off such liability against the dividend due on his claim, nor does the fact that the comptroller, at the time of the assignment, had not determined the amount necessary to be collected from the stockholders for the payment of the creditors, affect such right. King v. Armstrong (1893) 50 Ohio St. 222, 34 N. E. 163.

The indebtedness of the stockholders of a national bank on their individual liability, together with the other assets of the bank, constitute a trust fund for the benefit of its creditors; and, on the bank's becoming insolvent, the indebtedness of a stockholder who is also insolvent may, in equity, be set off against a dividend, payable out of the trust fund, on a balance due him on his deposit account with the bank at the time of its failure. Id.

A bank may lawfully set off indebtedness of a stockholder to the bank against dividends accruing on such stockholder's shares. First Nat. Bank v. De Morse (Tex. Civ. App. 1894) 26 S. W. 417.

Recovery of dividends illegally paid.—The receiver of a national bank cannot recover a dividend paid not at all out of profits, but entirely out of the capital, where the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and where the bank, at the time such dividend was declared and paid, was not insolvent. McDonald v. Williams (1899) 19 Sup. Ct. 743, 174 U. S. 397, 43 L. Ed. 1022.

A stockholder in an insolvent bank who receives a dividend from funds properly belonging to the creditors holds it under an implied and not an express trust in favor of the creditors, and hence limitations run in his favor against an action to recover the dividend. Hayden v. Thompson (1895) 71 Fed. 60, 17 C. C. A. 592, reversing decree (C. C. 1895) 67 Fed. 273.

It cannot be urged as a defense to a bill by the receiver of an insolvent national bank against the shareholders, to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits, that the remedies provided by the national banking act are exclusive, since the right to recover diverted trust funds is not dependent on statute. Id.

In the absence of fraud, the cause of action in favor of the receiver of an insolvent national bank against the stockholders to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits arises when the payment is made, and not on the appointment of the receiver and the discovery that the other assets of the bank are insufficient to pay its debts. Id.

The receiver of a national bank cannot maintain a bill in equity against its stockholders to recover dividends illegally paid them out of its capital stock, as they may be recovered in an action at law. Hayden v. Thompson (C. C. 1895) 67 Fed. 273, decree reversed (1895) 71 Fed. 60, 17 C. C. A. 592.

As to liability of director where excessive loan is made, and evidence in suit to enforce such liability, see § 9831, post; as to liability of cashier, see § 9661, ante.

Tax dividend—Discrimination.—A petition alleging that defendant, a national bank, ordered a tax dividend on its capital stock, the distribution thereof to be effected by the payment of taxes levied on the shares of stock held by the stockholders, and further alleging that in pursuance of said order the

bank paid the taxes levied on the shares of many of the shareholders, but failed to pay the taxes levied on certain other shares belonging to other shareholders, who had assigned their claims for such wrongful discrimination to plaintiff, stated a cause of action. Redhead v. Iowa Nat. Bank (1904) 98 N. W. 806, 123 Iowa, 336.

Cited without definite application, Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465; Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 504.

§ 9761. (R. S. § 5200, as amended, Act June 22, 1906, c. 3516.) Limit to liabilities which may be incurred by any one person, etc.

The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such associations, actually paid in and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, That the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed.

Act June 3, 1864, c. 106, § 29, 13 Stat. 108. Act June 22, 1906, c. 3516, 34 Stat. 451.

This section, as enacted in the Revised Statutes, was as follows:

"The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

It was amended by Act June 22, 1906, c. 3516, cited above, to read as set forth here.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Notes of Decisions

Construction and operation.—This section is a restriction on the power of the officers of national banking associations in conducting business against making loans of its funds either to themselves or others beyond the limit specified. Huff v. Union Nat. Bank (C. C. 1900) 173 Fed. 333.

There is no restriction of law prohibiting the Comptroller of Currency from permitting a national bank having a lawfully established branch to make loans at either place, based on the total amount of the capitalization and surplus of the corporation. The only restriction in law in this respect is that the aggregate loans made by the mother bank and all its branches shall not at any one time exceed the limitations expressed in this section. (1909) 27 Op. Atty. Gen. 601.

"Money borrowed."—The acceptance of a check, where the drawer has no funds on deposit, is a loan of the credit of the bank rather than a loan of money, and, if otherwise unobjectionable, is not within the restriction provided by this section. (1882) 17 Op. Atty. Gen. 471.

A national bank, at time of its organization from a state bank, took therefrom, among the discounted notes, one for a larger amount than the national bank was authorized to loan to a single borrower. Held, that such note was not, nor was any note subsequently given in renewal thereof, within the meaning of this section, given for money borrowed of the national bank. Allen v. First Nat. Bank (1872) 23 Ohio St. 97.

Discount in good faith.—A bank cashier discounted drafts drawn by P. & Co. on W. & Co., two distinct firms doing business in different cities, but composed of the same members, the former firm buying lumber, and shipping it to W. & Co. for sale; the latter also being consignee of third parties forwarding lumber on commission. Held, that such drafts were within the meaning of this section. Second Nat. Bank v. Burt (1883) 93 N. Y. 233, affirming (1882) 26 Hun, 672.

Excessive loans—Penalties.—A loan by a national bank in excess of the restriction is not void; but making such a loan subjects the bank and its of-

ficers to the forfeitures and penalties prescribed in section 9831, post. Shoemaker v. National Mechanics' Bank (C. C. 1869) Fed. Cas. No. 12,801; Stewart v. National Union Bank, Id. 13,-435.

Right to set up violation of statute as a defense.—A borrower from a national bank of an amount in excess of the amount allowed under national banking act cannot plead such act to defeat an action to recover the loan. Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1877) 96 U. S. 640, 642, 24 L. Ed. 648; Weber v. Spokane Nat. Bank (1894) 64 Fed. 208, 211, 12 C. C. A. 93; Wyman v. Citizens' Nat. Bank (C. C. 1887) 29 Fed. 734; Richeson v. National Bank of Mena (Ark. 1910) 132 S. W. 913; Mills County Nat. Bank v. Perry (1887) 72 Iowa, 15, 33 N. W. 341; Corcoran v. Batchelder (1888) 147 Mass. 541, 18 N. E. 420; Portland Nat. Bank v. Scott (1891) 20 Or. 421, 26 Pac. 276.

W., having expressly authorized mortgaging of his interest in a dredge to secure money to build it and to carry out a dredging contract, also knew a national bank was financing the building, and the amount necessary exceeded $60,000. Held that W. or his assignee could not object to a chattel mortgage executed to the bank for advancements in excess of one-tenth of its capital stock, in violation of this section; there being no penalty imposed on a national bank for violation of such section, unless it be a forfeiture of its charter, as provided by section 5239. The Seattle (1909) 170 Fed. 284, 95 C. C. A. 480.

A violation of this section can be taken advantage of only by the government. Maryland Trust Co. v. National Mechanics' Bank (1906) 63 A. 70, 102 Md. 608.

The fact that a bank has lent in excess of one-tenth of its capital, will not avoid the loan, if the excess was by mistake or ignorance, or known to the bank only. O'Hare v. Second Nat. Bank (1874) 77 Pa. (27 P. F. Smith) 96.

In an action by a national bank on a promissory note, evidence that there was an agreement to violate this section, and that the loans were in excess of the power of the bank to make, held to be admissible. Stephens v. Monongahela Bank (1878) 88 Pa. 157, 32 Am. Rep. 438.

Federal question.—A suit by a stockholder of a national bank for its benefit against the bank and its officers having charge of its assets individually, alleging that they had made excessive loans of funds to irresponsible and insolvent borrowers without adequate security in violation of the act, and that the bank after proper notice and demand had failed to bring the action, involved the construction of the national bank act, and was therefore a suit arising under the laws of the United States of which the federal courts had jurisdiction, though there was no diversity of citizenship. Huff v. Union Nat. Bank of Oakland (C. C. 1909) 173 Fed. 333.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 512, 522, 107 U. S. 655, 27 L. Ed. 520; First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 741, 174 U. S. 364, 43 L. Ed. 1007; California Nat. Bank v. Thomas (1902) 19 Sup. Ct. 4, 5, 171 U. S. 441, 43 L. Ed. 231; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002; American Nat. Bank of Nashville, Tenn., v. Miller (1913) 33 Sup. Ct. 883, 229 U. S. 517, 57 L. Ed. 1310; Kemp v. National Bank of The Republic (1901) 109 Fed. 48, 51, 48 C. C. A. 213; Waterbury v. McKinnon (1906) 146 Fed. 737, 77 C. C. A. 294; U. S. v. Lee (C. C. 1882) 12 Fed. 816, 817; Witters v. Foster (C. C. 1886) 26 Fed. 737, 738; Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 504; Movius v. Lee (C. C. 1887) 30 Fed. 298, 303 (affirmed Briggs v. Spaulding [1891] 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662); Stephens v. Overstolz (C. C. 1890) 43 Fed. 771, 772; Gerner v. Thompson (C. C. 1896) 74 Fed. 125, 127, 128; National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10, 12; Allen v. Luke (C. C. 1908) 163 Fed. 1018; First Nat. Bank v. Monroe (1911) 69 S. E. 1123, 135 Ga. 614.

§ 9762. (R. S. § 5201.) Associations not to loan or purchase their own stock.

No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, § 35, 13 Stat. 110.

This section was made applicable to state banking associations on their be-

coming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Notes of Decisions

1. "Loan."
2. Loans on security of stock.
3. —— Liens.
4. Purchase of stock.
5. Conversion of stock.
6. Right to take advantage of violation of statute.
7. Appointment of receiver.
8. Reduction of capital stock.
9. Federal questions.
10. Liability of stockholders.

1. "Loan."—The placing by one bank of its funds on permanent deposit with another bank is a loan. Bank v. Lanier (1870) 78 U. S. (11 Wall.) 369, 20 L. Ed. 172.

2. Loans on security of stock.—National banks cannot make a valid loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith. Bank v. Lanier (1870) 78 U. S. (11 Wall.) 369, 20 L. Ed. 172.

A national bank loaned money upon shares of its own stock as collateral security, and, upon default in payment, sold the stock, and applied the proceeds as a credit. Held, in an action by the debtor to recover the proceeds as having been unlawfully converted, that, if the illegality of loans on such security can be urged at all, except by the government, it can only be done while the contract is still unexecuted; after the stock is sold, and the proceeds applied to the debt, the courts will not interfere. First Nat. Bank v. Stewart (1883) 2 Sup. Ct. 778, 107 U. S. 676, 27 L. Ed. 592.

The fact that a national bank is prohibited from purchasing its own stock, does not make such a purchase a nullity, nor does the purchase extinguish the stock, and, where a bank bought and held shares of its own stock, an entry in a report to the Comptroller of the bonds, securities, etc., held by the bank from which such stock was omitted, constituted a false entry. Morse v. U. S. (1909) 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, writ of certiorari denied (1909) 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346.

Though a bank has no power to loan money on its own stock, as collateral, if it does so and takes the stock, it may convey a good title to a purchaser. Barron v. McKinnon (1912) 196 Fed. 933, 116 C. C. A. 483.

The acceptance by a national bank of a pledge of its own stock to secure a loan, although in violation of this section is valid, except as against the United States, after the pledge has been executed by a sale. First Nat. Bank v. Lanz (1913) 202 Fed. 117, 120 C. C. A. 271.

An affidavit of defense, in an action by a national bank on a note, is insufficient which alleges that the note was given to the bank in part payment for 10 shares of its capital stock, on the representation by an agent of the bank that the defendant would be made a director; that the bank went into voluntary liquidation before the maturity of a note given in renewal of the original note; that the bank, since going into liquidation, has paid all its depositors and other creditors; that at the time of the purchase the shares of stock, as affiant is informed and believes, and expects to show at the trial, were of no value, and have been of no value since; that affiant was not made a director, or offered the position; and that he expects to show at the trial that it was never the intention of the bank, or those in charge thereof, to offer him such a position, but that he was induced by such fraudulent representations to enter into the arrangement set forth. Brown v. Ohio Nat. Bank (1901) 18 App. D. C. 598.

A contract lien of a national bank on shares of its capital stock to secure a loan which it has made thereon is valid. Buffalo German Ins. Co. v. Third Nat. Bank (Sup. 1897) 43 N. Y. Supp. 550, 19 Misc. Rep. 564.

This section prohibits banking associations from making loans on security of shares of their own stock. Feckheimer v. National Exch. Bank (1884) 79 Va. 80.

3. —— Liens.—A by-law of a national bank prohibiting a stockholder who is indebted to the bank from transferring his certificate is void, as in contravention of this section. Evansville Nat. Bank v. Metropolitan Nat. Bank (C. C. 1871) Fed. Cas. No. 4,573; Buffalo German Ins. Co. v. Third Nat. Bank (1900) 56 N. E. 521, 162 N. Y. 163, 48 L. R. A. 107 (reversing decree [1898] 51 N. Y. Supp. 667, 29 App. Div. 137); Feckheimer v. National Exch. Bank (1884) 79 Va. 80. CONTRA, In re Dunkerson (D. C. 1868) Fed. Cas. No. 4,156.

Under this section a provision in the by-laws and stock certificates of a national bank that the stock was not transferable until all the former stockholder's liabilities to the bank were paid is void, and will not give the bank a lien on its stock for a debt due from the stockholder arising from collections made by him for the bank. A debt arising from the proceeds of such collection amounts to a loan, within the prohibition of the act. Conklin v. Second Nat. Bank of Oswego (1871) 45 N. Y. 655, 53 Barb. 512, note.

A loan to a shareholder does not give a lien on his stock. First Nat. Bank v. Lanier (1870) 11 Wall. 369, 374, 20 L. Ed. 172.

A national bank is impliedly precluded from forbidding any transfer of its shares of stock, without the consent of

the directors, by a stockholder while he is indebted to the bank, because of the repeal, by Act June 3, 1864, c. 106, re-enacting, in completed form, the entire law as to national banks, of the provisions of Act Feb. 25, 1863, c. 58 (12 Stat. 665), subjecting transfer of stock in a national bank to debts due by the stockholders to the bank, or permitting the board of directors to provide to that effect. Third Nat. Bank v. Buffalo German Ins. Co. (1904) 24 Sup. Ct. 524, 527, 193 U. S. 581, 48 L. Ed. 801, affirming judgment Buffalo German Ins. Co. v. Third Nat. Bank (1902) 64 N. E. 1119, 171 N. Y. 670.

In a suit by a national bank on a note against the maker and indorser the latter pleaded that the bank had allowed the maker to sell his stock in the bank, under which the bank had a lien, without first requiring payment of the note, thereby releasing the indorser. Held not error to strike such plea, for the reason that a national bank had no such lien. Smith v. First Nat. Bank (1902) 41 S. E. 983, 115 Ga. 608.

Where a by-law of a national bank, providing that a liability of a stockholder to the bank shall be a lien on the stock, is rendered inoperative by this section, a printed statement on the certificates of shares in such bank, to the effect that the bank claimed a lien thereon by virtue of such by-law, does not operate as notice to a purchaser of such certificates of an equitable lien claimed by the bank. Buffalo German Ins. Co. v. Third Nat. Bank (1900) 56 N. E. 521, 162 N. Y. 163, 48 L. R. A. 107, reversing judgment (1898) 51 N. Y. S. 667, 29 App. Div. 137.

A national bank can acquire no equitable lien as against an indebted stockholder on his distributive share of the assets on a liquidation of the bank's affairs. Bridges v. National Bank of Troy (1906) 77 N. E. 1005, 185 N. Y. 146, affirming judgment (1905) 94 N. Y. Supp. 1140, 106 App. Div. 616.

4. Purchase of stock.—A national bank has no power to purchase, as an investment, with its surplus funds and to hold as such, shares of stock in another national bank in view of section 9661, ante, and this section. First Nat. Bank v. Hawkins (1899) 19 Sup. Ct. 739, 740, 174 U. S. 364, 43 L. Ed. 1007.

The purchase of its own stock by a national bank, not for the purpose of preventing, or necessary to prevent, a loss upon a debt previously contracted, is illegal, and the bank may maintain an action at law to recover the money paid therefor without tendering back the stock. Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130.

A sale of corporate stock to a national bank, though ultra vires between the parties, passed the title to the bank, and it could transfer the same to a purchaser in the absence of a prior repudiation of the transaction by either of the original parties. Barron v. McKinnon (1912) 196 Fed. 933, 116 C. C. A. 483.

The sale by the president of a national bank to himself and the cashier of the stock of the bank, owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank of its own stock, where he acts in the double capacity of seller and buyer, cannot be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. In the one case the sale of the stock is enjoined by law, and its sale by the president may be ratified, however irregular it may have been in the first instance; but the purchase of its own stock by the bank is interdicted by law, and for this act there can be no authorization in advance and no ratification afterwards. Bundy v. Jackson (C. C. 1885) 24 Fed. 628.

The statutory inhibition against the purchase by a national bank of its own stock does not render stock so purchased void; and where, in such case, the stock is held for the bank by a nominal owner, a subsequent purchaser for value received by the bank acquires a good title, which cannot be questioned by the bank or its creditors. Wallace v. Hood (C. C. 1898) 89 Fed. 11, judgment affirmed Hood v. Wallace (1899) 97 Fed. 983, 38 C. C. A. 692.

Under this section the bank was not authorized to sell and deliver shares for which a note was given, on the agreement that when the note should fall due, the maker, at his election, could exchange the shares therefor. Atwater v. Stromberg (1899) 77 N. W. 963, 75 Minn. 277.

The purchase and sale of its stock by the president of a national bank, for the purpose of getting the stock into the hands of desirable persons, will not render the bank liable for fraud in its sale, the purchases being accomplished by means of funds of the bank loaned to the president, and the proceeds of the sales applied in payment of such loans; no actual authority or agency being shown, and the stock being transferred to the president individually, and registered in his name. Prosser v. First Nat. Bank (1887) 106 N. Y. 677, 13 N. E. 287.

5. Conversion of stock.—An action cannot be maintained against a national bank for conversion of shares of its own capital stock. Meyers v. Valley Nat. Bank (D. C. 1879) Fed. Cas. No. 9,519.

This section does not preclude a recovery for the value of certain shares of stock, which the bank contracted to give plaintiff for acting as director and doing business with the bank where the bank has received the benefit of the contract. Rich v. State Nat. Bank (1878) 7 Neb. 201, 29 Am. Rep. 382.

6. Right to take advantage of violation of statute.—If this section can be

urged by any one except the government, against the validity of a loan by a bank on the security of shares of its own stock, it can only be done before the contract is executed and while the security is still subsisting in the hands of the bank. When the contract has been executed, the security sold, and the proceeds applied to pay the debt, the court will not interfere. First Nat. Bank v. Stewart (1883) 2 Sup. Ct. 778, 107 U. S. 676, 27 L. Ed. 592.

The fact that a national bank purchased shares of its own stock ultra vires does not render its subsequent sale of such stock to another unlawful, or the stock void in the hands of the purchaser; nor does it constitute any defense to an action by a receiver of the bank against such purchaser to recover an assessment made after the bank's insolvency. Lantry v. Wallace (1899) 97 Fed. 865, 38 C. C. A. 510.

The sale which this section requires a national bank to make of its own stock, is real, and not fictitious; and where the president and cashier of a national bank, which is the owner of some of its own stock, purchase such stock, and execute their note to the bank for the purchase money, in a suit against them on the note by the receiver of such bank, they are estopped to set up as a defense that their purchase of the stock was unauthorized, or merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose. Bundy v. Jackson (C. C. 1885) 24 Fed. 628.

A purchaser from a national bank of shares of its capital stock, paying part cash therefor and giving his note for the balance of the purchase price, and leaving the shares of stock in the hands of the bank as collateral security for the payment of the note, cannot defeat a recovery by the bank on the note on the ground that this section prohibits national banks from making any loan or discount on the security of the shares of its own capital stock, and from becoming the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss on a debt previously contracted in good faith. Brown v. Ohio Nat. Bank (1901) 18 App. D. C. 598.

Where a contract in violation of this provision had been executed, the parties, being in pari delicto, would not be relieved by the court. Chapin v. Merchants' Nat. Bank (1888) 14 N. Y. St. Rep. 272.

This section does not invalidate such a loan, since only the government can take advantage of the breach of the law. Walden Nat. Bank of Birch (1891) 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211, affirming (1889) 55 Hun, 606. 7 N. Y. Supp. 934.

A contract made contrary to this provision is enforceable, in the absence of any declaration in the act itself prohibiting its enforcement. Buffalo German Ins. Co. v. Third Nat. Bank (1898) 51 N. Y. Supp. 667, 29 App. Div. 137, judgment reversed (1900) 56 N. E. 521, 162 N. Y. 163, 48 L. R. A. 107.

7. Appointment of receiver.—A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

8. Reduction of capital stock.—The object and policy of this section is to prevent the reduction of the outstanding stock of national banks and the withdrawal pro tanto of its capital. Wallace v. Hood (C. C. 1898) 89 Fed. 11, 13, affirmed (1899) 97 Fed. 865, 38 C. C. A. 510.

See U. S. v. Morse (C. C. 1908) 161 Fed. 429; note under § 9681, ante.

9. Federal questions.—In an action on a note against a national bank, wherein the only defense raised is that the giving of the note was part of a transaction in which the bank illegally purchased its own stock, a decision of the state court which is based on the fact that the purchase of stock and giving of the note were separate transactions is not reviewable in the supreme court, as being adverse to a liability claimed under United States laws. Chemical Nat. Bank of Chicago v. City Bank of Portage (1896) 16 Sup. Ct. 417, 419, 160 U. S. 646, 40 L. Ed. 568.

10. Liability of stockholders. — A stockholder in a national bank sold his stock in good faith to a broker, transferring the shares by subscribing a blank power of attorney on the back thereof, which authorized the purchaser to transfer the shares on the books of the bank. The broker failed to disclose his principal, who was in fact the president of the bank, who, on receiving the shares, had the amount charged to himself "as trustee of the bank," and credited to his personal account. Held, that the title to the shares passed when the vendor delivered the certificates to the broker with authority to transfer them, and that, the sale having been made in good faith, and without knowledge on the vendor's part that the purchase was for the benefit of the bank, which would render the transfer void, the vendor was not liable as a stockholder for the debts of the bank on its subsequent failure. Johnston v. Laflin (1880) 103 U. S. 800, 26 L. Ed. 532.

See Wright v. Merchants' Nat. Bank (C. C. 1879) Fed. Cas. No. 18,084; note under § 9689, ante.

Cited without definite application, First Nat. Bank v. National Exch. Bank (1875) 92 U. S. 122, 23 L. Ed.

679; U. S. v. Britton (1883) 2 Sup. Ct. 512, 522, 524, 107 U. S. 655, 27 L. Ed. 520; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Scott v. Deweese (1901) 21 Sup. Ct. 585, 588, 181 U. S. 202, 45 L. Ed. 822; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Waterbury v. McKinnon (1906) 146 Fed. 737, 77 C. C. A. 294; Swords v. Page (1909) 174 Fed. 916, 98 C. C. A. 528.

§ 9763. (Act Dec. 23, 1913, c. 6, § 24, as amended, Act Sept. 7, 1916, c. 461.) Loan on farm lands.

Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located, irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section. (38 Stat. 273. 39 Stat. 754.)

This section, which was a part of the Federal Reserve Act of 1913, as originally enacted, read as follows:

"Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land, situated within its Federal reserve district, but no such loan shall be made for a longer time than five years, nor for an amount exceeding fifty per centum of the actual value of the property offered as security. Any such bank may make such loans in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section."

It was amended by Act Sept. 7, 1916, c. 461, cited above, to read as set forth here.

See notes to section 1 of this act, post, § 9785.

§ 9764. (R. S. § 5202, as amended, Act Dec. 23, 1913, c. 6, § 13, and Act Sept. 7, 1916, c. 461.) Limit upon indebtedness to be incurred.

No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: Provided, however, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: Provided, however, That no member bank shall accept such drafts or bills of exchange referred to [in] this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security: Provided further, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus. (39 Stat. 753.)

Act June 3, 1864, c. 106, § 36, 13 Stat. 110. Act Dec. 23, 1913, c. 6, § 13, 38 Stat. 264. Act Sept. 7, 1916, c. 461, 39 Stat. 753.

This section, as enacted in the Revised Statutes, was as follows:

"No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserved profits."

It was amended by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 13, cited above, to read as follows:

"No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act."

It was again amended by Act Sept. 7, 1916, c. 461, last cited above, to read as set forth here.

Notes of Decisions

Operation of statute.—The limitation on the power conferred by section 9661, ante, to make contracts is imposed by this section. Eastern Tp. Bank v. Vermont Nat. Bank (C. C. 1884) 22 Fed. 186, 188.

Excessive debt.—This section does not prohibit a national bank from incurring indebtedness, up to the amount of its paid-up capital, for any purpose within its powers, though its circulation, deposits, special funds, and declared dividends exceed the amount of its paid-up capital. Weber v. Spokane Nat. Bank (1894) 64 Fed. 208, 12 C. C. A. 93, reversing judgment (C. C. 1892) 50 Fed. 735.

A debt incurred by a national bank, for which it receives and retains the consideration, is not void because incurred in violation of this section. Id.; Waterbury v. McKinnon (1906) 146 Fed. 737, 77 C. C. A. 294.

It is no defense to an action for a debt of a national bank that its indebtedness exceeded the limitations fixed by this provision. Hanover Nat. Bank v. First Nat. Bank (1901) 109 Fed. 421, 426, 48 C. C. A. 482.

A lease held not invalid because the aggregate rental which the bank agreed to pay during the term in monthly installments exceeded its capital stock. Such an agreement did not create an indebtedness for the aggregate amount of the installments, within the meaning of this section. Brown v. Schleier (1902) 118 Fed. 981. 55 C. C. A. 475, decree affirmed (1904) 24 Sup. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

Liabilities incurred by a bank held within the limit imposed by this section. (1882) 17 Op. Atty. Gen. 471.

The execution of a bond by a national bank to secure county deposits does not constitute an increase of the bank's liability, in violation of this section, declaring that no national banking association shall at any time be indebted or liable to an amount exceeding its capital stock actually paid in, except on account of moneys deposited with or collected by the association. Board of Sup'rs of Gratiot County v. Munson (1909) 122 N. W. 117, 157 Mich. 505, 16 Detroit Leg. N. 435.

Cited without definite application, Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002; Witters v. Foster (C. C. 1886) 26 Fed. 737, 738.

§ 9765. (R. S. § 5203.) Restriction upon use of circulating notes.

No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

Act June 3, 1864, c. 106, § 37, 13 Stat. 110.

Cited without definite application, Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002.

§ 9766. (R. S. § 5204.) Prohibition upon withdrawal of capital.

No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on

which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Act June 3, 1864, c. 106, § 38, 13 Stat. 110.

Notes of Decisions

Operation of statute.—A solvent corporation does not hold its capital or property subject to any trust in favor of its creditors, although it is in process of liquidation; this section not applying. Lawrence v. Greenup (1899) 97 Fed. 906, 38 C. C. A. 546.

Recovery of dividends paid.—The receiver of a national bank cannot recover a dividend paid, not out of profits, but entirely out of the capital, where the stockholder receiving such dividend acted in good faith, believing it to be paid out of the profits, and the bank at the time was not insolvent. McDonald v. Williams (1899) 19 Sup. Ct. 743, 744, 174 U. S. 397, 43 L. Ed. 1022.

Dividends paid after the insolvency of the bank may be recovered by its receiver where necessary to meet the demands of creditors. Hayden v. Williams (1899) 96 Fed. 279, 283, 37 C. C. A. 479.

A suit to recover a dividend wrongfully paid and received is not a suit for a violation of this section where the dividend was declared and paid after the bank had ceased operations and had gone into voluntary liquidation to return its capital to its shareholders after paying its debts. Lawrence v. Greenup (1899) 97 Fed. 906, 38 C. C. A. 546.

Liability of directors.—Bank directors cannot be held personally liable for money paid out for dividends "to a greater amount than net profits after deducting losses and bad debts," because there were debts bad in fact, but supposed to be good, when the dividends were declared and paid. Bad judgment on the part of the directors, as to the condition of the assets, without bad faith, does not make them individually liable. Witters v. Sowles (C. C. 1887) 31 Fed. 1.

See, also, note under § 9831, post.

Offenses.—The declaration of a dividend by the officers of a national bank, in the absence of profits, though prohibited under this section, is not a "willful misapplication" of its funds, within section 9772, post, and is not a criminal offense against the United States, and cannot be the object of a conspiracy to commit such an offense. U. S. v. Britton (1883) 2 Sup. Ct. 531, 108 U. S. 199, 27 L. Ed. 698.

There are no common-law offenses against the United States, and this section does not itself create any offense against the government. Id.

Cited without definite application. Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002; Hayden v. Thompson (1895) 71 Fed. 60, 63, 17 C. C. A. 592; Burrows v. Niblach (1898) 84 Fed. 111, 112, 28 C. C. A. 130; Berkowitz v. U. S. (1899) 93 Fed. 452, 457, 35 C. C. A. 379; Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465; Witters v. Foster (C. C. 1886) 26 Fed. 737, 738; Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 504.

§ 9767. (R. S. § 5205, as amended, Act June 30, 1876, c. 156, § 4.) Enforcing payment of deficiency in capital stock.

Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty

of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

Act March 3, 1873, c. 269, § 1, 17 Stat. 603. Act June 30, 1876, c. 156, § 4, 19 Stat. 64.

This section, as enacted in the Revised Statutes, did not contain the proviso at the end thereof as set forth here, beginning with the words "And provided, That if any shareholder," etc. Said proviso was added by amendment by Act June 20, 1876, c. 156, § 4, cited above.

Notes of Decisions

Shareholders.—Where a subscriber for a proposed increase in the capital stock of a bank pays and receives a receipt therefore, and is entered on the stock books as a stockholder, she becomes a stockholder, though her certificate of stock, which was made out for her when she should call for it, was not called for or sent to her. Pacific Nat. Bank of Boston v. Eaton (1891) 11 Sup. Ct. 984, 141 U. S. 227, 35 L. Ed. 702. Her position was not affected by the fact that subsequently thereto, by due proceedings, but unknown to her, the amount of the proposed increase was reduced. Id.

Assessment on shareholders.—Where a shareholder of a national bank subscribes to a certain increase of stock, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, by paying on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in this section. And the payment of such assessment is not a discharge of the shareholder's individual liability in the case of liquidation. Delano v. Butler (1886) 7 Sup. Ct. 39, 118 U. S. 634, 30 L. Ed. 260 (affirming Morrison v. Price [C. C. 1885] 23 Fed. 217); Mills v. Butler (1886) 7 Sup. Ct. 47, 118 U. S. 655, 30 L. Ed. 266.

The payment of an assessment upon the stock under this section by the pledgee thereof to protect its interest did not render it personally liable for the bank's debts as a stockholder under R. S. § 5151. Rankin v. Fidelity Insurance, Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 556, 189 U. S. 242, 47 L. Ed. 792.

The board of directors cannot levy assessments upon the stockholders to restore the capital of the bank and enable it to continue in business under the provisions of this section. Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425.

Where an assessment of 100 per cent. had been levied on the stock of an insolvent national bank, a new assessment cannot be sustained. Pepper v. Springfield Institution for Savings (1915) 218 Fed. 814, 134 C. C. A. 502.

A stockholder in a bank cannot avoid liability for the assessment thereon after the bank's failure because of fraud by an officer of the bank in selling the stock. Ryan v. Mt. Vernon Nat. Bank (1915) 224 Fed. 429, 140 C. C. A. 123.

On notice from the comptroller, under this section, that the bank's capital is impaired so as to require an assessment on the stockholders, such assessment is to be made by the stockholders themselves, and an assessment by the directors is void. Hulitt v. Bell (C. C. 1898) 85 Fed. 98.

An assessment to restore impaired capital, under this section is only enforceable by subjecting the stock of persons refusing to pay, and no action will lie against the stockholders personally. Id.

Stockholders of an insolvent national bank are bound by the action of the comptroller in making an assessment against them, and have no right to examine the accounts of the receiver as to the assets or debts of the bank. Man v. Cheeseman (D. C. 1874) Fed. Cas. No. 9,002a.

An insurance company, though forbidden by its charter from investing in national bank stock, after holding the stock and receiving dividends thereon, is estopped from setting up the unlawful acquisition to escape liability for an assessment on the subsequent insolvency of the bank, where the latter did not know in what manner the stock was acquired. Strong v. O'Neill (D. C. 1879) Fed. Cas. No. 13,543a.

In an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, the necessity of the comptroller's making as large an assessment as that in suit cannot be litigated. O'Connor v. With-

erby (1896) 111 Cal. 523, 44 Pac. 227.

The judiciary act (section 1233, ante), does not include actions to recover assessments on the capital stock of a national bank. McCormick v. Smith (1913) 130 P. 999, 23 Idaho, 487.

State courts have jurisdiction of actions to enforce liabilities of stockholders of national banks on stock assessments. Id.

An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable. Davis' Estate v. Watkins (1898) 76 N. W. 575, 56 Neb. 288.

Sale of stock.—A sale of the shares of a shareholder in a national bank, the capital stock of which is impaired, under this section, is void, unless the stock bring an amount equal to the assessment placed thereon. Merchants' Nat. Bank v. Fouche (1898) 31 S. E. 87, 103 Ga. 851.

Appointment of receiver.—Directors of a national bank are not empowered, without action of the stockholders, to levy the assessment ordered by the Comptroller for the purpose of restoring its capital and enabling it to continue in business, for the appointment of a receiver to close up the business of the banking association in case it fails to pay up its capital stock, and refuses to go into liquidation, evidently confers upon the association the privilege of declining to make good the deficiency, and to elect, instead, to go into voluntary liquidation, the exercise of which would seem to be a matter in which the owners, and not the managers, of the bank primarily are interested. Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 255, 192 U. S. 243, 48 L. Ed. 425, affirming judgment Weinhard v. Commercial Nat. Bank (1902) 68 Pac. 806, 41 Or. 359.

A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

Cited without definite application, Delano v. Butler (1886) 7 Sup. Ct. 39, 45, 118 U. S. 634, 30 L. Ed. 260; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; American Surety Co. v. Pauly (1898) 18 Sup. Ct. 552, 554, 170 U. S. 133, 42 L. Ed. 977; McDonald v. Williams (1899) 19 Sup. Ct. 743, 744, 174 U. S. 397, 43 L. Ed. 1022; Scott v. Deweese (1901) 21 Sup. Ct. 585, 588, 181 U. S. 202, 45 L. Ed. 822; Lantry v. Wallace (1901) 21 Sup. Ct. 878, 884, 182 U. S. 536, 45 L. Ed. 1218; Wingate v. Orchard (1896) 75 Fed. 241, 244, 21 C. C. A. 315; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; In re Hulitt (C. C. 1899) 96 Fed. 785, 786.

§ 9768. (R. S. § 5206.) Restriction upon use of notes of other banks.

No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

Act June 3, 1864, c. 106, § 39, 13 Stat. 111.

Cited without definite application, Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 644, 206 U. S. 158, 51 L. Ed. 1002.

§ 9769. (R. S. § 5207.) United States notes not to be held as collateral, etc.; penalty.

No association shall hereafter offer or receive United States notes or national-bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or pen-

alty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

Act Feb. 19, 1869, c. 32, 15 Stat. 270.

Cited without definite application, In re Harper (D. C. 1904) 133 Fed. 970, affirmed (1905) 141 Fed. 626, 72 C. C. A. 320.

§ 9770. (R. S. § 5208.) Penalty for falsely certifying checks.

It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

Act March 3, 1869, c. 135, 15 Stat. 335.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Provisions prescribing the punishment for falsely certifying checks are contained in Act July 12, 1882, c. 290, § 13, post, § 9771.

Notes of Decisions

As to criminal offense, see § 9771, post.

Operation of statute.—A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

Certifying of checks.—The word "certify," as commonly understood, implies that the check upon which the certification has been written has passed from the bank's custody into the hands of some other party, so that the import of an accusation that defendant did "willfully certify a certain check" is not simply that he wrote certain words on the face of it, but that he created an obligation to the bank in such a way as to make an instrument which can properly be called a "certified check." Potter v. U. S. (1894) 15 Sup. Ct. 144, 146, 155 U. S. 438, 39 L. Ed. 214.

This section prohibits the certification of a check drawn upon a national bank, where at the time of certification the drawer has not on deposit with the bank, and regularly entered to his credit on its books, an amount of money equal to the amount of the check. (1882) 17 Op. Atty. Gen. 471.

Whether the check be marked by the bank "accepted," or simply "good," can make no difference; either constitutes a certification within the meaning of the statute. Id.

The promise of a national bank to honor a depositor's checks has no contractual connection with the simultaneous act of the bank in certifying such checks for the benefit of anticipated holders; hence the validity of the debt created by paying the checks is not affected by this section, declaring it unlawful for national banks to certify any check unless the drawer have the amount thereof on deposit. Thompson v. St. Nicholas Nat. Bank (1889) 113 N. Y. 325, 21 N. E. 57.

Though under this section the overcertifying of checks by a national bank is unlawful, it does not estop the bank to indemnify itself out of collaterals pledged to secure such overcertification. Thompson v. St. Nicholas Nat. Bank (1888) 47 Hun, 621.

Effect of violation of statute.—Plaintiff's testator deposited with a firm of brokers certain bonds as margins for purchases of stocks, and the brokers, without his knowledge, delivered them to a bank under a standing agreement, previously made, that, if the brokers became indebted to the bank, it might at any time, in its discretion, sell any collateral held by it to secure such debt. On the day of the pledge, but, not in pursuance of any agreement made at the time of receiving the bonds, the bank, on the faith of the bonds, certified and subsequently paid certain checks drawn by the brokers. The bank took the bonds in good faith, without notice of the testator's title. Held, that the bonds were a valid security for the debt created by the certified checks, notwithstanding that the certification was in violation of this section; and plaintiffs could not recover the bonds without first paying the debt. Thompson v. St. Nicholas Nat. Bank (1892) 13 Sup. Ct. 66, 146 U. S. 240, 36 L. Ed. 956, affirming (1889) 21 N. E. 57, 113 N. Y. 325.

This section does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebtedness thereby creat-

ed from him to the bank, when the transaction has been completed by payment of the checks. Id.

This section does not invalidate an oral acceptance of a check, or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. Merchants' Nat. Bank v. First Nat. Bank (1874) 7 W. Va. 544.

This section does not invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but engaging to pay such check whenever a draft left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. Id.

Cited without definite application, Spurr v. U. S. (1898) 87 Fed. 701, 707, 709, 31 C. C. A. 202 (reversed [1899] 19 Sup. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150); Rieger v. U. S. (1901) 107 Fed. 914, 916, 47 C. C. A. 61 (writ of certiorari denied [1901] 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030); Merchants' Bank of Valdosta v. Baird (1908) 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; Chicago, St. P., M. & O. Ry. Co. v. U. S. (1908) 162 Fed. 835, 90 C. C. A. 211 (certiorari denied [1909] 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659); Geiger v. U. S. (1908) 162 Fed. 844, 89 C. C. A. 516; Carlisle v. U. S. (1912) 194 Fed. 827, 114 C. C. A. 531; Bowen v. Needles Nat. Bank (C. C. 1898) 87 Fed. 430, 431, 441 (affirmed [1899] 94 Fed. 925, 36 C. C. A. 553); U. S. v. Kimball (C. C. 1902) 117 Fed. 156; In re Harper (D. C. 1904) 133 Fed. 970 (affirmed [1905] 141 Fed. 626, 72 C. C. A. 320).

§ 9771. (Act July 12, 1882, c. 290, § 13.) Punishment for falsely certifying checks, etc.

That any officer, clerk, or agent of any national-banking association who shall willfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court. (22 Stat. 166.)

This section was part of the Currency Act of 1882, cited above.
See notes to section 1 of the act, ante, § 9665.

Notes of Decisions

Creation of offense.—Section 9770, ante, does not create any criminal offense, but should be read with this section. The two create one offense, viz. the certification of a check when the drawer has not sufficient money to cover it, or before the amount shall have been regularly entered. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

Intent.—To constitute a "willful" violation of the statute, within the criminal provision, a wrongful intent is essential, and an officer of a national bank who certified a check drawn thereon, believing in good faith that the drawer had a sufficient deposit in the bank, and having reasonable grounds for such relief, could not be convicted thereunder, though in fact the drawer's account was at the time overdrawn. Spurr v. U. S. (1899) 19 Sup. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150, reversing judgment (1898) 87 Fed. 701, 31 C. C. A. 202.

Something more than a mere certification of a check in excess of a deposit is necessary to make the offense punishable under section 10201, post, and a wrongful intent is of the essence, and the act of certification must be willful, and there must be an evil design and a wrongful purpose. Chadwick v. U. S. (1905) 141 Fed. 225, 243, 72 C. C. A. 343.

An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

Indictment.—The indictment need not allege delivery of the check by the bank after the certification. Potter v. U. S. (1894) 15 Sup. Ct. 144, 146, 155 U. S. 438, 39 L. Ed. 214, affirming U. S. v. Potter (C. C. 1892) 56 Fed. 83.

Counts charging separate conspiracies with officers of a national bank for the violation by such officers of section 9770, ante, by certifying checks when the drawer did not have sufficient funds on deposit to pay the same, may be joined in the same indictment under section 1690, ante, and, unless it appears that substantial rights of the defendant will be prejudiced by their

trial together, the court may properly refuse to compel the government to elect between them. Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343.

While it is a settled rule of criminal law that an indictment for conspiracy will not lie where a plurality of agents is logically necessary to complete the crime which it was the object of the conspiracy to commit, such rule does not apply to an indictment under this section for a conspiracy between the defendant, who had no official connection with a national bank, and an officer of such bank to cause a check of defendant drawn on the bank to be certified by such officer when defendant did not have a sufficient amount on deposit to pay the same. Id.

On the trial of an indictment charging defendant with conspiring with officers of a national bank for the certification of checks by such officers when the drawer had no funds on deposit, in violation of section 9770, ante, it is not essential to conviction to prove that defendant had knowledge that such false certification was in violation of the statute; the necessary criminal intent being imputed where it is shown that the parties to the transaction acted with knowledge of the facts. Id.

The indictment, in charging in the language of section 9770, ante, that the drawer of the check had not on deposit, at the time it was certified, "an amount of money equal to that specified" in the check, is sufficient. U. S. v. Potter (C. C. 1892) 56 Fed. 83, judgment reversed Potter v. U. S. (1894) 15 Sup. Ct. 144, 155 U. S. 438, 39 L. Ed. 214.

The indictment does not charge two offenses in the same count because it alleges therein that the check was certified "before the amount thereof had been entered to the credit of the drawer on the books of the bank," and also at a time when the drawer did not "have on deposit an amount of money equal to" the amount of the check. Id.

Some counts of the indictment simply charged that the checks were certified contrary to this prohibition, and others that after certification they were authenticated by the paying teller. Held that, inasmuch as the counts allege the certification as an accomplished act, it will not be presumed that the authentication was any essential part of it; and hence it is not necessary to allege the absence of the required credit or deposit at the time the authentication was made. Id.

Under this section an indictment against the president for "aiding and abetting" the cashier in certifying checks under the prohibited circumstances cannot be sustained. Id.

Allegations that the false entries were made with intent "to injure and defraud the said association and certain persons to the grand jurors unknown" are sufficient. Id., following U. S. v. Britton (1883) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520.

An indictment against an officer of a national bank, alleging unlawful certification of checks, was not fatally defective for failure to set out totidem verbis the written certifications, under the rule that in an indictment in federal courts it is not necessary to allege the tenor of an instrument, unless it touches the gist of the crime. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

Where an indictment against a national bank officer charged him personally with illegally certifying certain checks, it was necessary for the government, in order to sustain such charge, to prove that the individuals who actually executed the certification indorsement were but the physical instruments of the defendant and acted in accordance with his orders. Id.

Evidence.—On an indictment for illegally certifying a check while an officer of a bank, defendant can show a positive agreement on the part of the officers of the bank that the overdraft caused by such certified check should be practically treated as a loan from day to day, secured by ample collateral, and that before such certified check issued there was deposited in advance an ample amount of cash. Potter v. U. S. (1894) 15 Sup. Ct. 144, 147, 155 U. S. 438, 39 L. Ed. 214, reversing judgment U. S. v. Potter (C. C. 1892) 56 Fed. 83.

Upon the trial of the president of a national bank for certifying checks without funds, evidence of speculations by the cashier with funds of the bank, with defendant's knowledge, is admissible for its bearing upon the right of the latter to rely upon the former's representations as to the state of the customer's accounts. Spurr v. U. S. (1898) 87 Fed. 701, 31 C. C. A. 202, judgment reversed (1899) 19 Sup. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150.

In order to convict a national bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation, in order to avoid knowledge. Id.

In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge. Id.

In a prosecution for conspiracy, the alleged purpose of which was to prevent the arrest of defendant and others for violating the revenue laws, and including the crime of murder in aggravation thereof, a neighbor of defendant was allowed to testify that at the time when the officers attempted defendant's arrest, and a deputy marshal was killed, defendant had a still, which

at one time was east of his house, and then on the west side thereof. Another witness testified that he frequently visited defendant's house before the deputy was killed, and bought whisky of him; that he let defendant know he wanted it, and would lay his money down in a certain place, and after going back would find a bottle of whisky there and the money gone. Deputy marshals were allowed to testify that on a visit which they made to defendant's place a year or two before the occurrence in question they found whisky in jugs concealed about the premises, and that, on attempting to continue their search down a ravine leading from defendant's house, the latter and another appeared with guns, and compelled them to turn back. Held, that this evidence was properly admitted to prove the object and purpose of the conspiracy, and explain defendant's motive in entering into it, and in resisting the officers by firing on them and killing one of their number. Davis v. U. S. (1901) 107 Fed. 753, 46 C. C. A. 619.

Defense.—Defendant can show a positive agreement on the part of the officers of the bank that the overdraft caused by certified check should be practically treated as a loan from day to day, secured by ample collateral, and that before such certified check issued there was deposited in advance an ample amount of cash. Potter v. U. S. (1894) 15 Sup. Ct. 144, 155 U. S. 438, 39 L. Ed. 214, reversing judgment U. S. v. Potter (C. C. 1892) 56 Fed. 83.

Certiorari.—One who was duly accredited to and received and recognized by the United States under the title of agent from the Swiss Confederation was indicted under the provisions of this section. Defendant was president of a bank in the city of Washington. He had been, for many years, consul general of the Swiss Confederation, and, on February 28, 1869, was accredited their political agent. He was requested, on May 30, 1881, to resign both these positions, by his own government, and his resignation was accepted on June 20th. The indictment had been found on June 17th. The records of the state department showed. with reference to his relations with this government as political agents, simply a letter, under date of March 30, 1868, from him to secretary of state, inclosing his credentials, and soliciting an interview for the formal presentation; also a letter from the secretary, granting this interview, and a later one from another secretary, informing him that his relations to the United States did not accord him the privilege of the free entry of goods imported for his own use. Held, that the United States supreme court would not issue a writ of certiorari, commanding the supreme court of the District of Columbia to certify to it the indictment and proceedings under it. Ex parte Hitz (1884) 111 U. S. 766, 4 Sup. Ct. 698, 28 L. Ed. 592.

§ 9772. (R. S. § 5209.) Embezzlement; penalty.

Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Act June 3, 1864, c. 106, § 55, 13 Stat. 116. Act April 6, 1869, c. 11, 16 Stat. 7. Act July 8, 1870, c. 226, 16 Stat. 195.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Notes of Decisions

I. Purpose, construction, and operation
1. Purpose.
2. Construction and operation.

II. Offenses
(A) *Offenses in general*
3. Nature and elements.
4. — Intent.
5. Indictment.
6. Evidence.
7. Defenses.
8. Instructions.
9. Penalty.
10. Review.
11. Effect of prosecution and conviction.

II. Offenses—Cont'd

(B) *Embezzlement*

12. What constitutes offense.
13. Jurisdiction.
14. Indictment.
15. Evidence.
16. Instructions.

(C) *Abstraction*

17. What constitutes offense.
18. Indictment.
19. Evidence.

(D) *Willful misapplication*

20. What constitutes offense.
21. Indictment.
22. Selection of jury.
23. Variance.
24. Evidence.
25. —— Presumption and burden of proof.
26. Defenses.
27. Instructions.
28. Verdict.
29. Questions for jury.

(E) *Making false entries or statements*

30. What constitutes offense.
31. Jurisdiction.
32. Indictment.
33. Variance.
34. Evidence.
35. —— Presumption and burden of proof.
36. Defenses.
37. Instructions.
38. Verdict.
39. Questions for jury.
40. Penalty.

(F) *Aiding or abetting*

41. What constitutes offense.
42. Indictment.
43. Evidence.
44. Defenses.
45. Instructions.
46. Questions for jury.

III. Conspiracy

47. What constitutes offense.
48. Limitations.
49. Indictment.
50. Evidence.
51. Defenses.

IV. Offenses against state laws

52. Prosecutions in state courts.

I. PURPOSE, CONSTRUCTION, AND OPERATION

1. Purpose.—The primary purpose of the National Bank Act was to provide a means by which the government might carry on its fiscal operations so as to invite the public confidence in the banks chartered under the act to do business, and the law subjects the banks to regulations, looking to a safe administration of business. U. S. v. Wilson (C. C. 1910) 176 Fed. 806.

2. Construction and operation.—Jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment of sums lost by reason of their illegal conduct, is not conferred on the circuit court of the United States by this section. Whittemore v. Amoskeag Nat. Bank (1889) 134 U. S. 527, 10 Sup. Ct. 592, 33 L. Ed. 1002.

The president of a national bank, who has been appointed by the shareholders to close its affairs in liquidation, with authority to collect its credits, is an "agent," within the provisions of this section. Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832, affirming judgment U. S. v. Jewett (C. C. 1897) 84 Fed. 142.

"Moneys," as used in this section, includes national bank bills. U. S. v. Johnson (C. C. 1879) Fed. Cas. No. 15,483.

Directors of a national bank are "officers," within the meaning of this section. U. S. v. Means (C. C. 1889) 42 Fed. 599.

In this section the word "moneys" refers to the currency or circulating medium of the country, the word "funds," refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made, and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. U. S. v. Smith (D. C. 1907) 152 Fed. 542.

This statute is penal, and must be strictly construed, but not so construed as to defeat the legislative will, though doubtful words cannot be extended beyond their natural meaning to create an offense by construction merely. U. S. v. McClarty (D. C. 1911) 191 Fed. 518.

A schedule on the back of a report where it is covered by the same affidavit as the rest of the report is a part of the report, within this section. Harper v. U. S. (Ind. T. 1907) 104 S. W. 673.

II. OFFENSES

(A) *Offenses in general*

3. Nature and elements.—The acts denounced by this section, being punishable by imprisonment for not less than five nor more than ten years, constitute an infamous crime. Folsom v. U. S. (1895) 16 Sup. Ct. 222, 223, 160 U. S. 121, 40 L. Ed. 363.

Gross maladministration and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of this section. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

The first clause of this section provides for three distinct offenses: First, embezzlement; second, abstraction; and, third, willful misapplication. U. S. v. Lee (C. C. 1882) 12 Fed. 816.

Each of the words "embezzles, abstracts, or willfully misapplies" in the section must be given effect, and the word "misapply" includes acts not covered by the words "embezzle" or "ab-

stract," and an officer of a national bank, who causes or procures the money of the bank to be misapplied is an offender. U. S. v. Fish (C. C. 1885) 24 Fed. 585, 591.

An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388.

The crime of embezzlement by an officer, clerk, or agent of a national bank, under this section, necessarily includes the offenses of abstraction and willful misappropriation, but either of the latter offenses may be committed without embezzlement. Id.

4. —— **Intent.**—Under this section intent is an essential element of every offense therein specified, which must be charged in the indictment and proved. McKnight v. U. S. (1901) 111 Fed. 735, 49 C. C. A. 594; U. S. v. Voorhees (C. C. 1881) 9 Fed. 143.

A finding as to the intent with which false entries were made in the books of a national bank by an officer of the bank may be based on legitimate inferences from the facts shown, and where, on the trial of a defendant for making such entries with intent to deceive the bank examiner, it is found that the entries were false; that they were made, or caused to be made, by defendant; and that their necessary effect was to deceive the bank examiner,—it may be inferred that they were made with such intent. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

On the trial of the president of a national bank, charged with having made a false report of its condition to the comptroller, prior reports, attested by him, containing false statements, together with testimony that such misstatements were called to his attention by an examiner prior to his making the report in question, are admissible on the question of intent. Bacon v. U. S. (1899) 97 Fed. 35, 38 C. C. A. 37.

The words "with intent in either case to injure or defraud the association" precede the disjunctive clause "or to deceive any officers of the association or any agent appointed," etc.. and the term "to deceive" is referable to the antecedent "with intent" so as to subject any one who makes a false entry to the penalties of the law, provided he makes it with intent either to injure or defraud or to deceive. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

The intent to deceive has for its object the deception of any person appointed or to be appointed as examiner. Id.

On prosecution of cashier held, that only intent necessary to be proven was that he did the acts complained of purposely and designedly. Pearce v. U. S. (1912) 192 Fed. 561, 113 C. C. A. 33.

On indictment of a bank cashier under this section for embezzling funds of the bank, evidence that the funds were used in stock speculations with the consent of the officers of the bank, and for its benefit, is inadmissible to disprove the averments in the indictment that the acts were done with intent to injure and defraud the bank. U. S. v. Taintor (C. C. 1873) Fed. Cas. No. 16,428.

An indictment under this section charging defendant with drawing bills of exchange, and assigning notes without authority, need not allege an intent to injure and defraud the association. U. S. v. Johnson (C. C. 1879) Fed. Cas. No. 15,483.

The intent to defraud does not mean malice or ill will, but such intent to defraud as may be inferred from the willfully and knowingly doing that which is illegal, and which, in its necessary and natural consequence, must injure another. It may be shown or conclusively presumed from the doing of the wrongful, fraudulent, or illegal act. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

Under this section intention to deceive any one director or officer is as criminal as the intention to deceive all of them. U. S. v. Means (C. C. 1889) 42 Fed. 599.

The fact that the officers in question were not actually deceived is not conclusive proof of the absence of intent to deceive. Id.

If false entries had a natural tendency to deceive the bank officers, the fact that defendants deny having had any such actual intent cannot rebut the presumption of intent arising from the nature of the entries themselves. Id.

If there was a fraudulent understanding between defendant and the paying teller, that checks drawn by defendant in favor of a firm of stockbrokers were to be paid out of funds of the bank, when defendant had no funds or only insufficient funds to his credit, and that such debts were not to be charged in his account, but were to be fraudulently concealed until he should make deposits sufficient to meet them, defendant had a guilty intent to injure or defraud the bank. U. S. v. Kenney (C. C. 1898) 90 Fed. 257.

If, at the time defendant drew checks upon a national bank, he knew or had reason to believe that they were to be fraudulently paid by the teller out of the funds of the bank, and not from any funds to which defendant could legitimately resort, he had a guilty in-

tent; and it is immaterial that he intended finally to recompense the bank, through successful operations in stocks or otherwise. Id.

An intent to injure or defraud a national bank, within the meaning of this section does not necessarily involve malice or ill-will towards the bank. It is sufficient that the unlawful intent is such as, if carried into execution, will necessarily or naturally injure or defraud the bank. Id.

In determining defendant's guilty intent, the jury should consider his relation to the bank as an officer and a shareholder, assistance given the bank by him in its embarrassment by the loan of his individual money, and whether he had any motive for making false entries, together with circumstances that may have induced him to do so, such as an examination by the officers of the bank's affairs at the time the entries were made. U. S. v. Allen (D. C. 1880) 47 Fed. 696.

A bank director is personally liable on paper made to the bank by a firm of which he is a member, and, in making a report of the condition of the bank to the comptroller, the amount of such paper should be entered under the heading of "Liabilities of Directors (Individual and Firm) as Payers;" and, and in determining whether the omission of such an item from this heading was made with intent to deceive, the jury may consider whether defendant's action in this respect was caused by the prior receipt of a letter from the comptroller calling the attention of the bank officials to the excessive amount of the loans made to the directors, and demanding immediate reduction thereof. U. S. v. Graves (D. C. 1892) 53 Fed. 634.

On the trial of an officer of a national bank for embezzlement, abstraction, and misapplication of funds, under this section which makes an intent to injure or defraud an element of either offense, evidence of other transactions by defendant of similar character is admissible, but may be considered by the jury only on the question of the knowledge and intent of the accused when he committed the acts charged in the indictment. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388.

The intent to injure or defraud need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done. Id.

5. **Indictment.**—Requisites and sufficiency of an indictment under this section considered. U. S. v. Britton (1883) 2 Sup. Ct. 525, 108 U. S. 192, 27 L. Ed. 703.

An indictment charging that the funds alleged to have been embezzled were at the time in the possession of the defendant as president and agent, means that they had come into his possession in his official character, so that he held them in trust for the bank, and fully and exactly describes the offense of embezzlement under the act. But so far as the indictment charges defendant with a willful misapplication of the funds of the bank, it is not necessary to allege that they had previously been intrusted to the defendant. U. S. v. Northway (1887) 7 Sup. Ct. 580, 120 U. S. 327, 30 L. Ed. 664.

Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment; and the crime of embezzlement and making false entries by a president of a national bank, being punishable by such imprisonment, is an infamous offense, within the meaning of the fifth amendment to the constitution, for which the accused can be held only on presentment or indictment by grand jury. U. S. v. De Walt (1888) 9 Sup. Ct. 111, 128 U. S. 393, 32 L. Ed. 485.

An indictment for violating the national banking laws averred that the bank in question had been "heretofore" created and organized under the laws of the United States. Held that, even if it were assumed that the word should have been "theretofore," in order to make it certain that the bank had been incorporated prior to the finding of the indictment, the result was only an imperfect statement of what the law implies to be true after verdict. Coffin v. U. S. (1896) 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109.

Crimes against the United States committed within the district of Alaska, though not included in the enumeration of offenses contained in the Alaskan Penal Code, such as violations of this section, are governed by the requirement of Alaska Code Crim. Proc. § 43, that the indictment must charge but one crime and in one form only, rather than by the provisions of section 1690, ante, which permit the joinder in one indictment in separate counts of charges arising out of the same or connected acts or transactions, or of offenses or crimes of the same class. Summers v. U. S. (1913) 34 Sup. Ct. 38, 231 U. S. 92, 58 L. Ed. 137, reversing judgment (1913) 202 Fed. 457, 120 C. C. A. 563.

An indictment under the national banking laws, which, following the words of the statute, charges the president of the bank with embezzling, abstracting, and misapplying moneys, funds, and credits of the bank at various times need not specify how much was moneys, how much funds, and how much credits. Breese v. U. S. (1901) 106 Fed. 680, 45 C. C. A. 535, judgment reversed (1901) 108 Fed. 804, 48 C. C. A. 36.

The indictment averred that the note was dated on the 8th day of December, 1894, and was due and payable "on the 11th day of April, A. D. 1894." The proof corresponded with the indictment as to date, but showed that the note was due on the 11th day of April, 1895. Held, that the mistake in the indictment was one so obvious that it could not have misled the accused to his prejudice, and that the variance was not fatal. The note not being the subject-matter of the offense, and the averment of the date of its maturity one which was immaterial and unnecessary to its identification, the allegation as to the day of maturity might be rejected as surplusage. Rieger v. U. S. (1901) 107 Fed. 916, 47 C. C. A. 61, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030.

An indictment against a national bank cashier for an offense against the national banking law was not defective for failure to allege that the bank was doing business at the time the alleged offenses were committed. Geiger v. U. S. (1908) 162 Fed. 844, 89 C. C. A. 516.

An indictment, charging that defendant, being then and there the cashier of a certain "national banking association," to wit, etc., was not fatally defective for failure to allege that the national banking association specified was a national banking association organized under the laws of the United States. Id.

It is proper to join in a single count of the indictment a charge of willful misapplication of the bank's funds by its officers and a charge that the other defendants aided and abetted them therein, and that such joinder did not render the indictment demurrable for duplicity. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

An indictment against a defendant for the embezzlement and abstraction of the property of a national banking association is not demurrable because it charges the receipt of the property by him in different capacities, both as an officer and as an agent of the association. U. S. v. Jewett (C. C. 1897) 84 Fed. 142, judgment affirmed Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832.

Averments in an indictment that defendant was appointed agent in liquidation for the association, and accepted that office, are not inconsistent with further averments that he afterwards acted as president, clerk, and director of the association. Id.

An indictment charging an officer of a national bank with misapplication of its funds, or with making false entries in its books, need not allege that the acts were done feloniously, where they are charged to have been done willfully and with intent to defraud the bank, and are such as are made misdemeanors by the statute. U. S. v. Eastman (C. C. 1904) 132 Fed. 551.

An indictment under this section charging a defendant, in different counts, with offenses against two different national banks, of each of which he was an officer, is not necessarily demurrable; but the propriety of such joinder in a given case is left to the discretion of the court, which may compel an election between the counts or direct separate trials. Id.

Indictments for offenses under this section were quashed where it appeared that the grand jury permitted themselves to be influenced by appeals and arguments of a zealous advocate, by hearsay testimony, and by incompetent evidence, and appeared to have reached their conclusions through prejudice and undue zeal. U. S. v. Farrington (D. C. 1881) 5 Fed. 343.

Embezzlement, abstraction, and willful misapplication of the moneys, funds, etc., of a national bank, as described in this section, constitute three separate crimes or offenses, which, under section 1690, may be joined in one indictment, but must be stated in separate counts. U. S. v. Cadwallader (D. C. 1893) 59 Fed. 677.

A count in an indictment under this section charging that defendant, as a director of a national bank, between certain given dates abstracted and misapplied a stated sum of the moneys, funds, and credits of the bank, without further specification, is insufficient, as too general and indefinite. U. S. v. Martindale (D. C. 1903) 146 Fed. 280.

An indictment is bad for duplicity where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national bank by defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount, either of "funds" or of "credits," so embezzled or misapplied. U. S. v. Smith (D. C. 1907) 152 Fed. 542.

An indictment for conspiracy to commit a crime against the government, charging bank teller's abstraction, misapplication, and embezzlement of its funds, and the other defendants with having abetted such acts, was not bad for duplicity, since under Pen. Code, § 332, all were principals in the same crime. U. S. v. Rogers (D. C. 1915) 226 Fed. 512.

6. **Evidence.**—On trial of the president of a bank for conversion of its funds, the cashier, who has testified as a witness for defendant, may be asked, on cross-examination, whether he did not resign because of transactions of the defendant similar to that charged in the indictment. Agnew v. U. S. (1897) 17 Sup. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

Evidence of the commercial rating of a president of a bank at the time of an

alleged conversion by him of its funds, by purchasing for the bank, without authority, and having placed to his credit, worthless bonds, which he had guaranteed; and the testimony of the cashier of another bank as to whether, at the time of the transaction, he considered defendant's guaranty for such an amount good,—are irrelevant. Agnew v. U. S. (1897) 17 Sup. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

On the trial of a defendant upon charges of having, while an officer of a national bank, unlawfully abstracted money from such bank, and having made false entries in reports made to the comptroller, evidence that, at about the same time as the acts charged, the defendant made other reports to the comptroller, containing similar false statements, and that he also procured the execution by an irresponsible third party of a note without consideration, which he discounted on behalf of the bank, and appropriated the proceeds, is admissible on the question of intent, as showing that defendant had acted in bad faith towards the bank in such transactions, although such acts are not counted upon in the indictment. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of the act of July 12, 1882, authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until November 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the national bank act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

7. **Defenses.**—The acts and intent of the president of a bank in obtaining money from it on worthless securities, being such as to make him guilty of embezzlement, abstraction, or willful misapplication of its funds, it is immaterial that his acts were permitted, sanctioned, or ratified by the other officers of the bank, with knowledge of the facts. Breese v. U. S. (1901) 106 Fed. 680, 45 C. C. A. 535, judgment reversed (1901) 108 Fed. 804, 48 C. C. A. 36.

On the question of whether or not a bank president is guilty of abstracting or misapplying its moneys, it is immaterial that he drew out some of it for his children. Id.

If it appears that the funds of the banking association have been abstracted or willfully misapplied by defendant, he is precluded from denying that it was done with unlawful intent. U. S. v. Lee (C. C. 1882) 12 Fed. 816.

An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388.

8. **Instructions.**—On the trial for aiding the president of a bank in misapplying its funds and making false entries in its books, the jury were charged that if the president did knowingly make, or cause to be made, the false entries, they could not find defendants guilty as aiders, unless defendants, with like intent, did something showing their consent to and participation in the "unlawful and criminal acts" of the president. Held not open to the objection that the expression "unlawful and criminal acts" might have been understood as relating to unlawful acts of the president generally. Coffin v. U. S. (1896) 16 Sup. Ct. 943, 162 U. S. 664, 40 L. Ed. 1109.

The evidence showed that defendant, president of a national bank, without authority of the directors, purchased $20,000 bonds, of little value, at a great discount, and had them placed in the assets of the bank and to his credit at face value, giving his written guaranty for the principal and interest, which, by reason of his financial condition, was almost worthless. Held, that it was not error to refuse to charge that, from the guaranty, the jury might find that there was no intent to defraud the bank. Agnew v. U. S. (1897) 17 Sup. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

A charge to the effect that, if defendant, a bank president, purchased bonds which were worthless, or of but little value, placed them among the assets of the bank at a greatly exaggerated value, and had such exaggerated value placed to his own credit, these facts create a presumption of an intent to defraud the bank, which "throws the burden of proof upon the defendant," and that evidence to overcome the presumption "must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent," is not error, where the character of such evidence and the nature of a reasonable doubt are sufficiently explained in other portions of the charge. Id.

A charge that if the defendant "either embezzled or willfully misapplied" the funds or credits of the bank, "whereby, as a necessary, natural, or

legitimate consequence, its capital was reduced, or placed beyond the control of the directors, or its ability to meet its engagements or obligations, or to continue its business, was lessened or destroyed, the intent to injure or defraud the bank may be presumed," is correct. Id.

It is not reversible error to refuse to charge that, if defendant used the proceeds of a check belonging to the bank, and which he had caused to be placed to his credit, in the payment of a debt of the bank, the jury must find that he did not fraudulently embezzle the amount, especially where defendant's explanation of the transaction is unsatisfactory. Id.

In a prosecution, under this section against an officer or clerk of a national bank for embezzlement or the making of false entries, with intent to injure or defraud the bank or to deceive, if the acts charged are proved the intent must be inferred therefrom; and, while such inference or presumption is not conclusive, it throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy the jury, beyond a reasonable doubt, that there was no such guilty intent in the transaction, though, if the use of the words "beyond a reasonable doubt" was technically erroneous, such use was not prejudicial to the case, when the charge is viewed as a whole and in connection with the uncontradicted evidence of the acts which constituted the prima facie case. U. S. v. German (D. C. 1902) 115 Fed. 987.

9. Penalty.—Upon a plea of guilty to three indictments found under this section—one for the misapplication of funds of a national bank by the accused while cashier thereof, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers—the district court pronounced sentence upon the accused that he be confined "for the term of five years upon each of the three indictments above named, said terms not to run concurrently." Held, that the words, "said terms not to run concurrently," are uncertain and incapable of application, and therefore void, and that the sentences commenced at once, and ran concurrently. U. S. v. Patterson (C. C. 1887) 29 Fed. 775.

10. Review.—On application by the president of a national bank, indicted for a violation, as such president, of this section, for a writ of certiorari to bring the indictment to the United States supreme court, on the ground that he was the political agent of a foreign government, it appeared that such government had requested his resignation prior to the finding of the indictment, although it was not given until subsequent thereto, and that the United States government had withdrawn from him the usual privilege of diplomatic representatives of free entry of goods imported for his use. Held, that the writ, being discretionary with the court, should not be allowed. Ex parte Hitz (1884) 4 Sup. Ct. 698, 111 U. S. 766, 28 L. Ed. 592.

A judgment of a federal Circuit Court holding insufficient on demurrer certain counts of an indictment charging willful misapplication of the funds of a national bank, because the facts alleged did not constitute a crime under this section, as it should be construed, is reviewable in the Supreme Court, as based upon the construction of the statute upon which the indictment was founded. U. S. v. Heinze (1910) 31 Sup. Ct. 98, 218 U. S. 532, 54 L. Ed. 1139, 21 Ann. Cas. 884.

The decision of a federal district court quashing as "bad in law" certain counts of an indictment purporting to charge violations of this section is not reviewable in the federal Supreme Court under section 1704, ante, as based upon the construction of the statute on which the indictment was founded, since such ruling may as well have rested upon the opinion of the court as to the mere insufficiency of the indictment. U. S. v. Carter (1913) 34 Sup. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

11. Effect of prosecution and conviction.—Conviction of a national bank clerk for misappropriating the bank's funds in violation of this section held not to disqualify him to testify as a witness. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

The government, prosecuting for embezzlement a disbursing officer drawing checks on a government depository, forging indorsements thereon, and applying proceeds to his own use, held not estopped from recovering from the depository the amount paid. National Bank of Commerce v. U. S. (1915) 224 Fed. 679, 140 C. C. A. 219.

Under the common law a conviction of embezzlement as described in this section does not disqualify a witness, as such offense is not embraced within the three disqualifying classes, treason, felony, and the crimen falsi. U. S. v. Sims (C. C. 1907) 161 Fed. 1008.

(B) Embezzlement

12. What constitutes offense.—Though the president of a bank, in appropriating and converting its funds to his own use, does it in such a way that it can be easily discovered, and he is liable to a civil action, and does not abscond, or otherwise avoid the civil suit, he may be convicted of embezzlement. Breese v. U. S. (1901) 106 Fed. 680, 45 C. C. A. 535, judgment reversed (1901) 108 Fed. 804, 48 C. C. A. 36.

Accused's duty was to take drafts or other items received by a national bank by which he was employed from its

patrons for collection, present them to the drawees or others liable thereon, receive the money due, and return it to the bank. He, however, reported a less amount collected than he actually received, and converted the difference. Held, that in making the collection he acted as the bank's agent, and that the money, while in his possession and before it had been actually deposited in the bank, belonged to it, and that he was therefore properly convicted of embezzling the same. Spencer v. U. S. (1909) 169 Fed. 562, 95 C. C. A. 60.

"Embezzle," as used in this section, in relation to officers and agents of national banks, describes a crime which a person has opportunity to commit by reason of some office or employment, and which is some breach of confidence or trust. U. S. v. Conant (C. C. 1879) Fed. Cas. No. 14,844.

To constitute embezzlement of the funds of a bank by its officer, under this section, it must appear that the funds embezzled came lawfully into the possession of defendant, and were, while so held by him, converted to his own use, with intent to defraud the bank. But such possession need not be exclusive. It is sufficient if the business or assets of the association were actually or practically intrusted to his care and management, so that by virtue of his office he had not merely access to, or a constructive holding of, such funds, but such actual possession, though concurrent with others, as enabled him to have and exercise a control over them that would place him in lawful possession. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

Under an indictment for embezzlement of the funds of a bank by its officer. the jury need not find that the exact sum stated in the indictment was embezzled. It is sufficient if defendant embezzled any of the funds or assets. Id.

Embezzlement of the kind provided for in this section is a misdemeanor, and under the common law was merely a breach of trust. U. S. v. Sims (C. C. 1907) 161 Fed. 1008.

Embezzlement applies only to cases in which the party charged occupies a trust or fiduciary relation and takes the money or property intrusted to him and unlawfully applies the same to his own use, and may embrace either misapplication or abstraction. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

Where the president of a national bank converts its funds to his own use, he is guilty of embezzlement, under this section, unless he show authority for so doing. In re Van Campen (D. C. 1868) Fed. Cas. No. 16,835.

The crime of embezzlement from a national bank by an officer, clerk, or agent, within this section, involves two general elements: First, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388.

13. Jurisdiction.—The United States circuit court has exclusive jurisdiction of the prosecution of an officer of a national bank for embezzling the funds of such bank. U. S. v. Buskey (C. C. 1889) 38 Fed. 99.

14. Indictment.—An indictment under this section charging defendant with committing the offense of embezzlement as "president and agent" of the bank is sufficient. U. S. v. Northway (1887) 7 Sup. Ct. 580, 581, 120 U. S. 327, 30 L. Ed. 664.

Under this section an indictment is sufficient which avers that defendant was president of a national bank, and by virtue of his office took possession of certain bonds described belonging to the bank, and with intent to defraud the bank embezzled the bonds and converted them to his own use. Claassen v. U. S. (1891) 12 Sup. Ct. 169, 170, 142 U. S. 140, 35 L. Ed. 966.

In an indictment against an officer of a national bank for embezzlement, under this section, an averment that the money embezzled was lawful legal tender money of the United States is surplusage, and need not be proved. Porter v. U. S. (1898) 91 Fed. 494, 33 C. C. A. 652.

Where the facts averred in an indictment against an officer of a national bank for embezzlement show that defendant wrongfully used the bank's money in his care and under his control for the purpose of bribing certain city officials in his own interest, it sufficiently avers an appropriation to his own use, and is not vitiated by further averments that there was an intent to wrongfully convert the money to the use of such officials, and that it was so converted. McKnight v. U. S. (1899) 97 Fed. 208, 38 C. C. A. 115.

Where a count in an indictment charged two offenses included in this section, it was held on appeal in a habeas corpus case that, if the charge for abstracting funds be regarded as surplusage, the indictment was probably sufficient as one for embezzlement. Hopkins v. McClaughry (1913) 209 Fed. 821, 822, 126 C. C. A. 545.

An indictment of the president of a national bank for embezzling its moneys must show that the moneys were lawfully intrusted to his possession. U. S. v. Johnson (C. C. 1879) Fed. Cas. No. 15,483.

An indictment under this section for embezzlement, which charges that de-

fendant did have and receive "certain of the moneys and funds of said national banking association of the amount and value of $5,723.93," is defective in not stating what the property was which defendant is accused of misappropriating, the word "funds" including several species of property. U. S. v. Greve (D. C. 1894) 65 Fed. 488.

15. Evidence.—In a prosecution of a bank teller for embezzling the bank's funds, in violation of this section, evidence as to how the accused conducted himself in the performance of his duty as teller is competent. Tyler v. U. S. (1901) 106 Fed. 137, 45 C. C. A. 247.

An averment, in an indictment charging an officer of a national bank with embezzlement by paying out money on a note which he knew to be worthless, with intent to injure and defraud the bank, that the transaction was without the knowledge or consent of the directors or the discount committee, need not be specifically proved, where the transaction which the evidence tends to prove was one to which it cannot be presumed the directors or committee would consent; but in such case, if consent is relied on, it must be proved as matter of defense, and by evidence showing that it was given in good faith and with knowledge of the facts. McKnight v. U. S. (1902) 115 Fed. 972, 54 C. C. A. 358.

Evidence considered, and held sufficient, when considered in connection with defendant's confession, made to different persons, to sustain a verdict finding him guilty of embezzlement of the funds of a national bank of which he was paying teller. Flower v. U. S. (1902) 116 Fed. 241, 53 C. C. A. 271.

An entry in a book identified as the minute book of a national bank, showing the election of defendant as a director and as president of the bank, together with evidence that he acted as such, is sufficient, prima facie, to support an averment that he was president of the bank in an indictment charging him with embezzlement as such officer. McKnight v. U. S. (1903) 122 Fed. 926, 61 C. C. A. 112.

On the preliminary examination of the accused, charged with embezzlement, evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is sufficient evidence of the legal incorporation of the bank, and of the connection of the accused with it. In re Van Campen (D. C. 1868) Fed. Cas. No. 16,835.

16. Instructions.—Where the court, in a prosecution under this section for embezzlement by an officer of a national bank, refused to charge, as requested, that the defendant could not be convicted unless the jury found that the acts of embezzlement were committed with intent to injure or defraud the bank, as charged in the indictment, but charged that the averment of such intent was surplusage, such action was reversible error, notwithstanding it defined embezzlement in the charge as the fraudulent appropriation by defendant of the funds of the bank to his own use. McKnight v. U. S. (1901) 111 Fed. 735, 49 C. C. A. 594.

Under an indictment charging an officer of a national bank with embezzlement of its funds by causing money of the bank to be paid to persons known by him to be insolvent, for the purpose of bribery, and with intent to defraud the bank,—such payment being made under the guise of a loan, for which such persons executed their note to the bank,—the insolvency of such persons is an important consideration, going to the question of intent; and an instruction which, in effect, tells the jury that the question of their insolvency may be ignored, is misleading. McKnight v. U. S. (1902) 115 Fed. 972, 54 C. C. A. 358.

Charge to grand jury on the law of embezzlement by officers of national banks. Charge to Grand Jury (C. C. 1867) Fed. Cas. No. 18,246.

(C) Abstraction

17. What constitutes offense.—To constitute the crime of willfully abstracting the funds of a national bank by its officer, defined in this section, it must appear that the funds were withdrawn by the accused without the knowledge or consent of the association, and converted to the use and benefit of defendant or some one other than the association, with the intent to injure and defraud the association. No previous lawful possession of the funds is necessary, nor is it material by what means the abstraction is effected. It may be done by one act or series of acts, or by fraudulent schemes under the color of loans, discounts, checks, or entries. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

To abstract money from a national bank means to take from or withdraw the money from the possession and control of the bank, and to constitute the offense of abstracting it must be done without the knowledge and consent of the bank and with intent to injure and defraud it or some other company or person, and abstracting the funds may be done by one act or a succession of acts, and may be done under the color of loans, discounts, or checks. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

Abstraction, under this section, is the act of one who, being an officer, clerk, or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous law-

ful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388.

18. Indictment.—The offense of abstracting the funds of a bank under this section is not so equivalent to larceny that an indictment for astracting must describe the offense by words used to describe larceny. U. S. v. Northway (1887) 7 Sup. Ct. 580, 581, 120 U. S. 327, 30 L. Ed. 664.

An averment in an indictment against an officer and agent of a national banking association that the defendant "did steal, abstract, take, and carry away" property of the association, does not charge two offenses. U. S. v. Jewett (C. C. 1897) 84 Fed. 142, judgment affirmed Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832.

19. Evidence.—The conviction of a defendant charged with having, as a director and agent of a national bank, unlawfully abstracted money of the bank, is sufficiently supported by evidence which warranted a finding that defendant procured the making of two notes, for $4,500, by an employé who was wholly irresponsible, without consideration, and, having access to the funds and books of the bank, appropriated that sum of the bank's money to his own use, leaving the notes in exchange therefor. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

(D) Willful misapplication

20. What constitutes offense.—To constitute a "willful misapplication" of the funds of a national bank by an officer or agent thereof, there must be a conversion to his own use, or to the use of some one else. The offense is not committed where the president of a bank uses its funds to purchase shares of its stock, and holds them in trust for it, though such a purchase of its own stock, except to secure a debt due, is forbidden by law. U. S. v. Britton (1883) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520; Id. (1883) 2 Sup. Ct. 525, 108 U. S. 192, 27 L. Ed. 703; Steinman v. U. S. (1911) 185 Fed. 47, 107 C. C. A. 151.

Where an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution. U. S. v. Britton (1883) 108 U. S. 193, 2 Sup. Ct. 526, 27 L. Ed. 701.

The procuring of a dividend by an association when there are no net profits to pay it is not a willful misapplication of moneys and funds under this section. U. S. v. Britton (1883) 2 Sup. Ct. 531, 535, 108 U. S. 199, 27 L. Ed. 698.

The mere fact of payment by the officers of a national bank of a check which creates an overdraft does not necessarily constitute a fraudulent misapplication of the funds of the bank. Dow v. U. S. (1897) 82 Fed. 904, 27 C. C. A. 140.

To constitute a misapplication of the funds of a bank, it is necessary that some portion thereof shall be withdrawn from its possession or control, or that some conversion be made, so as to deprive the bank of the benefit thereof. Mere renewal of notes already in the bank's possession does not, of itself, constitute a misapplication of funds. Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584.

The misapplication of the assets of a national bank, in process of liquidation, by an agent appointed to close its affairs, is an offense within the provisions of this section. Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832, affirming judgment U. S. v. Jewett (C. C. 1897) 84 Fed. 142.

To constitute the offense of willful misapplication of the funds of a national bank, under this section, it is not essential that the money should be actually withdrawn from the bank, but the offense may be consummated by giving fraudulent credits, and the transfer of the same in the usual way by means of checks. An indictment for such offense, alleged to have been committed by discounting a certain note, is sustained by proof that defendant, as president of the bank, without the knowledge or consent of the directors discounted such note, which he knew to be worthless and insufficiently secured, crediting the proceeds on the books of the bank to the maker, subject to his check; that the maker drew a check for the amount in favor of a third person, who indorsed the same to defendant; and that defendant by means of such check paid a note held by the bank for which he was himself liable. Rieger v. U. S. (1901) 107 Fed. 916, 47 C. C. A. 61, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030.

The discounting by the president of a national bank with the funds of the bank of commercial paper known by him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a willful misapplication of its funds, constituting a criminal offense under this section. Flickinger v. U. S. (1906) 150 Fed. 1, 79 C. C. A. 515, writ of certiorari denied (1907) 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

Where a customer of a national banking association, whose note to the bank was about to mature, delivered a check

to the bank to pay the note when due, and, the check coming into the hands of defendant as cashier of the bank, he cashed it and converted the proceeds, the loss was that of the bank, and defendant's offense a willful misapplication and abstraction of the bank's funds and credits, and not a mere breach of trust. Geiger v. U. S. (1908) 162 Fed. 844, 89 C. C. A. 516.

"Willful misapplication" of the funds of a national bank, in order to constitute an offense denounced by this section, must be a willful misapplication for the use or benefit of accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body corporate or natural person, being entirely different from acts constituting an official maladministration, subjecting the bank to a forfeiture of its charter, as provided by section 5239 (page 3515). U. S. v. Steinman (1909) 172 Fed. 913, 97 C. C. A. 271.

An unintentional overdraft by a depositor in good standing and possessing ample means to pay, or an overdraft to be paid pursuant to a prior agreement resting on abundant credit, does not constitute a willful misapplication of national bank's funds, in violation of this section. Id.

For an officer of a national bank who is also a promoter of various enterprises to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds which cannot be covered up by entering the transactions on the books as loans and investments. Walsh v. U. S. (1909) 174 Fed. 615, 98 C. C. A. 461, writ of certiorari denied (1910) 30 Sup. Ct. 409, 215 U. S. 609, 54 L. Ed. 347.

Where, in a prosecution of the vice president of a bank for alleged misappropriation of the bank's funds in the payment of overdrafts by the bank's cashier, there was no evidence that the checks representing the overdrafts were paid with the knowledge or under the directions of the vice president, the offense as to him was not proved, under the rule that to constitute a willful misappropriation of a national bank's funds there must in fact be an unlawful application by the person charged, with intent to injure and defraud the bank. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

Accused, who was president of a national bank, having overdrawn his account $18,303.80, executed his note to the bank for $20,000, secured by certain corporate stock, the proceeds of the note being used to cancel the overdraft, and the balance was credited to his account, subject to check. The note not having been paid, the collateral was sold for $5,000 cash, which paid the $1,146 additional advancement and $3,800 on the overdraft. Held, that the execution of the note was a benefit and not a loss to the bank, and that accused by that transaction was not guilty of misapplying the bank's funds, in violation of this section. Adler v. U. S. (1910) 182 Fed. 464, 104 C. C. A. 608.

Mere renewal of a note by the officers of a national bank to cover a loan not sufficiently secured did not constitute a misapplication of the bank's funds, in violation of this section, because the transaction was accomplished in the form of a discount of the renewal note, by placing the proceeds to the customer's credit and receiving from him a check against the fund for an amount sufficient to pay the old note, without the bank parting with any money. Id.

It was the intention of congress to make criminal the misapplication and conversion of the funds of national banking associations, without regard to whether or not the party so misapplying received any of the funds or other advantage, directly or indirectly. U. S. v. Lee (C. C. 1882) 12 Fed. 816.

Where an officer of a national bank, with an intent to defraud the bank, allows a firm of which he is a member to overdraw its account, he is guilty of a misapplication of the moneys of the bank, within the meaning of this section. U. S. v. Fish (C. C. 1885) 24 Fed. 585.

The misappropriation of the funds of a national bank by an officer in the honest exercise of official discretion, in good faith, without fraud, for the advantage, or supposed advantage, of the bank, is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable. Id.

It is not necessary to show that the officer personally took any money from the bank, or was personally present when any other person took away money, to render him criminally liable. Id.

So far as the question of guilt or innocence of an officer under the statute is concerned, there is no distinction between a loan in bad faith for the purpose of defrauding the bank, and an application of money with like intent in a form other than a loan. Id.

A known abuse by an officer of discretionary power in making a series of loans which it is known the directors would not sanction will constitute a criminal misapplication of funds of the bank, if done in bad faith, for private gain, and not in the exercise of honest judgment. Id.

A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of an overdraft made with intent to defraud, and converts the same to his own use in fraud of the bank, is

guilty of a misapplication of the funds of the bank. U. S. v. Warner (C. C. 1886) 26 Fed. 616.

To constitute willful and criminal misapplication of the funds of a national bank by its officers, under this section, the accused need not have been previously in actual possession of such funds by virtue of any trust, duty, or employment, nor have derived any personal benefit from the transaction. It is enough if the misapplication is made by him, or under his direction, for his benefit or that of some one other than the association, with the intent to injure or defraud the association. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

Directors or the managing committee of a national bank may, in the honest exercise of official discretion, make loans or discounts for the actual or supposed benefit of the association, and, although the transaction be injudicious, and actually result in loss to the bank, there is no criminal liability so long as their acts are not in bad faith, for personal gain or private advantage. Id.

An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

In order that there shall be a criminal misapplication of the moneys, funds, or credits of a national banking association by its officers, in violation of this section, there must be a conversion of the moneys, funds, or credits of the association by the accused, either for his own use or that of some person other than the injured bank. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

The act of borrowing from a national bank more than one-tenth of its capital actually paid in and unimpaired or the act of borrowing on the security of the capital stock unless on a debt previously contracted in good faith is not criminal under this section, unless either act involves a misapplication of the funds of the bank to the use of the person violating the law and with intent to injure and defraud the bank. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

Willful misapplication is an essential of the crime, and there is no method of committing the crime without converting the money, funds, or credit of the bank. U. S. v. Heinze (C. C. 1909) 183 Fed. 907.

Funds of a national bank are not misapplied by an officer for the purpose of constituting a criminal offense, under this section merely by the drawing of a draft on a fund on deposit in another bank, or by entering a credit to a depositor on the books; but it is necessary that the fund should have been actually withdrawn or converted in some form, so that it is lost to the bank, and such loss must be averred in an indictment for the offense, and the facts set out showing it to have been unlawful. U. S. v. Martindale (D. C. 1903) 146 Fed. 280.

Willful misapplication of the moneys, funds, or credits of a national bank, within this section, consists in their misapplication by an officer, clerk, or agent of the bank, made willfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime. U. S. v. Breese (D. C. 1904) 131 Fed. 915, judgment reversed Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 383.

An indictment under this section charging the defendant, as president and director, with having willfully misapplied certain credits of the bank. "by procuring the authority of the board of directors * * * to an acceptance of an assignment" of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, does not state an offense under the statute, since what was done appears to have been by authority of the board of directors, and the facts set out do not show a misapplication of credits by defendant, nor is it averred that such misapplication was made to his own use, benefit, or gain, nor to that of any person other than the bank. U. S. v. Smith (D. C. 1907) 152 Fed. 542.

The fact alone that an officer of a national bank causes it to pay overdrafts, drawn by himself or other customers of the bank, or makes a loan without security, does not constitute an offense, under this section. U. S. v. Norton (D. C. 1911) 188 Fed. 256.

21. Indictment.—An indictment charging that defendant, president of a national bank, permitted a depositor, who was indebted to the association, and whom he knew to be insolvent, to withdraw his deposit, and failed to cause it to be applied to the indebtedness, without alleging that he was the duly authorized officer of the association whose duty it was to look after the accounts of depositors, fails to charge a willful misapplication of the funds of the bank. U. S. v. Britton (1883) 2 Sup. Ct. 526, 108 U. S. 193, 27 L. Ed. 701.

An indictment charging that defendant, president of a national bank, "procured" a note to be discounted, well knowing the maker and indorser thereof to be insolvent, implies that he submitted it to its directors or other authorized officers, and does not charge a misapplication of the funds of the bank. Id.

An indictment under this section

charging that the funds embezzled were at the time in defendant's possession as president and agent means that they had come into his possession in his official character, so that he held them in trust for the bank, and describes the offense of embezzlement as defined by the statute, but in so far as the indictment charges "willful misapplication" it need not allege that they had "previously been intrusted" to defendant. U. S. v. Northway, (1887) 7 Sup. Ct. 580, 581, 120 U. S. 327, 30 L. Ed. 664.

An indictment charging one with the offense as president of a certain national bank, "duly organized and doing business at the village of," etc., sufficiently states that the bank was organized under the national banking act to carry on the business of banking. Id.

An indictment for willfully misapplying funds of a national bank charging in general words fraudulent misapplication and intent to defraud the bank, and describing specifically funds misapplied and the manner of misapplication, need not negative every possible theory consistent with an honest purpose in the disposition of the funds specified. Evans v. U. S. (1894) 14 Sup. Ct. 934, 936, 153 U. S. 584, 38 L. Ed. 830; Id. (1894) 14 Sup. Ct. 939, 153 U. S. 608, 38 L. Ed. 839.

An indictment charging that H. misapplied the moneys of the bank with intent to convert a certain sum to the use of a specified company by causing it to be paid out of the bank on a check drawn by such company and cashed out of the bank's funds when the company had no funds therein and was insolvent, as H. well knew, whereby such sum was lost to the bank, sufficiently averred the actual conversion of the sum misapplied. Coffin v. U. S. (1895) 15 Sup. Ct. 394, 400, 156 U. S. 432, 39 L. Ed. 481.

An indictment for willfully misapplying the moneys, funds, and credits of a national bank, of which defendant was president, as well as a director and agent, must supplement the allegation of willful misapplication by allegations showing how the misapplication was made, and that it was an unlawful one. Batchelor v. U. S. (1895) 15 Sup. Ct. 446, 156 U. S. 426, 39 L. Ed. 478.

An indictment for the willful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of this section, by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it alleges a conversion by such officer. And a conversion is charged by an allegation that defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, received and discounted a promissory note for a specified sum, for his use, benefit, and advantage, knowing that the note was wholly unsecured, whereby the proceeds of the discount were wholly lost to the bank. U. S. v. Heinze (1910) 31 Sup. Ct. 98, 218 U. S. 532, 54 L. Ed. 1139, 21 Ann. Cas. 884.

Under this section an indictment charging that the accused did unlawfully, fraudulently, and willfully misapply and convert to his own use the assets of a national bank, with the intent then and thereby to injure and defraud the association, which conversion was done by some means and in some manner to the grand jury unknown, is not bad for want of certainty, in that it does not otherwise allege how the funds were misapplied by defendant. Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832, affirming judgment U. S. v. Jewett (C. C. 1897) 84 Fed. 142.

An indictment charging one, as "president, director, and agent" of a national bank in process of liquidation, with willfully misapplying the assets of the bank, is not bad because of inconsistency, nor for duplicity. Id.

An indictment charging one, as agent of a national banking association, with willfully misapplying the assets of the association, need not allege that the association is carrying on a banking business. Id.

In an indictment under this section charging an officer of a national banking association with the willful misapplication of certain moneys, funds, and credits of the bank by using the same to discount an unsecured note of a person known to be insolvent, such note does not constitute the subject-matter of the offense, and need not be set out in hæc verba. A description by giving the date and amount and the name of the maker, so as to advise the accused with reasonable certainty what note is intended, is sufficient. Rieger v. U. S. (1901) 107 Fed. 916, 47 C. C. A. 61, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030.

Where an indictment, under this section, for a criminal misapplication of the funds of a national bank, fully describes the act constituting the alleged offense, so as to advise the accused of the particular transaction which is called in question, and the act is averred to have been done willfully and with intent to injure and defraud the bank, and without its knowledge or consent, it is sufficient to allege generally that it was done for the use, benefit, and advantage of the accused, or some company or person other than the bank, and a conversion of the fund or credit need not be averred. Id.

An averment in the indictment that the misapplication of funds by the ac-

cused was for the benefit of himself "and other persons to the grand jurors aforesaid unknown" did not entitle the defendant to have the question whether the grand jury did in fact know, or should have known, the names of such other persons, submitted to the jury for the purpose of establishing a variance, since the failure to state such names, even if they might have been stated, could not have been prejudicial to defendant. Id.

It is not a substantial defect in an indictment to aver that the misapplication of the funds was without the knowledge "and" consent of the bank, its directors, etc., instead of using the disjunctive form. Id.

In an indictment under this section charging an officer of a national bank with a willful misapplication of its funds with intent to injure and defraud the association, it is not necessary to aver that the acts set out were done without authority from the directors. Flickinger v. U. S. (1906) 150 Fed. 1, 79 C. C. A. 515, writ of certiorari denied (1907) 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

An indictment alleging that F., as cashier of a national bank, unlawfully "converted" certain "moneys, funds, credit and credits" to the use of D. sufficiently charged the manner in which the misapplication was effected. Dickinson v. U. S. (1908) 159 Fed. 801, 86 C. C. A. 625.

Where an indictment against a national bank cashier for willful misapplication of the bank's funds and willful abstraction thereof alleged that a customer of the bank, prior to the maturity of a note held by the bank against it, delivered a check to the bank to pay the note when due, which check came into defendant's possession as cashier, and that defendant cashed the check and converted the proceeds, the indictment was not fatally defective for failure to allege in words as to who was the payee of the check, nor to charge that the bank was still the owner of the note. Geiger v. U. S. (1908) 162 Fed. 844, 89 C. C. A. 516.

Where a count in an indictment against a bank's officers and alleged aiders and abetters charged conspiracy to violate, and that to effect the object of the conspiracy defendant K., one of the parties thereto, drew and accepted a draft, set out, presented it to the bank, and obtained credit for the amount thereof for the drawer of the draft in which company K. was interested, the indictment sufficiently charged that an act was done by one of the parties to the alleged conspiracy to effect the object thereof and sufficiently specified such act to withstand a demurrer. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

In a prosecution of accused for aiding and abetting a national bank clerk to misapply the bank's funds, the indictment held not fatally defective for failure to sufficiently allege the manner in which the funds were misapplied by the clerk. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

A count in an indictment against a national bank president, charging misappropriation of a draft valued at $27,125, was not duplicitous because of an allegation of the substitution of three worthless notes of the same amount therefor. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

A count in an indictment against a national bank president for misapplication of funds in the form of exchange, by paying a state bank check for $9,000 by the issuance of four drafts therefor, held to charge a completed offense at the time the drafts were issued in payment of the check, and was therefore not duplicitous. Id.

Indictment held sufficient to charge misapplication of funds of national bank by its president. Stout v. U. S. (C. C. A. 1915) 227 Fed. 799.

Under an indictment for the willful and criminal misapplication of funds of a national bank by its officer, containing several special counts charging particular acts of misapplication, to sustain a verdict on the specific counts the particular acts must be proven as alleged; but the proof of other acts than alleged may be included in the verdict on the general count. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

An indictment against the president of a national bank for misapplication of its funds alleged that he "unlawfully and willfully, and with intent to injure and defraud the said association for the use, benefit, and advantage of himself, did misapply certain of the money and funds of said association, which he * * * then and there, with the intent aforesaid, paid and caused to be paid" to certain persons named. Held, that the indictment was bad for failure to allege the facts that made such payment unlawful or criminal. U. S. v. Eno (C. C. 1893) 56 Fed. 218.

It is not essential that such indictment should allege that the acts charged were done without the knowledge and assent of the directors of the association, for such knowledge and assent would not relieve the president from liability for an unlawful or criminal misappropriation of the bank's funds. Id.

Where the entry whose tenor is set forth contains the words, "See schedule," it is not a valid objection to the indictment that these words are not explained, for it is only necessary to set out the context, when it is presumptively a part of it. United States v. French (C. C. 1893) 57 Fed. 382; Same v. Work (C. C. 1893) 57 Fed. 391.

The omission from the indictment of

the dollar marks which appeared at the head of the columns in the report, whose tenor is therein set out, and in which defendant is charged with making false entries, is immaterial. U. S. v. French (C. C. 1893) 57 Fed. 382.

An allegation that defendant, an officer and agent of a national banking association, did secretly, in a manner and by particulars to the jurors unknown, willfully, unlawfully and fraudulently convert to his own use, and misapply, from said association to himself, certain funds, sufficiently charges the offense of "willful misapplication." U. S. v. Jewett (C. C. 1897) 84 Fed. 142, judgment affirmed Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832.

An indictment of an officer of a national bank for misapplication of funds, sufficiently alleges his possession of the funds by an averment that he was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in their control, management, and application. U. S. v. Eastman (C. C. 1904) 132 Fed. 551.

Various objections to an indictment under this section charging an officer of a national bank with misapplication of funds and property, on the ground of insufficiency of description of the property, considered, and held not well taken. Id.

Where, in a prosecution against a national bank officer for willful misapplication of the moneys, funds, and credits of the bank, the indictment definitely charged the value in lawful money of the United States of the misapplied property, it was not defective for failure to specify the exact thing misapplied, whether moneys, funds or credits. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

In a prosecution of a national bank officer for "willful misapplication" of the moneys, funds, and credits of the bank, the indictment properly alleged facts showing how the misapplication was made and the illegality thereof; the words "willful misapplication" having no settled technical meaning. Id.

It was no ground of objection, on demurrer to an indictment against a national bank officer for willful misapplication of the bank's funds, that the jury might draw from all the testimony the inference that the transaction amounted to no more than a legal overdraft. Id.

An indictment held not fatally defective for failure to charge that overdraft payment was unauthorized, that it was an actual conversion of the amount paid, or that the money was in some way absolutely lost to the bank. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

In a prosecution against bank officers for misapplication of the bank's funds, an indictment alleging that defendants, being officers of the bank, willfully and fraudulently, with intention to defraud the association, did misapply certain moneys of the bank, etc., constituted a sufficient allegation of a criminal intent to defraud, which was the gravamen of the offense to be inferred from facts and surrounding circumstances. Id.

An indictment against an officer of a national bank for willful misapplication of funds of the bank must allege facts showing a conversion of such funds; and an indictment which charges that defendant, as president, with intent to defraud the bank, and for the benefit of himself and others unnamed, caused the bank to discount single name commercial paper, and that the bank lost the amount paid on the discount, does not charge an offense. U. S. v. Heinze (C. C. 1909) 183 Fed. 907.

An indictment, under this section which charges defendant, as president of a national bank, with willful misapplication of its funds, with intent to defraud the bank, and for the benefit of himself and others, by causing the bank to discount a note signed only by a person known to him to be insolvent, and that the bank lost the amount paid on such discount, sufficiently charges fraudulent conversion, and is good. Id.

A prosecution for misapplying the funds of a national bank by its cashier must be by indictment. U. S. v. Hade (D. C. 1877) Fed. Cas. No. 15,274.

Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication, and must be charged in a separate count. U. S. v. Martindale (D. C. 1903) 146 Fed. 280.

An averment in an indictment, under this section, charging that defendants, as director and cashier of a national bank, by means of a draft drawn by them or by other stated means misapplied the moneys, funds, and credits "of said association without the knowledge and consent thereof," is not equivalent to an averment that the act was done without the knowledge and consent of the directors, as required by the statute, and is insufficient. Id.

An indictment under this section charging that defendant, as president of a national bank, willfully misapplied a certain sum of the "funds and credits" of the bank by discounting the note of a person known to be insolvent, the proceeds of which were divided between such person and defendant, is insufficient in its description of the offense, where it does not use the word "moneys," nor in any way describe the funds or credits charged to have been so misapplied. U. S. v. Smith (D. C. 1907) 152 Fed. 542.

An indictment under this section charging an officer of a national bank with the willful misapplication of its

"money, funds, and credits" must contain a particular description of the funds and of the credits charged to have been so misapplied, and show how much there was of money and of funds and of credits separately. Id.

An indictment which charges that defendant, while an officer of a national bank, with intent to injure or defraud the bank, unlawfully and willfully misapplied and converted to his own use funds of the bank by withdrawing money therefrom upon a charge ticket, pursuant to which the amount was charged to his account, is insufficient to charge an offense, in the absence of averments showing that the bank was in fact defrauded, or a probability that it would be defrauded, thereby, as that defendant was insolvent, and that the overdraft was not paid. U. S. v. Norton (D. C. 1911) 188 Fed. 256.

An indictment which charges that defendant, while president of a national bank, with intent to injure and defraud the bank, unlawfully and willfully misapplied and converted to his own use, by paying to himself the amount of a draft drawn by a customer on a third party to whom the bank was not indebted, does not charge an offense; there being no averment that the drawee was not solvent, or of other facts showing that the draft which defendant caused the bank to cash was not collectible. Id.

22. Selection of jury.—The offense of misapplying the assets of a national banking association by an officer or agent being a misdemeanor, under this section, the defendant in a prosecution for such defense is entitled to only three peremptory challenges to the jury. Jewett v. U. S. (1900) 100 Fed. 832 (affirming judgment U. S. v. Jewett [C. C. 1897] 84 Fed. 142); Tyler v. Same (1901) 106 Fed. 137, 45 C. C. A. 247.

23. Variance.—Where an indictment charged that a bank president received and placed to the credit of a company a bill of exchange of a certain number of pounds sterling, and the check offered to show the payment of such money was for dollars, there was no variance, where the sum misapplied was credited by taking the bill of exchange, and such sum was paid out on the check. Coffin v. U. S. (1895) 15 Sup. Ct. 394, 156 U. S. 432, 39 L. Ed. 481.

An averment, in an indictment under this section, for misapplication of moneys, funds, and credit by using the same to discount an unsecured note that such note was "made and drawn" by a person designated by his full first and sur names is supported by proof that it was made by such person, although it is not shown whether it was signed with his full first name or by his initials. Rieger v. U. S. (1901) 107 Fed. 916, 47 C. C. A. 61, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030.

Where a count in an indictment charges an officer of a national bank with having misapplied $25,000 of the money of the bank, "by causing the said sum of $25,000 to be credited to G. & W. on the books of the bank," etc., and the evidence shows a credit by a single entry of $105,000, $25,000 of which the jury found was a misapplication, held not a material variance, and that he may be convicted on that count. U. S. v. Fish (C. C. 1885) 24 Fed. 585.

An indictment under this section against an officer or director of a national bank for willful misapplication of its funds, in order to advise the defendant of the issues to be met, must set forth all of the facts necessary to show how the misapplication was made, and that it was an unlawful one. Under such an indictment charging that the misapplication was made by the drawing of checks on the bank, and obtaining their payment when he had in fact no money on deposit, where it appeared on the trial that defendant had an apparent credit on the books of the bank sufficient to cover the checks, the government cannot impeach such apparent credit by showing that a deposit previously entered on the books to the credit of defendant's account was false and fictitious, and the entry thereof fraudulently procured by defendant; no such transaction being charged in the indictment. U. S. v. Martindale (D. C. 1904) 146 Fed. 289.

24. Evidence.—Mere proof that a depositor made and deposited fictitious checks, which were credited to his account, does not show a willful misapplication of the bank's funds, in violation of this section, unless it is further shown that some portion of the funds were withdrawn from the bank's control or possession, or converted in some way, so as to deprive the bank of the benefit thereof. Dow v. U. S. (1897) 82 Fed. 904, 27 C. C. A. 140.

Upon the trial of a national bank officer for official misconduct, evidence as to his reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank. Spurr v. U. S. (1898) 87 Fed. 701, 31 C. C. A. 202.

As evidence that overdrafts on a bank by its president were made with intent to misapply its funds it may be shown that at the time of the overdrafts it was hopelessly insolvent, that this was due to its assets being notes of wholly irresponsible persons, and that these notes had been used by the president in connivance with the cashier, who was a director, and another director, to give him a fictitious credit. Breese v. U. S. (1901) 106 Fed. 680, 45 C. C. A. 535, judgment reversed (1901) 108 Fed. 804, 48 C. C. A. 36.

In a prosecution of the president of a national bank for violating this section, evidence held sufficient to require submission to the jury of the question whether he willfully misapplied to his own use funds of the bank to the extent of $10,000, without the authority of the bank's board of directors. Lear v. U. S. (1906) 147 Fed. 349, 77 C. C. A. 527.

Evidence that the cashier of a national bank overdrew his account, by means of checks which were not charged to his account, but carried in the drawer as cash and afterwards taken up by his note, all without the knowledge or consent of the board, is sufficient to warrant his conviction by a jury of misapplication of the bank's funds, in violation of this section. Brock v. U. S. (1906) 149 Fed. 173, 79 C. C. A. 121.

In a prosecution of the president of a national bank, evidence held sufficient to justify a conviction for willfully misapplying the bank's funds, and converting the same to use of himself or others, in violation of this section. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

In a prosecution for misappropriation of the funds of a national bank, a letter written by certain of the directors of the bank to the comptroller of the currency, after the misappropriation, was inadmissible either as showing the state of mind of the directors after the offense, or a ratification of the misappropriation. Dickinson v. U. S. (1908) 159 Fed. 801, 86 C. C. A. 625.

In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, defended on the ground that defendant did not know of the bank's interest in the certificate and was innocent of any criminal purpose, any error in admitting the bank's minute book on the prosecution's part to show that it disclosed no record of the directors sanctioning the use of the certificate, was harmless, where a witness, without any objection to the competency of the book, had testified to the substantive fact, which was admissible, that there was no such record in the book; the authenticity of the book not being questioned on writ of error, the effect of the testimony being wholly negative, and there being nothing to show that the directors had authorized the withdrawal by the cashier of the certificate, or had taken any action respecting it which was not recorded. Cook v. U. S. (1908) 159 Fed. 919, 87 C. C. A. 99, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

In a prosecution of certain officers of a national bank and defendant K. for conspiracy to misapply the bank's funds, evidence held to sustain a conviction. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

On prosecution of cashier of national bank for willful misapplication of funds, held not error to admit in evidence contents of bank's books. Pearce v. U. S. (1912) 192 Fed. 561, 113 C. C. A. 33.

General reputation of parties who made worthless paper discounted held irrelevant on prosecution of cashier of national bank for misapplication of funds. Id.

In a prosecution for aiding and abetting a national bank clerk in the misappropriation of its funds, in violation of this section, evidence held sufficient to corroborate the clerk to sustain a conviction of accused. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

In a prosecution for conspiracy to misapply the funds and credits of a national bank, evidence that defendant D. procured two notes, which had previously represented a contemplated loan to a church (but which had never been in fact made), and used them as collateral security for a loan to the bank, was admissible to show fraudulent intent. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming order U. S. v. Breese (D. C. 1908) 172 Fed. 761.

25. —— **Presumption and burden of proof.**—Under an indictment averring that certain funds were misapplied with intent to convert the same to the use of a certain company "and to other persons to the grand jury unknown," the government need not prove want of knowledge in the grand jury as to such persons, and, in the absence of evidence on the subject, the truth of the averment will be presumed. Coffin v. U. S. (1895) 15 Sup. Ct. 394, 400, 156 U. S. 432, 39 L. Ed. 481.

26. **Defenses.**—The fact that the officers of a national banking association which has gone into liquidation occupy the relation of trustees for creditors does not preclude the president of the association, who has been appointed as agent by the shareholders, to assist in the liquidation, from being prosecuted under this section, for willfully misapplying the assets of the association. Jewett v. U. S. (C. C. A. 1900) 100 Fed. 832, affirming judgment U. S. v. Jewett (C. C. 1897) 84 Fed. 142.

The willful misapplication of the funds of a national bank by an officer without the knowledge or consent of the bank, in violation of this section, is not changed, as to its criminal character, by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto, by taking no action in regard to it. Rieger v. U. S. (1901) 107 Fed. 916, 47 C. C. A. 61, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030.

On prosecution of cashier of national bank for misapplication of funds, held

immaterial whether defendant believed himself solvent. Pearce v. U. S. (1912) 192 Fed. 561, 113 C. C. A. 33.

Where withdrawals of a national bank's funds by the president constituted misappropriations at the time they were made, they did not lose their criminal character by the fact that he subsequently returned the money and made the misappropriations good. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

That directors of national bank knew of form of loans held not to relieve president of criminal responsibility, where without their knowledge there was only a semblance of security and the borrower was insolvent. Stout v. U. S. (C. C. A. 1915) 227 Fed. 799.

On indictment for the misapplication of bank funds by its officer, defendant offered to show that certain misapplications were made for the purpose of trying to secure the bank against losses through former misapplications. Held irrelevant, as defendant could not condone former offenses by subsequent efforts to make good the loss. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

Where one of the officers of a national bank willfully converted certain of the bank's funds to his own use, in violation of this section, it was no defense that the money was subsequently refunded; such fact being only evidence to negative the officers' intent to defraud at the time of the alleged conveyance. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

Officers of a national bank possess no authority to produce or permit a conversion of the bank's funds to the use of one of such officers; authority to commit a crime being an impossibility. Id.

27. **Instructions.**—On a trial for willful misapplication of the funds of a national bank, where it appeared that one of the defendants had drawn checks in excess of his deposits, which were paid, held, that it was reversible error for the court to call the jury's attention to a state statute making it a misdemeanor to draw a check on a bank, where there are no funds to meet it. Dow v. U. S. (1897) 82 Fed. 904, 27 C. C. A. 140.

Instructions given and refused on the trial of a defendant charged as an officer of a national bank, under this section, with misappropriation of its funds and with making false entries in its books considered, and the charge as given held correct and to cover fairly such of the requested instructions refused as were proper and applicable to the evidence. Goll v. U. S. (1907) 151 Fed. 412, 80 C. C. A. 642.

The following instruction, in a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, was unobjectionable, being but a broader statement of the principle that every man is presumed to know the natural and probable consequences of his own acts: "As I have said before the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge; and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his act. I have said that is what is presumed in every case a man means." Cook v. U. S. (1908) 159 Fed. 919, 87 C. C. A. 99, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

In a prosecution of an officer of a national bank under this section for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the section, stating that a misapplication of funds, in order to constitute an offense, must have been with intent to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed pursuant to law to examine the affairs of the bank," was not misleading, where the jury were subsequently charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown. Morse v. U. S. (1909) 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, writ of certiorari denied (1909) 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346.

Instructions considered in a prosecution of an officer of a national bank under this section for willfully misapplying funds of the bank, and, taken together, held to correctly submit to the jury the question of wrongful intent. Walsh v. U. S. (1909) 174 Fed. 615, 98 C. C. A. 461, writ of certiorari denied (1910) 30 Sup. Ct. 409, 215 U. S. 609, 54 L. Ed. 347.

28. **Verdict.**—In a prosecution for violating this section, the indictment contained 150 counts covering 50 transactions with reference to each of which embezzlement, abstraction, and willful misapplication were severally charged. The court directed an acquittal as to the charges of embezzlement and charged that the first three counts involving a $10,000 note transaction might be first considered, and, if that money was abstracted or willfully misapplied, the jury should convict defendant, and need not go further into the case. The jury on returning announced that they had found defendant guilty as indicated in the third count; but the verdict, as

recorded, was that the defendant was guilty in manner and form as charged in the third count in the indictment, and not guilty as to the remaining counts. Held, that such verdict was not tantamount to an express finding that the facts requisite to a conviction on any of the other counts had not been shown to exist, and that there was therefore no evidence on which a finding of their existence with reference to the third count could be sustained. Lear v. U. S. (1906) 147 Fed. 349, 77 C. C. A. 527.

Where an indictment under this section charging an officer of a national bank with willful misapplication of its funds contains counts each based on the discounting of a separate instrument, and another count based on the discounting of all of such instruments, a verdict is not repugnant and inconsistent because it finds the defendant guilty on the latter count and not guilty on the former. Flickinger v. U. S. (1906) 150 Fed. 1, 79 C. C. A. 515, writ of certiorari denied (1907) 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673.

29. Questions for jury.—In a prosecution of an officer of a national bank for misapplying its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, the question of intent is one for the jury, under proper instructions. Walsh v. U. S. (1909) 174 Fed. 615, 98 C. C. A. 461, writ of certiorari denied (1910) 30 Sup. Ct. 409, 215 U. S. 609, 54 L. Ed. 347.

(E) Making false entries or statements

30. What constitutes offense.—The statute which punishes false entries to deceive agents appointed under section 9832 refers to entries made with that intent, whether before or after the appointment of the agent. U. S. v. Britton (1883) 2 Sup. Ct. 512, 520, 107 U. S. 655, 27 L. Ed. 520.

The president and assistant cashier of a national bank are indictable as principals for making a false entry in a report, although neither of them actually signed or attested the report. Cochran v. U. S. (1895) 15 Sup. Ct. 628, 157 U. S. 286, 39 L. Ed. 704.

The assistant cashier of a bank is indictable for making a false entry in a report to the comptroller, although he is not one of the officers authorized to make such a report; for he may be regarded as within the category of "clerk or agent." Id.

Where a transaction by a national bank officer with intent to defraud is entered on a deposit slip, entry of the contents of such slip upon the books of the bank by him, or by his direction, is making a "false entry," within this section. Agnew v. U. S. (1897) 17 Sup. Ct. 235, 241, 165 U. S. 36, 41 L. Ed. 624.

Intent to injure a bank by a false report to the Comptroller of the Currency is not negatived as matter of law by the fact that the report showed the bank to be in better condition than it really was. U. S. v. Corbett (1909) 30 Sup. Ct. 81, 82, 215 U. S. 233, 54 L. Ed. 173.

If an overdraft on a national bank is properly made and allowed, or even if improperly allowed, the entry of the transaction on the books of the bank just as it occurred is not a false entry, under this section. Dow v. U. S. (1897) 82 Fed. 904, 27 C. C. A. 140.

Where the account of a depositor with a national bank shows that he has drawn out more money than has been credited to him, the excess constitutes an overdraft, and is required to be so reported in the bank's statement to the comptroller. The fact that the depositor has given the bank a note to secure overdrafts, where it has not actually been discounted, and the proceeds placed to his credit on the books, does not warrant the reporting of such overdraft under the head of "loans and discounts." Bacon v. U. S. (1899) 97 Fed. 35, 38 C. C. A. 37.

To constitute the offense of making a false report of the condition of a national bank, within this section, it is not necessary that such report, when made by an officer of the bank to the comptroller, should have been made in response to a call or request of the comptroller. Id.

Entries in the books of a national bank which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries, within the meaning of this section. Twining v. U. S. (1905) 141 Fed. 41, 72 C. C. A. 529.

Where the president of a national bank made a false report to the Comptroller of the Currency with intent to deceive an examiner who might be appointed to make an examination of the bank, as provided by section 9832, post, such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in this section. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

This section includes a report voluntarily made as well as one required by law, if the false entry was made with the requisite unlawful intent. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555, reversing judgment (1907) 104 S. W. 673, 7 Ind. T. 437.

A national bank, of which defendant was cashier, was in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the overdraft to be made good, and the officers induc-

ed F., who was solvent, to execute his note to the bank for their accommodation, and this was discounted; the proceeds being credited to the officers' individual accounts. Held, that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the Comptroller of the Currency as a loan and discount of the bank did not constitute the making of a "false entry," in violation of this section. Hayes v. U. S. (1909) 169 Fed. 101, 94 C. C. A. 449.

If the officer of a bank procured a note to be given to it by an irresponsible person, with intent of apparently increasing the bank's assets, and thereafter made an entry in a report required by law to the Comptroller of the Currency, including such note as a bona fide asset of the bank, with either of the intents denounced by this section, such entry would be a false entry within such section. Id.

Upon a charge against an officer of a national bank of making false entries in the books of the bank, it is immaterial whether defendant made the entries in person or caused them to be made by a clerk or bookkeeper. Morse v. U. S. (1909) 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, writ of certiorari denied (1909) 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346.

Entries in the books of a national bank showing loans to persons named on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which they gave without any intention of paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents in violation of this section. Id.

The fact that entries in a report made by a national bank to the Comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank. Id.

The making of false entries in the books of a national bank is equally an offense, whether it is done by the bank officer charged, or whether he procures it to be done through the medium of others. Richardson v. U. S. (1910) 181 Fed. 1, 104 C. C. A. 69.

Where an officer of the bank makes false credits in favor of a firm of which he is a member, and causes the money represented by such credits to be paid to his firm by being drawn out of the bank by his partner, in pursuance of an understanding had with him that the money should be so drawn, the credit having been made for that purpose, he will be guilty of a violation of the statute. U. S. v. Fish (C. C. 1885) 24 Fed. 585.

The crime of making false entries by an officer of a national bank, with intent to defraud, defined in this section, includes any entry on the books of the bank intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or defraud the association. The crime may be committed personally or by direction, and it is immaterial that the act was not done in a skillful manner, or that the falsity could be easily detected by inquiry or by examination of other books. U. S. v. Harper (C. C. 1887) 33 Fed. 471.

Under this section, it is an indictable offense to make a false entry in a report to the comptroller of the currency. U. S. v. French (C. C. 1893) 57 Fed. 382; Same v. Work (C. C. 1893) Id. 391.

A false entry, either in the books of the bank or in a report of its condition, is punishable only when the jury find that it was made by the defendant, or by his direction, with the intent, either (1) to injure or defraud the bank, or some other corporation, or some firm or person; or (2) to deceive some officer of the bank; or (3) to deceive some agent appointed or thereafter to be appointed to examine the affairs of the bank. If any one of these intents is present, the offense is complete. U. S. v. Allis (C. C. 1893) 73 Fed. 165.

The word "entry," as used in this section, declaring that every officer, clerk, or agent of a national banking association who makes any false entries in any of the bank's books with intent to injure or defraud the association shall be guilty of a misdemeanor, means "an item in an account." U. S. v. Morse (C. C. 1908) 161 Fed. 429.

A false entry within this section is an entry made in such book by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association. U. S. v. Wilson (C. C. 1910) 176 Fed. 806.

The offense of making a false entry in the books of a national bank by an officer, in violation of this section, may be made personally or by direction to another. Id.

A simple mistake by an officer of a national bank in making an entry in one of the company's books, growing out of a clerical error, is not a violation of this section. Id.

The making of false entries by a clerk in a national bank by direction of the president constitutes the latter a principal in the offense of making false en-

tries. In re Van Campen (D. C. 1868) Fed. Cas. No. 16,835.

Clerical mistakes, or mere arbitrary exercise of discretion in keeping books, are not "false entries," within this section. U. S. v. Allen (D. C. 1880) 47 Fed. 696.

The erasure of figures constituting part of a number already written in an account book of a national bank, and the writing of different figures in place of those erased, constitute "making an entry," within the meaning of this section. U. S. v. Crecilius (D. C. 1888) 34 Fed. 30.

Where the form of report as prescribed by the comptroller contains a heading of "Loans and Discounts," and also one of "Overdrafts," a bank officer is not justified in entering overdrafts which are being carried as such on the books of the bank as "Loans and Discounts," merely because he regards an overdraft as a temporary indefinite loan, nor because these two headings are both found among the "Resources" of the bank. U. S. v. Graves (D. C. 1892) 53 Fed. 634.

In determining whether the entry, under heading of "Loans and Discounts" in a report, of certain corporation bonds secured by mortgage, and owned by the bank, was the making of a "false entry," within the meaning of the statute, the jury may consider the fact that on the prescribed form of report, after a heading of "U. S. Bonds," there is a heading of "Other Stocks, Bonds," etc., and that, in the report made, certain other corporation bonds, owned by the bank, were entered under the latter heading. Id.

It is not making a "false entry," within the meaning of the statute, to enter in such report, under heading of "Loans and Discounts," items, which, on books of the bank, and for convenience of its officers, have been temporarily withdrawn from that heading, and which are, from day to day, carried on books of the bank under heading of "Suspended Loans," while awaiting the action of the directors as to entering them up as a loss on profit and loss account. Id.

A "false entry" in a report by a national bank officer or director, within the meaning of this section, is not an incorrect entry made through inadvertence or negligence, but is an entry known to the maker to be untrue. Id.

It is not a necessary ingredient of the offense of making a false entry in a report that the report shall be one of those mentioned in sections 9774, 9776, post, or one which the bank is bound by law to make. It is sufficient if the report is one made in the due course of business. U. S. v. Booker (D. C. 1897) 80 Fed. 376.

The entry on the books of a national bank by the cashier as a "cash item" of a check which actually entered into a transaction of the bank will not support an indictment of the cashier, under this section, for making a "false entry," although it is further charged that he knew the check to be worthless and fraudulent, and made the entry with intent to deceive, etc. The entry, being a truthful statement of the actual transaction, cannot be converted into a false entry by any other fraudulent or unlawful act of the cashier. U. S. v. Young (D. C. 1904) 128 Fed. 111.

Concealment by the president of a national bank from the bookkeeper of facts necessary to enable the latter to make accurate entries in the books of the bank, by reason of which fact he made false entries, does not constitute the making of false entries by the president which is made a criminal offense by this section. U. S. v. McClarty (D. C. 1911) 191 Fed. 523.

The false entries under this section must be made by the officer of the bank in person, or, if by another, the latter must in an affirmative way be authorized or directed by the officer to make the particular entry. Id.

The term "false entries," as used in this section, held not satisfied by an unfilled blank for paper rediscounted in the report of a national bank to the Comptroller of the Currency. U. S. v. Herrig (D. C. 1913) 204 Fed. 124.

Only a person guilty of knowingly making a false entry in a national bank's report to the Comptroller is guilty of violating this section, and not an officer of the bank who verifies the bank's report containing such entries, without knowledge or responsibility therefor. Id.

31. Jurisdiction.—The offense of making false entries in the books of a national bank is exclusively cognizable by the federal courts. In re Eno (C. C. 1893) 54 Fed. 669, judgment reversed People of State of New York v. Eno (1894) 15 Sup. Ct. 30, 155 U. S. 89, 39 L. Ed. 80.

32. Indictment.—It is not necessary to allege specifically in indictment that the reports were transmitted to the comptroller of the currency, or that they were published. U. S. v. Potter (C. C. 1892) 56 Fed. 83 (judgment reversed Potter v. U. S. [1894] 15 Sup. Ct. 144, 155 U. S. 438, 39 L. Ed. 214); Harper v. U. S. (Ind. T. 1907) 104 S. W. 673.

An indictment against a bank officer for a willfully false declaration or statement in a report made under section 9774, post, verified by his oath administered by a notary public of a state prior to the act of February 26, 1881, cannot be sustained. U. S. v. Curtis (1882) 2 Sup. Ct. 507, 510, 107 U. S. 671, 27 L. Ed. 534.

An indictment of the president of a national bank charging him with having made a false entry in one of its account books known as "Profit and Loss No. 6," as follows: "Richard L. Dickson, 182 days' int., 8 per cent., 132,-

673.49, to July 1, '76,—5,365.88;" purporting thereby to show that $5,365.88 had been received by said association on account of interest due from said Dickson, with intent to defraud the association, or to deceive any agent appointed to examine its affairs,—is not defective because it fails to allege that the entry was in an account of and in the due course of business of the bank, or that the interest in question was due; or on the ground that the entry is without significance, and unintelligible; or that it is not calculated to deceive a bank examiner; or because it is not alleged that, at the time the entry was made, an examiner had been appointed. U. S. v. Britton (1883) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520.

An indictment of the president of a national bank for making a false entry in its account books, "to injure and defraud said association, and certain persons to the grand jurors unknown," following the language of the statute, sufficiently charges the intent with which the offense was committed, and is not repugnant or impossible. Id.

An indictment for making a false entry in a report to the comptroller need not allege that such report was made by the banking association or that it was actually verified by the oath of the president or attested by the directors as required by section 9774, post, but it is sufficient to aver that defendant made such false entry "in a certain report * * * made to the comptroller of the currency in accordance with the provisions" of section 9774, post. Cochran v. U. S. (1895) 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704.

If, in an indictment under this section, it is the purpose of the government to charge the making of false entries in the books of the bank because of the receiving and crediting of checks drawn thereon by parties who had no funds there, the indictment should set forth a description of the checks, with an averment of the reasons why they were to be deemed false or valueless. Dow v. U. S. (1897) 82 Fed. 904, 27 C. C. A. 140.

An averment in the second or a subsequent count of an indictment, drawn under this section, that said defendant, on a date given, "being then and there the cashier of said association as aforesaid," as such cashier, committed the acts charged, is sufficient to identify and incorporate in said count the averments of the first count that the defendant was, at the time referred to, the duly elected and acting cashier of a certain national banking association, and that such association was at the time existing and carrying on business under the laws of the United States. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

An indictment against a sole defendant, charging that, as cashier of a national banking association, he caused and procured the making of false entries in the books of the bank, by certain clerks under his control as such cashier, with intent to defraud, sufficiently charges him with the offense as principal; the making of such entries by his direction being the same, in legal effect, as his making them in person. Id.

A count of an indictment, charging that defendant, as president of a national banking association, caused a false entry, which is set out, to be made in the books of the bank, purporting to show that a customer had deposited a certain sum to his general credit, when in fact, as defendant well knew, no such deposit had been made, is not insufficient, in the absence of an application for a bill of particulars, because it does not allege the manner in which defendant "caused" the entry to be made. McKnight v. U. S. (1899) 97 Fed. 208, 38 C. C. A. 115.

An indictment charging a defendant, as an officer of a national bank, with having made a false statement in a report made to the comptroller, is not required to set out such report in full, but is sufficient if it identifies the report by its date, and sets out the particular statement claimed to be false; the only requisite being that it shall clearly advise the accused of the exact charge he is required to meet. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

An indictment against two defendants, charging them with a conspiracy to commit an offense against the United States by making certain false entries in the books of a national bank of which one of the defendants was an officer, is not bad because, in stating the details of the overt act committed by defendants, it is averred that the entries which were made in the books of the bank were made by the hand of the defendant who was not an officer thereof; it being averred that both defendants were present and participated in the carrying out of the plan formed between them to make such entries. Scott v. U. S. (1904) 130 Fed. 429, 64 C. C. A. 631.

An indictment under this section, alleging that accused, while acting as president of a national bank, made a false entry in a report to the Comptroller of Currency, that the lawful money reserve in the bank, consisting of gold coin, was $23,955, when in fact the bank only had $21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand; the gist of the offense being the making of false entries in the report. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied

(1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

A count in an indictment for violating the national banking act alleged that accused, as president of the bank, made an entry in the bank's daily journal of the words and figures following: "Other Real Estate, A. Barton Farm, $3,350.00;" that the entry indicated that the south half of a specified quarter section of land was a certain 80-acre tract known as the "Barton Farm," and was an asset of the bank in the sum of $3,350.00; that the entry so made was false, in that the same described land was not then and there an asset of the bank of the value of $3,350.00, or of any sum whatsoever. Held, that such count was not defective as failing to charge that the A. Barton farm was known or described in accordance with the description recited, or was identified therewith, or because it was not charged that the A. Barton farm was not an asset of the bank. Id.

Where accused, a national bank clerk, was indicted under several counts for making false entries in the bank's books, in violation of this section, and on conviction on several counts was sentenced to imprisonment for a term less than the maximum provided for a single offense, and at least one of the counts in the indictment was sufficient, the sentence would be applied to such count, and the validity of the remaining counts regarded as immaterial. Harvey v. U. S. (1908) 159 Fed. 419, 86 C. C. A. 399.

An indictment under this section charging defendant as cashier of a national bank with making a false entry in a report with intent to deceive an officer of the association, need not describe the report with technical accuracy, and an averment of date when made, and that it was a report to the Comptroller of the Currency showing resources and liabilities on a certain date, is sufficient to authorize presumption that it was a report made by the association under section 9774. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555, reversing judgment (1907) 104 S. W. 673, 7 Ind. T. 437.

In a prosecution of a national bank officer for making false entries, an allegation that they were made "in a book of said bank known as 'Journal K'" sufficiently alleged that the book was a book of the association within this section. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

This section contemplated two separate intents, one to injure or defraud the association, and the other to deceive, either of which, when accompanying a forbidden act, constitutes an offense, and hence it was not necessary that an indictment alleging a false entry with intent to deceive should also charge an intent to injure or defraud the association or any other company or person. Id.

An indictment charging a bank officer with false entries "with the intent to deceive any agent appointed to examine the affairs of the bank" sufficiently designated the person intended to be deceived. Id.

Where an indictment against a national bank cashier for making false entries, specified with great particularity and at length the entries, the falsification of which was charged, and these entries were fully described, the indictment was not defective for indefiniteness, because it did not specify the names of the clerks or employés by whose hand the entries were in fact made. Richardson v. U. S. (1910) 181 Fed. 1, 104 C. C. A. 69.

Where a national bank cashier was indicted for making false entries, and also for indirectly participating in the making thereof, in that he caused and procured them to be made, proof of either of such charges was sufficient after verdict to sustain a conviction, even though the other was not proved. Id.

The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid. Id.

An indictment held to sufficiently charge the making of a false entry in a report to the Comptroller of the Currency of the condition of a national bank, in violation of this section, as against an objection raised by motion in arrest. Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149.

Where an indictment against bank officers for false reports specifically referred to the entries alleged to be false, it was not an abuse of the trial court's discretion to deny an application for a bill of particulars. Kettenbach v. U. S. (1913) 202 Fed. 377, 120 C. C. A. 505.

In a prosecution of a national bank president for making a false entry by debiting the account of the F. Bank with $25,000 not paid on a check or draft of that bank, the indictment held not demurrable. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

Where there is a doubt whether the indictment for making false entries charges an offense within the statute, the indictment should not be quashed, but the doubt be left to be solved on a motion in arrest of judgment. U. S. v. Bartow (1882) 10 Fed. 874.

An indictment which charges the making of a false entry in a report with intent to deceive the comptroller of the currency cannot be sustained, as he is not an agent appointed to examine the affairs of a national bank. Id.

Allegations that the false entries were made with intent "to injure and defraud the said association and certain persons to the grand jurors unknown" are sufficient. U. S. v. Potter (C. C. 1892) 56 Fed. 83, following U. S. v. Britton (1882) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520, and judgment reversed

Potter v. U. S. (1894) 15 Sup. Ct. 144, 155 U. S. 438, 39 L. Ed. 214.

The omission of the signs for dollars and cents in the recitals of the alleged false entries in the reports, and misnomer of the reports, are immaterial, where the reports are set out by their tenor in the indictment, so that these discrepancies are at the most mere "matter of form," within the meaning of section 1691, ante, for which the indictment is not to "be deemed insufficient." Id.

The use in an indictment under this section of the words "then and there" in alleging that the defendant was president or director of such bank, and that he made alleged false entries, is not uncertain or repugnant merely because in one place they may refer to the whole of a day and in another to only one instant of the day. Id.

An indictment against the president of a national bank under this section for making false entries in the books of the bank, which charges that it was done "with intent to injure and defraud the said association and certain persons to the grand jurors unknown," is sufficient, so far as concerns the allegations of intent. U. S. v. Potter (C. C. 1892) 56 Fed. 97, following U. S. v. Britton (1882) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520.

When the indictment alleges that the false entries in question indicated that there was then in the paying teller's department of the bank a certain amount in gold, legal tenders, and gold certificates, when such amount was not there in fact, it is not necessary that it should further allege that such amount was not then in other departments of the bank. Id.

Counts charging false entries by the president in reports of the condition of the bank, which allege that the reports were made in conformity with the law, and then set them out by their tenor, are bad for their failure to allege specifically that the reports were verified and attested by the cashier. Id.

The fact that the note teller's and paying teller's books, in which it is charged the president made the false entries on which the indictments are based, are usually kept by those officers without interference by the president, does not invalidate the indictment; for the presumption that these acts were so far beyond the range of his duty as to be mere spoliations is at best one of fact, and not of law. Id.

In addition to the entries themselves, the indictment need set out the context only when it so modifies the entries as to be, in presumption of law, a part of them. Id.

An allegation, in an indictment under this section, that defendant "did make a certain false entry in a certain report of the said association," will not be construed to mean that the entry was made after the report was completed, and was in fact an alteration. U. S. v. French (C. C. 1893) 57 Fed. 382; Same v. Work (C. C. 1893) Id. 391.

It is sufficient if the indictment allege the substance of the reports in question, without setting them out in full, for whether they are such reports as the law requires can be determined by the court from the allegations that they were made in response to the comptroller's order, and those touching their attestation, verification, and other like matters. Id.

For the purposes of this section, and of an indictment drawn under it, the preparation and completion of the report; the making of the false entry therein; its verification, attestation, and delivery to the comptroller,—may be considered as simultaneous, and there is consequently no repugnance in failing to allege that any or all of these things occurred in consecutive order. Id.

An indictment of an officer of a national bank, under this section, for misapplication of the funds or property of the association, sufficiently alleges the manner in which the misapplication was accomplished where it charges that, having access to the funds and properties of the bank, he willfully, unlawfully, fraudulently, and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. U. S. v. Eastman (C. C. 1904) 132 Fed. 551.

Where counts in an indictment against national bank officers in alleging the transaction claimed to have been falsely entered, described two different entries or sets of words written down in different parts of the same book or report, each count revealing a false record by double entry, such counts were double, as it does not follow that, because the debit entry of a transaction is false, the credit entry of the same transaction was also false. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

Where an indictment against bank officers alleged a conspiracy to make false entries in the books of the bank, one of which was charged to consist in entering in "call loans account," a "fictitious" promissory note as though it were a bona fide note affected by certain stock as collateral, whereas in truth the bank unlawfully owned the stock and the note was created and entered as a genuine note merely to conceal the illegality of the original purchase of the stock and the continued holding thereof, was not defective, in that the entry was a true entry of a fraudulent transaction only. Id.

An indictment under this section alleged that defendant, as president of a certain bank, "did knowingly, wrongfully, and unlawfully make, and cause to be made, false entries in a report or statement" of such bank, being a re-

port of its condition at a designated time, "made to the comptroller of the currency, as required by law to be made." The report was set out in full, and the particulars in which the entries were alleged to be false were stated in detail. Held, that the indictment was sufficient, though it did not allege that the report was made pursuant to a request of the comptroller, or according to a form or at a time prescribed by him under section 9774, which provides therefor. U. S. v. Hughitt (D. C. 1891) 45 Fed. 47.

Where an officer of a national bank is charged with several offenses under this section, in making at different times false entries in the books, reports, or statements of the association, such offenses may be charged in different counts of the same indictment, as provided in section 1690, ante, as "acts or transactions of the same class of crimes or offenses." U. S. v. Berry (D. C. 1899) 96 Fed. 842.

An indictment charging officers of a national bank with making a false entry in a report made by them, "with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States" does not charge an offense under this section; the comptroller not being charged with any duty to examine national banks, although he is given power to appoint agents for that purpose. U. S. v. Corbett (D. C. 1908) 162 Fed. 687, judgment reversed (1909) 30 Sup. Ct. 81, 215 U. S. 233, 54 L. Ed. 173.

A general averment in an indictment against officers of a national bank that a false entry charged to have been made by them in a report to the Comptroller of the Currency was made "with intent to injure and defraud the association" is insufficient to state an offense under this section; no facts being alleged to show in what manner the bank could have been injured or defrauded thereby. Id.

A count of an indictment which charges that a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity. U. S. v. Norton (D. C. 1911) 188 Fed. 256.

In an indictment under this section for making a false entry in a report, it was not necessary to allege that the report in which the false entry was made was one made by the association, since the penalty is affixed to any person making the false entry, and not to the association or its officers for making a false report. Harper v. U. S. (Ind. T. 1907) 104 S. W. 673.

In a prosecution under this section, the indictment alleged that accused was the duly elected, qualified, and acting cashier of a certain bank; that he made a false entry in a report, describing it; that the entry was made to deceive a certain person who was the duly elected, qualified, and acting president of that bank; that he made the false entry on a certain date in a report showing the resources and liabilities of the bank on a certain day to the Comptroller of the Currency. Held, that the indictment was sufficient. Id.

An allegation in an indictment that on a certain date a bank was a corporation duly organized and existing, with a qualified and acting president and cashier, and that on that date the cashier made a certain report to the Comptroller of the Currency, is a sufficient allegation that the bank was carrying on business at the time the report was made. Id.

33. Variance.—The variance between an indictment charging the making of a false report to the Comptroller of the Currency as to the condition of a national bank, by falsely showing the amount due to it from another bank, and the proof of the amount actually due, is immaterial. Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149.

Defendant, a bank cashier, summoned a clerk to his house, and directed him to make the books of the bank show a cash reserve of $50,000 more than it actually had, because of an expected demand for a statement from the comptroller. Defendant specified certain entries which he wished to have made, but left $12,000 unprovided for. The clerk added this by a false entry, showing a deposit by a depositor of something more than that amount the day before. Held, that a false entry made by the clerk under defendant's direction was made by the defendant, within the indictment. U. S. v. Youtsey (C. C. 1898) 91 Fed. 864.

Where an indictment under this section alleges the making of false entries in a report of a national bank to the comptroller of the currency with intent to injure and defraud the banking association and the stockholders thereof, and to deceive its directors, it is not sufficient to prove an intent to deceive other persons, such as creditors, depositors, the comptroller, or the public. U. S. v. Allen (D. C. 1880) 47 Fed. 696.

34. Evidence.—On trial of a national bank president on an indictment containing 25 counts, charging false entries in the books of the bank, running from February to December, 1892, with intent to injure, defraud, or deceive, in violation of this section, it was not error to permit a witness, from an examination of the bank's books, to testify to the condition of defendant's private account during such time, though he was convicted only on one count, which charged the making of the entry in February, 1892. Allis v. U. S. (1894) 15 Sup. Ct. 36, 37, 155 U. S. 117, 39 L. Ed. 91.

Books of a national bank, which were turned over to officers of the United States by the receivers of a state bank

which succeeded such national bank, are not inadmissible in evidence on behalf of the government in the prosecution of an officer of the bank for a violation of the national banking law on the ground that they were unlawfully obtained in violation of the constitutional provision against unreasonable searches and seizures. Bacon v. U. S. (1899) 97 Fed. 35, 38 C. C. A. 37.

In view of the provisions of the national banking act requiring the books of a national bank to be truthfully kept, by making it an offense to make false entries therein, proof that books are those of a national bank in which the record of its daily business was kept raises a presumption that they were properly kept, which renders them admissible in evidence without further proof, when offered by the government in a criminal suit against an officer of the bank for making false reports. Id.

The admission of expert testimony as to the meaning of certain entries in a report made by a national bank to the comptroller is not prejudicial error, conceding the construction of the report to be properly a matter of law for the court, where it appears that the witnesses correctly interpreted such entries. Id.

The fact that a letter written by the comptroller of the currency to the president of a national bank, which formed a part of the official correspondence of the bank, was taken by some individual from a box marked as containing private papers of the president, and was afterwards given to the officers of the United States, does not render such letter inadmissible in evidence on the part of the government in a prosecution of the president for a violation of the national banking laws. Id.

Under an indictment based upon this section charging an officer of a national bank with having made false entries in its books with the intent to deceive the officers and directors of the bank and any agent appointed by the comptroller to examine the affairs of the bank, and to injure and defraud the association, it is sufficient to prove the wrongful intent in either particular charged. McKnight v. U. S. (1899) 97 Fed. 208, 38 C. C. A. 115.

Evidence to the effect that when a bank rediscounts notes it indorses them, and that a bank held certain notes which it rediscounted, is sufficient to establish the fact, when such notes have become lost or destroyed, that they were indorsed by the bank, and to render admissible testimony of false entries in the books of the bank respecting such notes, made by direction of a defendant charged with having, as cashier, caused such entries to be made for the purpose of concealing the liability of the bank on account of such indorsement. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

On the trial of a defendant charged as an officer or agent of a national bank, under this section, with having made false entries in its books in the accounts showing the indebtedness to it of other banks, periodical statements taken from the bank's files and purporting to have been rendered to it by such other banks, and which are shown to have been under the defendant's charge, are admissible in evidence, and they may also be identified by employés of such other banks as having been made under their direction and duly sent by them, and their correctness verified by reference to the books of such banks, which are in evidence and used in connection with such books for convenience of reference, as evidence of the true state of the account between the two banks. Goll v. U. S. (1907) 151 Fed. 412, 80 C. C. A. 642.

Defendant was charged with having made a false entry in a report made to the comptroller of the currency as president of a national bank, in that he omitted from the statement of deposits for which the bank was liable the amount of a deposit made several years before and which had not been withdrawn. The defense was that the depositor had authorized defendant to loan the money, which had been done, but the depositor denied such agreement. It was shown by the evidence that defendant, in fact, made loans which were charged to the depositor's account, and for which he took notes payable to the depositor. Held, that a statement made by him to a borrower at the time of making such a loan, which was several years before the making of the alleged false report, to the effect that it was made from money left by the depositor to be loaned, was not admissible as a part of the res gestæ, but was properly excluded as a self-serving declaration. May v. U. S. (1907) 157 Fed. 1, 86 C. C. A. 575, writ of certiorari denied (1908) 28 Sup. Ct. 570, 209 U. S. 542, 52 L. Ed. 918.

On the trial of a cashier of a national bank for making a false entry in a report, where witnesses testified as to his reputation for truthfulness and honesty, it was not error to exclude testimony as to his reputation for morality and sobriety as irrelevant. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555, reversing judgment (1907) 104 S. W. 673, 7 Ind. T. 437.

In a prosecution of a national bank officer for making false entries in the bank's books, evidence held to sustain a conviction. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

Where false entries were made by the officers of a national bank to overcome complaints by the comptroller in order that the bank examiners and the comp-

troller might be deceived and misled thereby, proof of such false entries was sufficient to sustain a finding that they were made with intent to injure and defraud the bank, and this though they represented the condition of the bank to be more favorable than it was. Richardson v. U. S. (1910) 181 Fed. 1, 104 C. C. A. 69.

On a trial for making a false entry in a report to the Comptroller of the Currency on the condition of a national bank, by showing a false balance due it from another bank, the books of the latter bank are inadmissible, in the absence of evidence required in case of private books of account. Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149.

On a trial for having made on September 4, 1906, a false entry in a report to the Comptroller of the Currency of the condition of a national bank, the admission of evidence of subsequent admissions by accused that he was short in his accounts, to throw light on the question as to whether he knowingly made the false entry, was not erroneous. Id.

In a prosecution of officers of a national bank for falsifying reports to the comptroller, evidence of the making of prior false reports of the bank's condition held admissible to show motive or intent. Kettenbach v. U. S. (1913) 202 Fed. 377, 120 C. C. A. 505.

In a prosecution of national bank officers for falsifying reports to the Comptroller of the Currency, evidence held sufficient to sustain a finding that defendant K., the president of the bank, participated in the offense, and was therefore guilty. Id.

In a prosecution of a national bank president for making a false entry in the bank's books, evidence held to justify a finding that a charge of $25,000 against the account of another bank was a false entry and had not been authorized by the president of the bank the account of which was so charged. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

The testimony of a bank examiner who is a skilled accountant is admissible to show false entries; but it must consist of knowledge derived from his investigation of the books, and not of conclusions based partly upon statements of officers and clerks of the bank. U. S. v. Allen (D. C. 1880) 47 Fed. 696.

False entries in a statement, made by a book-keeper at the request of the bank examiner, purporting to give the balances due depositors, which statement it was the duty of the examiner to make, and not of the book-keeper, will not sustain an indictment for making "false entries in * * * a statement of the association," under this section. U. S. v. Eqe (D. C. 1892) 49 Fed. 852.

The president of a national bank cannot be convicted, under this section of the crime of making false entries in reports made by such bank to the comptroller upon evidence that he signed and verified reports containing false entries, where it is also shown that such entries were not made by him, or by his direction. U. S. v. Booker (D. C. 1899) 98 Fed. 291.

On a trial for making false entries on the books of a bank, the error, if any, in admitting evidence of defendant's making a false report of the bank's condition to the comptroller of the currency, covering the time of the false entries, is cured by an instruction to disregard such evidence, except the fact that the comptroller had called for such report, and that it had been prepared and transmitted. U. S. v. Folsom (N. M. 1894) 38 Pac. 70.

The jury are warranted in finding that false entries were made with guilty intent from the testimony of defendant that the said entries were made under his direction, with the knowledge that they were not transactions of the day on which they were entered in the books of the bank. Id.

35. —— **Presumption and burden of proof.**—If a president or cashier makes a false entry in a report of the condition of the bank to the comptroller of the currency, the jury are authorized to presume, from the false entry itself, in the absence of any explanation or of any other testimony, that he knew it to be false. This presumption results from the fact that it is the duty of the officer who verifies the report to know the condition of the bank, and, if the report is false, there is a prima facie presumption that he knew it. U. S. v. Allis (C. C. 1893) 73 Fed. 165.

Defendant, a bank cashier, summoned a bank clerk to his house, and directed him to make the books of the bank show a cash reserve of $50,000 more than it actually had, because of an expected demand for a statement from the comptroller. Defendant specified certain entries which he wished to have made, but left $12,000 unprovided for. The clerk added the $12,000 by a false entry, showing a deposit by a depositor of something more than that amount the day before. Held, that proof that entries were false to the knowledge of the officer making or directing them, that they were in the usual course to be carried into the report to the comptroller, and were of a character calculated to deceive the comptroller or his agent as to the condition of the bank, raised a presumption that they were made by defendant with intent to deceive the comptroller or his agent, though such presumption was not conclusive. U. S. v. Youtsey (C. C. 1898) 91 Fed. 864.

In a prosecution of a national bank officer for making alleged false entries, a plea of not guilty places on the gov-

ernment the burden of proving that defendant, within the district and within three years prior to the finding of the indictment, knowingly and intentionally made one or more false entries in the books of the bank with intent to deceive or defraud any agent of the government charged with the duty of supervising the transactions of the bank, or inspecting its books or accounts. U. S. v. Wilson (C. C. 1910) 176 Fed. 806.

Where entries by accused in the books of a national bank were false and capable of deceiving the comptroller's agents, defendant's intent to deceive and defraud may be inferred from the making of the entries, under the rule that every person is presumed to intend the natural and probable result of his acts knowingly done, and that an unlawful act implies an unlawful intent. Id.

36. **Defenses.** — Officers of a national bank may not make a false entry in the bank's books with intent to deceive in violation of this section, and escape criminal liability because they go through the idle and deceitful form of making a transaction to which the entry might nominally but not really relate. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

A conviction cannot be had under this section, where it appears that the officers alleged to have been deceived were accomplices in the speculation, to hide which the false entries were made. U. S. v. Means (C. C. 1889) 42 Fed. 599.

Every overdraft, whether made by previous arrangement or not, whether secured or not, and whether drawing interest or not, is a loan, and is required by the law and the rules prescribed by the comptroller to be listed and reported as an overdraft. It is, therefore, no defense, to a charge of false entries in respect to overdrafts, that they had been arranged for or secured, or that interest was to be paid upon them by agreement, if such false entries were made with a criminal intent; but, in determining the intent, the jury may consider the testimony of defendant that he considered the overdrafts as loans. U. S. v. Allis (C. C. 1893) 73 Fed. 165.

In an indictment of a national bank president under this section for making false entries in a report to the comptroller of the currency, it is no defense that such entries were made by a clerk, and verified by the president without actual knowledge of their truth, since it was his duty to inform himself; and especially is this the case as regards items showing assets and liabilities. U. S. v. Allen (D. C. 1880) 47 Fed. 696.

37. **Instructions.**—Instruction held erroneous as taking from the jury the right to consider, upon the question of intent, the explanation given by the defendant, while, if they believed such explanation, and that the defendant acted in good faith, the entries were not false, within the meaning of the statute. Mr. Justice Harlan dissenting. Graves v. U. S. (1897) 17 Sup. Ct. 393, 395, 165 U. S. 323, 41 L. Ed. 732.

In a prosecution of an officer of a national bank for making false entries in its books with intent to deceive the bank examiner, where there was testimony as to certain deposits made which were marked "special," and that the identical money was a few days later returned to the depositors, an instruction was correct which charged the jury that, if they found beyond a reasonable doubt that the understanding between such depositors and the defendant was that the money was only to be used by the bank for the purpose of being shown to the examiner as a part of the funds of the bank, then the entry of such sums as deposits was a false entry. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

Where an indictment contained a number of counts charging the defendant, as an officer of a national bank, with having caused false entries to be made in the books, a general instruction that there was not sufficient evidence to show that such entries were made by defendant, and directing a verdict of acquittal on such counts, was properly refused, where there was evidence sufficient to go to the jury upon any one of the counts. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

An instruction that defendant could not be convicted unless the entries were "knowingly and intentionally false when made," and were made with intent to defraud or deceive, and that if the jury found that the defendant "honestly believed, and had good reason to believe," that the entries were correct, he would not be guilty, held substantially that requested. Id.

Instructions given on the trial of a defendant charged under this section with having as president of a national bank made a false entry in a report to the Comptroller with intent to defraud, considered, and held not erroneous as applied to the evidence. May v. U. S. (1907) 157 Fed. 1, 86 C. C. A. 575, writ of certiorari denied (1908) 28 Sup. Ct. 570, 209 U. S. 542, 52 L. Ed. 918.

Instructions on trial of one charged with having, while cashier of a national bank, made false entries in a report of the bank, with intent to deceive the president, considered, and, taken together, held not erroneous. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555, reversing judgment (1907) 104 S. W. 673, 7 Ind. T. 437.

In the prosecution of defendants, under this section charged as officers with having made false entries in the books of a national bank and in reports to the Comptroller with intent to injure and defraud the bank and deceive its officers and the examiner, it was not error to charge the jury that, if they found that such false entries were made, they were authorized to presume therefrom, in the absence of any explanation, that defendants knew them to be false, and that, if the natural and probable consequence of such entries was to defraud or deceive, they might presume, in the absence of explanation, that such was defendant's intention. Morse v. U. S. (1909) 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, writ of certiorari denied (1909) 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346.

In a prosecution of national bank officers for falsification of reports, the court properly charged that defendants could be convicted on proof that the reports were made in pursuance of a previous arrangement between the clerk who made them and defendants who instigated them. Kettenbach v. U. S. (1913) 202 Fed. 377, 120 C. C. A. 505.

Where the court has several times stated to the jury that the indictment charges the making of false entries in the books of the bank, with intent to deceive the bank examiner, and the making of false reports, with intent to deceive the comptroller, it is not misleading to thereafter say that defendant is guilty if he made such false entries and report "with the intent mentioned in the statute," although the statute mentions several other intents. U. S. v. Peters (C. C. 1898) 87 Fed. 984.

A charge that a false entry on the books of a national bank alone gives rise to the presumption that it was made with criminal intent and knowledge of its falsity is cured by a statement elsewhere in the charge that a false entry must be known to be false and designed to deceive. Id.

On a prosecution of a bank officer for making a false entry in a report to deceive the other bank officers and the Comptroller, an erroneous instruction that, if accused made the report for the purpose of deceiving the other bank officers and the Comptroller, he should be convicted, was cured by another stating that conviction could not be had unless the evidence showed that accused committed the act under the conditions and at the time and place alleged in the indictment, setting them forth. Harper v. U. S. (Ind. T. 1907) 104 S. W. 673.

38. **Verdict.**—In a prosecution against an officer of a national banking association, under this section, for making false entries in the books of the association, and in reports to the comptroller, the indictment containing a number of counts, some charging the making of entries with intent to injure and defraud the association, and others with intent to deceive the association, and, in case of reports, the comptroller, the jury, on the first trial, rendered a verdict, which was set aside and a new trial granted, in which they found the defendant "guilty, as charged in the indictment, in falsifying the returns to the comptroller of the currency, and also books of the * * * bank, and on the balance of the counts we do not agree." Held, that such verdict could not be construed as a special verdict, amounting to an acquittal. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

39. **Questions for jury.**—Where a defendant was charged with having, as an officer of a national bank, made false statements in reports to the comptroller, by understating the amount of overdrafts on the bank, and the government proved that the overdrafts existing at the time of the reports in fact largely exceeded the amounts reported, which evidence was met by the defendant by evidence tending to show that a large part of such overdrafts bore interest, and by the claim that he did not consider it his duty to report as overdrafts accounts on which interest was being paid, the sufficiency of such defense, both as to the facts and the question of good faith, was a matter for determination by the jury. Dorsey v. U. S. (1900) 101 Fed. 746, 41 C. C. A. 652, writ of certiorari denied (1900) 20 Sup. Ct. 1030, 178 U. S. 613, 44 L. Ed. 1216.

40. **Penalty.**—The penalty for the offense of making a false entry in reports required by section 9774, post, is fixed by this section. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555.

(F) Aiding or abetting.

41. **What constitutes offense.**—Under the term "every person," persons not officers or agents of a national bank may be aiders and abettors of the president of the bank in the violation of such statute. Coffin v. U. S. (1895) 15 Sup. Ct. 394, 400, 156 U. S. 432, 39 L. Ed. 481.

One who has an interest in a company for the benefit of which the president of a national bank criminally misapplies its funds may be guilty as an aider and abettor in such misapplication, although the president has no interest in or relation to him, or to said company, and although he has no interest in the bank, or with the president thereof, of any kind. Coffin v. U. S. (1896) 16 Sup. Ct. 943, 162 U. S. 664, 40 L. Ed. 1109, distinguishing State v. Teahan (1882) 50 Conn. 92.

It is not necessary to the guilt of aiders and abettors, who are not officers of the bank, that they should have

a common purpose with the principal to subserve joint interests with him, by the misapplication of the bank's funds. Id.

If a violation of the statute is committed by an officer of the bank and by an outsider, the officer must be prosecuted as the principal, and the other can only be prosecuted, under the terms of the statute, as an aider and abettor. Id.

Persons having no official relations to a national bank may be regarded as aiders and abettors of some officer of the bank in the criminal misapplication of some of its funds, or in the making of false entries in its books. Id.

Where a violation of the statute is committed by an officer and an outsider, the one must be prosecuted as a principal, and the other as an aider and abettor, but the provision as to aiding and abetting does not apply to those who, as national bank officers, with fraudulent intent, make or cause to be made false entries in the books and reports of the bank, as such they are principals, whether they bring about the falsification through the medium of others, innocent or guilty, or do it themselves; the aiding and abetting applying only to those not connected with the bank, who counsel, or incite those who are. Richardson v. U. S. (1910) 181 Fed. 1, 104 C. C. A. 69.

In a prosecution for aiding and abetting a national bank clerk in misappropriating its funds in violation of this section, the government was not bound to prove that defendant knew the clerk's modus operandi. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

Where accused with knowledge that a national bank clerk had stolen money from the bank actually accepted what he must have known to be a portion of such money, and lost the same in gambling for the clerk, he was guilty of aiding and abetting the clerk in violation of this section. Id.

The words "aids or abets" are to be construed according to their natural import, and are satisfied by proof that accused actually participated in such misappropriation, and of concurring acts performed by him to that end. Id.

The president of a national bank may be properly convicted of aiding and abetting the cashier in falsifying reports to the Comptroller of the Currency, etc., in violation of this section. Kettenbach v. U. S. (1913) 202 Fed. 377, 120 C. C. A. 505.

Under this section, it is an indictable offense to aid and abet the making of a false entry in a report to the comptroller of the currency. U. S. v. French (C. C. 1893) 57 Fed. 382; Same v. Work (C. C. 1893) Id. 391.

A depositor may knowingly overdraw his account, and be innocent of any unlawful purpose; but if he does so for considerable amounts, without the knowledge and consent of the proper officials, and with a fraudulent intent that the moneys of the bank shall be applied to their payment by the teller without the knowledge or consent of the proper officials, he is guilty. U. S. v. Kenney (C. C. 1898) 90 Fed. 257.

To authorize a conviction for the offense of aiding and abetting an officer of a national bank in misapplying funds of the bank, contrary to this section, it is not necessary to show a conspiracy, or that the principal offender had been convicted; the offenses of the principal and accessory both being misdemeanors of the same grade. U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, judgment affirmed Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, writ of certiorari denied (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

42. **Indictment.**—An indictment charging the president of the bank with aiding and abetting one who is alleged to be cashier, to misapply the funds of the bank, need not charge that the president knew that such person was cashier. U. S. v. Northway (1887) 7 Sup. Ct. 580, 120 U. S. 327, 30 L. Ed. 664.

An indictment of H. and other persons, averring that "said H., then and there being president" of a certain national bank, "by virtue of his said office as president aforesaid," "misapplied the funds" with intent to defraud, etc., and that such other persons did unlawfully, feloniously, "knowingly," and with intent to defraud, aid and abet the "said H. as aforesaid," sufficiently averred that the aiders and abettors knew that H. was the president of the bank at the time his acts were charged to have been committed. Coffin v. U. S. (1895) 15 Sup. Ct. 394, 400, 156 U. S. 432, 39 L. Ed. 481.

An indictment of persons for aiding and abetting the president of a national bank in misapplying its funds and making false entries in its books with intent to defraud it need not specifically set out the act or acts by which the aiding and abetting were consummated. Id.

An indictment for aiding an officer of a bank in making false entries, etc., is not defective because it charges the principal with having made the entries with intent to defraud the bank, and also with intent to deceive examining agents, whereas it merely charges the aider with an intent to deceive such agents; for it is immaterial that the principal may have had several intents, if both principal and aider were actuated by the criminal intent to deceive such agents. Coffin v. U. S. (1896) 16 Sup. Ct. 943, 162 U. S. 664, 40 L. Ed. 1109.

An indictment for aiding and abetting an officer of a national bank in the misapplication of its funds, in violation of this section, considered, and held sufficient. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, affirming judgment U. S. v. Hillegass (D. C.

1910) 176 Fed. 444, and writ of certiorari denied Hillegass v. U. S. (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

An indictment for aiding and abetting a national bank clerk to misappropriate its funds in violation of this section need not state with particularity the nature of the aid or abetting rendered. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

An indictment seeking to charge third persons with aiding and abetting a director of a national bank in misapplying the funds of the bank must state facts showing a misapplication of money of the bank committed by the director. U. S. v. Warner (C. C. 1886) 26 Fed. 616.

Counts in an indictment which charge defendant with procuring and counseling the false entry before the fact are valid, for such acts are covered by the clause of the section extending the penalty to any one who "abets" an officer or agent in the acts prohibited. U. S. v. French (C. C. 1893) 57 Fed. 382; Same v. Work (C. C. 1893) Id. 391.

Though the counts in an indictment, under this section, for aiding and abetting the cashier in making such false entries, describe defendant as "being then and there a director" of the bank in question, it cannot be held that they charge him with aiding and abetting in his official capacity. Id.

An indictment charging an officer of a national bank with making false entries with intent to defraud, and charging another person with aiding and abetting him therein "in manner and form aforesaid," is defective in failing to charge, as to the latter, an intent to defraud. U. S. v. Berry (D. C. 1897) 85 Fed. 208.

A count in an indictment for aiding the misapplication of national bank funds in violation of this section, with ample allegations of fraudulent intent and purpose, distinctly charged embezzlement by the cashier of a national bank on many different days and times between May 24, 1897, and March 24, 1900, for the benefit and gain of defendant, by a pretended discount of paper contrary to the express direction of the directors, whereby defendant obtained $140,000 of its money and funds, and converted the same to his own use. Held good on a motion in arrest, in view of section 1690, ante, declaring the form of an indictment to be immaterial, provided the substance is there; the word "embezzlement," as used therein, showing a misapplication by the cashier of the property in his official possession, within the meaning of the statute, and the punishment prescribed being not so much for each offense, but so much for every officer or agent who commits such offenses, and every person who aids or abets, irrespective of the number of times. U. S. v. McClure (D. C. 1901) 107 Fed. 268.

43. **Evidence.**—On the trial of a defendant charged with aiding and abetting an officer of a national bank in the misapplication of its funds by lending the same to an insolvent corporation, of which defendant was president, evidence that such officer also lent money of the bank to other insolvent corporations is admissible as tending to show his intention in making the loans charged which is a material issue. Brown v. U. S. (1905) 142 Fed. 1, 73 C. C. A. 187.

In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank as collateral for a loan, defendant having used the certificate as collateral on a note he discounted, defended on the ground defendant did not know of the bank's interest in the certificate and was innocent of any purpose to aid and abet in abstracting it, the prosecution could show that the bank's minute book disclosed no record of the directors sanctioning the use of the certificate. Cook v. U. S. (1908) 159 Fed. 919, 87 C. C. A. 99, writ of certiorari denied (1908) 28 Sup. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

Any error in admitting such minute book was harmless, where a witness, without any objection to the competency of the book, had testified to the substantive fact, which was admissible, that there was no such record in the book; the authenticity of the book not being questioned on writ of error, the effect of the testimony being wholly negative, and there being nothing to show that the directors had authorized the withdrawal by the cashier of the certificate, or had taken any action respecting it which was not recorded. Id.

In a prosecution for aiding and abetting the officers of a national bank to willfully abstract the funds of the bank by means of certain overdrafts, evidence that prior to the making of such overdrafts it was agreed that the bank should furnish funds for the operations of certain corporations in which accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the overdrafts, and that at the time of the advances the value of the corporation's property was more than $300,000, while the overdrafts aggregated only $30,872.24, was admissible to show absence of criminal intent. U. S. v. Steinman (1909) 172 Fed. 913, 97 C. C. A. 271.

In a prosecution against officers of a national bank and certain alleged aiders and abetters for the willful misappropriation of the bank's funds, a question to one of the officers, if he had any arrangement with the vice president of the bank by which the bank was to be defrauded by willfully abstracting its funds and appropriating them to illegitimate purposes, should have been allowed. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

In a prosecution of national bank officers and alleged aiders and abetters

for misapplying the bank's funds, evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, was insufficient to sustain a conviction. Id.

Where, in a prosecution against officers of a national bank and alleged aiders and abetters for misapplying the bank's funds, it was claimed that such application was made partly through overdrafts by defendant K., and that he had conspired with certain officers of the bank to defraud it of its funds, evidence that many other customers of the bank had made overdrafts on it, the details of which were exhibited on certain pages of the bank's individual ledger offered in evidence, was admissible as bearing on defendant's criminal intent. Id.

Rulings of the trial court in admitting and excluding evidence in a prosecution for aiding and abetting an officer of a national bank in the misapplication of its funds considered, and held to contain no error. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, affirming judgment U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, and writ of certiorari denied Hillegass v. U. S. (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

In a prosecution for aiding and abetting a national bank clerk to misappropriate the bank's funds, evidence as to a statement made by the clerk to a witness as he handed over the money alleged to have been misappropriated to accused held admissible as res gestæ. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

In a prosecution under this section for aiding and abetting an officer of a national bank to misapply its funds with intent to defraud, evidence held to sustain a verdict of conviction. U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, judgment affirmed Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, writ of certiorari denied (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

44. Defenses.—The death of the principal before indictment is no obstacle to the prosecution and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of this section. Gallot v. U. S. (1898) 87 Fed. 446, 31 C. C. A. 44, certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

In a prosecution for aiding and abetting the willful misapplication of the funds of a national bank by its officers by overdrafts, an instruction that an arrangement by which the cashier and president of a banking institution allow its funds to be taken out is not a justification, since the funds of a national banking institution can only be taken out by the action of its board of directors, and that if the paying of the checks constituting the overdrafts, or any of them, either the money of the bank was removed from its resources, or its capital reduced, or its charter endangered, any one of such things would be sufficient to warrant the jury in finding a misapplication with intent to injure the bank, was erroneous. U. S. v. Steinman (1909) 172 Fed. 913, 97 C. C. A. 271.

In a prosecution for aiding and abetting a national bank clerk to misappropriate the bank's funds, by means of fifty different overdrafts, the fact that the bank's officers had knowledge of one or two of the transactions did not relieve them of their criminal character. Keliher v. U. S. (1912) 193 Fed. 8, 114 C. C. A. 128.

Officers of a national bank possess no authority to produce or permit a conversion of the bank's funds to the use of one of such officers; authority to commit a crime being an impossibility. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

45. Instructions.—Under an indictment for aiding a bank president in violating the banking laws, the jury were instructed that, to make defendants guilty, they must have done something "showing their consent to or participation in" the unlawful acts of the president. Held, that the jury could not have understood that the acts of the president were to be treated by them as criminal acts; nor could they have been misled by the use of the disjunctive "or" into supposing that mere consent of defendants to his unlawful acts would be sufficient to render them guilty. Coffin v. U. S. (1896) 16 Sup. Ct. 943, 162 U. S. 664, 40 L. Ed. 1109.

Instructions considered given on the trial of a prosecution for aiding and abetting an officer of a national bank in the misapplication of its funds, and held without error. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, affirming judgment U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, and writ of certiorari denied Hillegass v. U. S. (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

46. Questions for jury.—In a prosecution of defendant K. for aiding and abetting the officers of a national bank in the misappropriation of the bank's funds by means of checks and drafts of a hosiery company, in which such defendants were interested, whether such appropriation was intended to injure and defraud the bank held for the jury. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

III. CONSPIRACY

47. What constitutes offense.—As the procuring of a dividend by a national

banking association when there are no net profits to pay it is not a willful misapplication of its moneys and funds, under this section, a conspiracy to commit such act is not made punishable by section 10201, post. U. S. v. Britton (1883) 2 Sup. Ct. 531, 535, 108 U. S. 199, 27 L. Ed. 698.

A conspiracy to violate this section by causing false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit "an offense against the United States," within the meaning of R. S. § 5440, post, § 10201, and is indictable thereunder. Scott v. U. S. (1904) 130 Fed. 429, 64 C. C. A. 631.

Since, under this section, the offense can only be committed by an officer or agent of the bank, under a count of an indictment for conspiracy to misapply funds of the national bank, it is sufficient to show an agreement to commit that offense made between either the cashier or the vice president of the bank and the defendants for whose benefit the money is alleged to have been withdrawn. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

48. **Limitations.**—An indictment for conspiracy to embezzle and misapply the funds of a national bank, made more than three years before indictment, but involving an overt act committed within the three-year period, was not barred by limitations. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming order U. S. v. Breese (D. C. 1908) 172 Fed. 761.

Limitation does not begin to run against a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds so long as the conspiracy continues or acts to effect its object are committed. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

49. **Indictment.**—Where a count in an indictment against a bank's officers and alleged aiders and abetters charged conspiracy to violate this section, and that to effect the object of the conspiracy defendant K., one of the parties thereto, drew and accepted a draft, set out, presented it to the bank, and obtained credit for the amount thereof for the drawer of the draft in which company K. was interested, the indictment sufficiently charged that an act was done by one of the parties to the alleged conspiracy to effect the object thereof and sufficiently specified such act to withstand a demurrer. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

Since the offense of misapplying funds of a national bank can only be committed by an officer or agent of the bank, under a count of an indictment for conspiracy to misapply funds of the national bank, it is sufficient to show an agreement to commit that offense made between either the cashier or the vice president of the bank and the defendants for whose benefit the money is alleged to have been withdrawn. Id.

Where three persons were charged with conspiracy to embezzle and misapply the funds and credits of a national bank, and the proof was sufficient to convict two of them, but not the third, the charge against him would be treated as surplusage, and the conviction of the others sustained. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming judgment U. S. v. Breese (D. C. 1908) 172 Fed. 761.

Under the act of March 2, 1867, it is an offense for an officer of a national bank to conspire with another, not an officer, to abstract or embezzle the funds thereof; and an indictment charging the two with a conspiracy to commit such offense is good. U. S. v. Martin (C. C. 1870) Fed. Cas. No. 15,-728.

An indictment alleging the conspiracy to defraud the United States in the exercise of its governmental and fiscal functions, by deliberately giving false information regarding the financial condition of a national bank, the fraud resulting in lessening the power of the federal government by failure to maintain in efficient condition one portion of the national fiscal system, stated an offense against the United States; it being possible to have a conspiracy to defraud by merely deceiving a governmental officer, though neither the government nor the officer was deprived thereby of money or money value. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

A charge of conspiracy between officers of a national bank to embezzle, abstract, or willfully misapply its funds in violation of this section is supported by evidence that, acting together with a common understanding, defendants largely overdrew their respective accounts with the bank, to such an extent that they were wholly unable to meet the same, as they must have known, and that, to cover up such overdrafts, by a common understanding they placed worthless notes in the bank with the intent and result of injuring and defrauding the bank. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

An indictment charging the president of a national bank with conspiring with others to commit an offense against the United States by making a false entry in the books of the bank showing its balance in the hands of its reserve bank to be larger than it was in fact, with intent to deceive any agent who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of the bank, does not state an offense under section 10201, post, where the overt act charged to have been committed by defendant consisted in his concealing from the bookkeeper, who actually made the alleged

false entries, but who is not charged with being a party to the conspiracy, the issuance of certain drafts which should have been credited to the account of said reserve bank. U. S. v. McClarty (D. C. 1911) 191 Fed. 518.

Indictment for conspiracy against United States held not bad for duplicity in alleging overt acts in and of themselves constituting a crime under this section, in view of Pen. Code, § 332, making an abettor a principal. U. S. v. Rogers (D. C. 1915) 226 Fed. 512.

50. Evidence.—Where an indictment for conspiracy to willfully misapply the funds of a national bank charged that the conspiracy had been formed between officers of the bank and defendant K. to willfully misapply the bank funds to the use of a company, and that such conspiracy was accomplished by defendant K. in drawing and accepting a draft in behalf of the company, and in depositing the draft in the bank, and obtaining credit therefor in the company's account, to effect the object of the conspiracy, the burden was on the government to prove that the conspiracy as alleged was entered into, that defendant K. was a party to it, and that the acts referred to were done by him to effect the object of the conspiracy. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

Where an indictment against officers of a national bank and others, alleged to have aided and abetted them in the misapplication of the bank's funds, charged conspiracy and intent to willfully misapply the bank's funds in several ways, and, among them, of procuring it to make large loans to a hosiery company by paper indorsed by a woolen company, which, it was claimed, was then largely indebted to the bank, proof that funds of the bank were loaned on paper of the hosiery company which was indorsed by the woolen company was admissible, but not evidence of a mortgage given by the woolen company to the bank, nor as to notes which the woolen company made to the bank to secure its individual obligations, and not as indorser of the hosiery company. Id.

A charge under R. S. § 5440, post, § 10201, of conspiracy between officers of a naitonal bank to embezzle, abstract, or willfully misapply its funds in violation of this section, is supported by evidence that, acting together with a common understanding, defendants largely overdrew their respective accounts with the bank, to such an extent that they were wholly unable to meet the same, as they must have known, and that, to cover up such overdrafts, by a common understanding they placed worthless notes in the bank with the intent and result of injuring and defrauding the bank. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

51. Defenses.—It is not a defense to a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds by means of excessive loans or overdrafts for their benefit that the Comptroller of the Currency did not do all he might have done to compel a correction of such irregularities. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

The most formal vote of the directors of a national bank cannot authorize the embezzlement, abstraction, or willful misapplication of its funds by an officer, and will not constitute a defense to conspiracy to commit such offense. Id.

IV. OFFENSES AGAINST STATE LAWS

52. Prosecutions in state courts.—An indictment under state law for forgery committed for the purpose of deceiving the bank examiner is triable in the state court, and it is no objection to the jurisdiction of the state courts that the offense was a violation of the national banking law, and that the offender is subject to punishment for both crimes. Cross v. State (1889) 10 Sup. Ct. 47, 132 U. S. 131, 33 L. Ed. 287.

Where congress has prescribed the punishment only where an officer of a national bank embezzles property of the bank, a state legislature may prescribe the punishment where the property embezzled is deposited in the bank, and belongs to the depositor. State v. Tuller (1867) 34 Conn. 280.

Gen. St. Conn. tit. 12, § 191, prescribing the punishment where an officer of any bank incorporated by authority in the state embezzled any property deposited in the bank, applies to tellers of national banks doing business within the state. Id.

Upon trial of defendant for forgery it appeared that a draft was drawn by one national bank upon another, that defendant was a bookkeeper in the bank, and without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. Held, that the punishment of the crime was within the jurisdiction of the state courts, notwithstanding this section and act March 3, 1875, which provides that the circuit courts of the United States shall have exclusive cognizance of all causes and offenses cognizable under the authority of the United States, except as otherwise provided by law. Hoke v. People (1887) 122 Ill. 511, 13 N. E. 823.

Since the passage of this act, an accessory to an embezzlement by an officer of a national bank cannot be prosecuted for a felony in the state courts, though he is not indictable in the federal courts. Commonwealth v. Felton (1869) 101 Mass. 204.

The fact that a person who has stolen

property belonging to a national bank is an officer of the bank and subject to punishment for embezzlement under this section does not relieve him from his liability to punishment for the same act as a larceny at common law or under the statutes of a state. Commonwealth v. Barry (1874) 116 Mass. 1.

The jurisdiction of a state court over a larceny of property of a national bank, by an officer thereof, is not affected by his liability for embezzlement, under this section. Id.

The embezzlement of the funds of a national bank being an offense over which the federal courts have jurisdiction, any prosecution thereof by the state courts is in violation of section 711, R. S., section 1233, ante, providing that the jurisdiction of the federal courts over crimes cognizable under the authority of the United States shall be exclusive of the state courts. People v. Fonda (1886) 62 Mich. 401, 29 N. W. 26.

A state court has jurisdiction of an indictment against an officer of a national bank for receiving a deposit when the bank was insolvent, this not being made an offense by the laws of the United States. State v. Bardwell (1895) 72 Miss. 535, 18 South. 377. Forgery of a note by the president and cashier of a bank, with intent to deceive the United States bank examiner, by entering it upon the books of the bank as assets, is within the jurisdiction of the state court, although the federal court has exclusive jurisdiction to determine the falsity of the entries and punish the makers. State v. White (1888) 101 N. C. 770, 7 S. E. 715, affirmed in (1889) 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287.

Embezzlement by the cashier of a national bank is not an indictable offense under the law of Pennsylvania, and a cashier imprisoned under an indictment therefor is entitled to his discharge upon habeas corpus. The crime is punishable only under the federal statute. Commonwealth v. Ketner (1880) 92 Pa. St. 372, 37 Am. Rep. 692.

The teller of a national bank may be convicted in a state court upon an indictment charging him with falsely making entries in the books of the bank, and in reports and statements as to the bank's condition, with intent to injure and defraud the bank; the offense thus charged being forgery at common law. Commonwealth v. Luberg (1880) 94 Pa. St. 85, 1 Cr. Law Mag. 779.

A teller of a national bank may be convicted in a state court upon an indictment charging him with fraudulently making false entries, reports, and statements with intent to injure and defraud the bank. The offense thus charged was forgery at common law. Luberg v. Commonwealth (Pa. 1880) 1 Browne, Nat. Bank Cas. 408, 37 Leg. Int. 339; Commonwealth v. Luberg (1880) 94 Pa. St. 85.

A state court has no jurisdiction to try the cashier of a national bank for embezzling the bank's funds, where the state statutes do not apply to national banks; the offense not being indictable at common law. Commonwealth v. Ketner (Pa. 1880) 1 Browne, Nat. Bank Cas. 404, 37 Leg. Int. 339.

CITED WITHOUT DEFINITE APPLICATION

Ex parte Hitz (1884) 4 Sup. Ct. 698, 111 U. S. 766, 28 L. Ed. 592; Ex parte Bain (1887) 7 Sup. Ct. 781, 782, 121 U. S. 1, 30 L. Ed. 849; In re Claasen (1891) 11 Sup. Ct. 735, 736, 737, 140 U. S. 200, 35 L. Ed. 409; New York v. Eno (1894) 15 Sup. Ct. 30, 31, 155 U. S. 89, 39 L. Ed. 80; Wright v. Henkel (1903) 23 Sup. Ct. 781, 785, 190 U. S. 40, 47 L. Ed. 948; Ballman v. Fagin (1906) 26 Sup. Ct. 212, 213, 200 U. S. 186, 50 L. Ed. 433; Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 643, 206 U. S. 158, 51 L. Ed. 1002; U. S. v. Dickinson (1909) 29 Sup. Ct. 485, 213 U. S. 92, 53 L. Ed. 711; Gardes v. U. S. (1898) 87 Fed. 172, 173, 174, 30 C. C. A. 596 (writ of certiorari denied [1898] 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179); Berkowitz v. Same (1899) 93 Fed. 452, 457, 35 C. C. A. 379; Youtsey v. Same (1899) 97 Fed. 937, 38 C. C. A. 562; Wolfson v. Same (1900) 101 Fed. 430, 431, 41 C. C. A. 422 (writ of certiorari denied [1901] 21 Sup. Ct. 919, 180 U. S. 637, 45 L. Ed. 710); Breese v. Same (1901) 106 Fed. 680, 45 C. C. A. 535 (reversed [1901] 108 Fed. 804, 48 C. C. A. 36); Hanover Nat. Bank v. First Nat. Bank (1901) 109 Fed. 421, 426, 48 C. C. A. 482; Horman v. U. S. (1902) 116 Fed. 350, 53 C. C. A. 570 (writ of certiorari denied [1902] 23 Sup. Ct. 841, 187 U. S. 641, 47 L. Ed. 345); U. S. v. Ninety-nine Diamonds (1905) 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185 (certiorari denied [1906] 26 Sup. Ct. 760, 201 U. S. 645, 50 L. Ed. 903); Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343; Breese v. Same (1906) 143 Fed. 250, 74 C. C. A. 388; Lowdon v. Same (1906) 149 Fed. 673, 674, 79 C. C. A. 361; Chicago, St. P., M. & O. Ry. Co. v. Same (1908) 162 Fed. 835, 90 C. C. A. 211 (certiorari denied [1909] 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659); Spencer v. Same (1909) 169 Fed. 562, 95 C. C. A. 60; Woods v. Same (1909) 174 Fed. 651, 98 C. C. A. 405 (certiorari denied [1910] 30 Sup. Ct. 574, 216 U. S. 620, 54 L. Ed. 641); Carlisle v. Same (1912) 194 Fed. 827, 114 C. C. A. 531; U. S. v. Warner (C. C. 1886) 26 Fed. 616; Same v. Smith (C. C. 1889) 40 Fed. 755, 759; First Nat. Bank v. Moore (C. C. 1892) 48 Fed. 799, 802; U. S. v. Peters (C. C. 1898) 87 Fed. 984, 985 (affirmed [1899]

94 Fed. 127, 36 C. C. A. 105); Same v. Heinze (C. C. 1908) 161 Fed. 425; Same v. Berry (D. C. 1899) 96 Fed. 842, 844; Same v. McKnight (D. C. 1902) 112 Fed. 982; Same v. Twining (D. C. 1904) 132 Fed. 129.

§ 9773. (R. S. § 5210.) List of shareholders, etc., to be kept.

The President and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business-hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

Act June 3, 1864, c. 106, § 40, 13 Stat. 111.

Notes of Decisions

Construction and operation of statute.—This statute was merely designed to furnish to the public dealing with a bank a knowledge of the names of its incorporators, and to what extent they might be relied on as giving safety to dealing with the bank, and it was not intended for the purpose of local taxation. Waite v. Dowley (1876) 94 U. S. 527, 534, 24 L. Ed. 181.

This section does not levy taxes, but is a limitation upon the right of the state, which must not discriminate against national banks by methods of taxation differing from those used in taxing other moneyed capital in the hands of individual citizens. Covington v. First Nat. Bank (1905) 25 Sup. Ct. 562, 566, 198 U. S. 100, 49 L. Ed. 963.

This section was designed to furnish to the public dealing with a bank a knowledge of the names of its corporators and to what extent they may be relief on as giving safety to dealings with the bank. Lyons v. Westwater (1910) 181 Fed. 681, 104 C. C. A. 663.

Right to inspect lists.—A stockholder in a national bank held to have the absolute right under this section to examine the list of stockholders at any proper time, whatever may be his motive. Murray v. Walker (1913) 161 S. W. 512, 156 Ky. 536.

A shareholder of a national bank located in the city of New York was entitled to examine its list of shareholders, and to make extracts therefrom for the purpose of negotiating for the purchase of stock. People v. Consolidated Nat. Bank (1905) 94 N. Y. Supp. 173, 105 App. Div. 409.

—— **Enforcement of right.**—On an application to a federal court by a shareholder in a national banking association for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on this section, the pleadings must show that the matter in dispute exceeds the value of $2,000 to give the court jurisdiction. Large v. Consolidated Nat. Bank (C. C. 1905) 137 Fed. 168.

In a proceeding by an alleged stockholder of a national bank to compel an examination of the bank's stock books, evidence that plaintiff was not a stockholder in good faith or at all held admissible. Murray v. Walker (1913) 161 S. W. 512, 156 Ky. 536, Ann. Cas. 1915C, 363.

State courts have jurisdiction to compel the officers of national banks by mandamus to exhibit to the county assessor the list of the shareholders in their banks, which list they are required by this section to keep subject to the inspection of "the officers duly authorized to assess taxes under state authority," since, in respect to that duty, the bank officers are not officers of the United States. Paul v. McGraw (1891) 3 Wash. St. 296, 28 Pac. 532; Same v. Chapin (1892) 3 Wash. St. 433, 28 Pac. 760.

Liability of shareholders.—See Finn v. Brown (1891) 12 Sup. Ct. 136, 142 U. S. 56, 35 L. Ed. 936. As to persons liable, see McDonald v. Dewey (1906) 26 Sup. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419. See, also, note under § 9689, ante.

—— **Estoppel.**—Where in an action by the receiver of a national bank to recover an assessment from one in whose name a certificate of stock had been issued, but who it was shown held the same only as trustee to secure an unpaid indebtedness from the actual owner of the stock to a third person, the plaintiff did not produce in evidence the list of stockholders required by this section to be kept by the bank, or show whether or not such list was in fact kept, but relied solely on the stock certificate book, all persons must be held to have been chargeable with notice of all the facts in regard to such stock therein shown; and, conceding that defendant's liability could be established by such book alone, without producing or accounting for the list of stockholders, it is insufficient to create an estoppel which would prevent him from showing the facts where it appears there-

from that the stock was transferred to him by one to whom the previous certificate had been issued as pledgee. Tourtelot v. Stolteben (C. C. 1900) 101 Fed. 362.

State legislation.—The Vermont act of 1865, requiring cashiers of national banks to transmit to the clerks of the several towns in which any stockholders of national banks should reside a list of the names of such stockholders, does not conflict with the law of congress, so far as it relates to national bank shares owned by residents of the state. Newman v. Wait (1874) 46 Vt. 689.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; Thayer v. Butler (1891) 11 Sup. Ct. 987, 988, 141 U. S. 284, 35 L. Ed. 711; Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 466, 165 U. S. 606, 41 L. Ed. 844; Scott v. Deweese (1901) 21 Sup. Ct. 585, 588, 181 U. S. 202, 45 L. Ed. 822; Lantry v. Wallace (1901) 21 Sup. Ct. 878, 885, 182 U. S. 536, 45 L. Ed. 1218; Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 7, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433; Citizens' Nat. Bank v. Kentucky, Use of Boyle County (1910) 30 Sup. Ct. 532, 534, 217 U. S. 443, 54 L. Ed. 832; Sigua Iron Co. v. Greene (1898) 88 Fed. 207, 214, 31 C. C. A. 477; Stapylton v. Thaggard (1898) 91 Fed. 93, 33 C. C. A. 353; First Nat. Bank v. Richmond (C. C. 1889) 39 Fed. 309, 313 (appeal dismissed [1892] 13 Sup. Ct. 1044, 149 U. S. 769, 37 L. Ed. 959); Wallace v. Hood (C. C. 1898) 89 Fed. 11, 16 (affirmed [1899] 97 Fed. 865, 38 C. C. A. 510); Fowler v. Gowing (C. C. 1907) 152 Fed. 801 (affirmed [1908] 165 Fed. 891, 91 C. C. A. 569); U. S. v. Lamson (C. C. 1908) 165 Fed. 80.

§ 9774. (R. S. § 5211, as amended, Act Feb. 27, 1877, c. 69, § 1.) Reports to Comptroller of the Currency.

Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

Act June 3, 1864, c. 106, § 34, 13 Stat. 109. Act March 3, 1869, c. 130, § 1, 15 Stat. 326. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 252.

This section was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by striking out, after the words "resources and liabilities of the," the word "associations," and substituting therefor the word "association," as set forth here.

The verification required by this section may be made before a notary public or other state officer, having an official seal, and authorized to administer oaths, by Act Feb. 26, 1881, c. 82, post, § 9775.

All savings banks and savings and trust companies organized under acts of Congress are subject to the provisions of this section, and of R. S. §§ 5212, 5213, post, §§ 9776, 9777, by Act June 30, 1876, c. 156, § 6, post, § 9778.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

Notes of Decisions

"Liabilities."—The "liabilities" of a national bank, which are required by this section, to be stated in the reports to the comptroller of the currency, include contingent as well as absolute liabilities; and hence an unmatured note, payment of which at maturity is guaranteed by the bank, should be included in the list of liabilities. Cochran v. U. S. (1895) 15 Sup. Ct. 628, 157 U. S. 286, 39 L. Ed. 704.

False report—Civil liability.—Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in

the official report to the Comptroller of the Currency, made and published conformably to this section cannot be held civilly liable to any one deceived to his injury by such report, since the exclusive test of such liability is furnished by section 9831, post. Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 206 U. S. 158, 51 L. Ed. 1002.

The federal statute requiring directors of a national bank to report its condition to the comptroller of the currency requires the report to contain a true statement of the condition of the bank. The act of directors of a national bank in signing a report of its condition to the comptroller of the currency, in falsely reporting an item of loans and discounts containing paper worth much less than its face value which would materially affect the value of its stock, would render them individually liable to a purchaser of the stock who in good faith relied upon such report as stating the bank's true financial condition. MacDonald v. De Fremery (1914) 142 Pac. 73, 168 Cal. 189.

Where directors, in signing a statutory report, knew, or by the exercise of ordinary diligence should have known, that an item of "Loans and Discounts" contained paper worth much less than its face value, which would materially affect the value of the bank stock, they were individually liable, under the common law, to a purchaser of the stock who was damaged by in good faith relying on the report. Smalley v. McGraw (1907) 111 N. W. 1093, 148 Mich. 384, 14 Detroit Leg. N. 226, rehearing denied (1907) 112 N. W. 915, 148 Mich. 384, 14 Detroit Leg. N. 432.

A director of an insolvent national bank, who has attested a report by the executive officers of the bank as to its condition, under this section, is personally liable for the false statements in such report, where relied on by a purchaser of stock in the bank, even though the director was unaware of the falsity of the reports, and had no intention to defraud. Gerner v. Mosher (1899) 78 N. W. 384, 58 Neb. 135, 46 L. R. A. 244.

This section does not make a director individually liable for a false report, unless he attested it, or in some manner participated in making or publishing it. Id.

The directors of a national bank, by "attesting" the reports of its condition, made by its executive officers to the comptroller of the currency, as required by this section, thereby certify that the statements in the report are absolutely true. Id.

This section requires a national bank to report five times a year its financial condition to the comptroller of the currency, and publish the reports in a newspaper. Held that, while such reports are for the information of the comptroller and stockholders and depositors, they are also for the information of those who contemplate dealing with the bank; and, where a person is misled by false report to part with his money on the security of stock in an insolvent bank, he may recover his loss in an action for deceit against the officers of the bank who signed the false report. Merchants' Nat. Bank of Hillsboro v. Thoms (Ohio, 1892) 28 Wkly. Law Bul. 164.

See, also, note under § 9831, post.

—— **Criminal liability.**—An indictment against an officer of a bank under section 10295, post, for a willfully false declaration or statement in a report made under this section, verified by his oath administered by a notary public of a state prior to the act of February 26, 1881, cannot be sustained. U. S. v. Curtis (1882) 2 Sup. Ct. 507, 107 U. S. 671, 27 L. Ed. 534.

The assistant cashier of a bank is indictable for making a false entry in a report to the comptroller, although he is not one of the officers authorized by this section to make such a report; for he may be regarded as within the category of "clerk or agent," within the terms of section 9772, ante. Cochran v. U. S. (1895) 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704.

It is not a necessary ingredient of the offense of making a false entry in a report that the report shall be one of those mentioned in this section and section 9776, post, or one which the bank is bound by law to make. It is sufficient if the report is one made in the due course of business. U. S. v. Booker (D. C. 1897) 80 Fed. 376.

See, also, note under § 9772, ante.

—— **Indictment.**—Prior to the act of February 26, 1881 (21 Stat. 352), notaries public in the several states had no authority to administer to officers of national banking associations the oath required by this section, and so an indictment against an officer of a bank for a willfully false declaration or statement in a report made under this section, verified by his oath administered by a notary public of a state prior to the act of February 26, 1881, cannot be sustained. U. S. v. Curtis (1882) 2 Sup. Ct. 507, 107 U. S. 671, 27 L. Ed. 534.

An indictment under section 9772, ante, for making a false entry in a report to the comptroller, need not allege that such report was made by the banking association, or that it was actually verified by the oath or affirmation of the president or cashier, or attested by the directors, as required by this section, but it is sufficient to aver that defendant made such false entry "in a certain report of the condition of the First National Bank, * * * made to the comptroller of the currency in accordance with the provisions" of this section. Cochran v. U. S. (1895) 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704.

Failure to make reports.—See note under § 9777, post.

Procuring and furnishing information.—The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by this section. Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 6, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433, affirming judgment Harkness v. Guthrie (1904) 75 Pac. 624, 27 Utah, 248, 107 Am. St. Rep. 664, 1 Ann. Cas. 129.

The President may give to a committee of Congress information in the possession of the Comptroller of the Currency relative to the operation of national banks, if, in his opinion, it is proper to do so, but if, in his opinion, the interests of the government require that this information shall be treated as confidential, he has the right to refuse to divulge it. (1912) 29 Op. Atty. Gen. 555.

If the President believes that information should be obtained and considered by the comptroller in the performance of his duties, he may direct him to procure it; and after it has been obtained for this legitimate purpose, he may, if he deems it proper, direct the comptroller to furnish it to the committee of Congress. If, however, neither the President nor the comptroller believes that such information is useful or necessary to the comptroller in the performance of his duties, the President could not properly direct him him to procure it. Id.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; Ex Parte Bain (1887) 7 Sup. Ct. 781, 783, 121 U. S. 1, 30 L. Ed. 849; U. S. v. Hall (1889) 9 Sup. Ct. 663, 664, 131 U. S. 50, 33 L. Ed. 97; Keyser v. Hitz (1890) 10 Sup. Ct. 290, 292, 133 U. S. 138, 33 L. Ed. 531; Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662 (see note under § 5239, ante); Thomas v. Taylor (1912) 32 Sup. Ct. 403, 404, 224 U. S. 73, 56 L. Ed. 673; Fisher v. Tradesmen's Nat. Bank (1894) 64 Fed. 706, 707, 12 C. C. A. 409; Bacon v. U. S. (1899) 97 Fed. 35, 38 C. C. A. 37 (writ of certiorari denied [1899] 20 Sup. Ct. 1022, 175 U. S. 726, 44 L. Ed. 339); Hanover Nat. Bank v. First Nat. Bank (1901) 109 Fed. 421, 425, 48 C. C. A. 482; Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465; U. S. v. Allis (C. C. 1893) 73 Fed. 165, 168 (affirmed [1894] 15 Sup. Ct. 36, 155 U. S. 117, 39 L. Ed. 91); U. S. v. Lamson (C. C. 1908) 165 Fed. 80; U. S. v. Franklin (C. C. 1909) 174 Fed. 161.

§ 9775. (Act Feb. 26, 1881, c. 82.) Verification of reports.

The oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: Provided, That the officer administering the oath is not an officer of the bank. (21 Stat. 352.)

This was an act entitled "An act defining the verification of returns of national banks."

R. S. § 5211, mentioned in this section, is set forth ante, § 9774.

Notes of Decisions

False report—Criminal liability.—See U. S. v. Curtis (1882) 2 Sup. Ct. 507, 107 U. S. 671, 27 L. Ed. 534. See, also, notes under §§ 9772, 9774, ante.

§ 9776. (R. S. § 5212.) Report as to dividends.

In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

Act March 3, 1869, c. 130, § 2, 15 Stat. 327.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

See notes to R. S. § 5211, ante, § 9774.

Cited without definite application, U. S. v. Britton (1883) 2 Sup. Ct. 526, 530, 108 U. S. 193, 27 L. Ed. 701; Keyser v. Hitz (1890) 10 Sup. Ct. 290,

292, 133 U. S. 138, 33 L. Ed. 531; Bacon v. U. S. (1899) 97 Fed. 35, 38, 38 C. C. A. 87 (writ of certiorari denied [1899] 20 Sup. Ct. 1022, 175 U. S. 726, 44 L. Ed. 339); U. S. v. Lamson (C. C. 1908) 165 Fed. 80.

§ 9777. (R. S. § 5213.) Penalty for failure to make reports.

Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

Act March 3, 1869, c. 130, §§ 1, 2, 15 Stat. 326.

This section was made applicable to state banking associations on their becoming members of the Federal reserve banks, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 9, post, § 9792.

See notes to R. S. § 5211, ante, § 9774.

Notes of Decisions

Failure to make reports.—The failure to make reports required by section 9774, ante, subjects the association to the penalty under this section. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555.

Cited without definite application, Keyser v. Hitz (1890) 10 Sup. Ct. 290, 292, 133 U. S. 138, 33 L. Ed. 531; Cochran v. U. S. (1895) 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704; Hanover Nat. Bank v. First Nat. Bank (1901) 109 Fed. 421, 426, 48 C. C. A. 482; U. S. v. Lamson (C. C. 1908) 165 Fed. 80.

§ 9778. (Act June 30, 1876, c. 156, § 6.) Reports of savings banks and savings and trust companies.

All savings-banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking-associations are required to make and publish under the provisions of sections fifty two hundred and eleven, fifty-two hundred and twelve and fifty two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalty may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located and all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: Provided, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars. (19 Stat. 64.)

This section was part of an act authorizing the appointment of receivers of national banks, etc., cited above.

See notes to section 1 of this act, post, § 9826.

Notes of Decisions

Savings banks.—Savings banks in District of Columbia held entitled to become national banking associations. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 292, 133 U. S. 138, 33 L. Ed. 531.

§ 9779. (R. S. § 5214, as amended, Act May 30, 1908, c. 229, § 9, Act Dec. 23, 1913, c. 6, § 27, and Act Aug. 4, 1914, c. 225.)[1] Taxes on circulating notes, deposits and capital stock.

In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111. Act May 30, 1908, c. 229, § 9, 35 Stat. 550. Act Dec. 23, 1913, c. 6, § 27, 38 Stat. 274. Act Aug. 4, 1914, c. 225, 38 Stat. 682.

This section, as enacted in the Revised Statutes, read as set forth here.

It was amended by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 9, to read as follows:

"National banking associations having on deposit bonds of the United States, bearing interest at the rate of two per centum per annum, including the bonds issued for the construction of the Panama Canal, under the provisions of section eight of 'An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans,' approved June twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds; and such associations having on deposit bonds of the United States bearing interest at a rate higher than two per centum per annum shall pay a tax of one-half of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds. National banking associations having circulating notes secured otherwise than by bonds of the United States shall pay for the first month a tax at the rate of five per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and thereafter such tax of ten per centum per annum, upon the average amount of such notes. Every national banking association having outstanding circulating notes secured by a deposit of other securities than United States bonds shall make monthly returns, under oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average monthly amount of its notes so secured in circulation; and it shall be the duty of the Comptroller of the Currency to cause such reports of notes in circulation to be verified by examination of the banks' records. The taxes received on circulating notes secured otherwise than by bonds of the United States shall be paid into the Division of Redemption of the Treasury and credited and added to the reserve fund held for the redemption of United States and other notes."

As so amended, it superseded the Parity Act of March 14, 1900, c. 41, § 13, which was as follows:

"That every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this Act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes."

This section, and R. S. §§ 5153, 5172, 5191, amended by said Aldrich-Vreeland Act of May 30, 1908, c. 229, were re-enacted, to read as such sections

read prior to May 30, 1908, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 27, 38 Stat. 274, as amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682, subject to such amendments or modifications as were prescribed in that act.

A proviso annexed to said re-enacting provision of section 27 of the Federal Reserve Act was as follows:

"Provided, however, That section nine of the act first referred to in this section" (being section 9 of said Aldrich-Vreeland Act of May 30, 1908, c. 229, § 9, 35 Stat. 550) "is hereby amended so as to change the tax rates fixed in said Act by making the portion applicable thereto read as follows: National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes."

Said Act Dec. 23, 1913, c. 6, § 27, mentioned above, was amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682. The change made by said amendment consisted in adding to the proviso above quoted the following:

"Provided further, That whenever in his judgment he may deem it desirable, the Secretary of the Treasury shall have power to suspend the limitations imposed by section one and section three of the Act referred to in this section, which prescribe that such additional circulation secured otherwise than by bonds of the United States shall be issued only to National banks having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of the capital stock of such banks, and to suspend also the conditions and limitations of section five of said Act except that no bank shall be permitted to issue circulating notes in excess of one hundred and twenty-five per centum of its unimpaired capital and surplus. He shall require each bank and currency association to maintain on deposit in the Treasury of the United States a sum in gold sufficient in his judgment for the redemption of such notes, but in no event less than five per centum. He may permit National banks, during the period for which such provisions are suspended, to issue additional circulation under the terms and conditions of the Act referred to as herein amended: Provided further, That the Secretary of the Treasury, in his discretion, is further authorized to extend the benefits of this Act to all qualified State banks and trust companies, which have joined the Federal reserve system, or which may contract to join within fifteen days after the passage of this Act."

This last amendment, quoted above, became inoperative, by reason of the expiration by limitation on June 30, 1915, of said Act May 30, 1908, c. 229 (see notes to Chapter Two A of this title), so that said amendment made by said Act Dec. 23, 1913, c. 6, § 27, also quoted above, is the only part of said above-quoted amendments which is still in effect. Said amendment is therefore incorporated into this section, so as to make the section read as set forth here.

Act Dec. 21, 1905, c. 3, § 1, post, § 6827, provided that every national banking association having on deposit, as provided by law, Panama Canal bonds, issued under Act June 28, 1902, c. 1302, § 8, ante, § 6826, to secure its circulating notes, should pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per cent. each half year upon the average amount of such of its notes in circulation as were based upon the deposit of such bonds, such tax to be in lieu of existing taxes on its notes in circulation imposed by R. S. § 5214. This provision was superseded by the amendment of this section by said Aldrich-Vreeland Act of May 30, 1908, c. 229, § 9.

Every national banking association was required to pay a tax of ten per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them, by Act Feb. 8, 1875, c. 36, § 20, ante, § 6290.

Provisions relating to the taxation of banks other than national banks are contained in Rev. St. §§ 3407–3417, and subsequent provisions, ante, §§ 6288–6299.

Notes of Decisions

Purpose, validity, and operation.—Shares of stock in national banks are a species of personal property separate from the person of their owner for the purpose of taxation and have a situs of their own. Tappan v. Merchants' Nat. Bank (1873) 19 Wall. 490, 499, 22 L. Ed. 189.

Act June 3, 1864, providing a national currency secured by pledge of United States bonds, which, in furtherance of that object, and also to meet the expenses of executing the law, imposed a tax on the notes in circulation of the banking associations organized under the act, was not a revenue bill, such as the constitution requires to originate in the house of representatives; and

therefore the taxing provisions contained in R. S. § 5214 (post, § 9779), are not invalid because they originated in the senate after the act had passed the house. Twin City Nat. Bank of New Brighton v. Nebeker (1897) 17 Sup. Ct. 766, 768, 167 U. S. 196, 42 L. Ed. 134.

One of the public policies embodied in National Bank Act was to secure the public credit and encourage the issue of notes to circulate as currency, founded on the security of the bonds of the United States, and this purpose would be directly discouraged by exempting a national banking association which reduced its circulation below 5 per centum of its capital stock from the payment of a duty thereon but enforcing the payment of such duty against a national bank which had not reduced its outstanding circulation, to the limit stated. Merchants' Nat. Bank v. U. S. (1909) 29 Sup. Ct. 593, 595, 214 U. S. 33, 53 L. Ed. 899.

The half-yearly duty provided for by this section was intended, among other things, at least to create a general fund for paying the cost of engraving and printing the circulating notes of a national banking association. Id.

The obligations and penalties imposed by R. S. § 5214 (post, § 9779, relate to solvent banks, not to a bank which has passed into the hands of the Comptroller of the Currency. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

The purpose of the tax was not revenue, but to reimburse the treasury for expenses incurred in printing the notes and all other expenses. Merchants' National Bank of Baltimore v. U. S. (1906) 42 Ct. Cl. 6.

Notes in circulation.—Notes of a national banking association, signed by the proper officers, are not "notes in circulation," so long as the bank has never parted with any interest in or control over them, and may either issue them or cause them to be canceled or destroyed at its option. (1894) 20 Op. Atty. Gen. 695.

The term "notes in circulation" means instruments binding the banks to the holder or holders as promises to pay. (1894) 20 Op. Atty. Gen. 704.

Bank notes signed and actually paid out over the counter, or otherwise so dealt with as to become liabilities of the bank, are notes in circulation. Id.

Notes merely held in the vault of the bank, whether signed or unsigned, and notes so signed and held, and carried on the books of the bank, are not notes in circulation. Id.

Notes that have been obligations of the bank, but cease to be so, returned and remaining in the bank for whatever period, are not during such period its notes in circulation. Id.

United States bonds.—The duty imposed on every national banking association by this section of "one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds," is a tax upon the franchise of the bank, not a tax upon its capital stock. Hence, in determining the quantum of such tax payable by the bank, no deduction can be made from its capital stock of the amount thereof which is invested in any nontaxable property that does not fall under the description of "United States bonds" within the meaning of the statute. (1878) 16 Op. Atty. Gen. 174.

Although the bonds known as the "District of Columbia 3.65 bonds" are obligations of the United States, for the payment of which the faith of the government is solemnly pledged, yet those bonds are not "United States bonds" within the meaning of this and the next preceding section. Held, accordingly that a national banking association, in making returns of the average amount of its capital stock, etc., under this section, should not be allowed to deduct the amount of capital invested in "District of Columbia 3.65 bonds," although these bonds are, by section 7 of the act of June 20, 1874 (chapter 337), "exempt from taxation by federal, State, or municipal authority." (1878) 16 Op. Atty. Gen. 174.

In determining "the average amount invested in United States bonds," under the provisions of section 3408, R. S., imposing a tax upon the capital employed in the business of banking, and "the amount invested in United States bonds," under the provisions of this section, the amount thus "invested" is in either case to be ascertained by taking the price actually paid for the bonds. But within the price accrued interest should not be computed, that being a mere temporary investment, which is replaced as soon as the interest becomes due and payable. (1878) 16 Op. Atty. Gen. 187.

Exemption.—A national bank whose outstanding circulating notes amount to less than 5 per cent. of its capital is not exempted from the payment of the half-yearly duty imposed by this section upon the average amount of its notes in circulation by section 6294, ante, providing that the outstanding circulation of any association shall be free from taxation when reduced to an amount not exceeding 5 per cent. of its capital, though the latter section is, by section 6298, ante, expressly made applicable to national banking associations; the statutes from which its provisions were taken showing that it was made applicable to give national banks representing state banks the benefit of the presumption of loss or inability to retire the circulation of the state bank when 95 per cent. had been actually retired. Merchants' Nat. Bank v. U.

S. (1909) 29 Sup. Ct. 593, 594, 214 U. S. 33, 53 L. Ed. 899.

Payment of tax.—Where the United States Treasurer charged a sum of money in payment of a tax to the official account of the Comptroller, without his consent, and took a certificate of deposit therefor, but requested the Secretary to suspend covering it into the treasury, and the three agreed that the matter be suspended, it must be adjudged that payment was not intended to be consummated. Johnston v. U. S. (1881) 17 Ct. Cl. 157.

The 5 per cent. redemption fund deposited by a national bank with the United States treasurer is a fund for the one purpose of redeeming circulating notes, and, the bank becoming insolvent, cannot be appropriated by the Treasurer for payment of the tax due the United States. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

State taxation.—This section and section 9784, post, limit the state power to tax national banks, and confine taxation to the shares of stock and to an assessment of real estate of the bank. First Nat. Bank v. Board of Equalization of Independence County (1909) 122 S. W. 988, 92 Ark. 335.

Under this section and section 9784, post, personal property owned by any such association is not subject to taxation under state laws. First Nat. Bank v. Province (1898) 51 P. 821, 20 Mont. 374.

See, also, notes under § 9784, post, and Const. art. 1, § 8, and art. 6, cl. 2.

Cited without definite application, U. S. v. Lamson (C. C. 1908) 165 Fed. 80.

§ 9780. (R. S. § 5215.) Half-yearly return of circulation, deposits, and capital stock.

In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Notes of Decisions

See note under § 9779, ante.

Cited without definite application, U. S. v. Real Estate Sav. Bank (1881) 104 U. S. 728, 730, 26 L. Ed. 908; U. S. v. Lamson (C. C. 1908) 165 Fed. 80.

§ 9781. (R. S. § 5216.) Penalty for failure to make return.

Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association, by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Notes of Decisions

Operation of statute.—The obligations and penalties imposed by the statutes relate to solvent banks, not to a bank which has passed into the hands of the Comptroller of the Currency. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

§ 9782. (R. S. § 5217.) Penalty for failure to pay duties.

Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the

interest, as it may become due, on the bonds deposited with him by such defaulting association.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Notes of Decisions

See Jackson v. U. S. (1885) 20 Ct. Cl. 298. See, also, note under § 9781, ante.

§ 9783. (R. S. § 5218.) Refunding excessive duties.

In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

Res. March 2, 1867, No. 49, 14 Stat. 572.

Cited without definite application, Merchants' Nat. Bank v. U. S. (1909) 29 Sup. Ct. 593, 594, 214 U. S. 33, 53 L. Ed. 899.

§ 9784. (R. S. § 5219.) State taxation.

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111. Act Feb. 10, 1868, c. 7, 15 Stat. 34.

Notes of Decisions

I. Construction, operation and validity of statute

1. In general.
2. Validity.

II. State taxation

3. State power to tax.
4. —— Exclusiveness of power conferred.
5. —— Taxation by territories.
6. Property subject.
7. —— Bank shares.
8. —— Government bonds.
9. —— Real property.
10. —— Deposits.
11. —— Surplus.
12. Exemptions.
13. Manner of assessment and taxation.
14. —— Duties placed on banks and bank officers.
15. —— Assessed to shareholders.
16. —— Valuation
17. —— Deductions.
18. —— Reassessment.
19. Place of taxation.
20. Payment of tax.
21. —— Liability of bank officers.
22. —— Liability of bank.
23. Collection of tax.
24. —— Injunction.
25. —— Federal questions.

III. Restrictions against discrimination

26. Discrimination in modes and systems of taxation.
27. Discrimination in rates.
28. —— "Rate."
29. "Moneyed capital."
30. Discrimination in valuation.
31. Discrimination in allowing deduction.
32. Discrimination in allowing exemptions.
33. Discrimination between banks.
34. Shares owned by nonresidents.

IV. State legislation

35. Construction, operation, and validity.

I. CONSTRUCTION, OPERATION, AND VALIDITY OF STATUTE

In general.—This section was not intended to control the power of the state on the subject of taxation, or to prohibit the exemption of particular kinds of property, but to protect the capital invested in national bank shares from unfriendly discrimination by the states in the exercise of the taxing power. Adams v. Nashville (1877) 95 U. S. 19, 20, 24 L. Ed. 369; Mercantile

Nat. Bank v. City of New York (C. C. 1886) 28 Fed. 776, decree affirmed (1887) 7 Sup. Ct. 826, 121 U. S. 138, 30 L. Ed. 895.

This section authorizes the assessment of shares of national banking associations located within a state, in such manner as the legislature of the state may provide, subject only to the restrictions that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by nonresidents shall be taxed in the city or town where the bank is located and not elsewhere. Crocker v. Scott (1906) 87 P. 102, 149 Cal. 575.

The first proviso of this section is not to be construed as requiring uniform taxation in all the different municipalities of a state or territory, but only as requiring that the rate shall be uniform in the municipality in which the bank is located, or in which the shareholder resides. People v. Moore (1873) 1 Idaho, 504.

Under this section the state is left free to exercise the power of taxation of national banks assessing the same upon the real property of the bank, or upon the shares of its capital stock, at the election of the state, in accordance with the constitution and laws of the state, and only in conformity with the rules applicable to the citizens and corporations of the state. Frederick County Com'rs v. Farmers' & Mechanics' Nat. Bank (1878) 48 Md. 117.

Act Feb. 10, 1868, modifying the construction of section 41 of the act of June 3, 1864, operated to change the mode of taxation from that time forward, but had no retroactive effect upon proceedings to impose a state tax, previously had. Abbott v. Inhabitants of Bangor (1868) 56 Me. 310.

Under this section the shares of their stock may be taxed to the owners thereof by the states, subject to the restriction that such taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state; and such restriction having been construed by the federal courts to relate to such other moneyed capital as, by its use, comes into competition with the business of national banks, the owners of national bank stock may require the courts to consider and determine whether such other moneyed capital is taxed by state laws at a less rate than is imposed thereby on national bank stock. Mechanics' Nat. Bank v. Baker (1901) 48 A. 582, 65 N. J. Law, 549, affirming judgment (1900) 46 A. 586, 65 N. J. Law, 113.

The act of congress permitting state taxation of national banks only by a tax upon the shares of stock and requiring that they shall be taxed at no higher rate than other moneyed capital is superior to the state Constitution. Commercial Trust Co. of New Jersey v. Hudson County Board of Taxation (1914) 92 A. 263, 86 N. J. Law, 424, judgment affirmed (Err. & App. 1915) 92 A. 799.

This section applies to banks organized under Act 1863, c. 58, as well as to those organized under the act of 1864. City of Utica v. Churchill (1865) 33 N. Y. 161.

The import of this section is that a state may tax the shares of the national banks located therein, though it does not tax eo nomine the "shares" of the banks organized under its own authority, but only their capital, provided such tax is the full equivalent for that imposed on the national banks. Van Slyke v. State (1869) 23 Wis. 655.

2. Validity.—The proviso of this section is constitutional and valid. People v. Assessors of Town of Barton (N. Y. 1865) 44 Barb. 148, 29 How. Prac. 371.

II. STATE TAXATION

3. State power to tax.—Congress may prohibit any taxation of national banks by states, cities, counties, or towns, and its mere silence on the subject, if it were silent would be a prohibition. First Nat. Bank v. Richmond (C. C. 1889) 39 Fed. 309, 310, appeal dismissed (1892) 13 Sup. Ct. 1044, 149 U. S. 769, 37 L. Ed. 959.

National banks located in Kentucky stand, as to taxation, upon the same footing with state banks. City Nat. Bank v. City of Paducah (Ky. 1888) 9 S. W. 218.

National banks organized under Act Feb. 25, 1863 (12 Stat. 665), are subject to state taxation within the limits indicated by this section. Stetson v. City of Bangor (1868) 56 Me. 274.

To justify a state in taxing shares of stock in national banks, subject to the condition of this section it is not necessary that there should be any state banks in existence. Smith v. Webb (1866) 11 Minn. 500.

The states have never surrendered to the general government the right to tax the property of national banks. First Nat. Bank v. Peterborough (1875) 56 N. H. 38, 32 Am. Rep. 416.

Under this section, the only restriction on this power of taxation is that it shall not be at any greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that shares owned by nonresidents of the state shall be taxed in the city or town where the bank is located; the mode in which the tax shall be assessed and collected, and the place where it shall be laid on resident stockholders being left to the discretion of the legislatures of the states in which the banks are respectively located. North Ward Nat. Bank v. City of Newark (1877) 39 N. J. Law, 380.

4. —— **Exclusiveness of power conferred.**—There can be no state taxation of a national bank without congressional consent. New York ex rel. Williams v. Weaver (1879) 100 U. S. 539, 543, 25 L. Ed. 705; Weiser Nat. Bank v. Jeffreys (1908) 95 P. 23, 14 Idaho, 659; North Ward Nat. Bank v. City of Newark (1877) 39 N. J. Law (10 Vroom) 380; People v. Feitner (1908) 83 N. E. 592, 191 N. Y. 88 (reversing order [1907] 105 N. Y. S. 993, 120 App. Div. 838); State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

This section limits the power of a state to tax national banks, their property, or their franchises, and any tax in excess of and not in conformity with such section is void. Weiser Nat. Bank v. Jeffreys (1908) 95 P. 23, 14 Idaho, 659.

The power of the state to tax national banks or their shares of stock is derived from Congress, and the decisions of the United States Supreme Court on questions touching that power are controlling. Des Moines Nat. Bank v. City of Des Moines (Iowa, 1911) 133 N. W. 767.

The state tax law is to be construed in connection with the act of Congress permitting the state to tax national bank stock, as the power of the state is derived entirely from the federal legislation. First Nat. Bank of St. Joseph v. St. Joseph Tp. (1881) 9 N. W. 838, 46 Mich. 526.

National banks are subject to such taxation only as is allowed by this section. City of Pittsburg v. First Nat. Bank (1867) 55 Pa. (5 P. F. Smith) 45; State v. First Nat. Bank (1868) 4 Nev. 348; National Commercial Bank v. City of Mobile (1878) 62 Ala. 284, 34 Am. Rep. 15. Which not only confers the power but also prescribes the limitations on its exercise. Tarrant v. Bessemer Nat. Bank (Ala. App. 1913) 61 So. 47.

5. —— **Taxation by territories.**—The word "state" should be construed to mean "territory" as well, and national bank shares may be taxed, therefore, in the territories as well as in the states. Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 595, 139 U. S. 438, 35 L. Ed. 210; People v. Moore (1873) 1 Idaho, 504; Silver Bow County Com'rs v. Davis (1887) 6 Mont. 306, 12 Pac. 688.

6. **Property subject.**—The personal property of a national bank cannot be directly assessed for taxation by state authorities. City and County of San Francisco v. Crocker-Woolworth Nat. Bank (C. C. 1899) 92 Fed. 273; People v. National Bank of D. O. Mills & Co. (1898) 55 P. 685, 123 Cal. 53, 45 L. R. A. 747, 69 Am. St. Rep. 32; First Nat. Bank v. City and County of San Francisco (1900) 61 P. 778, 129 Cal. 96; Same v. Province (1898) 51 P. 821, 20 Mont. 374; Same v. Kreig (1893) 21 Nev. 404, 32 Pac. 641.

The only taxation of national banks contemplated by this section is taxation on shares of stock and on real property. First Nat. Bank v. Albright (1908) 28 Sup. Ct. 349, 208 U. S. 548, 52 L. Ed. 614 (affirming judgment [N. M. 1906] 86 P. 548); First Nat. Bank v. Board of Equalization of Independence County (1909) 122 S. W. 988, 92 Ark. 335; National State Bank of Oskaloosa v. Young (1868) 25 Iowa, 311.

No tax can be levied on national banks, based on income licenses, or franchises. Second Nat. Bank v. Caldwell (D. C. 1882) 13 Fed. 429, 432; Graves County v. First Nat. Bank (1900) 56 S. W. 16, 108 Ky. 194, 21 Ky. Law Rep. 1656; George Schuster & Co. v. City of Louisville (1905) 89 S. W. 689, 124 Ky. 189, 28 Ky. Law Rep. 588.

Where a state imposes a tax on the capital of state banks, it cannot lay a tax on the shares of national banks. Bradley v. Illinois (1866) 4 Wall. 459, 462, 18 L. Ed. 433.

The excess only of the par value of national bank stock over the amount of the owner's interest-bearing indebtedness is liable to taxation. Stanley v. Albany County Sup'rs (1887) 7 Sup. Ct. 1234, 121 U. S. 535, 30 L. Ed. 1000; Richards v. Incorporated Town of Rock Rapids (1887) 31 Fed. 505.

Act Wash. March 9, 1891, § 21, provides for the assessment and taxation of national bank stock to the bank. Section 23 renders the bank liable for the tax as agent for the shareholder, and authorizes it to pay the tax out of the shareholder's profits or charge it to his account. Held, that a tax so assessed is not a tax on the capital of the bank, forbidden by this section. First Nat. Bank v. County of Chehalis (1897) 17 Sup. Ct. 629, 630, 166 U. S. 440, 41 L. Ed. 1069.

St. Ky. 1894, c. 108, providing for a tax on the "franchise" of corporations, associations, etc. (section 4077), taking the whole act together, and especially sections 4078–4081, is to be construed, not as a tax on the franchise in the technical sense, but upon all the intangible property of the corporation; and this tax not being levied upon the shares of stock in the names of the shareholders, nor equivalent in law to a tax so levied, the provision is void as applied to national banking associations, as not being authorized by this section. Owensboro Nat. Bank v. City of Owensboro (1899) 19 Sup. Ct. 537, 173 U. S. 664, 43 L. Ed. 850, reversing decree (Ky. 1897) 39 S. W. 1116.

An assessment in a lump sum of all the personal property of a national bank to the bank itself cannot be regarded as one against the stockholders on their shares. Stapylton v. Thag-

gard (1898) 91 Fed. 93, 33 C. C. A. 353.

Individual property held within the state may be taxed by the state. The property of the Bank of the United States is no exception. Bank of United States v. Deveaux (C. C. 1808) Fed. Cas. No. 916.

The furniture of national banks is exempt from state taxation because congress has not permitted it, while the real estate of such banks may be subjected to a state tax because congress does permit it. Covington City Nat. Bank v. City of Covington (C. C. 1884) 21 Fed. 484.

The imposition of a tax on the shares of the bank according to the Louisiana statute, which requires the bank to pay the tax, and then look to dividends and to the stockholders for reimbursement, is a tax on the bank itself. Citizens' Bank v. Board of Assessors for Parish of Orleans (C. C. 1893) 54 Fed. 73.

Under this section an assessment on the shares in gross, or on the capital stock of a bank, against the corporation, is not authorized. National Commercial Bank v. City of Mobile (1878) 62 Ala. 284, 34 Am. Rep. 15.

Real estate owned by a national bank is taxable by state authorities, and the separate shares of its capital stock, as personal property of the holder of such shares, may be taxed by the state or its municipal subdivisions subject to this section. Id.

Under Act Idaho March 12, 1901 (Laws 1901, p. 233), the assessor is authorized to assess the shares of stock of national banks to the individual owners thereof, but it is not permitted to assess the capital stock of such banks. Weiser Nat. Bank v. Jeffreys (1908) 95 P. 23, 14 Idaho, 659.

The act of congress under which the national banks were organized allows the taxation by the states of the shares of stock in the banks, but not of the capital stock itself. Smith v. First Nat. Bank (1869) 17 Mich. 479.

An annual tax, authorized by act of legislature, passed Jan. 4, 1859, to be levied, assessed, and collected by the city of Pittsburg, upon the average quarterly business of banks and banking institutions, is not within the terms of this section, because it is not a tax upon the shares of the shareholders of banks. City of Pittsburg v. First Nat. Bank (1867) 55 Pa. (5 P. F. Smith) 45.

A national bank having paid into the state treasury the tax of 1 per centum on the par value of its stock, under the Pennsylvania act of March 31, 1870, its banking house, which was a part of its capital, represented by its shares of stock, is not liable to taxation for county purposes; the banking house was a part of the capital of the institution represented by its shares of stock, and a tax on the par value of the shares was a tax upon it. Farmers' & Drovers' Nat. Bank v. Greene County (Pa. 1881) 12 Lanc. Bar, 162.

As this section permits taxation by states of the real estate only of national banks, such a bank is under no legal obligation to render and pay taxes on its stock. First Nat. Bank v. City of Lampasas (1903) 78 S. W. 42, 33 Tex. Civ. App. 530.

There can be no taxation of the bank's franchise in lieu of taxation of its shares. State v. Clement Nat. Bank (1911) 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

7. —— **Bank shares.**—Shares of stock in a national bank may be taxed as such by the state. First National Bank v. Kentucky (1869) 9 Wall. 353, 358, 19 L. Ed. 701; Lionberger v. Rowse (1869) 9 Wall. 468, 473, 19 L. Ed. 721; McHenry v. Downer (1897) 47 P. 779, 116 Cal. 20, 45 L. R. A. 737; Hubbard v. Johnson County Sup'rs (1867) 23 Iowa, 130; Scobee v. Bean (1900) 59 S. W. 860, 22 Ky. Law Rep. 1076, 109 Ky. 526; First Nat. Bank v. Meredith (1869) 44 Mo. 500; Curtis v. Ward (1874) 58 Mo. 295; Clapp v. Same (1874) 58 Mo. 296; Albuquerque Nat. Bank v. Perea (1891) 5 N. M. 664, 25 Pac. 776.

The excess only of the par value of national bank stock over the amount of the owner's interest-bearing indebtedness is liable to taxation. Stanley v. Albany County Sup'rs (1887) 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Richards v. Town of Rock Rapids (C. C. 1887) 31 Fed. 505; Peavey v. Town of Greenfield (1886) 64 N. H. 284, 9 Atl. 722; McAden v. Mecklenburg County Com'rs (1887) 97 N. C. 355, 2 S. E. 670; Rosenblatt v. Johnston (1881) 104 U. S. 462, 463, 26 L. Ed. 832. Whether owned by residents or nonresidents. Kyle v. Town of Fayetteville (1876) 75 N. C. 445; Id. (1876) 449.

The fact that a state could not, because of their charters, tax two banks, will not preclude its taxing the shares in a national bank. Lionberger v. Rowse (1869) 9 Wall. 468, 473, 19 L. Ed. 721.

If the shares of an insolvent bank in the hands of a receiver have any value, they are taxable in the hands of the holders or owners under this section. Rosenblatt v. Johnston (1881) 104 U. S. 462, 463, 26 L. Ed. 832.

Under this section a state may tax the shares of a national bank without regard to their ownership; the shares of stock of a national bank owned by another bank not being exempt by reason of such ownership. National Bank of Redemption v. Boston (1888) 8 Sup. Ct. 772, 773, 125 U. S. 60, 31 L. Ed. 689.

Under this section a state may tax national bank shares held by its corporate or individual citizens as an investment, subject to the restriction that

the tax shall not exceed the burden upon similar property in the state. First Nat. Bank v. Herbert (C. C. 1890) 44 Fed. 158.

Code Ala. 1907, § 2082, subd. 8, providing for the taxation of shares of national banks, does not impose a tax on the banks, and does not violate this section. Tarrant v. Bessemer Nat. Bank (Ala. App. 1913) 61 So. 47.

The term "shares of capital stock" is not the same as the term "capital stock," which means the actual money or property paid in and possessed by the corporation, and there is no authority under the statutes of the United States nor the revenue laws of Idaho to tax the capital stock of national banks. Weiser Nat. Bank v. Jeffreys (1908) 95 P. 23, 14 Idaho, 659.

The shares of national banks are by the act of Congress authorizing such associations placed within the reach of the taxing power of the states, subject to certain conditions, which were intended to prevent any discrimination against such shares. Wright v. Stilz (1866) 27 Ind. 338.

Statutes of this state, as they were in 1865 and 1866, taken in connection with the federal law, did not authorize the assessment of taxes for state, county, and municipal purposes upon stock of national banks owned by nonresidents. Abbott v. City of Bangor (1867) 54 Me. 540.

A state tax levied against a citizen of the state upon his shares in a national bank situated therein is valid, if levied in the same manner and to the same extent as taxes on similar property; there being no act of congress restricting the right of the state to so exercise its power of taxation. Stetson v. City of Bangor (1868) 56 Me. 274.

In the year 1866 supervisors had no authority to assess national bank shares. Davis v. Kalamazoo Tp. (1869) 1 Mich. N. P. 16.

Under Const. Minn. art. 9, § 3, providing that "laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property," the legislature has authority to pass laws for taxing shares in national banks in the manner prescribed by this section. Smith v. Webb (1866) 11 Minn. 500 (Gil. 378).

Under this act and Act N. J. March 28, 1862, providing that all private corporations of this state shall be taxed at the full amount of their capital stock paid in and accumulated surplus, and the persons holding the capital stock of such corporation shall not be assessed therefor, no tax could be imposed on the shares in a national bank. Matheson v. Boyd (1867) 32 N. J. Law (3 Vroom) 273.

A tax assessed by the authorities of a state against the individual stockholders of a national bank is not invalid on the ground that the bank is an instrumentality of the general government for the execution of its constitutional powers. City of Utica v. Churchill (1865) 33 N. Y. 161.

The state has power to tax national bank shares, subject to the limitations that such tax shall not exceed the rate imposed on other moneyed capital of individuals, nor that imposed on shares in state banks. Frazer v. Siebern (1866) 16 Ohio St. 614.

Shares of bank stock are not subject to taxation for county purposes. Allegheny County v. Shoenberger (Pa. 1853) 1 Grant Cas. 35.

Bank stock, as individual property, may be taxed when owned by residents of the state. Union Bank v. State (1836) 17 Tenn. (9 Yerg.) 490.

There is nothing in the United States Constitution, nor in the national banking act, which precludes the legislature of Utah, under its comprehensive grant of legislature power, from taxing the franchise of banking by a tax upon the individual shares of stockholders in national banks. Salt Lake City Nat. Bank v. Golding (1876) 2 Utah, 1.

Under Acts Va. 1883–84, § 17, p. 568, providing for a state tax on the assessed market value of the shares of banks located in the state, regardless of the residence of the stockholders, and Code Va. § 833, cl. 2, providing that the board of supervisors of each county shall order a levy on all property assessed with a state tax within the county, the board has power to levy a tax for county purposes on the shares of stock of a bank located in the county, although some of its stockholders are nonresidents of the state. Stockholders of Bank of Abingdon v. Board of Sup'rs Washington County (1891) 88 Va. 293, 13 S. E. 407.

8. —— **Government bonds.**—The shares of stock in national banks are, in the hands of the stockholders, liable to taxation by the state, although the entire capital of the bank is invested in national securities declared by the act to be "exempt from taxation by or under state authority." Van Allen v. The Assessors (1865) 70 U. S. [3 Wall.] 573, 18 L. Ed. 229; People v. Commissioners (1866) 71 U. S. [4 Wall.] 244, 18 L. Ed. 344; City of Utica v. Churchill (1865) 33 N. Y. 161; New York ex rel. Duer v. Commissioners of Taxes and Assessments (1866) 4 Wall. 244, 256, 18 L. Ed. 344; First Nat. Bank of Chicago v. Farwell (C. C. 1881) 7 Fed. 518; People v. Bradley (1866) 39 Ill. 130; Wright v. Stilz (1866) 27 Ind. 338; Fox v. Haight (1866) 31 N. J. Law, 399; Jewell v. Hart, Id. 434; City of Utica v. Churchill (1865) 33 N. Y. 161; Frazer v. Siebern (1866) 16 Ohio St. 614; Harrison v. Vines (1876) 46 Tex. 15; Adair v. Robinson (1894) 6 Tex. Civ. App. 275, 25 S. W. 734.

Taxation by state authority of the

capital stock of a national bank, invested in United States securities, restrained. First Nat. Bank of Omaha v. Douglas County (C. C. 1873) Fed. Cas. No. 4,809.

National banks, which have invested their stock in United States bonds, are not subject to taxation by the states on their capital stock. Sumter County v. National Bank of Gainesville (1878) 62 Ala. 464, 34 Am. Rep. 30.

Where an assessor in assessing the stock of a national bank exempted therefrom the amount of the bonds of the United States and of municipal corporations, owned by the bank, the county authorities had no right to assess the stock as omitted property on the theory that the bonds were not exempt from taxation. Judy v. National State Bank (Iowa, 1907) 110 N. W. 605.

The undivided profits of a national bank, beyond the amount required by law to be kept as a surplus fund, are taxable, though invested in government bonds. First Nat. Bank v. City of Concord (1879) 59 N. H. 75.

A tax cannot be assessed and levied upon the capital stock of a national bank, such capital stock consisting of government bonds. Salt Lake City Nat. Bank v. Golding (1876) 2 Utah, 1.

9. —— **Real property.**—Under this section, real estate of a national bank is subject to taxation distinct from its other capital. People's National Bank v. Marye (C. C. 1901) 107 Fed. 570, 579 (modified and affirmed [1903] 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180); Second Nat. Bank v. Caldwell (D. C. 1882) 13 Fed. 429; Loftin v. Citizens' Nat. Bank (1882) 85 Ind. 341.

A state cannot tax a bank chartered by congress, except upon its real property. Stapylton v. Thaggard (1898) 91 Fed. 93, 33 C. C. A. 353.

The banking office and lot lawfully owned and occupied as a place of business by a national bank, created under the act of congress, is not, under Laws Minn. 1874, c. 1, which requires the assessment of the capital stock of corporations at its actual value, without deduction on account of real property held by the bank, liable to assessment and taxation as real estate against the bank. Rice County Com'rs v. Citizens' Nat. Bank of Faribault (1877) 23 Minn. 280.

The dwelling house and lot owned by a national bank, and occupied by its cashier as a residence, but paid for out of the profits of the bank, and also its lot and bank buildings used entirely for banking purposes, are liable to an ordinary tax on real estate for county purposes, though the bank has paid to the state its six-mill tax on the par value of its shares, under the Pennsylvania act of 1879. Chester County v. National Bank of Chester County (Pa. 1880) 1 Chest. Co. Rep. 130, 12 Lanc. Bar. 163.

10. —— **Deposits.**—Though the deposits of a savings bank are exempt from taxation, its assets cannot be entirely disregarded on an assessment for taxation of the stock of a national bank owned by it; and the savings bank is not entitled to set off the entire amount of its liabilities against the stock so held. People v. Coleman (1892) 63 Hun, 633, 18 N. Y. S. 675.

Since P. S. Vt. 804–820, taxing interest-bearing deposits in national banks, does not tax a deposit as the term may be used to indicate the money deposited, but rather taxes the credit the depositor receives therefor, which is also included in the term "deposit," the tax is not objectionable as a tax on the property or business of the bank. State v. Clement Nat. Bank (1911) 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

There is no provision in the federal law depriving a state of the power to tax deposits in national banks to depositors. Id.

Since the failure to tax property borrowed against the borrower is no objection to a taxation of the credit to the lender, the fact that a borrowing bank can be protected from taxation on deposits by the doctrine of federal supremacy does not impair the right of the state to tax depositors. Id.

P. S. Vt. 804–820, imposing a tax on certain interest-bearing national bank deposits, is not invalid as an unlawful interference with the business of national banks because of the publicity required to be given to the business of the depositor and the bank by the returns required on which the tax is to be assessed. Id.

P. S. Vt. 804–820, provides for the taxation of certain interest-bearing national bank deposits requiring the depositor to make a return of his average deposit within the class taxed for the preceding six months on which a tax of $^{7}/_{20}$ of 1 per cent. is levied. The statute authorizes in lieu of returns by depositors the stipulation by the bank to itself make a return of the average deposits of the class taxed and pay the tax on such sum with the right to deduct, not a proportionate amount of the tax so paid, but the actual $^{7}/_{20}$ of 1 per cent. on the average amount of the taxpayer's deposit, as a credit against the account. Held, that where a bank voluntarily elected to pay the tax itself and charge the same to its depositors knowing that, by reason of withdrawals and deposits made after the date on which the assessments were required, it would not be able to entirely recoup itself for the tax so paid, it was not entitled to object to the tax on the ground that because of its inability to so recoup itself the tax was in effect a tax on the business of the bank which the state had no authority to levy. Id.

11. —— **Surplus.**—For a state to tax the surplus capital of national banks, in excess of the amount they are re-

quired to carry to their surplus fund semiannually, is not prohibited by congress, and is not an encroachment upon the constitutional powers vested in the federal government. First Nat. Bank v. Peterborough (1875) 56 N. H. 38, 32 Am. Rep. 416.

The taxation of the surplus capital of national banks by state authority is not the taxation of the means or agencies employed by the general government for the execution of its constitutional powers, but is the taxation of the property of such agents. Id.

The surplus fund which a national bank is required to reserve from its net profits is not excluded from the valuation of its shares for taxation. Strafford Nat. Bank v. Dover (1878) 58 N. H. 316.

12. Exemptions.—It is within the constitutional powers of congress to enact statutes establishing a national bank in any state, and provide that the shares of its capital stock shall be exempt from taxation by the states. Flint v. City of Boston (1868) 99 Mass. 141, 96 Am. Dec. 713.

The right of exempting public stocks from state taxation has been waived by this section, so far as stockholders in national banks can be considered as the owners of public stocks held by such banks. City of Utica v. Churchill (1865) 33 N. Y. 161.

This section has no reference to property exempted from all taxation. Appeal of Everitt (1872) 71 Pa. 216.

13. Manner of assessment and taxation.—Ky. St. c. 108, § 4077 et seq., providing for a tax on the franchises and property of corporations, and not upon the shares of stock in the names of the stockholders, is invalid, as applied to national banks as a mode of taxation unauthorized by this section. Third Nat. Bank v. Stone (1899) 19 Sup. Ct. 759, 174 U. S. 432, 43 L. Ed. 1035.

This section does not require the state to conform its system of taxation with respect to local banking corporations to that applied to national bank shares, and it is not violated because a state taxes the property, instead of the shares of domestic corporations. Nevada Nat. Bank v. Dodge (1902) 119 Fed. 57, 56 C. C. A. 145.

That the value of the shares of a national bank includes value due to nontaxable United States bonds owned by the bank is no objection to the validity of an assessment of such shares for taxation by a state without excluding the value of the bonds. Hager v. American Nat. Bank (1908) 159 Fed. 396, 86 C. C. A. 334; Same v. Louisville National Banking Co. (1908) 159 Fed. 402, 86 C. C. A. 340.

A statute requiring taxation of shares of national banks at their true money value, which does not permit a deduction therefrom for the amount of United States bonds or other nontaxable securities held by the bank, is not in conflict with this section. Exchange Nat. Bank v. Miller (C. C. 1884) 19 Fed. 372.

Act La. 1888, § 27, providing that shares in banks shall be assessed to the shareholders, but requiring the bank to pay taxes so assessed, and authorizing it to collect the same from the shareholders, imposes a tax, not upon the bank, but upon its shares, as permitted by this section. Whitney Nat. Bank v. Parker (C. C. 1890) 41 Fed. 402.

The Kentucky revenue act of Nov. 11, 1892, providing for the taxation of banks and other corporations, as applied to national banks, is a tax, not on the franchise granted by congress, but on the equivalent in value of its shares of capital stock, and is not therefore in violation of this section, prescribing the manner in which national banks may be taxed by the states. First Nat. Bank v. Stone (C. C. 1898) 88 Fed. 409.

Act March 21, 1900, requiring the shares of national banks to be listed and assessed, and taxes levied thereon, in the same manner as real estate, is not equivalent to requiring banks and other corporations to pay taxes on the valuation of their franchises, and could only be sustained by proof showing that its operation did not result in discrimination. First Nat. Bank v. City of Covington (C. C. 1900) 103 Fed. 523.

The validity of a state statute providing for the taxation of national bank stock is not affected by the fact that it does not provide for any deduction from the valuation on account of any United States bonds held by the bank. Charleston Nat. Bank v. Melton (C. C. 1909) 171 Fed. 743; Citizens' Nat. Bank of Charleston v. Same (C. C. 1909) Id. 751.

The New York court of appeals having determined in People v. Dolan (1867) 36 N. Y. 59, that the New York act of 1866 established a system of taxation for bank shares "peculiar to itself and independent of the general system of taxation in existence in the state," and that "the act was intended as a substitute for the then existing mode of assessing and taxing that portion of the property of the state in the capital of such moneyed corporations," held, that an assessment of the shares of a national banking association, made under such act, was void for want of power in the assessors to make such assessment. National Albany Exch. Bank v. Hills (C. C. 1880) 5 Fed. 248, 251, reversed (1881) 105 U. S. 319, 26 L. Ed. 1052.

Under this section the legislature of a state may, subject to certain restrictions, provide how shares in national banking associations shall be taxed. Scobee v. Bean (1900) 59 S. W. 860, 109 Ky. 526, 22 Ky. Law Rep. 1076.

Shares of national banks must be taxed eo nomine, if at all, and there-

fore they cannot be taxed under the laws of this state in July, 1866. Smith v. Webb (1866) 11 Minn. 500 (Gil. 378).

Act Mo. Feb. 4, 1864, being "An act for the assessment and collection of revenue in the state of Missouri," by which the assessment of the shares of a bank is distinctly and separately required to be made against the shares, thereby rendering the shareholders liable, is in consonance with this section. Lionberger v. Rowse (1868) 43 Mo. 67.

Laws Wis. 1868, c. 136,—which provides for the reassessment and collection of delinquent taxes of 1865 and 1866, on the shares of national banks in Wisconsin,—is not in conflict with the provisions of this section. Bagnall v. State (1869) 25 Wis. 112.

14. —— Duties placed on banks and bank officers.—A state law requiring cashiers of banks to transmit to the clerks of the several towns in the state in which any stock or shareholder shall reside a true list of the names of such stock or shareholders, with the number of shares standing against the names of such stock or shareholders on the books, together with the amount of money actually paid in on such shares, held not void on the ground that congress had legislated on the same subject. Waite v. Dowley (1876) 94 U. S. 527, 532, 24 L. Ed. 181.

A national bank may be compelled to disclose the names of its depositors, and the amounts of their deposits, under the compulsory process of a state court, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners. First Nat. Bank of Youngstown v. Hughes (C. C. 1881) 6 Fed. 737.

Act Ind. March 15, 1867, authorizing the collection of a tax on shares of capital stock in national banks, and providing that the officers of such banks shall return a list of the stockholders, is not invalid on the ground that the officers of the national banks are officers of the federal government, and not subject to state authority. Whitney v. Ragsdale (1870) 33 Ind. 107, 5 Am. Rep. 185.

15. —— Assessed to shareholders.—The state tax must be assessed directly against the shares of the stockholders in national banks. National Bank v. City of Richmond (C. C. 1890) 42 Fed. 877; First Nat. Bank v. Fisher (1891) 45 Kan. 726, 26 Pac. 482; Smith v. Webb (1866) 11 Minn. 500 (Gil. 378); First Nat. Bank v. Meredith (1869) 44 Mo. 500; State ex rel. Lathrop v. Dowling (1872) 50 Mo. 134; Miller v. Fourth Nat. Bank (Ohio 1884) 12 Wkly. Law Bul. 66; Miller v. First Nat. Bank (1889) 46 Ohio St. 424, 21 N. E. 860.

National bank shares are subject to state taxation in the hands of individual shareholders. Van Slyke v. Wisconsin (1894) 154 U. S. 581, 14 Sup. Ct. 1168, 20 L. Ed. 240; Sumter County v. National Bank of Gainesville (1878) 62 Ala. 464, 34 Am. Rep. 30; Morseman v. Younkin (1869) 27 Iowa, 350; Albuquerque Nat. Bank v. Perea (1891) 5 N. M. 664, 25 P. 776; City of Utica v. Churchill (N. Y. 1865) 43 Barb. 550; Parker v. Siebern (1866) 3 Ohio Dec. 441; Mintzer v. Montgomery County (1867) 54 Pa. (4 P. F. Smith) 139.

The shares must be assessed to the individual stockholders, and not to the bank itself in solido. First Nat. Bank v. City of Richmond (C. C. 1889) 39 Fed. 309; First Nat. Bank of Mendota v. Smith (1872) 65 Ill. 44; Head v. Board of Review of City of Jefferson (Iowa, 1915) 152 N. W. 600; First Nat. Bank v. Fisher (1891) 45 Kan. 726, 26 Pac. 482; People v. Commissioners of Taxes (1866) 35 N. Y. 423.

The capital stock of a national bank cannot be assessed, as such, by state authority, but the shares may be assessed to the individual holders. Collins v. Chicago (C. C. 1867) Fed. Cas. No. 3,011.

An assessment on the capital stock of a national bank by an aggregate or gross assessment is irregular and invalid, as such assessment should be against the individual shareholders. Sumter County v. National Bank of Gainesville (1878) 62 Ala. 464, 34 Am. Rep. 30.

Assessment of taxes against national bank stock must be made against the shareholders personally. Refusal of the officers to furnish the assessor with a list of shareholders does not justify making the assessment and enforcing the tax against the bank property. City of Springfield v. First Nat. Bank (1885) 87 Mo. 441.

An individual who subscribes for shares in a bank, and pays part of the amount of the capital, and conveys his shares to the bank to secure the residue, is liable to be taxed for the amount thus paid in, as the owner of bank stock. Tucker v. Aiken (1834) 7 N. H. 113.

P. L. N. J. 1866, p. 1078, is not in violation of this section, since the tax is imposed on shares, and not upon the bank; being assessed in form only to the bank. Mechanics' Nat. Bank v. Baker (1900) 46 A. 586, 65 N. J. Law, 113, affirmed (1901) 48 A. 582, 65 N. Y. Law, 549.

Laws N. Y. 1882, c. 409, as amended by Laws N. Y. 1892, c. 714, provides (section 313) that every bank shall, in December of each year, furnish taxing officers with a list of its stockholders, and that the names appearing on such list shall be deemed the owners of the shares, for the purpose of assessment. Section 314 provides that the tax on such shares shall be a lien from the time of the assessment, and that a transfer of the shares after such time

shall be subject to the lien. Section 315 makes it the duty of the bank to pay the taxes on the shares out of the dividends. Held, that an assessment of bank stock in the name of the person appearing on the list is valid, as against the real owner, to whom the shares were transferred before the assessment was made, as an assessment in the name of the person appearing on the list as owner is, in effect, an assessment on the shares, against whoever owned them at the time of the assessment. People v. Barker (1895) 87 Hun, 194, 33 N. Y. Supp. 1042.

16. —— **Valuation.**—Under Act Feb. 10, 1868, and a Pennsylvania statute, it was held that national bank shares might be assessed above their par value for local taxation. Hepburn v. School Directors of Carlisle (1874) 23 Wall. 480, 483, 23 L. Ed. 112.

The shares of a national bank may be assessed under the laws of a state at their full and true value, though the assessment exceeds the par or nominal value thereof. New York ex rel. Gallatin Nat. Bank v. Commissioners of Taxes & Assessments (1876) 94 U. S. 415, 416, 24 L. Ed. 164.

The rule adopted by the state board of assessors of the city of Albany to assess all shares of stock in state and national banks in the city at par without regard to their actual or market values, but making the requisite reduction for real estate owned by the banks is not in conflict with this section. Stanley v. Albany County (1887) 7 Sup. Ct. 1234, 1235, 121 U. S. 535, 30 L. Ed. 1000.

A taxation of national bank shares above their par value renders the whole tax inoperative and void. Union Nat. Bank v. Chicago (C. C. 1871) Fed. Cas. No. 14,374.

A state cannot tax shares in a national bank by requiring the value of the property of the bank to be added to the value of the shares, otherwise ascertained, to obtain its assessable value. St. Louis Nat. Bank v. Papin (C. C. 1876) Fed. Cas. No. 12,239.

Shares in national banks may be taxed at their true money value. Exchange Nat. Bank v. Miller (C. C. 1884) 19 Fed. 372.

A state may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank is invested in nontaxable bonds, as taxation of the shares is not taxation either of the capital stock or of the nontaxable bonds. First Nat. Bank v. Board of Equalization of Independence County (1909) 122 S. W. 988, 92 Ark. 335.

Under Code Iowa, § 1305, providing that all property subject to taxation shall be valued at its actual value, which means its value in the market in the ordinary course of trade, and section 1322, providing that shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located, and requiring the bank to aid the assessor in fixing the value of such shares, to furnish a verified statement of its financial condition, and sections 1370, 1371, requiring the board of equalization to adjust assessments by raising or lowering the same as in their opinion will be just, contemplate that the assessor and the board may seize on any information within reach that may furnish aid to a conclusion on the subject of the value of national bank stock in assessing the same, and the authorities are not bound by the showing of the books of the bank. First Nat. Bank v. City Council of Estherville (Iowa, 1907) 112 N. W. 829.

The par value of the shares of stock in a national bank was $100. The statement furnished by the bank to the assessor showed that the value of the shares did not exceed $112. It was proved that the bank had transferred stock at $175 per share, and it did not appear that the transfer was for purposes other than investment. Held, that the board of equalization did not err in fixing the value of the stock at $130 per share. Id.

The original statement of a revenue agent in a proceeding against a national bank to assess omitted property alleged that the capital stock of the bank consisted of 500 shares of the par value of $100 each, that there was a surplus and undivided profits amounting to over $16,000, and that the property, except $30,000, was omitted from taxation for a year. An amended statement alleged that the value of the 500 shares of stock was $50,000; that there was a surplus of $13.000 and over $3,000 in undivided profits; that all of the shares of stock, except 270 shares, were omitted from taxation for that year, leaving unassessed 230 shares and their proportionate part of the surplus and undivided profits. Held, that the original and amended statements failed to show that the valuation fixed on which taxes were paid was not sufficient to cover everything that the bank had that was taxable, for the valuation of nontaxable securities may have been deducted from such valuation. Commonwealth v. Mt. Sterling Nat. Bank (1907) 99 S. W. 958, 30 Ky. Law Rep. 954.

For the purposes of taxation, national bank shares of stock are worth what their market value is at the time the assessment is made, and not what their value may be on the consummation of a contemplated closing of the bank's business, and division made among the shareholders. National Bank of Commerce v. City of New Bedford (1892) 155 Mass. 313, 29 N. E. 532; Adams v. Same (1892) 155 Mass. 317, 29 N. E. 532.

The owners of national bank stock

are to be taxed thereon at its true value. Lippincott v. Lippincott (N. J. Sup. 1907) 66 A. 113.

In ascertaining the true value of national bank stock for the purpose of taxation, Act N. J. May 11, 1905 (P. L. p. 457), does not require that the nontaxable property of banks should be deducted from their assets. Id.

The true value of national bank shares for taxation is under ordinary conditions their exchangeable value; that is, their market value; but this rule is not an invariable test of true value under all circumstances. City of Newark v. Tunis (N. J. 1911) 81 A. 722; Same v. Clark (N. J. 1911) Id. 723, 724.

In assessing the value of shares in a national bank, the actual and not the par value is the standard to be adopted by the commissioners of taxation. Such valuation is not affected by the fact that a portion of the capital of the bank is invested in United States bonds, or by the fact that the bank is required by law to accumulate and retain a reserve. People v. Commissioners of Taxes and Assessments (1876) 8 Hun, 536.

Under Laws N. Y. 1866, c. 761, the actual, and not the par, value of the shares of the capital stock of national banks, is the basis of assessment. People v. Commissioners of Taxes and Assessments (1876) 67 N. Y. 516.

In determining the value of national bank shares for taxation under this section, owners of shares in national banks can deduct bona fide debts from the value of such shares, as provided in Rev. St. Ohio, § 2730, for ascertaining "credits" for taxation. State Nat. Bank v. Shields (Ohio, 1894) 31 Wkly. Law Bul. 321.

National bank stock is to be appraised at its current value in the market where the bank is located. Appeal of Everitt (Pa. 1872) 71 Pa. (21 P. F. Smith) 216.

17. —— **Deductions.**—In the taxation of the shares of a national bank, the shareholders are not entitled to any allowance for such of the capital and surplus of the bank as may be invested in government bonds. First Nat. Bank v. Farwell (C. C. 1881) 7 Fed. 518.

The Montana statute (Pol. Code, § 3692) provides for assessing shares of bank stock to the owners thereof, and, to aid the assessors in determining their value, requires the bank to furnish a verified statement showing the amount and number of shares of its capital stock, surplus, etc. An assessor, instead of demanding the statement here required, presented to a national bank a blank form for listing property subject to taxation. The bank did not return a verified list, but its assistant cashier handed to the assessor a statement beginning "Capital, $800,000," followed by items of surplus, undivided profits, United States bonds, and real estate. The assessor deducted the amount of the bonds and real estate from the "capital" and assessed the remainder to the bank, as stock. Held, that the tax was illegal, as the capital of national banks is exempt from taxation under the federal laws, and as both the state and federal laws require the shares to be taxed to their owners; and that the form of the return did not warrant the assumption that the bank owned its own shares. Brown v. French (C. C. 1897) 80 Fed. 166.

In the assessment and taxation of shares of national bank stock, the owners thereof, having no other credits or moneyed capital, are entitled to deduct their bona fide debts from the assessed value of such shares of stock. Wasson v. First Nat. Bank (1886) 107 Ind. 206, 8 N. E. 97.

Code Iowa 1873, § 814, provides that "in making up the amount of money or credits which any person is required to list, or have listed or assessed, he will be entitled to deduct from the gross amount all debts in good faith owing by him." Section 802 provides that the term "credit," as there used, includes "every claim and demand for money, labor, or other valuable thing," and all "money or property of any kind secured by deed, mortgage, or otherwise." Held, that in assessing national bank stock the holder thereof is entitled to deduct from its cash value the amount of his debts. First Nat. Bank v. City Council of Albia (1892) 86 Iowa, 28, 52 N. W. 334.

Shares of stock in national banks, when taxed under Ky. St. 1903, §§ 4092–4092b, are subject to have deducted the value of nontaxable government bonds held by the bank. Marion Nat. Bank v. Burton (1906) 90 S. W. 944, 121 Ky. 876, 28 Ky. Law Rep. 864, 10 L. R. A. (N. S.) 947.

18. —— **Reassessment.**—Equity will not enjoin a reassessment of a tax on the stock and real property of a national bank because of the apprehension that this section will be violated by the assessing officer in making the assessment. First Nat. Bank v. Albright (1908) 28 Sup. Ct. 349, 208 U. S. 548, 52 L. Ed. 614, affirming judgment (N. M. 1906) 86 P. 548.

19. **Place of taxation.**—The tax prescribed in this section must be levied at the place where the bank is located, without regard to their domicile. The rule that personal property has no situs of its own is one of convenience only. First Nat. Bank of Mendota v. Smith (1872) 65 Ill. 44; People v. Commissioners of Taxes (1866) 35 N. Y. 423.

This provision gives to shares of stock in national banks a situs of their own separate from the person of their owner for the purpose of taxation and permits taxation by state authority at

the place where the bank is located and not elsewhere. Tappan v. Merchants' Nat. Bank (1873) 19 Wall. 490, 500, 22 L. Ed. 189.

Stocks of foreign corporations held in New York, having no situs in that state, and not being taxable there, their nontaxation is not a violation of this section. Mercantile Nat. Bank v. City of New York (1887) 7 Sup. Ct. 826, 121 U. S. 138, 30 L. Ed. 895, affirming decree (C. C. 1886) 28 Fed. 776.

Shares of the capital stock of a national bank are taxable as personal property by the state in which the bank is located, regardless of the residence of the stockholders. McIver v. Robinson (1875) 53 Ala. 456.

Bank stock, the property of an incorporated insurance company, required by its charter to keep, and actually keeping, its office in the city of Hartford, is not taxable in the town of Hartford. Hartford Fire Ins. Co. v. Hartford (1819) 3 Conn. 15.

Bank stock, owned by a savings society, there being no clause of exemption in its charter, is liable to taxation in the place where its office is established. Savings Bank of New London v. Town of New London (1849) 20 Conn. 111.

Municipal corporations cannot tax bank stock owned by nonresidents of the city, because such stock can have no location or situs other than the domicile of the owner. City of Madison v. Whitney (1863) 21 Ind. 261.

The word "place," as used in the proviso in this section, refers to the location of the bank, and not to the state authority under which the tax is to be assessed; and shares held by a citizen are taxable in the town where the bank is located, and not where he resides. Packard v. City of Lewiston (1867) 55 Me. 456.

Pub. Laws Me. 1867, c. 126, § 2, providing that shares of national banks shall be assessed to the owners in the place where the bank is located, is not at variance with this section. Id.

Under this section shares in national banks established under that law may be taxed by the state, and the tax assessed in the city or town within the state where the owner resides. Austin v. City of Boston (1867) 96 Mass. (14 Allen) 359.

The fact that an owner of bank shares has made an unintentional mistake in the statement required by St. Mass. 1872, c. 321, § 6, as to his residence, will not prevent his being properly taxed upon them in the town wherein he resides. Goldsbury v. Inhabitants of Warwick (1873) 112 Mass. 384.

The legislation of Michigan (Sp. Laws 1875, p. 185), providing for the taxation of such stock in the township where the bank is located, except that, where a stockholder resides in another township in the same county, he is taxable in his own township, is valid. Howell v. Village of Cassopolis (1877) 35 Mich. 471.

The stock of a nonresident can in no proper sense be regarded as personal property within the village where the bank is located, unless some statute has so declared. Intangible property, like stock, must always follow the domicile of the owner, unless separated from it by positive law. Id.

Under this section shares can only be taxed by a state where the bank is situated. Smith v. Webb (1866) 11 Minn. 500 (Gil. 378).

With regard to a state tax, the word "place" meant state, and, with regard to a county and township or city tax, it meant those localities, respectively. Fox v. Haight (1866) 31 N. J. Law (2 Vroom) 399; Jewell v. Hart, Id. 434.

Shares of nonresident stockholders in national banks are taxable at the place where the bank is located. Farmers' Nat. Bank v. Cook (1867) 32 N. J. Law (3 Vroom) 347.

Under the federal statute, stock in a national bank cannot be taxed in any state other than that in which the bank is located. De Baum v. Smith (1892) 55 N. J. Law (26 Vroom) 110, 25 Atl. 277.

Stockholders in a national bank cannot be taxed for the stock held by them in the town or ward in which such bank is located, when they reside elsewhere, notwithstanding the proviso in this section. The place of taxation is determined by the statute of the state. City of Utica v. Churchill (1865) 43 Barb. 550.

Shares of national bank stock owned by a nonresident are to be taxed where the bank is located. Kyle v. Town of Fayetteville (1876) 75 N. C. 445, 449.

The state may direct the manner and place of taxing the shares of national bank stock of resident owners, and, the legislature not having separated such shares from the person of their owner, their situs, like that of other personal property, is at the domicile of their owner, and not necessarily where the bank was located. Strong v. O'Donnell (Pa. 1874) 31 Leg. Int. 269, 10 Phila. 575.

A law of the state, assessing for taxation shares at any other than the place where the banks are located, is void. City of Nashville v. Thomas (1868) 45 Tenn. (5 Cold.) 600.

Stocks in banks are taxable under the law of this state at the place where the owner resides, when he is an inhabitant of this state. Id.

This section does not prohibit a state from listing and taxing shares in the town or city where the owner lives, instead of in that wherein the bank is located. The word "place" is a very indefinite term, and must be construed with reference to the connection in which it is used, the subject-matter

spoken of, and the object in view. The intention of congress was to prevent unjust and unequal taxation that might result from the action of state governments hostile to the system. The sole object of the provision was to prevent the same stock being taxed in two different states, when the bank is located in one state and stock therein owned by the inhabitants of another. The reference to the place where the bank is located is solely to determine what state shall have jurisdiction to tax the owners of the stock for such stock. Clapp v. City of Burlington (1870) 42 Vt. 579, 1 Am. Rep. 355.

The proviso to this section merely requires that the state having jurisdiction at the place where the bank is located shall tax bank shares, and is not in conflict with a statute requiring shares in a national bank to be assessed where the owner resides. Id.

Under Acts W. Va. 1875, c. 54, shares of bank stock are assessable to the holder thereof in the district only where he resides, and then only in case they have not been included in the assessment of the capital of the bank where it does business; and if a city in which an incorporated bank does business neglects to assess the capital stock, as it has a right to do, it cannot assess a nonresident shareholder with the value of the shares held by him. Watson v. Town of Fairmont (1893) 38 W. Va. 183, 18 S. E. 467.

20. Payment of tax.—A state may lawfully tax the shares of a national bank, and may require the tax to be paid in the first instance by the corporation, with the right to reimbursement from the stockholders. National Bank of Commerce in St. Louis v. Allen (1915) 223 Fed. 472, 139 C. C. A. 20, affirming judgment (D. C. 1914) 211 Fed. 743.

In an action to recover money paid to defendant for taxes levied on bank stock owned by plaintiff, it appeared that the payment was made by the bank. The cashier testified that the bank always paid personal taxes on the shares of such of the stockholders as were liable to taxation, giving one check for the total amount, and to those stockholders who were not subject to taxation a proportionate amount was remitted, called a "tax dividend," so that the amount paid each year was equalized to the stockholders. Held, that such payment by the bank was from moneys belonging to the stockholders. Ætna Ins. Co. v. City of New York (1896) 7 App. Div. 145, 40 N. Y. Supp. 120.

21. —— Liability of bank officers.—A state cannot impose a tax on the presidents of national banks doing business in the state, since the president is an officer prescribed by the act of congress, through whom, in part, the business of the association must be carried on, and hence a tax on the president, as such, would be a burden on a federal agency. Linton v. Childs (1899) 32 S. E. 617, 105 Ga. 567.

22. —— Liability of bank.—A state may require a national bank to pay for its stockholders the taxes legally assessed against their respective shares. National Commercial Bank v. City of Mobile (1878) 62 Ala. 284, 34 Am. Rep. 15; Sumter County v. National Bank of Gainesville (1878) 62 Ala. 464, 34 Am. Rep. 30; Commonwealth v. First Nat. Bank (1815) 67 Ky. (4 Bush) 98, 96 Am. Dec. 285.

Pub. St. Mass. c. 13, §§ 8–10, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. Held, that a suit for this tax cannot be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared. City of Boston v. Beal (1893) 55 Fed. 26, 5 C. C. A. 26, 5 U. S. App. 253, affirming (C. C. 1892) 51 Fed. 306.

Where an act of a state legislature provides for the taxation of the shares of a national bank, and that the taxes against such shares shall be levied against the holder of the same in the list of personal property, the legislature has power to provide that the taxes "shall be paid by the bank." First Nat. Bank v. Douglas County (C. C. 1874) Fed. Cas. No. 4,799.

Under Laws Iowa 1868, c. 153, to render a national bank, organized under the national banking law, liable for the payment of taxes due from its shareholders, it must be averred and shown that the bank now has or has had in its possession dividends or other money or property belonging to the delinquent shareholder. The bank is not absolutely liable, independent of such showing; the rule herein differing from that under the Kentucky statute. Hershire v. First Nat. Bank (1872) 35 Iowa, 272.

Under Code Iowa, 1873, § 819, providing that banks shall be liable for the tax on shares of capital stock as the agent of the shareholders, and that they "shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied on his shares," a bank is not liable unless it has money or property belonging to the delinquent shareholder. Farmers' & Traders' Nat. Bank v. Hoffmann (1894) 93 Iowa, 119, 61 N. W. 418.

Evidence that a bank had not declared a dividend for a year previous to the levy of an assessment on its capital stock, and that the surplus which it reported after the assessment was made was worthless, by reason of the

shrinkage of the securities composing it, will sustain a finding that, after the assessment, the bank had no money of the shareholder with which to pay the tax. Id.

Acts Mich. 1867, No. 122, providing for the levy and collection of a specific tax upon national banks, is unconstitutional. First Nat. Bank of Sturgis v. Watkins (1870) 21 Mich. 483.

National banks are agents of their stockholders for the purpose of listing their stock for taxation and paying the tax thereon. First Nat. Bank v. Webster County (Neb. 1907) 113 N. W. 190, reversing judgment on rehearing (1906) 110 N. W. 535.

The act providing that "it shall be the duty of the said banks to retain and pay the amount of tax assessed to each of the said stockholders thereof out of the dividends from time to time declared" does not make the taxes a charge against the bank, either in form or substance. Farmers' Nat. Bank of New Jersey v. Cook (1867) 32 N. J. Law (3 Vroom) 347.

The bank is not liable primarily, or as the agent of the shareholders, under the act of congress, or the revenue laws of New Mexico, for the payment of a tax levied upon such shares. Albuquerque Nat. Bank v. Perea (1891) 5 N. M. 664, 25 Pac. 776.

By an act of the legislature (1814) relative to the "Bank of Newbern," it was provided that a "tax of 1 per cent. per annum" should be levied on "all stock holden in the bank, except on stock holden by the state," which should be "paid to the treasurer of the state by the president or cashier of the bank," etc. Held, that the tax was payable out of the common funds of the bank, instead of the shares of the profits blonging to the holders of the stock. Attorney General v. Bank of Newbern (1835) 21 N. C. 216.

Under the North Carolina act of 1833 chartering the Bank of Cape Fear, the tax of "25 cents on each share of stock owned by individuals" is payable out of the general funds of the bank; the state not being entitled to any exemption from such tax in the distribution of the dividends. Attorney General v. Bank of Cape Fear (1847) 40 N. C. 71.

A national bank has implied power to stipulate with the state to voluntarily pay a tax imposed on a specified class of the bank's interest-bearing deposits by P. S. 804–820, for the purpose of relieving depositors of the obligation of returning their deposits for taxation, and themselves paying the tax as provided by the act, as a matter of business expediency, though by so doing the bank may be required to pay a part of the tax which by reason of withdrawals, etc., it might not be able to charge against the accounts of depositors. State v. Clement Nat. Bank (1911) 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

The state has a right to resort to the bank as a garnishee for the collection of its claims against the stockholders for taxes, and the legislature may require the assessment of the stock to be made to the bank in solido. First Nat. Bank v. Chehalis County (1893) 6 Wash. 64, 32 Pac. 1051.

Laws Wash. 1893, p. 333, §§ 21–23, provide that shares of stock in all banks shall be assessed to the owners thereof, such tax to be paid by the bank, which shall have a lien on all the rights of the shareholders in the corporate property for reimbursement. Held, that no suit for such tax can be maintained against the receiver of an insolvent national bank, where the property represented by the shares has disappeared, since the receiver could not in such case be reimbursed, and the tax would fall on the assets of the bank, which belong to the creditors, thereby indirectly violating the rule forbidding a state to tax the capital stock of a national bank. Baker v. King County (1897) 50 P. 481, 17 Wash. 622.

23. Collection of tax.—A state has the right to make the national banks its agents to collect a state tax on their shares from the individual share holders, and it is no objection thereto that the state banks are not required to do the same. Merchants' & Manufacturers' Nat. Bank v. Pennsylvania (1897) 17 Sup. Ct. 829, 831, 167 U. S. 461, 42 L. Ed. 236.

Where the assessing officers, in taxing national bank shares, have arrived at a correct result, the collection of the taxes will not be restrained because the method was erroneous. Union Pac. R. Co. v. Lincoln County (C. C. 1872) Fed. Cas. No. 14,379; St. Louis Nat. Bank v. Papin (C. C. 1876) Fed. Cas. No. 12,239.

Under the statutes of Nebraska, national bank shares may be taxed, and the tax enforced by distraint against the property of the bank. First Nat. Bank v. Douglas County (C. C. 1874) Fed. Cas. No. 4,799.

A national bank which returns its capital for taxation is not thereby estopped from setting up that the same was not subject to taxation, and refusing to pay the tax. Brown v. French (C. C. 1897) 80 Fed. 166.

There is no statute in Alabama which requires the national banking associations to pay the state tax on the shares of such associations. Such tax can only be assessed under Code Ala. 1876, § 362, subd. 13, and can be collected only as taxes against other individuals are collected. Sumter County v. National Bank of Gainesville (1878) 62 Ala. 464, 34 Am. Rep. 30.

Code Iowa, § 1322, provides that shares of stock in national banks shall be assessed to the stockholders at the place where the bank is located. Section 1374 as amended by Acts 28th

Gen. Assem. Iowa, c. 50, provides that, when property subject to taxation is omitted, the county treasurer shall make demand of the person by whom it should have been listed of the amount the property should have been taxed in the years it was omitted. The auditor and treasurer of a county gave notice to the stockholders of a national bank that they were the owners of stock omitted from taxation for preceding years, and required them to show cause on a specified day why the same should not be assessed against them. On the day fixed the tax ferret appeared before the officers and informed them of the omitted property. There was no assessment of the stock by the officers. Held, that there was no assessment on which to base an action for taxes on property omitted from taxation for preceding years. Judy v. National State Bank (Iowa, 1907) 110 N. W. 605.

An assessment upon the shares of a national bank under an invalid state law cannot be enforced. First Nat. Bank v. Fancher (1872) 48 N. Y. 524.

Act Pa. Feb. 23, 1866, requiring the cashier of every bank to collect from every stockholder a tax of 1 per cent. on the par value of the stock held by such stockholder and pay the same into the treasury, was invalid as being incompatible with this section. Markoe v. Hartranft (Pa. 1867) 15 Am. Law Reg. 487.

A national bank having voluntarily rendered its capital stock for taxation, and stated, in its answer, in an action to recover the taxes thereon, as increased in value on equalization, that it was willing to pay taxes thereon according to its rendition, it may be held liable for the taxes on the value of its stock as rendered, though taxation of such stock is unauthorized; but an equalization board could not, without its consent, augment its conceded liability by adding other personal property to its rendition, or raising the value of that which had been rendered. First Nat. Bank v. City of Lampasas (1903) 78 S. W. 42, 33 Tex. Civ. App. 530.

Where an assessment of national bank deposits is made, the state may make the bank its agent to collect the tax. State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

24. —— **Injunction.** — Where complainant has paid so much of the tax as was not in violation of this section, the collection of the remainder may be enjoined. Pelton v. Commercial Nat. Bank (1879) 101 U. S. 143, 148, 25 L. Ed. 901.

In a suit to enjoin enforcement of taxes assessed against stockholders of a bank, it was held that there was no error in dismissing the bill on demurrer. German Nat. Bank v. Kimball (1880) 103 U. S. 732, 26 L. Ed. 469.

A national bank may maintain a suit on behalf of its shareholders to enjoin the collection of taxes on their shares. The shareholder who makes an affidavit showing his indebtedness and makes a proper demand for deduction is entitled to an injunction where he has not paid the tax, and no tax should have been levied where it is clear that all affidavits and demands for deduction which could have been made would have been disregarded, and that the assessments had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in valuation of bank shares for taxation. It is not essential to show such a fraud, when it is established that there were debts to be deducted and the tax is still unpaid. Hills v. National Albany Exch. Bank (1881) 105 U. S. 319, 26 L. Ed. 1052.

A bank whose capital stock is assessed at full value, while all other property is assessed at less than half value, may obtain relief in equity by enjoining collection of the excess. Merchants' Nat. Bank of Toledo v. Cumming (C. C. 1878) Fed. Cas. No. 9,453.

A bill in equity will lie, where assessment of shares is made under an act void for want of power in the assessor, upon complaint of a national bank, to restrain the collection of the amounts severally assessed upon the shares of the respective shareholders, in order to prevent a multiplicity of suits. National Albany Exch. Bank v. Hills (C. C. 1880) 5 Fed. 248.

In order to prevent a multiplicity of suits, the collection of an illegal tax on national bank shares will be enjoined upon the application of the bank, where the latter is required by the statute under which the assessment was made to retain so much of any dividend or dividends belonging to such shareholders as shall be necessary to pay any taxes assessed in pursuance of the act. Albany City Nat. Bank v. Maher (C. C. 1881) 6 Fed. 417.

The collection of an illegal tax on national bank shares will not be enjoined upon the application of a shareholder, upon the mere ground of such illegality. Id.

Where national bank shares are taxed beyond the limit established by congress, an injunction will be granted only as to such excess. First Nat. Bank v. Treasurer of Lucas County (C. C. 1885) 25 Fed. 749; Whitney Nat. Bank v. Parker (C. C. 1890) 41 Fed. 402.

An averment in a bill to restrain the collection of taxes assessed under a statute against the shares of a national bank, that if a certain "contention is true, which is denied, then the said state law [specifying it] is null and void, because it operates as a discrimination against the shareholders of national banks, in violation of the express terms of" this section, is sufficiently explicit to raise the issue whether there is in the act any discrimination prohibited by the act of congress. Whit-

ney Nat. Bank v. Parker (C. C. 1890) 41 Fed. 402.

Where a bank is required by law to pay the taxes assessed on all its shares, and reimburse itself from its shareholders, it may sue to enjoin collection of taxes illegally assessed, as it stands in the relation of a trustee, and such suit will save multiplicity of actions. Id.

A bill to enjoin the collection of taxes assessed against a national bank and against the stockholders on their shares, on the grounds that the taxation was double, that the stockholders were not allowed to set off debts against the valuation of their shares, and that the board of equalization illegally increased the assessment, raises the federal question of the validity of the tax, under this section, prescribing the method in which national bank shares may be taxed. Sioux Falls Nat. Bank v. Swenson (C. C. 1892) 48 Fed. 621; Dakota Nat. Bank v. Same, Id. 626.

A national bank may maintain a suit in equity in behalf of its shareholders to enjoin the collection of taxes on its shares under a law claimed to be invalid; and, where the validity of the entire tax is contested, the complainant will not be required to pay any part of the tax as a condition to the granting of a preliminary injunction. First Nat. Bank v. City of Covington (C. C. 1900) 103 Fed. 523.

Act Va. March 6, 1890, providing for the taxation of bank shares, required the banks to pay the taxes levied thereunder against their stockholders, and provided that, in case a bank failed to make such payment within a certain time, the cashier and his sureties should be liable therefor, with an added penalty, to be recovered at suit of the state. Act March 3, 1896, providing for the collection of delinquent taxes on bank shares, left it optional with a bank to pay such taxes levied against its stockholders, and provided that, in case it did not elect to make such payment after notice, suits should be instituted for the collection of the same from the stockholders individually. Held, that whether the later act be regarded as repealing the provision of the one under which the taxes were levied, authorizing suit against the cashier, or as merely providing a cumulative remedy, a national bank could not maintain a suit to enjoin the officers of the state from proceeding to collect such taxes, upon an allegation that the statute imposing the same was discriminative and invalid, under the laws of the United States, as applied to national bank shares, where it was not alleged that any action was threatened or contemplated against the bank itself, since, in suits against the stockholders under the later act, they had full opportunity to make any defense, and neither they, nor the bank in their behalf, had any ground for injunction. People's Nat. Bank of Lynchburg v. Marye (C. C. 1901) 107 Fed. 570, decree modified (1903) 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180.

Where a state statute provides for a tax on the stock of a national bank and requires the bank to pay it, the bank is in effect made a trustee and has the right to resort to a court of equity to determine its duty for its protection against the state, on the one hand, and the stockholders, on the other. Charleston Nat. Bank v. Melton (C. C. 1909) 171 Fed. 743; Citizens' Nat. Bank of Charleston v. Same, Id. 751.

25. —— **Federal questions.** — Objections to the valuation of national bank stock for taxation, as being in excess of the actual value, exorbitant and unjust, and not in proportion to other like personal property, but grossly in excess thereof, and constituting unfair and unequal taxation, do not raise any federal question which will sustain a writ of error from the federal Supreme Court to a state court, where no mention of the national bank act was made, nor of any right or privilege claimed under it, and the provisions of the United States Revised Statutes were not invoked, by name or otherwise, and there was no assertion that the local statutes under which the assessment was made were repugnant to the terms of this section. First Nat. Bank v. City Council of Estherville (1910) 30 Sup. Ct. 152, 153, 215 U. S. 341, 54 L. Ed. 223.

An action to enforce a right conferred by this section is a suit arising "under the laws of the United States," within the meaning of the act of March 3, 1875. Stanley v. Board of Sup'rs of Albany Co. (C. C. 1881) 6 Fed. 561.

National banks may, like other banks and citizens, sue in the federal courts whenever the subject-matter of litigation involves some element of jurisdiction. Thus a suit by a national bank against a county treasurer, to enjoin the collection of an excessive tax upon its personal property, alleged to be made in violation of the act of congress permitting the state to tax national banks, presents a case arising under a law of congress, and is maintainable in a federal court. Union Nat. Bank v. Miller (C. C. 1883) 15 Fed. 703.

A bill to enjoin the collection of taxes assessed against a national bank and against the stockholders on their shares, on the grounds that the taxation was double, that the stockholders were not allowed to set off debts against the valuation of their shares, and that the board of equalization illegally increased the assessment, raises the federal question of the validity of the tax, under this section. Sioux Falls Nat. Bank v. Swenson (C. C. 1892) 48 Fed. 621; Dakota Nat. Bank v. Same, Id. 626.

III. RESTRICTIONS AGAINST DISCRIMINATION

26. **Discrimination in modes and systems of taxation.**—The enabling act of

the state of New York of March 9, 1855, imposing a tax on shares in national banking associations, held not to conform to the limitations prescribed by this section. Van Allen v. Assessors (1865) 3 Wall. 573, 581, 18 L. Ed. 229.

The fact that under the act of congress the capital of national banks can be taxed by the states in no other way than by an assessment upon the shares of that capital held by individuals does not render unconstitutional the Iowa statute which taxes savings banks in that state on the amount of their paid-up capital, and does not tax the shares of those banks held by individual shareholders; the same rate per cent. being assessed upon the capital of the savings banks as upon the shares of the national banks, and it not appearing that the tax upon the former is not as great as that upon the latter. Davenport Nat. Bank v. Davenport Board of Equalization (1887) 8 Sup. Ct. 73, 123 U. S. 83, 31 L. Ed. 94.

No discrimination against national banks, in violation of this section, is made by the system of taxation prevailing in New York in respect to trust companies, since it must be presumed that if such companies are using their funds in a strictly banking business, under an assumption of powers not in fact conferred by law, the state will take proper steps to keep them within the statutory limits, and a neglect for a limited time to do so cannot be considered as an assent by the state to such an improper assumption of power. Jenkins v. Neff (1902) 22 Sup. Ct. 905, 186 U. S. 230, 46 L. Ed. 1140, affirming judgment (1900) 57 N. E. 408, 163 N. Y. 320.

The retroactive feature of a state statute making it the duty of certain officers of each national bank to list its stock for taxation, and requiring the bank to pay the tax and the penalty for delinquency subject to a deduction because of taxes paid by the bank under other statutes, does not discriminate against the bank, contrary to this section, as applied to the shares of resident stockholders, where such statute is construed with the state court as not imposing any new liability upon domestic shareholders or the bank, but is simply providing another method for assessment of stock which escaped taxation by not being listed. Citizens' Nat. Bank v. Kentucky, Use of Boyle County (1909) 30 Sup. Ct. 532, 533, 217 U. S. 443, 54 L. Ed. 832.

An agreement between a national bank and the state, by which the former agrees to pay upon the basis of average deposits, the tax imposed under P. S. Vt. c. 37, upon interest-bearing deposits, and thereby relieve its depositors from the necessity of making any returns, is not ultra vires of the bank because the average amount upon which the bank agrees to pay may not precisely correspond to the amount upon which the depositors would be taxed, or because the agreement does not contemplate a charge against the depositors' accounts of the amounts paid by the bank. Clement Nat. Bank v. Vermont (1913) 34 Sup. Ct. 31, 231 U. S. 120, 58 L. Ed. 147.

An owner of national bank shares seeking to overthrow a state taxation system on the ground that it discriminates against holders of such shares, contrary to this section, assumes the burden of proving such discrimination. New York ex rel. Amoskeag Sav. Bank v. Purdy (1913) 34 Sup. Ct. 114, 231 U. S. 373, 58 L. Ed. 274.

The taxing scheme of Laws N. Y. 1909, c. 62, cannot be said to contravene this section merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another likewise indebted, who has invested his money otherwise. Id.

The fact that bonds and evidences of debt of public or private corporations, and shares of stock in foreign corporations, owned by residents of Maryland, cannot be taxed for county or city purposes, under Code Pub. Gen. Laws Md. art. 81, § 201 (Laws 1896, c. 143), at a higher rate than 30 cents on each $100 of valuation, does not render the taxation of national bank shares for city purposes at a higher rate illegal; the capital of all domestic banking and other corporations being subject to taxation at the same rate, and it not appearing that the statute, in its practical operation, resulted in relieving the capital of private banking firms from equal taxation. National Bank of Baltimore v. City of Baltimore (1900) 100 Fed. 24, 40 C. C. A. 254, affirming (C. C. 1899) 92 Fed. 239.

The New York court of appeals having determined in People v. Dolan (1867) 36 N. Y. 59, that the New York act of 1866 established a system of taxation for bank shares "peculiar to itself and independent of the general system of taxation in existence in the state," and that "the act was intended as a substitute for the then existing mode of assessing and taxing that portion of the property of the state in the capital of such moneyed corporations," held, that an assessment of the shares of a national banking association, made under such act, was void for want of power in the assessors to make such assessment. National Albany Exch. Bank v. Hills (C. C. 1880) 5 Fed. 248.

It is not sufficient to invalidate the taxation of national bank shares to show that, in the case of a single state bank, the shares of which are subject to a like taxation, the assessors, either by mistake or intention, have shown favor. The system of assessment of bank shares, owing to the fact that the shares of different banks are differently rated, must necessarily be imperfect, and the law does not require absolute accuracy. It was the intention of congress to prevent the state by hos-

tile legislation, and the taxing officers by a hostile rule, from discriminating against national banks, to place all bank shares, state and national, on a common level. Where the shareholders have the same rights as other individuals taxed for moneyed capital, they should look to the statutes of the state for relief. Stanley v. Board of Sup'rs of Albany County (C. C. 1883) 15 Fed. 483.

Where it appears that the shares in a national bank have been assessed at their commercial value, estimated by their relation to the whole of the bank's moneyed capital, while several hundred thousand dollars of moneyed capital in the hands of individuals has escaped assessment altogether, by reason of the gross negligence or willful omission of the assessor, the bank thus assessed is entitled to have the entire assessment annulled. First Nat. Bank v. Lindsay (C. C. 1891) 45 Fed. 619.

Ky. St. § 4077, provided for the taxation of the franchises of all corporations for state and local purposes. As applied to national banks, such statute was held invalid by the supreme court of the United States, as in violation of this section. By act of March 21, 1900, it was provided that shares of stock of national banks should be assessed and taxes collected thereon in the same manner as real estate, and (section 3) that such banks which had not paid franchise taxes under the prior law should be assessed on their stock thereunder for the years subsequent to 1892. Held, that such retroactive provision could not be upheld as a curative statute, the prior law being void as to national banks, and that it was itself invalid, as in violation of this section, being applicable to national banks alone, without any provision for the retroactive taxation of other moneyed capital in the hands of individual citizens, and it being very improbable that the tax thereby imposed was the equivalent of the franchise tax required to be paid by other corporations. First Nat. Bank v. City of Covington (C. C. 1900) 103 Fed. 523.

The provision of the revenue law (Code Ala. § 358, subd. 2), which exempts from taxation money invested in state bonds, is sanctioned by immemorial custom of good faith and public honesty, a violation of which is not to be presumed to have been intended by congress, and is not an unfriendly discrimination against capital invested in national banks; but the provisions (section 362, subds. 8, 10) which authorize the taxpayer to deduct his indebtedness from the amount of "money loaned" and "solvent credits," taxing only the excess, and exempting from taxation such portion of the "capital stock of incorporated companies created under any law of the state as may be invested in property, and taxed otherwise as property," and limiting municipal taxation upon such corporations upon moneyed capital, discriminate unfavorably against shareholders in national banks, and are to that extent violative of the act of congress, and therefore, prior to Act Ala. Dec. 8, 1880, providing for the taxation of shares of stockholders in national banks, there was no statute in force under which a valid assessment of taxes could be made upon such shares. Pollard v. State (1880) 65 Ala. 628.

Act Ala. Dec. 8, 1880, providing for a tax on each share of every national bank, to be paid by the bank at "the same rate of taxation as is levied on other moneyed capital," money loaned and solvent credits being elsewhere taxed only after deduction of debts, is within the authority of this section. Maguire v. Mobile (1882) 71 Ala. 401.

Evidence of the failure of the state to tax shares of stock in a building and loan association is immaterial in determining the validity of a state tax on shares of stock in a national bank levied under Act Ariz. April 13, 1893, which following this section, provides that state taxation of such shares shall not be "at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens"; since the limitation applies solely to individuals, associations, or corporations whose business is similar to or parallel with that of a national bank in making profit by the use of moneyed capital as money. Consolidated Nat. Bank v. Pima County (1897) 48 P. 291, 5 Ariz. 142.

Kirby's Dig. Ark. §§ 6902, 6919–6924, requiring every bank to annually deliver to the assessor a statement of the amount of capital, undivided profits, value of moneys, credits, etc., the amount loaned to or deposited with the bank, and providing that the shares in banks taxable by law shall be listed by the officers thereof showing the names of the persons owning the same, and that the taxes assessed on the shares of stock thus listed shall be paid by the bank, etc., provide for the taxation of the shares of national bank stock, and not the capital stock of the bank itself, and the requirement of a schedule setting forth the enumerated things is merely intended as a method of arriving at the valuation of the shares, so that the statute meets the requirement of this section. First Nat. Bank v. Board of Equalization of Independence County (1909) 122 S. W. 988, 92 Ark. 335.

The fact that under the laws of California shares of stock in state banks and other state moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that Pol. Code Cal. §§ 3609, 3610, providing for the taxation of shares in national banks constitutes an invalid discrimination against national banks, where a different method has been adopted by the state for the assessment and taxation

tal engaged in the operation of banking. Palmer v. McMahon (1890) 10 Sup. Ct. 324, 133 U. S. 660, 33 L. Ed. 772.

The provision in this section that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens held not violated by Rev. St. Mont. div. 5, c. 53, § 1003, providing that, when the entire capital stock of any incorporated company shall be invested in assessable property in the territory, such stock shall not be taxed, as the restriction imposed refers to other "moneyed capital" used in making a profit on money by the use of the moneyed capital as money, and not to capital invested in mining, manufacturing, or transportation. Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 597, 139 U. S. 438, 35 L. Ed. 210.

This section refers only to moneyed capital which comes into competition with the business of national banks; and the exemption of the stocks and bonds of insurance, wharf, and gas companies, or other noncompeting capital or credits, is not an unlawful discrimination against national banks whose stock is taxed. First Nat. Bank v. County of Chehalis (1897) 17 Sup. Ct. 629, 637, 166 U. S. 440, 41 L. Ed. 1069.

The term "moneyed capital" is used in a restricted sense in this section, and what constitutes moneyed capital, within the meaning of this section, is to be determined by the nature of the business in which it is employed, the purpose of the statute being to prevent discrimination against national banks as such. Where capital is not so employed as to come into competition with the business of national banks, although in a general sense it is moneyed capital, it is within the discretion of the state to tax it at a different rate from banking capital. National Bank of Baltimore v. City of Baltimore (1900) 100 Fed. 24, 40 C. C. A. 254.

"Other moneyed capital" refers to other taxable moneyed capital, and the valuation of shares in national banks for taxation is not, within the meaning of that section, at a greater rate than the assessment of other moneyed capital, unless such other moneyed capital be subject or liable to taxation. Exchange Nat. Bank v. Miller (C. C. 1884) 19 Fed. 372.

The act of congress which protects national banks from injurious discriminations does not limit the standard of comparison to the "moneyed capital" invested in the "incorporated banks" of a state, but extends to all "moneyed capital in the hands of individual citizens of the state." To equalize the shares of national banks as to a part only of that moneyed capital is not to equalize them as to the whole, which is necessary to comply with the statute. First Nat. Bank v. Treasurer of Lucas County (C. C. 1885) 25 Fed. 749, appeal dismissed Treasurer of Lucas County v. First Nat. Bank (1888) 9 Sup. Ct. 804, 131 U. S. 450, 33 L. Ed. 201.

The term "moneyed capital" means money employed in a business whose object is to make profit by investing in securities by way of loan, discount, or otherwise, which from time to time are reduced again to money, and reinvested. Mercantile Nat. Bank v. Shields (C. C. 1894) 59 Fed. 952. It evidently meant either money itself or negotiable securities readily convertible into money and having a quotable market value, as distinguished from ordinary property. Mercantile Nat. Bank v. City of New York (C. C. 1886) 28 Fed. 776 (decree affirmed [1887] 7 Sup. Ct. 826, 121 U. S. 138, 30 L. Ed. 895); First Nat. Bank v. Richmond (C. C. 1889) 39 Fed. 309, 310 (appeal dismissed [1892] 13 S. Ct. 1044, 149 U. S. 769, 37 L. Ed. 959). It means capital employed in a business in which the stock in trade from which profits are expected to accrue is money, including in that term absolute money, legal substitutes for money, and commercial representatives of money. First Nat. Bank v. Turner (1900) 57 N. E. 110, 154 Ind. 456. It signifies capital employed in the operation of banking, and otherwise used as money as a source of profit. Ankeny v. Blakley (1903) 74 P. 485, 44 Or. 78. It was used in contradistinction to capital invested in stocks, etc., and meant that put into mere private or individual securities, and a state could levy no tax on national bank stock greater than that levied on mortgages, etc. Commonwealth v. Girard Bank (Pa. 1870) 1 Leg. Gaz. 46. But it refers only to capital coming into competition with the business of national banks, so that exemptions from taxation, however large, such as deposits in failing banks of money belonging to charitable institutions, which are exempted for reasons of public policy, are not forbidden by the statute. First Nat. Bank v. Chapman (1899) 19 Sup. Ct. 407, 409, 173 U. S. 205, 43 L. Ed. 669. And does not include capital which does not come in competition with the business of national banks. Commercial Nat. Bank v. Chambers (1901) 21 Sup. Ct. 863, 182 U. S. 556, 45 L. Ed. 1227, affirming judgment (1900) 61 P. 560, 21 Utah, 324, 56 L. R. A. 346.

Under the restriction contained in this section, shares are not taxable under the statute for the taxation of personal property generally; the owner of "other moneyed capital" invested in credits, whether by a corporation in which he is a stockholder, and which is assessed under Pol. Code Cal. § 3608, or by himself individually, being entitled by Id. § 3629, to a deduction from his assessment for debts due to bona fide residents of the state, while the owner of bank stock, which is prop-

erty, and not a credit, cannot obtain such deduction. McHenry v. Downer (1897) 47 P. 779, 116 Cal. 20, 45 L. R. A. 737.

The "moneyed capital" referred to is money invested in other banking institutions, and therefore, if the shares or personalty of other banks are taxed at their full value in addition to taxation on the real estate of such banks, the shares of national banks may also be taxed in the same manner. Illinois Nat. Bank v. Kinsella (1903) 66 N. E. 338, 201 Ill. 31.

This section permits the taxation of national bank shares, provided no discrimination is made against them in favor of stock of other banks in competition with national banks; the terms "other moneyed capital" being defined as capital in corporations carrying on the business of banking as defined by law and custom, and which is employed in competition with the business of national banks. Des Moines Nat. Bank v. City of Des Moines (Iowa, 1911) 133 N. W. 767.

Whether, under P. L. N. J. 1866, p. 1078, § 16, providing for the taxation of national bank stock, that stock is assessed at a greater rate than other moneyed capital in the hands of individual citizens of the state, in violation of this section, is a question of fact, to be decided in each case by the evidence respecting the taxes assessed in the particular district wherein the stock is taxed; and, in all cases where discrimination against national bank stock appears, our laws afford ample remedy, by application to the commissioners of appeal and the state board of taxation, and by certiorari to this court. Mechanics' Nat. Bank v. Baker (1900) 46 A. 586, 65 N. J. Law, 113, affirmed (1901) 48 A. 582, 65 N. J. Law, 549.

National banks are not protected against discriminatory taxation in favor of other "moneyed capital" by this section, unless such capital is employed in a business competitive with that of such bank. First Nat. Bank of Raton v. McBride (N. M. 1915) 149 P. 353.

The term, "moneyed capital in the hands of individual citizens of such state," and similar language in Rev. St. Tex. art. 5080, providing that "nothing herein shall be so construed as to tax national or state banks or the shareholders thereof at a greater rate than is assessed against other moneyed capital in the hands of individuals," refer to capital owned by natural persons, and not to capital belonging to corporations. Primm v. Fort (1900) 57 S. W. 972, 23 Tex. Civ. App. 605, denying rehearing (1900) 57 S. W. 86, 23 Tex. Civ. App. 605.

The words "other moneyed capital," as used in this section, does not mean all capital, the value of which is measured in terms of money, nor all forms of investment in which the interest of the owner is expressed in money, nor shares of stock represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire property of the corporation, nor real or personal property, such as ordinary chattels or commodities, nor investments in manufacturing and industrial enterprises; but does include shares of stock or other interest owned by individuals in enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by the use of money. First Nat. Bank v. Christensen (Utah, 1911) 118 P. 778.

In an action by a national bank, based on this section, an allegation that "all the moneyed capital owned by resident individual citizens, and invested in interest-bearing loans, discounts, and securities, except that owned by and invested in incorporated banks," is unassessed capital, etc., does not set forth with sufficient particularity that there are left unassessed classes of moneyed capital which come into competition with national banks. Washington Nat. Bank v. King County (1894) 9 Wash. 607, 38 Pac. 219.

30. Discrimination in valuation.—The valuation of national bank shares at a higher percentage than other moneyed capital is a violation of this section. Pelton v. Commercial Nat. Bank (1879) 101 U. S. 143, 144, 25 L. Ed. 901.

Where a county assessor assessed the stock of all the banks in the county at the par value, and the actual value of the shares of a national bank was from 25 to 30 per cent. above par, while the actual value of the shares of all the banks in the county with one exception were above par, varying from 10 to over 100 per cent., the assessment came as near as practicable to securing between state and national banks equality and uniformity of taxation, and was valid. Williams v. Albany County (1887) 7 Sup. Ct. 1244, 1255, 122 U. S. 154, 30 L. Ed. 1088.

An order of a state board for the equalization of property for taxation, which increases the assessment of shares of a national bank above that of other property in the county, is within the prohibition of this section. Whitbeck v. Mercantile Nat. Bank (1888) 8 Sup. Ct. 1121, 1122, 127 U. S. 193, 32 L. Ed. 118.

A discrimination against national banks and in favor of state banks and other moneyed corporations results from the taxation of shares of stock of national banks, under Pol. Code Cal. §§ 3608–3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the property of state banks and other moneyed corporations does not require, although

property is defined by Const. Cal. art. 13, § 1, as including franchises, that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock. San Francisco Nat. Bank v. Dodge (1905) 25 Sup. Ct. 384, 386, 197 U. S. 70, 49 L. Ed. 669.

Inequalities in the valuation of shares of national bank stock, under constitution and laws of a state requiring that all property shall be taxed upon its value by a uniform rule, afford no ground for relief unless it be shown that there was an intentional discrimination. Exchange Nat. Bank v. Miller (C. C. 1884) 19 Fed. 372.

It is no less an unlawful discrimination that the national bank shares are in fact assessed below "their true value in money." First Nat. Bank v. Treasurer of Lucas County (C. C. 1885) 25 Fed. 749, appeal dismissed Treasurer of Lucas County v. First Nat. Bank (1888) 9 Sup. Ct. 804, 131 U. S. 450, 33 L. Ed. 201.

This section prohibits an adverse discrimination by a local government in the valuation of national bank stock for assessment, as compared with the assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money. Puget Sound Nat. Bank v. King County (C. C. 1893) 57 Fed. 433.

Pol. Code Cal. § 3640, establishing a mode for assessing corporations, including national banks, enacted that a corporation owning or possessing shares of the capital stock of another company shall be assessed therefor, and that, if a corporation has its principal place of business in the state, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, dividing the remainder by the entire known shares into which its capital stock is divided, and that the holder of capital stock whose principal place of business is not in the state must be individually assessed for such stock. Held, that these provisions, so far as applied to national banks, violated this section. Miller v. Heilborn (1881) 58 Cal. 138.

Const. 1879, art. 13, § 1, required taxation of all nonexempt property in proportion to value and defined "property" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters or things, capable of private ownership. Pol. Code Cal. § 3607, provided that all property not exempt must be taxed, except that nothing therein contained should be construed to authorize double taxation, and section 3608 declared that shares of stock in corporations possessed no intrinsic value over the actual value of the property of the corporation, and that all such property should be assessed and taxed, but that no assessment should be made of shares of stock, nor should any holder thereof be taxed thereon. The section was subsequently amended to exclude national bank shares. Held, that since, under such provisions, all the elements of value contained in corporate stock were subject to taxation to the corporation, sections 3609, 3610, providing for the taxation of stock in national banks, did not constitute a discrimination against the latter, prohibited by this section. Crocker v. Scott (1906) 87 P. 102, 149 Cal. 575.

Hurd's Rev. St. Ill. 1899, p. 1393, § 1, provides that there shall be taxed (first) "all real and personal property" in the state except as otherwise exempted; (third) the stock of banks and banking companies. Pages 1400, 1401, §§ 35–39, provide a method whereby the stockholders in every bank in the state, whether organized under state or national law, shall be assessed and taxed on the value of such bank stock. Page 1399, § 30, provides that "every bank (other than national banks), banker, broker or stock jobber" shall list with the assessor all the property, "except real estate which shall be listed and assessed as other real estate is listed and assessed under this act," in a manner prescribed, so as to obtain a statement of the net personal property of the bank. Held, that the stock or personalty of every state or private bank was to be assessed at its full value, in addition to the taxation on real estate, and therefore there was no discrimination against national banks or their shareholders, similarly taxed. Illinois Nat. Bank v. Kinsella (1903) 66 N. E. 338, 201 Ill. 31.

The owner of bank stock is not discriminated against by section 30 of the revenue act, which taxes unincorporated state banks on a valuation based on the difference between their assets and liabilities. Bressler v. Wayne County (1891) 32 Neb. 834, 49 N. W. 787, 13 L. R. A. 614.

An assessment of the shares of a national bank at their fair value in money, after deducting the proportionate part of the value of the bank's realty, is not in conflict with this section, since there is no unjust discrimination as between an individual shareholder of a bank, who is taxed on his shares as on other personal property, and the individual citizen, who is taxed on his personal property. Pacific Nat. Bank v. Pierce County (1899) 56 P. 936, 20 Wash. 675.

31. Discrimination in allowing deductions.—A state statute refusing to a stockholder the same deduction for debts, from the valuation of his shares, as is allowed to those having moneyed capital otherwise invested, held to violate this section. New York ex rel.

Williams v. Weaver (1879) 100 U. S. 539, 542, 25 L. Ed. 705.

A state statute, authorizing the taxation of national bank stockholders in the value of their shares, conflicts with this section so far as it does not permit the deduction of the stockholder's debts from the assessed value of the stock, where the owner of all other personal property is allowed that privilege. This does not render the statute void, for the stockholder may have no debts, and if he has debts the assessment is voidable, and the taxing officer acts without authority only after notice that he has debts which should be deducted. Albany County v. Stanley (1881) 105 U. S. 305, 308, 26 L. Ed. 1044.

A state statute taxing national bank shares without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments, is a discrimination forbidden by this section, and a perpetual injunction should be granted as to those shareholders who proved that at the time of the assessment they owed debts which should rightfully have been deducted. Evansville Nat. Bank v. Britton (1881) 105 U. S. 322, 324, 26 L. Ed. 1053.

Where a state law requires assessors to assess to each taxpayer his real estate at its value, and his personal estate at its full value, after deducting debts owed by him, and providing that if, before the completion of the assessment, he makes affidavit "that the value of the personal estate owned by him, after deducting his just debts and his property invested in the stock of any corporation liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more," and a statute subsequently passed, relating to the taxation of bank shares, made no provision for deducting debts, held, that such statutes remain a valid rule of assessment for shareholders of national banks who have no debts to deduct, that the prior statute is not in conflict with the act of congress, and that the later statute is valid, except that it does not authorize a deduction for debts of the shareholder, which, being a distinct and separable principle, will not invalidate the whole act. Supervisors of Albany v. Stanley (Sup. 1882) 12 Fed. 82.

Act N. Y. April 23, 1866 (Laws 1866, c. 761), providing for the taxation of shares in national banks, conflicts with this section in so far as it does not permit a stockholder of a national bank to deduct the amount of his debts from the assessed value of his stock, but permits the owner of other taxable property to do so, but an assessment under the state statute without such deduction is not invalid for that reason unless the stockholder shows the assessors what his just debts are and takes steps to have the assessment made accordingly. Stanley v. Albany County (1887) 7 Sup. Ct. 1234, 121 U. S. 535, 30 L. Ed. 1000.

Where the laws of a state allow a taxpayer owning moneyed capital to make a deduction from the amount assessed against him of his bona fide indebtedness, no such provision being made for the indebtedness of holders of bank stock, they are entitled to such deduction, although they omitted to make demand therefor till after the return of the shares for assessment and the session of the state board of equalization. Whitbeck v. Mercantile Nat. Bank (1888) 8 Sup. Ct. 1121, 1122, 127 U. S. 193, 32 L. Ed. 118.

That a state statute permits some debts to be deducted from some moneyed capital for assessment for taxation, but not from that which is invested in the shares of national banks, does not show a violation of this section. First Nat. Bank v. Ayers (1896) 16 Sup. Ct. 412, 413, 160 U. S. 660, 40 L. Ed. 573.

Rev. St. Ohio, § 2759, relating to the taxation of unincorporated banks and bankers, provides for deducting the debts of the business from the amount of capital employed therein, and assessing the remainder for taxation, without permitting a further deduction of the banker's general debts. Section 2762 to 2766, relating to incorporated banks, state and national, require the shares of stock to be listed at their "true value in money," which is taken as the assessment after first deducting the amount of the bank's real estate, which is taxed separately. Held, that the true value of the shares in money can only be ascertained by deducting the debts of the bank from its assets; and hence the result is practically the same as in the case of unincorporated banks, so that there is no unlawful discrimination in favor of the latter, and against national banks. First Nat. Bank v. Chapman (1899) 19 Sup. Ct. 407, 410, 173 U. S. 205, 43 L. Ed. 669.

The fact that, by the tax laws of Ohio (Rev. St. § 2730f), the owners of what are termed "credits" are allowed to deduct their debts therefrom, and are assessed only upon the balance, while no such right of deduction is given to the owners of national bank shares, cannot be held an unlawful discrimination against the latter, in the absence of any data from which the court can determine what proportion the moneyed capital of individual citizens included in the term "credits" bears to the amount invested in national bank shares. Id.

The refusal to deduct the value of real estate owned in other states by a

national bank from the value of a stock does not make an unlawful discrimination against such banks under this section, where such deduction is not authorized by the laws of the state in valuing shares of other corporations. Commercial Nat. Bank v. Chambers (1901) 21 Sup. Ct. 863, 864, 182 U. S. 556, 45 L. Ed. 1227.

The imposition upon the basis of book values of a 1 per cent. tax upon national bank stock under the New York tax law (Laws 1909, c. 62), which forbids any deductions because of the personal indebtedness of the shareholders, such as are allowed when assessing other taxable personal property, does not contravene the provision of this section, where shareholders in state banks are subjected to precisely the same taxation, and a substantially similar burden is imposed upon shareholders in trust companies and savings banks by the franchise tax of 1 per cent. on the capital stock, surplus, and undivided profits of the trust companies, and on the surplus and undivided earnings of the savings banks, while individual bankers, who are entitled to the privilege of deduction for personal debts, are taxed at the higher general tax rate locally applicable upon the amount of capital invested in the banking business. New York ex rel. Amoskeag Sav. Bank v. Purdy (1913) 34 Sup. Ct. 114, 231 U. S. 373, 58 L. Ed. 274.

The provision of Pol. Code Cal. § 3609, relating to the assessment and taxation of national bank shares, that in making the assessment to each stockholder there shall be deducted from the value of his shares "such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank," is valid and enforceable, when construed in harmony with the other parts of the section and the express declaration therein that such shares shall not be taxed at a greater rate than other moneyed capital in the hands of individual citizens of the state; its purpose being to require the deduction from the total value of the bank stock, not only of the value of its real estate, which is taxable to the bank, but also of the value of all other property owned by the bank which would be exempt from taxation, under the laws of the state, in the hands of owners of other moneyed capital, and to thus fix the basis for the value of shares in the hands of the stockholders. Nevada Nat. Bank v. Dodge (1902) 119 Fed. 57, 56 C. C. A. 145.

Pol. Code Cal. § 3609, construed and held to give stockholders in national banks the right to the same deductions from the assessed value of their shares as is allowed to local banks and individual owners of other moneyed capital. Id.

Where moneyed capital was taxed a fixed amount per share, but a reduction of indebtedness was allowed before the assessment, a similar tax, without a deduction, on national banks, was invalid. City Nat. Bank v. Paducah (C. C. 1877) Fed. Cas. No. 2,743.

The restriction contained in this section was violated by Act N. Y. April 23, 1866, providing that a bank shareholder who had been assessed upon the value of his shares was not entitled to any deduction on account thereof as allowed by the general laws of this state in so far as the act related to the shares of a national banking association. National Albany Exch. Bank v. Hills (C. C. 1880) 5 Fed. 248, 250, reversed (1881) 105 U. S. 319, 26 L. Ed. 1052.

By the revenue law of Indiana of 1872, capital represented by credits, which include money at interest within or without the state, is not taxed for its full or fair value, but only on the balance which may remain after deducting the amount of the taxpayer's bona fide indebtedness, while capital represented by national bank stock is taxed according to its fair value, without allowance for debts. Held, that the law is in conflict with this section, and therefore invalid. Evansville Nat. Bank v. Britton (C. C. 1881) 8 Fed. 867.

Under Act La. 1888, § 27, relating to taxation of national bank shares, making no deduction for that part of the bank's property entering into their value which consists of nontaxable state and national securities, which deduction may, under the act, be made by individuals, a tax on national bank shares violates this section, and it is immaterial that the same discrimination is made against other corporations. Whitney Nat. Bank v. Parker (C. C. 1890) 41 Fed. 402.

Rev. St. Ohio, § 2730, allows a deduction of legal bona fide debts owing by citizens of the state to be made from credits held by them for purposes of taxation, but the state courts hold that such deduction is not allowable from shares in a national bank. Held, that this is a discrimination in favor of "other moneyed capital" of the state, and against national banks, within the prohibition of this section, and it is not less so from the fact that the deduction is also denied in the case of shares of railroads, insurance companies, and manufacturing corporations, for they are not "moneyed capital." Mercantile Nat. Bank v. Shields (C. C. 1894) 59 Fed. 952.

The provisions of the statutes of Ohio permitting the deduction of indebtedness from "credits" for purposes of taxation do not constitute discrimination in favor of other moneyed capital, as against shares in national banks, within the meaning of this section, merely because such credits are defined

to include deposits in savings banks and shares in building and loan associations, and in the absence of proof that such statutes in fact operate to exempt from taxation moneyed capital which comes into competition with the business of national banks. Mercantile Nat. Bank v. Hubbard (C. C. 1899) 98 Fed. 465.

A statute imposing taxes on bank shares, and requiring the assessment of such shares to be at their market value without making any deduction on account of the real estate owned by the bank, is not discriminative and invalid, under this section, where it applies to all banks. People's Nat. Bank v. Marye (C. C. 1901) 107 Fed. 570, decree modified (1903) 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180.

That the statutes of a state permit a taxpayer to deduct the amount of his indebtedness from the amount of all bonds, notes, and other evidences of debts which he is required to return for taxation does not render the assessment of national bank shares at their market value, without allowing the holder to deduct his indebtedness, an unlawful discrimination against such shares, and in favor of other moneyed capital, where the same rule of assessment applies to all bank shares. Id.

While a provision of a state revenue statute that stockholders in national banks shall not be entitled to any deduction from the assessed valuation of their shares because of debts owed by them, while owners of other "money, credits, or investments" are allowed such deduction, is invalid as applied to a stockholder who owes debts and who has not sufficient other money, credits, or investments from which such debts may be deducted, as subjecting him to taxation "at a greater rate than is assessed on other moneyed capital in the hands of individual citizens" of the state, in violation of this section, it is not so invalid as to a stockholder who is not actually affected by it to his detriment, and a bill filed by a bank to enjoin the collection of taxes imposed on its stockholders because of such provision must allege facts showing the portion of the tax so rendered illegal, and that the valid portion has been paid or tendered, in order to entitle the complainant to equitable relief. Charleston Nat. Bank v. Melton (C. C. 1909) 171 Fed. 743; Citizens' Nat. Bank of Charleston v. Same, Id. 751.

The fact that Code Ala. 1907, § 2082, subd. 9, providing for the taxation of shares of corporations other than banks, permits a deduction of the value of the taxable real and personal property of such corporations does not render subdivision 8, providing for the taxation of shares of banks, subject only to a deduction of the assessed value of the real estate of the banks, discriminatory in violation of this section. Tarrant v. Bessemer Nat. Bank (Ala. App. 1913) 61 So. 47.

Code Ala. 1907, § 2082, subd. 8, providing for the taxation of shares of banks, including national banks, does not discriminate in favor of private individuals merely because it does not allow a deduction of the amount invested by banks in exempt bonds of the state. Id.

The tax law of 1881 (Rev. St. Ind. 1881, §§ 6332, 6333, 6336) provides that in the assessment and taxation of credits the individual taxpayer, as owner thereof, may deduct therefrom his bona fide debts, except debts of certain designated classes, but no provision is made for deducting such debts from the value of shares of national bank stock. Held, that the statutes are, so far as they prevent deduction from national bank stock, repugnant to this section. Wasson v. First Nat. Bank (1886) 8 N. E. 97, 107 Ind. 206.

Under this section, where the value of government bonds owned by state and savings banks within the state are required to be deducted from their assets in making assessments against them, the value of such bonds held by national banks doing business in competition with state banks in the state must be deducted in determining the value of the shares of such national banks for taxation. Des Moines Nat. Bank v. City of Des Moines (1911) 133 N. W. 767, 153 Iowa, 336.

Code Supp. Iowa 1913, §§ 1310, 1311, 1321, 1322, 1322—1a, providing for deducting United States bonds from property of private banks in assessing shares, held not a discrimination against shareholders of national banks. Head v. Board of Review of City of Jefferson (Iowa, 1915) 152 N. W. 600.

Comp. Laws Mich. § 969, enumerating as taxable property all credits in excess of the debts of the persons taxed, is not in conflict with this section, even though no deductions are made from the value of the bank stock. First Nat. Bank of St. Joseph v. St. Joseph Tp. (1881) 46 Mich. 526, 9 N. W. 838.

The fact that the revenue law of Nebraska (section 27) authorizes the individual taxpayer, in listing his property for taxation, to deduct the bona fide debts owing by him from the gross amount of his "credits," does not render a denial of the right of an owner of national bank stock to deduct his bona fide indebtedness from the value of such stock a discrimination against him, within the meaning of this section. The "credits" of the individual taxpayer mentioned in the revenue act are not "moneyed capital," within the meaning of section 219. Bressler v. Wayne County (1891) 32 Neb. 834, 49 N. W. 787, 13 L. R. A. 614, overruling (1889) 25 Neb. 468, 41 N. W. 356.

Laws N. Y. 1880, c. 596, imposes no limitations on the power of the assessors to make such deductions as this section requires, and is not invalid, therefore, in not providing for neces-

sary deductions. McMahon v. Palmer (N. Y. 1882) 11 Daly, 214.

Tax Law N. Y. (Laws 1896, c. 908) § 21, subd. 4, authorizes the deduction of the just debts of a person or corporation assessed in determining the amount of his assessment for taxation. Section 24, as amended by Laws N. Y. 1901, c. 550, provides that the rate of tax on bank stock shall be 1 per cent. on the value thereof, ascertained as therein provided, and that the owners of bank stock shall be entitled to no deduction from the taxable value thereof because of their personal indebtedness. Held, that section 24 did not constitute a discrimination against national bank stock. People v. Feitner (1907) 105 N. Y. S. 993, 120 App. Div. 838, order reversed (1908) 83 N. E. 592, 191 N. Y. 88.

Tax Law N. Y. (Laws 1896, c. 908) § 23, as amended by Laws 1901, c. 550, provides that the fiscal officer of every bank shall report to the assessor the amount of its authorized capital stock, number of shares, and their par value, the amount of stock paid in, amount of surplus and undivided profits, and a list of stockholders and their respective holdings. Section 24, as amended by Laws N. Y. 1901, c. 550, provides that the rate of tax on bank stock shall be 1 per cent. on the value thereof, ascertained by adding together the amount of the capital stock, surplus, and undivided profits, and dividing the result by the number of shares outstanding, provided that the rate shall not be greater than that assessed upon other moneyed capital in the hands of individual citizens, and that the owners of the stock shall be entitled to no deduction from the taxable value thereof, because of their personal indebtedness. Held, that an assessment based upon sections 23 and 24 was not void as being a discrimination against national bank stock, because no deduction of debts was allowed, as is permitted in the case of other corporations and individuals. People v. Feitner (1908) 83 N. E. 592, 191 N. Y. 88, reversing order (1907) 105 N. Y. S. 993, 120 App. Div. 838.

The revenue act of North Carolina (Acts 1885, c. 177, § 12) enumerates what shall be deemed solvent credits, within the meaning of the act, and provides that the party taxed "may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor." Held, that the holder of stock of a national bank located in said state was entitled to deduct his indebtedness from the valuation of his shares of said stock, although national bank stock was not included in the list of "solvent credits" enumerated in the state statute. McAden v. Mecklenburg County Com'rs (1887) 2 S. E. 670, 97 N. C. 355.

The state cannot tax national bank stock in excess of other moneyed capital of its citizens, as by refusing to deduct the excess of debts over credits of the stockholders from the amount of their stock. First Nat. Bank v. Chapman (1894) 9 Ohio Cir. Ct. R. 79.

The single fact that Rev. St. Ohio, § 2730, permits some debts to be deducted from some moneyed capital, but not from that invested in national bank shares, does not show that the amount of moneyed capital in Ohio from which debts may be deducted, as compared with the moneyed capital invested in national bank shares, is so substantial as to amount to an illegal discrimination against national bank shareholders. Chapman v. First Nat. Bank (1897) 47 N. E. 54, 56 Ohio St. 310.

Statutes of Texas permitting private banks to deduct their deposits from their taxable assets do not discriminate against national banks, which are, by act Tex. March 31, 1885, required to render a sworn statement of the number of their shares, each share for its actual cash value, less its proportion of real estate, which is taxed separately, since, to determine such value, it is necessary to deduct deposits, as debts against the bank. Engelke v. Schlender (1890) 75 Tex. 559, 12 S. W. 999.

The owner of national bank stocks is entitled under this section to have bona fide debts set off against the assessed value of his stock, when the law of the state authorizes such debts to be set off against shares of capital stock of a state bank or against moneyed capital used in competition with national banks. Newport v. Mudgett (1897) 51 P. 466, 18 Wash. 271.

32. Discrimination in allowing exemptions.—The laws of Pennsylvania removed the burden of county taxation from railroad securities, from shares of stock in any company liable to pay a certain tax into the state treasury, from mortgages, judgments, and recognizances of every kind, from moneys owing upon agreements for the sale of real estate, and from all loans made by corporations, which were taxable for state purposes, when the state tax should be paid. In an action to enjoin the levying of a county tax upon certain shares in a national bank in such state, brought on the ground that such tax was inconsistent with this section, the bill showed large amounts of property in the state of the kind mentioned above as exempt from county taxation. Held, that a demurrer to the bill was improperly sustained. Boyer v. Boyer (1885) 5 Sup. Ct. 706, 113 U. S. 689, 28 L. Ed. 1089.

The exemption or nontaxation of deposits in savings banks, municipal bonds, and stocks of foreign corporations are not violations of this section. Mercantile Nat'l Bank v. New York (1887) 7 Sup. Ct. 826, 830, 121 U. S. 138, 30 L. Ed. 895.

Act N. J. April 11, 1866, § 15, provides that all private corporations, excepting banking institutions, and those which by virtue of any contract in its charter, or other contracts with the state are exempted from taxation, and except mutual life insurance companies specially taxed, are taxed at the full amount of their capital stock paid in and accumulated surplus, but any realty owned by such corporations in any other state shall not be liable to be estimated in such accumulated surplus, and shall not be assessed against the stockholders, and such corporations as have no capital stock other than that excepted shall be assessed for the full amount of the property without deduction for debts, but depositors in savings banks shall be exempted from taxation on their personal estate to the amount of their deposits. Held, that assessments of national banks under this statute were not invalid as discriminating against such banks contrary to this section. Nat. Newark Banking Co. v. Newark (1887) 7 Sup. Ct. 839, 121 U. S. 163, 30 L. Ed. 904.

A bill by a national bank to enjoin the collection of taxes on its stock, alleging that moneyed capital in the state, a specified amount of which was invested in stocks and bonds of insurance, wharf, and gas companies, and another specified amount in loans and securities payable to citizens, the nature of which was not indicated other than by the allegation of the legal conclusion that they were "taxable," was exempted from taxation, does not show a discrimination against the bank in violation of this section, by taxing its stock at a greater rate than was assessed on other moneyed captal in the hands of citizens of the state. First Nat. Bank v. County of Chehalis (1897) 17 Sup. Ct. 629, 637, 166 U. S. 440, 41 L. Ed. 1069.

If the taxation laws of a state subject to taxation the capital stock of certain corporations, but exempt the shares held by the several stockholders, while the shares of national bank stock are subject to taxation in the hands of the shareholders, but the capital stock itself is exempt, held, that there is here no such discrimination against capital invested in national banks as to conflict with this section. Mercantile Nat. Bank v. City of New York (C. C. 1886) 28 Fed. 776, decree affirmed (1887) 7 Sup. Ct. 826, 121 U. S. 138, 30 L. Ed. 895.

This section is violated when bank shares are assessed, under Revenue Act La. 1888, § 27, at their commercial value as rated or related to the entire capital of the bank, including United States and state bonds, while individuals, firms, or corporations are, under section 28 of that act, assessed on the items of their capital or stock, which assessment excludes United States or state bonds; they being exempt from direct taxation. First Nat. Bank v. Lindsay (C. C. 1891) 45 Fed. 619.

Mining claims, being real estate, are a different class of property from the stock of national banks; and the fact that taxes are laid upon the claims belonging to mining corporations under 12 Sess. Laws Mont. p. 67, and not upon the stock of such corporation, and that such claims are assessed at the rate of five dollars per acre, without regard to value, while the stocks of national banks are assessed at their market value, is not a discrimination within the meaning of this section. Silver Bow County Com'rs v. Davis (1887) 6 Mont. 306, 12 Pac. 688.

This section is not infringed by state laws, which provide that all personal property, including money and all debts owing by solvent debtors, and shares in national and state banks and other corporations, shall be assessed at their true value and taxed at an equal rate, even if these laws also provide that certain property, including shares in certain classes of corporations, shall be exempt from taxation. Stratton v. Collins (1881) 43 N. J. Law (14 Vroom) 562.

The only effect of Act N. J. May 11, 1905 (P. L. p. 457), in determining the value of national bank stock is to allow an individual taxpayer to claim the same deductions and exemptions as against the asssessment of his shares of national bank stock as he might against the assessment of his other personal property. Lippincott v. Lippincott (N. J. Sup. 1907) 66 A. 113.

This section does not prohibit the states from exempting any subjects from taxation. Appeal of Gorgas (1872) 79 Pa. (29 P. F. Smith) 149.

This section does not prevent a state, which exempts from taxation certain forms of moneyed capital, from taxing shares of stock in national banks. McLaughlin v. Chadwell (1872) 54 Tenn. (7 Heisk.) 389.

This section is intended merely to prevent moneyed capital invested in national banks from being placed at a disadvantage as compared with moneyed capital in the hands of citizens of the state, used for practically an identical purpose with that invested in the stock of national banks; and the nontaxation of credits owing to individual citizens, such as accounts, promissory notes, and mortgages, is not an unlawful discrimination against national banks whose capital is taxed. First Nat. Bank v. Chehalis County (1893) 6 Wash. 64, 32 Pac. 1051.

A case of discrimination against national banks arises only when the moneyed capital employed in the hands of individual owners in carrying on operations of the same character as those by national banks is some considerable amount, and is exempt by operation of law or by the willful act of the assessors. Washington Nat. Bank v.

King County (1894) 9 Wash. 607, 38 Pac. 219.

33. **Discrimination between banks.**—An exemption from taxation of deposits in savings banks is not a discrimination against national banks. Mercantile Nat. Bank v. City of New York (1887) 7 Sup. Ct. 826, 121 U. S. 138, 30 L. Ed. 895 (affirming decree [C. C. 1886] 28 Fed. 776); Richards v. Incorporated Town of Rock Rapids (C. C 1887) 31 Fed. 505.

Taxes levied under Pub. St. Mass. c. 13, § 8, which provides that all bank shares shall be assessed at their cash value, and at the same rate and no greater than other moneyed capital in the hands of citizens is by law assessed, are not invalid, under this section, because, under statutory provisions, the tax on savings banks is based on the amount of their deposits, excepting deposits invested in loans secured on taxable real estate, since savings banks are organized for the purpose of investing the savings of small investors, and not for banking purposes in the commercial sense. National Bank of Redemption v. Boston (1888) 8 Sup. Ct. 772, 773, 125 U. S. 60, 31 L. Ed. 689.

A state statute giving banks the option to pay a tax of four mills on each dollar on the actual value of their shares, or of collecting from their shareholders and paying into the state treasury a tax of eight mills on the dollar of the par value of the shares, does not conflict with this section, which does not forbid discrimination between national banks, but only as between such banks and state banks or other moneyed capital. Merchants' & Manufacturers' Nat. Bank v. Pennsylvania (1897) 17 Sup. Ct. 829, 830, 167 U. S. 461, 42 L. Ed. 236.

A discrimination against national banks, forbidden by this section, does not necessarily result from the adoption by the state of a different method of taxation with reference to national banks from that adopted for state banks. Covington v. First Nat. Bank (1905) 25 Sup. Ct. 562, 563, 198 U. S. 100, 49 L. Ed. 963.

Where the state board of equalization for the "incorporated banks" of the state attempts to equalize the national banks in one class inter sese, and the state banks in a separate class inter sese, but adopts one standard of percentages for the state banks and another standard for the national banks, upon the same basis of principal sums for calculation as to each class, and maintains the average of one class at a different figure from the average of the other, if the result be an assessment of the national banks at a higher valuation, comparatively, than the others, this is evidence, in a general way, of a discrimination that is unlawful, and if it produces, as to the plaintiffs, an injurious discrimination, by assessing their shares at a valuation higher than other moneyed capital in the county or city where they are located, the excessive taxation will be restrained. First Nat. Bank v. Treasurer of Lucas County (C. C. 1885) 25 Fed. 749, appeal dismissed Treasurer of Lucas County v. First Nat. Bank (1888) 9 Sup. Ct. 804, 131 U. S. 450, 33 L. Ed. 201.

It is just as much against the statute to discriminate in favor of one national bank as against another as it is to discriminate in favor of other citizens. Id.

Laws Iowa 1866, c. 108, providing for the taxation of shares in national banks, is unauthorized and invalid, since shares of state banks are not taxed. Hubbard v. Johnson County Sup'rs (1867) 23 Iowa, 130.

The taxation of private banks and bankers on the aggregate value of the property invested in the business, while incorporated banks, including national banks, are taxed by means of an assessment of the value of the corporate shares, does not constitute a discrimination against national banks, though in the one case United States bonds are treated as exempt, and deducted from the aggregate of stocks and bonds, and in the other the value of the corporate shares is determined by including the value of United States bonds. National State Bank v. City of Burlington (1903) 94 N. W. 234, 119 Iowa, 696.

The taxation of national banks by valuation of the shares of stock owned therein (such shares being assessed to the stockholders at the place where the bank is located) is substantially the same as that authorized with reference to state and savings banks, which are directly taxed by valuation of the aggregate shares thereof (United States bonds being included in determining the valuation of the aggregate shares), and there is no discrimination against national banks. Id.

The par value of the shares of a national bank was $100. The statement furnished by the bank to the assessor showed that the value of the stock did not exceed $112 per share. There was evidence that the bank had sold for purposes of investment stock at $175 per share. Each share for purposes of assessment was fixed at $130. Assessments made against a state and a savings bank fixed the shares at $120. Transfers of the savings bank stock had been made at $137 per share. The capital stock of the state bank was $50,000, surplus $10,000, and an item of $20,000 was deducted as total amount of debt. Held not to show any such discriminaion against the national bank as to warrant interference by the courts. First Nat. Bank v. City Council of Estherville (Iowa, 1907) 112 N. W. 829.

Under this section, an assessment on shares of stock in a national bank, where, under Code Iowa, §§ 1321–1325,

shares of stock in state and savings banks are not taxable, is an invalid discrimination against national banks. First Nat. Bank v. City Council of Estherville (Iowa, 1911) 129 N. W. 475.

The proviso in this section does not prevent the state from taxing stock in national banks at a greater rate than that imposed on the most favored state banks. Deposit Bank v. Daviess County (1897) 102 Ky. 174, 39 S. W. 1060, 19 Ky. Law Rep. 248, 44 L. R. A. 825.

Under Const. Ky. § 181, as amended, empowering the General Assembly to authorize cities to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses, or franchises, in lieu of an ad valorem tax thereon, and Act Ky. March 18, 1904 (Laws 1904, c. 33), passed pursuant thereto, giving cities such authority, an ordinance providing for the levying of a tax on state and national banks and trust companies, based on income, licenses, or franchises, is void as to national banks; and if the shares of such banks should be assessed on an ad valorem basis, while the state banks are taxed under the ordinance, the assessment would be void as to national banks as a discrimination in favor of state banks and trust companies, the rate on the ad valorem basis being higher than that paid by the state banks and trust companies under the ordinance. George Schuster & Co. v. City of Louisville (1905) 89 S. W. 689, 28 Ky. Law Rep. 588, 124 Ky. 189.

This section is not violated because two banks which have retained their state organization are taxed a less amount under their charter by special privilege. Lionberger v. Rowse (1868) 43 Mo. 67.

Since under P. S. Vt. 804–820, taxing interest-bearing national bank deposits, owners thereof are required to pay a single tax to the state at a fixed rate less than the average rate of taxes imposed under the general law, such act is not unconstitutional as discriminating against national banks in that all their deposits bearing interest were taxed to the depositors, while only deposits in savings institutions exceeding $2,000 were similarly taxed. State v. Clement Nat. Bank (Vt. 1911) 78 A. 944.

34. Shares owned by nonresidents.—The retroactive provision of Act Ky. March 21, 1900, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited by this section, where, until the passage of that act, national banks were not required to return for taxation shares of their capital stock held outside of the state. Covington v. First Nat. Bank (1905) 25 Sup. Ct. 562, 565, 198 U. S. 100, 49 L. Ed. 963, affirming judgment First Nat. Bank v. Covington (C. C. 1903) 129 Fed. 792.

Under this section a nonresident shareholder, being compelled to pay the tax at such place, is entitled to all deductions from the value of his shares, on account of debts, that are allowed to resident shareholders. Mercantile Nat. Bank v. Shields (C. C. 1894) 59 Fed. 952.

This section makes unlawful the imposing by, or by the authority of, a state, of a tax, on shares owned by an inhabitant thereof in the capital stock of a national banking association organized under that statute, and established in another state. Flint v. Board of Aldermen of City of Boston (1868) 99 Mass. 141, 96 Am. Dec. 713.

The provisions of Act Mass. June 11, 1868 (St. 1868, c. 349), taxing shares in national banks owned by nonresidents of the state, are not unconstitutional, as exceeding the limitation prescribed to the rate of assessment by this section. Providence Inst. for Savings v. City of Boston (1869) 101 Mass. 575, 3 Am. Rep. 407.

The general statute (Sess. Laws Mich. 1875, p. 185) providing for the taxation of bank stock held by nonresidents of the town in which the bank is located, who are residents of another township in the same county, in the township where they reside, the charter of the village of Cassopolis, authorizing the taxation of "all property, real and personal, within the limits of said village," not exempt from taxation for county and township purposes, does not warrant the taxation by the village of the shares of stockholders who reside in another township in the same county. Howell v. Village of Cassopolis (1877) 35 Mich. 471.

Stock in the name of, and owned by, nonresident stockholders, is not taxable to the bank. Mechanics' Bank of Newark v. Thomas (1857) 26 N. J. Law (2 Dutch.) 181.

The stock of a national bank located in New Jersey, held by a resident of Pennsylvania, is not liable to taxation in the latter state. Bucks v. Ely (Pa. 1867) 6 Phila. 414.

IV. STATE LEGISLATION

35. Construction, operation, and validity.—As to construction and operation of state laws taxing national bank property, see Citizens' Nat. Bank v. Kentucky to Use of Boyle County (1910) 30 Sup. Ct. 532, 217 U. S. 443, 54 L. Ed. 832; Covington City Nat. Bank v. City of Covington (C. C. 1884) 21 Fed. 484; Second Nat. Bank v. Caldwell (D. C. 1882) 13 Fed. 429; People v. Moore (1873) 1 Idaho, 504; Strader v. Manville (1870) 33 Ind. 111; Town of McGregor v. McGregor Branch of State Bank (1861) 12 Iowa, 79; Henkle v. Town of Keota (1886) 68 Iowa, 334, 27 N. W. 250; Dutton v. Citizens'

Nat. Bank (1894) 53 Kan. 440, 36 Pac. 719; Commonwealth v. First Nat. Bank (1815) 67 Ky. (4 Bush) 98, 96 Am. Dec. 285; Commonwealth v. Covington Nat. Bank (1885) 7 Ky. Law Rep. (abstract) 48; Stetson v. City of Bangor (1868) 56 Me. 274; Revere v. City of Boston (1877) 123 Mass. 375; First Nat. Bank v. Peterborough (1875) 56 N. H. 38, 32 Am. Rep. 416; Weston v. City of Manchester (1883) 62 N. H. 574; City of Utica v. Churchill (1865) 33 N. Y. 161; People v. Commissioners of Taxes and Assessments (1876) 67 N. Y. 516; Buie v. Commissioners of Town of Fayetteville (1878) 79 N. C. 267; Moore v. City of Fayetteville (1879) 80 N. C. 154, 30 Am. Rep. 75; Frazer v. Siebern (1866) 16 Ohio St. 614; Niles v. Shaw (1893) 50 Ohio St. 370, 34 N. E. 162; Strong v. O'Donnell (Pa. 1875) 32 Leg. Int. 283; Appeal of Truby (1880) 96 Pa. 52; Gorley v. Bowlby (1889) 8 Pa. Co. Ct. R. 17; Harrison v. Vines (1876) 46 Tex. 15; Waco Nat. Bank v. Rogers (1879) 51 Tex. 606; Rosenburg v. Weekes (1887) 67 Tex. 578, 4 S. W. 899; State v. Clement Nat. Bank (1911) 78 A. 944, 74 Vt. 167, Ann. Cas. 1912D, 22; Ruggles v. City of Fond du Lac (1881) 53 Wis. 436, 10 N. W. 565.

As to validity of such laws, see People's Nat. Bank of Lynchburg v. Marye (C. C. 1901) 107 Fed. 570 (decree modified [1903] 24 S. Ct. 68, 191 U. S. 272, 48 L. Ed. 180); Middletown Nat. Bank v. Town of Middletown (1902) 51 A. 138, 74 Conn. 449; Whitney v. Ragsdale (1870) 33 Ind. 107, 5 Am. Rep. 185; Primghar State Bank v. Rerick (1895) 96 Iowa, 238, 64 N. W. 801; Commonwealth v. Covington Nat. Bank (1885) 7 Ky. Law Rep. 40.

CITED WITHOUT DEFINITE APPLICATION

Cummings v. Merchants' Nat. Bank (1879) 101 U. S. 153, 25 L. Ed. 903; Tennessee v. Whitworth (1886) 6 Sup. Ct. 645, 647, 117 U. S. 129, 29 L. Ed. 830; Bell's Gap R. Co. v. Pennsylvania (1890) 10 Sup. Ct. 533, 536, 134 U. S. 232, 33 L. Ed. 892; Cleveland Trust Co. v. Lander (1902) 22 Sup. Ct. 394, 395, 184 U. S. 111, 46 L. Ed. 456; Lander v. Mercantile Nat. Bank of Cleveland, Ohio (1902) 22 Sup. Ct. 908, 913, 186 U. S. 458, 46 L. Ed. 1247; Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 7, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433; Home Savings Bank v. Des Moines (1906) 27 Sup. Ct. 571, 575, 205 U. S. 503, 51 L. Ed. 901; Wynne v. U. S. (1909) 30 Sup. Ct. 447, 448, 217 U. S. 234, 54 L. Ed. 748; Davenport Nat. Bank v. Mittelbuscher (C. C. 1883) 15 Fed. 225, 228; Santa Clara v. Southern Pac. R. Co. (C. C. 1883) 18 Fed. 385, 401 (affirmed [1886] 6 Sup. Ct. 1132, 118 U. S. 394, 30 L. Ed. 118); The Exchange Bank Tax Cases (C. C. 1884) 21 Fed. 99; First Nat. Bank v. Hungate (C. C. 1894) 62 Fed. 548, 549.

CHAPTER THREE A

Federal Reserve Banks

This chapter, inserted here as additional to the original chapters of this Title of the Revised Statutes, includes the provisions for the establishment of Federal reserve banks of the Federal Reserve Act of Dec. 23, 1913, c. 6, and amendatory acts.

Sec.
9785. Short title of act; "bank," "national bank," "national banking association," "member bank," "board," "district," and "reserve bank," defined.

FEDERAL RESERVE DISTRICTS

9786. (1) Federal reserve cities and Federal reserve districts; designation by Reserve Bank Organization Committee; readjustment.
(2) Powers of Reserve Bank Organization Committee; Federal reserve banks; supervision of organization; titles of Federal reserve banks.
(3) Acceptance of act by banks; subscriptions to capital stock of Federal reserve banks; when and how payable.
(4) Liability of shareholders of Federal reserve banks.
(5) Banks failing to accept act to cease acting as reserve agents.
(6) Banks failing to become member banks or to comply with provisions of act to forfeit rights, etc., under national bank act; determination of noncompliance with or violations of act; liability of directors of banks for noncompliance with or violations of act.
(7) Effect of dissolution of banks.
(8) Public subscriptions to capital stock of Federal reserve banks.
(9) Limitation on amount of public subscriptions to capital stock of Federal reserve banks; designation and transfer of stock.

Sec.
(10) Allotment to United States of stock in Federal reserve banks.
(11) Nonvoting stock.
(12) Rules and regulations governing transfers of capital stock of Federal reserve banks.
(13) Required capital of Federal reserve banks; effect of act on present reserve cities and central reserve cities; powers and expenses of organization committee in carrying out the provisions of act; appropriation.

BRANCH OFFICES

9787. Federal reserve bank branch offices; directors and managers of branch banks.

FEDERAL RESERVE BANKS

9788. (1) Certificate of establishment of Federal reserve districts; contents; application blanks for subscriptions to capital stock of Federal reserve banks.
(2) Certificate of organization of Federal reserve bank; contents.
(3) Acknowledgment and transmission of certificate of organization to Comptroller of Currency; filing.
(4) Corporate capacity and powers of Federal reserve banks.
(5) Board of directors of Federal reserve banks; classification, qualifications and election; compensation and expenses; chairman of Federal reserve bank and "Federal reserve agent"; appointment, qualifications, compensation, and powers and duties; deputy chairman of Federal reserve bank and deputy Federal reserve agent; meetings of directors; term of office of directors; vacancies in office of directors.

STOCK ISSUES; INCREASE AND DECREASE OF CAPITAL

9789. Capital stock of Federal reserve banks; value of shares; increase or decrease; certificate of increase; transfer or hypothecation of shares owned by member banks prohibited; subscriptions to stock of reserve bank on increase of capital by member bank; amount of subscription to stock of reserve bank required of member banks after organization of reserve bank; surrender of shares of stock in reserve bank by member bank on decrease of capital or liquidation.

Sec.
9790. Cancellation of stock held by member bank on insolvency; certificate of reduction of capital of reserve bank.

DIVISION OF EARNINGS

9791. (1) Dividends on stock of reserve banks; franchise tax on net earnings of reserve banks; surplus fund.
(2) Disposition of net earnings paid to United States as franchise tax; disposition of surplus fund on dissolution or insolvency of reserve bank.
(3) Exemption of reserve banks from taxation.

STATE BANKS AS MEMBERS

9792. (1) State banks as members of Federal reserve banks; application, etc., stock, how paid for.
(2) By-laws regulating admission of state banks, etc.; to membership in Federal reserve banks; capital stock required of state banks as condition precedent to membership in Federal reserve bank.
(3) Laws, etc., applicable to state banks on becoming members of Federal reserve banks.
(4) Cancellation of membership of state banks in Federal reserve banks.

FEDERAL RESERVE BOARD

9793. (1) Federal Reserve Board; number of members; appointment; ex officio members; salaries.
(2) Members of board, Secretary of the Treasury, Assistant Secretaries of the Treasury and Comptroller of Currency ineligible during terms of office and for two years thereafter to hold office, etc., in member banks; qualifications and terms of office of members of board; governor and vice governor of board; office for board; oath of office of members of board.
(3) Assessments on Federal reserve banks to pay expenses of Federal Reserve Board.
(4) First meeting of Federal Reserve Board; Secretary of the Treasury ex officio chairman of Federal Reserve Board; members not to hold stock in banks, etc.; vacancies in board, how filled.
(5) Filling vacancies on Federal Reserve Board.
(6) Powers of Secretary of the Treasury not impaired.
(7) Reports of Federal Reserve Board to Congress.

Sec.

9794. Enumerated powers of Federal Reserve Board.
(a) Examination of accounts, etc., of Federal reserve banks and member banks; publication of weekly statements.
(b) Permitting rediscounting of discounted paper.
(c) Suspending reserve requirements; establishing graduated tax on deficiency in gold reserve held against Federal reserve notes.
(d) Supervising and regulating issue and retirement of Federal reserve notes.
(e) Adding to or reclassifying reserve and central reserve cities.
(f) Suspending or removing officers or directors of Federal reserve banks.
(g) Requiring writing off of doubtful or worthless assets of Federal reserve banks.
(h) Suspending operations or liquidating or reorganizing Federal reserve banks.
(i) Requiring bonds of Federal reserve agents; making regulations for safeguarding collateral, bonds, Federal reserve notes, etc.
(j) Exercising supervision over Federal reserve banks.
(k) Granting permits to national banks to act as trustees, etc.
(l) Employing attorneys, experts, assistants, clerks, etc.; salaries and fees of attorneys, etc.; civil service rules not applicable to appointments.
(m) To permit member banks to carry reserve in Federal reserve bank.

FEDERAL ADVISORY COUNCIL

9795. (1) Federal Advisory Council; number of members; selection; compensation and allowances; meetings; officers; mode of procedure; quorum; vacancies.
(2) Powers of Federal Advisory Council.

POWERS OF FEDERAL RESERVE BANKS

9796. (1) Deposits with Federal reserve banks.
(2) Discounts by Federal reserve banks of notes, drafts, or bills of exchange.
(3) Aggregate of rediscounted notes and bills.
(4) Discount by Federal reserve banks of acceptances.
(5) Acceptance by Federal reserve banks of drafts or bills of exchange on imported or exported goods.
(6) Advances to member banks on their notes.

Sec.

OPEN MARKET OPERATIONS

9797. (1) Purchase or sale in open market by Federal reserve banks of bills of exchange, etc.
(2) Powers of Federal reserve banks.

GOVERNMENT DEPOSITS

9798. (1) Government deposits in Federal reserve banks and fiscal agencies thereof for United States.
(2) Deposits of funds of United States in banks not belonging to system established by Act prohibited; member banks as depositaries.

NOTE ISSUES

9799. (1) Federal reserve notes; issue authorized; by whom and for what dues receivable; redemption.
(2) Application for Federal reserve notes; collateral required.
(3) Reserves against deposits and Federal reserve notes; amount; lettering and numbering on Federal reserve notes; return for credit or redemption of Federal reserve notes to reserve bank of issue; ten per cent penalty on issue of Federal reserve notes by bank other than that of issue; redemption of Federal reserve notes at Treasury; exchange for gold of Federal reserve notes received at Treasury otherwise than for redemption; cancellation and destruction of Federal reserve notes unfit for circulation.
(4) Deposits in Treasury for redemption of Federal reserve notes; amount; grant or rejection of application for Federal reserve notes; manner of supplying notes; interest on notes; lien of notes on assets of bank.
(5) Reduction of liability for outstanding Federal reserve notes by deposit of Federal reserve notes, etc., with Federal reserve agent; disposition of gold, etc., so deposited.
(6) Withdrawal of collateral deposited for protection of Federal reserve notes and substitution of other collateral.
(7) Plates and dies for and denominations, form and tenor of Federal reserve notes.
(8) Place of deposit of Federal reserve notes prior to delivery to Federal reserve banks.
(9) Control and direction of plates and dies by Comptroller of

Sec.

Currency; expense of issue and retirement of notes to be paid by Federal reserve banks.

(10) Examination of plates, dies, etc.

(11) Appropriations and paper for printing Federal reserve notes; reimbursement of United States for printing notes by national banks and Federal reserve banks.

(12) Deposit of checks and drafts for collection; charges; clearance of checks.

(13) Rules and regulations for transfer of funds and charges therefor among Federal reserve banks; clearing houses.

REFUNDING BONDS

9800. (1) Retirement of circulating notes; application for sale of bonds deposited to secure notes.

(2) List of applications for Federal reserve board; purchase of bonds by Federal reserve banks; allotment of bonds to Federal reserve banks.

(3) Transfer of bonds to Federal reserve banks; deposit and payment of purchase price.

(4) Issue of circulating notes to Federal reserve banks purchasing bonds.

(5) Issue of circulating notes to Federal reserve banks; amount; form.

(6) Exchange of two per cent gold bonds with circulation privileges for one year gold notes without circulation privileges.

(7) Issue of one year gold notes and three per cent gold bonds.

(8) Exchange of one year gold notes for three per cent gold bonds.

BANK RESERVES

9801. (1) Demand deposits defined.

(2) Reserves of subscribing member banks.

9802. Repeal of law making funds deposited for redemption of national bank notes part of reserve fund.

9803. Repeal; borrowing gold on security of United States bonds or one year gold notes; sale of such bonds or notes.

9804. Effect of partial invalidity of act.

9805. Reservation of power to amend, alter, or repeal act.

§ 9785. (Act Dec. 23, 1913, c. 6, § 1.) Short title of act; "bank," "national bank," "national banking association," "member bank," "board," "district," and "reserve bank," defined.

The short title of this Act shall be the "Federal Reserve Act."

Wherever the word "bank" is used in this Act, the word shall be held to include State bank, banking association, and trust company, except where national banks or Federal reserve banks are specifically referred to.

The terms "national bank" and "national banking association" used in this Act shall be held to be synonymous and interchangeable. The term "member bank" shall be held to mean any national bank, State bank, or bank or trust company which has become a member of one of the reserve banks created by this Act. The term "board" shall be held to mean Federal Reserve Board; the term "district" shall be held to mean Federal reserve district; the term "reserve bank" shall be held to mean Federal reserve bank. (38 Stat. 251.)

This was the first section of the Federal Reserve Act, entitled, "An act to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

Sections 2–7, 9–16, 18–20, 26, 29, and 30 of the act are set forth post, under this chapter, §§ 9786–9805.

Section 8 of the act amended R. S. § 5154, and is incorporated in that section as set forth ante, § 9694.

Section 17 of the act repealed so much of R. S. § 5159, Act June 20, 1874, § 4, and Act July 12, 1882, § 8, and any other provisions of existing statutes as required that before any national banking association shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds.

Section 21 of the act amended R. S. § 5240, and is incorporated in that section as set forth post, § 9832.

Section 22 of the act, relating to loans and gratuities to bank examiners, prohibiting the giving to or receipt by officers, directors, employés, or attorneys of

a member bank of fees, commissions, gifts, etc., for or in connection with any transaction or business of the bank, except as prescribed, prohibiting examiners from disclosing the names of borrowers or the collateral for loans of a member bank, except in certain cases, and prescribing the punishment for violations of its provisions, is set forth post, § 9833.

Section 23 of the act, relating to the individual liability of stockholders of national banks, is set forth ante, § 9689.

Section 24 of the act, relating to loans on farm lands by national banks, is set forth ante, § 9763.

Section 25 of the act, relating to the establishment of foreign branches by national banks, is set forth ante, § 9745.

Section 27 of said act extended the provisions of the Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, to June 30, 1915, and re-enacted R. S. §§ 5153, 5172, 5191, and 5214, ante, §§ 9691, 9714, 9746, 9779, to read as they read prior to their amendment by said Aldrich-Vreeland Act of May 30, 1908, c. 229, subject to such amendments or modifications as were prescribed by this act. It was amended by Act Aug. 4, 1914, c. 225, 38 Stat. 682. A proviso annexed to the section, amending a part of said Aldrich-Vreeland Act of May 30, 1908, c. 229, § 9, which section amended R. S. § 5214, is incorporated in said R. S. § 5214, as set forth ante, § 9779. See, also, notes to Chapter Two A of this Title.

Section 28 of the act amended R. S. § 5143, and is incorporated in that section as set forth ante, § 9681.

FEDERAL RESERVE DISTRICTS

§ 9786. (Act Dec. 23, 1913, c. 6, § 2.) (1) Federal reserve cities and Federal reserve districts; designation by Reserve Bank Organization Committee; readjustment.

As soon as practicable, the Secretary of the Treasury, the Secretary of Agriculture and the Comptroller of the Currency, acting as "The Reserve Bank Organization Committee," shall designate not less than eight nor more than twelve cities to be known as Federal reserve cities, and shall divide the continental United States, excluding Alaska, into districts, each district to contain only one of such Federal reserve cities. The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: Provided, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all. Such districts shall be known as Federal reserve districts and may be designated by number. A majority of the organization committee shall constitute a quorum with authority to act.

(2) Powers of Reserve Bank Organization Committee; Federal reserve banks; supervision of organization; titles of Federal reserve banks.

Said organization committee shall be authorized to employ counsel and expert aid, to take testimony, to send for persons and papers, to administer oaths, and to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located. The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank, which shall include in its title the name of the city in which it is situated, as "Federal Reserve Bank of Chicago."

(3) Acceptance of act by banks; subscriptions to capital stock of Federal reserve banks; when and how payable.

Under regulations to be prescribed by the organization committee, every national banking association in the United States is hereby required, and every eligible bank in the United States and

every trust company within the District of Columbia, is hereby authorized to signify in writing, within sixty days after the passage of this Act, its acceptance of the terms and provisions hereof. When the organization committee shall have designated the cities in which Federal reserve banks are to be organized, and fixed the geographical limits of the Federal reserve districts, every national banking association within that district shall be required within thirty days after notice from the organization committee, to subscribe to the capital stock of such Federal reserve bank in a sum equal to six per centum of the paid-up capital stock and surplus of such bank, one-sixth of the subscription to be payable on call of the organization committee or of the Federal Reserve Board, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be subject to call when deemed necessary by the Federal Reserve Board, said payments to be in gold or gold certificates.

(4) Liability of shareholders of Federal reserve banks.

The shareholders of every Federal reserve bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of their subscriptions to such stock at the par value thereof in addition to the amount subscribed, whether such subscriptions have been paid up in whole or in part, under the provisions of this Act.

The liability of shareholders of national banking associations generally was prescribed by section 23 of this act, ante, § 9689, which section superseded R. S. § 5151.

(5) Banks failing to accept act to cease acting as reserve agents.

Any national bank failing to signify its acceptance of the terms of this Act within the sixty days aforesaid, shall cease to act as a reserve agent, upon thirty days' notice, to be given within the discretion of the said organization committee or of the Federal Reserve Board.

(6) Banks failing to become member banks or to comply with provisions of act to forfeit rights, etc., under national bank act; determination of noncompliance with or violations of act; liability of directors of banks for noncompliance with or violations of act.

Should any national banking association in the United States now organized fail within one year after the passage of this Act to become a member bank or fail to comply with any of the provisions of this Act applicable thereto, all of the rights, privileges, and franchises of such association granted to it under the national-bank Act, or under the provisions of this Act, shall be thereby forfeited. Any noncompliance with or violation of this Act shall, however, be determined and adjudged by any court of the United States of competent jurisdiction in a suit brought for that purpose in the district or territory in which such bank is located, under direction of the Federal Reserve Board, by the Comptroller of the Currency in his own name before the association shall be declared dissolved. In cases of such noncompliance or violation, other than the failure to become a member bank under the provisions of this Act, every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.

(7) Effect of dissolution of banks.

Such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred.

(8) Public subscriptions to capital stock of Federal reserve banks.

Should the subscriptions by banks to the stock of said Federal reserve banks or any one or more of them be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee may, under conditions and regulations to be prescribed by it, offer to public subscription at par such an amount of stock in said Federal reserve banks, or any one or more of them, as said committee shall determine, subject to the same conditions as to payment and stock liability as provided for member banks.

(9) Limitation on amount of public subscriptions to capital stock of Federal reserve banks; designation and transfer of stock.

No individual, copartnership, or corporation other than a member bank of its district shall be permitted to subscribe for or to hold at any time more than $25,000 par value of stock in any Federal reserve bank. Such stock shall be known as public stock and may be transferred on the books of the Federal reserve bank by the chairman of the board of directors of such bank.

(10) Allotment to United States of stock in Federal reserve banks.

Should the total subscriptions by banks and the public to the stock of said Federal reserve banks, or any one or more of them, be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee shall allot to the United States such an amount of said stock as said committee shall determine. Said United States stock shall be paid for at par out of any money in the Treasury not otherwise appropriated, and shall be held by the Secretary of the Treasury and disposed of for the benefit of the United States in such manner, at such times, and at such price, not less than par, as the Secretary of the Treasury shall determine.

(11) Nonvoting stock.

Stock not held by member banks shall not be entitled to voting power.

(12) Rules and regulations governing transfers of capital stock of Federal reserve banks.

The Federal Reserve Board is hereby empowered to adopt and promulgate rules and regulations governing the transfers of said stock.

(13) Required capital of Federal reserve banks; effect of act on present reserve cities and central reserve cities; powers and expenses of organization committee in carrying out the provisions of act; appropriation.

No Federal reserve bank shall commence business with a subscribed capital less than $4,000,000. The organization of reserve districts and Federal reserve cities shall not be construed as changing the present status of reserve cities and central reserve cities, except in so far as this Act changes the amount of reserves that may be carried with approved reserve agents located therein. The organization committee shall have power to appoint such assistants and incur such expenses in carrying out the provisions of this Act as it shall deem necessary, and such expenses shall be payable by the Treasurer of the United States upon voucher approved by the

Secretary of the Treasury, and the sum of $100,000, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for the payment of such expenses. (38 Stat. 251.)

The previous provisions relating to reserve cities and central reserve cities were contained in R. S. §§ 5191, 5192, Act June 20, 1874, c. 343, § 2, and Act March 3, 1887, c. 378, §§ 1, 2, ante, §§ 9746–9750.

BRANCH OFFICES

§ 9787. (Act Dec. 23, 1913, c. 6, § 3.) Federal reserve bank branch offices; directors and managers of branch banks.

Each Federal reserve bank shall establish branch banks within the Federal reserve district in which it is located and may do so in the district of any Federal reserve bank which may have been suspended. Such branches shall be operated by a board of directors under rules and regulations approved by the Federal Reserve Board. Directors of branch banks shall possess the same qualifications as directors of the Federal reserve banks. Four of said directors shall be selected by the reserve bank and three by the Federal Reserve Board, and they shall hold office during the pleasure, respectively, of the parent bank and the Federal Reserve Board. The reserve bank shall designate one of the directors as manager. (38 Stat. 253.)

FEDERAL RESERVE BANKS

§ 9788. (Act Dec. 23, 1913, c. 6, § 4.) (1) Certificate of establishment of Federal reserve districts; contents; application blanks for subscriptions to capital stock of Federal reserve banks.

When the organization committee shall have established Federal reserve districts as provided in section two of this Act, a certificate shall be filed with the Comptroller of the Currency showing the geographical limits of such districts and the Federal reserve city designated in each of such districts. The Comptroller of the Currency shall thereupon cause to be forwarded to each national bank located in each district, and to such other banks declared to be eligible by the organization committee which may apply therefor, an application blank in form to be approved by the organization committee, which blank shall contain a resolution to be adopted by the board of directors of each bank executing such application, authorizing a subscription to the capital stock of the Federal reserve bank organizing in that district in accordance with the provisions of this Act.

(2) Certificate of organization of Federal reserve bank; contents.

When the minimum amount of capital stock prescribed by this Act for the organization of any Federal reserve bank shall have been subscribed and allotted, the organization committee shall designate any five banks of those whose applications have been received, to execute a certificate of organization, and thereupon the banks so designated shall, under their seals, make an organization certificate which shall specifically state the name of such Federal reserve bank, the territorial extent of the district over which the operations of such Federal reserve bank are to be carried on, the city and State in which said bank is to be located, the amount of capital stock and the number of shares into which the same is divided, the name and place of doing business of each bank executing such certificate, and of all banks which have subscribed to the capital stock of such Federal reserve bank and the number of shares subscribed by each, and the fact that the certificate is made to enable those banks executing same, and all banks which have subscribed or may thereafter subscribe to the capital stock of such

Federal reserve bank, to avail themselves of the advantages of this Act.

(3) Acknowledgment and transmission of certificate of organization to Comptroller of Currency; filing.

The said organization certificate shall be acknowledged before a judge of some court of record or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall file, record and carefully preserve the same in his office.

(4) Corporate capacity and powers of Federal reserve banks.

Upon the filing of such certificate with the Comptroller of the Currency as aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

First. To adopt and use a corporate seal.

Second. To have succession for a period of twenty years from its organization unless it is sooner dissolved by an Act of Congress, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity.

Fifth. To appoint by its board of directors, such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

Sixth. To prescribe by its board of directors by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this Act.

Eighth. Upon deposit with the Treasurer of the United States of any bonds of the United States in the manner provided by existing law relating to national banks, to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited, such notes to be issued under the same conditions and provisions of law as relate to the issue of circulating notes of national banks secured by bonds of the United States bearing the circulating privilege, except that the issue of such notes shall not be limited to the capital stock of such Federal reserve bank.

But no Federal reserve bank shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence business under the provisions of this Act.

(5) Board of directors of Federal reserve banks; classification, qualifications and election; compensation and expenses; chairman of Federal reserve bank and "Federal reserve agent"; appointment, qualifications, compensation, and powers and duties; deputy chairman of Federal reserve bank and deputy Federal reserve agent; meetings of directors; term of office of directors; vacancies in office of directors.

Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.

The board of directors shall perform the duties usually appertaining to the office of directors of banking associations and all such duties as are prescribed by law.

Said board shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and shall, subject to the provisions of law and the orders of the Federal Reserve Board, extend to each member bank such discounts, advancements and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks.

Such board of directors shall be selected as hereinafter specified and shall consist of nine members, holding office for three years, and divided into three classes, designated as classes A, B, and C.

Class A shall consist of three members, who shall be chosen by and be representative of the stock-holding banks.

Class B shall consist of three members, who at the time of their election shall be actively engaged in their district in commerce, agriculture or some other industrial pursuit.

Class C shall consist of three members who shall be designated by the Federal Reserve Board. When the necessary subscriptions to the capital stock have been obtained for the organization of any Federal reserve bank, the Federal Reserve Board shall appoint the class C directors and shall designate one of such directors as chairman of the board to be selected. Pending the designation of such chairman, the organization committee shall exercise the powers and duties appertaining to the office of chairman in the organization of such Federal reserve bank.

No Senator or Representative in Congress shall be a member of the Federal Reserve Board or an officer or a director of a Federal reserve bank.

No director of class B shall be an officer, director, or employee of any bank.

No director of class C shall be an officer, director, employee, or stockholder of any bank.

Directors of class A and class B shall be chosen in the following manner:

The chairman of the board of directors of the Federal reserve bank of the district in which the bank is situated or, pending the appointment of such chairman, the organization committee shall classify the member banks of the district into three general groups or divisions. Each group shall contain as nearly as may be one-third of the aggregate number of the member banks of the district and shall consist, as nearly as may be, of banks of similar capitalization. The groups shall be designated by number by the chairman.

At a regularly called meeting of the board of directors of each member bank in the district it shall elect by ballot a district reserve elector and shall certify his name to the chairman of the board of directors of the Federal reserve bank of the district. The chairman shall make lists of the district reserve electors thus named by banks in each of the aforesaid three groups and shall transmit one list to each elector in each group.

Each member bank shall be permitted to nominate to the chairman one candidate for director of class A and one candidate for director of class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished by the chairman to each elector.

Every elector shall, with fifteen days after the receipt of the said list, certify to the chairman his first, second, and other choices of a director of class A and class B, respectively, upon a preferential ballot, on a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each elector shall make a cross opposite the name of the first, second, and other choices for a director of class A and for a director of class B, but shall not vote more than one choice for any one candidate.

Any candidate having a majority of all votes cast in the column of first choice shall be declared elected. If no candidate have a majority of all the votes in the first column, then there shall be added together the votes cast by the electors for such candidates in the second column and the votes cast for the several candidates in the first column. If any candidate then have a majority of the electors voting, by adding together the first and second choices, he shall be declared elected. If no candidate have a majority of electors voting when the first and second choices shall have been added, then the votes cast in the third column for other choices shall be added together in like manner, and the candidate then having the highest number of votes shall be declared elected. An immediate report of election shall be declared.

Class C directors shall be appointed by the Federal Reserve Board. They shall have been for at least two years residents of the district for which they are appointed, one of whom shall be designated by said board as chairman of the board of directors of the Federal reserve bank and as "Federal reserve agent." He shall be a person of tested banking experience; and in addition to his duties as chairman of the board of directors of the Federal reserve bank he shall be required to maintain under regulations to be established by the Federal Reserve Board a local office of said board on the premises of the Federal reserve bank. He shall make regular reports to the Federal Reserve Board, and shall act as its official representative for the performance of the functions conferred upon it by this Act. He shall receive an annual compensation to be fixed by the Federal Reserve Board and paid monthly by the Federal reserve bank to which he is designated. One of the directors of class C, who shall be a person of tested banking experience, shall be appointed by the Federal Reserve Board as deputy chairman and deputy Federal reserve agent to exercise the powers of the chairman of the board and Federal reserve agent in case of absence or disability of his principal.

Directors of Federal reserve banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, which amount shall be paid by the respective Federal reserve banks. Any compensation that may be provided by boards of directors of Federal reserve banks for directors, officers or employees shall be subject to the approval of the Federal Reserve Board.

The Reserve Bank Organization Committee may, in organizing Federal reserve banks, call such meetings of bank directors in the several districts as may be necessary to carry out the purposes of this Act, and may exercise the functions herein conferred upon the chairman of the board of directors of each Federal reserve bank pending the complete organization of such bank.

At the first meeting of the full board of directors of each Federal reserve bank, it shall be the duty of the directors of classes A, B and C, respectively, to designate one of the members of each class

whose term of office shall expire in one year from the first of January nearest to date of such meeting, one whose term of office shall expire at the end of two years from said date, and one whose term of office shall expire at the end of three years from said date. Thereafter every director of a Federal reserve bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the several classes of directors of Federal reserve banks may be filled in the manner provided for the original selection of such directors, such appointees to hold office for the unexpired terms of their predecessors. (38 Stat. 254.)

The Federal Reserve Board was empowered to enforce provisions of the Clayton Act of Oct. 15, 1914, c. 323, by section 11 thereof, ante, § 8835j.

Interlocking directorates in specified banks were prohibited by the Clayton Act of Oct. 15, 1914, c. 323, § 8, as amended by Act May 15, 1916, c. 120, ante, § 8835h.

STOCK ISSUES; INCREASE AND DECREASE OF CAPITAL

§ 9789. (Act Dec. 23, 1913, c. 6, § 5.) Capital stock of Federal reserve banks; value of shares; increase or decrease; certificate of increase; transfer or hypothecation of shares owned by member banks prohibited; subscriptions to stock of reserve bank on increase of capital by member bank; amount of subscription to stock of reserve bank required of member banks after organization of reserve bank; surrender of shares of stock in reserve bank by member bank on decrease of capital or liquidation.

The capital stock of each Federal reserve bank shall be divided into shares of $100 each. The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, and may be decreased as member banks reduce their capital stock or surplus or cease to be members. Shares of the capital stock of Federal reserve banks owned by member banks shall not be transferred or hypothecated. When a member bank increases its capital stock or surplus, it shall thereupon subscribe for an additional amount of capital stock of the Federal reserve bank of its district equal to six per centum of the said increase, one-half of said subscription to be paid in the manner hereinbefore provided for original subscription, and one-half subject to call of the Federal Reserve Board. A bank applying for stock in a Federal reserve bank at any time after the organization thereof must subscribe for an amount of the capital stock of the Federal reserve bank equal to six per centum of the paid-up capital stock and surplus of said applicant bank, paying therefor its par value plus one-half of one per centum a month from the period of the last dividend. When the capital stock of any Federal reserve bank shall have been increased either on account of the increase of capital stock of member banks or on account of the increase in the number of member banks, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing the increase in capital stock, the amount paid in, and by whom paid. When a member bank reduces its capital stock it shall surrender a proportionate amount of its holdings in the capital of said Federal reserve bank, and when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock of said Federal reserve bank and be released from its stock subscription not previously called. In either case the shares surrendered shall be canceled and the member bank shall receive in payment therefor, under regulations to be

prescribed by the Federal Reserve Board, a sum equal to its cash-paid subscriptions on the shares surrendered and one-half of one per centum a month from the period of the last dividend, not to exceed the book value thereof, less any liability of such member bank to the Federal reserve bank. (38 Stat. 257.)

§ 9790. (Act Dec. 23, 1913, c. 6, § 6.) Cancellation of stock held by member bank on insolvency; certificate of reduction of capital of reserve bank.

If any member bank shall be declared insolvent and a receiver appointed therefor, the stock held by it in said Federal reserve bank shall be canceled, without impairment of its liability, and all cash-paid subscriptions on said stock, with one-half of one per centum per month from the period of last dividend, not to exceed the book value thereof, shall be first applied to all debts of the insolvent member bank to the Federal reserve bank, and the balance, if any, shall be paid to the receiver of the insolvent bank. Whenever the capital stock of a Federal reserve bank is reduced, either on account of a reduction in capital stock of any member bank or of the liquidation or insolvency of such bank, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing such reduction of capital stock and the amount repaid to such bank. (38 Stat. 258.)

DIVISION OF EARNINGS

§ 9791. (Act Dec. 23, 1913, c. 6, § 7.) (1) Dividends on stock of reserve banks; franchise tax on net earnings of reserve banks; surplus fund.

After all necessary expenses of a Federal reserve bank have been paid or provided for, the stockholders shall be entitled to receive an annual dividend of six per centum on the paid-in capital stock, which dividend shall be cumulative. After the aforesaid dividend claims have been fully met, all the net earnings shall be paid to the United States as a franchise tax, except that one-half of such net earnings shall be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank.

(2) Disposition of net earnings paid to United States as franchise tax; disposition of surplus fund on dissolution or insolvency of reserve bank.

The net earnings derived by the United States from Federal reserve banks shall, in the discretion of the Secretary, be used to supplement the gold reserve held against outstanding United States notes, or shall be applied to the reduction of the outstanding bonded indebtedness of the United States under regulations to be prescribed by the Secretary of the Treasury. Should a Federal reserve bank be dissolved or go into liquidation, any surplus remaining, after the payment of all debts, dividend requirements as hereinbefore provided, and the par value of the stock, shall be paid to and become the property of the United States and shall be similarly applied.

(3) Exemption of reserve banks from taxation.

Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate. (38 Stat. 258.)

STATE BANKS AS MEMBERS

§ 9792. (Act Dec. 23, 1913, c. 6, § 9.) (1) State banks as members of Federal reserve banks; application, etc.; stock, how paid for.

Any bank incorporated by special law of any State, or organized

under the general laws of any State or of the United States, may make application to the reserve bank organization committee, pending organization, and thereafter to the Federal Reserve Board for the right to subscribe to the stock of the Federal reserve bank organized or to be organized within the Federal reserve district where the applicant is located. The organization committee or the Federal Reserve Board, under such rules and regulations as it may prescribe, subject to the provisions of this section, may permit the applying bank to become a stockholder in the Federal reserve bank of the district in which the applying bank is located. Whenever the organization committee or the Federal Reserve Board shall permit the applying bank to become a stockholder in the Federal reserve bank of the district, stock shall be issued and paid for under the rules and regulations in this Act provided for national banks which become stockholders in Federal reserve banks.

(2) By-laws regulating admission of state banks, etc., to membership in Federal reserve banks; capital stock required of state banks as condition precedent to membership in Federal reserve bank.

The organization committee or the Federal Reserve Board shall establish by-laws for the general government of its conduct in acting upon applications made by the State banks and banking associations and trust companies for stock ownership in Federal reserve banks. Such by-laws shall require applying banks not organized under Federal law to comply with the reserve and capital requirements and to submit to the examination and regulations prescribed by the organization committee or by the Federal Reserve Board. No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated, under the provisions of the national banking Act.

The provisions of the national bank act relating to the organization of state banks as national banking associations were incorporated in R. S. §§ 5154, 5155, ante, §§ 9694, 9695.

(3) Laws, etc., applicable to state banks on becoming members of Federal reserve banks.

Any bank becoming a member of a Federal reserve bank under the provisions of this section shall, in addition to the regulations and restrictions hereinbefore provided, be required to conform to the provisions of law imposed on the national banks respecting the limitation of liability which may be incurred by any person, firm, or corporation to such banks, the prohibition against making purchase of or loans on stock of such banks, and the withdrawal or impairment of capital, or the payment of unearned dividends, and to such rules and regulations as the Federal Reserve Board may, in pursuance thereof, prescribe.

Such banks, and the officers, agents, and employees thereof, shall also be subject to the provisions of and to the penalties prescribed by sections fifty-one hundred and ninety-eight, fifty-two hundred, fifty-two hundred and one, and fifty-two hundred and eight, and fifty-two hundred and nine of the Revised Statutes. The member banks shall also be required to make reports of the conditions and of the payments of dividends to the comptroller, as provided in sections fifty-two hundred and eleven and fifty-two hundred and twelve of the Revised Statutes, and shall be subject to the penalties prescribed by section fifty-two hundred and thirteen for the failure to make such report.

Of the sections of the Revised Statutes mentioned in this section, R. S. § 5198, relating to the taking of usurious interest, etc., is set forth ante, § 9759;

R. S. § 5200, ante, § 9761, prescribed the limit of liability which may be incurred by any one person, etc.; R. S. § 5201, ante, § 9762, prohibited the purchase of or loans on stock, etc.; R. S. § 5208, ante, § 9770, prescribed a penalty for falsely certifying checks; R. S. § 5209, ante, § 9772, defined embezzlement by national banks, etc., and prescribed the punishment therefor; R. S. §§ 5211, 5212, ante, §§ 9774, 9776, required reports to the Comptroller of the Currency; R. S. § 5213, ante, § 9777, prescribed the penalty for failure to make such reports.

(4) Cancellation of membership of state banks in Federal reserve banks.

If at any time it shall appear to the Federal Reserve Board that a member bank has failed to comply with the provisions of this section or the regulations of the Federal Reserve Board, it shall be within the power of the said board, after hearing, to require such bank to surrender its stock in the Federal reserve bank; upon such surrender the Federal reserve bank shall pay the cash-paid subscriptions to the said stock with interest at the rate of one-half of one per centum per month, computed from the last dividend, if earned, not to exceed the book value thereof, less any liability to said Federal reserve bank, except the subscription liability not previously called, which shall be canceled, and said Federal reserve bank shall, upon notice from the Federal Reserve Board, be required to suspend said bank from further privileges of membership, and shall within thirty days of such notice cancel and retire its stock and make payment therefor in the manner herein provided. The Federal Reserve Board may restore membership upon due proof of compliance with the conditions imposed by this section. (38 Stat. 259.)

FEDERAL RESERVE BOARD

§ 9793. (Act Dec. 23, 1913, c. 6, § 10.) (1) Federal Reserve Board; number of members; appointment; ex officio members; salaries.

A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members ex officio, and five members appointed by the President of the United States, by and with the advice and consent of the Senate. In selecting the five appointive members of the Federal Reserve Board, not more than one of whom shall be selected from any one Federal reserve district, the President shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country. The five members of the Federal Reserve Board appointed by the President and confirmed as aforesaid shall devote their entire time to the business of the Federal Reserve Board and shall each receive an annual salary of $12,000, payable monthly together with actual necessary traveling expenses, and the Comptroller of the Currency, as ex officio member of the Federal Reserve Board, shall, in addition to the salary now paid him as Comptroller of the Currency, receive the sum of $7,000 annually for his services as a member of said Board.

(2) Members of board, Secretary of the Treasury, Assistant Secretaries of the Treasury and Comptroller of Currency ineligible during terms of office and for two years thereafter to hold office, etc., in member banks; qualifications and terms of office of members of board; governor and vice governor of board; office for board; oath of office of members of board.

The members of said board, the Secretary of the Treasury, the Assistant Secretaries of the Treasury, and the Comptroller of the Currency shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any

member bank. Of the five members thus appointed by the President at least two shall be persons experienced in banking or finance. One shall be designated by the President to serve for two, one for four, one for six, one for eight, and one for ten years, and thereafter each member so appointed shall serve for a term of ten years unless sooner removed for cause by the President. Of the five persons thus appointed, one shall be designated by the President as governor and one as vice governor of the Federal Reserve Board. The governor of the Federal Reserve Board, subject to its supervision, shall be the active executive officer. The Secretary of the Treasury may assign offices in the Department of the Treasury for the use of the Federal Reserve Board. Each member of the Federal Reserve Board shall within fifteen days after notice of appointment make and subscribe to the oath of office.

(3) Assessments on Federal reserve banks to pay expenses of Federal Reserve Board.

The Federal Reserve Board shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year.

(4) First meeting of Federal Reserve Board; Secretary of the Treasury ex officio chairman of Federal reserve board; members not to hold stock in banks, etc.; vacancies in board, how filled.

The first meeting of the Federal Reserve Board shall be held in Washington, District of Columbia, as soon as may be after the passage of this Act, at a date to be fixed by the Reserve Bank Organization Committee. The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board. No member of the Federal Reserve Board shall be an officer or director of any bank, banking institution, trust company, or Federal reserve bank nor hold stock in any bank, banking institution, or trust company; and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement. Whenever a vacancy shall occur, other than by expiration of term, among the five members of the Federal Reserve Board appointed by the President, as above provided, a successor shall be appointed by the President, with the advice and consent of the Senate, to fill such vacancy, and when appointed he shall hold office for the unexpired term of the member whose place he is selected to fill.

(5) Filling vacancies on Federal Reserve Board.

The President shall have power to fill all vacancies that may happen on the Federal Reserve Board during the recess of the Senate, by granting commissions which shall expire thirty days after the next session of the Senate convenes.

(6) Powers of Secretary of the Treasury not impaired.

Nothing in this Act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.

(7) Reports of Federal Reserve Board to Congress.

The Federal Reserve Board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress. (38 Stat. 260.)

A further provision of this section amended R. S. § 324, and is incorporated into that section as set forth ante, § 495.

§ 9794. (Act Dec. 23, 1913, c. 6, § 11, as amended, Act Sept. 7, 1916, c. 461.) Enumerated powers of Federal Reserve Board.

The Federal Reserve Board shall be authorized and empowered:

(a) Examination of accounts, etc., of Federal reserve banks and member banks; publication of weekly statements.

(a) To examine at its discretion the accounts, books and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary. The said board shall publish once each week a statement showing the condition of each Federal reserve bank and a consolidated statement for all Federal reserve banks. Such statements shall show in detail the assets and liabilities of the Federal reserve banks, single and combined, and shall furnish full information regarding the character of the money held as reserve and the amount, nature and maturities of the paper and other investments owned or held by Federal reserve banks.

(b) Permitting rediscounting of discounted paper.

(b) To permit, or, on the affirmative vote of at least five members of the Reserve Board to require Federal reserve banks to rediscount the discounted paper of other Federal reserve banks at rates of interest to be fixed by the Federal Reserve Board.

(c) Suspending reserve requirements; establishing graduated tax on deficiency in gold reserve held against Federal reserve notes.

(c) To suspend for a period not exceeding thirty days, and from time to time to renew such suspension for periods not exceeding fifteen days, any reserve requirement specified in this Act: Provided, That it shall establish a graduated tax upon the amounts by which the reserve requirements of this Act may be permitted to fall below the level hereinafter specified: And provided further, That when the gold reserve held against Federal reserve notes falls below forty per centum, the Federal Reserve Board shall establish a graduated tax of not more than one per centum per annum upon such deficiency until the reserves fall to thirty-two and one-half per centum, and when said reserve falls below thirty-two and one-half per centum, a tax at the rate increasingly of not less than one and one-half per centum per annum upon each two and one-half per centum or fraction thereof that such reserve falls below thirty-two and one-half per centum. The tax shall be paid by the reserve bank, but the reserve bank shall add an amount equal to said tax to the rates of interest and discount fixed by the Federal Reserve Board.

(d) Supervising and regulating issue and retirement of Federal reserve notes.

(d) To supervise and regulate through the bureau under the charge of the Comptroller of the Currency the issue and retirement of Federal reserve notes, and to prescribe rules and regulations under which such notes may be delivered by the Comptroller to the Federal reserve agents applying therefor.

(e) Adding to or reclassifying reserve and central reserve cities.

(e) To add to the number of cities classified as reserve and central reserve cities under existing law in which national banking associations are subject to the reserve requirements set forth in section twenty

of this Act; or to reclassify existing reserve and central reserve cities or to terminate their designation as such.

(f) Suspending or removing officers or directors of Federal reserve banks.

(f) To suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing by the Federal Reserve Board to the removed officer or director and to said bank.

(g) Requiring writing off of doubtful or worthless assets of Federal reserve banks.

(g) To require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks.

(h) Suspending operations or liquidating or reorganizing Federal reserve banks.

(h) To suspend, for the violation of any of the provisions of this Act, the operations of any Federal reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.

(i) Requiring bonds of Federal reserve agents; making regulations for safeguarding collateral, bonds, Federal reserve notes, etc.

(i) To require bonds of Federal reserve agents, to make regulations for the safeguarding of all collateral, bonds, Federal reserve notes, money or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this Act, and make all rules and regulations necessary to enable said board effectively to perform the same.

(j) Exercising supervision over Federal reserve banks.

(j) To exercise general supervision over said Federal reserve banks.

(k) Granting permits to national banks to act as trustees, etc.

(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.

Notes of Decisions

Operation and validity of statute.— The provision authorizing the Federal Reserve Board to grant to national banks applying therefor the right to act as trustee, etc., under the rules of the board, is not invalid, as an attempted delegation of legislative powers, in violation of Const. U. S. art. 1, § 1. People v. Brady (Ill. 1915) 110 N. E. 864. But is within the express exception, "when not in contravention of state or local law," and hence unauthorized. Id. And is not within power of Congress, as such functions belong exclusively to the states. Id.

(l) Employing attorneys, experts, assistants, clerks, etc.; salaries and fees of attorneys, etc.; civil service rules not applicable to appointments.

(l) To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the members of said board. All such attorneys, experts, assistants, clerks, and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: Provided, That nothing herein shall prevent the President from placing said employees in the classified service.

The Civil Service Act of Jan. 16, 1883, c. 27, mentioned in this section, is set forth ante, §§ 3271–3282.

(m) To permit member banks to carry reserve in Federal reserve bank.

(m) Upon the affirmative vote of not less than five of its members the Federal Reserve Board shall have power, from time to time, by general ruling, covering all districts alike, to permit member banks to carry in the Federal reserve banks of their respective districts any portion of their reserves now required by section nineteen of this Act to be held in their own vaults. (38 Stat. 261. 39 Stat. 752.)

This section was amended by Act Sept. 7, 1916, c. 461, last cited above, by inserting clause (m), making the section read as set forth here.

The Federal Reserve Board was empowered to enforce the Clayton Act of Oct. 15, 1914, c. 323, by section 11 thereof, ante, § 8835j.

FEDERAL ADVISORY COUNCIL

§ 9795. (Act Dec. 23, 1913, c. 6, § 12.) (1) Federal Advisory Council; number of members; selection; compensation and allowances; meetings; officers; mode of procedure; quorum; vacancies.

There is hereby created a Federal Advisory Council, which shall consist of as many members as there are Federal reserve districts. Each Federal reserve bank by its board of directors shall annually select from its own Federal reserve district one member of said council, who shall receive such compensation and allowances as may be fixed by his board of directors subject to the approval of the Federal Reserve Board. The meetings of said advisory council shall be held at Washington, District of Columbia, at least four times each year, and oftener if called by the Federal Reserve Board. The council may in addition to the meetings above provided for hold such other meetings in Washington, District of Columbia, or elsewhere, as it may deem necessary, may select its own officers and adopt its own methods of procedure, and a majority of its members shall constitute a quorum for the transaction of business. Vacancies in the council shall be filled by the respective reserve banks, and members selected to fill vacancies, shall serve for the unexpired term.

(2) Powers of Federal Advisory Council.

The Federal Advisory Council shall have power, by itself or through its officers, (1) to confer directly with the Federal Reserve Board on general business conditions; (2) to make oral or written representations concerning matters within the jurisdiction of said board; (3) to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks, and the general affairs of the reserve banking system. (38 Stat. 263.)

POWERS OF FEDERAL RESERVE BANKS

§ 9796. (Act Dec. 23, 1913, c. 6, § 13, as amended, Act March 3, 1915, c. 93, and Act Sept. 7, 1916, c. 461.) (1) Deposits with Federal Reserve banks.

Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other

Federal reserve banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

(2) Discounts by Federal reserve banks of notes, drafts, or bills of exchange.

Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days, exclusive of days of grace: Provided, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

(3) Aggregate of rediscounted notes and bills.

The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

(4) Discount by Federal reserve banks of acceptances.

Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

(5) Acceptance by Federal reserve banks of drafts or bills of exchange on imported or exported goods.

Any member bank may accept drafts or bills of exchange drawn drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured

either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus.

(6) Advances to member banks on their notes.

Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States. (38 Stat. 263. 38 Stat. 958. 39 Stat. 752.)

This section, as originally enacted, was as follows:

"(1) Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

"(2) Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days: Provided, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

"(3) Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

"(4) The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"(5) Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

The sixth paragraph of this section amended R. S. § 5202, and is incorporated into that section as set forth ante, § 9764.

"(7) The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board."

This section was amended by Act March 3, 1915, c. 93, cited above, by making paragraphs 3, 4, 5 as numbered in this section as originally enacted read as follows:

"(3) Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid up and unimpaired capital stock and surplus of the bank for which the rediscounts are made, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank.

"(4) The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"(5) Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months' sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank, and such regulations shall apply to all banks alike regardless of the amount of capital stock and surplus."

It was again amended by Act Sept. 7, 1916, c. 461 last cited above, to read as set forth here.

The seventh paragraph of this section of the act last cited above amended R. S. § 5202, and is incorporated into that section as set forth ante, § 9764.

OPEN MARKET OPERATIONS

§ 9797. (Act Dec. 23, 1913, c. 6, § 14, as amended, Act Sept. 7, 1916, c. 461.) (1) Purchase or sale in open market by Federal reserve banks of bills of exchange, etc.

Any Federal reserve bank may, under rules and regulations prescribed by the Federal Reserve Board, purchase and sell in the open market, at home or abroad, either from or to domestic or foreign banks, firms, corporations, or individuals, cable transfers and bankers' acceptances and bills of exchange of the kinds and maturities by this Act made eligible for rediscount, with or without the indorsement of a member bank.

(2) Powers of Federal reserve banks.

Every Federal reserve bank shall have power:

(a) To deal in gold coin and bullion at home or abroad, to make loans thereon, exchange Federal reserve notes for gold, gold coin, or gold certificates, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security, including the hypothecation of United States bonds or other securities which Federal reserve banks are authorized to hold;

(b) To buy and sell, at home or abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, such purchases to be made in accordance with rules and regulations prescribed by the Federal Reserve Board;

(c) To purchase from member banks and to sell, with or without its indorsement, bills of exchange arising out of commercial transactions, as hereinbefore defined;

(d) To establish from time to time, subject to review and determination of the Federal Reserve Board, rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business;

(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve

Board, to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell, with or without its indorsement, through such correspondents or agencies bills of exchange arising out of actual commercial transactions which have not more than ninety days to run, exclusive of days of grace, and which bear the signature of two or more responsible parties, and, with the consent of the Federal Reserve Board, to open and maintain banking accounts for such foreign correspondents or agencies. (38 Stat. 264. 39 Stat. 754.)

Subsection (e) of this section of the Federal Reserve Act was, as originally enacted, as follows:

"(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain banking accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell with or without its indorsement, through such correspondents or agencies, bills of exchange arising out of actual commercial transactions which have not more than ninety days to run and which bear the signature of two or more responsible parties."

It was amended by Act Sept. 7, 1916, c. 461, last cited above, so as to make this section read as set forth here.

Member banks of the Federal reserve system and Federal reserve banks were authorized to buy and sell farm loan bonds, by Act July 17, 1916, c. 245, § 27, post, § 9835r.

GOVERNMENT DEPOSITS

§ 9798. (Act Dec. 23, 1913, c. 6, § 15.) (1) Government deposits in Federal Reserve banks and fiscal agencies thereof for United States.

The moneys held in the general fund of the Treasury, except the five per centum fund for the redemption of outstanding national-bank notes and the funds provided in this Act for the redemption of Federal reserve notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits.

(2) Deposits of funds of United States in banks not belonging to system established by Act prohibited; member banks as depositaries.

No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this Act: Provided, however, That nothing in this Act shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositories. (38 Stat. 265.)

NOTE ISSUES

§ 9799. (Act Dec. 23, 1913, c. 6, § 16, as amended, Act Sept. 7, 1916, c. 461.) (1) Federal reserve notes; issue authorized; by whom and for what dues receivable; redemption.

Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve

banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia or in gold or lawful money at any Federal reserve bank.

(2) Application for Federal reserve notes; collateral required.

Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances rediscounted under the provisions of section thirteen of this Act, or bills of exchange indorsed by a member bank of any Federal reserve district and purchased under the provisions of section fourteen of this Act, or bankers' acceptances purchased under the provisions of said section fourteen. The Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it.

(3) Reserves against deposits and Federal reserve notes; amount; lettering and numbering on Federal reserve notes; return for credit or redemption of Federal reserve notes to reserve bank of issue; ten per cent. penalty on issue of Federal reserve notes by bank other than that of issue; redemption of Federal reserve notes at Treasury; exchange for gold of Federal reserve notes received at Treasury otherwise than for redemption; cancellation and destruction of Federal reserve notes unfit for circulation.

Every Federal reserve bank shall maintain reserves in gold or lawful money of not less than thirty-five per centum against its deposits and reserves in gold of not less than forty per centum against its Federal reserve notes in actual circulation, and not offset by gold or lawful money deposited with the Federal reserve agent. Notes so paid out shall bear upon their faces a distinctive letter and serial number, which shall be assigned by the Federal Reserve Board to each Federal reserve bank. Whenever Federal reserve notes issued through one Federal reserve bank shall be received by another Federal reserve bank they shall be promptly returned for credit or redemption to the Federal reserve bank through which they were originally issued. No Federal reserve bank shall pay out notes issued through another under penalty of a tax of ten per centum upon the face value of notes so paid out. Notes presented for redemption at the Treasury of the United States shall be paid out of the redemption fund and returned to the Federal reserve banks through which they were originally issued, and thereupon such Federal reserve bank shall, upon demand of the Secretary of the Treasury, reimburse such redemption fund in lawful money or, if such Federal reserve notes have been redeemed by the Treasurer in gold or gold certificates, then such funds shall be reimbursed to the extent deemed necessary by the Secretary of the Treasury in gold or gold certificates, and such Federal reserve bank shall, so long as any of its Federal reserve notes remain outstanding, maintain with the Treasurer in gold an amount sufficient in the judgment of the Secretary to provide for all redemptions

to be made by the Treasurer. Federal reserve notes received by the Treasury, otherwise than for redemption, may be exchanged for gold out of the redemption fund hereinafter provided and returned to the reserve bank through which they were originally issued, or they may be returned to such bank for the credit of the United States. Federal reserve notes unfit for circulation shall be returned by the Federal reserve agents to the Comptroller of the Currency for cancellation and destruction.

(4) Deposits in Treasury for redemption of Federal reserve notes; amount; grant or rejection of application for Federal reserve notes; manner of supplying notes; interest on notes; lien of notes on assets of bank.

The Federal Reserve Board shall require each Federal reserve bank to maintain on deposit in the Treasury of the United States a sum in gold sufficient in the judgment of the Secretary of the Treasury for the redemption of the Federal reserve notes issued to such bank, but in no event less than five per centum; but such deposit of gold shall be counted and included as part of the forty per centum reserve hereinbefore required. The board shall have the right, acting through the Federal reserve agent, to grant in whole or in part or to reject entirely the application of any Federal reserve bank for Federal reserve notes; but to the extent that such application may be granted the Federal Reserve Board shall, through its local Federal reserve agent, supply Federal reserve notes to the bank so applying, and such bank shall be charged with the amount of such notes and shall pay such rate of interest on said amount as may be established by the Federal Reserve Board, and the amount of such Federal reserve notes so issued to any such bank shall, upon delivery, together with such notes of such Federal reserve bank as may be issued under section eighteen of this Act upon security of United States two per centum Government bonds, become a first and paramount lien on all the assets of such bank.

(5) Reduction of liability for outstanding Federal reserve notes by deposit of Federal reserve notes, etc., with Federal reserve agent; disposition of gold, etc., so deposited.

Any Federal reserve bank may at any time reduce its liability for outstanding Federal reserve notes by depositing, with the Federal reserve agent, its Federal reserve notes, gold, gold certificates, or lawful money of the United States. Federal reserve notes so deposited shall not be reissued, except upon compliance with the conditions of an original issue.

The Federal reserve agent shall hold such gold, gold certificates, or lawful money available exclusively for exchange for the outstanding Federal reserve notes when offered by the reserve bank of which he is a director. Upon the request of the Secretary of the Treasury the Federal Reserve Board shall require the Federal reserve agent to transmit so much of said gold to the Treasury of the United States as may be required for the exclusive purpose of the redemption of such notes.

(6) Withdrawal of collateral deposited for protection of Federal reserve notes and substitution of other collateral.

Any Federal reserve bank may at its discretion withdraw collateral deposited with the local Federal reserve agent for the protection of its Federal reserve notes deposited with it and shall at the same time substitute therefor other like collateral of equal amount with the approval of the Federal reserve agent under regulations to be prescribed by the Federal Reserve Board.

(7) Plates and dies for and denominations, form and tenor of Federal reserve notes.

In order to furnish suitable notes for circulation as Federal reserve notes, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of $5, $10, $20, $50, $100, as may be required to supply the Federal reserve banks. Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this Act and shall bear the distinctive numbers of the several Federal reserve banks through which they are issued.

(8) Place of deposit of Federal reserve notes prior to delivery to Federal reserve banks.

When such notes have been prepared, they shall be deposited in the Treasury, or in the subtreasury or mint of the United States nearest the place of business of each Federal reserve bank and shall be held for the use of such bank subject to the order of the Comptroller of the Currency for their delivery, as provided by this Act.

(9) Control and direction of plates and dies by Comptroller of Currency; expense of issue and retirement of notes to be paid by Federal reserve banks.

The plates and dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws relating to the procuring of such notes, and all other expenses incidental to their issue and retirement, shall be paid by the Federal reserve banks, and the Federal Reserve Board shall include in its estimate of expenses levied against the Federal reserve banks a sufficient amount to cover the expenses herein provided for.

(10) Examination of plates, dies, etc.

The examination of plates, dies, bed pieces, and so forth, and regulations relating to such examination of plates, dies, and so forth, of national-bank notes provided for in section fifty-one hundred and seventy-four Revised Statutes, is hereby extended to include notes herein provided for.

R. S. § 5174, mentioned in this section, requiring the annual examination of the plates, etc., from which the national bank notes are printed, is set forth ante, § 9718.

(11) Appropriations and paper for printing Federal reserve notes; reimbursement of United States for printing notes by national banks and Federal reserve banks.

Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the Act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this Act may be used in the discretion of the Secretary for the purposes of this Act, and should the appropriations heretofore made be insufficient to meet the requirements of this Act in addition to circulating notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: Provided, however, That nothing in this section contained shall

be construed as exempting national banks or Federal reserve banks from their liability to reimburse the United States for any expenses incurred in printing and issuing circulating notes.

The national bank notes were required to be printed upon the distinctive or special paper used for printing United States notes, by Act March 3, 1875, c. 130, § 1, ante, § 9716.

The Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, mentioned in this section, authorized the issue of additional circulating notes to national banks, etc. See notes to Chapter Two A of this Title.

(12) Deposit of checks and drafts for collection; charges; clearance of checks.

Every Federal reserve bank shall receive on deposit at par from member banks or from Federal reserve banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal reserve bank, checks and drafts drawn by any depositor in any other Federal reserve bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal reserve bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal reserve bank.

(13) Rules and regulations for transfer of funds and charges therefor among Federal reserve banks; clearing houses.

The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal reserve banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal reserve banks, or may designate a Federal reserve bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks. (38 Stat. 265. 39 Stat. 754.)

The second paragraph of this section, as originally enacted, was as follows: "(2) Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes and bills, accepted for rediscount under the provisions of section thirteen of this Act, and the Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it."

It was amended by Act Sept. 7, 1916, c. 461, last cited above, so as to make the section read as set forth here.

REFUNDING BONDS

§ 9800. (Act Dec. 23, 1913, c. 6, § 18.) (1) Retirement of circulating notes; application for sale of bonds deposited to secure notes.

After two years from the passage of this Act, and at any time during a period of twenty years thereafter, any member bank desiring to retire the whole or any part of its circulating notes, may file with the Treasurer of the United States an application to sell for its account, at par and accrued interest, United States bonds securing circulation to be retired.

(2) List of applications for Federal reserve board; purchase of bonds by Federal reserve banks; allotment of bonds to Federal reserve banks.

The Treasurer shall, at the end of each quarterly period, furnish the Federal Reserve Board with a list of such applications, and the Federal Reserve Board may, in its discretion, require the Federal reserve banks to purchase such bonds from the banks whose applications have been filed with the Treasurer at least ten days before the end of any quarterly period at which the Federal Reserve Board may direct the purchase to be made: Provided, That Federal reserve banks shall not be permitted to purchase an amount to exceed $25,000,000 of such bonds in any one year, and which amount shall include bonds acquired under section four of this Act by the Federal reserve bank.

Provided further, That the Federal Reserve Board shall allot to each Federal reserve bank such proportion of such bonds as the capital and surplus of such bank shall bear to the aggregate capital and surplus of all the Federal reserve banks.

(3) Transfer of bonds to Federal reserve banks; deposit and payment of purchase price.

Upon notice from the Treasurer of the amount of bonds so sold for its account, each member bank shall duly assign and transfer, in writing, such bonds to the Federal reserve bank purchasing the same, and such Federal reserve bank shall, thereupon, deposit lawful money with the Treasurer of the United States for the purchase price of such bonds, and the Treasurer shall pay to the member bank selling such bonds any balance due after deducting a sufficient sum to redeem its outstanding notes secured by such bonds, which notes shall be canceled and permanently retired when redeemed.

(4) Issue of circulating notes to Federal reserve banks purchasing bonds.

The Federal reserve banks purchasing such bonds shall be permitted to take out an amount of circulating notes equal to the par value of such bonds.

(5) Issue of circulating notes to Federal reserve banks; amount; form.

Upon the deposit with the Treasurer of the United States of bonds so purchased, or any bonds with the circulating privilege acquired under section four of this Act, any Federal reserve bank making such deposit in the manner provided by existing law, shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited. Such notes shall be the obligations of the Federal reserve bank procuring the same, and shall be in form prescribed by the Secretary of the Treasury, and to the same tenor and effect as national-bank notes now provided by law. They shall be issued and redeemed under the same terms and conditions as national-bank notes except that they shall not be limited to the amount of the capital stock of the Federal reserve bank issuing them.

(6) Exchange of two per cent gold bonds with circulation privileges for one year gold notes without circulation privileges.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary of the Treasury may issue, in exchange for United States two per centum gold bonds bearing the circulation privilege, but against which no circulation is outstanding, one-year gold notes of the United States without the cir-

culation privilege, to an amount not to exceed one-half of the two per centum bonds so tendered for exchange, and thirty-year three per centum gold bonds without the circulation privilege for the remainder of the two per centum bonds so tendered: Provided, That at the time of such exchange the Federal reserve bank obtaining such one-year gold notes shall enter into an obligation with the Secretary of the Treasury binding itself to purchase from the United States for gold at the maturity of such one-year notes, an amount equal to those delivered in exchange for such bonds, if so requested by the Secretary, and at each maturity of one-year notes so purchased by such federal reserve bank, to purchase from the United States such an amount of one-year notes as the Secretary may tender to such bank, not to exceed the amount issued to such bank in the first instance, in exchange for the two per centum United States gold bonds; said obligation to purchase at maturity such notes shall continue in force for a period not to exceed thirty years.

(7) Issue of one year gold notes and three per cent gold bonds.

For the purpose of making the exchange herein provided for, the Secretary of the Treasury is authorized to issue at par Treasury notes in coupon or registered form as he may prescribe in denominations of one hundred dollars, or any multiple thereof, bearing interest at the rate of three per centum per annum, payable quarterly, such Treasury notes to be payable not more than one year from the date of their issue in gold coin of the present standard value, and to be exempt as to principal and interest from the payment of all taxes and duties of the United States except as provided by this Act, as well as from taxes in any form by or under State, municipal, or local authorities. And for the same purpose, the Secretary is authorized and empowered to issue United States gold bonds at par, bearing three per centum interest payable thirty years from date of issue, such bonds to be of the same general tenor and effect and to be issued under the same general terms and conditions as the United States three per centum bonds without the circulation privilege now issued and outstanding.

(8) Exchange of one year gold notes for three per cent gold bonds.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary may issue at par such three per centum bonds in exchange for the one-year gold notes herein provided for. (38 Stat. 268.)

BANK RESERVES

§ 9801. (Act Dec. 23, 1913, c. 6, § 19, as amended, Act Aug. 15, 1914, c. 252.) (1) Demand deposits defined.

Demand deposits within the meaning of this Act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment.

(2) Reserves of subscribing member banks.

When the Secretary of the Treasury shall have officially announced, in such manner as he may elect, the establishment of a Federal reserve bank in any district, every subscribing member bank shall establish and maintain reserves as follows:

(a) A bank not in a reserve or central reserve city as now or hereafter defined shall hold and maintain reserves equal to twelve per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date five-twelfths thereof and permanently thereafter four-twelfths.

In the Federal reserve bank of its district, for a period of twelve months after said date, two-twelfths, and for each succeeding six months an additional one-twelfth, until five-twelfths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

After said thirty-six months' period said reserves, other than those hereinbefore required to be held in the vaults of the member bank and in the Federal reserve bank, shall be held in the vaults of the member bank or in the Federal reserve bank, or in both, at the option of the member bank.

(b) A bank in a reserve city, as now or hereafter defined, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date, six-fifteenths thereof, and permanently thereafter five-fifteenths.

In the Federal reserve bank of its district for a period of twelve months after the date aforesaid, at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in central reserve cities, as now defined by law.

After said thirty-six months' period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank or in both, at the option of the member bank.

(c) A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults, six-eighteenths thereof.

In the Federal reserve bank, seven-eighteenths.

The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

Any Federal reserve bank may receive from the member banks as reserves not exceeding one-half of each installment, eligible paper as described in section thirteen properly indorsed and acceptable to the said reserve bank.

If a State bank or trust company is required or permitted by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company or with a national bank, such reserve deposits so kept in such State bank, trust company, or national bank shall be construed within the meaning of this section as if they were reserve deposits in a national bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situate. Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and

surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: Provided, however, That no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

In estimating the reserves required by this Act, the net balance of amounts due to and from other banks shall be taken as the basis for ascertaining the bank deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act. (38 Stat. 270. 38 Stat. 691.)

Subsections (b) and (c) of this section were, as originally enacted, as follows:

"(b) A bank in a reserve city, as now or hereafter defined, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

"In its vaults for a period of thirty-six months after said date six-fifteenths thereof, and permanently thereafter five-fifteenths.

"In the Federal reserve bank of its district for a period of twelve months after the date aforesaid at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

"For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

"After said thirty-six months' period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank, or in both, at the option of the member bank.

"(c) A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

"In its vaults six-eighteenths thereof.

"In the Federal reserve bank seven-eighteenths.

"The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

"Any Federal reserve bank may receive from the member banks as reserves, not exceeding one-half of each installment, eligible paper as described in section fourteen properly indorsed and acceptable to the said reserve bank.

"If a State bank or trust company is required by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company, such reserve deposits so kept in such State bank or trust company shall be construed, within the meaning of this section, as if they were reserve deposits in a national bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situate. Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

"The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: Provided, however, That

no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

"In estimating the reserves required by this Act, the net balance of amounts due to and from other banks shall be taken as the basis for ascertaining the deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

"National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act."

These subsections were amended by Act Aug. 15, 1914, c. 252, last cited above, so as to make the section read as set forth here.

§ 9802. (Act Dec. 23, 1913, c. 6, § 20.) Repeal of law making funds deposited for redemption of national bank notes part of reserve fund.

So much of sections two and three of the Act of June twentieth, eighteen hundred and seventy-four, entitled "An Act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes," as provides that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the Act aforesaid, is hereby repealed. And from and after the passage of this Act such fund of five per centum shall in no case be counted by any national banking association as a part of its lawful reserve. (38 Stat. 271.)

The Currency Act of June 20, 1874, c. 343, §§ 2, 3, mentioned in this section, are set forth ante, §§ 9748, 9751.

The Parity Act of March 14, 1900, c. 41, mentioned in this section, prescribing the standard unit of value of money, and providing for the redemption of United States notes and Treasury notes, etc., is set forth ante, §§ 6480–6487.

§ 9803. (Act Dec. 23, 1913, c. 6, § 26.) Repeal; borrowing gold on security of United States bonds or one year gold notes; sale of such bonds or notes.

All provisions of law inconsistent with or superseded by any of the provisions of this Act are to that extent and to that extent only hereby repealed: Provided, Nothing in this Act contained shall be construed to repeal the parity provision or provisions contained in an Act approved March fourteenth, nineteen hundred entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes," and the Secretary of the Treasury may for the purpose of maintaining such parity and to strengthen the gold reserve, borrow gold on the security of United States bonds authorized by section two of the Act last referred to or for one-year gold notes bearing interest at a rate of not to exceed three per centum per annum, or sell the same if necessary to obtain gold. When the funds of the Treasury on hand justify, he may purchase and retire such outstanding bonds and notes. (38 Stat. 274.)

§ 9804. (Act Dec. 23, 1913, c. 6, § 29.) Effect of partial invalidity of act.

If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. (38 Stat. 275.)

§ 9805. (Act Dec. 23, 1913, c. 6, § 30.) Reservation of power to amend, alter, or repeal act.

The right to amend, alter, or repeal this Act is hereby expressly reserved. (38 Stat. 275.)

CHAPTER FOUR

Dissolution and Receivership

Sec.
9806. Voluntary dissolution of associations.
9807. Enforcement of shareholders' individual liability by creditors on voluntary dissolution.
9808. Notice of intent to dissolve.
9809. Deposit of lawful money to redeem outstanding circulation.
9810. Exemption as to an association consolidating with another.
9811. Reassignment of bonds and redemption of notes, etc.
9812. Destruction of redeemed notes.
9813. Mode of protesting notes.
9814. Examination by special agent.
9815. Continuing business after default.
9816. Notice to holders; redemption at Treasury; cancellation of bonds.
9817. Sale of bonds at auction.
9818. Sale of bonds at private sale.
9819. Disposal of protested notes.
9820. Cancellation of national bank notes.
9821. Appointment of receivers; deposits in Government depositary.
9822. Notice to present claims.
9823. Dividends.
9824. Injunction upon receivership.
9825. Fees and expenses.
9826. Receivers for banks violating law, failing to pay judgments, or becoming insolvent.
9827. Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.
9828. Purchase by receiver of property of bank; request to Comptroller.
9829. Approval of request.
9830. Payment.
9831. Penalty for violation of this Title.
9832. Bank examinations; appointment, salaries, and powers of examiners.
9833. Loans, etc., to bank examiners; penalty; performance of other services by examiner for compensation prohibited; fees, etc., to directors, etc., prohibited; disclosures by examiners prohibited; penalties.
9834. Transfers, when void.
9835. Use of the title "national."

§ 9806. (R. S. § 5220.) Voluntary dissolution of associations.

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112.

Notes of Decisions

Construction of statute.—This section contemplates only a voluntary liquidation. McDonald v. Thompson (1902) 22 Sup. Ct. 297, 299, 184 U. S. 71, 46 L. Ed. 437.

See note under § 9807, post.

Right to liquidate.—The right to put a national bank in voluntary liquidation does not affect the right of the comptroller to appoint a receiver under the act of June 30, 1876. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

The right given by this section may be exercised, though it be contrary to to the wishes, and against the interests, of the owners of the minority of the stock. Watkins v. National Bank of Lawrence (1893) 51 Kan. 254, 32 Pac. 914.

The owners of two-thirds of the stock of a national bank may vote to liquidate the bank, though they are the directors and the executive officers thereof, since they, as directors and officers, owe no duty to dissenting minority stockholders to continue the bank, where they do not desire so to do. Green v. Bennett (Tex. Civ. App. 1908) 110 S. W. 108.

This section confers on a national bank the right to liquidate when the owners of two-thirds of the shares thereof agree so to do, and is not limited to insolvent banks, nor to cases where the interest of all of the shareholders, including the minority, may be best subserved thereby. Id.

Pendency and completion of liquidation.—The dissolution of a national banking association is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the Comptroller of the Currency, or by depositing an amount of treasury notes with him adequate to their redemption. (1869) 13 Op. Atty. Gen. 56.

A resolution of the directors of a bank, that said bank go into liquidation, be closed, and its business cease, and that its franchises be surrendered, does not operate to dissolve the corporation. Nothing but a repeal of the charter, or a judicial decree, can effect such a dissolution so as to preclude suits and actions against it to enforce its debts and liabilities. Lake Ontario Nat. Bank v. Onondaga County Bank (N. Y. 1876) 7 Hun, 549.

—— Effect on powers, duties, and liabilities.—A judgment against the bank on its guaranty, recovered after the making of such agreement, is not binding upon the stockholders who had no knowledge of the agreement, so as to prevent their raising the question whether the guaranty was not discharged by the release of the principal debtor. Schrader v. Manufacturers' Nat. Bank (1890) 10 Sup. Ct. 238, 133 U. S. 67, 33 L. Ed. 564, affirming decree Irons v. Manufacturers' Nat. Bank (C. C. 1888) 36 Fed. 843.

The officers of a national bank, which has gone into liquidation, having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes, shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders. Id.

The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, turned over to him in consideration of a release from all further liability under the lease; the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it. Brown v. Schleier (1904) 24 Sup. Ct. 558, 194 U. S. 18, 48 L. Ed. 857, affirming decree (1902) 118 Fed. 981, 55 C. C. A. 475.

The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agent is a trust fund for the primary benefit of creditors. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Same (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

Where the insolvency of a national bank was accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors. Id.

After a national bank has, by its shareholders, decided to go into liquidation, its president, upon giving paper held by the bank to creditors of the bank as collateral security for their claims, has authority to indorse or guaranty such paper in the name of the bank, so as to bind the bank and its shareholders. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, 596, reversed (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

The obligations, duties, and liabilities of such association, before the completion of the acts necessary to its dissolution, stated. (1869) 13 Op. Atty. Gen. 56.

A national bank, though it has ceased to do a banking business, has such a corporate existence as enables it in its own name to collect, for distribution among its stockholders, debts contracted with it. McCann v. Rogers (1893) 15 Ky. Law Rep. 127.

A resolution by vote of two-thirds of the shareholders of a national bank to go into liquidation and close, certified to the comptroller of the currency, does not dissolve the corporation, nor affect its capacity to collect its assets and close its affairs. Merchants' Nat. Bank v. Gaslin (1889) 41 Minn. 552, 43 N. W. 483.

Where shareholders of a national bank appointed a committee to liquidate its affairs, the control of the bank by the directors, and their power to determine what actions should be brought by it, was not thereby terminated. Planten v. National Nassau Bank of New York (Sup. 1916) 157 N. Y. S. 31.

The owners of two-thirds of the stock of a national bank, who are its directors and executive officers, must, on voting to liquidate the bank, make such disposition of the assets as will be to the best interests of all the stockholders, including minority dissenting stockholders, and this may be done by the directors or by means of a liquidating committee. Green v. Bennett (Tex. Civ. App. 1908) 110 S. W. 108.

A sale of the assets of a national bank, in process of liquidation by the liquidating committee, composed of the directors of the bank owning two-thirds of its stock, to a bank organized by themselves is not void, but only subject to the closest scrutiny on the part of a court of equity, and subject to be set aside on it being shown that it was not conducted with the utmost fairness, to the end that full value, and the best price obtainable, was realized. Id.

A liquidating agent of a national bank, though authorized to pay the bank's debts by delivery of assets, may not create a new liability against the

bank or its stockholders. First Nat. Bank of Merkel v. Armstrong (Tex. Civ. App. 1914) 168 S. W. 873.

Since one advancing money to the liquidating agent of a national bank to take up a renewal note for a loan made to the bank before liquidation would be subrogated to the rights of the creditor, it was immaterial that the liquidating agent had no authority to execute the renewal note. Id.

Where a national bank went into voluntary liquidation, it thereby ceased to do business as a going concern, and was not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee. Muir v. Citizens' Nat. Bank (1905) 80 P. 1007, 39 Wash. 57.

—— Effect on right to sue and be sued.—A national bank, voluntarily liquidating under this section, is not thereby dissolved as a corporation, but may sue and be sued in winding up its business. Central Bank v. Connecticut Mut. Life Ins. Co. (1881) 104 U. S. 54, 26 L. Ed. 693; Merchants' Nat. Bank v. Gaslin (1889) 41 Minn. 552, 43 N. W. 483; Farmers' Nat. Bank of Durant v. Suther (1911) 116 P. 173, 28 Okl. 806; Pritchard v. First Nat. Bank (1898) 76 N. W. 1106, 101 Wis. 86.

A national bank which has gone into voluntary liquidation becomes subject to like proceedings as domestic corporations; for instance, to a creditors' bill to reach a fund held by the president. Merchants' & Planters' Nat. Bank v. Masonic Hall (1880) 65 Ga. 603.

A judgment rendered against a national bank which has gone into voluntary liquidation, and to dissolve which proper steps have been taken, is void, and hence may be collaterally attacked. Hodgson v. McKinstrey (1895) 3 Kan. App. 412, 42 Pac. 929.

Remedies of and proceedings by minority stockholders.—Where a contract by which a national bank assumed all the obligations of an insolvent bank in contemplated liquidation was fully explained at a meeting at which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by this section and section 9808, post, the stockholders were not thereafter entitled to claim that such contract was ultra vires. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Same (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

Where a national bank has gone into voluntary liquidation in pursuance of the vote of all its stockholders, and all but one of them have united in organizing a new national bank under a different name, and the omitted stockholder has accepted dividends from the proceeds of nearly all the assets of the old bank, he cannot claim to be a stockholder in the new bank, nor a right to share in its earnings. First Nat. Bank v. Marshall (1888) 26 Ill. App. 440.

A stockholder held estopped from complaining that the greater part of the assets were sold to the new bank, if he knew they were thus disposed of when he accepted his share of the proceeds. Id.

The owners of two-thirds of the stock of a national bank voted to liquidate it. They were the officers of the bank, and became the liquidating committee. Held, that dissenting minority stockholders had a remedy against the liquidating committee for injuries resulting from the failure of the committee to properly dispose of the assets of the bank. Green v. Bennett (Tex. Civ. App. 1908) 110 S. W. 108.

Minority stockholders of a solvent national bank cannot obtain relief, from the majority stockholders, for injuries resulting from the destruction of the good will of the bank, by a liquidation thereof by a vote of the owners of two-thirds of the stock thereof, the act of liquidation destroying the value of such good will, as a value separate from the value of tangible assets, and the loss falling proportionately on all the stockholders. Id.

The owners of two-thirds of the stock of a solvent national bank, who were also its directors and executive officers, voted to liquidate the bank, and organized a new bank, and apportioned the stock thereof among themselves, to the exclusion of minority stockholders of the old bank. They elected themselves directors and officers of the new bank; and, through a liquidating committee composed of themselves, they transferred the assets of the old bank to the new one. Held, that since the minority stockholders had only the right to demand that the assets of the old bank be disposed of so that the full value thereof should be received for distribution among shareholders, they could not complain of the transaction, in the absence of a showing that the sales were not for full value, and on as favorable terms as could be obtained. Id.

A petition, in an action by minority stockholders of a national bank against the majority stockholders and a new bank, alleged that the majority stockholders, owning two-thirds of the stock, voted to liquidate the bank, that the majority stockholders organized the new bank, and that it purchased the assets of the old bank, and averred, on information and belief, that the directors of the new bank, who were the directors of the old bank, took advantage of section 9810, post, held, that the averment on information and belief did not show that the majority

stockholders effected a consolidation of the old bank with the new bank, especially since such a conclusion was contradictory to the averments of the petition generally. Id.

Rights of depositors.—If a national bank goes into liquidation, the book accounts of depositors draw interest from the date of suspension; the act of going into liquidation dispensing with demand. Richmond v. Irons (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, reversing decree Irons v. Manufacturers' Nat. Bank (1886) 27 Fed. 591.

The payment, by the successor of a national bank which had gone into liquidation, of the installments of interest due on government bonds deposited with the old bank, is an admission that such bonds came into the possession of the new bank on its reorganization. First Nat. Bank v. Strang (1888) 28 Ill. App. 325.

A national bank, the successor of one which went into liquidation, is liable for deposits therein. Eans v. Exchange Bank of Jefferson City (1883) 79 Mo. 182.

Appointment of receiver.—See notes under §§ 9821, 9826, post.

Cited without definite application, Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Commercial National Bank v. Weinhard (1904) 24 Sup. Ct. 253, 256, 192 U. S. 243, 48 L. Ed. 425; Citizens' Central National Bank of New York v. Appleton (1910) 30 Sup. Ct. 364, 216 U. S. 196, 54 L. Ed. 443; Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Williamson v. American Bank (1911) 185 Fed. 66, 107 C. C. A. 286; Harvey v. Lord (C. C. 1882) 10 Fed. 236, 238; Williamson v. American Bank (C. C. 1901) 109 Fed. 36, 37 (affirmed [1902] 115 Fed. 793, 52 C. C. A. 1); (1882) 17 Op. Atty. Gen. 409.

§ 9807. (Act June 30, 1876, c. 156, § 2.) Enforcement of shareholders' individual liability by creditors on voluntary dissolution.

When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. (19 Stat. 63.)

This section was part of an act authorizing the appointment of receivers of national banks, etc., cited above.

See notes to section 1 of the act, post, § 9826.

R. S. § 5220, mentioned in this section, is set forth ante, § 9806.

R. S. § 5151, also mentioned in this section, providing for individual liability of shareholders of national banks, was superseded by the provisions of the same nature of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 23, ante, 9689.

Said Federal Reserve Act of Dec. 23, 1913, ante, §§ 9785–9805, created a new system for the government and regulation of all national banks, and such of the state banks, and trust companies as, possessing the necessary qualifications, signify their acceptance of the act.

Notes of Decisions

Enforcement of stockholders' individual liability.—Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course. Poppleton v. Wallace (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

See, also, note under § 9689, ante.

Enforcement by receiver, see § 9821, post.

—— **Jurisdiction and remedy.**—The only authorized procedure for enforcing the individual liability of the shareholders of a national bank which has gone into voluntary liquidation is by a bill in equity in the nature of a creditor's bill, brought by a creditor "on behalf of himself and of all other creditors of the association against the shareholders thereof in any court of equity for the district in which such association may have been located or established," as provided by this act; the purpose of the statute being to create a fund to be applied with and in aid of the assets of the bank in all cases of voluntary, as of involuntary, liquidation, through a general creditors' suit in a court of equity, having power to enforce the liability equally and ratably as between the shareholders,

and to determine the extent to which, and those for whose benefit, it shall be enforced. A trustee appointed by the shareholders to conduct the business of liquidation has no authority to enforce such liability, nor can a suit for that purpose be maintained in any district other than that in which the bank is located. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the court of original jurisdiction, and brought by a receiver or other person appointed by such court. Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1, affirming decree (C. C. 1901) 109 Fed. 36.

An action by a citizen of another state on an assigned nonnegotiable note of a national bank which had gone into voluntary liquidation to subject assets to the payment thereof, and to enforce the liability of stockholders, was properly brought in the federal Circuit Court, in so far as the enforcement of the stockholders' liability was concerned, under this section. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, affirmed Wyman v. Wallace (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

No new liability on the part of the stockholders was created by this section, nor did this act provide for enforcing liability against stockholders under circumstances not permitting its enforcement before the act was passed, but it may be construed as limiting the tribunal in which proceedings are to be instituted to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

—— **Abatement.**—Pendency of a suit under this section is not a bar to a suit by plaintiff on his claim against the bank. Central Nat. Bank v. Connecticut Mut. L. Ins. Co. (1881) 104 U. S. 54, 76, 26 L. Ed. 693.

A creditors' bill was filed against a national bank before the passage of this act, and a receiver appointed; an amended bill, to which all the stockholders were made parties, being filed after its enactment. Subsequently the comptroller of the currency appointed a receiver to wind up the affairs of the bank, who brought this suit against one of the stockholders. Held, on demurrer to a plea in abatement, that, as the stockholder's liability could be completely enforced in the equity suit, he should not be vexed by two suits in the same jurisdiction, for the same cause of action. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

—— **Pleading.**—Where a bill was filed against a national bank, alleging that its voluntary liquidation was fraudulent, and praying to have all sales or transfers by the bank set aside, and after the filing of the bill Act June 30, 1876, was passed, it was not error to allow an amended bill, bringing in all of the stockholders, and asking an accounting of the indebtedness of the bank and the amounts due from the stockholders under the national banking act. Richmond v. Irons (1887) 7 Sup. Ct. 788, 797, 121 U. S. 27, 30 L. Ed. 864.

—— **Judgment.**—A judgment against a bank on its guaranty, recovered after the making of an agreement by its president that the guaranty, which was made before liquidation, should not be discharged by the release of the principal debtor, is not binding on the stockholders, who had no knowledge of the agreement, so as to prevent their raising the question whether the guaranty was not discharged by the release of the principal debtor. Schrader v. Manufacturers' Nat. Bank (1890) 10 Sup. Ct. 238, 241, 133 U. S. 67, 33 L. Ed. 564.

Preferences and distribution of assets.—After a national bank went into voluntary liquidation, several creditors took in payment of their claims paper belonging to the bank, with the bank's guaranty of payment, which paper was not paid. Held, that such creditors were not entitled to share in the assets obtained by enforcement of the statutory liability of the stockholders, since, after the bank went into liquidation, its powers being limited to the collection of assets and the payment of debts, it could not guaranty payment. Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864, reversing decree Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591.

In a suit in chancery under this statute by a creditor, the fund obtained is a part of the general assets of the bank, and all creditors stand upon an equal footing in the distribution of it. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, decree reversed Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

A mortgage of all his individual property executed by a cashier and stockholder of a bank, after it had closed its doors, to secure a depositor, was a preference, and was void as against a judgment recovered against the cashier by the receiver, either in the hands of the receiver or of a purchaser from him for value. Gatch v. Fitch (C. C. 1888) 34 Fed. 566.

See note under § 9806, ante.

§ 9808. (R. S. § 5221.) Notice of intent to dissolve.

Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112.

Cited without definite application, Central National Bank v. Life Ins. Co. (1881) 104 U. S. 54, 26 L. Ed. 693; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 161 U. S. 1, 40 L. Ed. 595; Citizens' Central Nat. Bank of New York v. Appleton (1910) 30 Sup. Ct. 364, 216 U. S. 196, 54 L. Ed. 443; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; U. S. v. Jewett (C. C. 1897) 84 Fed. 142, 143, affirmed (1900) 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568.

§ 9809. (R. S. § 5222.) Deposit of lawful money to redeem outstanding circulation.

Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States, lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

Act June 3, 1864, c. 106, §§ 42, 43, 13 Stat. 112. Act July 14, 1870, c. 257, 16 Stat. 274.

§ 9810. (R. S. § 5223.) Exemption as to an association consolidating with another.

An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

Act July 14, 1870, c. 257, 16 Stat. 274.

Notes of Decisions

Consolidation of banks.—Under this section the consolidation of two banks with the comptroller's approbation, whereby one agreed to assume the other's liabilities, and issued its own increased shares to the stockholders of the first bank, was not void as ultra vires. Bonnet v. First Nat. Bank (1900) 60 S. W. 325, 24 Tex. Civ. App. 613.

Where a bank consolidated with another, taking all the assets and assuming all the liabilities of the latter, it became a new corporation, whose stockholders were the stockholders of each corporation before consolidation; and hence stockholders of the first bank had no right to the new shares brought in which increased the capital stock. Id.

The owners of two-thirds of the stock of a national bank voted to liquidate it. They organized a new bank, to the exclusion of minority dissenting stockholders of the old bank. The new bank purchased the assets of the old bank through the liquidating committee, consisting of the directors of the old bank. Held, that the transaction did not amount to a consolidation of the two banks, and the minority stockholders were not entitled to a proportionate share of the stock of the new bank. Green v. Bennett (Tex. Civ. App. 1908) 110 S. W. 108.

§ 9811. (R. S. § 5224, as amended, Act Feb. 18, 1875, c. 80, § 1.) Reassignment of bonds and redemption of notes, etc.

Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 320.

This section, as enacted in the Revised Statutes, did not contain the provision at the end thereof as set forth here, beginning with the words, "And if any such bank shall fail," etc. Said provision was added by amendment by Act Feb. 18, 1875, c. 80, § 1, cited above.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, by section 4 of that act. See notes under Chapter Two A of this Title.

Provisions relating to redeeming circulating notes in the ordinary course of business are set forth in chapter 3 of this Title, "Regulation of the Banking Business."

Cited without definite application, Central Nat. Bank v. Life Ins. Co. (1881) 104 U. S. 54, 26 L. Ed. 693; Twin City Bank v. Nebiker (1897) 17 Sup. Ct. 766, 768, 167 U. S. 196, 42 L. Ed. 134; U. S. v. Jewett (C. C. 1897) 84 Fed. 142, 143, affirmed (1900) 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568.

§ 9812. (R. S. § 5225, as amended, Act Feb. 27, 1877, c. 69, § 1.) Destruction of redeemed notes.

Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the five preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four.

Act June 3, 1864, c. 106, § 43, 13 Stat. 112. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 252.

This section was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by striking out, after the words "its affairs under the," the word "six," and substituting therefor the word "five," as set forth here.

Provisions relating to the maceration of national bank notes, and repealing so much of R. S. § 5184, ante, § 9723, and this section as provided for the burning of the same were made by Act June 23, 1874, c. 455, § 1, ante, § 6560.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

Cited without definite application, Schmidt v. U. S. (1904) 133 Fed. 257, 66 C. C. A. 389.

§ 9813. (R. S. § 5226.) Mode of protesting notes.

Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon

demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

Act June 3, 1864, c. 106, § 46, 13 Stat. 113.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

Notes of Decisions

See note under § 9815, post.

Unpaid deposit—Offset.—A stockholder could not offset against his statutory double liability the amount of his unpaid deposit account. Williams v. Rose (D. C. 1914) 218 Fed. 898.

Cited without definite application, Richmond v. Irons (1887) 7 Sup. Ct. 788, 797, 121 U. S. 27, 30 L. Ed. 864; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 161 U. S. 1, 40 L. Ed. 595; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 916, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 242, 21 C. C. A. 315; Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1; Roberts v. Hill (C. C. 1885) 23 Fed. 311.

§ 9814. (R. S. § 5227.) Examination by special agent.

On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

Notes of Decisions

Unpaid deposit.—See note under § 9813, ante.

Cited without definite application, Richmond v. Irons (1887) 7 Sup. Ct. 788, 797, 121 U. S. 27, 30 L. Ed. 864; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 161 U. S. 1, 40 L. Ed. 595;

Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 916, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 242, 21 C. C. A. 315; Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1.

§ 9815. (R. S. § 5228, as amended, Act Feb. 18, 1875, c. 80, § 1.) Continuing business after default.

After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

Act June 3, 1864, c. 106, § 46, 13 Stat. 113. Act Feb. 18, 1875, c. 80, 18 Stat. 320.

This section was amended by Act Feb. 18, 1875, c. 80, cited above, by striking out, after the words "and notice," the words "of forfeiture of the bonds," and substituting therefor the word "thereof," as set forth here.

The provisions of this section were made inapplicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

Notes of Decisions

Continuing business after default.—Delinquent banks, whose notes have been protested and whose officers have been notified by the comptroller that proceedings for liquidation have been instituted, cannot lawfully pay out any of their notes, or discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to the association and deliver special deposits; but this power refutes the theory that the bank at that stage of the proceedings has ceased to exist. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 398, 20 L. Ed. 840.

The business of a national bank must stop when insolvency is declared, and no debt can be made after that, and the only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before insolvency. U. S. v. Knox (1884) 4 Sup. Ct. 686, 687, 111 U. S. 784, 28 L. Ed. 603.

Special deposits.—The provision that it shall be lawful for a national bank, after its failure, to "deliver special deposits," is as effectual a recognition of its power to receive them as an express declaration to that effect would have been. Carlisle First Nat. Bank v. Graham (1879) 100 U. S. 699, 25 L. Ed. 750. And embraces public securities of the United States. Id.

This section implies that a bank may receive special deposits. Id. The phrase "special deposits" thus used, embraces government bonds. Id.

This section does not apply to a certified check on a second bank deposited with it for collection only. Louisiana Ice Co. v. State Nat. Bank (La. 1881) 1 McGloin, 181.

A national bank has not implied power, as incidental to the purpose of its organization, to receive government bonds as a special deposit. Whitney v. First Nat. Bank (1877) 50 Vt. 388, 28 Am. Rep. 503.

Cited without definite application, Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Merrill v. National Bank (1899) 19 Sup. Ct. 360, 366, 173 U. S. 131, 43 L. Ed. 640; Merchants' Nat. Bank v. Armstrong (C. C. 1895) 65 Fed. 932, 935.

§ 9816. (R. S. § 5229.) Notice to holders; redemption at Treasury; cancellation of bonds.

Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discre-

tion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

The provisions of this section were made inapplicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

§ 9817. (R. S. § 5230.) Sale of bonds at auction.

Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

Act June 3, 1864, c. 106, §§ 47, 48, 13 Stat. 114.

The provisions of this section were made inapplicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 38 Stat. 549.

The lien given by this section was made applicable to the circulating notes authorized to be issued to members of national currency associations by said Aldrich-Vreeland Act of May 30, 1908, c. 229, 35 Stat. 546, by section 1 of that act, ante, 35 Stat. 546. See notes to Chapter Two A of this Title.

Cited without definite application, Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 565, 107 U. S. 445, 27 L. Ed. 537.

§ 9818. (R. S. § 5231.) Sale of bonds at private sale.

The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market-value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

Act June 3, 1864, c. 106, § 49, 13 Stat. 114.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

§ 9819. (R. S. § 5232.) Disposal of protested notes.

The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

§ 9820. (R. S. § 5233.) Cancellation of national bank notes.

All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by National banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

§ 9821. (R. S. § 5234, as amended, Act May 15, 1916, c. 121.) Appointment of receivers; deposits in Government depositary.

On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than two per centum per annum upon the average monthly amount of such deposits.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114. Act May 15, 1916, c. 121, 39 Stat. 121.

This section was amended by Act May 15, 1916, c. 121, cited above, by adding the proviso as set forth here.

R. S. §§ 5226, 5227, mentioned in this section, are set forth ante, §§ 9813, 9814.

Other provisions relating to the appointment, powers, and duties of receivers and agents were made by Act June 30, 1876, c. 156, amended by Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354, and by Act March 29, 1886, c. 28, post, §§ 9827–9830.

The provisions of this section were made applicable to bonds, other than United States bonds, deposited by national banks for the issue of additional circulating notes authorized by the Aldrich-Vreeland Act of May 30, 1908, c. 229, § 3, 35 Stat. 548, by section 4 of that act, 35 Stat. 549. See notes to Chapter Two A of this Title.

Notes of Decisions

1. Construction, operation, and validity of statute.
2. Receivers—Powers, duties, and nature of office.
3. Appointment of receiver.
4. Effect of appointment.
5. Liability of receiver.
6. Direction of comptroller.
7. —— Conclusiveness of comptroller's decision.
8. Order of court.
9. Possession, management, and control of property.
10. —— Sale of property.
11. Exemption from taxation.
12. Collection of debts.
13. —— Actions.
14. —— Set-offs.
15. Sale or compromise of debts.
16. Money unlawfully received and converted—Recovery by receiver.
17. —— Recovery against receiver.
18. Liability of directors.
19. Liability of stockholders.
20. —— Enforcement by receiver.
21. —— Second assessment.

1. Construction, operation, and validity of statute.—See, also, note under § 9826, post.

The statute does not make the capital stock on failure of the bank such a trust fund in the hands of the directors for the benefit of creditors as to render invalid an assignment for creditors by the shareholders who were also the directors. Peters v. Bain (1890) 10 Sup. Ct. 354, 361, 133 U. S. 670, 33 L. Ed. 696.

This section, and sections 9823, 9834, post, do not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency. Scott v. Armstrong (1892) 13 Sup. Ct. 148, 151, 146 U. S. 499, 36 L. Ed. 1059.

The provisions empowering the comptroller to appoint receivers for insolvent national banks, and to make ratable assessments upon the stockholders, does not vest in him a judicial power, in violation of the constitution. Bushnell v. Leland (1897) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

It is the intent of the statute to throw the entire control of an insolvent bank into the hands of the comptroller of the treasury, for the purpose of facilitating the winding up of its affairs and the payment of its obligations. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

Dissolution of a national bank can be enforced only by proceedings under the national banking act, its organization cannot be impeached collaterally. Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1872) 1 Colo. 531.

2. Receivers—Powers, duties, and nature of office.—A receiver of an insolvent national bank, appointed by the comptroller of the currency, is the agent of the United States, and not an agent or officer of any court. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 165 U. S. 443, 41 L. Ed. 782; Armstrong v. Trautman (C. C. 1888) 36 Fed. 275, 276; Platt v. Beach (D. C. 1868) Fed. Cas. No. 11,215; Stanton v. Wilkeson (D. C. 1876) Fed. Cas. No. 13,299. He is limited in his functions by the object of the receivership, and the duties which it involves. Ellis v. Little (1882) 27 Kan. 707, 41 Am. Rep. 434. He is chargeable with knowledge of all facts known to the bank affecting the character of such assets. People's State Bank v. Francis (1899) 79 N. W. 853, 8 N. D. 369. He is vested with all the rights of creditors and the rights of the corporation itself. He may challenge any wrongful act which creditors could challenge, and maintain such suits against third parties, including actions against directors and stockholders of a bank on account of wrongful and fraudulent acts, as the corporation might maintain; but he is not authorized to challenge or impeach an executed transaction between the bank and a third party, which was simply ultra vires and which, though known to the United States through its proper officials at the time it was undertaken and commenced, was neither arrested nor complained of by the United States or any creditor or stockholder of the bank. Such receiver is not vested by virtue of his appointment with all of those visitorial powers over national banks which the United States acting in its sovereign capacity may exercise. Brown v. Schleier (1902) 118 Fed. 981, 986, 55 C. C. A. 475, affirmed (1904) 24 Sup. Ct. 558, 194 U. S. 18, 48 L. Ed. 857. He is charged by the laws of the United States with the execution of duties in the performance of which he acts as an agent and officer of the United States, and his office is created and his duties defined by congress. McDonald v. Nebraska (1900) 101 Fed. 171, 177, 41 C. C. A. 278.

Persons dealing with the receiver of a national bank in his official capacity are chargeable with knowledge of his authority, and the estate of the bank cannot be charged for the receiver's default or inability to perform contracts in excess of his authority. Ellis v. Little (1882) 27 Kan. 707, 41 Am. Rep. 434.

3. Appointment of receiver.—The debtors of a national bank, when sued by a person whom the comptroller, professing to act in pursuance of this section, has appointed to be its receiver, cannot inquire into the lawfulness of such receiver's appointment. Cadle v. Baker (1874) 87 U. S. (20 Wall.) 650, 22 L. Ed. 448.

The comptroller of the currency has power to appoint a receiver for a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders, without a previous judicial ascertainment of the necessity for the appointment of a receiver or of the existence of the liabilities of the bank; and the conferring of such authority upon him by statute does not vest in him judicial power, in violation of the constitution. Bushnell v. Leland (1896) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598; Ex parte Chetwood (1897) 17 Sup. Ct. 385, 390, 165 U. S. 443, 41 L. Ed. 782.

The statute of limitations is not set in motion against a certificate of deposit by the appointment of a receiver for the bank which issued it. Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 505.

A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating this section. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

4. Effect of appointment.—A bank does not lose its corporate existence by mere default in paying its circulating

notes and the appointment of a receiver. The bank may be sued notwithstanding a receiver has been appointed and is administering its affairs. First Nat. Bank v. Pahquioque Bank (1871) 81 U. S. (14 Wall.) 383, 20 L. Ed. 840.

The power given to apply to a federal court to enjoin further proceedings is evidence tending to refute the theory that a bank, after the appointment of a receiver, ceases to exist. Id.

The provisions of section 9831 show conclusively that the act of the comptroller in appointing a receiver does not work a complete dissolution of the association. Id.

A bank does not cease to exist on the appointment of a receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 398, 20 L. Ed. 840; Rosenblatt v. Johnston (1881) 104 U. S. 462, 463, 26 L. Ed. 832.

Property of correspondent in remittances held not destroyed or impaired by the suspending of the sending bank or the appointment of a receiver therefor before their actual receipt. McDonald v. Chemical Nat. Bank (1899) 19 Sup. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106, affirming decree Hayden v. Chemical Nat. Bank (1898) 84 Fed. 874, 28 C. C. A. 548.

Under this section a state court has no authority to order execution against a national bank in the hands of a receiver to enforce a lien, obtained before the receiver's appointment, by an attachment against the bank as garnishee, though the rights thus acquired must be recognized by the comptroller of the currency. Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44 L. Ed. 1146.

The officers of a national bank have no power to incur a liability on the part of such bank after it has gone into liquidation which will be binding on the shareholders, and a judgment on a liability so created, rendered against the bank by collusion of the officers, is not conclusive on the shareholders. Moss v. Whitzel (C. C. 1901) 108 Fed. 579.

A national bank continues to exist and has capacity to sue and be sued, notwithstanding the appointment of a receiver of its assets by the comptroller of the currency. Moss v. Goodhart (D. C. 1913) 209 Fed. 102.

A bank organized under the United States currency act as a national bank had failed to redeem its notes, and the comptroller of the currency, under the provisions of the currency act, had appointed a receiver, who had taken possession of its assets, and its affairs were being wound up. A creditor presented a claim against the bank to the receiver, who disallowed it, and the creditor thereupon brought suit upon it against the bank. Held, that the proceedings of the comptroller had not produced a forfeiture of the franchise of the bank and a dissolution of the corporation, and that therefore the suit would lie against it. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325.

The legal existence of a national bank is not ended by its insolvency and the appointment of a receiver therefor by the comptroller of the currency, but it still continues as an entity, capable of suing and being sued, notwithstanding such appointment; and where under such circumstances, the legal title to a note, not an asset of the bank, is in its name, but the beneficial ownership in another, a suit upon such note may be maintained in its name to recover the money due thereon. Camp v. First Nat. Bank (1902) 33 So. 241, 44 Fla. 497, 103 Am. St. Rep. 173.

A national bank is not absolutely dissolved by the appointment of a receiver for it, but may be sued thereafter by a creditor. Green v. Walkill Nat. Bank (N. Y. 1875) 7 Hun, 63.

A judgment is not invalid because recovered in the name of a national bank after it has gone into voluntary liquidation. Cage v. Shapard (1898) 46 S. W. 839, 19 Tex. Civ. App. 206.

5. **Liability of receiver.**—A suit by a creditor of an insolvent national bank against a receiver thereof, appointed pursuant to this section, to recover money alleged to be due on the theory that dividends declared pursuant to this section had not been declared on the proper basis, involved the administration of the trust, and was therefore properly brought in equity. Merrill v. National Bank (1899) 19 Sup. Ct. 360, 365, 173 U. S. 131, 43 L. Ed. 640.

A receiver of a national bank is not liable for damages sustained by a person on account of the fraud practiced upon him by the bank and its officers in inducing him to purchase stock. Lantry v. Wallace (1901) 21 Sup. Ct. 878, 182 U. S. 536, 45 L. Ed. 1218, affirming judgment (1899) 97 Fed. 865, 38 C. C. A. 510.

In a suit against the receiver of a national bank for money loaned the bank while it was a going concern, it was error to permit plaintiff to recover interest on the loan after the bank's suspension and the appointment of a receiver, since debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes, and the amount of all debts computed as of that day. American Nat. Bank v. Williams (1900) 101 Fed. 943, 42 C. C. A. 101.

Cause of action against a receiver of a national bank for wrongful sale of certain of its assets or less than 50 per cent. of their value was in the bank, and could not be maintained by a stockholder without alleging a demand on and refusal by the receiver's successor, the comptroller, and the bank

in turn to bring the action. Moss v. Goodhart (D. C. 1913) 209 Fed. 102.

Where the receiver of a national bank illegally sold certain of its assets for less than 50 per cent. of their value, and a stockholder was compelled to sue to obtain relief because of the refusal of the receiver's successor, the comptroller, or the bank to sue, the receiver's successor was a necessary party to such suit. Id.

An action by a receiver of a national bank against a prior receiver to charge with a trust property sold by the prior receiver for his benefits, and subsequently conveyed to a corporation promoted by him in payment of the capital stock of which he owned 95 per cent. is not barred by laches, though not brought until the expiration of many years after the sale, but brought shortly after the facts were brought home to the receiver, and it did not appear that he should have known the facts prior thereto. Schofield v. Baker (D. C. 1914) 212 Fed. 504.

Where a national bank suspends before a draft sent to it for collection is paid, an action for its recovery can be maintained against its receiver. Corn Exch. Bank v. Blye (1886) 2 N. Y. St. Rep. 8, 112.

6. Direction of comptroller.—The language of the statute authorizing the appointment of a receiver of a national bank to act under the direction of the comptroller means no more than that the receiver shall be subject to the direction of the comptroller. National Bank of Metropolis v. Kennedy (1872) 17 Wall. 19, 22, 21 L. Ed. 554.

A receiver, in order to sue for a debt due the bank, need not procure an order of the comptroller; it being a part of the receiver's official duty to collect the assets. Id.

Authorization by the comptroller is not necessary to entitle a receiver of a national bank to bring an action to establish a claim of the bank against an insolvent debtor, and for the sale of collateral held by the bank. Turner v. Richardson (1901) 21 Sup. Ct. 295, 180 U. S. 87, 45 L. Ed. 438, affirming judgment Richardson v. Turner (1900) 28 So. 158, 52 La. Ann. 1613.

The decision of the comptroller of the currency that it is necessary to collect, and his requisition of a certain percentage of the liability of the shareholders of a national bank, in order to pay its debts, is not a decision that a larger percentage will not be necessary, and he has plenary power to make successive assessments until the full liability of the shareholder is exhausted. Deweese v. Smith (1901) 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971, judgment affirmed Smith v. Brown (1902) 23 Sup. Ct. 845, 187 U. S. 637, 47 L. Ed. 344.

Specific authority given by the comptroller to the receiver of a national bank to bring an action against a stockholder to recover an assessment is not withdrawn or affected by a subsequent general authority to compromise or sell all the claims or assets of the bank. McClaine v. Rankin (1902) 119 Fed. 110, 56 C. C. A. 160, judgment reversed (1905) 25 Sup. Ct. 410, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

Where a court has appointed a receiver to liquidate the debts of a national bank in voluntary liquidation, no action of the comptroller is required to empower such receiver to enforce the liability of the shareholders. King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

7. —— Conclusiveness of comptroller's decision.—Where a national bank becomes insolvent, the order of the comptroller of the currency as to the amount of an assessment to be made upon the stockholders is binding, and cannot be controverted by the stockholders in a suit against them for the recovery thereof. Kennedy v. Gibson (1869) 75 U. S. (8 Wall.) 498, 19 L. Ed. 476; Casey v. Galli (1876) 94 U. S. 673, 24 L. Ed. 168, 307.

The comptroller of the currency has authority to determine when it is necessary, in winding up the affairs of an insolvent bank, to enforce the liability of the stockholders, and levy assessments accordingly, and his determination is conclusive on the stockholders. Aldrich v. Campbell (1899) 97 Fed. 663, 38 C. C. A. 347.

Under the acts of congress the comptroller of the currency is constituted a quasi judicial tribunal to determine at what times and what amounts, not exceeding the full liability of the stockholders, it is necessary to collect from them to pay the debts of the bank; and hence his decisions of such questions are impervious to collateral attack, and open to avoidance by a court only in a direct attack on them for error of law, fraud, or mistake. Deweese v. Smith (1901) 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971, judgment affirmed Smith v. Brown (1902) 23 Sup. Ct. 845, 187 U. S. 637, 47 L. Ed. 344.

Comptroller of currency, in winding up insolvent national bank, has authority to finally determine when a deficiency of assets exists. Bailey v. Sawyer (C. C. 1877) Fed. Cas. No. 744.

The comptroller of the currency, at such time as he deems proper, and upon such data as are satisfactory to him, may pass upon the necessity of instituting proceedings against national bank stockholders to enforce their personal liability as such; and when his decision is made it is conclusive, and cannot be questioned in any litigation that may ensue. Waldron v. Alling (1902) 76 N. Y. S. 250, 78 App. Div. 86.

The decision of the comptroller of the currency that the capital stock is impaired is conclusive on the stockholders

of the bank and on the courts.—Thomas v. Gilbert (Or. 1909) 101 P. 393.

8. Order of court.—The courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and cannot order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by this section to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association. In re Earle (C. C. 1899) 92 Fed. 22.

The district court is "a court of record of competent jurisdiction," within this section, permitting a receiver of a national bank to compromise doubtful claims on the order of such a court. In re Platt (D. C. 1867) Fed. Cas. No. 11,211.

An order of court which authorized the receiver of a national bank to sell the bank assets, consisting of bills receivable, judgments, overdrafts, stocks, warrants, securities, assessments on stockholders, and "all other personal property and chattel property and evidences of indebtedness," entered on a petition which did not comprehend real estate, limited the receiver to sell personal and chattel property, and did not authorize a sale by him of real estate consisting of tidelands purchased by the receiver, with the approval of the comptroller of the currency, by exercising the preference right granted by law to the bank as a riparian owner of uplands to purchase on paying the price in installments and obtaining a deed on final payment. Schofield v. Baker (D. C. 1914) 212 Fed. 504.

Under this section a receiver of a national bank cannot sell the real or personal property of the bank without an order of court, and a sale not authorized is void. Id.

A receiver of a national bank may, upon the order of a competent court, sell or compound all bad or doubtful debts of the bank and all the real and personal property on such terms as the court shall direct, but cannot sell the property of the bank in the absence of such an order or upon terms in conflict therewith. Ellis v. Little (1882) 27 Kan. 707, 41 Am. Rep. 434. Nor can he charge the estate of the bank by his executory contract unless authorized to do so under the provisions of the national banking act and the order of a competent court of record obtained under the terms of that act. Id.

An order of a court of record of competent jurisdiction is a prerequisite to a valid sale by the receiver. Tourtelot v. Booker (Tex. Civ. App. 1913) 160 S. W. 293.

9. Possession, management, and control of property.—The property of a national bank, attached at the suit of an individual creditor after the bank became insolvent, cannot be subjected to sale for the payment of his demand against the claim of the property by a receiver of a bank subsequently appointed. First Nat. Bank v. Colby (1874) 88 U. S. (21 Wall.) 609, 22 L. Ed. 687.

A receiver does not by filing a petition in a federal court, under this section, for leave to sell property of the bank, or to sell or compound bad or doubtful debts, place the assets of the bank in the custody of the court, in the sense in which it has the custody of property in the hands of a receiver appointed by itself. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 391, 165 U. S. 443, 41 L. Ed. 782.

An instrument assigning certain shares of stock and bonds to the receiver of a national bank to secure a debt from the assignor to the bank, subject to certain prior pledges of a portion of the stock and bonds, in terms vested the receiver with "the rights of an owner, so far as regards sale, disposition, and management." Held, that dealings with the stock and bonds by the receiver after the assignor's death, with the approval of the controller, by which a forced sale was prevented by prior pledgees, and all parties in interest were benefited, could not be attacked in equity by the assignor's administrator because he did not assent to the same. McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392, affirming decree Earle v. McCartney (C. C. 1901) 112 Fed. 372.

When a party asserts the ownership of property, or a specific lien thereon, it is within the discretion of the trial court to retain the property within its jurisdiction until the questions at issue can be determined, even though such property is a fund in the hands of the receiver of a national bank and an injunction is necessary to restrain him from transmitting it to the comptroller of the currency in the usual course as required by statute. American Can Co. v. Williams (1907) 153 Fed. 882, 82 C. C. A. 628, affirming judgment on rehearing (1906) 149 Fed. 200, 79 C. C. A. 158.

A receiver of an insolvent national bank stands in the place of the bank as to property equitably belonging to third persons. Skud v. Tillinghast (1912) 195 Fed. 1, 115 C. C. A. 83.

The receiver of an insolvent national bank has no greater right to enforce collection of assets than the bank itself would have had. Casey v. La Societe De Credit Mobilier (C. C. 1874) Fed. Cas. No. 2,496.

Proper parties to suit to recover pledged negotiable notes, see Chase v. Cannon (C. C. 1891) 47 Fed. 674.

Where a receiver, on taking possession of the assets of a national bank,

found its affairs in confusion and found stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it was his duty to ascertain and assert fully the obligations and liabilities of the pledger to the bank and the purpose and extent of the pledge. Wise v. Williams (C. C. 1908) 162 Fed. 161.

A national bank, lawfully owning uplands and thereby having under state laws a preference right to purchase tidelands of the state, may purchase tidelands, and receiver, acquiring tidelands with the approval of the comptroller of the currency, may not challenge the right to acquire the same, and his holding can be questioned only by the government. Schofield v. Baker (D. C. 1914) 212 Fed. 504.

The 5 per cent. redemption fund is in effect a trust fund held for one purpose, that of redeeming the bank's circulating notes. The treasurer has no power over the fund of an insolvent bank beyond redeeming its notes, and the fund passes to the custody of the comptroller as an asset of the bank. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

If the receiver of a national bank has authority of the proper district court and the consent of every one of the creditors of the bank to a private sale of any of its assets, then the dividend money could be used to purchase such asset. The money thus used would again become assets of the bank for distribution. (1891) 20 Op. Atty. Gen. 269.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are attached, the United States court will not, on a bill in equity by the receiver of such bank against plaintiffs in the attachment suit and the officer who served the attachment, enjoin all proceedings in such suit, and appoint a receiver for the funds attached, on the ground that such court has exclusive jurisdiction of such bank, and is entitled through its receiver to the control of the funds. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

The receiver of a national bank has the legal title to the property covered by his appointment, entitling him to maintain an action at law in his own name in the state courts. Fish v. Olin (1903) 56 A. 533, 76 Vt. 120.

10. —— Sale of property.—An order of court authorizing a receiver of a bank to sell bad or doubtful assets held not to authorize him to sell an interest in real estate. Baker v. Schofield (1915) 221 Fed. 322, 136 C. C. A. 320, affirming decree Schofield v. Baker (D. C. 1914) 212 Fed. 504.

Where a receiver has sold the property of a national bank under an order of court in accordance with this section, such sale will not thereafter be set aside before confirmation upon a subsequent offer of an advance bid of some $5,000 or $6,000, where a former sale of the same property had been set aside for inadequacy of price. In re Third Nat. Bank (D. C. 1880) 4 Fed. 775.

A sale by a receiver of the property of a national bank, under an order of court, in accordance with the provisions of this section, constitutes a judicial sale. Id.

A receiver of a national bank transferred privately to a third person land purchased with the approval of the comptroller of the currency. The third person merely paid the price which the receiver had paid to the state and a nominal profit. Subsequently the title was transferred to the receiver's attorney. The receiver thereafter promoted a corporation, and the land was conveyed to it in full payment of its capital stock. The third person made admissions that he purchased for the receiver and held the title to accommodate him. The value of the land greatly exceeded the price paid by the third person and by the receiver on the title being conveyed to his attorney. Held, that the property was chargeable with a trust under the rule that a trustee may not directly nor indirectly purchase any of the trust property and acquire title as against the beneficiary. Schofield v. Baker (D. C. 1914) 212 Fed. 504.

Where property sold by the receiver of a national bank to a third person for his benefit was subsequently conveyed to a corporation in payment of the capital stock, he owning a large majority of the stock, persons subsequently acquiring the stock could not prevent a decree charging the property with a trust in favor of the bank on payment to such receiver or to the corporation of all money paid for the purchase and all taxes and assessments with interest from date of payment. Id.

Where a bank receiver sold land under an order of court, and not by virtue of his appointment by the comptroller of the currency, the recital in his deed of his appointment by such comptroller does not entitle the deed to admission in evidence without proof of his authority to sell. Hutchinson v. Patterson (1910) 126 S. W. 403, 226 Mo. 174.

One of the liquidating trustees of a national bank may purchase at the sale of the assets of the bank; he being one of the stockholders, and it being at auction, after notice to all the stockholders, who alone were interested,—the bank being solvent. Cage v. Shapard (1898) 46 S. W. 839, 19 Tex. Civ. App. 206.

11. Exemption from taxation.—See § 6299, ante, and note thereunder.

Personal property of an insolvent

bank in the hands of a receiver appointed under this section is exempt from state taxation. Rosenblatt v. Johnston (1881) 104 U. S. 462, 463, 26 L. Ed. 832.

The property of a national bank organized under the act of 1864, levied upon by a county treasurer to satisfy a tax levied after the bank has become insolvent, cannot be subjected to such demand against a claim for the property by a receiver subsequently appointed. Woodward v. Ellsworth (1879) 4 Colo. 580.

12. **Collection of debts.**—A receiver of a national bank holds its negotiable notes subject to the same defenses that applied to the bank itself. Hatch v. Johnson Loan & Trust Co. (C. C. 1895) 79 Fed. 828.

A receiver for a national bank has authority, on sufficient consideration, to extend the time of payment of a debt owing such bank, where by so doing he can, in his judgment, strengthen the security he holds for the payment of such debt. People's State Bank v. Francis (1899) 79 N. W. 853, 8 N. D. 369.

13. —— **Actions**—A receiver of a national bank, appointed by the comptroller under this section, may sue for demands due the bank in his own name as receiver, or in the name of the bank. National Bank of Metropolis v. Kennedy (1872) 17 Wall. 19, 21, 21 L. Ed. 554.

In an action by the receiver of an insolvent national bank against a former stockholder and director to recover the price he received for shares of stock which it was alleged he sold to the cashier and received payment from funds of the bank, evidence considered, and held insufficient to charge defendant with notice either that the stock was bought by the cashier or paid for with funds of the bank, if such was the fact; it appearing that he delivered the stock on a contract signed by the cashier as agent for another director, and that the greater part was paid for by such director to whom it was transferred, and who received dividends thereon. Swords v. Page (1909) 174 Fed. 916, 98 C. C. A. 528.

An action by a receiver of a national bank to collect a debt due the bank is one brought under authority of this section, and is within the jurisdiction of a federal court, regardless of the amount in controversy. Schofield v. Palmer (C. C. 1904) 134 Fed. 753.

The federal district court has jurisdiction of a common-law action brought by a receiver to collect a claim due the estate. Platt v. Beach (D. C. 1868) Fed. Cas. No. 11,215.

A debtor of a national bank in the hands of a receiver cannot question the authority of such receiver. Jacobson v. Berry (1907) 135 Ill. App. 415.

This act authorizes the receiver, when appointed, to sue for and stand in judgment in the courts of the country in all cases involving the collection of debts due such bank or association. The power to collect debts embraces the right to use all necessary means to attain that object. Case v. Berwin (1870) 22 La. Ann. 321.

A bill by a receiver of a national bank to establish a lien in favor of the bank on a note which the bank held for collection and which the depositor, who was financially irresponsible, had assigned to a third party, examined, and held to show sufficient grounds for equitable relief. Gibbons v. Hecox (1895) 63 N. W. 519, 105 Mich. 509, 55 Am. St. Rep. 463.

In an action by the receiver against a debtor of the bank, an allegation that on a day named the comptroller of the currency appointed the plaintiff receiver of the bank, in accordance with the provisions of the act of congress, and the plaintiff has taken possession of the assets, including the demand in suit, is a sufficient allegation of appointment. Platt v. Crawford (N. Y. 1868) 8 Abb. Prac. (N. S.) 297.

A certificate of the comptroller of the currency, approved and concurred in by the secretary of the treasury, reciting the existence of all the facts of which the former is required by the national currency act to be satisfied, to authorize him to appoint a receiver of a national bank, under the provisions of that act, is sufficient evidence of the validity of the appointment of the receiver in an action brought by him as such. Platt v. Beebe (1874) 57 N. Y. 339.

Where no proceeding is pending under the national bank law for forfeiture of the charter of a bank, its receiver may, in a state court, maintain an action against its directors to recover damages sustained through their gross neglect of their duties, allowing its funds to be lost or wasted. Brinckerhoff v. Bostwick (1882) 88 N. Y. 52.

A receiver of a national bank coming into a state court to enforce a mortgage executed to him to secure a pre-existing indebtedness to the bank is subject to the laws of the state relating to mortgages executed in fraud of creditors. Watts v. Dubois (Tex. Civ. App. 1902) 66 S. W. 698.

A suit by the receiver of an insolvent national bank to foreclose a mortgage given to it is not within any of the classes of cases in which the federal courts have exclusive jurisdiction, and may therefore be instituted in any court having jurisdiction in other respects. Witters v. Sowles (1889) 61 Vt. 366, 18 Atl. 191.

14. —— **Set-offs.**—Funds received on the discounting of a note, and deposited with the discounting bank, subject to the check of the depositor, and which had been drawn on by him, but were intended by him to meet the note when

due, can be pleaded as a set-off in an action on the note brought by the receiver of the discounting bank. Scott v. Armstrong (1892) 13 Sup. Ct. 148, 146 U. S. 499, 36 L. Ed. 1059, reversing Armstrong v. Scott (C. C. 1888) 36 Fed. 63.

The right to a set-off against the receiver of a bank is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created. Yardley v. Philler (1897) 17 Sup. Ct. 835, 167 U. S. 344, 42 L. Ed. 192, reversing decree Philler v. Yardley (1894) 62 Fed. 645, 10 C. C. A. 562, 25 L. R. A. 824.

The indorser of a note which is discounted by a national bank, and which matures after the bank becomes insolvent and a receiver is appointed, is entitled to set off against the note the amount of his deposits in the bank at the time of its failure Yardley v. Clothier (1892) 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462, disapproving Armstrong v. Scott (C. C. 1888) 36 Fed. 63, and Stephens v. Schuchmann (1888) 32 Mo. App. 333, and affirming (C. C. 1892) 49 Fed. 337.

Where a national bank received a third person's note for the accommodation of its cashier who pledged securities attached to the note, the failure of the bank to protect the securities whereby they were lost, was available to the maker by way of recoupment when sued on the note by the receiver of the bank. Skud v. Tillinghast (1912) 195 Fed. 1, 115 C. C. A. 83.

If the bank holds notes at the time of its failure, and was entitled to receive the amounts due thereon when they matured, an offset of credit on the books in favor of the depositor might be made against the notes; but it cannot be allowed where it appears that the notes were not the property of the bank at the time of its failure, but had been indorsed away for value. Balbach v. Frelinghuysen (C. C. 1883) 15 Fed. 675.

In an action at law by the receiver of a national bank on a note, the maker may plead as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the liens of the United States and general creditors attached. Adams v. Spokane Drug Co. (C. C. 1893) 57 Fed. 888, following Yardley v. Clothier (C. C. 1892) 49 Fed. 337.

An unsecured depositor, having at the time of the receiver's appointment no right of set-off against a debt which he owes the bank, but which has not matured, does not, on the maturity of the debt, become entitled to use his deposit as a set-off. Armstrong v. Helm (1891) 13 Ky. Law Rep. 460.

In an action against the indorser of a promissory note which matured in the hands of plaintiff, as receiver of an insolvent national bank, defendant's deposit in the bank cannot be made the subject of a set-off, as the claim therefor existed before the receiver's right accrued, and its allowance would be contrary to the spirit of this section. Stephens v. Schuchmann (1888) 32 Mo. App. 333.

The receiver of an insolvent national bank takes its assets subject to all defenses, and an indorser on an unpaid note, who was sued alone, may set off against the note his deposit in the bank, without showing that the makers were insolvent. Curtis v. Davidson (1914) 150 N. Y. S. 305, 164 App. Div. 597.

A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent, but the managing officer of the bank knew it to be insolvent. Before the note matured, the charter was forfeited for insolvency, and a receiver appointed. Held, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the national banking law. Scott v. Armstrong (1892) 13 Sup. Ct. 148, 146 U. S. 499, 36 L. Ed. 1059, reversing Armstrong v. Scott (C. C. 1888) 36 Fed. 63.

Under this section and section 9834, the maker of a note held by an insolvent national bank cannot, in defense to an action thereon by its receiver, offset a claim against the bank which was assigned to him after the bank suspended, and before the receiver was appointed. Davis v. Knipp (1895) 92 Hun, 297, 36 N. Y. Supp. 705.

A set-off may be pleaded in an action brought by a receiver of an insolvent national bank. Hade v. McVay (1877) 31 Ohio St. 231.

T. gave to the V. National Bank his bond for $65,000, with warrant of attorney to confess judgment, and at the same time deposited $31,000 United States bonds as collateral. R. had to his credit in the bank $43,000. The bank, being insolvent, stopped payment. On the next day R. assigned his deposit to T., and on the same day the bank entered judgment against T. on his bond. Held, that T. could not set off the deposit against his indebtedness to the bank, as to allow him to do so would secure him a preference over other creditors of the bank, after the act of insolvency, and would conflict with this section. Venango Nat. Bank v. Taylor (1867) 56 Pa. St. (6 P. F. Smith) 14.

An act of a receiver of a national bank, in allowing a certificate of deposit issued by such bank as an offset to a note due the bank, signed by the holder of the certificate and another, was void, in the absence of an order of court authorizing it, where such certificate was transferred to such

holder after the bank became insolvent. Beckham v. Shackelford (1894) 8 Tex. Civ. App. 660, 29 S. W. 200.

15. Sale or compromise of debts.—A national bank may accept stocks in satisfaction of a doubtful debt, with a view to their subsequent sale or conversion into money in order to make good or reduce an anticipated loss. First Nat. Bank v. National Exch. Bank (1875) 92 U. S. 122, 23 L. Ed. 679.

An order for the composition of a claim, when the claim is not a "bad or doubtful debt," is invalid, and a composition made under such an order is ineffectual. Price v. Yates (C. C. 1879) Fed. Cas. No. 11,418.

A judgment recovered by the receiver of an insolvent national bank against a stockholder on an assessment made by the comptroller, although uncollectible, is not a "bad or doubtful debt," which a court may authorize the receiver to compound, under this section. In re Earle (C. C. 1899) 96 Fed. 678.

A federal court will not authorize the receiver of a national bank to compound the statutory liability of certain stockholders by accepting a gross sum, less than is due, in satisfaction thereof, although more money would thus be realized than by proceedings to collect the same in the usual way, when it appears probable that such stockholders have fraudulently conveyed their property to avoid their legal obligations as stockholders, or to shield themselves from injury and exposure by litigation. In re Certain Stockholders of the California Nat. Bank (D. C. 1892) 53 Fed. 38.

The receiver of a national bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter, or trade the assets. Ellis v. Little (1892) 27 Kan. 707, 41 Am. Rep. 434.

Where the receiver of a national bank compromised suits with counsel for the United States, the compromise will not be opened years afterwards, no fraud being alleged. Henderson v. Myers (Pa. 1876) 11 Phila. 616.

A copy of an order of a court authorizing the receiver of a national bank to sell the assets of the bank, authenticated by the comptroller of the currency, but never recorded or made a minute in any court, is inadmissible to establish such order as an order of a court of record. Tourtelot v. Booker (Tex. Civ. App. 1913) 160 S. W. 293.

16. Money unlawfully received and converted—Recovery by receiver.—A bill by the receiver of an insolvent national bank against the shareholders to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits may be brought without an express order from the comptroller of the currency. Hayden v. Thompson (1895) 71 Fed. 60, 17 C. C. A. 592, reversing decree (C. C. 1895) 67 Fed. 273.

A suit by the receiver of an insolvent national bank against its officers and directors to compel restitution of funds unlawfully diverted by them is one to execute a trust, and involves an accounting as to trust funds, and hence is of equitable cognizance. Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402.

A bill by the receiver of a national bank against its officers and directors for the unlawful diversion of funds of the bank is sufficient to support a recovery, when the diversion is proved, although a further allegation that such diversion was fraudulent is not proved. The gravamen of the bill is the fact of unlawful diversion. Id.

The receiver of an insolvent national bank may recover from a stockholder dividends declared and paid after the bank became insolvent, where necessary to meet the demands of creditors. Hayden v. Williams (1899) 96 Fed. 279, 37 C. C. A. 479.

The receiver of a national bank cannot recover from a stockholder, in an action at law, a sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent. Lawrence v. Greenup (1899) 97 Fed. 906, 38 C. C. A. 546.

A receiver of an insolvent national bank may maintain a suit in equity in any district against all the stockholders within the court's jurisdiction to recover back unearned dividends received by them, and unlawfully paid from the bank's capital when insolvent, on the ground that it is a suit to follow trust funds. Hayden v. Brown (C. C. 1899) 94 Fed. 15.

17. —— Recovery against receiver.—A married woman and her husband conveyed her separate real estate to secure notes held by the bank for the debt of the husband. By his consent the receiver of the bank appointed by the comptroller of the currency collected the rents and paid them into the United States treasury, subject to the order of the comptroller. The wife sought by bill to compel the receiver to account to her for the rents received by him. Held, that they were not to be accounted for in that action. Hitz v. Jenks (1887) 8 Sup. Ct. 143, 123 U. S. 297, 31 L. Ed. 156.

Action of complainant in including the amount of the check in his claim held not to amount to an election of a remedy, or create an equitable estoppel which precluded him, on learning the facts, from maintaining a suit against the receiver to recover the proceeds of the check as his property, on tendering back the dividends received thereon, be-

fore the closing of the estate in insolvency, and while the money was still in the receiver's hands. Richardson v. Olivier (1900) 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113.

A suit by a depositor in a bank against its receiver to recover the proceeds of a check fraudulently received by the officers of the bank after its insolvency, and which came into the hands of the receiver, commenced within three years after the insolvency, is not barred by laches, in the absence of a statute of limitations which would bar an action at law of like character, where no injury to any one has resulted from the delay, which was due solely to a misunderstanding of his rights by complainant, caused in part, at least, by statements made to him by the receiver. Id.

In an action to secure the application of part of the funds in the hands of a receiver of a national bank, appointed by the comptroller of the currency, in satisfaction of plaintiff's claim against the insolvent bank for money received by it as collecting agent, the bank is only a nominal party, for the receiver is the one to be held accountable for any unauthorized disposition of the money sued for. Grant v. Spokane Nat. Bank (C. C. 1891) 47 Fed. 673.

Where the proceeds of a draft sent to a national bank for collection and remittance were paid to the receiver of the bank on its insolvency, the owner of the draft is entitled to recover the amount thereof. American Can Co. v. Williams (C. C. 1908) 176 Fed. 816, judgment affirmed (1910) 178 Fed. 420, 101 C. C. A. 634.

Where drafts were sent to a national bank for collection and remittance and were paid in checks which were indorsed to another bank and credited to the account of the collecting bank to recover overdrafts, the owner of the drafts is not entitled to recover their amount of the receiver of the collecting bank on its insolvency out of the bank's general assets, though the proceeds diminished the indebtedness of the insolvent bank. Id.

Where a draft sent to a national bank for collection and remittance was paid by a check in favor of the bank, and was indorsed and transmitted to another bank, which credited the amount to the collecting bank, and the check was collected through the clearing house after the appointment of a receiver of the collecting bank on its insolvency, the draft not having been credited to the collecting bank to make good its overdraft until after the appointment of the receiver, though the receiver may institute proceedings to recover such amount, the owner of the draft is not entitled to recover it out of the general assets of the collecting bank where it has not actually been collected. Id.

Where drafts sent to a national bank were upon depositors in the bank, and the amount thereof was debited to their accounts, no money coming into the possession of the bank by reason thereof, the owner of the draft cannot recover the amount thereof out of the general assets from the receiver of the bank on its insolvency. Id.

Where a draft sent to a national bank for collection and remittance was paid by check on another bank, where the check was deposited and the proceeds credited to the collecting bank, the owner of the draft on insolvency of the collecting bank and appointment of a receiver is entitled to recover only the lowest balance to the credit of the collecting bank in the bank on which the check was drawn between the date of the deposit in the latter bank and the appointment of the receiver. Id.

Where a draft was sent to a national bank for collection and remittance, and was paid by check, which was deposited in the bank on which the check was drawn and the proceeds credited to the collecting bank, and there was then a sufficient balance in favor of the collecting bank to pay the check, but before the appointment of a receiver of the collecting bank on its insolvency there was a cash withdrawal of an amount exceeding the amount of the check, though leaving a balance greater than the amount of the check, which balance, however, was extinguished before the appointment of the receiver, the owner of the draft is not entitled to recover its amount out of the general assets. Id.

18. Liability of directors.—A creditor of an insolvent bank, for which a receiver has been appointed, cannot sue the directors to enforce individual liability for violations of the banking law; the remedy provided by this section and section 9831, post, being exclusive of others. National Exch. Bank v. Peters (C. C. 1890) 44 Fed. 13, appeal dismissed (1892) 12 Sup. Ct. 767, 144 U. S. 570, 36 L. Ed. 545.

See, also, notes under § 9831, post.

19. Liability of stockholders.—See, also, notes under §§ 9689, 9807, ante.

As to claims, dividends, and distribution of assets, see note under § 9823, post.

The sum to be paid by stockholders being liquidated, and due and payable when the comptroller's order therefor is made, the amount bears interest from the date of the order. Casey v. Galli (1876) 94 U. S. 673, 677, 24 L. Ed. 168.

The term "individual liability of the stockholders" generally refers to the liability incurred under acts of congress and state statutes by the mere ownership of stock, and has no reference to the liability which stockholders incur by borrowing money of the bank, indorsing notes held by it, or unlawfully taking or receiving its funds without

consideration. Hayden v. Thompson (1895) 71 Fed. 60, 64, 17 C. C. A. 592.

20. —— Enforcement by receiver.— Where the comptroller of the currency orders an assessment upon the stockholders of an insolvent national bank equal to the par amount of the stock, the suit must be at law. Kennedy v. Gibson (1869) 75 U. S. (8 Wall.) 498, 19 L. Ed. 476; Casey v. Galli (1876) 94 U. S. 674, 24 L. Ed. 168, 307.

On the bill by a receiver against stockholders of a bank which fails to pay its notes, action on the part of a comptroller touching the personal liability of the stockholders must precede the institution of suit by the receiver, and the fact must be averred. Kennedy v. Gibson (1869) 8 Wall. 498, 504, 19 L. Ed. 476.

It is no objection to such a bill, properly filed against stockholders within the jurisdiction of the court, that stockholders named in the bill and averred to be without the jurisdiction are not made codefendants. Id.

Creditors of a bank which fails to pay its notes are not proper parties to a bill by the receiver against the stockholders. Id.

In a suit by a receiver to enforce the liability of the stockholders of a national bank, the stockholder is estopped from denying the existence or the validity of the corporation. Casey v. Galli (1876) 94 U. S. 674, 24 L. Ed. 168, 307.

A transferee of national bank stock cannot recover the consideration paid therefor by cross-bill in an action brought by a receiver to enforce against the transferror the statutory liability as such cross-bill raises an independent controversy, in which the receiver has no interest. Stuart v. Hayden (1898) 18 Sup. Ct. 274, 276, 169 U. S. 1, 42 L. Ed. 639.

The objection that the statute of limitations does not bar the right of the creditors of a national bank to enforce the individual liability of its shareholders, so long as there are any outstanding claims against the bank, cannot be raised by the receiver of a national bank, in an action brought by him under this section to recover an assessment upon a stockholder, with interest from the date when payable, in which a demurrer to the bill on the ground that it sets forth a cause of action barred by the statute of limitations has been sustained. McDonald v. Thompson (1902) 22 Sup. Ct. 297, 298, 184 U. S. 71, 46 L. Ed. 437, affirming decree (1900) 101 Fed. 183, 41 C. C. A. 290.

An action brought by a receiver under this section to enforce the individual liability of a shareholder is not an action upon a "contract or promise in writing" within the Nebraska statute of limitations, but is governed by the provision of that statute requiring actions "upon a contract not in writing express or implied," or "upon a liability created by statute" to be begun within four years. Id.

The transferees of stock of a national bank, who are parties defendant to a suit by a receiver of the bank to enforce the individual liability against the transferror on the ground that he transferred the stock to escape it, cannot by a supposed cross bill inject into such a suit the litigation of the question whether or not the vendor deceived and defrauded them by the transfer. Stuart v. Hayden (1895) 72 Fed. 402, 18 C. C. A. 618, decree affirmed (1898) 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

In a suit between the receiver of a national bank and a stockholder, the books of the bank are evidence to establish acts of the corporation and its financial condition at a particular time, though not as to dealings between the corporation and the defendant. Hayden v. Williams (1899) 96 Fed. 279, 37 C. C. A. 479.

The receiver of an insolvent national bank may maintain a suit in equity to enforce an assessment against stockholders, where such assessment is less than the full amount of their liability; and, where the question of law involved is common as to a number of the stockholders, and rests upon substantially the same facts, they may be joined as defendants. Bailey v. Tillinghast (1900) 99 Fed. 801, 40 C. C. A. 93, affirming decree Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46.

No portion of the liability of a stockholder of a national bank for the payment of its debts becomes due or enforceable before the comptroller of the currency decides that it is necessary to collect it and fixes the time for its payment. Deweese v. Smith (1901) 106 Fed. 438, 441, 45 C. C. A. 408, 66 L. R. A. 971, affirmed (1902) 23 Sup. Ct. 845, 187 U. S. 637, 47 L. Ed. 344.

The testimony of a witness that in his capacity as receiver of a national bank he made personal demand upon a stockholder for the payment of an assessment, and that the stockholder admitted having received notice thereof, where uncontradicted, sufficiently shows notice and demand to support an action to recover the assessment. McClaine v. Rankin (1902) 119 Fed. 110, 56 C. C. A. 160, judgment reversed (1905) 25 Sup. Ct. 410, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

A complaint in an action by the receiver of a national bank to recover an assessment from a stockholder sufficiently shows the capital stock of the bank, although not directly alleged, where it alleges that there were 500 shares, of the par value of $100 each, and that the assessment was made ratably, at $100 per share, and amounted to $50,000. Id.

A federal court in equity has jurisdiction to appoint a receiver to liqui-

date its obligations, and to authorize him to collect and enforce by action the liability of shareholders of the bank. King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

The right of a receiver of a national bank in liquidation to enforce the liability of shareholders does not accrue until such liability matures by the act of the court in determining the amount to be paid. Id.

Where it had been previously determined in a probate proceeding by the receiver of an insolvent national bank to establish a claim for an assessment levied on stock against decedent's estate that she was the owner of the stock, the parties to a subsequent action against decedent's distributees by the receiver's successor to recover a subsequent assessment being in privity, defendants were estopped to relitigate the question of decedent's ownership, though the cause of action in the two proceedings was not the same. Rankin v. City of Big Rapids (1904) 133 Fed. 670, 66 C. C. A. 568.

An assessment by the comptroller of the currency against the stockholders of a national bank may be collected by the receiver by an action at law against the stockholders. Young v. Wempe (C. C. 1891) 46 Fed. 354.

While, in a suit by a receiver of an insolvent national bank for an assessment against a stockholder, where defendant was induced by fraudulent representations to purchase stock of such bank, which was closed at the time of such purchase, the decree of the state court rescinding the contract could not be pleaded as a bar, the question of defendant's liability as a stockholder to creditors of the bank not having been in issue, such decree was conclusive as between the receiver and the defendant as to the question of fraud in defendant's purchase, and for that purpose might properly be pleaded by defendant. Stufflebeam v. De Lashmutt (C. C. 1900) 101 Fed. 367.

It is no defense to a suit by the receiver of a national bank against a stockholder to recover the amount of an assessment made by the comptroller of the currency that the assessment was not needed by the receiver. Strong v. Southworth (D. C. 1875) Fed. Cas. No. 13,545.

The right of the receiver of a national bank to recover an assessment laid on the stockholders for the purpose of paying debts grows out of this section, and the state statute is inapplicable as a rule of decision. Stanton v. Wilkeson (D. C. 1876) Fed. Cas. No. 13,299.

A receiver held authorized to proceed in his own name against the separate stockholders to recover the amount due from each. Id.

In an action by the receiver of a national bank to recover an assessment on stock alleged to be held by the defendant as executrix, a copy of entries in the stock book of the bank showing the issuance of a certificate of stock to the estate of the defendant's testator, identified as a true copy by the deposition of the former cashier, who testified with the book before him, is admissible against the defendant to prove such entries. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

The compensation of the United States attorney appearing for the receiver of a failed national bank is not regulated by the fee bill prescribed by statute, nor should it be paid by the government, but out of the funds of the trust. (1892) 20 Op. Atty. Gen. 476.

The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, need not aver that there was a necessity therefor, or that the comptroller determined that there was such necessity, though the law provides that the comptroller may enforce the individual liability of the stockholders, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the comptroller made the assessment and directed its enforcement. O'Connor v. Witherby (1896) 111 Cal. 523, 44 Pac. 227.

A judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of an assessment upon shareholders to pay debts, upon which execution was directed to issue, to be levied of the estate of the wards, was not a personal judgment against the wards, and cannot be enforced against an estate subsequently inherited by them, and which never came to the hands of the guardian. Clark v. Ogilvie (1901) 63 S. W. 429, 111 Ky. 181, 23 Ky. Law Rep. 552.

The receiver, appointed by the comptroller of the currency, for a national bank located in another state, is not a foreign receiver, and may sue in the courts of New York for an assessment levied on shareholders of the bank, without regard to the doctrine of comity. Peters v. Foster (1890) 56 Hun, 607, 10 N. Y. Supp. 389, 18 Civ. Proc. R. 380.

Under Code Civ. Proc. N. Y. § 449, excepting from the provision that an action must be prosecuted in the name of the real party in interest a person expressly authorized by statute to sue, the receiver of a national bank may sue for assessments levied on the stockholders. Id.

Note given for stock.—A stockholder in a national bank is liable to the receiver thereof on a note given to the bank for capital stock. Hepburn v. Kincannon (1897) 21 So. 569, 74 Miss. 691.

When the comptroller of the curren-

cy decides that it is necessary to enforce the personal liability of a stockholder in an insolvent national bank, and fixes and adjusts the amount thereof, it becomes a definite, liquidated claim against such stockholder, and is subject to sale or assignment by the receiver like any other claim which he may hold as a part of the bank's assets. Waldron v. Alling (1902) 76 N. Y. S. 250, 73 App. Div. 86.

Where, in an action by an assignee of a national bank receiver to enforce the personal liability of a stockholder, it appears that the claim was sold and transferred by the receiver to plaintiff, and that plaintiff is the owner thereof, it will be presumed that whatever formal steps were necessary to make such transfer valid were taken, including any step required by this section. Id.

This section does not impose any such particular personal trust upon the receiver in the matter of collecting the liability as would deprive him of the power to make a valid assignment thereof after it has been fixed and adjusted by the comptroller of the currency. Id.

21. —— **Second assessment.**—The comptroller of the currency is authorized to make a second assessment upon the shareholders of an insolvent national banking association, where the first assessment proves insufficient to pay the debts and liabilities of the bank. Studebaker v. Perry (1902) 22 Sup. Ct. 463, 184 U. S. 258, 46 L. Ed. 528, affirming judgment (1900) 102 Fed. 947, 43 C. C. A. 69.

The ultimate liability of a stockholder of an insolvent national bank under this section is for the full amount of the par value of his stock, if that amount is required; and when the comptroller makes an assessment for a smaller amount, he has power to make a second assessment, if the first proves insufficient to pay the debts of the bank. Aldrich v. Yates (C. C. 1899) 95 Fed. 78.

Cited without definite application, U. S. ex rel. Citizens' Nat. Bank v. Knox (1880) 102 U. S. 422, 424, 26 L. Ed. 216; Delano v. Butler (1886) 7 Sup. Ct. 39, 45, 118 U. S. 634, 30 L. Ed. 260; Richmond v. Irons (1887) 7 Sup. Ct. 788, 797, 121 U. S. 27, 30 L. Ed. 864; Butler v. Coleman (1888) 8 Sup. Ct. 718, 719, 124 U. S. 721, 31 L. Ed. 567; Chemical Nat. Bank of Chicago v. City Bank of Portage (1896) 16 Sup. Ct. 417, 419, 160 U. S. 646, 40 L. Ed. 568; Same v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; Pauly v. State Loan & Trust Co. (1897) 17 Sup. Ct. 465, 466, 165 U. S. 606, 41 L. Ed. 844; American Surety Co. v. Pauly (1898) 18 Sup. Ct. 552, 554, 170 U. S. 133, 42 L. Ed. 977; Robinson v. Southern Nat. Bank of New York (1901) 21 Sup. Ct. 383, 387, 180 U. S. 295, 45 L. Ed. 536; Rankin v. Fidelity Insurance, Trust & Safe Deposit Co. (1903) 23 Sup. Ct. 553, 554, 189 U. S. 242, 47 L. Ed. 792; Commercial Nat. Bank v. Weinhard (1904) 24 Sup. Ct. 253, 256, 192 U. S. 243, 48 L. Ed. 425; American Nat. Bank of Nashville, Tenn., v. Miller (1913) 33 Sup. Ct. 883, 229 U. S. 517, 57 L. Ed. 1310; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Bailey v. Mosher (1894) 63 Fed. 488, 491, 11 C. C. A. 304; Wingate v. Orchard (1896) 75 Fed. 241, 242, 243, 21 C. C. A. 315; Studebaker v. Perry (1900) 102 Fed. 947, 948, 43 C. C. A. 69 (affirmed [1902] 22 Sup. Ct. 463, 184 U. S. 258, 46 L. Ed. 528); Williamson v. American Bank (1902) 115 Fed. 793, 52 C. C. A. 1; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677, 678; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18; Welles v. Stout (C. C. 1889) 38 Fed. 67, 68; Sowles v. Witters (C. C. 1889) 39 Fed. 403, 408; Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577; In re First Nat. Bank (C. C. 1891) 49 Fed. 120; Hulitt v. Bell (C. C. 1898) 85 Fed. 98, 99; Kimball v. Dunn (C. C. 1898) 89 Fed. 782; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; Williamson v. American Bank (C. C. 1901) 109 Fed. 36, 37 (affirmed [1902] 115 Fed. 793, 52 C. C. A. 1); Rankin v. Herod (C. C. 1905) 140 Fed. 661; Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395, 396; U. S. v. Schlierholz (D. C. 1905) 137 Fed. 616.

§ 9822. (R. S. § 5235.) Notice to present claims.

The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

See note under § 9823, post.

Cited without definite application, Terrill v. National Bank (1899) 19 Sup. Ct. 360, 365, 173 U. S. 131, 43 L. Ed. 640; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44

L. Ed. 1146; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Richardson v. Oliver (1900) 105 Fed. 277, 279, 44 C. C. A. 468, 53 L. R. A. 113; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84.

§ 9823. (R. S. § 5236.) Dividends.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.

Notes of Decisions

1. Construction and operation.
2. Claims of creditors.
3. — Computation of claims.
4. — Interest on claims.
5. — Disallowance of claim.
6. — Claims of lessor.
7. — Right to preference.
8. — Trust funds.
9. — Deposits.
10. — Actions.
11. Claims of government.
12. Distribution of surplus.
13. State legislation.

1. Construction and operation.—See, also, note under § 9834, post.

See Scott v. Armstrong (1892) 13 Sup. Ct. 148, 151, 146 U. S. 499, 36 L. Ed. 1059, and note under § 9821, ante.

2. Claims of creditors. — A secured creditor of an insolvent national bank is entitled to prove and receive dividends on the full amount due him at the date of insolvency, without regard to his collaterals or any collections he may make upon them, provided only that the sums received by way of dividends and from the collaterals do not exceed the entire debt. Merrill v. National Bank of Jacksonville (1899) 19 Sup. Ct. 360, 173 U. S. 131, 43 L. Ed. 640, affirming decrees Merrill v. First Nat. Bank (1896) 75 Fed. 148, 21 C. C. A. 282, and (1896) 78 Fed. 208, 24 C. C. A. 63.

Those portions of the collections on account of sales of butter actually coming into the hands of the receiver of a national bank which had virtually acquired and operated through its officers an insolvent creamery company doing business under an arrangement by which the proceeds of sales, less a stated compensation, were to be divided pro rata among those furnishing the milk, may be recovered by the latter, even though the transaction may have been beyond the powers of the bank, and they are further entitled to participate pro rata as general creditors to the extent that the proceeds of such sales had been diverted and appropriated by the bank. Earling v. Emigh (1910) 30 Sup. Ct. 672, 218 U. S. 27, 54 L. Ed. 915, affirming judgment Emigh v. Earling (1908) 115 N. W. 128, 134 Wis. 565.

It is a proper exercise of discretion on the part of a circuit court to enjoin a receiver of a national bank from transmitting a fund in his hands to the treasurer of the United States pending the determination by the court of a preferential claim thereto. American Can Co. v. Williams (1906) 149 Fed. 200, 79 C. C. A. 158, judgment affirmed on rehearing (1907) 153 Fed. 882, 82 C. C. A. 628.

Creditors of a national bank in liquidation, who received, as collateral, paper guaranteed by the bank, and who have obtained judgments against the bank on its guaranty, stand on the basis of general creditors, and should receive only the amount due them by the books of the bank when it suspended, less payments and amounts collected from collaterals, with legal interest upon the unpaid balance. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591, decree reversed Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864.

Unsecured creditors of a national bank are on the same footing of equality. Armstrong v. Scott (C. C. 1888) 36 Fed. 63, 65, reversed (1892) 13 Sup. Ct. 148, 146 U. S. 499, 36 L. Ed. 1059.

Plaintiff furnished securities to the cashier of a national bank, the insolvency of which was concealed from her, to be pledged as security for a note of the cashier, the proceeds of which were placed to the credit of such bank with its reserve bank. A portion of such proceeds was applied to the payment of an overdraft due the reserve bank, and the remainder stood to the credit of the insolvent bank at the time a receiver was appointed therefor, and came into his hands. Held, that plaintiff, having

paid the note to release her securities, was entitled to recover from the receiver the portion of the proceeds which came into his hands, and, as to the remainder, was entitled to be subrogated to the right to dividends of the reserve bank, whose indebtedness it paid. Hallett v. Fish (C. C. 1903) 123 Fed. 201.

It is not within the province of the comptroller of the currency to inquire into the use the creditors of a national bank propose to make of the dividend paid them. (1891) 20 Op. Atty. Gen. 269.

The existing directors of a national bank who proceed without objection, no others being elected to wind up its affairs, may submit to arbitration a claim made against it by one of their number, and such a submission is valid if the vote is unanimous, although he is present at the meeting when it is made; and directors subsequently elected, a majority of whom were not stockholders at the time the liquidation began, have no power to revoke the submission. Richards v. Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

Where a national bank, organized under the national banking act, becomes insolvent, and is placed in the hands of a receiver, pursuant to the provisions of such act, the rights and liabilities of its debtors and creditors become fixed at the appointment of the receiver, and thereupon its property is subject, after prior government claims, if any, to disposal and ratable distribution, upon principles of equity, among all its general creditors. Balch v. Wilson (1878) 25 Minn. 299, 33 Am. Rep. 467.

A stockholder's indebtedness to a national bank cannot be set off against the claims of a pledgee who received the stock as security for a loan made on the faith of the pledge, and without knowledge of the bank's claim or its insolvency. McConville v. Means (Ohio Super. Ct. Cin. 1889) 21 Wkly. Law Bul. 193.

Where a national bank operated a cooperative creamery corporation, and held in its hands money belonging to milk producers for which checks were issued, but remained unpaid at the time the bank was closed, the money to pay the same having been used to pay other obligations of the bank, the owners of the fund were entitled to stand as general creditors of the bank. Emigh v. Earling (Wis. 1908) 115 N. W. 128.

3. —— **Computation of claims.**—The payment by the comptroller of the currency of a creditor of an insolvent national bank, who has recovered judgment after refusal of the comptroller to pay his claim, is to be based on the amount due on the adjudicated claim at the date of the failure of the bank, and not on the amount due when the claim is adjudicated. U. S. v. Knox (1884) 4 Sup. Ct. 686, 111 U. S. 784, 28 L. Ed. 603.

Collections from collateral securities made by a creditor of a national bank after the declared insolvency of the bank need not be deducted from the amount on which dividends are to be computed by the receiver of the bank, as the secured creditor is a creditor to the full amount due him when the insolvency is declared, and his right to dividends is unaffected by his collateral. Aldrich v. Chemical Nat. Bank (1900) 20 Sup. Ct. 498, 176 U. S. 618, 44 L. Ed. 611, affirming decree Armstrong v. Chemical Nat. Bank (1897) 83 Fed. 556, 27 C. C. A. 601.

Creditors of an insolvent national bank cannot be required, in proving their claims, to allow credit for any collections made after the date of the declared insolvency from collateral securities held by them. Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, reversing (C. C. 1892) 50 Fed. 798, and decree modified (1895) 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231.

Creditors of a national bank in liquidation, who received, as collateral, paper guaranteed by the bank, and who have obtained judgments against the bank on its guaranty, stand on the basis of general creditors, and should receive only the amount due them by the books of the bank when it suspended, less payments and amounts collected from collaterals with legal interest upon the unpaid balance. Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591.

4. —— **Interest on claims.**—Depositors held entitled to interest on their demands. National Bank of Commonwealth v. Mechanics' Nat. Bank (1876) 94 U. S. 437, 438, 24 L. Ed. 176.

If a national bank goes into liquidation, the book accounts of depositors draw interest from the date of suspension; the act of going into liquidation dispensing with demand. Richmond v. Irons (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, reversing decree Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591.

An order directing payment of interest by the receiver of a national bank from date of judicial demands is erroneous, as funds coming into the hands of a receiver are turned over to the comptroller, and could not earn interest, and any payment of interest would necessarily be taken from some other trust fund; and this particularly where the involved circumstances of the case made it impossible to pay over the amount without investigation and an accounting. Richardson v. Louisville Banking Co. of Louisville, Ky. (1899) 94 Fed. 442, 36 C. C. A. 307.

No interest is recoverable against the fund in the hands of the receiver of an insolvent national bank on recovery in

a suit to establish a claim against the bank, made necessary solely by the disallowance of the claim by the receiver. The receiver is required to exercise his judgment as to the allowance of claims, and other creditors are not chargeable with interest because of an error on his part. Merchants' Nat. Bank v. School Dist. No. 8, of Meagher County, Mont. (1899) 94 Fed. 705, 36 C. C. A. 432.

Where a sufficient fund has been realized from the assets of a national bank, which has been declared in default, to pay all claims against it, and leave a surplus, interest on the claims will be allowed during the period of administration, before appropriating the surplus to the stockholders. Chemical Nat. Bank v. Bailey (C. C. 1875) Fed. Cas. No. 2,635.

Interest is recoverable on the balance due a depositor in a national bank which has been declared in default by the comptroller of the currency, though he made no formal demand of payment. Id.

Assumpsit by the holder of a claim against a national bank, which had been declared in default, to recover interest during the period of administration, will not lie against the receiver or against the comptroller of the currency, but will lie against the bank. Id.

While the plaintiff is entitled to a dividend only on the basis of the debt and interest as of the date when the bank suspended, in this suit against the bank interest should be computed to the date of judgment against defendant. Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 507.

5. —— **Disallowance of claim.**—The decision of a receiver disallowing a claim is subject to review in a state court. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 401, 20 L. Ed. 840.

The disallowance of claim by the receiver is not conclusive in respect to the validity of the claim, and is no bar to an action at law by the creditors. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325, 4 Am. Rep. 80.

6. —— **Claims of lessor.**—A claim for rent which was due nine days before the suspension of the bank is an existing demand which is entitled to be proven up for participation in the distribution of the assets. Chemical Nat. Bank v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 161 U. S. 1, 40 L. Ed. 595.

Where a national bank takes a lease for a long term, its insolvency and dissolution soon afterwards, and the appointment of a receiver, who refuses to take possession of the leased premises, do not entitle the lessor to damages out of the assets, the rent having been paid for the time the bank was in possession. Fidelity Safe-Deposit & Trust Co. v. Armstrong (C. C. 1888) 35 Fed. 567.

A national bank leasing premises for a number of years, but becoming insolvent before the expiration of the term, is liable as any other person or corporation for the rent for the balance of the term. And may be sued for damages, where it was in arrears for rent when a receiver was appointed, for failure to carry out the provisions of the lease. Chemical Nat. Bank v. Hartford Deposit Co. (1895) 41 N. E. 225, 156 Ill. 522, affirming (1895) 58 Ill. App. 256.

7. —— **Right to preference.**—When a national bank has been placed in the hands of a receiver as insolvent, the federal law becomes from that moment the law of the distribution of its assets to the exclusion of the law of any state; and a second bank, which holds a deposit of funds of the insolvent bank, against which the latter has drawn drafts which have not been paid, cannot pay the same after notice, and set up the payment as a defense to an action by the receiver to recover the deposit, although by the law of the state in which the second bank is located a draft or check is held to be an assignment pro tanto of the fund on which it is drawn; since by the federal law it is not such an assignment as entitles the holder to a preference over the other creditors when the drawer has become insolvent before payment. First Nat. Bank v. Selden (1903) 120 Fed. 212, 56 C. C. A. 532, 62 L. R. A. 559.

The manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors; and the diligence of a creditor who files a creditors' bill can give him no greater rights than are given any other creditor to share in the distribution of the assets, and a prayer in the bill that such creditor be given priority over other creditors will not be granted. Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308.

Where a deposit with a correspondent has, long prior to the commission of an act of insolvency by a national bank, been pledged to secure loans made to the insolvent by its correspondent, neither the subsequent insolvency of the bank, nor the appointment of a receiver, destroys the lien of the correspondent on the deposit. Bell v. Hanover Nat. Bank (C. C. 1893) 57 Fed. 821.

The question whether an insolvent national bank should pay a savings bank in full or pro rata is one to be determined by the United States courts. Auburn Sav. Bank v. Hayes (C. C. 1894) 61 Fed. 911.

The recovery of a judgment by a creditor against a national bank after the appointment of a receiver gives no lien or preference to such creditor.

Green v. Walkill Nat. Bank (N. Y. 1875) 7 Hun, 63.

8. —— **Trust funds.**—In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually augmented by the receipt of the trust fund. And if the trust fund was created merely by a check on the same bank drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference. Beard v. Independent Dist. of Pella City (1898) 88 Fed. 375, 31 C. C. A. 562.

The assets of a national bank in the hands of a receiver constitute a trust fund, in behalf of all creditors having claims thereon valid and in full life when the receiver was appointed, which the statute of limitations does not touch or affect. Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503.

The comptroller having notified a national bank that its capital was impaired, it was agreed that it might continue business on the directors putting in $100,000 in cash, and retiring that amount of objectionable securities. That sum was contributed; the account being opened with trustees appointed by the directors to manage the fund, with full power, as far as the bank was concerned, and to account therefor to the contributors in such manner as to protect the equities of each individual and the bank. It was understood between the trustees and the examiner that the securities to be retired were to be designated by the comptroller or examiner, but there was no such understanding with the comptroller. The full amount of objectionable securities had not been selected and given to the trustees when the bank was closed, the receiver taking and proceeding to collect the whole assets. Held, that the receiver was not required to account for the balance of the $100,000 as a special trust fund, but merely as a debt. Booth v. Welles (C. C. 1890) 42 Fed. 11.

The treasurer of a city, in accordance with an arrangement with a bank in which he kept an account as treasurer, deposited at night funds which had come into his office after banking hours, and which belonged in part to the city and in part to the state, for safe-keeping until the next morning, when, as was his custom, he separated out the portion of the funds belonging to the city, and had the same placed to his credit on his bank book. On the morning in question this was done before the hour for opening the bank. The bank was insolvent, and known to be so by its officers, and was at the time virtually in possession of the bank examiner, who took formal possession before the time for opening arrived, and the bank was not thereafter opened for business. The treasurer at once demanded the return of the funds, which were still in the bank, but they were retained by the examiner, and subsequently turned over to the receiver, who credited them to the treasurer on the bank books. Held, that such funds did not become the property of the bank, and were recoverable by the city from the receiver. City of Philadelphia v. Eckels (C. C. 1896) 98 Fed. 485.

The C. Ry. Co., in order to secure one H. as surety for it on a bond, made a special deposit of $18,000 in the name of H., trustee, in a bank of which H. was president, receiving from the bank a certificate stating the purpose of the deposit. The money so deposited was never separated from the other moneys of the bank, but it was credited on the books to H., trustee. H. drew out $9,000 in checks signed as trustee, and appropriated it. The trust account showed a balance of $9,000 when the bank failed. Held, that the C. Ry. Co. was entitled to a preference of $9,000 only. Cleveland, C., C. & St. L. Ry. Co. v. Hawkins (C. C. 1897) 79 Fed. 29.

One recovering money which came into the hands of the receiver of an insolvent national bank as a trust fund, of which she was owner, is not entitled to interest thereon. Hallett v. Fish (C. C. 1903) 123 Fed. 201.

In all cases where an insolvent national bank held funds as trustee, to entitle a claim therefor to a preference over those of general creditors, it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identified, not by earmarks, but by being traced into the estate and there now found, to its augmentation. Lucas County v. Jamison (C. C. 1908) 170 Fed. 338.

In an action against a receiver of a national bank to recover as a trust fund the amount of a draft collected by the bank, the burden of proof is on the owners of the draft to trace its proceeds into the common assets. American Can Co. v. Williams (C. C. 1908) 176 Fed. 816, judgment affirmed (1910) 178 Fed. 420, 101 C. C. A. 634.

Money placed in the hands of the cashier of an insolvent national bank to indemnify him as surety on an attachment bond is a trust fund, although mingled with the bank's funds, so that it went into the receiver's hands with the general assets. Flint Road-Cart Co. v. Stephens (1888) 32 Mo. App. 341.

Trust funds coming into the hands of a receiver of a national bank which are not identifiable as belonging specifically to a particular person are held by him as assets of the bank, and must be ratably apportioned among all the bank's creditors. Emigh v. Earling (Wis. 1908) 115 N. W. 128.

A national bank operated a creamery corporation, agreeing to pay patrons the proceeds of butter manufactured

from milk delivered after deducting 3½ cents a pound for its services. During the two months prior to the bank's insolvency the proceeds of the butter sold was received by the bank's receiver either actually or through the bank's correspondents, to whom drafts therefor had been sent for collection, and at no time had the bank's money on hand or credit with its collecting agents been reduced below the amounts so received. Held, that the money so received, after deducting the bank's commission, belonged to the creamery patrons, and, being traced specifically into the hands of the bank's receiver, they were entitled to recover the same from him. Id.

9. —— **Deposits.**—The claims of depositors in a national bank at the time of its suspension, for the amount of their deposits, are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments. National Bank of Commonwealth v. Mechanics' Nat. Bank (1876) 94 U. S. 437, 24 L. Ed. 176.

A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit. Id.

The interest being a liquidated sum at the time of the payment of the deposit, an action lies to recover it, and interest thereon. Id.

Complainant held entitled to be relieved from its election, and be allowed to reclaim amount of deposit. Standard Oil Co. of Ky. v. Hawkins (1896) 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739.

The rights of a depositor in a national bank, as such, in case of the bank's insolvency, are not affected by the fact that he is also a stockholder, his duties and liabilities as stockholder being measured by the provisions of the statute; and he has the same right to reclaim a deposit fraudulently received from him when the bank was known by its officers to be in a failing condition as any other depositor, where he had no knowledge of the bank's condition, and did not participate in the frauds of its officers. Richardson v. Olivier (1900) 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113.

A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession. Id.

A national bank, on the morning on which it was closed by the comptroller, presented to the clearing-house association a large amount in checks and drafts upon other banks, a number of which had been deposited by a city and by another bank. The manager of the association received the proceeds of all such checks and drafts, and paid therefrom debts of the bank, leaving a balance to the credit of the bank. Held, that the payments must be presumed to have been made with the money of the bank, and that the remainder included that belonging to the city and the other depositing bank, and constituted a trust fund in the hands of the receiver, representing the checks and drafts the title to which remained in the depositors. City of Philadelphia v. Aldrich (C. C. 1899) 98 Fed. 487.

That a deposit of public funds in a national bank was wrongful, and known to be so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on its insolvency. Lucas County v. Jamison (C. C. 1908) 170 Fed. 338.

Evidence held insufficient to show that the officers of a national bank had knowledge that the bank was irretrievably insolvent at the time the bank accepted a deposit of certain checks and vouchers from complainant. Goshorn v. Murray (D. C. 1912) 197 Fed. 407.

The claim of a person who has left with the bank United States bonds on special deposit, and for safe-keeping, is a debt against the bank, within the meaning of the act. Turner v. First Nat. Bank (1869) 26 Iowa, 562.

The officers of a national bank, knowing the bank to be hopelessly insolvent, accepted a deposit, and the next day closed its doors. Held, that the amount of the deposit was recoverable against the receiver. Craigie v. Smith (N. Y. 1884) 14 Abb. N. C. 409, affirmed in (1885) 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

Where a national bank is hopelessly insolvent, to the knowledge of its officers, who have been notified by the comptroller of the currency to make good a certain deficiency, and they make no efforts to comply with such directions, the receipt of a draft offered by a depositor by the bank is a fraud on the depositor, and he is entitled to recover the proceeds of the draft so long as he can trace them, wherever they may be found. Importers' & Traders' Bank v. Peters (1889) 51 Hun, 640, 4 N. Y. Supp. 599, affirming judgment (1888) 1 N. Y. Supp. 89, and judgment affirmed (1890) 123 N. Y. 272, 25 N. E. 319.

One who deposits checks and drafts in a bank when it is in a failing condition cannot secure a preference for the amount thereof over other creditors on the money in the bank at the time of its failure, without tracing the proceeds of such checks and drafts and showing that such proceeds are included in such cash. Cherry v. Territory (1907) 89 P. 190, 17 Okl. 213.

Where a bank is insolvent on the last two days that it transacts business, and receives deposits, and it affirmatively appears from the evidence

that there was found in the bank when it closed its doors $20,000 in cash, and $12,857.39 was deposited on the last day it transacted business, in an action for a preference by one who deposited on the day before the last on which it received deposits, his recovery of a preference will be limited to the cash on hand less the deposits of the last day; there being no attempt to trace the identical money deposited into any other assets of the bank. Id.

When moneys of the territory are deposited by the territorial secretary in a bank that was insolvent, and it afterwards fails, and the territory is unable to trace the identical funds deposited, it should be confined to the general rules of law regarding presumptions of fact applied to other depositors; and when, under such rules, it is evident that the deposits of the last day on which the bank transacted business belong to other creditors, a preference will be denied the territory as to such deposits, even though no preference is claimed by those entitled thereto; and, under such circumstances, it is immaterial whether or not the secretary had any authority for making such deposit. Id.

When a bank receives deposits of cash while insolvent, and fails without sufficient money on hand to pay back all of the deposits so received, the law will presume that the money was paid out by the bank in the order that it was received, and that the money on hand is the money of the last depositor, and so on back in the inverse order of the deposits as to time. Id.

Where a bank received a deposit while in a failing condition, and when it closed its doors had a sufficient amount of cash to repay such deposits, such payment will not be made in preference to others, where the evidence shows that such cash was deposited by other creditors. Cherry v. Territory (1907) 89 P. 192, 17 Okl. 221, 8 L. R. A. (N. S.) 1254.

Where the secretary of the territorial board for leasing school lands without any authority deposits moneys and checks received from the rents of such lands in a national bank, which fails, before the territory can be paid ahead of other creditors of the bank, it must affirmatively appear that the particular moneys and checks so deposited, or the proceeds thereof, were turned over to the receiver, or went to swell the assets of such bank. Id.

10. —— **Actions.**—In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the comptroller of the currency, but should direct that the claim of the creditor, as established, be certified to the comptroller, to be paid in due course of administration. Merrill v. First Nat. Bank (1896) 75 Fed. 148, 21 C. C. A. 282.

A decree which commands the receiver of an insolvent national bank to pay over a large sum of money within 10 days, where, as a matter of fact, and in accordance with law, the funds are in the custody of the comptroller of the currency, unduly limits the time for satisfying the decree, and might result in the receiver being in contempt for not paying over moneys which are not within his control. Richardson v. Louisville Banking Co. of Louisville, Ky. (1899) 94 Fed. 442, 36 C. C. A. 307.

Where it is not shown that a certain collection made by a receiver of an insolvent national bank was forwarded by a correspondent of the bank, nor included in the list of items sent, it is not sufficiently traced; and this though the receiver testified that the item was collected for the forwarding bank. Id.

Plaintiff sued the receiver of a national bank for money loaned the bank for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively, that plaintiff contracted for the loan with the bank cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not receipted for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the comptroller and to defendant, written after the bank's insolvency, plaintiff, who was inexperienced in business matters, referred to herself as a stockholder. Held, that the evidence did not estop plaintiff from showing that she was not a stockholder, and that that issue was properly submitted to the jury. American Nat. Bank v. Williams (1900) 101 Fed. 943, 42 C. C. A. 101.

A receiver of a national bank, who is a party to a decree allowing a preferred claim in a suit in which a creditor of the insolvent bank is entitled to appeal, held without authority to compromise with the successful claimant without the consent of the aggrieved creditor, and without order of court. Empire State Surety Co. v. Carroll County (1912) 194 Fed. 593, 114 C. C. A. 435.

One who presents several claims against an insolvent national bank is

not, by taking dividends on the claim allowed by the comptroller of the currency, estopped to sue the bank on the disputed claims, ordered by the comptroller to be thrown out of consideration, to be settled elsewhere. Chemical Nat. Bank v. World's Columbian Exposition (1897) 48 N. E. 331, 170 Ill. 82, affirming judgment (1896) 67 Ill. App. 169.

It is proper in a suit on a contract of a national bank, after a receiver has been appointed for it, to render judgment against the bank only, and enter an order requiring the receiver to certify the claim in judgment to the comptroller of the currency of the United States, to be paid by him in due course of administration of the assets of the bank. Wolf v. McNulta (1899) 52 N. E. 896, 178 Ill. 85, reversing judgment McKeon v. Wolf (1898) 77 Ill. App. 325.

In case of the failure of a bank, the receiver is a proper party defendant in proceedings for the adjudications of claims against the bank. Turner v. First Nat. Bank (1869) 26 Iowa, 562.

Money placed in the hands of the cashier of an insolvent national bank to indemnify him as surety on an attachment bond is a trust fund, although mingled with the bank's funds, so that it went into the receiver's hands with the general assets; and a state court has jurisdiction to enter a decree establishing it as a preferred claim against the bank. Flint Road Cart Co. v. Stephens (1888) 32 Mo. App. 341.

In an action against a national bank for which a receiver had been appointed, by a creditor, to establish his claim, which had been rejected by the receiver, the latter is properly made a party. Green v. Walkill Nat. Bank (N. Y. 1876) 7 Hun, 63.

The appointment of a receiver under the national bank act does not absolutely dissolve the corporation; and, in an action to establish the claim of a creditor which has been rejected either by the United States comptroller of the currency or the receiver, the bank and the receiver may both be made parties defendant. Id.

11. Claims of government.—Neither the receiver nor the comptroller has power to submit to the federal court in a suit by creditors the question of priority of payment, or the amount, of claims of the government. Case v. Terrell (1870) 11 Wall. 199, 202, 20 L. Ed. 134.

The provisions of this section withdraws national banks which have failed from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 566, 107 U. S. 445, 27 L. Ed. 537.

Where postal and money-order funds have been deposited by a deputy postmaster, without security, in a bank which subsequently becomes insolvent, a bill by the United States. claiming a priority over other creditors, will be dismissed. Id. But see U. S. v. Cook County Nat. Bank (C. C. 1879) Fed. Cas. No. 14,853.

In the case of an insolvent bank the treasurer represents the United States as a creditor. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

A tax due the government may be set up ordinarily by way of counterclaim; but where the assets of an insolvent bank are in the hands of the comptroller of the currency, and the government must take pro rata with other creditors, the counterclaim will be dismissed without prejudice. Id.

The United States have no priority over private creditors in the assets of an insolvent national bank for payment of deposits made in such bank to the respective credit of the United States treasurer, of a United States disbursing officer, and of the registry of a United States district court, after the fund which may be realized from the bonds held by the United States as a security for such deposits is exhausted. (1871) 13 Op. Atty. Gen. 528.

Where (as in the case of the First National Bank of New Orleans) a national bank is hopelessly insolvent, and the United States pays private creditors the amounts owed by the bank, the government is subrogated to their claims against the bank, but is not entitled to be preferred. (1882) 17 Op. Atty. Gen. 360.

12. Distribution of surplus.—Where a number of the shareholders of a national bank in good faith paid an assessment made to comply with a requirement of the comptroller to make good an impairment of the bank's capital, although such assessment was invalid because made by the directors instead of by the stockholders, on the insolvency of the bank, and the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amounts so paid, before general distribution of the remaining assets among all the shareholders. In re Hulitt (C. C. 1899) 96 Fed. 785.

Liquidation dividends of a national bank belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not, and must be paid to the holder of such shares on demand. Bath Sav. Inst. v. Sagadahoc Nat. Bank (1897) 36 A. 996, 89 Me. 500.

Knowledge by a purchaser of bank stock that shares wrongfully issued to him were for the purpose of deceiving

the comptroller of the treasury held not to preclude a recovery on an award of liquidators. Jones v. Beaver Nat. Bank (1912) 134 N. Y. S. 776, 150 App. Div. 145.

Where a shareholder of an insolvent national bank failed to pay an assessment of less than the par value, made by the comptroller, a purchaser for value of the former's shares was not entitled to participate in the equitable distribution by such agent of money collected and turned over to him by the comptroller after the assessment was made, until the shareholders who paid the assessment were first reimbursed. Richardson v. Wallace (1893) 39 S. C. 216, 17 S. E. 725.

The assets of a national bank being considered insufficient to pay its debts, the comptroller ordered an assessment of 39 per cent. on the stock. One of the stockholders, who was indebted to the bank, had been sued thereon, and his stock was attached, and sold at sheriff's sale therefor, and on this stock no assessment was paid. After the assessment the comptroller unexpectedly collected a claim of $8,000 due the bank, which amount was turned over to the agent of the stockholders. Held, that the purchaser of shares at the sheriff's sale was not entitled to share in such fund until the assessments were refunded to the shareholders who had paid them. Id.

13. State legislation.—The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to this section, and is therefore inapplicable in the case of a national bank. Davis v. Elmira Sav. Bank (1896) 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700.

Laws N. Y. 1892, c. 689, § 118, provides that the trustees of any savings bank may "deposit in any bank in this state organized under any law of this state or of the United States" a sum not exceeding 25 per cent. of its paid-up capital. Section 130 provides that all the property of "any bank" which shall become insolvent shall, after providing for payment of its circulating notes, if it has any, be applied first to the payment in full of money deposited therewith by any savings bank. Held, that the term "any bank," as used in section 130, applies to "national banks" and that this statute does not conflict with this section, as the acceptance of a deposit from a savings bank is with knowledge of the statute, whereby an equitable lien is created in favor of the savings bank. Elmira Sav. Bank v. Davis (1893) 73 Hun, 357, 26 N. Y. Supp. 200, 25 L. R. A. 546, applying Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and affirmed (1894) 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546.

Laws N. Y. 1892, c. 689, § 130, which provides that a claim by a savings bank as a depositor in a national bank shall be a preferred claim in case the national bank becomes insolvent, does not interfere with the utility of national banks as an instrumentality of government, since no possessory right is given until after the insolvency of the national bank. Id.

Cited without definite application, Kennedy v. Gibson (1869) 8 Wall. 498, 503, 19 L. Ed. 476; First National Bank v. Colby (1874) 21 Wall. 609, 612, 22 L. Ed. 687; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 243, 21 C. C. A. 315; Denton v. Baker (1897) 79 Fed. 189, 193, 24 C. C. A. 476; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Dolley v. Abilene Nat. Bank (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Roberts v. Hill (C. C. 1885) 24 Fed. 571, 575; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18, 22; Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577; Merchants' & Farmers' Bank v. Austin (C. C. 1891) 48 Fed. 25, 32; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; In re Devlin (D. C. 1910) 180 Fed. 170.

§ 9824. (R. S. § 5237.) Injunction upon receivership.

Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller,

and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.
See notes to R. S. § 5234, ante, § 9821.

Cited without definite application, Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677, 678; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84.

§ 9825. (R. S. § 5238.) Fees and expenses.

All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, § 51, 13 Stat. 115.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

Fees of district attorney.—The appointment of special counsel by the receiver, though sanctioned by the comptroller, did not affect the district attorney's right to fees as counsel for the receiver, in suits to which the receiver was a party, it appearing that he was ready and offered to perform them, and did perform them so far as the opposition of the receiver allowed, no want of skill, diligence, or industry being imputed to him. Gibson v. Peters (C. C. 1888) 35 Fed. 721, set aside by circuit judge (C. C. 1888) 36 Fed. 487, and judgment affirmed (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

A district attorney need not wait until actually instructed by the solicitor of the treasury, to enter on the duties of counsel to the receiver, but, if the solicitor fails to give directions, he may nevertheless enter on the duties, and recover compensation from the receiver. Id.

The compensation of the district attorney in suits under this section is not limited to the fees prescribed by law in suits to which the United States is a party; but, the United States not being a party to or interested in such suits, and the district attorney's compensation therein not being audited by any of the treasury officers to whose supervision his accounts as district attorney are subjected, he is entitled to the usual compensation for such services, to be paid out of the assets of the bank. Id.

The expenses of poceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case. Id.

The compensation of the United States attorney appearing for such receiver is not regulated by the fee bill prescribed by statute, nor should it be paid by the government, but out of the funds of the trust. (1892) 20 Op. Atty. Gen. 476.

Costs of master.—The costs of a master appointed to investigate the affairs of the bank will be ordered to be paid by the receiver. McElhenny v. First Nat. Bank of Ashland (C. C. 1879) Fed. Cas. No. 8,779.

Costs of collecting notes.—A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. Citizens' Bank & Trust Co. v. Thornton (1909) 174 Fed. 752, 98 C. C. A. 478.

Cited without definite application, Mullett v. U. S. (1893) 14 Sup. Ct. 190, 192, 150 U. S. 566, 37 L. Ed. 1184; McDonald v. Thompson (1902) 22 Sup. Ct. 297, 298, 184 U. S. 71, 46 L. Ed. 437; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Harvey v. Lord (C. C. 1882) 10 Fed. 236, 237; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; Ex parte Houghton (D. C. 1881) 7 Fed. 657, 659, 660.

§ 9826. (Act June 30, 1876, c. 156, § 1.) Receivers for banks violating law, failing to pay judgments, or becoming insolvent.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes. (19 Stat. 63.)

This was the first section of an act entitled "An act authorizing the appointment of receivers of national banks, and for other purposes."

Section 2 of the act, relating to the enforcement of shareholders' liability on voluntary dissolution, is set forth ante, § 9807.

Section 3 of the act is set forth post, § 9827.

Section 4 of the act amended R. S. § 5205, and is incorporated into that section as set forth ante, § 9767.

Section 5 of the act, requiring all counterfeit notes to be marked with the word "counterfeit," "altered," or "worthless," is set forth ante, § 6568.

Section 6 of the act, requiring all savings banks or savings and trust companies organized under any act of Congress to make reports to the Comptroller, is set forth ante, § 9778.

R. S. §§ 5234, 5239, mentioned in this section, are set forth ante, § 9821, post, § 9831.

Notes of Decisions

See notes under §§ 9821, 9824, ante.

Receivers—Powers, duties, and nature of office.—Though not a party to a suit against the bank in a state court, the receiver of a national bank may appear in that court and contest the validity of the judgment. Denton v. Baker (1899) 93 Fed. 46, 35 C. C. A. 187.

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank. Brown v. French (C. C. 1897) 80 Fed. 160.

A receiver of a national bank has no status in court which will justify him in making a motion to dissolve an attachment issued against the bank before his appointment, until he had obtained an order making him a party to the action. Tracy v. First Nat. Bank (1868) 37 N. Y. 523.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are attached, the receiver of such bank, not being a party to the action, cannot move to set aside the attachment proceedings. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

A receiver of a national bank of another state, though not a party to an action in a New York court, has such a status that under Code Civ. Proc. N. Y. § 682, he may move to set aside attachment proceedings. People's Bank v. Mechanics' Nat. Bank (N. Y. 1882) 62 How. Prac. 422.

A receiver of an insolvent national bank, appointed after issue of an attachment against the bank, may, under Code Civ. Proc. N. Y. § 682, move to vacate the attachment without being made a party to the action. National Shoe & Leather Bank v. Mechanics' Nat. Bank (1882) 89 N. Y. 440.

The receiver of a bank, who acquired title to attached property prior to the attachment, cannot move to vacate the same simply because, under such attachment against the bank, his property was seized; Code Civ. Proc. N. Y. § 682, allowing only those whose interests are acquired subsequent to the attachment to so move. Key West Building & Loan Ass'n v. Bank of Key West (1892) 63 Hun, 633, 18 N. Y. Supp. 390; Allen v. Same (1892) 63 Hun, 633, 18 N. Y. Supp. 391.

The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency. Held, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim. Barrett v. Henrietta Nat. Bank (1890) 78 Tex. 222, 14 S. W. 569.

Appointment of receiver.—The comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank. Bushnell v. Leland (1897) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

The assignee of bonds deposited with the treasurer of the United States as security for the redemption of national bank notes cannot question the validity of the appointment of a receiver for the bank in respect to other property than the bonds. Van Antwerp v. Hulburd (C. C. 1871) Fed. Cas. No. 16,-827.

Where the officers of a national bank have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver. Irons v. Manufacturers' Nat. Bank (C. C. 1875) Fed. Cas. No. 7,-068.

After a creditor has brought suit and a receiver has been appointed, the comptroller has no authority to appoint another receiver. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of section 2, art. 2, Const. U. S. Price v. Abbott (C. C. 1883) 17 Fed. 506.

In an action by the receiver of an insolvent national bank against the stockholders to collect an assessment, they cannot inquire into the legality of the receiver's appointment. Young v. Wempe (C. C. 1891) 46 Fed. 354.

The power vested in the comptroller of the currency to appoint a receiver is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

The right to put a national bank in voluntary liquidation, given to stockholders by section 9806, ante, does not affect the right of the comptroller to appoint a receiver. Id.

The comptroller's decision is conclusive of the facts authorizing the appointment of a receiver. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46, affirmed (1900) 99 Fed. 801, 40 C. C. A. 93.

As to those matters specified by the federal bank acts as authorizing the Comptroller to appoint a receiver for a national bank, his jurisdiction is exclusive, but in other contingencies a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof to compel them to observe their obligations to their stockholders, and has power to appoint a receiver, and where a national bank went into voluntary liquidation and was not insolvent, owing only a small debt to the only persons who had any claims upon the assets except the stockholders, a state court could appoint a receiver and require an accounting at the suit of a minority stockholder. Grout v. First Nat. Bank (Colo. 1910) 111 P. 556.

If a national bank has ceased to be a going concern, its creditors having been paid in full and nothing remaining but the collection of its assets and their distribution among the stockholders, held, that the appointment of a receiver of a claim by such bank against a director for a neglect of duty is proper. Wallach v. Billings (1911) 161 Ill. App. 317.

Under the act of congress for the organization of national banks, it is the province of the comptroller of the currency to determine whether the emergency which authorizes the appointment of a receiver for a bank has arisen or not. And whenever he determines that the emergency has arisen, and appoints a receiver accordingly, his determination is conclusive upon the debtors of the bank, though it may not be so upon the bank itself. Platt v. Crawford (N. Y. 1868) 8 Abb. Prac. (N. S.) 297.

Effect of appointment.—The appointment of a receiver for an insolvent national bank does not dissolve the corporation so as to prevent the recovery of a judgment against it on a valid claim. Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 441, 161 U. S. 1, 40 L. Ed. 595.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller of the currency. Earle v. Commonwealth of Pennsylvania (1900) 20 Sup. Ct. 915, 44 L. Ed. 1146.

One appointed merely temporary receiver of a national bank on account of a suspension of payments, arising from defalcations of certain officers, is not necessarily such a representative of the bank that limitations provided in an insurance policy, intended to indemnify the bank against such defalcations, will commence to run when the receiver discovers the frauds. Jackson v. Fidelity & Casualty Co. (1896) 75 Fed. 359, 21 C. C. A. 394.

The appointment of a receiver of a national bank, and his taking possession of its books and its assets, so far incapacitates the bank from investigating frauds by its officials, and bringing suit on policies insuring their fidelity, as to excuse a delay by the bank in bringing

suit on such policies, within a period of limitation fixed therein. Id.

The assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

The appointment of a receiver for a national bank by the comptroller, because of its failure to redeem its currency, is not such a dissolution of the corporation as will prevent a creditor from maintaining an action against it after the comptroller has disallowed his claim, particularly as the act of congress expressly provides for the causes of forfeiture and the proceedings to enforce it, the failure to redeem currency not being one of such causes. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. Barnes v. Pogue (Ohio Super. Ct. Cin. 1893) 29 Wkly. Law Bul. 382.

Proceedings in state courts.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 392, 165 U. S. 443, 41 L. Ed. 782.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Earle v. Conway (1900) 20 Sup. Ct. 918, 44 L. Ed. 1149, affirming judgment Conway v. Chestnut St. Nat. Bank (1899) 42 A. 303, 189 Pa. 610.

Where a judgment creditor of a national bank has had his execution returned nulla bona, the bank having gone into liquidation, and having no ostensible property on which levy may be made, he may enjoin the bank from disposing of its assets among its stockholders, and have a receiver appointed, though a bill has been filed in a federal court by the stockholders, praying for the appointment of a receiver. Merchants' & Planters' Nat. Bank v. Masonic Hall (1879) 63 Ga. 549.

§ 9827. (Act June 30, 1876, c. 156, § 3, as amended, Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354.) Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said share-

holders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the

shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent. (19 Stat. 63. 27 Stat. 345. 29 Stat. 600.)

This section, as enacted in the Revised Statutes, was as follows:

"Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares may direct, distributing such

assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards."

It was amended by Act Aug. 3, 1892, c. 360, cited above, to read as follows: "Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall by the vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or prop-

that there was found in the bank when it closed its doors $20,000 in cash, and $12,857.39 was deposited on the last day it transacted business, in an action for a preference by one who deposited on the day before the last on which it received deposits, his recovery of a preference will be limited to the cash on hand less the deposits of the last day; there being no attempt to trace the identical money deposited into any other assets of the bank. Id.

When moneys of the territory are deposited by the territorial secretary in a bank that was insolvent, and it afterwards fails, and the territory is unable to trace the identical funds deposited, it should be confined to the general rules of law regarding presumptions of fact applied to other depositors; and when, under such rules, it is evident that the deposits of the last day on which the bank transacted business belong to other creditors, a preference will be denied the territory as to such deposits, even though no preference is claimed by those entitled thereto; and, under such circumstances, it is immaterial whether or not the secretary had any authority for making such deposit. Id.

When a bank receives deposits of cash while insolvent, and fails without sufficient money on hand to pay back all of the deposits so received, the law will presume that the money was paid out by the bank in the order that it was received, and that the money on hand is the money of the last depositor, and so on back in the inverse order of the deposits as to time. Id.

Where a bank received a deposit while in a failing condition, and when it closed its doors had a sufficient amount of cash to repay such deposits, such payment will not be made in preference to others, where the evidence shows that such cash was deposited by other creditors. Cherry v. Territory (1907) 89 P. 192, 17 Okl. 221, 8 L. R. A. (N. S.) 1254.

Where the secretary of the territorial board for leasing school lands without any authority deposits moneys and checks received from the rents of such lands in a national bank, which fails, before the territory can be paid ahead of other creditors of the bank, it must affirmatively appear that the particular moneys and checks so deposited, or the proceeds thereof, were turned over to the receiver, or went to swell the assets of such bank. Id.

10. —— **Actions.**—In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the comptroller of the currency, but should direct that the claim of the creditor, as established, be certified to the comptroller, to be paid in due course of administration. Merrill v. First Nat. Bank (1896) 75 Fed. 148, 21 C. C. A. 282.

A decree which commands the receiver of an insolvent national bank to pay over a large sum of money within 10 days, where, as a matter of fact, and in accordance with law, the funds are in the custody of the comptroller of the currency, unduly limits the time for satisfying the decree, and might result in the receiver being in contempt for not paying over moneys which are not within his control. Richardson v. Louisville Banking Co. of Louisville, Ky. (1899) 94 Fed. 442, 36 C. C. A. 307.

Where it is not shown that a certain collection made by a receiver of an insolvent national bank was forwarded by a correspondent of the bank, nor included in the list of items sent, it is not sufficiently traced; and this though the receiver testified that the item was collected for the forwarding bank. Id.

Plaintiff sued the receiver of a national bank for money loaned the bank for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively, that plaintiff contracted for the loan with the bank cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not receipted for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the comptroller and to defendant, written after the bank's insolvency, plaintiff, who was inexperienced in business matters, referred to herself as a stockholder. Held, that the evidence did not estop plaintiff from showing that she was not a stockholder, and that that issue was properly submitted to the jury. American Nat. Bank v. Williams (1900) 101 Fed. 943, 42 C. C. A. 101.

A receiver of a national bank, who is a party to a decree allowing a preferred claim in a suit in which a creditor of the insolvent bank is entitled to appeal, held without authority to compromise with the successful claimant without the consent of the aggrieved creditor, and without order of court. Empire State Surety Co. v. Carroll County (1912) 194 Fed. 593, 114 C. C. A. 435.

One who presents several claims against an insolvent national bank is

not, by taking dividends on the claim allowed by the comptroller of the currency, estopped to sue the bank on the disputed claims, ordered by the comptroller to be thrown out of consideration, to be settled elsewhere. Chemical Nat. Bank v. World's Columbian Exposition (1897) 48 N. E. 331, 170 Ill. 82, affirming judgment (1896) 67 Ill. App. 169.

It is proper in a suit on a contract of a national bank, after a receiver has been appointed for it, to render judgment against the bank only, and enter an order requiring the receiver to certify the claim in judgment to the comptroller of the currency of the United States, to be paid by him in due course of administration of the assets of the bank. Wolf v. McNulta (1899) 52 N. E. 896, 178 Ill. 85, reversing judgment McKeon v. Wolf (1898) 77 Ill. App. 325.

In case of the failure of a bank, the receiver is a proper party defendant in proceedings for the adjudications of claims against the bank. Turner v. First Nat. Bank (1869) 26 Iowa, 562.

Money placed in the hands of the cashier of an insolvent national bank to indemnify him as surety on an attachment bond is a trust fund, although mingled with the bank's funds, so that it went into the receiver's hands with the general assets; and a state court has jurisdiction to enter a decree establishing it as a preferred claim against the bank. Flint Road Cart Co. v. Stephens (1888) 32 Mo. App. 341.

In an action against a national bank for which a receiver had been appointed, by a creditor, to establish his claim, which had been rejected by the receiver, the latter is properly made a party. Green v. Walkill Nat. Bank (N. Y. 1876) 7 Hun, 63.

The appointment of a receiver under the national bank act does not absolutely dissolve the corporation; and, in an action to establish the claim of a creditor which has been rejected either by the United States comptroller of the currency or the receiver, the bank and the receiver may both be made parties defendant. Id.

11. Claims of government.—Neither the receiver nor the comptroller has power to submit to the federal court in a suit by creditors the question of priority of payment, or the amount, of claims of the government. Case v. Terrell (1870) 11 Wall. 199, 202, 20 L. Ed. 134.

The provisions of this section withdraws national banks which have failed from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. Cook County Nat. Bank v. U. S. (1883) 2 Sup. Ct. 561, 566, 107 U. S. 445, 27 L. Ed. 537.

Where postal and money-order funds have been deposited by a deputy postmaster, without security, in a bank which subsequently becomes insolvent, a bill by the United States, claiming a priority over other creditors, will be dismissed. Id. But see U. S. v. Cook County Nat. Bank (C. C. 1879) Fed. Cas. No. 14,853.

In the case of an insolvent bank the treasurer represents the United States as a creditor. Jackson v. U. S. (1885) 20 Ct. Cl. 298.

A tax due the government may be set up ordinarily by way of counterclaim; but where the assets of an insolvent bank are in the hands of the comptroller of the currency, and the government must take pro rata with other creditors, the counterclaim will be dismissed without prejudice. Id.

The United States have no priority over private creditors in the assets of an insolvent national bank for payment of deposits made in such bank to the respective credit of the United States treasurer, of a United States disbursing officer, and of the registry of a United States district court, after the fund which may be realized from the bonds held by the United States as a security for such deposits is exhausted. (1871) 13 Op. Atty. Gen. 528.

Where (as in the case of the First National Bank of New Orleans) a national bank is hopelessly insolvent, and the United States pays private creditors the amounts owed by the bank, the government is subrogated to their claims against the bank, but is not entitled to be preferred. (1882) 17 Op. Atty. Gen. 360.

12. Distribution of surplus.—Where a number of the shareholders of a national bank in good faith paid an assessment made to comply with a requirement of the comptroller to make good an impairment of the bank's capital, although such assessment was invalid because made by the directors instead of by the stockholders, on the insolvency of the bank, and the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amounts so paid, before general distribution of the remaining assets among all the shareholders. In re Hulitt (C. C. 1899) 96 Fed. 785.

Liquidation dividends of a national bank belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not, and must be paid to the holder of such shares on demand. Bath Sav. Inst. v. Sagadahoc Nat. Bank (1897) 36 A. 996, 89 Me. 500.

Knowledge by a purchaser of bank stock that shares wrongfully issued to him were for the purpose of deceiving

the comptroller of the treasury held not to preclude a recovery on an award of liquidators. Jones v. Beaver Nat. Bank (1912) 134 N. Y. S. 776, 150 App. Div. 145.

Where a shareholder of an insolvent national bank failed to pay an assessment of less than the par value, made by the comptroller, a purchaser for value of the former's shares was not entitled to participate in the equitable distribution by such agent of money collected and turned over to him by the comptroller after the assessment was made, until the shareholders who paid the assessment were first reimbursed. Richardson v. Wallace (1893) 39 S. C. 216, 17 S. E. 725.

The assets of a national bank being considered insufficient to pay its debts, the comptroller ordered an assessment of 39 per cent. on the stock. One of the stockholders, who was indebted to the bank, had been sued thereon, and his stock was attached, and sold at sheriff's sale therefor, and on this stock no assessment was paid. After the assessment the comptroller unexpectedly collected a claim of $8,000 due the bank, which amount was turned over to the agent of the stockholders. Held, that the purchaser of shares at the sheriff's sale was not entitled to share in such fund until the assessments were refunded to the shareholders who had paid them. Id.

13. State legislation.—The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to this section, and is therefore inapplicable in the case of a national bank. Davis v. Elmira Sav. Bank (1896) 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700.

Laws N. Y. 1892, c. 689, § 118, provides that the trustees of any savings bank may "deposit in any bank in this state organized under any law of this state or of the United States" a sum not exceeding 25 per cent. of its paid-up capital. Section 130 provides that all the property of "any bank" which shall become insolvent shall, after providing for payment of its circulating notes, if it has any, be applied first to the payment in full of money deposited therewith by any savings bank. Held, that the term "any bank," as used in section 130, applies to "national banks" and that this statute does not conflict with this section, as the acceptance of a deposit from a savings bank is with knowledge of the statute, whereby an equitable lien is created in favor of the savings bank. Elmira Sav. Bank v. Davis (1893) 73 Hun, 357, 26 N. Y. Supp. 200, 25 L. R. A. 546, applying Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and affirmed (1894) 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546.

Laws N. Y. 1892, c. 689, § 130, which provides that a claim by a savings bank as a depositor in a national bank shall be a preferred claim in case the national bank becomes insolvent, does not interfere with the utility of national banks as an instrumentality of government, since no possessory right is given until after the insolvency of the national bank. Id.

Cited without definite application, Kennedy v. Gibson (1869) 8 Wall. 498, 503, 19 L. Ed. 476; First National Bank v. Colby (1874) 21 Wall. 609, 612, 22 L. Ed. 687; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 243, 21 C. C. A. 315; Denton v. Baker (1897) 79 Fed. 189, 193, 24 C. C. A. 476; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Dolley v. Abilene Nat. Bank (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Roberts v. Hill (C. C. 1885) 24 Fed. 571, 575; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18, 22; Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577; Merchants' & Farmers' Bank v. Austin (C. C. 1891) 48 Fed. 25, 32; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; In re Devlin (D. C. 1910) 180 Fed. 170.

§ 9824. (R. S. § 5237.) Injunction upon receivership.

Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller,

and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.
See notes to R. S. § 5234, ante, § 9821.

Cited without definite application, Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677, 678; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84.

§ 9825. (R. S. § 5238.) Fees and expenses.

All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, § 51, 13 Stat. 115.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

Fees of district attorney.—The appointment of special counsel by the receiver, though sanctioned by the comptroller, did not affect the district attorney's right to fees as counsel for the receiver, in suits to which the receiver was a party, it appearing that he was ready and offered to perform them, and did perform them so far as the opposition of the receiver allowed, no want of skill, diligence, or industry being imputed to him. Gibson v. Peters (C. C. 1888) 35 Fed. 721, set aside by circuit judge (C. C. 1888) 36 Fed. 487, and judgment affirmed (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

A district attorney need not wait until actually instructed by the solicitor of the treasury, to enter on the duties of counsel to the receiver, but, if the solicitor fails to give directions, he may nevertheless enter on the duties, and recover compensation from the receiver. Id.

The compensation of the district attorney in suits under this section is not limited to the fees prescribed by law in suits to which the United States is a party; but, the United States not being a party to or interested in such suits, and the district attorney's compensation therein not being audited by any of the treasury officers to whose supervision his accounts as district attorney are subjected, he is entitled to the usual compensation for such services, to be paid out of the assets of the bank. Id.

The expenses of poceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case. Id.

The compensation of the United States attorney appearing for such receiver is not regulated by the fee bill prescribed by statute, nor should it be paid by the government, but out of the funds of the trust. (1892) 20 Op. Atty. Gen. 476.

Costs of master.—The costs of a master appointed to investigate the affairs of the bank will be ordered to be paid by the receiver. McElhenny v. First Nat. Bank of Ashland (C. C. 1879) Fed. Cas. No. 8,779.

Costs of collecting notes.—A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. Citizens' Bank & Trust Co. v. Thornton (1909) 174 Fed. 752, 98 C. C. A. 478.

Cited without definite application, Mullett v. U. S. (1893) 14 Sup. Ct. 190, 192, 150 U. S. 566, 37 L. Ed. 1184; McDonald v. Thompson (1902) 22 Sup. Ct. 297, 298, 184 U. S. 71, 46 L. Ed. 437; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Harvey v. Lord (C. C. 1882) 10 Fed. 236, 237; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; Ex parte Houghton (D. C. 1881) 7 Fed. 657, 659, 660.

§ 9826. (Act June 30, 1876, c. 156, § 1.) Receivers for banks violating law, failing to pay judgments, or becoming insolvent.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes. (19 Stat. 63.)

This was the first section of an act entitled "An act authorizing the appointment of receivers of national banks, and for other purposes."

Section 2 of the act, relating to the enforcement of shareholders' liability on voluntary dissolution, is set forth ante, § 9807.

Section 3 of the act is set forth post, § 9827.

Section 4 of the act amended R. S. § 5205, and is incorporated into that section as set forth ante, § 9767.

Section 5 of the act, requiring all counterfeit notes to be marked with the word "counterfeit," "altered," or "worthless," is set forth ante, § 6568.

Section 6 of the act, requiring all savings banks or savings and trust companies organized under any act of Congress to make reports to the Comptroller, is set forth ante, § 9778.

R. S. §§ 5234, 5239, mentioned in this section, are set forth ante, § 9821, post, § 9831.

Notes of Decisions

See notes under §§ 9821, 9824, ante.

Receivers—Powers, duties, and nature of office.—Though not a party to a suit against the bank in a state court, the receiver of a national bank may appear in that court and contest the validity of the judgment. Denton v. Baker (1899) 93 Fed. 46, 35 C. C. A. 187.

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank. Brown v. French (C. C. 1897) 80 Fed. 160.

A receiver of a national bank has no status in court which will justify him in making a motion to dissolve an attachment issued against the bank before his appointment, until he had obtained an order making him a party to the action. Tracy v. First Nat. Bank (1868) 37 N. Y. 523.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are attached, the receiver of such bank, not being a party to the action, cannot move to set aside the attachment proceedings. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

A receiver of a national bank of another state, though not a party to an action in a New York court, has such a status that under Code Civ. Proc. N. Y. § 682, he may move to set aside attachment proceedings. People's Bank v. Mechanics' Nat. Bank (N. Y. 1882) 62 How. Prac. 422.

A receiver of an insolvent national bank, appointed after issue of an attachment against the bank, may, under Code Civ. Proc. N. Y. § 682, move to vacate the attachment without being made a party to the action. National Shoe & Leather Bank v. Mechanics' Nat. Bank (1882) 89 N. Y. 440.

The receiver of a bank, who acquired title to attached property prior to the attachment, cannot move to vacate the same simply because, under such attachment against the bank, his property was seized; Code Civ. Proc. N. Y. § 682, allowing only those whose interests are acquired subsequent to the attachment to so move. Key West Building & Loan Ass'n v. Bank of Key West (1892) 63 Hun, 633, 18 N. Y. Supp. 390; Allen v. Same (1892) 63 Hun, 633, 18 N. Y. Supp. 391.

The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency. Held, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim. Barrett v. Henrietta Nat. Bank (1890) 78 Tex. 222, 14 S. W. 569.

Appointment of receiver.—The comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank. Bushnell v. Leland (1897) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

The assignee of bonds deposited with the treasurer of the United States as security for the redemption of national bank notes cannot question the validity of the appointment of a receiver for the bank in respect to other property than the bonds. Van Antwerp v. Hulburd (C. C. 1871) Fed. Cas. No. 16,-827.

Where the officers of a national bank have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver. Irons v. Manufacturers' Nat. Bank (C. C. 1875) Fed. Cas. No. 7,-068.

After a creditor has brought suit and a receiver has been appointed, the comptroller has no authority to appoint another receiver. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of section 2, art. 2, Const. U. S. Price v. Abbott (C. C. 1883) 17 Fed. 506.

In an action by the receiver of an insolvent national bank against the stockholders to collect an assessment, they cannot inquire into the legality of the receiver's appointment. Young v. Wempe (C. C. 1891) 46 Fed. 354.

The power vested in the comptroller of the currency to appoint a receiver is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

The right to put a national bank in voluntary liquidation, given to stockholders by section 9806, ante, does not affect the right of the comptroller to appoint a receiver. Id.

The comptroller's decision is conclusive of the facts authorizing the appointment of a receiver. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46, affirmed (1900) 99 Fed. 801, 40 C. C. A. 93.

As to those matters specified by the federal bank acts as authorizing the Comptroller to appoint a receiver for a national bank, his jurisdiction is exclusive, but in other contingencies a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof to compel them to observe their obligations to their stockholders, and has power to appoint a receiver, and where a national bank went into voluntary liquidation and was not insolvent, owing only a small debt to the only persons who had any claims upon the assets except the stockholders, a state court could appoint a receiver and require an accounting at the suit of a minority stockholder. Grout v. First Nat. Bank (Colo. 1910) 111 P. 556.

If a national bank has ceased to be a going concern, its creditors having been paid in full and nothing remaining but the collection of its assets and their distribution among the stockholders, held, that the appointment of a receiver of a claim by such bank against a director for a neglect of duty is proper. Wallach v. Billings (1911) 161 Ill. App. 317.

Under the act of congress for the organization of national banks, it is the province of the comptroller of the currency to determine whether the emergency which authorizes the appointment of a receiver for a bank has arisen or not. And whenever he determines that the emergency has arisen, and appoints a receiver accordingly, his determination is conclusive upon the debtors of the bank, though it may not be so upon the bank itself. Platt v. Crawford (N. Y. 1868) 8 Abb. Prac. (N. S.) 297.

Effect of appointment.—The appointment of a receiver for an insolvent national bank does not dissolve the corporation so as to prevent the recovery of a judgment against it on a valid claim. Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 441, 161 U. S. 1, 40 L. Ed. 595.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller of the currency. Earle v. Commonwealth of Pennsylvania (1900) 20 Sup. Ct. 915, 44 L. Ed. 1146.

One appointed merely temporary receiver of a national bank on account of a suspension of payments, arising from defalcations of certain officers, is not necessarily such a representative of the bank that limitations provided in an insurance policy, intended to indemnify the bank against such defalcations, will commence to run when the receiver discovers the frauds. Jackson v. Fidelity & Casualty Co. (1896) 75 Fed. 359, 21 C. C. A. 394.

The appointment of a receiver of a national bank, and his taking possession of its books and its assets, so far incapacitates the bank from investigating frauds by its officials, and bringing suit on policies insuring their fidelity, as to excuse a delay by the bank in bringing

suit on such policies, within a period of limitation fixed therein. Id.

The assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

The appointment of a receiver for a national bank by the comptroller, because of its failure to redeem its currency, is not such a dissolution of the corporation as will prevent a creditor from maintaining an action against it after the comptroller has disallowed his claim, particularly as the act of congress expressly provides for the causes of forfeiture and the proceedings to enforce it, the failure to redeem currency not being one of such causes. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. Barnes v. Pogue (Ohio Super. Ct. Cin. 1893) 29 Wkly. Law Bul. 382.

Proceedings in state courts.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 392, 165 U. S. 443, 41 L. Ed. 782.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Earle v. Conway (1900) 20 Sup. Ct. 918, 44 L. Ed. 1149, affirming judgment Conway v. Chestnut St. Nat. Bank (1899) 42 A. 303, 189 Pa. 610.

Where a judgment creditor of a national bank has had his execution returned nulla bona, the bank having gone into liquidation, and having no ostensible property on which levy may be made, he may enjoin the bank from disposing of its assets among its stockholders, and have a receiver appointed, though a bill has been filed in a federal court by the stockholders, praying for the appointment of a receiver. Merchants' & Planters' Nat. Bank v. Masonic Hall (1879) 63 Ga. 549.

§ 9827. (Act June 30, 1876, c. 156, § 3, as amended, Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354.) Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said share-

holders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the

erty of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It was further amended by Act March 2, 1897, c. 354, last cited above, to read as set forth here.

R. S. §§ 5234, 5236, mentioned in this section, are set forth ante, §§ 9821, 9823.

Provisions relating to the purchase by a receiver of property of the bank of which he is receiver, to be sold on execution, etc., were made by Act March 29, 1886, c. 28, post, §§ 9828-9830.

Notes of Decisions

Operation of statute.—The provision that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, does not limit the power of the comptroller to take action before the bank ceases to do a banking business. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

Selection and authority of agent.—A duly elected "agent" proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expenditures, etc., and he and his sureties are finally discharged by its order. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 391, 165 U. S. 443, 41 L. Ed. 782.

The agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Action against agent—Removal of causes.—The agent is appointed for winding up the affairs of a national bank, and his duties and liabilities arise under the constitution or laws of the United States; and therefore the federal court has jurisdiction of an action brought against such agent by the pledgor of corporate stock, and which action is based on the fact that such agent has improperly sold such stock as assets of the defunct bank; and therefore such action may be removed from the state to the federal court, irrespective of the question of diverse citizenship. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312.

Control of assets.—The assets of an insolvent national bank are not brought under the control or protection of the federal courts by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Enforcement of stockholders' Liability.—See notes under §§ 9689, 9807, ante.

An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, as he has no greater powers than those conferred upon the receiver. Church v. Ayer (D. C. 1897) 80 Fed. 543.

Agent as plaintiff.—When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, on motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter. McConville v. Gilmour (C. C. 1888) 36 Fed. 277, 1 L. R. A. 498.

The liquidating agent of a national bank has authority to sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. Norwood v. Interstate Nat. Bank (1898) 48 S. W. 3, 92 Tex. 268, reversing judgment (Civ. App. 1898) 45 S. W. 927.

Actions against agent. — Where a

shareholder's agent has been appointed to take charge of the assets of a national bank under this section, providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. Barron v. McKinnon (C. C. 1910) 179 Fed. 759.

Under this section a state court has jurisdiction of an action by stockholders to compel an agent so appointed to distribute to them property collected by him. Ingold v. Gilmore (1907) 108 N. Y. S. 373, 118 App. Div. 727.

Action against directors.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit. Id.

§ 9828. (Act March 29, 1886, c. 28, § 1.) Purchase by receiver of property of bank; request to Comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (24 Stat. 8.)

This section and the two sections next following were an act entitled as an act additional to the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, which was incorporated into this Title of the Revised Statutes.

See notes to Act June 20, 1874, c. 343, § 1, ante, § 9657.

§ 9829. (Act March 29, 1886, c. 28, § 2.) Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (24 Stat. 8.)

§ 9830. (Act March 29, 1886, c. 28, § 3.) Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the

erty of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It was further amended by Act March 2, 1897, c. 354, last cited above, to read as set forth here.

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The agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

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Control of assets.—The assets of an insolvent national bank are not brought under the control or protection of the federal courts by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Enforcement of stockholders' Liability.—See notes under §§ 9689, 9807, ante.

An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, as he has no greater powers than those conferred upon the receiver. Church v. Ayer (D. C. 1897) 80 Fed. 543.

Agent as plaintiff.—When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, on motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter. McConville v. Gilmour (C. C. 1888) 36 Fed. 277, 1 L. R. A. 498.

The liquidating agent of a national bank has authority to sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. [illegible] v. Interstate Nat. Bank (1[illegible] W. 3, 92 Tex. 268, reversi[illegible] (Civ. App. 1898) 45 S. W. [illegible]

Actions against agent.—[illegible]

shareholder's agent has been appointed to take charge of the assets of a national bank under this section, providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. Barron v. McKinnon (C. C. 1910) 179 Fed. 759.

Under this section a state court has jurisdiction of an action by stockholders to compel an agent so appointed to distribute to them property collected by him. Ingold v. Gilmore (1907) 108 N. Y. S. 373, 118 App. Div. 727.

Action against directors.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit. Id.

§ 9828. (Act March 29, 1886, c. 28, § 1.) Purchase by receiver of property of bank; request to Comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (24 Stat. 8.)

This section and the two sections next following were an act entitled as an act additional to the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, which was incorporated into this Title of the Revised Statutes.

See notes to Act June 20, 1874, c. 343, § 1, ante, § 9657.

§ 9829. (Act March 29, 1886, c. 28, § 2.) Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (24 Stat. 8.)

§ 9830. (Act March 29, 1886, c. 28, § 3.) Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of [illegible] property and under any such allowance shall be made by [illegible] the Currency direct, with the

the comptroller of the treasury held not to preclude a recovery on an award of liquidators. Jones v. Beaver Nat. Bank (1912) 134 N. Y. S. 776, 150 App. Div. 145.

Where a shareholder of an insolvent national bank failed to pay an assessment of less than the par value, made by the comptroller, a purchaser for value of the former's shares was not entitled to participate in the equitable distribution by such agent of money collected and turned over to him by the comptroller after the assessment was made, until the shareholders who paid the assessment were first reimbursed. Richardson v. Wallace (1893) 39 S. C. 216, 17 S. E. 725.

The assets of a national bank being considered insufficient to pay its debts, the comptroller ordered an assessment of 39 per cent. on the stock. One of the stockholders, who was indebted to the bank, had been sued thereon, and his stock was attached, and sold at sheriff's sale therefor, and on this stock no assessment was paid. After the assessment the comptroller unexpectedly collected a claim of $8,000 due the bank, which amount was turned over to the agent of the stockholders. Held, that the purchaser of shares at the sheriff's sale was not entitled to share in such fund until the assessments were refunded to the shareholders who had paid them. Id.

13. State legislation.—The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to this section, and is therefore inapplicable in the case of a national bank. Davis v. Elmira Sav. Bank (1896) 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700.

Laws N. Y. 1892, c. 689, § 118, provides that the trustees of any savings bank may "deposit in any bank in this state organized under any law of this state or of the United States" a sum not exceeding 25 per cent. of its paid-up capital. Section 130 provides that all the property of "any bank" which shall become insolvent shall, after providing for payment of its circulating notes, if it has any, be applied first to the payment in full of money deposited therewith by any savings bank. Held, that the term "any bank," as used in section 130, applies to "national banks" and that this statute does not conflict with this section, as the acceptance of a deposit from a savings bank is with knowledge of the statute, whereby an equitable lien is created in favor of the savings bank. Elmira Sav. Bank v. Davis (1893) 73 Hun, 357, 26 N. Y. Supp. 200, 25 L. R. A. 546, applying Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and affirmed (1894) 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546.

Laws N. Y. 1892, c. 689, § 130, which provides that a claim by a savings bank as a depositor in a national bank shall be a preferred claim in case the national bank becomes insolvent, does not interfere with the utility of national banks as an instrumentality of government, since no possessory right is given until after the insolvency of the national bank. Id.

Cited without definite application, Kennedy v. Gibson (1869) 8 Wall. 498, 503, 19 L. Ed. 476; First National Bank v. Colby (1874) 21 Wall. 609, 612, 22 L. Ed. 687; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 243, 21 C. C. A. 315; Denton v. Baker (1897) 79 Fed. 189, 193, 24 C. C. A. 476; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Dolley v. Abilene Nat. Bank (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Roberts v. Hill (C. C. 1885) 24 Fed. 571, 575; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18, 22; Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577; Merchants' & Farmers' Bank v. Austin (C. C. 1891) 48 Fed. 25, 32; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; In re Devlin (D. C. 1910) 180 Fed. 170.

§ 9824. (R. S. § 5237.) Injunction upon receivership.

Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller,

and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.
See notes to R. S. § 5234, ante, § 9821.

Cited without definite application, Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677, 678; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84.

§ 9825. (R. S. § 5238.) Fees and expenses.

All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, § 51, 13 Stat. 115.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

Fees of district attorney.—The appointment of special counsel by the receiver, though sanctioned by the comptroller, did not affect the district attorney's right to fees as counsel for the receiver, in suits to which the receiver was a party, it appearing that he was ready and offered to perform them, and did perform them so far as the opposition of the receiver allowed, no want of skill, diligence, or industry being imputed to him. Gibson v. Peters (C. C. 1888) 35 Fed. 721, set aside by circuit judge (C. C. 1888) 36 Fed. 487, and judgment affirmed (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

A district attorney need not wait until actually instructed by the solicitor of the treasury, to enter on the duties of counsel to the receiver, but, if the solicitor fails to give directions, he may nevertheless enter on the duties, and recover compensation from the receiver. Id.

The compensation of the district attorney in suits under this section is not limited to the fees prescribed by law in suits to which the United States is a party; but, the United States not being a party to or interested in such suits, and the district attorney's compensation therein not being audited by any of the treasury officers to whose supervision his accounts as district attorney are subjected, he is entitled to the usual compensation for such services, to be paid out of the assets of the bank. Id.

The expenses of poceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case. Id.

The compensation of the United States attorney appearing for such receiver is not regulated by the fee bill prescribed by statute, nor should it be paid by the government, but out of the funds of the trust. (1892) 20 Op. Atty. Gen. 476.

Costs of master.—The costs of a master appointed to investigate the affairs of the bank will be ordered to be paid by the receiver. McElhenny v. First Nat. Bank of Ashland (C. C. 1879) Fed. Cas. No. 8,779.

Costs of collecting notes.—A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. Citizens' Bank & Trust Co. v. Thornton (1909) 174 Fed. 752, 98 C. C. A. 478.

Cited without definite application, Mullett v. U. S. (1893) 14 Sup. Ct. 190, 192, 150 U. S. 566, 37 L. Ed. 1184; McDonald v. Thompson (1902) 22 Sup. Ct. 297, 298, 184 U. S. 71, 46 L. Ed. 437; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Harvey v. Lord (C. C. 1882) 10 Fed. 236, 237; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; Ex parte Houghton (D. C. 1881) 7 Fed. 657, 659, 660.

§ 9826. (Act June 30, 1876, c. 156, § 1.) Receivers for banks violating law, failing to pay judgments, or becoming insolvent.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes. (19 Stat. 63.)

This was the first section of an act entitled "An act authorizing the appointment of receivers of national banks, and for other purposes."

Section 2 of the act, relating to the enforcement of shareholders' liability on voluntary dissolution, is set forth ante, § 9807.

Section 3 of the act is set forth post, § 9827.

Section 4 of the act amended R. S. § 5205, and is incorporated into that section as set forth ante, § 9767.

Section 5 of the act, requiring all counterfeit notes to be marked with the word "counterfeit," "altered," or "worthless," is set forth ante, § 6568.

Section 6 of the act, requiring all savings banks or savings and trust companies organized under any act of Congress to make reports to the Comptroller, is set forth ante, § 9778.

R. S. §§ 5234, 5239, mentioned in this section, are set forth ante, § 9821, post, § 9831.

Notes of Decisions

See notes under §§ 9821, 9824, ante.

Receivers—Powers, duties, and nature of office.—Though not a party to a suit against the bank in a state court, the receiver of a national bank may appear in that court and contest the validity of the judgment. Denton v. Baker (1899) 93 Fed. 46, 35 C. C. A. 187.

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank. Brown v. French (C. C. 1897) 80 Fed. 160.

A receiver of a national bank has no status in court which will justify him in making a motion to dissolve an attachment issued against the bank before his appointment, until he had obtained an order making him a party to the action. Tracy v. First Nat. Bank (1868) 37 N. Y. 523.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are attached, the receiver of such bank, not being a party to the action, cannot move to set aside the attachment proceedings. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

A receiver of a national bank of another state, though not a party to an action in a New York court, has such a status that under Code Civ. Proc. N. Y. § 682, he may move to set aside attachment proceedings. People's Bank v. Mechanics' Nat. Bank (N. Y. 1882) 62 How. Prac. 422.

A receiver of an insolvent national bank, appointed after issue of an attachment against the bank, may, under Code Civ. Proc. N. Y. § 682, move to vacate the attachment without being made a party to the action. National Shoe & Leather Bank v. Mechanics' Nat. Bank (1882) 89 N. Y. 440.

The receiver of a bank, who acquired title to attached property prior to the attachment, cannot move to vacate the same simply because, under such attachment against the bank, his property was seized; Code Civ. Proc. N. Y. § 682, allowing only those whose interests are acquired subsequent to the attachment to so move. Key West Building & Loan Ass'n v. Bank of Key West (1892) 63 Hun, 633, 18 N. Y. Supp. 390; Allen v. Same (1892) 63 Hun, 633, 18 N. Y. Supp. 391.

The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency. Held, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim. Barrett v. Henrietta Nat. Bank (1890) 78 Tex. 222, 14 S. W. 569.

Appointment of receiver.—The comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank. Bushnell v. Leland (1897) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

The assignee of bonds deposited with the treasurer of the United States as security for the redemption of national bank notes cannot question the validity of the appointment of a receiver for the bank in respect to other property than the bonds. Van Antwerp v. Hulburd (C. C. 1871) Fed. Cas. No. 16,-827.

Where the officers of a national bank have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver. Irons v. Manufacturers' Nat. Bank (C. C. 1875) Fed. Cas. No. 7,-068.

After a creditor has brought suit and a receiver has been appointed, the comptroller has no authority to appoint another receiver. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of section 2, art. 2, Const. U. S. Price v. Abbott (C. C. 1883) 17 Fed. 506.

In an action by the receiver of an insolvent national bank against the stockholders to collect an assessment, they cannot inquire into the legality of the receiver's appointment. Young v. Wempe (C. C. 1891) 46 Fed. 354.

The power vested in the comptroller of the currency to appoint a receiver is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

The right to put a national bank in voluntary liquidation, given to stockholders by section 9806, ante, does not affect the right of the comptroller to appoint a receiver. Id.

The comptroller's decision is conclusive of the facts authorizing the appointment of a receiver. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46, affirmed (1900) 99 Fed. 801, 40 C. C. A. 93.

As to those matters specified by the federal bank acts as authorizing the Comptroller to appoint a receiver for a national bank, his jurisdiction is exclusive, but in other contingencies a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof to compel them to observe their obligations to their stockholders, and has power to appoint a receiver, and where a national bank went into voluntary liquidation and was not insolvent, owing only a small debt to the only persons who had any claims upon the assets except the stockholders, a state court could appoint a receiver and require an accounting at the suit of a minority stockholder. Grout v. First Nat. Bank (Colo. 1910) 111 P. 556.

If a national bank has ceased to be a going concern, its creditors having been paid in full and nothing remaining but the collection of its assets and their distribution among the stockholders, held, that the appointment of a receiver of a claim by such bank against a director for a neglect of duty is proper. Wallach v. Billings (1911) 161 Ill. App. 317.

Under the act of congress for the organization of national banks, it is the province of the comptroller of the currency to determine whether the emergency which authorizes the appointment of a receiver for a bank has arisen or not. And whenever he determines that the emergency has arisen, and appoints a receiver accordingly, his determination is conclusive upon the debtors of the bank, though it may not be so upon the bank itself. Platt v. Crawford (N. Y. 1868) 8 Abb. Prac. (N. S.) 297.

Effect of appointment.—The appointment of a receiver for an insolvent national bank does not dissolve the corporation so as to prevent the recovery of a judgment against it on a valid claim. Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 441, 161 U. S. 1, 40 L. Ed. 595.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller of the currency. Earle v. Commonwealth of Pennsylvania (1900) 20 Sup. Ct. 915, 44 L. Ed. 1146.

One appointed merely temporary receiver of a national bank on account of a suspension of payments, arising from defalcations of certain officers, is not necessarily such a representative of the bank that limitations provided in an insurance policy, intended to indemnify the bank against such defalcations, will commence to run when the receiver discovers the frauds. Jackson v. Fidelity & Casualty Co. (1896) 75 Fed. 359, 21 C. C. A. 394.

The appointment of a receiver of a national bank, and his taking possession of its books and its assets, so far incapacitates the bank from investigating frauds by its officials, and bringing suit on policies insuring their fidelity, as to excuse a delay by the bank in bringing

suit on such policies, within a period of limitation fixed therein. Id.

The assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

The appointment of a receiver for a national bank by the comptroller, because of its failure to redeem its currency, is not such a dissolution of the corporation as will prevent a creditor from maintaining an action against it after the comptroller has disallowed his claim, particularly as the act of congress expressly provides for the causes of forfeiture and the proceedings to enforce it, the failure to redeem currency not being one of such causes. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. Barnes v. Pogue (Ohio Super. Ct. Cin. 1893) 29 Wkly. Law Bul. 382.

Proceedings in state courts.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 392, 165 U. S. 443, 41 L. Ed. 782.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Earle v. Conway (1900) 20 Sup. Ct. 918, 44 L. Ed. 1149, affirming judgment Conway v. Chestnut St. Nat. Bank (1899) 42 A. 303, 189 Pa. 610.

Where a judgment creditor of a national bank has had his execution returned nulla bona, the bank having gone into liquidation, and having no ostensible property on which levy may be made, he may enjoin the bank from disposing of its assets among its stockholders, and have a receiver appointed, though a bill has been filed in a federal court by the stockholders, praying for the appointment of a receiver. Merchants' & Planters' Nat. Bank v. Masonic Hall (1879) 63 Ga. 549.

§ 9827. (Act June 30, 1876, c. 156, § 3, as amended, Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354.) Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said share-

holders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the

shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent. (19 Stat. 63. 27 Stat. 345. 29 Stat. 600.)

This section, as enacted in the Revised Statutes, was as follows:

"Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares may direct, distributing such

assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards."

It was amended by Act Aug. 3, 1892, c. 360, cited above, to read as follows: "Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall by the vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or prop-

erty of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It was further amended by Act March 2, 1897, c. 354, last cited above, to read as set forth here.

R. S. §§ 5234, 5236, mentioned in this section, are set forth ante, §§ 9821, 9823.

Provisions relating to the purchase by a receiver of property of the bank of which he is receiver, to be sold on execution, etc., were made by Act March 29, 1886, c. 28, post, §§ 9828-9830.

Notes of Decisions

Operation of statute.—The provision that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, does not limit the power of the comptroller to take action before the bank ceases to do a banking business. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

Selection and authority of agent.—A duly elected "agent" proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expenditures, etc., and he and his sureties are finally discharged by its order. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 391, 165 U. S. 443, 41 L. Ed. 782.

The agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Action against agent—Removal of causes.—The agent is appointed for winding up the affairs of a national bank, and his duties and liabilities arise under the constitution or laws of the United States; and therefore the federal court has jurisdiction of an action brought against such agent by the pledgor of corporate stock, and which action is based on the fact that such agent has improperly sold such stock as assets of the defunct bank; and therefore such action may be removed from the state to the federal court, irrespective of the question of diverse citizenship. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312.

Control of assets.—The assets of an insolvent national bank are not brought under the control or protection of the federal courts by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Enforcement of stockholders' Liability.—See notes under §§ 9689, 9807, ante.

An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, as he has no greater powers than those conferred upon the receiver. Church v. Ayer (D. C. 1897) 80 Fed. 543.

Agent as plaintiff.—When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, on motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter. McConville v. Gilmour (C. C. 1888) 36 Fed. 277, 1 L. R. A. 498.

The liquidating agent of a national bank has authority to sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. Norwood v. Interstate Nat. Bank (1898) 48 S. W. 3, 92 Tex. 268, reversing judgment (Civ. App. 1898) 45 S. W. 927.

Actions against agent. — Where a

shareholder's agent has been appointed to take charge of the assets of a national bank under this section, providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. Barron v. McKinnon (C. C. 1910) 179 Fed. 759.

Under this section a state court has jurisdiction of an action by stockholders to compel an agent so appointed to distribute to them property collected by him. Ingold v. Gilmore (1907) 108 N. Y. S. 373, 118 App. Div. 727.

Action against directors.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit. Id.

§ 9828. (Act March 29, 1886, c. 28, § 1.) Purchase by receiver of property of bank; request to Comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (24 Stat. 8.)

This section and the two sections next following were an act entitled as an act additional to the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, which was incorporated into this Title of the Revised Statutes.

See notes to Act June 20, 1874, c. 343, § 1, ante, § 9657.

§ 9829. (Act March 29, 1886, c. 28, § 2.) Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (24 Stat. 8.)

§ 9830. (Act March 29, 1886, c. 28, § 3.) Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the

erty of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It was further amended by Act March 2, 1897, c. 354, last cited above, to read as set forth here.

R. S. §§ 5234, 5236, mentioned in this section, are set forth ante, §§ 9821, 9823.

Provisions relating to the purchase by a receiver of property of the bank of which he is receiver, to be sold on execution, etc., were made by Act March 29, 1886, c. 28, post, §§ 9828–9830.

Notes of Decisions

Operation of statute.—The provision that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, does not limit the power of the comptroller to take action before the bank ceases to do a banking business. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

Selection and authority of agent.—A duly elected "agent" proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expenditures, etc., and he and his sureties are finally discharged by its order. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 391, 165 U. S. 443, 41 L. Ed. 782.

The agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Action against agent—Removal of causes.—The agent is appointed for winding up the affairs of a national bank, and his duties and liabilities arise under the constitution or laws of the United States; and therefore the federal court has jurisdiction of an action brought against such agent by the pledgor of corporate stock, and which action is based on the fact that such agent has improperly sold such stock as assets of the defunct bank; and therefore such action may be removed from the state to the federal court, irrespective of the question of diverse citizenship. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312.

Control of assets.—The assets of an insolvent national bank are not brought under the control or protection of the federal courts by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Enforcement of stockholders' Liability.—See notes under §§ 9689, 9807, ante.

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§ 9829. (Act March 29, 1886, c. 28, § 2.) Approval of request.

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§ 9830. (Act March 29, 1886, c. 28, § 3.) Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may [illegible] deposi[illegible] Treasurer of the United States for the benefit [illegible], to the amount as may be recommended and [illegible]urpose for which such allowance was made: [illegible]at all payments to be made for or on account [illegible] such property and under any such allowance [illegible] Comptroller of the Currency direct, with the

the comptroller of the treasury held not to preclude a recovery on an award of liquidators. Jones v. Beaver Nat. Bank (1912) 134 N. Y. S. 776, 150 App. Div. 145.

Where a shareholder of an insolvent national bank failed to pay an assessment of less than the par value, made by the comptroller, a purchaser for value of the former's shares was not entitled to participate in the equitable distribution by such agent of money collected and turned over to him by the comptroller after the assessment was made, until the shareholders who paid the assessment were first reimbursed. Richardson v. Wallace (1893) 39 S. C. 216, 17 S. E. 725.

The assets of a national bank being considered insufficient to pay its debts, the comptroller ordered an assessment of 39 per cent. on the stock. One of the stockholders, who was indebted to the bank, had been sued thereon, and his stock was attached, and sold at sheriff's sale therefor, and on this stock no assessment was paid. After the assessment the comptroller unexpectedly collected a claim of $8,000 due the bank, which amount was turned over to the agent of the stockholders. Held, that the purchaser of shares at the sheriff's sale was not entitled to share in such fund until the assessments were refunded to the shareholders who had paid them. Id.

13. State legislation.—The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to this section, and is therefore inapplicable in the case of a national bank. Davis v. Elmira Sav. Bank (1896) 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700.

Laws N. Y. 1892, c. 689, § 118, provides that the trustees of any savings bank may "deposit in any bank in this state organized under any law of this state or of the United States" a sum not exceeding 25 per cent. of its paid-up capital. Section 130 provides that all the property of "any bank" which shall become insolvent shall, after providing for payment of its circulating notes, if it has any, be applied first to the payment in full of money deposited therewith by any savings bank. Held, that the term "any bank," as used in section 130, applies to "national banks" and that this statute does not conflict with this section, as the acceptance of a deposit from a savings bank is with knowledge of the statute, whereby an equitable lien is created in favor of the savings bank. Elmira Sav. Bank v. Davis (1893) 73 Hun, 357, 26 N. Y. Supp. 200, 25 L. R. A. 546, applying Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and affirmed (1894) 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546.

Laws N. Y. 1892, c. 689, § 130, which provides that a claim by a savings bank as a depositor in a national bank shall be a preferred claim in case the national bank becomes insolvent, does not interfere with the utility of national banks as an instrumentality of government, since no possessory right is given until after the insolvency of the national bank. Id.

Cited without definite application, Kennedy v. Gibson (1869) 8 Wall. 498, 503, 19 L. Ed. 476; First National Bank v. Colby (1874) 21 Wall. 609, 612, 22 L. Ed. 687; Earle v. Pennsylvania (1900) 20 Sup. Ct. 915, 917, 178 U. S. 449, 44 L. Ed. 1146; Studebaker v. Perry (1902) 22 Sup. Ct. 463, 464, 184 U. S. 258, 46 L. Ed. 528; Wingate v. Orchard (1896) 75 Fed. 241, 243, 21 C. C. A. 315; Denton v. Baker (1897) 79 Fed. 189, 193, 24 C. C. A. 476; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Dolley v. Abilene Nat. Bank (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Roberts v. Hill (C. C. 1885) 24 Fed. 571, 575; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18, 22; Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577; Merchants' & Farmers' Bank v. Austin (C. C. 1891) 48 Fed. 25, 32; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; In re Devlin (D. C. 1910) 180 Fed. 170.

§ 9824. (R. S. § 5237.) Injunction upon receivership.

Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller,

and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.
See notes to R. S. § 5234, ante, § 9821.

Cited without definite application, Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677, 678; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84.

§ 9825. (R. S. § 5238.) Fees and expenses.

All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, § 51, 13 Stat. 115.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

Fees of district attorney.—The appointment of special counsel by the receiver, though sanctioned by the comptroller, did not affect the district attorney's right to fees as counsel for the receiver, in suits to which the receiver was a party, it appearing that he was ready and offered to perform them, and did perform them so far as the opposition of the receiver allowed, no want of skill, diligence, or industry being imputed to him. Gibson v. Peters (C. C. 1888) 35 Fed. 721, set aside by circuit judge (C. C. 1888) 36 Fed. 487, and judgment affirmed (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

A district attorney need not wait until actually instructed by the solicitor of the treasury, to enter on the duties of counsel to the receiver, but, if the solicitor fails to give directions, he may nevertheless enter on the duties, and recover compensation from the receiver. Id.

The compensation of the district attorney in suits under this section is not limited to the fees prescribed by law in suits to which the United States is a party; but, the United States not being a party to or interested in such suits, and the district attorney's compensation therein not being audited by any of the treasury officers to whose supervision his accounts as district attorney are subjected, he is entitled to the usual compensation for such services, to be paid out of the assets of the bank. Id.

The expenses of poceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case. Id.

The compensation of the United States attorney appearing for such receiver is not regulated by the fee bill prescribed by statute, nor should it be paid by the government, but out of the funds of the trust. (1892) 20 Op. Atty. Gen. 476.

Costs of master.—The costs of a master appointed to investigate the affairs of the bank will be ordered to be paid by the receiver. McElhenny v. First Nat. Bank of Ashland (C. C. 1879) Fed. Cas. No. 8,779.

Costs of collecting notes.—A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. Citizens' Bank & Trust Co. v. Thornton (1909) 174 Fed. 752, 98 C. C. A. 478.

Cited without definite application, Mullett v. U. S. (1893) 14 Sup. Ct. 190, 192, 150 U. S. 566, 37 L. Ed. 1184; McDonald v. Thompson (1902) 22 Sup. Ct. 297, 298, 184 U. S. 71, 46 L. Ed. 437; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Chemical Nat. Bank v. Armstrong (1893) 59 Fed. 372, 374, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Harvey v. Lord (C. C. 1882) 10 Fed. 236, 237; Gilbert v. McNulta (C. C. 1899) 96 Fed. 83, 84; Ex parte Houghton (D. C. 1881) 7 Fed. 657, 659, 660.

§ 9826. (Act June 30, 1876, c. 156, § 1.) Receivers for banks violating law, failing to pay judgments, or becoming insolvent.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes. (19 Stat. 63.)

This was the first section of an act entitled "An act authorizing the appointment of receivers of national banks, and for other purposes."

Section 2 of the act, relating to the enforcement of shareholders' liability on voluntary dissolution, is set forth ante, § 9807.

Section 3 of the act is set forth post, § 9827.

Section 4 of the act amended R. S. § 5205, and is incorporated into that section as set forth ante, § 9767.

Section 5 of the act, requiring all counterfeit notes to be marked with the word "counterfeit," "altered," or "worthless," is set forth ante, § 6568.

Section 6 of the act, requiring all savings banks or savings and trust companies organized under any act of Congress to make reports to the Comptroller, is set forth ante, § 9778.

R. S. §§ 5234, 5239, mentioned in this section, are set forth ante, § 9821, post, § 9831.

Notes of Decisions

See notes under §§ 9821, 9824, ante.

Receivers—Powers, duties, and nature of office.—Though not a party to a suit against the bank in a state court, the receiver of a national bank may appear in that court and contest the validity of the judgment. Denton v. Baker (1899) 93 Fed. 46, 35 C. C. A. 187.

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank. Brown v. French (C. C. 1897) 80 Fed. 166.

A receiver of a national bank has no status in court which will justify him in making a motion to dissolve an attachment issued against the bank before his appointment, until he had obtained an order making him a party to the action. Tracy v. First Nat. Bank (1868) 37 N. Y. 523.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are attached, the receiver of such bank, not being a party to the action, cannot move to set aside the attachment proceedings. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

A receiver of a national bank of another state, though not a party to an action in a New York court, has such a status that under Code Civ. Proc. N. Y. § 682, he may move to set aside attachment proceedings. People's Bank v. Mechanics' Nat. Bank (N. Y. 1882) 62 How. Prac. 422.

A receiver of an insolvent national bank, appointed after issue of an attachment against the bank, may, under Code Civ. Proc. N. Y. § 682, move to vacate the attachment without being made a party to the action. National Shoe & Leather Bank v. Mechanics' Nat. Bank (1882) 89 N. Y. 440.

The receiver of a bank, who acquired title to attached property prior to the attachment, cannot move to vacate the same simply because, under such attachment against the bank, his property was seized; Code Civ. Proc. N. Y. § 682, allowing only those whose interests are acquired subsequent to the attachment to so move. Key West Building & Loan Ass'n v. Bank of Key West (1892) 63 Hun, 633, 18 N. Y. Supp. 390; Allen v. Same (1892) 63 Hun, 633, 18 N. Y. Supp. 391.

The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency. Held, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim. Barrett v. Henrietta Nat. Bank (1890) 78 Tex. 222, 14 S. W. 569.

Appointment of receiver.—The comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank. Bushnell v. Leland (1897) 17 Sup. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

The assignee of bonds deposited with the treasurer of the United States as security for the redemption of national bank notes cannot question the validity of the appointment of a receiver for the bank in respect to other property than the bonds. Van Antwerp v. Hulburd (C. C. 1871) Fed. Cas. No. 16,-827.

Where the officers of a national bank have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver. Irons v. Manufacturers' Nat. Bank (C. C. 1875) Fed. Cas. No. 7,-068.

After a creditor has brought suit and a receiver has been appointed, the comptroller has no authority to appoint another receiver. Harvey v. Lord (C. C. 1882) 10 Fed. 236.

Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of section 2, art. 2, Const. U. S. Price v. Abbott (C. C. 1883) 17 Fed. 506.

In an action by the receiver of an insolvent national bank against the stockholders to collect an assessment, they cannot inquire into the legality of the receiver's appointment. Young v. Wempe (C. C. 1891) 46 Fed. 354.

The power vested in the comptroller of the currency to appoint a receiver is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

The right to put a national bank in voluntary liquidation, given to stockholders by section 9806, ante, does not affect the right of the comptroller to appoint a receiver. Id.

The comptroller's decision is conclusive of the facts authorizing the appointment of a receiver. Tillinghast v. Bailey (C. C. 1897) 86 Fed. 46, affirmed (1900) 99 Fed. 801, 40 C. C. A. 93.

As to those matters specified by the federal bank acts as authorizing the Comptroller to appoint a receiver for a national bank, his jurisdiction is exclusive, but in other contingencies a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof to compel them to observe their obligations to their stockholders, and has power to appoint a receiver, and where a national bank went into voluntary liquidation and was not insolvent, owing only a small debt to the only persons who had any claims upon the assets except the stockholders, a state court could appoint a receiver and require an accounting at the suit of a minority stockholder. Grout v. First Nat. Bank (Colo. 1910) 111 P. 556.

If a national bank has ceased to be a going concern, its creditors having been paid in full and nothing remaining but the collection of its assets and their distribution among the stockholders, held, that the appointment of a receiver of a claim by such bank against a director for a neglect of duty is proper. Wallach v. Billings (1911) 161 Ill. App. 317.

Under the act of congress for the organization of national banks, it is the province of the comptroller of the currency to determine whether the emergency which authorizes the appointment of a receiver for a bank has arisen or not. And whenever he determines that the emergency has arisen, and appoints a receiver accordingly, his determination is conclusive upon the debtors of the bank, though it may not be so upon the bank itself. Platt v. Crawford (N. Y. 1868) 8 Abb. Prac. (N. S.) 297.

Effect of appointment.—The appointment of a receiver for an insolvent national bank does not dissolve the corporation so as to prevent the recovery of a judgment against it on a valid claim. Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 441, 161 U. S. 1, 40 L. Ed. 595.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller of the currency. Earle v. Commonwealth of Pennsylvania (1900) 20 Sup. Ct. 915, 44 L. Ed. 1146.

One appointed merely temporary receiver of a national bank on account of a suspension of payments, arising from defalcations of certain officers, is not necessarily such a representative of the bank that limitations provided in an insurance policy, intended to indemnify the bank against such defalcations, will commence to run when the receiver discovers the frauds. Jackson v. Fidelity & Casualty Co. (1896) 75 Fed. 359, 21 C. C. A. 394.

The appointment of a receiver of a national bank, and his taking possession of its books and its assets, so far incapacitates the bank from investigating frauds by its officials, and bringing suit on policies insuring their fidelity, as to excuse a delay by the bank in bringing

suit on such policies, within a period of limitation fixed therein. Id.

The assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

The appointment of a receiver for a national bank by the comptroller, because of its failure to redeem its currency, is not such a dissolution of the corporation as will prevent a creditor from maintaining an action against it after the comptroller has disallowed his claim, particularly as the act of congress expressly provides for the causes of forfeiture and the proceedings to enforce it, the failure to redeem currency not being one of such causes. National Pahquioque Bank v. First Nat. Bank (1870) 36 Conn. 325.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. Barnes v. Pogue (Ohio Super. Ct. Cin. 1893) 29 Wkly. Law Bul. 382.

Proceedings in state courts.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 392, 165 U. S. 443, 41 L. Ed. 782.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Earle v. Conway (1900) 20 Sup. Ct. 918, 44 L. Ed. 1149, affirming judgment Conway v. Chestnut St. Nat. Bank (1899) 42 A. 303, 189 Pa. 610.

Where a judgment creditor of a national bank has had his execution returned nulla bona, the bank having gone into liquidation, and having no ostensible property on which levy may be made, he may enjoin the bank from disposing of its assets among its stockholders, and have a receiver appointed, though a bill has been filed in a federal court by the stockholders, praying for the appointment of a receiver. Merchants' & Planters' Nat. Bank v. Masonic Hall (1879) 63 Ga. 549.

§ 9827. (Act June 30, 1876, c. 156, § 3, as amended, Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354.) Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said share-

holders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the

shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent. (19 Stat. 63. 27 Stat. 345. 29 Stat. 600.)

This section, as enacted in the Revised Statutes, was as follows:

"Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares may direct, distributing such

assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards."

It was amended by Act Aug. 3, 1892, c. 360, cited above, to read as follows: "Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall by the vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or prop-

erty of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It was further amended by Act March 2, 1897, c. 354, last cited above, to read as set forth here.

R. S. §§ 5234, 5236, mentioned in this section, are set forth ante, §§ 9821, 9823.

Provisions relating to the purchase by a receiver of property of the bank of which he is receiver, to be sold on execution, etc., were made by Act March 29, 1886, c. 28, post, §§ 9828-9830.

Notes of Decisions

Operation of statute.—The provision that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, does not limit the power of the comptroller to take action before the bank ceases to do a banking business. Washington Nat. Bank v. Eckels (C. C. 1893) 57 Fed. 870.

Selection and authority of agent.—A duly elected "agent" proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expenditures, etc., and he and his sureties are finally discharged by its order. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 391, 165 U. S. 443, 41 L. Ed. 782.

The agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Action against agent—Removal of causes.—The agent is appointed for winding up the affairs of a national bank, and his duties and liabilities arise under the constitution or laws of the United States; and therefore the federal court has jurisdiction of an action brought against such agent by the pledgor of corporate stock, and which action is based on the fact that such agent has improperly sold such stock as assets of the defunct bank; and therefore such action may be removed from the state to the federal court, irrespective of the question of diverse citizenship. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312.

Control of assets.—The assets of an insolvent national bank are not brought under the control or protection of the federal courts by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. Chetwood v. California Nat. Bank (1896) 45 P. 854, 113 Cal. 649.

Enforcement of stockholders' Liability.—See notes under §§ 9689, 9807, ante.

An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, as he has no greater powers than those conferred upon the receiver. Church v. Ayer (D. C. 1897) 80 Fed. 543.

Agent as plaintiff.—When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, on motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter. McConville v. Gilmour (C. C. 1888) 36 Fed. 277, 1 L. R. A. 498.

The liquidating agent of a national bank has authority to sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. Norwood v. Interstate Nat. Bank (1898) 48 S. W. 3, 92 Tex. 268, reversing judgment (Civ. App. 1898) 45 S. W. 927.

Actions against agent. — Where a

shareholder's agent has been appointed to take charge of the assets of a national bank under this section, providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. Barron v. McKinnon (C. C. 1910) 179 Fed. 759.

Under this section a state court has jurisdiction of an action by stockholders to compel an agent so appointed to distribute to them property collected by him. Ingold v. Gilmore (1907) 103 N. Y. S. 373, 118 App. Div. 727.

Action against directors.—That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit. Id.

§ 9828. (Act March 29, 1886, c. 28, § 1.) Purchase by receiver of property of bank; request to Comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (24 Stat. 8.)

This section and the two sections next following were an act entitled as an act additional to the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, which was incorporated into this Title of the Revised Statutes.

See notes to Act June 20, 1874, c. 343, § 1, ante, § 9657.

§ 9829. (Act March 29, 1886, c. 28, § 2.) Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (24 Stat. 8.)

§ 9830. (Act March 29, 1886, c. 28, § 3.) Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the

approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. (24 Stat. 8.)

§ 9831. (R. S. § 5239.) Penalty for violation of this Title.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Act June 3, 1864, c. 106, § 53, 13 Stat. 116.
See notes to R. S. § 5234, ante, § 9821.

Notes of Decisions

I. Construction, operation, and nature of statute
1. In general.

II. Proceedings for forfeiture
2. Limitation of actions.
3. Information.
4. Fees and expenses.

III. Liability of directors
5. Elements of liability in general.
6. Knowledge and intent.
7. Acts of officers.
8. False statements.
9. Negligence.
10. Excessive loans.
11. Unlawful operations.
12. Unlawful increase of capital stock.
13. Unlawful dividends.
14. Measure of damages.

IV. Actions against directors
15. Conditions precedent.
16. Remedies available.
17. Jurisdiction.
18. Limitation of actions.
19. Survival of action.
20. Issues.
21. Parties plaintiff—Receiver.
22. —— Stockholders.
23. —— Depositors.
24. —— Creditors.
25. Parties defendant.
26. Pleading.
27. —— Multifariousness.
28. Evidence.
29. Defenses.

I. CONSTRUCTION, OPERATION, AND NATURE OF STATUTE

1. In general.—Jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment of sums lost by reason of their illegal conduct, is not conferred on the circuit court of the United States by this section. Whittemore v. Amoskeag Nat. Bank (1889) 134 U. S. 527, 10 Sup. Ct. 592, 33 L. Ed. 1002.

The statute does not give a federal court jurisdiction of a suit by stockholders for loss of funds where all the parties are residents of the state. Whittemore v. Amoskeag Nat. Bank (1890) 10 Sup. Ct. 592, 134 U. S. 527, 33 L. Ed. 1002, reversing decree (C. C. 1885) 26 Fed. 819.

"Willful misapplication" of the funds of a national bank, in order to constitute an offense denounced by section 9772, ante, must be a willful misapplication for the use or benefit of accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body corporate or natural person, being entirely different from acts constituting an official maladministration, subjecting the bank to a forfeiture of its charter, as provided by this section. U. S. v. Steinman (1909) 172 Fed. 913, 97 C. C. A. 271.

This act is a remedial, and not a penal, statute. Stephens v. Overstolz (C. C. 1890) 43 Fed. 465.

In a proceeding against national bank directors to enforce personal liability imposed by this section, the state court, in which the proceeding is instituted, is bound by the interpretation of the statute by the Supreme Court of the United States. Jones Nat. Bank v. Yates (Neb. 1913) 139 N. W. 844, 1135.

II. PROCEEDINGS FOR FORFEITURE

2. Limitation of actions.—The forfeiture of the rights, privileges, and franchises of a bank authorized by this section, for violation by its directors of the provisions of the banking act, comes within section 1712, ante, limiting suits for any penalty or forfeiture, accruing under the laws of the United States, to five years. Welles v. Graves (C. C. 1890) 41 Fed. 459.

3. **Information.**—As this section only refers to acts done by the directors, or by the executive officers with the knowledge of the directors, an information seeking a forfeiture, which charges that the association did the act, is insufficient. Trenholm v. Commercial Nat. Bank (C. C. 1889) 38 Fed. 323.

In an information charging that "the banking association and the directors thereof did knowingly permit," etc., the allegation that the association, aside from the directors, permitted the doing of the alleged acts, tenders an immaterial issue, and should be stricken out on motion. Id.

4. **Fees and expenses.**—For services performed by the United States district attorney in bringing a suit against a national bank, and obtaining a forfeiture of its charter, he is not entitled to more than $10, the fees prescribed by section 1378, ante; there being no other law of the United States giving a compensation to a district attorney for such services. Bashaw v. U. S. (C. C. 1891) 47 Fed. 40, judgment affirmed U. S. v. Bashaw (1892) 50 Fed. 749, 1 C. C. A. 653.

The expenses of proceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

III. LIABILITY OF DIRECTORS

5. **Elements of liability in general.**—The willful misapplication of moneys and funds which is made an offense by section 9772, ante, means something different from the acts of official maladministration referred to in this section, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company, other than the association with intent to injure and defraud it or some other body corporate or some natural person. U. S. v. Britton (1882) 2 Sup. Ct. 512, 523, 107 U. S. 655, 27 L. Ed. 520; Steinman v. U. S. (1911) 185 Fed. 47, 107 C. C. A. 151.

Directors cannot be held personally liable for money expended in good faith in repair of realty. Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402.

Directors who authorize expenditures to prospect for minerals are personally liable therefor. Id.

It is the duty of directors of a national bank to exercise reasonable control and supervision over its affairs, and to use ordinary care and diligence in ascertaining the condition of its business, which is such care as an ordinarily prudent and diligent man would exercise in view of all the circumstances. Rankin v. Cooper (C. C. 1907) 149 Fed. 1010.

Directors of a national bank are not insurers or guarantors of the fidelity and proper conduct of its executive officers, and are not responsible for losses resulting from the wrongful acts or omissions of such officers, provided they have exercised ordinary care in the exercise of their own duties as directors. Id.

Directors of a national bank are not expected to watch the routine of every day's business, but they should have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally know of and give direction to its important and general affairs. Id.

If nothing has come to the knowledge of the directors of a national bank to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is all that is required of them, but if, on the other hand, they know, or by the exercise of ordinary care should know, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible. Id.

It is incumbent upon the directors of a national bank in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency. Id.

While a director of a national bank ought not to be held responsible for the conduct of its business from the very day of his election, if he has not been a director before, he becomes responsible for acts or omissions from the time he acquires knowledge of the bank's condition and begins to actively participate in its affairs. Id.

A loss resulting to a national bank from bad loans, which were not repaid, cannot be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by section 9740, ante. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

Where a national bank executed a lease before the comptroller of currency had authorized it to do business, the directors are not liable thereon where they are not named as parties, and there are no words to bind them to its covenants. Seeberger v. McCormick (1899) 53 N. E. 340, 178 Ill. 404, affirming judgment McCormick v. Seeberger (1898) 73 Ill. App. 87.

The provision of the national banking act making the directors liable for neglect or mismanagement whereby the bank's franchises and property are lost, does not render them liable to a

stockholder for neglect or mismanagement in the affairs of the bank whereby insolvency results, and the stock becomes worthless. Conway v. Halsey (1882) 44 N. J. Law (15 Vroom) 462, 28 Alb. Law J. 27.

6. **Knowledge and intent.**—Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency cannot be held civilly liable to any one deceived to his injury by such report, since the test of such liability is a knowing violation of the provisions of the title relating to national banks. Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 206 U. S. 158, 51 L. Ed. 1002, modifying judgment Yates v. Jones Nat. Bank (1905) 105 N. W. 287, 74 Neb. 734.

Directors of a national bank cannot be held to the common-law liability for inattention to duty as directors in not preventing a hazardous, imprudent, and disastrous loan, if such loan was made by their associates, without their knowledge, connivance, or participation. Witters v. Sowles (C. C. 1887) 31 Fed. 1.

Directors held not liable for the acts of the cashier in violation of the banking law, when done without their participation or knowledge. Clews v. Bardon (C. C. 1888) 36 Fed. 617.

The mere fact that a director of a national bank does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability for losses sustained by the bank through the failure of the directors to exercise proper care and supervision over its affairs. Rankin v. Cooper (C. C. 1907) 149 Fed. 1010.

Mere negligence, without proof of an intentional violation, is insufficient to create such liability. Jones Nat. Bank v. Yates (1913) 139 N. W. 844, 1135, 93 Neb. 121.

7. **Acts of officers.**—Members of the committees held guilty of negligence which rendered them liable for the losses resulting from the mismanagement of the cashier, but other directors not liable; it not appearing that they had knowledge of the negligent manner in which the committees, on whose reports they relied, had performed their duties. Warner v. Penoyer (1898) 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761, reversing decree (C. C. 1897) 82 Fed. 181.

The directors are not liable for losses through malversations of the cashier, unless, by the performance of their duty of supervision such losses would have been prevented. Id.

Where directors of a national bank engaged in or knowingly permitted stock speculation by the president and vice president with the bank's funds, such directors were liable for the losses sustained. McKinnon v. Morse (C. C. 1910) 177 Fed. 576.

8. **False statements.**—Act of directors of a national bank, including, as part of resources in report to Comptroller of the Currency, assets which they had been directed by the Comptroller to collect or remove from the bank, is an intentional violation of the bank act, rendering them liable to one purchasing stock of the bank in reliance on such report. Thomas v. Taylor (1912) 32 Sup. Ct. 403, 224 U. S. 73, 56 L. Ed. 673.

A director of a national bank who participates in or approves the continued carrying on its books of worthless paper as assets in amount sufficient to affect the standing of the bank is responsible for the falsity of the statements made and published which under the general practice are merely summaries from the books. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

An officer or director of a national bank who knowingly authorizes the making and publication of a false report is liable, under this section, to one who had purchased stock of the bank from another in reliance thereon, and has suffered loss. Id.

A director of an insolvent national bank is not liable to a depositor for fraud and deceit by its officers, as at common law, unless such director had knowledge of, approved, or participated in, the fraudulent acts complained of. Jones Nat. Bank v. Yates (1913) 139 N. W. 844, 1135, 93 Neb. 121.

Under this section directors who have attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources, assets which they had been informed by the Comptroller of the Currency were doubtful, and for the collection, or removal from the bank, of which immediate steps should be taken, are liable to one who, on the strength of the report, bought stock of the bank, for the depreciation thereof by reason of the shrinkage in the value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. Taylor v. Thomas (1908) 108 N. Y. Supp. 454, 124 App. Div. 53, reversing judgment (1907) 106 N. Y. Supp. 538, 55 Misc. Rep. 411.

Where directors of a national bank by their gross negligence permit fraudulent statements of the condition of their bank to be published, they are liable to a person misled and injured thereby, although they did not participate in the fraud. Houston v. Thornton (1898) 29 S. E. 827, 122 N. C. 365.

Negligence of directors in permitting a false statement of the condition of a national bank to be published is a wrong to any person misled thereby

into purchasing stock of the bank; and such directors are liable to respond to such person for the injury done, and the right of action therefor could not pass to the receiver of the bank on its insolvency. Id.

9. **Negligence.**—The directors of a national bank which has become insolvent by reason of losses caused by the discount from time to time of paper not properly secured, indorsed by a director who is a man of wealth and the largest stockholder in the bank, and in whom the other directors have reason to place confidence, cannot be held liable for the mere failure to discover the illegal transactions, and to prevent such director from continuing therein. Movius v. Lee (D. C. 1887) 30 Fed. 298, decree affirmed Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662.

Where the affairs of a bank are managed by its president, who was represented to be trustworthy and efficient, and owned the greater part of the stock, and the bank was generally considered to be prosperous, directors cannot be held liable for losses through mismanagement on the ground that they were negligent in not, within 90 days, compeling the board of directors to make a thorough investigation of the books and condition of the bank; nothing in this section or sections 9661, 9685, or 9774, ante, relating to the duties of directors, etc., imposing such liabilities. Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662.

Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They failed to record mortgages given to secure large debts due the bank, after they were aware of its insolvency, and erroneously advised an examiner who had taken charge of the bank that it was not necessary to record them. Held, that the directors were personally liable for the losses caused by such neglect, and the fraud and defalcations of the cashier. Robinson v. Hall (1894) 63 Fed. 222, 12 C. C. A. 674, distinguishing Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662, and reversing (C. C. 1894) 59 Fed. 648.

A director of a national bank may make himself personally liable for the failure of the board to charge worthless paper off on the books by failing to make reasonable personal effort to induce proper action. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

A receiver of national bank may sue the directors for malfeasance of officers when they were so negligent as to make practically no examination of its affairs, and to hold meetings only at rare intervals, and then to limit their business to the election of directors and the declaration of dividends. Gibbons v. Anderson (C. C. 1897) 80 Fed. 345.

The court can only charge directors with liability for losses shown to have resulted from their negligence. Warner v. Penoyer (C. C. 1898) 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761, reversing decree (C. C. 1897) 82 Fed. 181.

The provisions of the national banking act defining the duties of the directors do not relieve them from their common-law liability for a failure to diligently and honestly discharge their trust. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

Directors of national banks must exercise ordinary care and prudence and reasonable supervision, and are not shielded from liability by ignorance of wrongdoing resulting from gross inattention. Williams v. Brady (D. C. 1915) 221 Fed. 118.

Action may be maintained against directors of a bank for negligence in management of its affairs resulting in loss. Flynn v. Third Nat. Bank (1900) 81 N. W. 572, 122 Mich. 642, 6 Detroit Leg. N. 877.

Directors of a national bank are only required to exercise a reasonable supervision over its affairs, and where they appoint from their number a discount committee and an examination committee they shift the responsibility to such committees, and when during three years such committees permit the cashier of the bank to discount notes for a mere dealer in cheap musical instruments, taken by him from parties not shown to be responsible, which notes are frequently protested or renewed to such an extent that his discounts finally cover two-thirds of the bank's capital, the directors forming such committees are guilty of such negligence and misconduct as would render them liable to stockholders injured thereby. Hanna v. People's Nat. Bank (1901) 71 N. Y. Supp. 1076, 35 Misc. Rep. 517; Id. (1902) 78 N. Y. Supp. 516, 76 App. Div. 224, modified Same v. Lyon (1904) 71 N. E. 778, 179 N. Y. 107.

10. **Excessive loans.**—A loan by a national bank in excess of the restriction is not void; but making such a loan subjects the bank and its officers to the forfeitures and penalties prescribed in this section. Stewart v. National Union Bank (C. C. 1869) Fed. Cas. No. 13,435; Shoemaker v. National Mechanics' Bank (C. C. 1869) Fed. Cas. No. 12,801.

Directors of a national bank who make or assent to the making of a loan to any one person of a sum exceeding one-tenth of the capital stock of the bank becomes personally liable for all loss sustained thereby. Witters v. Sowles (C. C. 1887) 31 Fed. 1, 3.

Where the directors of a national

bank assent to a loan, in excess of the limit prescribed by section 9761, ante, and subsequently retire paper representing a part of this loan, by charging it against an illegal dividend, declared when the bad paper reckoned to make up an apparent surplus more than exceeds the capital stock, the transaction is invalid, and, for the amount of the paper thus retired, the directors are personally liable, as provided by this section, for damages sustained in consequence of excessive loans. Witters v. Sowles (C. C. 1890) 43 Fed. 405.

Where the directors of a national bank became aware, through the report of a committee of their number, and also by notices sent them individually by the Comptroller of the Currency, that the bank had been making excessive loans to its president and to other persons, firms, and corporations with which he was associated, but took no effective steps to reduce such loans, or to prevent their increase, which continued until the bank became insolvent, they will be held jointly and severally liable for all losses which the bank sustained through subsequent transactions and which could have been prevented by a proper discharge of their duties. Rankin v. Cooper (C. C. 1907) 149 Fed. 1010.

Where a bank director was not acting as a director in obtaining discount of certain notes belonging to his father by the bank, he cannot be held liable because he induced or permitted the bank to extend credit to his father in excess of the legal limit fixed by this section. Hicks v. Steel (1905) 105 N. W. 767, 142 Mich. 292, 12 Detroit Leg. N. 706, 4 L. R. A. (N. S.) 279.

Directors of a national bank cannot be made to respond to damages or to pay excessive loans, unless some injury was done to the bank or loss sustained by reason thereof. Emerson v. Gaither (1906) 64 A. 26, 103 Md. 564, 8 L. R. A. (N. S.) 738.

11. Unlawful operations.—Where a national bank acquired certain mill property, in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mils as the bank's agent, using its funds, and operated them for the bank at a loss of $23,000, the directors of the bank participating are liable to the creditors for the loss. Cockrill v. Abeles (1898) 86 Fed. 505, 30 C. C. A. 223.

12. Unlawful increase of capital stock.—The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by the directors, with an understanding that they were not to be paid, is in violation of this section, and the directors of the bank participating are liable for all losses resulting to the creditors. Cockrill v. Abeles (1898) 86 Fed. 505, 30 C. C. A. 223.

13. Unlawful dividends.—Bank directors cannot be held personally liable for money paid out for dividends "to a greater amount than net profits after deducting losses and bad debts" (R. S. § 5204, ante, § 9765), because there were debts bad in fact, but supposed to be good, when the dividends were declared and paid. Bad judgment on the part of the directors, as to the condition of the assets, without bad faith, does not make them individually liable. Witters v. Sowles (C. C. 1887) 31 Fed. 1.

14. Measure of damages.—The measure of damages recoverable stated in an action against directors of a national bank under this section, by one who purchased stock of the bank in reliance on the published statements of its condition which were false, in that they included as assets a large amount of worthless paper. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

IV. ACTIONS AGAINST DIRECTORS

15. Conditions precedent.—The forfeiture of the bank's charter in a suit brought by the comptroller of the currency is not a condition precedent to the maintenance of a suit against its directors for excessive loans. Cockrill v. Cooper (1898) 86 Fed. 7, 29 C. C. A. 529.

Under this section the comptroller cannot authorize the receiver to bring suit, under section 9821, to enforce personal liability of directors until it has been adjudged by a proper court that such acts have been done as authorize a forfeiture of the charter. Welles v. Graves (C. C. 1890) 41 Fed. 459.

The right to maintain an action under this section to recover of a bank director the damages sustained by his bank in consequence of excessive loans made by him while serving in the capacity of director, is not affected by the fact that the comptroller has or has not procured a forfeiture of the bank's charter. Stephens v. Overstolz (C. C. 1890) 43 Fed. 771.

Liability can be enforced only after the violation of the statute has been judicially determined, and a forfeiture declared. Hayden v. Thompson (C. C. 1895) 67 Fed. 273, decree reversed (1895) 71 Fed. 60, 17 C. C. A. 592.

A national bank may maintain a suit against its directors to enforce their liability under this section for losses resulting from a violation of the statutory requirements in conducting the business of the bank. A suit by the comptroller for dissolution of the association and an adjudication of such violations is not a condition precedent to the enforcement of such liability. National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10.

A receiver of a national bank may maintain a suit against the directors in

behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the misconduct or negligence of defendants, and it is not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller. Allen v. Luke (C. C. 1906) 141 Fed. 694.

Action against directors of insolvent national bank for wrongful acts held not prematurely filed, while bank was in process of liquidation. Williams v. Brady (D. C. 1915) 221 Fed. 118.

The directors of a bank being negligent in the management of its affairs, resulting in loss, and one of them being appointed its receiver, his refusal to bring action therefor is not a prerequisite for action by the stockholders on behalf of the bank. Flynn v. Third Nat. Bank (1900) 81 N. W. 572, 122 Mich. 642, 6 Detroit Leg. N. 877.

Where the directors of a national bank have violated the national banking act, to the damage of the bank, a shareholder cannot maintain an action against them for such violation for his benefit alone, while the bank is a going concern and has not been dissolved by proper action by the comptroller of the currency in a federal court. Zinn v. Baxter (1901) 62 N. E. 327, 65 Ohio St. 341.

16. Remedies available.—Action by national bank against officer participating in loan exceeding statutory limit held not maintainable in equity, in absence of any showing of inadequacy of legal relief. Corsicana Nat. Bank v. Johnson (1915) 218 Fed. 822, 134 C. C. A. 510.

The personal liability of directors of a national bank for declaring dividends in excess of net profits, and loaning to separate persons, firms, or corporations amounts exceeding one-tenth of the capital stock, cannot be enforced in an action at law. Welles v. Graves (C. C. 1890) 41 Fed. 459.

The right of action against the directors of a national bank, for violation of the provisions of the national banking act, given by this section, is for a tort, and comes within the common-law definition of actions on the case. Cockrill v. Butler (C. C. 1897) 78 Fed. 679.

The provisions of the national banking act defining the duties of the directors of such banks do not relieve them from their common-law liability for a failure to diligently and honestly discharge their trust. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

This section excludes banking associations and receivers from none of the remedies for the collection of debts, claims, and dues of the bank or its creditors provided by the general rules and principles of law and equity, but they impose on directors additional liabilities, and subject them to proper remedies for their enforcement. Hayden v. Thompson (1895) 71 Fed. 60, 67, 17 C. C. A. 592.

The liability of directors of a national bank to a common-law action of deceit for false and fraudulent representations made by them in the pretended performance of duties imposed upon them by the national banking law is not precluded by the liability imposed in that law for violation of its provisions. Prescott v. Haughey (C. C. 1895) 65 Fed. 653.

But see Jones Nat. Bank v. Yates (Neb. 1913) 139 N. W. 844, 1135, holding that this section affords the exclusive rule under which damages from national bank directors are determined on a loss resulting from their violation of an express duty imposed upon them by the act; Huff v. Union Nat. Bank (C. C. 1909) 173 Fed. 333, holding that the measure of liability of officers of national banking associations for a violation of any of the provisions of the law governing them is fixed by this section; and National Exch. Bank v. Peters (C. C. 1890) 44 Fed. 13, appeal dismissed (1892) 12 Sup. Ct. 767, 144 U. S. 570, 36 L. Ed. 545, holding that this section and section 9821, ante, are exclusive of other remedies, and a creditor of an insolvent bank, for which a receiver has been appointed, cannot sue its directors for the purpose of making them personally liable for the mismanagement of the bank.

The receiver of an insolvent national bank may maintain a suit in equity on behalf of creditors and stockholders against the directors to recover for losses sustained through their negligent and fraudulent management. Freeman v. Jackson (D. C. 1915) 227 Fed. 688.

17. Jurisdiction.—The statute does not give the federal courts jurisdiction of a suit by a stockholder against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by their illegal conduct. Whittemore v. Amoskeag Nat. Bank (1890) 10 Sup. Ct. 592, 134 U. S. 527, 33 L. Ed. 1002, reversing decree (C. C. 1885) 26 Fed. 819.

The express denial of an immunity claimed in both the trial and appellate courts, under this section, by officers and directors of a national bank in respect to the rule of liability applied for making false official reports as to the bank's financial condition, is sufficient to sustain the exercise by the Supreme Court of the United States of its appellate jurisdiction over state courts. Yates v. Jones Nat. Bank (1907) 27 Sup. Ct. 638, 640, 206 U. S. 158, 51 L. Ed. 1002, modifying judgment (1905) 105 N. W. 287, 74 Neb. 734.

State courts may enforce, against directors of a national bank who have made false representations as to the

bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by this section. Id.

Equity has jurisdiction of a suit against national bank directors for excessive loans, when the directors are numerous, their terms of service not identical, and the misdoing has continued over the terms of more than one set of directors. Cockrill v. Cooper (1898) 86 Fed. 7, 29 C. C. A. 529.

An action by a receiver of a bank whose charter has been forfeited against a director, is properly brought at law; there being no necessity for invoking the aid of a court of chancery either because of the nature of the issues involved or to avoid a multiplicity of actions. Stephens v. Overstolz (C. C. 1890) 43 Fed. 771.

An allegation that a director withdrew a specific sum from the bank, after knowledge of its insolvency, and immediately before its suspension, states a matter for an action at law, and is not cognizable in equity. Robinson v. Hall (C. C. 1894) 59 Fed. 648, decree reversed (1894) 63 Fed. 222, 12 C. C. A. 674.

A suit by a national bank against its former officers and directors, under this section, to recover for losses resulting from their mismanagement in violation of the provisions of the national banking law, is cognizable in equity, where the transactions involved are complicated, and the conversion of securities into money is required before the extent of the liability can be ascertained, and when, therefore, the remedy at law is not complete or adequate. National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10.

Where a national bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, a court of equity will entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state. Rankin v. Cooper (C. C. 1907) 149 Fed. 1010.

A suit by a stockholder of a national bank for its benefit against the bank and its officers having charge of its assets individually, alleging that they had made excessive loans of funds to irresponsible and insolvent borrowers without adequate security in violation of the act, and that the bank after proper notice and demand had failed to bring the action, involved the construction of the national bank act, and was therefore a suit arising under the laws of the United States of which the federal courts had jurisdiction, though there was no diversity of citizenship. Huff v. Union Nat. Bank of Oakland (C. C. 1909) 173 Fed. 833.

Where a stockholder's agent of a national bank sought to recover from directors losses sustained by stock speculations of the president and vice president with the directors' knowledge and participation, a bill in equity for an accounting was sustainable, though a recovery at law could be had as to some of the transactions pleaded. McKinnon v. Morse (C. C. 1910) 177 Fed. 576.

An action by a stockholder of a national bank against its directors for damages for their gross negligence may be brought in a state court. Brinckerhoff v. Bostwick (1882) 88 N. Y. 52, reversing (1880) 23 Hun, 237.

Equity has jurisdiction of a suit by a stockholder of a national bank, in behalf of himself and other stockholders, against the bank, its receiver and directors, to recover of the latter damages to the stock of plaintiff and other uniting stockholders, caused by their negligence. Sayles v. White (1897) 46 N. Y. Supp. 194, 18 App. Div. 590.

18. Limitation of actions.—The provisions of a state statute of limitations do not apply to the liability of directors of a national bank for violation of the national banking law, created by this section. Welles v. Graves (C. C. 1890) 41 Fed. 459.

If the personal liability imposed by this section upon directors for violation of the provisions of the banking act, in favor of any one injured thereby, can be enforced without reference to whether the charter has been forfeited or not, it is not a penalty within the meaning of section 1712, ante, limiting actions for penalties to five years. Id.

That a suit by the comptroller for the forfeiture of the charter of a national bank for violations of the banking statutes is barred by limitation does not bar a suit by the bank against its officers and directors, under this section, to charge them with losses resulting from such violations. National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10.

The statute does not commence to run against a suit by a national bank against its managing officers to enforce their liability under this section for losses resulting from acts in violation of the national banking law, until such officers have surrendered control of the bank to their successors. Id.

19. Survival of action.—An act of congress imposing a legal liability on the directors of a national bank for certain things which they may do which shall result in an injury to the bank, its stockholders or creditors, and making them liable for the amount of the damage, is a remedial, and not a penal, statute, and therefore an action under it survives against the estate of a director. Stephens v. Overstolz (C. C. 1890) 43 Fed. 465.

20. Issues.—An action against directors of a national bank under this section, involves no direct issues of negligence, the sole issue being whether defendant caused or permitted to be made a statement of the bank's condition on which plaintiff relied to his injury, and which statement defendant knew was materially false. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

In an action by a national bank to recover damages sustained in consequence of excessive loans made by former directors in violation of this section, the issues to the jury are whether the loans were made when the borrower was already indebted to one-tenth of the capital actually paid in by the bank, whether such loans were knowingly made by such directors, and what portions of the moneys were so lost. City Nat. Bank of Mangum v. Crow (Okl. 1910) 111 P. 210.

21. Parties plaintiff—Receiver.—Liability for declaring and paying dividends out of the capital stock of the bank can be enforced only by the receiver acting under the direction of the comptroller. Hayden v. Thompson (C. C. 1895) 67 Fed. 273, decree reversed (1895) 71 Fed. 60, 17 C. C. A. 592.

An action against the directors of a national bank under this section can be maintained only by a receiver of the bank; and an action by a private individual against such directors for damages arising from the making of false reports or other violations of the national banking act can only be maintained as an action at the common law in the nature of an action of deceit. Gerner v. Thompson (C. C. 1896) 74 Fed. 125.

A receiver of an insolvent national bank, in his own name or in the name of the bank, may enforce against the directors, for the benefit of the stockholders, depositors, and other creditors of the bank, any right or claim resting upon the nonperformance or negligent performance of their duties that the bank itself could have enforced. Movius v. Lee (C. C. 1887) 30 Fed. 298, decree affirmed Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662.

22. —— Stockholders.—A stockholder may sue, in equity, the directors for their gross negligence, resulting in loss of the corporate assets, where the directors are still in control or the receiver has refused to sue. Ackerman v. Halsey (1883) 37 N. J. Eq. (10 Stew.) 356; Hand v. Atlantic Bank (1877) 9 Abb. N. C. 287, note.

A stockholder of an insolvent national bank may bring suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the officers of the bank, the receiver, and the Comptroller of the Currency have all refused to bring such a suit. Ex parte Chetwood (1897) 17 Sup. Ct. 385, 390, 165 U. S. 443, 41 L. Ed. 782.

An action by a purchaser of a national bank stock against directors to recover damages under this section because of the knowing publication of false reports, is in plaintiff's own right, and not that of the bank. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

A stockholder in an insolvent national bank for which a receiver has been appointed cannot sue its directors to make them personally liable for the mismanagement of the bank, as the right of action is in the receiver, and not in the individual stockholder. Howe v. Barney (C. C. 1891) 45 Fed. 668.

A stockholder in a national bank cannot sue the directors for their gross negligence, whereby loss of the corporate assets has resulted. Conway v. Halsey (1882) 44 N. J. Law (15 Vroom) 462, 28 Alb. Law J. 27.

A stockholder may maintain an action against the directors charged by him to have caused loss by their negligence; the bank and its receiver having refused to bring suit. Nelson v. Burrows (N. Y. 1881) 9 Abb. N. C. 280.

If the receiver of a national bank is one of the directors chargeable with neglect, one or more of the stockholders may maintain an action in behalf of all for misuse of the bank's funds. Brinckerhoff v. Bostwick (1882) 88 N. Y. 52.

Where no proceeding is pending under the national bank law for forfeiture of the charter of a bank, its stockholders may, in a state court, maintain an action against its directors to recover for their gross neglect without alleging that the comptroller of the currency directed, or refused to direct, the receiver to bring such action. Id.

Where a national bank presently solvent sold out a former stockholder's shares for his failure to pay an assessment thereon, made necessary by the negligence or misconduct of its directors in loaning its funds to irresponsible parties, such stockholder may maintain a suit on behalf of himself and of others similarly situated against the bank and its directors, who permitted or caused the loss, to compel such directors to account to and pay him the value of his stock as it stood before the acts of negligence or misconduct occurred. Hanna v. People's Nat. Bank (1901) 71 N. Y. Supp. 1076, 35 Misc. Rep. 517; Id. (1902) 78 N. Y. Supp. 516, 76 App. Div. 224, modified Same v. Lyon (1904) 71 N. E. 778, 179 N. Y. 107.

Where the directors of a national bank have violated the provisions of the national banking act, to the damage of the bank and its shareholders, and the bank fails on request to bring an action

against such directors for the recovery of such damages, an action may be maintained for that purpose by a shareholder. Zinn v. Baxter (1901) 62 N. E. 327, 65 Ohio St. 341.

23. —— **Depositors.**—The national bank act does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. Boyd v. Schneider (1904) 131 Fed. 223, 65 C. C. A. 209.

24. —— **Creditors.**—A creditor of an insolvent national bank that is in the hands of a receiver cannot sue to enforce, against officers and directors who have violated the banking laws, the personal liability imposed by this section, as such liability is an asset belonging equally to all creditors, and must be enforced by the receiver. Bailey v. Mosher (1894) 63 Fed. 488, 11 C. C. A. 304.

The right to maintain a suit against the directors of an insolvent national bank under this section to recover for general distribution, as assets of the bank, sums alleged to have been lost to it through the negligence or mismanagement of its affairs by defendants, is one vested in the receiver for the benefit of both creditors and stockholders; and conceding that such suit may be maintained without a previous adjudication forfeiting the bank's charter under said section, and even that it may be brought by others than the receiver, acting under direction of the Comptroller of the Currency (which is doubtful), it cannot in any case be maintained by creditors alone, who have no interest in the fund sought to be recovered, beyond the amount of their claims, and no authority to represent the stockholders to whom the remaining interest belongs. Boyd v. Schneider (C. C. 1903) 124 Fed. 239.

25. **Parties defendant.**—Plaintiff may sue one or more of the directors, and must make out a sufficient case against each one to authorize recovery. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

In an action by a stockholder of a national bank against the directors for loss of the corporate assets through the latter's negligence, the bank and the receiver appointed by the comptroller should be joined. Hand v. Atlantic Bank (N. Y. 1877) 9 Abb. N. C. 287, note.

A receiver of the assets of a national bank, appointed by the comptroller of the currency, is a necessary party defendant in a suit in equity against directors of the corporation to recover damages for the waste and loss of the corporate assets, caused by the negligence of the directors in the discharge of their official duties. Hand v. Atlantic Nat. Bank (N. Y. 1877) 55 How. Prac. 231.

Where the receiver of a national bank is one of the directors chargeable with neglect, and action is brought by one or more of the stockholders on behalf of all for misuse of the bank's funds, the bank itself, and the receiver, as such, are proper and necessary parties defendant. Brinckerhoff v. Bostwick (1882) 88 N. Y. 52.

A corporation is such a legal entity that a stockholder may maintain an action against it, either at law or in chancery. Accordingly, in case of misappropriation of a stockholder's funds by a national bank, his remedy is against the bank, and not against the directors in their private capacity. Wilson v. First Nat. Bank (1873) 1 Wyo. 108.

Where directors of a national bank have violated the national banking act, to the damage of the bank and its shareholders, and an action has been brought against them by a shareholder the bank must be made a party. Zinn v. Baxter (1901) 62 N. E. 327, 65 Ohio St. 341.

26. **Pleading.**—Facts pleaded in an action for attesting as directors a false report of the condition of a national bank determined the rights of plaintiff, so that recovery is not prevented by designating the action as one for deceit instead of one arising under the national bank act. Thomas v. Taylor (1912) 32 Sup. Ct. 403, 224 U. S. 73, 56 L. Ed. 673.

A bill brought to charge the directors of an insolvent national bank with the amount of losses caused by the bank's failure, alleged that one of defendants sold and transferred his stock on a day named, but the evidence showed that defendant had not paid anything for the stock, but delivered it to a messenger of another one of defendants, from whom he had agreed to purchase it, and that such defendant then sold and indorsed the stock to a third party, as it was agreed he might do if he so desired. Plaintiff moved to amend the bill to conform to the proofs, and make it allege that the transfer was merely formal. Held unnecessary. Movius v. Lee (C. C. 1887) 30 Fed. 298.

In an action against a bank director under this section for making excessive loans, plaintiff may state the aggregate amount of the excessive loans made to each party, and the damage resulting therefrom in each case, accompanying each allegation with an exhibit showing the dates and amounts of the several loans that go to make up the aggregate sum stated in the petition, and is not compelled to declare in a separate count for each loan made. Stephens v. Overstolz (C. C. 1890) 43 Fed. 771.

An allegation that the directors "permitted" loans to be made to one person in excess of 10 per cent. of the bank's capital is not equivalent to an averment that they knowingly permitted them, or that they could have ascertained the existence thereof by an examination of the books, and is insufficient to charge them with personal liability for resulting losses. Robinson v. Hall (C. C. 1894) 59 Fed. 648, decree reversed (1894) 63 Fed. 222, 12 C. C. A. 674.

The bill need not allege the exact amount of the loss arising from each transaction set out where it is not yet known; but it should set out with particularity the acts of defendants relied on to constitute negligence or misconduct, and the details of the several transactions should be given with such fullness as can be done by complainant. Allen v. Luke (C. C. 1906) 141 Fed. 694.

A bill on behalf of the stockholders of a national bank to charge the directors with liability for losses alleged to have been due to their negligence or misconduct held to set out the details of the several transactions relied on with sufficient fullness. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

In such a bill, charging the making of illegal loans by defendants as directors, it is not necessary to allege a formal vote of defendants authorizing or approving such loans. Allen v. Luke (C. C. 1908) 163 Fed. 1018.

A bill by a stockholder's agent of an insolvent bank against directors to recover moneys lost by ultra vires transactions of the president and vice president, in which defendants participated, alleging that at a stockholders' meeting held pursuant to law plaintiff was elected as shareholders' agent to wind up the affairs of the bank in place of a receiver, and that he gave bond, as required by law, and is the duly qualified agent of the shareholders to act in the place of the receiver, sufficiently showed complainant's capacity to sue. McKinnon v. Morse (C. C. 1910) 177 Fed. 576.

In an action by a receiver of a national bank against directors to recover damages for negligence in permitting the looting of the bank by its cashier, defendants held not entitled to a bill of particulars to make the complaint more definite and certain as to the means by which the fraud was committed. Curtis v. Phelps (D. C. 1913) 209 Fed. 261.

In action against directors of national bank for negligent and wrongful acts, complaint held sufficient as against directors who attended meetings at which the acts complained of were done. Williams v. Brady (D. C. 1915) 221 Fed. 118.

Allegations of negligence and violation of statutes on part of directors of national bank in retaining unfit persons as president and vice president held not sufficiently specific as to their unfitness. Id.

Allegation that directors of national bank were negligent, because of unreasonable neglect and failure to attend meetings, without alleging facts showing an unreasonable neglect and failure, held insufficient. Id.

Various exceptions to a bill by the receiver of an insolvent national bank against its directors to enforce their liability for losses sustained through their negligent and fraudulent acts considered. Freeman v. Jackson (D. C. 1915) 227 Fed. 688.

In an action by a stockholder of a national bank charging the directors with misconduct, neglect, etc., a complaint failing to allege a demand upon the comptroller of the currency for, and his refusal of, a direction that the receiver bring the action, as required by this section, held to be defective. Brinckerhoff v. Bostwick (1880) 23 Hun, 237, reversed in (1882) 88 N. Y. 52.

27. —— **Multifariousness.** — Where several depositors of a national bank had claims against a number of the bank's directors, arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, such depositors were entitled to maintain a single suit against such directors in equity. Boyd v. Schneider (1904) 131 Fed. 223, 65 C. C. A. 209.

Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect. Id.

Where a bill, brought by the receiver of a national bank against all of the directors holding office during the existence of the bank, the legal representatives of deceased directors, and the cashiers of the bank, joins claims for losses suffered by the bank by reason of the directors' negligence and inattention, and claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors, it is multifarious. Price v. Coleman (C. C. 1884) 21 Fed. 357.

Equity cannot entertain jurisdiction of a bill by the receiver of a national bank against its stockholders to recover dividends illegally paid them out of its capital stock, as such bill is multifarious, one stockholder having no interest in the claim against another. Hayden v. Thompson (C. C. 1895) 67

Fed. 273, decree reversed (1895) 71 Fed. 60, 17 C. C. A. 592.

The receiver of an insolvent national bank filed a bill in equity against the shareholders to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits. Held, that the facts that some of the defendants participated in but one or two of the 16 dividends on which the suit was based, that others participated in more, and others in all the dividends, did not render the bill multifarious. Hayden v. Thompson (1895) 71 Fed. 60, 17 C. C. A. 592, reversing decree (C. C. 1895) 67 Fed. 273.

A bill filed by the receiver of a bank against a number of the directors to recover money of the bank alleged to have been lost through defendants' misconduct is not bad for multifariousness, where the matters alleged are such as can most conveniently be tried in a single suit. Allen v. Luke (C. C. 1906) 141 Fed. 694.

28. **Evidence.**—Evidence that notes included as assets in the statements of a national bank were given for loans to the maker in excess of the 10 per cent. permitted by this section held immaterial in an action against directors for publishing a false statement; but evidence that defendants were at the time selling their stock at prices much above its actual value held material. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

In an action against directors of a national bank under this section, the fact that plaintiff subsequently became a director and attested statements including as assets some of the same paper, was admissible as in the nature of an admission that such paper was not so clearly worthless as to make defendant's acts unlawful. Id.

In action for damages to purchaser of national bank stock, evidence held insufficient to make question for jury as to director's knowledge of worthlessness of loans, when reports were made and published. Chesbrough v. Woodworth (1915) 221 Fed. 912, 137 C. C. A. 482.

In action against bank director for damages caused purchaser of stock, who relied on published reports which included worthless loans in the bank's assets, evidence as to belief of other directors concerning the loans held properly excluded. Id.

In an action by the receiver of an insolvent national bank to charge the directors with liability for losses, proof of general supineness and looseness of management on their part is not sufficient to cast upon them the burden of exonerating themselves. Warner v. Penoyer (1898) 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761, reversing decree (C. C. 1897) 82 Fed. 181.

29. **Defenses.**—The directors of a national bank are not trustees of an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by the operation of the law upon their official relation to the bank; and the statute of limitations and the doctrine of laches may be invoked in their defense, when sued for a breach of such trust. Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402.

Where a bank director makes a wrongful loan of money from which loss occurs, it is no defense to an action by the receiver of the bank against the director's estate that the insolvency of the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver. Stephens v. Overstolz (C. C. 1890) 43 Fed. 465.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. Barnes v. Pogue (Ohio 1893) 29 Wkly. Law Bul. 382.

CITED WITHOUT DEFINITE APPLICATION

Richmond v. Irones (1887) 7 Sup. Ct. 788, 797, 121 U. S. 27, 30 L. Ed. 864; Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 595, 139 U. S. 438, 35 L. Ed. 210; Chemical Nat. Bank of Chicago v. Hartford Deposit Co. (1896) 16 Sup. Ct. 439, 440, 161 U. S. 1, 40 L. Ed. 595; California Nat. Bank v. Thomas (1898) 19 Sup. Ct. 4, 5, 171 U. S. 441, 43 L. Ed. 231; Abbott v. National Bank of Commerce (1899) 20 Sup. Ct. 153, 154, 175 U. S. 409, 44 L. Ed. 217; Weber v. Spokane Nat. Bank (1894) 64 Fed. 208, 210, 12 C. C. A. 93; Kemp v. National Bank of The Republic (1901) 109 Fed. 48, 51, 48 C. C. A. 213; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; U. S. v. Graves (D. C. 1892) 53 Fed. 634, 651 (reversed [1897] 17 Sup. Ct. 393, 165 U. S. 323, 41 L. Ed. 732).

§ 9832. (R. S. § 5240, as amended, Act Feb. 19, 1875, c. 89, and Act Dec. 23, 1913, c. 6, § 21.) Bank examinations; appointment, salaries, and powers of examiners.

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary: Provided, however, That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of State banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

The Federal Reserve Board, upon the recommendation of the Comptroller of the Currency, shall fix the salaries of all bank examiners and make report thereof to Congress. The expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the banks examined in proportion to assets or resources held by the banks upon the dates of examination of the various banks.

In addition to the examinations made and conducted by the Comptroller of the Currency, every Federal reserve bank may, with the approval of the Federal reserve agent or the Federal Reserve Board, provide for special examination of member banks within its district. The expense of such examinations shall be borne by the bank examined. Such examinations shall be so conducted as to inform the Federal reserve bank of the condition of its member banks and of the lines of credit which are being extended by them. Every Federal reserve bank shall at all times furnish to the Federal Reserve Board such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank.

No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

The Federal Reserve Board shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Federal Reserve Board shall order a special examination and report of the condition of any Federal reserve bank.

Act June 3, 1864, c. 106, § 54, 13 Stat. 116. Act Feb. 19, 1875, c. 89, 18 Stat. 329. Act Dec. 23, 1913, c. 6, § 21, 38 Stat. 271.

This section, as enacted in the Revised Statutes, was as follows:

"The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. Every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer."

It was amended by Act Feb. 19, 1875, c. 89, cited above, to read as follows: "The Comptroller of the Currency, with the approval of the Secretary of

the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. That all persons appointed to be examiners of national banks not located in the redemption-cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided."

It was further amended by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 21, last cited above, to read as set forth here.

Said last amendment of this section superseded R. S. § 5241, which provided that no association should be subject to visitorial powers other than such as were authorized by this Title, or were vested in the courts of justice.

Provisions for examinations of federal land banks and associations were made by the Federal Farm Loan Act, Act July 17, 1916, c. 245, § 28, post, § 9835a.

Notes of Decisions

Assets in examiner's charge.—The fact that a national bank, for which no receiver has yet been appointed, is in charge of an examiner apointed by the comptroller to investigate its affairs, does not exempt its tangible assets from levy under execution upon final judgment. Kimball v. Dunn (C. C. 1898) 89 Fed. 782.

Visitations other than by examiner.—The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by this section. Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 6, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433, affirming judgment Harkness v. Guthrie (1904) 75 P. 624, 27 Utah, 248, 107 Am. St. Rep. 664.

National banks cannot be compelled by the auditor or probate judge to present for inspection the deposit books of the bank in order to reach such deposits for purposes of taxation. First Nat. Bank of Youngtown v. Hughes (C. C. 1878) Fed. Cas. No. 4,811.

It is not visitation to compel a national bank to disclose the names of its depositors and the amounts of their deposits under the compulsory process of a state court. First Nat. Bank v. Hughes (C. C. 1881) 6 Fed. 737, 740, appeal dismissed (1882) 1 Sup. Ct. 489, 106 U. S. 523, 27 L. Ed. 268.

A national bank is not prohibited from permitting an examination of its books by an insuring company, but it cannot legally obligate itself to permit such examination. The contract may, however, properly provide that, in case the examiner of the company shall not be allowed access to the books of the bank for the purpose of making an examination, the company shall have the option, upon reasonable notice, to terminate its contract. (1909) 27 Op. Atty. Gen. 324.

Code Ala. 1886, § 1677, which provides that stockholders of all private corporations have the right to have access to, and inspection and examination of, the books, records, and papers of the corporation, at all reasonable and proper times, applies to national banks located within the state. The rights of stockholders conferred by the above statute are not curtailed by, nor is the statute in conflict with, this section. Winter v. Baldwin (1890) 89 Ala. 483, 7 South. 734.

Offenses.—See U. S. v. Britton (1882) 2 Sup. Ct. 512, 107 U. S. 655, 27 L. Ed. 520; U. S. v. Corbett (1909) 30 Sup. Ct. 81, 82, 215 U. S. 233, 54 L. Ed. 173, reversing (D. C. 1908) 162 Fed. 687; Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of

certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

See, also, note under § 9772, ante.

Cited without definite application, Talbott v. Board of Com'rs of Silver Bow County (1891) 11 Sup. Ct. 594, 596, 139 U. S. 438, 35 L. Ed. 210; Briggs v. Spaulding (1891) 11 Sup. Ct. 924, 928, 141 U. S. 132, 35 L. Ed. 662; American Surety Co. v. Pauly (1898) 18 Sup. Ct. 552, 554, 170 U. S. 133, 42 L. Ed. 977; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209.

(R. S. § 5241. Superseded.)

This section was as follows:

"No association shall be subject to any visitorial powers other than such as are authorized by the Title, or are vested in the courts of justice."

It was superseded by the amendment of R. S. § 5240, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 21, to read as set forth, ante, § 9832.

§ 9833. (Act Dec. 23, 1913, c. 6, § 22.) Loans, etc., to bank examiners; penalty; performance of other services by examiner for compensation prohibited; fees, etc., to directors, etc., prohibited; disclosures by examiners prohibited; penalties.

No member bank or any officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than $5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given. Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than $5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given; and shall forever thereafter be disqualified from holding office as a national-bank examiner. No national-bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank. No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this section shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both.

Except as provided in existing laws, this provision shall not take effect until sixty days after the passage of this Act. (38 Stat. 272.)

This section was part of the Federal Reserve Act of 1913, cited above.

See notes to section 1 of the act, ante, § 9785.

§ 9834. (R. S. § 5242.) Transfers, when void.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contempla-

tion thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Act June 3, 1864, c. 106, § 52, 13 Stat. 115. Act March 3, 1873, c. 269, § 2, 17 Stat. 603.

Notes of Decisions

1. Construction and operation in general.
2. Preferences in general.
3. —— Act of insolvency.
4. —— Contemplation of insolvency.
5. —— View to prevent application of assets.
6. —— View to a preference.
7. Set-offs.
8. Present and future advances.
9. Special deposits and trust funds.
10. Receivers.
11. Attachment.
12. Injunction.
13. Recovery of preference.
14. Federal question.
15. State legislation.

1. Construction and operation in general.—This section does not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency. Scott v. Armstrong (1892) 13 Sup. Ct. 148, 146 U. S. 499, 36 L. Ed. 1059, reversing judgment Armstrong v. Scott (C. C. 1888) 36 Fed. 63.

A transfer of property by a national bank after the commission of an act of insolvency, or in contemplation thereof, and with a view to the preference of one creditor to another, or to prevent the application of the assets of the bank as provided by law, except in the payment of its circulating notes, is void. Price v. Coleman (C. C. 1885) 22 Fed. 694, 696, reversed (1888) 8 Sup. Ct. 718, 124 U. S. 721, 31 L. Ed. 567.

A transfer or payment by a bank to be void under this section must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view of giving a preference to one creditor over another, or with a view to prevent the application of its assets as provided by law. National Security Bank v. Price (C. C. 1885) 22 Fed. 697, 698, affirmed (1889) 9 Sup. Ct. 281, 129 U. S. 223, 32 L. Ed. 682.

Notes given in renewal of other notes held by a national bank, the original notes not being returned to the maker, are not "evidences of debt," or "assets," within this section. First Nat. Bank v. Johnston (1892) 97 Ala. 655, 11 South. 690.

The clause forbidding state courts to grant preliminary injunctions against national banks, is not repealed by this section. Freeman Mfg. Co. of North Adams v. National Bank of the Republic (1894) 160 Mass. 398, 35 N. E. 865.

The amendment of 1873 relates only to suits against associations located where the suit is brought, and not to causes against a nonresident corporation. Southwick v. First Nat. Bank of Memphis (N. Y. 1876) 7 Hun, 96.

2. Preferences in general.—The failure of a national bank before having made its settlement for the day with the clearing-house association of which it is a member, but after it has surrendered its demands against the other banks of the association, and received credit therefor on the settlement sheet of the manager, does not deprive the association of the right to collect such demands, and apply the proceeds in settlement of the debits shown against the bank by such settlement sheet, in accordance with the rules of the association, though the association is given no right by the failure to appropriate a balance due the bank on the clearing to a debt due the association, and such appropriation is an illegal performance within this section. Yardley v. Philler (1897) 17 Sup. Ct. 835, 840, 167 U. S. 344, 42 L. Ed. 192, reversing decree Philler v. Yardley (1894) 62 Fed. 645, 10 C. C. A. 562, 25 L. R. A. 824.

Appropriation of certain balance to certificate loan account after deducting certain duebills held a preference, within the inhibition of this section. Id.

Transfer held not made after the commission of an act of insolvency, or in contemplation thereof and with a view to a preference, or to prevent the application of the assets as prescribed by the banking act. Price v. Coleman (C. C. 1885) 22 Fed. 694.

A creditor of an insolvent bank, whose demand grows out of a fraudulent transaction perpetrated by its officers, held to be only a general creditor, who both by this statute and the general law, must stand on an equality with all of its creditors. Citizens' Nat. Bank v. Dowd (C. C. 1888) 35 Fed. 340.

Disposition made of surplus held not warranted by agreement, and therefore to give a preference. Yardley v. Philler (C. C. 1893) 58 Fed. 746, decree reversed Philler v. Yardley (1894) 62 Fed. 645, 10 C. C. A. 562, 25 L. R. A. 824.

A national bank obtained a loan at a time when it was in fact insolvent, although it was not known to be so by the lender. As security the president executed a deed of the bank building and lot. Held, that the fact that such deed was not recorded until the day the bank closed its doors did not entitle the

general creditors of the bank to have it set aside, where there was no agreement to withhold it from record, and under the laws of the state it was good as a mortgage, as between the parties, though not recorded. Stapylton v. Stockton (1899) 91 Fed. 326, 33 C. C. A. 542.

3. —— **Act of insolvency.**—The mere fact that a correspondent of a national bank refuses to pay a check drawn on it by such bank at a time when the account of the latter is overdrawn does not constitute an act of insolvency on the part of the drawing bank, which would render subsequent transfers of property or payments made by it void, as preferences. McDonald v. Chemical Nat. Bank (1899) 19 Sup. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106, affirming decree Hayden v. Chemical Nat. Bank (1898) 84 Fed. 874, 28 C. C. A. 548.

Remittances made by a national bank to its correspondence, in the ordinary course of business, before the commission of any act of insolvency, are not void under this section, though the bank is in fact insolvent at the time, and is closed by the bank examiner before the remittances are actually received by the correspondent banks. Hayden v. Chemical Nat. Bank (C. C. 1897) 80 Fed. 587.

"Act of insolvency" means a condition of inability to meet current pecuniary obligations. Raynor v. Pacific Nat. Bank (1883) 49 N. Y. Super. Ct. 119.

A national bank, by refusing to pay its obligations, commits an act of insolvency within this section, although it may possibly have assets enough finally to meet all demands. Market Nat. Bank v. Pacific Nat. Bank (1883) 30 Hun, 50, affirmed in (1883) 93 N. Y. 648.

4. —— **Contemplation of insolvency.**—This section does not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency. Scott v. Armstrong (1892) 13 Sup. Ct. 148, 151, 146 U. S. 499, 36 L. Ed. 1059.

So long as a national bank is carrying on its business as usual, and has committed no act of insolvency, and it does not appear that a present suspension of business is contemplated by its officers, though it is actually insolvent, to their knowledge, payments or remittances made or caused to be made to a correspondent bank in the due course of its daily business cannot be said to have been made in contemplation of insolvency, within the meaning of this section. McDonald v. Chemical Nat. Bank (1899) 19 Sup. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106, affirming decree Hayden v. Chemical Nat. Bank (1898) 84 Fed. 874, 28 C. C. A. 548.

Payments made by a national bank before commission of any act of bankruptcy, and not in contemplation thereof, but in the ordinary course of business, are not invalidated by this section, though the bank is in fact insolvent at the time. Hayden v. Chemical Nat. Bank (1898) 84 Fed. 874, 28 C. C. A. 548, affirming (C. C. 1897) 80 Fed. 587.

A transfer of the collateral by the cashier of the national bank held to be in contemplation of an act of insolvency, within the meaning of this section, and void regardless of whether or not defendant knew the condition of the other bank. Ball v. German Bank of Carroll County, Iowa (1911) 187 Fed. 750, 109 C. C. A. 498, writ of certiorari denied German Bank of Carroll County, Iowa, v. Ball (1912) 32 Sup. Ct. 840, 225 U. S. 709, 56 L. Ed. 1267.

A bank is in contemplation of insolvency within the meaning of this section when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. Roberts v. Hill (C. C. 1885) 24 Fed. 571, overruling former opinion (C. C. 1885) 23 Fed. 311.

5. —— **View to prevent application of assets.**—If the officers of a national bank, at the time of pledging a note to secure a depositor, who had been allowing the bank to use his money and who was apprehensive of a loss thereof, saw that the bank was approaching failure, and made the pledge to keep the note out of the assets to be distributed, such pledge would be void; but if they made it to prevent failure, and expecting to prevent failure by retaining and using the deposit to pay other depositors, it would be good. Roberts v. Hill (C. C. 1885) 23 Fed. 311.

Where property is transferred by a bank to a creditor to avoid paying him the amount due him, and thus postpone the failure of the bank, it is none the less fraudulent and void. Roberts v. Hill (C. C. 1885) 24 Fed. 571, overruling former opinion (C. C. 1885) 23 Fed. 311.

6. —— **View to a preference.**—So long as a national bank is a going concern, and has committed no act of insolvency, and it does not appear that a present suspension of business is contemplated by its officers, though it is actually insolvent, to their knowledge, payments or remittances made or caused to be made to a correspondent bank in the due course of its daily business cannot be said to have been made with a view to prefer the correspondent as a creditor. McDonald v. Chemical Nat. Bank (1899) 19 Sup. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106, affirming decree Hayden v. Chemical Nat. Bank (1898) 84 Fed. 874, 28 C. C. A. 548.

A transfer of the collateral by the cashier of the national bank held to be with a view of preferring defendant as

a creditor, within the meaning of this section, and void, regardless of whether or not defendant knew the condition of the other bank. Ball v. German Bank of Carroll County, Iowa (1911) 187 Fed. 750, 109 C. C. A. 498, writ of certiorari denied German Bank of Carroll County, Iowa, v. Ball (1912) 32 Sup. Ct. 840, 225 U. S. 709, 56 L. Ed. 1267.

After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, will be presumed to be made with a fraudulent intent. National Security Bank v. Price (C. C. 1885) 22 Fed. 697, judgment affirmed Same v. Butler (1889) 9 Sup. Ct. 281, 129 U. S. 223, 32 L. Ed. 682.

The intent to give a preference is presumed when a payment is made to a creditor by a bank whose officers know of its insolvency, and therefore that it cannot pay all of its creditors in full Roberts v. Hill (C. C. 1885) 24 Fed. 571, overruling former opinion (C. C. 1885) 23 Fed. 311.

Payment of a certificate of deposit by an insolvent national bank more than six weeks before its suspension, and at a time when it was in apparent good standing, and its insolvency known only by its cashier, who fraudulently concealed it, and when there was no evidence to show an intent on the part of the cashier to give preference to the depositor, is not void, under this section, though the depositor is a director, where he acted in good faith, and was ignorant of any wrongdoing or of the bank's insolvency. Hayes v. Beardsley (1892) 136 N. Y. 299, 32 N. E. 855.

7. **Set-offs.**—Right of bank to set off certificates of liquidating bank against its own, see National Security Bank v. Butler (1889) 9 Sup. Ct. 281, 129 U. S. 223, 32 L. Ed. 682, affirming judgment Same v. Price (C. C. 1885) 22 Fed. 697.

Funds received on the discounting of a note, and deposited with the discounting bank, subject to the check of the depositor, and which had been drawn on by him, but were intended by him to meet the note when due, could not be pleaded as a set-off in an action on note brought by the receiver of the discounting bank, who received the note before maturity, and was not affected by the provision of Code Civ. Proc. Ohio, which provides that a cross demand which might be pleaded as a counterclaim or set-off shall not be extinguished as such by the assignment or death of either party, as this provision does not apply to the assignment of a demand before maturity. Armstrong v. Scott (C. C. 1888) 36 Fed. 63, judgment reversed Scott v. Armstrong (1892) 13 Sup. Ct. 148, 146 U. S. 499, 36 L. Ed. 1059.

Where an insolvent national bank is placed in the hands of a receiver, all unsecured creditors are placed upon the same footing by the provisions of the national banking law. Therefore an unsecured depositor, having at the time of the receiver's appointment no right of set-off against a debt which he owes the bank, but which has not matured, does not, on the maturity of the debt, become entitled to use his deposit as a set-off. Armstrong v. Helm (1891) 13 Ky. Law Rep. 460.

This section does not prevent a debtor of the bank from setting off against his indebtedness the amount of a claim he holds against the bank; and it is immaterial whether or not the debt due to the bank had matured at the time of its insolvency. Mercer v. Dyer (1895) 15 Mont. 317, 39 Pac. 314, following Farmers' & Merchants' State Bank v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

In an action against the indorser of a promissory note which matured in the hands of plaintiff, as receiver of an insolvent national bank, defendant's deposit in the bank cannot be made the subject of a set-off, as the claim therefor existed before the receiver's right accrued, and its allowance would be contrary to the spirit of this section. Stephens v. Schuchmann (1888) 32 Mo. App. 333.

Since the receiver of a national bank takes the assets of the bank subject to subsisting rights between the bank and its customers, a depositor who is indebted to the bank on a note may set off the amount of his deposit against the amount due upon the note as if the bank were solvent. Clots v. Bently (N. Y. 1872) 5 Alb. Law J. 286.

Under this section the maker of a note held by an insolvent national bank cannot, in defense to an action thereon by its receiver, offset a claim against the bank which was assigned to him after the bank suspended, and before the receiver was appointed. Davis v. Knipp (1895) 92 Hun, 297, 36 N. Y. Supp. 705.

This section does not prohibit the allowance of any valid set-off, legal or equitable, which a debtor of the bank has against any obligation owing by him to it at the time of its insolvency, the allowance of such set-off not being the creation of a preference. Armstrong v. Warner (1892) 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466.

T. gave to the V. National Bank his bond for $65,000, with warrant of attorney to confess judgment, and at the same time deposited $31,000 United States bonds as collateral. R. had to his credit in the bank $43,000. The bank, being insolvent, stopped payment. On the next day R. assigned his deposit to T., and on the same day the bank entered judgment against T. on his bond. Held, that T. could not set

off the deposit against his indebtedness to the bank, as to allow him to do so would secure him a preference over other creditors of the bank, after the act of insolvency, and would conflict with this section. Venango Nat. Bank v. Taylor (1867) 56 Pa. St. (6 P. F. Smith) 14.

8. Present and future advances.—This section has reference to the payment or securing of existing debts, and does not render invalid transfers by way of security for a loan then obtained, and of which all creditors presumptively receive the benefit, although, as a part of the same transaction, it is agreed that the security given shall also stand as security for an antecedent indebtedness to the person making the loan. While such agreement is invalid, if the creditor acts in good faith, and in the belief that the bank is solvent, it does not deprive him of the right to the security, to the extent of his present advances. Stapylton v. Stockton (1899) 91 Fed. 326, 33 C. C. A. 542.

This section does not prohibit a bank which has in good faith accepted the draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the proceeds of collections made by it, on paper in its hands belonging to the insolvent bank, to the payment of the draft, since its lien on such collections runs from the date of the acceptance. In re Armstrong (C. C. 1890) 41 Fed. 381.

This section is directed to a preference, not to the giving of security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such a loan until the debt is paid, though the debtor is insolvent, and the creditor has reason at the time to believe that to be the fact. Armstrong v. Chemical Nat. Bank (C. C. 1890) 41 Fed. 234, 6 L. R. A. 226.

A mortgage, given to a national bank solely to secure notes thereafter to be discounted for the mortgagor, is void. Fowler v. Scully (1873) 72 Pa. (22 P. F. Smith) 456, 13 Am. Rep. 699.

9. Special deposits and trust funds.—The statute forbidding preferences is not believed to prevent a beneficiary from following trust money held for him by a bank into any new investment thereof made by the bank. Philadelphia Nat. Bank v. Dowd (C. C. 1889) 38 Fed. 172, 183, 2 L. R. A. 480.

Under this section a county whose money has been deposited in a national bank that has become insolvent has no superior right over other depositors in the assets of the bank unless the identical funds deposited have come into the hands of the receiver. Spokane County v. Clark (C. C. 1894) 61 Fed. 538.

An executor, who was also cashier of a national bank, purchased certain accepted bills of exchange, paid for them by his check as executor, and deposited them in the bank in a box containing the papers of the estate. About a week thereafter the bank failed, and the receiver refused to deliver the drafts, claiming them as assets of the bank. Held, that the purchase by the cashier was not as agent for the bank, and therefore not in violation of this section, and that the estate was entitled to the proceeds of the drafts. Tuttle v. Frelinghuysen (1884) 38 N. J. Eq. (11 Stew.) 12.

An act of a receiver of a national bank, in allowing a certificate of deposit issued by such bank as an offset to a note due the bank, signed by the holder of the certificate and another, was void, in the absence of an order of court authorizing it, where such certificate was transferred to such holder after the bank became insolvent. Beckham v. Shackelford (1894) 8 Tex. Civ. App. 660, 29 S. W. 200.

A national bank operated a creamery corporation, agreeing to pay patrons the proceeds of butter manufactured from milk delivered after deducting 3½ cents a pound for its services. During the two months prior to the bank's insolvency the proceeds of the butter sold was received by the bank's receiver either actually or through the bank's correspondents, to whom drafts therefor had been sent for collection, and at no time had the bank's money on hand or credit with its collecting agents been reduced below the amounts so received. Held, that the money so received, after deducting the bank's commission, belonged to the creamery patrons, and, being traced specifically into the hands of the bank's receiver, they were entitled to recover the same from him. Emigh v. Earling (Wis. 1908) 115 N. W. 128.

Trust funds coming into the hands of a receiver of a national bank which are not identifiable as belonging specifically to a particular person are held by him as assets of the bank, and must be ratably apportioned among all the bank's creditors. Id.

10. Receivers.—The appointment of a temporary receiver, even if erroneous under this section, is not cause for reversal in view of Gen. St. 1902, § 802, providing that causes shall not be reversed when errors "are immaterial, or such as have not injuriously affected appellant"; it appearing that the appointment was made to fill a vacancy by death of one appointed to the same position, to whose appointment appellant reserved no exception and acquiesced therein for about two months, and the appointment was necessary to preserve funds already in the hands of the court. Cogswell v. Second Nat. Bank (1903) 56 A. 574, 76 Conn. 252.

This section is not violated by appointing a permanent receiver on appli-

cation of a stockholder, by a state court as part of the final judgment. Id.

The prohibition of this section against the issue of attachments, injunctions, and executions from state courts against the property of national banks, does not prohibit a requisition to the receiver to deliver up property belonging, not to the bank, but to the party in whose favor the requisition issues. Corn Exch. Bank v. Blye (N. Y. 1885) 37 Hun, 473.

This section was not intended to protect the receiver of an insolvent bank in detaining property which he found in the custody of the bank, and which the latter did not own, or to prohibit him from delivering the same to the sheriff upon proper requisition. Corn Exch. Bank v. Blye (1886) 101 N. Y. 303, 4 N. E. 635.

Where a national bank suspends before a draft sent to it for collection is paid, an action for its recovery can be maintained against its receiver, and the state courts are not deprived of jurisdiction thereof by this section. Corn Exch. Bank v. Blye (1886) 2 N. Y. St. Rep. 112.

II. Attachment.—The property of an insolvent bank attached at the suit of a creditor cannot be sold for the payment of his demand against a claim for the property by a receiver subsequently appointed. First National Bank v. Colby (1874) 21 Wall. 609, 612, 22 L. Ed. 687.

Where service is made on a national bank only by attachment and publication or service out of the state, the attachment, being prohibited by this section, should be vacated, and the service set aside. Garner v. Second Nat. Bank (C. C. 1895) 66 Fed. 369.

This section does not prevent an attachment of a national bank, and its receiver as garnishees in a state court, though such attachment cannot create a lien upon specific assets of the bank in the receiver's hands or disturb his custody of such assets or prevent payment thereof to the treasurer subject to the order of the Comptroller. Earle v. Conway (1900) 20 Sup. Ct. 918, 178 U. S. 456, 44 L. Ed. 1149.

Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of this section, is beyond the power of the court. Van Reed v. People's Nat. Bank (1905) 25 Sup. Ct. 775, 777, 198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154.

An attachment of funds of a national bank on deposit in another bank, after one of its circulating notes has been duly protested for nonpayment, will not create a lien, as against a receiver subsequently appointed. Harvey v. Allen (C. C. 1879) Fed. Cas. No. 6,177.

The property of a national bank is subject to attachment issued by a state court. First Nat. Bank v. Colby (1871) 46 Ala. 435.

The attachment of the property of a national bank in an action against it will not be dissolved, dismissed, or abated, or the levy quashed, because the bank had committed an act of insolvency before the institution of the suit, and its charter had afterwards been dissolved and its franchises forfeited by decree of the federal court, and a receiver properly appointed to take charge of its assets under act of congress. Id.

The provision that no attachment shall be issued against a national bank or its property before final judgment, is constitutional. Dennis v. First Nat. Bank (1899) 59 P. 777, 127 Cal. 453, 78 Am. St. Rep. 79. It is mandatory, and applies to attachments issuing from state courts against such banks. Dennis v. First Nat. Bank (1899) 59 P. 777, 127 Cal. 453, 78 Am. St. Rep. 79; Meyer v. First Nat. Bank (1904) 77 P. 334, 10 Idaho, 175. In a suit begun in a state court against a national bank, no attachment can issue until after final judgment. Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn. Ch. App. 1897) 46 S. W. 1026; McBride v. Illinois Nat. Bank (1908) 112 N. Y. Supp. 794, 128 App. Div. 503; Central Nat. Bank v. Richland Nat. Bank (N. Y. 1876) 52 How. Prac. 136; Rhoner v. First Nat. Bank (N. Y. 1878) 14 Hun, 126. Even by consent of the parties or by waiver of the want of it. Merchants' Laclede Nat. Bank v. Troy Grocery Co. (1905) 39 So. 476, 144 Ala. 605. Nor though it is incorporated in this state and located in another. Rhoner v. Allentown First Nat. Bank (N. Y. 1878) 14 Hun, 126, 1 Browne, Nat. Bank Cas. 331.

An attachment on warrant issued by a state court, to affect the property of a national bank, is illegal and void. Chesapeake Bank v. First Nat. Bank (1874) 40 Md. 269, 17 Am. Rep. 601. Whether the bank is solvent or insolvent. Planters' Loan & Savings Bank v. Berry (1893) 91 Ga. 264, 18 S. E. 137; Bank of Montreal v. Fidelity Nat. Bank (1888) 49 Hun, 607, 1 N. Y. Supp. 852, judgment affirmed (1889) 112 N. Y. 667, 20 N. E. 414, following Pacific Nat. Bank v. Mixter (1888) 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567; Van Reed v. People's Nat. Bank (1905) 25 Sup. Ct. 775, 776, 198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154. But see People's Bank v. Mechanics' Nat. Bank (N. Y. 1882) 62 How. Prac. 422, holding that the prohibition as to attachments applies only to insolvent banks, and Robinson v. National Bank of Newberne (1880) 81 N. Y. 385, 37 Am. Rep. 508, affirming (1880) 58 How, Prac. 306, 19 Hun, 477, holding that the prohibition in this section only applies to cases of actual or impending insolvency of the association. And see, also, cases holding that an attachment is-

sued against an insolvent national bank is invalid, and the fact that the bank subsequently pays a large amount of its debts in full does not estop it from questioning the validity of the attachment. Raynor v. Pacific Nat. Bank (1883) 93 N. Y. 371. And that an attachment issued against a national bank, which is at the time insolvent, is invalid, and is not made valid by the subsequent acquisition by the bank of further capital. Raynor v. Pacific Nat. Bank (1883) 93 N. Y. 371.

A federal court cannot issue a writ of attachment before final judgment against a national bank; its jurisdiction being limited by the restrictions imposed on state courts. Butler v. Coleman (1888) 8 Sup. Ct. 718, 719, 124 U. S. 721, 31 L. Ed. 567.

This section prohibits the suing out of a foreign attachment against a national bank after its insolvency. Commerce Bank v. City Nat. Bank (Pa. 1877) 12 Phila. 189.

Where attachment has issued from a state court against a national bank before final judgment contrary to this section, an injunction to restrain the proceeding will not be granted in another state where both parties in the attachment suit reside, as the proceeding is entirely void. First Nat. Bank v. La Due (1888) 39 Minn. 415, 40 N. W. 367.

Where a national bank purchased a draft with bill of lading of corn attached, which was paid, and the money was in the bank's possession, a suit in equity, in attachment, by the buyer of the corn, against the seller and the bank for breach of contract, and praying a return of the money from the bank, is not an attachment. Russel v. Smith Grain Co. (1902) 32 So. 287, 80 Miss. 688.

Though the laws relating to national banks prior to Act July 12, 1882, prohibited the issue of attachments out of the state courts against them, this was a personal privilege, and the right to insist on it was waived by pleading the general issue in such attachment proceedings. Norris v. Merchants' Nat. Bank (1889) 30 Ill. App. 54.

Where a national bank, organized under the laws of the United States, and doing business in another state, has property within this state, an action by attachment may be brought against it as a foreign corporation. Allen v. Scandinavian Nat. Bank (N. Y. 1873) 46 How. Prac. 71.

Under this section an action against a bank located in another state cannot be commenced by attachment of its property here. Central Nat. Bank v. Richland Nat. Bank (N. Y. 1876) 52 How. Prac. 136, Thomp. Nat. Bank. Cas. 801.

Under the national banking act, an attachment is prohibited, and may not issue out of a state court against a national bank insolvent or on the eve of insolvency. National Shoe & Leather Bank v. Mechanics' Nat. Bank (1882) 89 N. Y. 467.

Although the supreme court of New York has jurisdiction over an action ex contractu brought by a citizen of the state against a national bank located in another state, an attachment which has issued against its property in New York will be vacated upon positive proof of its insolvency. People's Bank v. Mechanics' Bank (N. Y. 1882) 62 How. Prac. 422.

Where it is contended that, at the time of the issuing and levy of an attachment against a national bank without the state, such bank was insolvent, the burden of showing that it was insolvent at that time is upon the defendant; and that fact should be made clearly to appear, or else the attachment should be maintained. Market Nat. Bank v. Pacific Nat. Bank (N. Y. 1882) 64 How. Prac. 1, 2 Civ. Proc. R. 330.

The clause prohibiting attachments against insolvent national banks was not repealed by section 9668, ante. Raynor v. Pacific Nat. Bank (1883) 93 N. Y. 371.

No attachment can be issued against a national banking association, or its property, after it has committed an act of insolvency. Raynor v. Pacific Nat. Bank (N. Y. 1883) 49 N. Y. Super. Ct. (17 Jones & S.) 119.

Where a national bank, by refusing to pay its obligations, commits an act of insolvency within this section an attachment upon its property should not be granted, or, if granted, should be vacated. Market Nat. Bank v. Pacific Nat. Bank (N. Y. 1883) 30 Hun, 50, affirmed in (1883) 93 N. Y. 648.

Plaintiff commenced an action against nonresidents and attached certain cotton. A national bank intervened, claiming the cotton, whereon plaintiff brought an action against the bank, in which he again attached the cotton. Held, that a motion of the bank to dissolve the attachment against it should have been granted. Willard Mfg. Co. v. Merchants' Nat. Bank (1902) 41 S. E. 870, 130 N. C. 609.

Though attachment against a national bank cannot be maintained in a state court, such bank may intervene in attachment and claim the property; and it does not thereby become a party, so as to authorize dismissal of the action. Id.

Where a foreign attachment is sued out against a national bank after its insolvency, and before final judgment, in violation of this section, the attachment will be quashed on a rule taken by the receiver of the bank. Commerce Bank v. City Nat. Bank (Pa. 1877) 12 Phila. 189.

A suit against a national bank for a breach of contract may be brought in a state court of a state other than that in which the bank is located; and there is nothing in the federal statutes to prevent an attachment issuing in

such an action before judgment. Holmes v. National Bank of Wilmington (1882) 18 S. C. 31, 44 Am. Rep. 558.

The appearance by an attorney of a nonresident national bank, the filing of a plea in abatement, and granting the bank an appeal, will not give the court jurisdiction in a suit in which it was attempted to bring the bank before the court by attachment of debts due it by defendants upon whom process was served. Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn. Ch. App. 1897) 46 S. W. 1026.

As by this section an attachment issued before final judgment from a state court against a national bank is prohibited, such an attachment does not operate as notice to the absent defendant, so as to give the court jurisdiction of the party or subject-matter. Safford v. First Nat. Bank (1889) 61 Vt. 373, 17 Atl. 748.

12. Injunction.—This section does not deprive the federal circuit court of power to issue such an injunction, or to continue, after removal of the case, an injunction previously granted by a state court. Hower v. Weiss Malting & Elevator Co. (1893) 55 Fed. 356, 5 C. C. A. 129, distinguishing Butler v. Mixter (1888) 8 Sup. Ct. 718, 124 U. S. 721, 31 L. Ed. 567.

The provision that no injunction shall issue against a national bank before final judgment in any suit, action, or proceeding prevents the issuance of any such writ in a state court against a national bank. Meyer v. First Nat. Bank (1904) 77 Pac. 334, 10 Idaho, 175.

Under this section it is improper to grant a preliminary injunction against a national bank, or against its officers or directors, or against its property (where the injunction against such officers, directors, or property is the equivalent of an injunction against the bank), even after it has ceased to be a going concern and the sole controversy in the case is one between the shareholders. Wallach v. Billings (1911) 161 Ill. App. 317.

The clause forbidding state courts to grant preliminary injunctions against national banks, is meant not merely to preserve to such banks control of their general assets, but applies to an order restraining the transfer or enforcement of notes as wrongfully pledged to a bank with notice. Freeman Mfg. Co. of North Adams v. National Bank of the Republic (1894) 160 Mass. 398, 35 N. E. 865.

13. Recovery of preference.—A bill by the receiver of a bank to set aside a preferential transfer of notes, in violation of this section, is not sustained by proof that the notes were put into the transferee's hands for payment by him, and that, instead of paying them, he wrongfully kept them. Alabama Iron & Railway Co. v. Austin (1899) 94 Fed. 897, 36 C. C. A. 536.

Where a national bank, after or in contemplation of an act of insolvency, made a transfer of notes to a creditor as a preference, which was void under this section, the receiver may at his election maintain an action at law against the creditor for their conversion. Ball v. German Bank of Carroll County, Iowa (1911) 187 Fed. 750, 109 C. C. A. 498, writ of certiorari denied German Bank of Carroll County, Iowa, v. Ball (1912) 32 Sup. Ct. 840, 225 U. S. 709, 56 L. Ed. 1267.

14. Federal question.—An action between a receiver of an insolvent national bank and a depositor, involving only the right of set-off of deposits against notes due by the depositor, does not present a federal question, under this section, avoiding preferences to creditors of such an insolvent bank. Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577.

The question whether an insolvent national bank should pay a savings bank in full under Laws N. Y. 1882, c. 409, § 282, or pro rata is one to be determined by the United States courts. Auburn Sav. Bank v. Hayes (C. C. 1894) 61 Fed. 911.

15. State legislation.—The provision of the New York banking law as to debts due savings banks by an insolvent bank does not apply in the case of a national bank. Davis v. Elmira Sav. Bank (1896) 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700.

Laws N. Y. 1892, c. 689, § 118, provides that the trustees of any savings bank may "deposit in any bank in this state organized under any law of this state or of the United States" a sum not exceeding 25 per cent. of its paid-up capital. Section 130 provides that all the property of "any bank" which shall become insolvent shall, after providing for payment of its circulating notes, if it has any, be applied first to the payment in full of money deposited therewith by any savings bank. Held, that the term "any bank," as used in section 130, applies to "national banks," but that such statute does not conflict with this section. Elmira Sav. Bank v. Davis (1893) 73 Hun, 357, 26 N. Y. Supp. 200, applying Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, affirmed in (1894) 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546.

Cited without definite application, Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 386, 20 L. Ed. 840; Merrill v. National Bank (1899) 19 Sup. Ct. 360, 365, 173 U. S. 131, 43 L. Ed. 640; Earle v. Carson (1903) 23 Sup. Ct. 254, 256, 188 U. S. 42; 47 L. Ed. 373; Earling v. Emigh (1909) 30 Sup. Ct. 672, 675, 218 U. S. 27, 54 L. Ed. 915; Chemical Nat. Bank v. Arm-

strong (1893) 59 Fed. 372, 375, 8 C. C. A. 155, 28 L. R. A. 231 (modified [1895] 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231); Wingate v. Orchard (1896) 75 Fed. 241, 243, 21 C. C. A. 315; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Wright v. Merchants' Nat. Bank (C. C. 1876) Fed. Cas. No. 18,064; Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503, 504; Louis Snyders' Sons Co. v. Armstrong (C. C. 1888) 37 Fed. 18, 22; Kimball v. Dunn (C. C. 1898) 89 Fed. 782; Greevy v. Jacob Tome Institute (C. C. 1904) 132 Fed. 408; Armstrong v. Second Nat. Bank (D. C. 1889) 38 Fed. 883, 886.

§ 9835. (R. S. § 5243.) Use of the title "national."

All banks not organized and transacting business under the national-currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings-banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

Act March 3, 1873, c. 269, § 3, 17 Stat. 603.

Notes of Decisions

Name of bank.—The plaintiff's title, "The Third National Bank of Baltimore," was not in itself an averment either that the plaintiff was a banking association established in the district of Maryland or under the law of the United States providing for national banking associations; and the fact that this section imposes a fine upon any corporation, not organized under the national banking act, which shall use the word "national" as part of its name, does not necessarily imply that it was lawfully established under such act. Third Nat. Bank v. Teal (C. C. 1881) 5 Fed. 503, 504.

The use by State banks of the word "international" as a portion of their name or title is not in violation of this section. (1899) 22 Op. Atty. Gen. 475.

TITLE LXII A

FEDERAL FARM LOANS

This Title, inserted here as additional to the original Titles of the Revised Statutes, includes the Federal Farm Loan Act of July 17, 1916, c. 245.

Sec.

9835a. Short title of act; administration under direction of Federal Farm Loan Board.

DEFINITIONS

9835aa. "First mortgage" and "farm loan bonds" defined.

FEDERAL FARM LOAN BOARD

9835b. (1) Federal Farm Loan Bureau established; supervision by Federal Farm Loan Board.
(2) Federal Farm Loan Board; members; appointment; salaries; traveling expenses.
(3) Federal Farm Loan Board; terms of office; oath; Farm Loan Commissioner.
(4) Federal Farm Loan Board; first meeting.
(5) Federal Farm Loan Board; holding office or directorship in banking, etc., institutions prohibited; oath as to eligibility.
(6) Federal Farm Loan Board; filling vacancies.
(7) Farm loan registrars, land bank appraisers and land bank examiners; appointment; connection with banking, etc., institutions prohibited.
(8) Salaries of Federal Farm Loan Board, farm loan registrars and land bank examiners payable by United States; compensation of land bank appraisers.
(9) Attorneys, experts, etc., for Federal Farm Loan Board; employment; salaries and fees.
(10) Semiannual statements of federal land banks of salaries paid officers and employés.
(11) Annual report of Federal Farm Loan Board.
(12) Examinations and reports of condition of federal land banks; statements of results thereof; appraisals of farm land; amortization tables.
(13) Statements of condition of national farm loan associations and federal land banks.
(14) Bulletins and circulars; contents and distribution; payment for from organization fund.

FEDERAL LAND BANKS

9835bb. (1) Federal land bank districts; boundaries.
(2) Establishment of federal land banks; titles of banks; branches.
(3) Temporary directors; number; qualifications; bonds; compensation; president; vice-president, secretary, and treasurer; employment of attorneys, etc.; compensation.
(4) Contents of organization certificates.
(a) Name of bank.
(b) District of operations, and city of location.
(c) Amount of capital stock and number of shares; increase of capital stock.
(d) Purpose of making of certificate; acknowledgment and recording.
(5) Changes in organization certificate.
(6) Time of commencement of corporate existence of federal land banks; powers enumerated.
(a) Corporate seal.
(b) Corporate succession.
(c) Contracts.
(d) Suits by and against.
(e) Election, etc., of directors, president, etc.
(f) By-laws.
(g) Incidental powers.

Sec.

(7) Time of election of directors, etc., of federal land banks.
(8) Directors of federal land banks; number and qualifications; local directors and district directors; election and appointment.
(9) Local directors; notice to national farm loan associations of elections; lists of candidates by farm loan associations.
(10) Local directors; selection by farm loan associations of names from lists of candidates.
(11) District directors; appointment; terms of office.
(12) Local directors; designation of terms of office; vacancies in board of directors.
(13) Qualifications of directors.
(14) Expenses of directors; approval by Federal Farm Loan Board of compensation of directors, etc., of federal land banks.

CAPITAL STOCK OF FEDERAL LAND BANKS

9835c. (1) Minimum amount; regulation of subscriptions to.
(2) Division into shares; who may subscribe for.
(3) Transfer, etc., of stock held by national farm loan associations.
(4) Dividends on stock; voting stock.
(5) Subscriptions to stock; subscriptions by United States to make up deficit in required minimum amount.
(6) Retirement of original stock.
(7) Proportion of stock held in quick assets.

GOVERNMENT DEPOSITARIES

9835cc. Federal land banks and joint stock land banks designated as depositaries of public moneys and employed as government financial agents; bonds; investment of funds deposited.

NATIONAL FARM LOAN ASSOCIATIONS

9835d. (1) Purposes of organization; articles of association; contents; signature to; copies for federal land banks.

Sec.

(2) Directors; election; terms of office; secretary-treasurer; president; vice-president; loan committee.
(3) Compensation and qualifications of directors, etc.
(4) Secretary-treasurer; powers and duties; bond; reports.
(5) Expenses of secretary-treasurer, etc., of national farm loan associations; payment.
(6) Number of incorporators; mode of organization; number of directors; secretary and treasurer of secretary-treasurer.
(7) Articles of association; report and affidavit accompanying; contents.
(8) Investigation of solvency, etc., of applicants for incorporation; grant or refusal of charter.
(9) Grant or refusal of charter.
(10) Loans to associations from federal land banks; right to.
(11) Loans to members of association; subscriptions to capital stock of federal land banks; holding stock subscribed as collateral security for loan; retirement of stock subscribed.
(12) Reduction of capital stock of federal land banks.

CAPITAL STOCK OF NATIONAL FARM LOAN ASSOCIATIONS

9835dd. (1) Par value of shares.
(2) Voting stock.
(3) Borrowers only to be members or shareholders of national farm loan associations; application for membership; amount of stock to be held by borrower; stock held as collateral security by association for loan; retirement of stock.
(4) Increase of capital stock.

NATIONAL FARM LOAN ASSOCIATIONS—SPECIAL PROVISIONS

9835e. (1) Right of members to loans.
(2) Loans by federal land bank to members of national farm loan associations to pay for shares subscribed to in association; payment.
(3) Commissions on interest payments on loans; amount; deduction from dividends payable to as-

Sec.

sociations; loans by federal land banks to associations; rate of interest.
(4) Individual liability of shareholders.
(5) Admission of new members.

APPRAISAL

9835ee. (1) Appraisal of land offered as security for loan by loan committee; report; approval of loan by directors.
(2) Report of appraisal submitted to directors of land bank.
(3) Reference of applications for loan to land bank appraisers; investigation and report by appraisers.
(4) Forms for appraisal reports.
(5) Examinations, etc., by land bank appraisers as to farm loan bonds and first mortgages.
(6) Borrowers as appraisers or members of loan committees.

POWERS OF NATIONAL FARM LOAN ASSOCIATIONS

9835f. Enumerated powers of national farm loan associations.
(a) Indorsing mortgages.
(b) Receiving advances from federal land banks and loaning to shareholders.
(c) Acquiring and disposing of property.
(d) Issuing interest bearing certificates against deposits of current funds convertible into farm loan bonds.

RESTRICTIONS ON LOANS BASED ON FIRST MORTGAGES

9835ff. (1) Restrictions on loans enumerated.
(a) Security by first mortgage.
(b) Agreement in mortgage for repayment on amortization plan.
(c) Maximum interest rate.
(d) Purposes of loans enumerated.
(e) Limitation on amount of loans; basis of appraisal; reappraisal.
(f) Persons to whom loans may be made; sale of mortgaged lands; death of mortgagor.
(g) Maximum of loans to one borrower; minimum of loans.
(h) Form of applications for loans.

Sec.

(i) Simple interest on defaulted payments; payment of taxes, liens, etc.; insurance.
(j) Agreement by borrowers as to use of loans.
(k) Loans not invalidated by unauthorized acts by federal land banks or national farm loan associations.
(2) Loans to be current funds or farm loan bonds.

POWERS OF FEDERAL LAND BANKS

9835g. Enumerated powers.
(a) Issuing and selling farm loan bonds.
(b) Investing funds in farm first mortgages.
(c) Receiving and depositing with farm loan registrar farm first mortgages as collateral security for farm loan bonds; collecting, etc., dues, interest, etc., payable under mortgages and bonds.
(d) Acquiring and disposing of property.
(e) Depositing securities and funds with federal reserve banks.
(f) Receiving deposits from national farm loan associations.
(g) Borrowing money.
(h) Buying and selling United States bonds.
(i) Charging fees for loans.

RESTRICTIONS ON FEDERAL LAND BANKS

9835gg. Enumeration of restrictions.
(a) Transacting banking business unauthorized by act.
(b) Loaning on first mortgages except through national farm loan associations.
(c) Accepting other than first mortgages.
(d) Issuing excess of farm loan bonds; receiving excess of additional mortgages from national farm loan associations.
(e) Demanding, etc., unauthorized commissions, etc.

AGENTS OF FEDERAL LAND BANKS

9835h. (1) Loans through agents; when authorized.
(2) Manner of making loans through agents.
(3) Who may be employed as agents.

Sec.
(4) Expenses of and commissions to agents.
(5) Expenses of agents added to loans.
(6) Collecting interest, etc., by agents.
(7) Indorsement of loans by agents; liability thereon.
(8) Loans through agents to cease, when.

JOINT STOCK LAND BANKS

9835hh. (1) Power to organize; manner of organization; number of directors.
(2) Individual liability of shareholders.
(3) Powers, duties, and liabilities; stock; United States not to purchase; voting stock.
(4) Limitation on amount of issue of farm loan bonds; transacting banking business not authorized by act.
(5) Minimum amount of subscribed capital stock required.
(6) Issuing bonds before payment of capital stock prohibited.
(7) Form of farm loan bonds.
(8) Interest rates; restrictions on mortgage loans.
(9) Interest rates; increase.
(10) Unauthorized commissions or charges.
(11) Farm loan bonds; power to issue; form and contents.

POWERS OF FEDERAL FARM LOAN BOARD

9835i. Enumeration of powers.
(a) Organizing and chartering federal land banks, national farm loan associations, and joint stock land banks; authorizing increase of capital stock.
(b) Reviewing and altering interest rates.
(c) Granting or refusing authority to issue farm loan bonds.
(d) Making rules and regulations as to charges on loans.
(e) Requiring reports and statements; examining banks and associations.
(f) Prescribing form and terms of farm loan bonds and surety bonds.
(g) Regulating payments between federal land banks.
(h) Suspending or removal of directors, registrars, appraisers, examiners, etc.

Sec.
(i) Exercising supervisory authority over federal land banks.
(j) Incidental powers.

APPLICATIONS FOR FARM LOAN BONDS

9835ii. (1) Application through farm loan registrar; collateral security accompanying; schedule of.
(2) Investigation and appraisal of securities tendered by Federal Farm Loan Board.
(3) Transmission of decisions of Federal Farm Loan Board to land bank and farm loan registrar; information by registrar to Farm Loan Board.
(4) Approval in writing of issue of farm loan bonds.

ISSUE OF FARM LOAN BONDS

9835j. (1) Duties of farm loan registrars.
(2) Return of collateral securities on rejection of application.
(3) Disposition of collateral security on approval of application for issue.
(4) Mortgages acceptable as collateral security.
(5) Limiting amount of issue to collateral security; United States bonds or cash in lieu of mortgages withdrawn.
(6) Additional collateral.

FORM OF FARM LOAN BONDS

9835k. (1) Denominations; minimum and maximum periods; interest coupons; rate of interest.
(2) Rules and regulations relating to payment of bonds.
(3) Delivery of bonds to banks.
(4) Preparation of bonds; custody of plates, dies, etc.; expenses of preparation; exchange for registered bonds; re-exchange for coupon bonds.

SPECIAL PROVISIONS OF FARM LOAN BONDS

9835l. (1) Land banks bound by acts of officers and Federal Farm Loan Board in issue of bonds.
(2) Liability of land banks for bonds.
(3) Record on minutes of liability for bonds.
(4) Signing and attesting bonds; certificate to.

Sec.

APPLICATION OF AMORTIZATION AND INTEREST PAYMENTS

9835m. (1) Notice to farm loan registrars of interest, amortization, etc., payments on collateral security for farm loan bonds; crediting payments; cancellation of mortgages on payment in full.
(2) Withdrawal of collateral security and substitution of other security therefor.
(3) Place and mode of payment of farm loan bonds or interest thereon; cancellation on payment.
(4) Withdrawal of collateral security on surrender of farm loan bonds.
(5) Interest payments on hypothecated first mortgages.
(6) Face value of bonds or interest coupons to holders.
(7) Amortization, etc., payments on principal of first mortgages to constitute trust fund.
(I) Application of trust fund in cases of federal land banks.
(a) Payment of farm loan bonds at maturity.
(b) Purchase of farm loan bonds.
(c) Loans on first mortgages on farm lands.
(d) Purchase of United States bonds.
(II) Application of trust fund in case of joint stock land banks.
(a) Payment of farm loan bonds at maturity.
(b) Purchase of farm loan bonds.
(c) Loans on first mortgages.
(d) Purchase of United States bonds.
(8) Deposit of trust fund with farm loan registrars as substituted collateral security.
(9) Notice to farm loan registrars of disposition of payments on principal of mortgages.

RESERVES AND DIVIDENDS OF LAND BANKS

9835n. (1) Reserves; amount; making good impairment; debit to reserve account of defaults in payment of interest, etc.
(2) Dividends on balance of net earnings; investment of reserves.

RESERVE AND DIVIDENDS OF NATIONAL FARM LOAN ASSOCIATIONS

9835o. (1) Reserves; amount.
(2) Reserves; making good impairment.
(3) Dividends on balance of net earnings.
(4) Reserves; investment.
(5) Reserves; disposition on liquidation.

DEFAULTED LOANS

9835p. Notice to national farm loan associations or agents of default; making default good.

EXEMPTION FROM TAXATION

9835q. (1) Exemption from federal, state, municipal and local taxation; exceptions; first mortgages and farm loan bonds are instrumentalities of government.
(2) Shares in joint stock land banks included in valuation of personal property of owners, etc., for state taxation.
(3) Real property subject to taxation.

INVESTMENT IN FARM LOAN BONDS

9835r. (1) Fiduciary and trust funds may be invested in; security for public deposits.
(2) Buying and selling by member banks of Federal Reserve System.
(3) Buying and selling by federal reserve banks.

EXAMINATIONS

9835s. (1) Land bank examiners; number; appointment.
(2) Land bank examiners; powers; duties, liabilities, and penalties; examinations; reports of.
(3) Land bank examiners; salaries.

DISSOLUTION AND APPOINTMENT OF RECEIVERS

9835t. (1) Insolvency of national farm loan associations; what constitutes; receivers; powers and duties.
(2) Insolvency of national farm loan associations; receivers; payments to Treasurer of United States.

Sec.
(3) Insolvency of federal land banks and joint stock land banks; receivers; powers and duties.
(4) Insolvency of national farm loan associations; cancellation of stock held in federal land banks; application of payments on such stock to payment of debts of association; reduction of capital stock of federal land banks; certificate of.
(5) Voluntary liquidation; consent of Federal Farm Loan Board; consolidation of national farm loan associations.

STATE LEGISLATION

9835u. (1) Examination of state laws relating to conveying and recording land titles, mortgage foreclosures, and homestead and other exemptions.
(2) First mortgages ineligible as basis of issue of farm loan bonds, when; assistance in examinations by Attorney General or special counsel.
(3) Statements as when and why act cannot be complied with under state laws.

PENALTIES

9835v. (1) False statements in applications for loans; willful overvaluation of land by loan committees or appraisers; acceptance of loan or gratuity by land bank examiners.
(2) Falsely making, forging or counterfeiting, etc., bonds or coupons; passing, etc., false, etc., bonds or coupons; falsely altering, etc., bonds or coupons.
(3) Officers, directors, attorneys or employé of national farm loan association, federal land bank, or joint stock land bank receiving unauthorized fee, commission, etc.; federal land bank or national farm association charging or receiving unauthorized fee, commission, etc.; examiner disclosing names of borrowers.
(4) Embezzlement, etc., of moneys, funds, etc., of national farm loan associations, federal land banks, or joint stock land banks by persons connected therewith, or defrauding same, or aiding and abetting therein.
(5) Deceiving, defrauding, etc., or attempting to deceive, defraud, etc., by false pretenses as to character, etc., of farm loan bonds or coupons.
(6) Arrest, etc., of violators of act by Secret Service Division of Treasury Department.

GOVERNMENT DEPOSITS

9835w. Deposits for temporary use with federal land banks; certificates of indebtedness therefor; redemption; aggregate of deposits.

ORGANIZATION EXPENSES

9835x. Appropriation for expenses.

LIMITATION OF COURT DECISIONS

9835y. Effect of partial invalidity of Act.

REPEALING CLAUSE

9835z. Acts repealed; time of taking effect of act; amendment, etc., of act.

§ 9835a. (Act July 17, 1916, c. 245, § 1.) Short title of act; administration under direction of Federal Farm Loan Board.

The short title of this Act shall be "The Federal Farm Loan Act." Its administration shall be under the direction and control of the Federal Farm Loan Board hereinafter created. (39 Stat. 360.)

This section and the 34 sections next following were an act entitled "An act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositaries and financial agents for the United States, and for other purposes," cited above.

DEFINITIONS

§ 9835aa. (Act July 17, 1916, c. 245, § 2.) "First mortgage" and "farm loan bonds" defined.

Wherever the term "first mortgage" is used in this Act it shall be held to include such classes of first liens on farm lands as shall be

approved by the Federal Farm Loan Board, and the credit instruments secured thereby. The term "farm loan bonds" shall be held to include all bonds secured by collateral deposited with a farm loan registrar under the terms of this Act; they shall be distinguished by the addition of the words "Federal," or "joint stock," as the case may be. (39 Stat. 360.)

FEDERAL FARM LOAN BOARD

§ 9835b. (Act July 17, 1916, c. 245, § 3.) (1) Federal Farm Loan Bureau established; supervision by Federal Farm Loan Board.

There shall be established at the seat of government in the Department of the Treasury a bureau charged with the execution of this Act and of all Acts amendatory thereof, to be known as the Federal Farm Loan Bureau, under the general supervision of a Federal Farm Loan Board.

(2) Federal Farm Loan Board; members; appointment; salaries; traveling expenses.

Said Federal Farm Loan Board shall consist of five members, including the Secretary of the Treasury, who shall be a member and chairman ex officio, and four members to be appointed by the President of the United States, by and with the advice and consent of the Senate. Of the four members to be appointed by the President, not more than two shall be appointed from one political party, and all four of said members shall be citizens of the United States and shall devote their entire time to the business of the Federal Farm Loan Board; they shall receive an annual salary of $10,000 payable monthly, together with actual necessary traveling expenses.

(3) Federal Farm Loan Board; terms of office; oath; Farm Loan Commissioner.

One of the members to be appointed by the President shall be designated by him to serve for two years, one for four years, one for six years, and one for eight years, and thereafter each member so appointed shall serve for a term of eight years, unless sooner removed for cause by the President. One of the members shall be designated by the President as the Farm Loan Commissioner, who shall be the active executive officer of said board. Each member of the Federal Farm Loan Board shall within fifteen days after notice of his appointment take and subscribe to the oath of office.

(4) Federal Farm Loan Board; first meeting.

The first meeting of the Federal Farm Loan Board shall be held in Washington as soon as may be after the passage of this Act, at a date and place to be fixed by the Secretary of the Treasury.

(5) Federal Farm Loan Board; holding office or directorship in banking, etc., institutions prohibited; oath as to eligibility.

No member of the Federal Farm Loan Board shall, during his continuance in office, be an officer or director of any other institution, association, or partnership engaged in banking, or in the business of making land mortgage loans or selling land mortgages. Before entering upon his duties as a member of the Federal Farm Loan Board each member shall certify under oath to the President that he is eligible under this section.

(6) Federal Farm Loan Board; filling vacancies.

The President shall have the power, by and with the advice and consent of the Senate, to fill any vacancy occurring in the membership of the Federal Farm Loan Board; if such vacancy shall be filled during the recess of the Senate a commission shall be granted which shall expire at the end of the next session.

(7) Farm loan registrars, land bank appraisers and land bank examiners; appointment; connection with banking, etc., institutions prohibited.

The Federal Farm Loan Board shall appoint a farm loan registrar in each land bank district to receive applications for issues of farm loan bonds and to perform such other services as are prescribed by this Act. It shall also appoint one or more land bank appraisers for each land bank district and as many land bank examiners as it shall deem necessary. Farm loan registrars, land bank appraisers, and land bank examiners appointed under this section shall be public officials and shall, during their continuance in office, have no connection with or interest in any other institution, association, or partnership engaged in banking or in the business of making land mortgage loans or selling land mortgages: Provided, That this limitation shall not apply to persons employed by the board temporarily to do special work.

(8) Salaries of Federal Farm Loan Board, farm loan registrars and land bank examiners payable by United States; compensation of land bank appraisers.

The salaries and expenses of the Federal Farm Loan Board, and of farm loan registrars and examiners authorized under this section, shall be paid by the United States. Land bank appraisers shall receive such compensation as the Federal Farm Loan Board shall fix, and shall be paid by the Federal land banks and the joint stock land banks which they serve, in such proportion and in such manner as the Federal Farm Loan Board shall order.

(9) Attorneys, experts, etc., for Federal Farm Loan Board; employment; salaries and fees.

The Federal Farm Loan Board shall be authorized and empowered to employ such attorneys, experts, assistants, clerks, laborers, and other employees as it may deem necessary to conduct the business of said board. All salaries and fees authorized in this section and not otherwise provided for shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the Federal Farm Loan Board. All such attorneys, experts, assistants, clerks, laborers, and other employees, and all registrars, examiners, and appraisers shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: Provided, That nothing herein shall prevent the President from placing said employees in the classified service.

The Civil Service Act of Jan. 16, 1883, c. 27, mentioned in this paragraph, is set forth ante, §§ 3271–3282.

(10) Semiannual statements of federal land banks of salaries paid officers and employés.

Every Federal land bank shall semiannually submit to the Federal Farm Loan Board a schedule showing the salaries or rates of compensation paid to its officers and employees.

(11) Annual report of Federal Farm Loan Board.

The Federal Farm Loan Board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress.

(12) Examinations and reports of condition of federal land banks; statements of results thereof; appraisals of farm land; amortization tables.

The Federal Farm Loan Board shall from time to time require examinations and reports of condition of all land banks established under the provisions of this Act and shall publish consolidated statements of the results thereof. It shall cause to be made appraisals of farm lands as provided by this Act, and shall prepare and publish amortization tables which shall be used by national farm loan associations and land banks organized under this Act.

(13) Statements of condition of national farm loan associations and federal land banks.

The Federal Farm Loan Board shall prescribe a form for the statement of condition of national farm loan associations and land banks under its supervision, which shall be filled out quarterly by each such association or bank and transmitted to said board.

(14) Bulletins and circulars; contents and distribution; payment for from organization fund.

It shall be the duty of the Federal Farm Loan Board to prepare from time to time bulletins setting forth the principal features of this Act and through the Department of Agriculture or otherwise to distribute the same, particularly to the press, to agricultural journals, and to farmers' organizations; to prepare and distribute in the same manner circulars setting forth the principles and advantages of amortized farm loans and the protection afforded debtors under this Act, instructing farmers how to organize and conduct farm loan associations, and advising investors of the merits and advantages of farm loan bonds; and to disseminate in its discretion information for the further instruction of farmers regarding the methods and principles of cooperative credit and organization. Said board is hereby authorized to use a reasonable portion of the organization fund provided in section thirty-three of this Act for the objects specified in this paragraph, and is instructed to lay before the Congress at each session its recommendations for further appropriations to carry out said objects. (39 Stat. 360.)

FEDERAL LAND BANKS

§ 9835bb. (Act July 17, 1916, c. 245, § 4.) (1) Federal land bank districts; boundaries.

As soon as practicable the Federal Farm Loan Board shall divide the continental United States, excluding Alaska, into twelve districts, which shall be known as Federal land bank districts, and may be designated by number. Said districts shall be apportioned with due regard to the farm loan needs of the country, but no such district shall contain a fractional part of any State. The boundaries thereof may be readjusted from time to time in the discretion of said board.

(2) Establishment of federal land banks; titles of banks; branches.

The Federal Farm Loan Board shall establish in each Federal land bank district a Federal land bank, with its principal office located in such city within the district as said board shall designate. Each Federal land bank shall include in its title the name of the city in which it is located. Subject to the approval of the Federal Farm Loan Board, any Federal land bank may establish branches within the land bank district.

(3) Temporary directors; number; qualifications; bonds; compensation; president, vice-president, secretary, and treasurer; employment of attorneys, etc.; compensation.

Each Federal land bank shall be temporarily managed by five directors appointed by the Federal Farm Loan Board. Said directors shall be citizens of the United States and residents of the district. They shall each give a surety bond, the premium on which shall be paid from the funds of the bank. They shall receive such compensation as the Federal Farm Loan Board shall fix. They shall choose from their number, by majority vote, a president, a vice president, a secretary and a treasurer. They are further authorized and empowered to employ such attorneys, experts, assistants, clerks, laborers, and other employees as they may deem necessary, and to fix their compensation, subject to the approval of the Federal Farm Loan Board.

(4) Contents of organization certificates.

Said temporary directors shall, under their hands, forthwith make an organization certificate, which shall specifically state:

(a) Name of bank.

First. The name assumed by such bank.

(b) District of operations, and city of location.

Second. The district within which its operations are to be carried on, and the particular city in which its principal office is to be located.

(c) Amount of capital stock and number of shares; increase of capital stock.

Third. The amount of capital stock and the number of shares into which the same is to be divided: Provided, That every Federal land bank organized under this Act shall by its articles of association permit an increase of its capital stock from time to time for the purpose of providing for the issue of shares to national farm loan associations and stockholders who may secure loans through agents of Federal land banks in accordance with the provisions of this Act.

(d) Purpose of making of certificate; acknowledgment and recording.

Fourth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Act. The organization certificate shall be acknowledged before a judge or clerk of some court of record or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Farm Loan Commissioner, who shall record and carefully preserve the same in his office, where it shall be at all times open to public inspection.

(5) Changes in organization certificate.

The Federal Farm Loan Board is authorized to direct such changes in or additions to any such organization certificate, not inconsistent with this Act, as it may deem necessary or expedient.

(6) Time of commencement of corporate existence of federal land banks; powers enumerated.

Upon duly making and filing such organization certificate the bank shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

(a) Corporate seal.

First. To adopt and use a corporate seal.

(b) Corporate succession.

Second. To have succession until it is dissolved by Act of Congress or under the provisions of this Act.

(c) Contracts.

Third. To make contracts.

(d) Suits by and against.

Fourth. To sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons.

(e) Election, etc., of directors, president, etc.

Fifth. To elect or appoint directors, and by its board of directors to elect a president and a vice president, appoint a secretary and a treasurer and other officers and employees, define their duties, require bonds of them, and fix the penalty thereof; by action of its board of directors dismiss such officers and employees, or any of them, at pleasure and appoint others to fill their places.

(f) By-laws.

Sixth. To prescribe, by its board of directors, subject to the supervision and regulation of the Federal Farm Loan Board, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected, its officers elected or appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

(g) Incidental powers.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business herein described.

(7) Time of election of directors, etc., of federal land banks.

After the subscriptions to stock in any Federal land bank by national farm loan associations, hereinafter authorized, shall have reached the sum of $100,000, the officers and directors of said land bank shall be chosen as herein provided and shall, upon becoming duly qualified, take over the management of said land bank from the temporary officers selected under this section.

(8) Directors of federal land banks; number and qualifications; local directors and district directors; election and appointment.

The board of directors of every Federal land bank shall be selected as hereinafter specified and shall consist of nine members, each holding office for three years. Six of said directors shall be known as local directors, and shall be chosen by and be representative of national farm loan associations; and the remaining three directors shall be known as district directors, and shall be appointed by the Federal Farm Loan Board and represent the public interest.

(9) Local directors; notice to national farm loan associations of elections; lists of candidates by farm loan associations.

At least two months before each election the Farm Loan Commissioner shall notify each national farm loan association in writing that such election is to be held, giving the number of directors to be elected for its district, and requesting each association to nominate one candidate for each director to be elected. Within ten days of the receipt of such notice each association shall forward its nominations to said Farm Loan Commissioner. Said commissioner shall prepare a list of candidates for local directors consisting of the twenty persons securing the highest number of votes from national farm loan associations making such nominations.

(10) Local directors; selection by farm loan associations of names from lists of candidates.

At least one month before said election said Farm Loan Commissioner shall mail to each national farm loan association the list of candidates. The directors of each national farm loan association shall cast the vote of said association for as many candidates on said list as there are vacancies to be filled, and shall forward said vote to the Farm Loan Commissioner within ten days after said list of candidates is received by them. The candidates receiving the highest number of votes shall be elected as local directors. In case of a tie the Farm Loan Commissioner shall determine the choice.

(11) District directors; appointment; terms of office.

The Federal Farm Loan Board shall designate one of the district directors to serve for three years and to act as chairman of the board of directors. It shall designate one of said directors to serve for a term of two years and one to serve for a term of one year. After the first appointments each district director shall be appointed for a term of three years.

(12) Local directors; designation of terms of office; vacancies in board of directors.

At the first regular meeting of the board of directors of each Federal land bank it shall be the duty of the local directors to designate two of the local directors whose term of office shall expire in one year from the date of such meeting, two whose term of office shall expire in two years from said date, and two whose term of office shall expire in three years from said date. Thereafter every local director of a Federal land bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the board of directors shall be filled for the unexpired term in the manner provided for the original selection of such directors.

(13) Qualifications of directors.

Directors of Federal land banks shall have been for at least two years residents of the district for which they are appointed or elected, and at least one district director shall be experienced in practical farming and actually engaged at the time of his appointment in farming operations within the district. No director of a Federal land bank shall, during his continuance in office, act as an officer, director, or employee of any other institution, association, or partnership engaged in banking or in the business of making or selling land mortgage loans.

(14) Expenses of directors; approval by Federal Farm Loan Board of compensation of directors, officers, etc., of federal land banks.

Directors of Federal land banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, to be paid by the respective Federal land banks. Any compensation that may be provided by boards of directors of Federal land banks for directors, officers, or employees shall be subject to the approval of the Federal Farm Loan Board. (39 Stat. 362.)

CAPITAL STOCK OF FEDERAL LAND BANKS

§ 9835c. (Act July 17, 1916, c. 245, § 5.) (1) Minimum amount; regulation of subscriptions to.

Every Federal land bank shall have, before beginning business, a subscribed capital of not less than $750,000. The Federal Farm Loan Board is authorized to prescribe the times and conditions of

(12) Examinations and reports of condition of federal land banks; statements of results thereof; appraisals of farm land; amortization tables.

The Federal Farm Loan Board shall from time to time require examinations and reports of condition of all land banks established under the provisions of this Act and shall publish consolidated statements of the results thereof. It shall cause to be made appraisals of farm lands as provided by this Act, and shall prepare and publish amortization tables which shall be used by national farm loan associations and land banks organized under this Act.

(13) Statements of condition of national farm loan associations and federal land banks.

The Federal Farm Loan Board shall prescribe a form for the statement of condition of national farm loan associations and land banks under its supervision, which shall be filled out quarterly by each such association or bank and transmitted to said board.

(14) Bulletins and circulars; contents and distribution; payment for from organization fund.

It shall be the duty of the Federal Farm Loan Board to prepare from time to time bulletins setting forth the principal features of this Act and through the Department of Agriculture or otherwise to distribute the same, particularly to the press, to agricultural journals, and to farmers' organizations; to prepare and distribute in the same manner circulars setting forth the principles and advantages of amortized farm loans and the protection afforded debtors under this Act, instructing farmers how to organize and conduct farm loan associations, and advising investors of the merits and advantages of farm loan bonds; and to disseminate in its discretion information for the further instruction of farmers regarding the methods and principles of cooperative credit and organization. Said board is hereby authorized to use a reasonable portion of the organization fund provided in section thirty-three of this Act for the objects specified in this paragraph, and is instructed to lay before the Congress at each session its recommendations for further appropriations to carry out said objects. (39 Stat. 360.)

FEDERAL LAND BANKS

§ 9835bb. (Act July 17, 1916, c. 245, § 4.) (1) Federal land bank districts; boundaries.

As soon as practicable the Federal Farm Loan Board shall divide the continental United States, excluding Alaska, into twelve districts, which shall be known as Federal land bank districts, and may be designated by number. Said districts shall be apportioned with due regard to the farm loan needs of the country, but no such district shall contain a fractional part of any State. The boundaries thereof may be readjusted from time to time in the discretion of said board.

(2) Establishment of federal land banks; titles of banks; branches.

The Federal Farm Loan Board shall establish in each Federal land bank district a Federal land bank, with its principal office located in such city within the district as said board shall designate. Each Federal land bank shall include in its title the name of the city in which it is located. Subject to the approval of the Federal Farm Loan Board, any Federal land bank may establish branches within the land bank district.

(3) Temporary directors; number; qualifications; bonds; compensation; president, vice-president, secretary, and treasurer; employment of attorneys, etc.; compensation.

Each Federal land bank shall be temporarily managed by five directors appointed by the Federal Farm Loan Board. Said directors shall be citizens of the United States and residents of the district. They shall each give a surety bond, the premium on which shall be paid from the funds of the bank. They shall receive such compensation as the Federal Farm Loan Board shall fix. They shall choose from their number, by majority vote, a president, a vice president, a secretary and a treasurer. They are further authorized and empowered to employ such attorneys, experts, assistants, clerks, laborers, and other employees as they may deem necessary, and to fix their compensation, subject to the approval of the Federal Farm Loan Board.

(4) Contents of organization certificates.

Said temporary directors shall, under their hands, forthwith make an organization certificate, which shall specifically state:

(a) Name of bank.

First. The name assumed by such bank.

(b) District of operations, and city of location.

Second. The district within which its operations are to be carried on, and the particular city in which its principal office is to be located.

(c) Amount of capital stock and number of shares; increase of capital stock.

Third. The amount of capital stock and the number of shares into which the same is to be divided: Provided, That every Federal land bank organized under this Act shall by its articles of association permit an increase of its capital stock from time to time for the purpose of providing for the issue of shares to national farm loan associations and stockholders who may secure loans through agents of Federal land banks in accordance with the provisions of this Act.

(d) Purpose of making of certificate; acknowledgment and recording.

Fourth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Act. The organization certificate shall be acknowledged before a judge or clerk of some court of record or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Farm Loan Commissioner, who shall record and carefully preserve the same in his office, where it shall be at all times open to public inspection.

(5) Changes in organization certificate.

The Federal Farm Loan Board is authorized to direct such changes in or additions to any such organization certificate, not inconsistent with this Act, as it may deem necessary or expedient.

(6) Time of commencement of corporate existence of federal land banks; powers enumerated.

Upon duly making and filing such organization certificate the bank shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

(a) Corporate seal.

First. To adopt and use a corporate seal.

(b) Corporate succession.

Second. To have succession until it is dissolved by Act of Congress or under the provisions of this Act.

(c) Contracts.

Third. To make contracts.

(d) Suits by and against.

Fourth. To sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons.

(e) Election, etc., of directors, president, etc.

Fifth. To elect or appoint directors, and by its board of directors to elect a president and a vice president, appoint a secretary and a treasurer and other officers and employees, define their duties, require bonds of them, and fix the penalty thereof; by action of its board of directors dismiss such officers and employees, or any of them, at pleasure and appoint others to fill their places.

(f) By-laws.

Sixth. To prescribe, by its board of directors, subject to the supervision and regulation of the Federal Farm Loan Board, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected, its officers elected or appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

(g) Incidental powers.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business herein described.

(7) Time of election of directors, etc., of federal land banks.

After the subscriptions to stock in any Federal land bank by national farm loan associations, hereinafter authorized, shall have reached the sum of $100,000, the officers and directors of said land bank shall be chosen as herein provided and shall, upon becoming duly qualified, take over the management of said land bank from the temporary officers selected under this section.

(8) Directors of federal land banks; number and qualifications; local directors and district directors; election and appointment.

The board of directors of every Federal land bank shall be selected as hereinafter specified and shall consist of nine members, each holding office for three years. Six of said directors shall be known as local directors, and shall be chosen by and be representative of national farm loan associations; and the remaining three directors shall be known as district directors, and shall be appointed by the Federal Farm Loan Board and represent the public interest.

(9) Local directors; notice to national farm loan associations of elections; lists of candidates by farm loan associations.

At least two months before each election the Farm Loan Commissioner shall notify each national farm loan association in writing that such election is to be held, giving the number of directors to be elected for its district, and requesting each association to nominate one candidate for each director to be elected. Within ten days of the receipt of such notice each association shall forward its nominations to said Farm Loan Commissioner. Said commissioner shall prepare a list of candidates for local directors consisting of the twenty persons securing the highest number of votes from national farm loan associations making such nominations.

(10) Local directors; selection by farm loan associations of names from lists of candidates.

At least one month before said election said Farm Loan Commissioner shall mail to each national farm loan association the list of candidates. The directors of each national farm loan association shall cast the vote of said association for as many candidates on said list as there are vacancies to be filled, and shall forward said vote to the Farm Loan Commissioner within ten days after said list of candidates is received by them. The candidates receiving the highest number of votes shall be elected as local directors. In case of a tie the Farm Loan Commissioner shall determine the choice.

(11) District directors; appointment; terms of office.

The Federal Farm Loan Board shall designate one of the district directors to serve for three years and to act as chairman of the board of directors. It shall designate one of said directors to serve for a term of two years and one to serve for a term of one year. After the first appointments each district director shall be appointed for a term of three years.

(12) Local directors; designation of terms of office; vacancies in board of directors.

At the first regular meeting of the board of directors of each Federal land bank it shall be the duty of the local directors to designate two of the local directors whose term of office shall expire in one year from the date of such meeting, two whose term of office shall expire in two years from said date, and two whose term of office shall expire in three years from said date. Thereafter every local director of a Federal land bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the board of directors shall be filled for the unexpired term in the manner provided for the original selection of such directors.

(13) Qualifications of directors.

Directors of Federal land banks shall have been for at least two years residents of the district for which they are appointed or elected, and at least one district director shall be experienced in practical farming and actually engaged at the time of his appointment in farming operations within the district. No director of a Federal land bank shall, during his continuance in office, act as an officer, director, or employee of any other institution, association, or partnership engaged in banking or in the business of making or selling land mortgage loans.

(14) Expenses of directors; approval by Federal Farm Loan Board of compensation of directors, officers, etc., of federal land banks.

Directors of Federal land banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, to be paid by the respective Federal land banks. Any compensation that may be provided by boards of directors of Federal land banks for directors, officers, or employees shall be subject to the approval of the Federal Farm Loan Board. (39 Stat. 362.)

CAPITAL STOCK OF FEDERAL LAND BANKS

§ 9835c. (Act July 17, 1916, c. 245, § 5.) (1) Minimum amount; regulation of subscriptions to.

Every Federal land bank shall have, before beginning business, a subscribed capital of not less than $750,000. The Federal Farm Loan Board is authorized to prescribe the times and conditions of

the payment of subscriptions to capital stock, to reject any subscription in its discretion, and to require subscribers to furnish adequate security for the payment thereof.

(2) Division into shares; who may subscribe for.

The capital stock of each Federal land bank shall be divided into shares of $5 each, and may be subscribed for and held by any individual, firm, or corporation, or by the Government of any State or of the United States.

(3) Transfer, etc., of stock held by national farm loan associations.

Stock held by national farm loan associations shall not be transferred or hypothecated, and the certificates therefor shall so state.

(4) Dividends on stock; voting stock.

Stock owned by the Government of the United States in Federal land banks shall receive no dividends, but all other stock shall share in dividend distributions without preference. Each national farm loan association and the Government of the United States shall be entitled to one vote for each share of stock held by it in deciding all questions at meetings of shareholders, and no other shareholder shall be permitted to vote. Stock owned by the United States shall be voted by the Farm Loan Commissioner, as directed by the Federal Farm Loan Board.

(5) Subscriptions to stock; subscriptions by United States to make up deficit in required minimum amount.

It shall be the duty of the Federal Farm Loan Board, as soon as practicable after the passage of this Act, to open books of subscription for the capital stock of a Federal land bank in each Federal land bank district. If within thirty days after the opening of said books any part of the minimum capitalization of $750,000 herein prescribed for Federal land banks shall remain unsubscribed, it shall be the duty of the Secretary of the Treasury to subscribe the balance thereof on behalf of the United States, said subscription to be subject to call in whole or in part by the board of directors of said land bank upon thirty days' notice with the approval of the Federal Farm Loan Board; and the Secretary of the Treasury is hereby authorized and directed to take out shares corresponding to the unsubscribed balance as called, and to pay for the same out of any moneys in the Treasury not otherwise appropriated. Thereafter no stock shall be issued except as hereinafter provided.

(6) Retirement of original stock.

After the subscriptions to capital stock by national farm loan associations shall amount to $750,000 in any Federal land bank, said bank shall apply semiannually to the payment and retirement of the shares of stock which were issued to represent the subscriptions to the original capital twenty-five per centum of all sums thereafter subscribed to capital stock until all such original capital stock is retired at par.

(7) Proportion of stock held in quick assets.

At least twenty-five per centum of that part of the capital of any Federal land bank for which stock is outstanding in the name of national farm loan associations shall be held in quick assets, and may consist of cash in the vaults of said land bank, or in deposits in member banks of the Federal reserve system, or in readily marketable securities which are approved under rules and regulations of the Federal Farm Loan Board: Provided, That not less than five per centum of such capital shall be invested in United States Government bonds. (39 Stat. 364.)

Provisions for the Federal reserve system were made by Act Dec. 23, 1913, c. 6, set forth ante, Title LXII, Chapter 3A.

GOVERNMENT DEPOSITARIES

§ 9835cc. (Act July 17, 1916, c. 245, § 6.) Federal land banks and joint stock land banks designated as depositaries of public moneys and employed as government financial agents; bonds; investment of funds deposited.

All Federal land banks and joint stock land banks organized under this Act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. And the Secretary of the Treasury shall require of the Federal land banks and joint stock land banks thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. No Government funds deposited under the provisions of this section shall be invested in mortgage loans or farm loan bonds. (39 Stat. 365.)

NATIONAL FARM LOAN ASSOCIATIONS

§ 9835d. (Act July 17, 1916, c. 245, § 7.) (1) Purposes of organization; articles of association; contents; signature to; copies for federal land banks.

Corporations, to be known as national farm loan associations, may be organized by persons desiring to borrow money on farm mortgage security under the terms of this Act. Such persons shall enter into articles of association which shall specify in general terms the object for which the association is formed and the territory within which its operations are to be carried on, and which may contain any other provision, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. Said articles shall be signed by the persons uniting to form the association, and a copy thereof shall be forwarded to the Federal land bank for the district, to be filed and preserved in its office.

(2) Directors; election; terms of office; secretary-treasurer; president; vice-president; loan committee.

Every national farm loan association shall elect, in the manner prescribed for the election of directors of national banking associations, a board of not less than five directors, who shall hold office for the same period as directors of national banking associations. It shall be the duty of said board of directors to choose in such manner as they may prefer a secretary-treasurer, who shall receive such compensation as said board of directors shall determine. The board of directors shall elect a president, a vice president, and a loan committee of three members.

(3) Compensation and qualifications of directors, etc.

The directors and all officers except the secretary-treasurer shall serve without compensation, unless the payment of salaries to them shall be approved by the Federal Farm Loan Board. All officers and directors except the secretary-treasurer shall, during their term of office, be bona fide residents of the territory within which the association is authorized to do business, and shall be shareholders of the association.

by them, and such other information as may be required by rules and regulations to be prescribed by the Federal Farm Loan Board. No loan shall be approved by the directors unless said loan committee agrees upon a favorable report.

(2) Report of appraisal submitted to directors of land bank.

The written report of said loan committee shall be submitted to the Federal land bank, together with the application for the loan, and the directors of said land bank shall examine said written report when they pass upon the loan application which it accompanies, but they shall not be bound by said appraisal.

(3) Reference of applications for loan to land bank appraisers; investigation and report by appraisers.

Before any mortgage loan is made by any Federal land bank, or joint stock land bank, it shall refer the application and written report of the loan committee to one or more of the land bank appraisers appointed under the authority of section three of this Act, and such appraiser or appraisers shall investigate and make a written report upon the land offered as security for said loan. No such loan shall be made by said land bank unless said written report is favorable.

(4) Forms for appraisal reports.

Forms for appraisal reports for farm loan associations and land banks shall be prescribed by the Federal Farm Loan Board.

(5) Examinations, etc., by land bank appraisers as to farm loan bonds and first mortgages.

Land bank appraisers shall make such examinations and appraisals and conduct such investigations, concerning farm loan bonds and first mortgages, as the Federal Farm Loan Board shall direct.

(6) Borrowers as appraisers or members of loan committees.

No borrower under this Act shall be eligible as an appraiser under this section, but borrowers may act as members of a loan committee in any case where they are not personally interested in the loan under consideration. When any member of a loan committee or of a board of directors is interested, directly or indirectly, in a loan, a majority of the board of directors of any national farm loan association shall appoint a substitute to act in his place in passing upon such loan. (39 Stat. 369.)

POWERS OF NATIONAL FARM LOAN ASSOCIATIONS

§ 9835f. (Act July 17, 1916, c. 245, § 11.) Enumerated powers of national farm loan associations.

Every national farm loan association shall have power:

(a) Indorsing mortgages.

First. To indorse, and thereby become liable for the payment of, mortgages taken from its shareholders by the Federal land bank of its district.

(b) Receiving advances from federal land banks and loaning to shareholders.

Second. To receive from the Federal land bank of its district funds advanced by said land bank, and to deliver said funds to its shareholders on receipt of first mortgages qualified under section twelve of this Act.

(c) Acquiring and disposing of property.

Third. To acquire and dispose of such property, real or personal, as may be necessary or convenient for the transaction of its business.

(d) Issuing interest bearing certificates against deposits of current funds convertible into farm loan bonds.

Fourth. To issue certificates against deposits of current funds bearing interest for not longer than one year at not to exceed four per centum per annum after six days from date, convertible into farm loan bonds when presented at the Federal land bank of the district in the amount of $25 or any multiple thereof. Such deposits, when received, shall be forthwith transmitted to said land bank, and be invested by it in the purchase of farm loan bonds issued by a Federal land bank or in first mortgages as defined by this Act. (39 Stat. 369.)

RESTRICTIONS ON LOANS BASED ON FIRST MORTGAGES

§ 9835ff. (Act July 17, 1916, c. 245, § 12.) (1) Restrictions on loans enumerated.

No Federal land bank organized under this Act shall make loans except upon the following terms and conditions:

(a) Security by first mortgage.

First. Said loans shall be secured by duly recorded first mortgages on farm land within the land bank district in which the bank is situated.

(b) Agreement in mortgage for repayment on amortization plan.

Second. Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual or semiannual installments sufficient to cover, first, a charge on the loan, at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan; second, a charge for administration and profits at a rate not exceeding one per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; and, third, such amounts to be applied on the principal as will extinguish the debt within an agreed period, not less than five years nor more than forty years: Provided, That after five years from the date upon which a loan is made additional payments in sums of $25 or any multiple thereof for the reduction of the principal, or the payment of the entire principal, may be made on any regular installment date under the rules and regulations of the Federal Farm Loan Board: And provided further, That before the first issue of farm loan bonds by any land bank the interest rate on mortgages may be determined in the discretion of said land bank subject to the provisions and limitations of this Act.

(c) Maximum interest rate.

Third. No loan on mortgage shall be made under this Act at a rate of interest exceeding six per centum per annum, exclusive of amortization payments.

(d) Purposes of loans enumerated.

Fourth. Such loans may be made for the following purposes and for no other:

(a) To provide for the purchase of land for agricultural uses.

(b) To provide for the purchase of equipment, fertilizers and live stock necessary for the proper and reasonable operation of the mortgaged farm; the term "equipment" to be defined by the Federal Farm Loan Board.

(c) To provide buildings and for the improvement of farm lands; the term "improvement" to be defined by the Federal Farm Loan Board.

(d) To liquidate indebtedness of the owner of the land mortgaged, existing at the time of the organization of the first national

farm loan association established in or for the county in which the land mortgaged is situated, or indebtedness subsequently incurred for purposes mentioned in this section.

(e) Limitation on amount of loans; basis of appraisal; reappraisal.

Fifth. No such loan shall exceed fifty per centum of the value of the land mortgaged and twenty per centum of the value of the permanent, insured improvements thereon, said value to be ascertained by appraisal, as provided in section ten of this Act. In making said appraisal the value of the land for agricultural purposes shall be the basis of appraisal and the earning power of said land shall be a principal factor.

A reappraisal may be permitted at any time in the discretion of the Federal land bank, and such additional loan may be granted as such reappraisal will warrant under the provisions of this paragraph. Whenever the amount of the loan applied for exceeds the amount that may be loaned under the appraisal as herein limited, such loan may be granted to the amount permitted under the terms of this paragraph without requiring a new application or appraisal.

(f) Persons to whom loans may be made; sale of mortgaged lands; death of mortgagor.

Sixth. No such loan shall be made to any person who is not at the time, or shortly to become, engaged in the cultivation of the farm mortgaged. In case of the sale of the mortgaged land, the Federal land bank may permit said mortgage and the stock interests of the vendor to be assumed by the purchaser. In case of the death of the mortgagor, his heir or heirs, or his legal representative or representatives, shall have the option, within sixty days of such death, to assume the mortgage and stock interests of the deceased.

(g) Maximum of loans to one borrower; minimum of loans.

Seventh. The amount of loans to any one borrower shall in no case exceed a maximum of $10,000, nor shall any loan be for a less sum than $100.

(h) Form of applications for loans.

Eighth. Every applicant for a loan under the terms of this Act shall make application on a form to be prescribed for that purpose by the Federal Farm Loan Board, and such applicant shall state the objects to which the proceeds of said loan are to be applied, and shall afford such other information as may be required.

(i) Simple interest on defaulted payments; payment of taxes, liens, etc.; insurance.

Ninth. Every borrower shall pay simple interest on defaulted payments at the rate of eight per centum per annum, and by express covenant in his mortgage deed shall undertake to pay when due all taxes, liens, judgments, or assessments which may be lawfully assessed against the land mortgaged. Taxes, liens, judgments, or assessments not paid when due, and paid by the mortgagee, shall become a part of the mortgage debt and shall bear simple interest at the rate of eight per centum per annum. Every borrower shall undertake to keep insured to the satisfaction of the Federal Farm Loan Board all buildings the value of which was a factor in determining the amount of the loan. Insurance shall be made payable to the mortgagee as its interest may appear at time of loss, and, at the option of the mortgagor and subject to general regulations of the Federal Farm Loan Board, sums so received may be used to pay for reconstruction of the buildings destroyed.

(j) Agreement by borrowers as to use of loans.

Tenth. Every borrower who shall be granted a loan under the provisions of this Act shall enter into an agreement, in form and

under conditions to be prescribed by the Federal Farm Loan Board, that if the whole or any portion of his loan shall be expended for purposes other than those specified in his original application, or if the borrower shall be in default in respect to any condition or covenant of the mortgage, the whole of said loan shall, at the option of the mortgagee, become due and payable forthwith: Provided, That the borrower may use part of said loan to pay for his stock in the farm loan association, and the land bank holding such mortgage may permit said loan to be used for any purpose specified in subsection fourth of this section.

(k) Loans not invalidated by unauthorized acts by federal land banks or national farm loan associations.

Eleventh. That no loan or the mortgage securing the same shall be impaired or invalidated by reason of the exercise of any power by any Federal land bank or national farm loan association in excess of the powers herein granted or any limitations thereon.

(2) Loans to be current funds or farm loan bonds.

Funds transmitted to farm loan associations by Federal land banks to be loaned to its members shall be in current funds, or farm loan bonds, at the option of the borrower. (39 Stat. 370.)

POWERS OF FEDERAL LAND BANKS

§ 9835g. (Act July 17, 1916, c. 245, § 13.) Enumerated powers.

Every Federal land bank shall have power, subject to the limitations and requirements of this Act—

(a) Issuing and selling farm loan bonds.

First. To issue, subject to the approval of the Federal Farm Loan Board, and to sell farm loan bonds of the kinds authorized in this Act, to buy the same for its own account, and to retire the same at or before maturity.

(b) Investing funds in farm first mortgages.

Second. To invest such funds as may be in its possession in the purchase of qualified first mortgages on farm lands situated within the Federal land bank district within which it is organized or for which it is acting.

(c) Receiving and depositing with farm loan registrar farm first mortgages as collateral security for farm loan bonds; collecting, etc., dues, interest, etc., payable under mortgages and bonds.

Third. To receive and to deposit in trust with the farm loan registrar for the district, to be by him held as collateral security for farm loan bonds, first mortgages upon farm land qualified under section twelve of this Act, and to empower national farm loan associations, or duly authorized agents, to collect and immediately pay over to said land banks the dues, interest, amortization installments and other sums payable under the terms, conditions, and covenants of the mortgages and of the bonds secured thereby.

(d) Acquiring and disposing of property.

Fourth. To acquire and dispose of—

(a) Such property, real or personal, as may be necessary or convenient for the transaction of its business, which, however, may be in part leased to others for revenue purposes.

(b) Parcels of land acquired in satisfaction of debts or purchased at sales under judgments, decrees, or mortgages held by it. But no such bank shall hold title and possession of any real estate purchased or acquired to secure any debt due to it, for a longer period

than five years, except with the special approval of the Federal Farm Loan Board in writing.

(e) Depositing securities and funds with federal reserve banks.

Fifth. To deposit its securities, and its current funds subject to check, with any member bank of the Federal Reserve System, and to receive interest on the same as may be agreed.

(f) Receiving deposits from national farm loan associations.

Sixth. To accept deposits of securities or of current funds from national farm loan associations holding its shares, but to pay no interest on such deposits.

(g) Borrowing money.

Seventh. To borrow money, to give security therefor, and to pay interest thereon.

(h) Buying and selling United States bonds.

Eighth. To buy and sell United States bonds.

(i) Charging fees for loans.

Ninth. To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board, reasonable fees not exceeding the actual cost of appraisal and determination of title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in section twelve. (39 Stat. 372.)

RESTRICTIONS ON FEDERAL LAND BANKS

§ 9835gg. (Act July 17, 1916, c. 245, § 14.) Enumeration of restrictions.

No Federal land bank shall have power—

(a) Transacting banking business unauthorized by act.

First. To accept deposits of current funds payable upon demand except from its own stockholders, or to transact any banking or other business not expressly authorized by the provisions of this Act.

(b) Loaning on first mortgages except through national farm loan associations.

Second. To loan on first mortgage except through national farm loan associations as provided in section seven and section eight of this Act, or through agents as provided in section fifteen.

(c) Accepting other than first mortgages.

Third. To accept any mortgages on real estate except first mortgages created subject to all limitations imposed by section twelve of this Act, and those taken as additional security for existing loans.

(d) Issuing excess of farm loan bonds; receiving excess of additional mortgages from national farm loan associations.

Fourth. To issue or obligate itself for outstanding farm loan bonds in excess of twenty times the amount of its capital and surplus, or to receive from any national farm loan association additional mortgages when the principal remaining unpaid upon mortgages already received from such association shall exceed twenty times the amount of its capital stock owned by such association.

(e) Demanding, etc., unauthorized commissions, etc.

Fifth. To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act. (39 Stat. 372.)

AGENTS OF FEDERAL LAND BANKS

§ 9835h. (Act July 17, 1916, c. 245, § 15.) (1) Loans through agents; when authorized.

Whenever, after this Act shall have been in effect one year, it shall appear to the Federal Farm Loan Board that national farm loan associations have not been formed, and are not likely to be formed, in any locality, because of peculiar local conditions, said board may, in its discretion, authorize Federal land banks to make loans on farm lands through agents approved by said board.

(2) Manner of making loans through agents.

Such loans shall be subject to the same conditions and restrictions as if the same were made through national farm loan associations, and each borrower shall contribute five per centum of the amount of his loan to the capital of the Federal land bank, and shall become the owner of as much capital stock of the land bank as such contribution shall warrant.

(3) Who may be employed as agents.

No agent other than a duly incorporated bank, trust company, mortgage company, or savings institution, chartered by the State in which it has its principal office, shall be employed under the provisions of this section.

(4) Expenses of and commissions to agents.

Federal land banks may pay to such agents the actual expense of appraising the land offered as security for a loan, examining and certifying the title thereof, and making, executing, and recording the mortgage papers; and in addition may allow said agents not to exceed one-half of one per centum per annum upon the unpaid principal of said loan, such commission to be deducted from dividends payable to the borrower on his stock in the Federal land bank.

(5) Expenses of agents added to loans.

Actual expenses paid to agents under the provisions of this section shall be added to the face of the loan and paid off in amortization payments subject to the limitations provided in subsection ninth of section thirteen of this Act.

(6) Collecting interest, etc., by agents.

Said agents, when required by the Federal land banks, shall collect and forward to such banks without charge all interest and amortization payments on loans indorsed by them.

(7) Indorsement of loans by agents; liability thereon.

Any agent negotiating any such loan shall indorse the same and become liable for the payment thereof, and for any default by the mortgagor, on the same terms and under the same penalties as if the loan had been originally made by said agent as principal and sold by said agent to said land bank, but the aggregate of the unpaid principal of mortgage loans received from any such agent shall not exceed ten times its capital and surplus.

(8) Loans through agents to cease, when.

If at any time the district represented by any agent under the provisions of this section shall, in the judgment of the Federal Farm Loan Board, be adequately served by national farm loan associations, no further loans shall be negotiated therein by agents under this section. (39 Stat. 373.)

JOINT STOCK LAND BANKS

§ 9835hh. (Act July 17, 1916, c. 245, § 16.) (1) Power to organize; manner of organization; number of directors.

Corporations, to be known as joint stock land banks, for carrying on the business of lending on farm mortgage security and issuing farm loan bonds, may be formed by any number of natural persons not less than ten. They shall be organized subject to the requirements and under the conditions set forth in section four of this Act, so far as the same may be applicable: Provided, That the board of directors of every joint stock land bank shall consist of not less than five members.

(2) Individual liability of shareholders.

Shareholders of every joint stock land bank organized under this Act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

(3) Powers, duties, and liabilities; stock; United States not to purchase; voting stock.

Except as otherwise provided, joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal land banks by this Act, so far as such restrictions and conditions are applicable: Provided, however, That the Government of the United States shall not purchase or subscribe for any of the capital stock of any such bank; and each shareholder of any such bank shall have the same voting privileges as holders of shares in national banking associations.

(4) Limitation on amount of issue of farm loan bonds; transacting banking business not authorized by act.

No joint stock land bank shall have power to issue or obligate itself for outstanding farm loan bonds in excess of fifteen times the amount of its capital and surplus, or to receive deposits or to transact any banking or other business not expressly authorized by the provisions of this Act.

(5) Minimum amount of subscribed capital stock required.

No joint stock land bank shall be authorized to do business until capital stock to the amount of at least $250,000 has been subscribed, one-half thereof paid in cash and the balance subject to call by the board of directors, and a charter has been issued to it by the Federal Farm Loan Board.

(6) Issuing bonds before payment of capital stock prohibited.

No joint stock land bank shall issue any bonds until after the capital stock is entirely paid up.

(7) Form of farm loan bonds.

Farm loan bonds issued by joint stock land banks shall be so engraved as to be readily distinguished in form and color from farm loan bonds issued by Federal land banks, and shall otherwise bear such distinguishing marks as the Federal Farm Loan Board shall direct.

(8) Interest rates; restrictions on mortgage loans.

Joint stock land banks shall not be subject to the provisions of subsection (b) of section seventeen of this Act as to interest rates on mortgage loans or farm loan bonds, nor to the provisions of subsections first, fourth, sixth, seventh, and tenth of section twelve as to restrictions on mortgage loans: Provided, however, That no

loans shall be made which are not secured by first mortgages on farm lands within the State in which such joint stock land bank has its principal office, or within some one State contiguous to such State. Such joint stock land banks shall be subject to all other restrictions on mortgage loans imposed on Federal land banks in section twelve of this Act.

(9) Interest rates; increase.

Joint stock land banks shall in no case charge a rate of interest on farm loans exceeding by more than one per centum the rate of interest established for the last series of farm loan bonds issued by them.

(10) Unauthorized commissions or charges.

Joint stock land banks shall in no case demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act.

(11) Farm loan bonds; power to issue; form and contents.

Each joint stock land bank organized under this Act shall have authority to issue bonds based upon mortgages taken by it in accordance with the terms of this Act. Such bonds shall be in form prescribed by the Federal Farm Loan Board, and it shall be stated in such bonds that such bank is organized under section sixteen of this Act, is under Federal supervision, and operates under the provisions of this Act. (39 Stat. 374.)

POWERS OF FEDERAL FARM LOAN BOARD

§ 9835i. (Act July 17, 1916, c. 245, § 17.) Enumeration of powers.

The Federal Farm Loan Board shall have power—

(a) Organizing and chartering federal land banks, national farm loan associations, and joint stock land banks; authorizing increase of capital stock.

(a) To organize and charter Federal land banks, and to charter national farm loan associations and joint stock land banks subject to the provisions of this Act, and in its discretion to authorize them to increase their capital stock.

(b) Reviewing and altering interest rates.

(b) To review and alter at its discretion the rate of interest to be charged by Federal land banks for loans made by them under the provisions of this Act, said rates to be uniform so far as practicable.

(c) Granting or refusing authority to issue farm loan bonds.

(c) To grant or refuse to Federal land banks, or joint stock land banks, authority to make any specific issue of farm loan bonds.

(d) Making rules and regulations as to charges on loans.

(d) To make rules and regulations respecting the charges made to borrowers on loans under this Act for expenses in appraisal, determination of title, and recording.

(e) Requiring reports and statements; examining banks and associations.

(e) To require reports and statements of condition and to make examinations of all banks or associations doing business under the provisions of this Act.

(f) Prescribing form and terms of farm loan bonds and surety bonds.

(f) To prescribe the form and terms of farm loan bonds, and the form, terms, and penal sums of all surety bonds required under this

Act and of such other surety bonds as they shall deem necessary, such surety bonds to cover financial loss as well as faithful performance of duty.

(g) Regulating payments between federal land banks.

(g) To require Federal land banks to pay forthwith to any Federal land bank their equitable proportion of any sums advanced by said land bank to pay the coupons of any other land bank, basing said required payments on the amount of farm loan bonds issued by each land bank and actually outstanding at the time of such requirement.

(h) Suspending or removal of directors, registrars, appraisers, examiners, etc.

(h) To suspend or to remove for cause any district director or any registrar, appraiser, examiner, or other official appointed by said board under authority of section three of this Act, the cause of such suspension or removal to be communicated forthwith in writing by the Federal Farm Loan Board to the person suspended or removed, and in case of a district director to the proper Federal land bank.

(i) Exercising supervisory authority over federal land banks.

(i) To exercise general supervisory authority over the Federal land banks, the national farm loan associations, and the joint stock land banks herein provided for.

(j) Incidental powers.

(j) To exercise such incidental powers as shall be necessary or requisite to fulfill its duties and carry out the purposes of this Act. (39 Stat. 375.)

APPLICATIONS FOR FARM LOAN BONDS

§ 9835ii. (Act July 17, 1916, c. 245, § 18.) (1) Application through farm loan registrar; collateral security accompanying; schedule of.

Any Federal land bank, or joint stock land bank, which shall have voted to issue farm loan bonds under this Act, shall make written application to the Federal Farm Loan Board, through the farm loan registrar of the district, for approval of such issue. With said application said land bank shall tender to said farm loan registrar as collateral security first mortgages on farm lands qualified under the provisions of section twelve, section fifteen, or section sixteen of this Act, or United States Government bonds, not less in aggregate amount than the sum of the bonds proposed to be issued. Said bank shall furnish with such mortgages a schedule containing a description thereof and such further information as may be prescribed by the Federal Farm Loan Board.

(2) Investigation and appraisal of securities tendered by Federal Farm Loan Board.

Upon receipt of such application said farm loan registrar shall verify said schedule and shall transmit said application and said schedule to the Federal Farm Loan Board, giving such further information pertaining thereto as he may possess. The Federal Farm Loan Board shall forthwith cause to be made such investigation and appraisement of the securities tendered as it shall deem wise, and it shall grant in whole or in part, or reject entirely, such application.

(3) Transmission of decisions of Federal Farm Loan Board to land bank and farm loan registrar; information by registrar to Farm Loan Board.

The Federal Farm Loan Board shall promptly transmit its decision as to any issue of farm loan bonds to the land bank applying

for the same and to the farm loan registrar of the district. Said registrar shall furnish, in writing, such information regarding any issue of farm loan bonds as the Federal Farm Loan Board may at any time require.

(4) Approval in writing of issue of farm loan bonds.

No issue of farm loan bonds shall be authorized unless the Federal Farm Loan Board shall approve such issue in writing. (39 Stat. 375.)

ISSUE OF FARM LOAN BONDS

§ 9835j. (Act July 17, 1916, c. 245, § 19.) (1) Duties of farm loan registrars.

Whenever any farm loan registrar shall receive from the Federal Farm Loan Board notice that it has approved any issue of farm loan bonds under the provisions of section eighteen he shall forthwith take such steps as may be necessary, in accordance with the provisions of this Act, to insure the prompt execution of said bonds and the delivery of the same to the land bank applying therefor.

(2) Return of collateral securities on rejection of application.

Whenever the Federal Farm Loan Board shall reject entirely any application for an issue of farm loan bonds, the first mortgages and bonds tendered to the farm loan registrar as collateral security therefor shall be forthwith returned to said land bank by him.

(3) Disposition of collateral security on approval of application for issue.

Whenever the Federal Farm Loan Board shall approve an issue of farm loan bonds, the farm loan registrar having the custody of the first mortgages and bonds tendered as collateral security for such issue of bonds shall retain in his custody those first mortgages and bonds which are to be held as collateral security, and shall return to the bank owning the same any of said mortgages and bonds which are not to be held by him as collateral security. The land bank which is to issue said farm loan bonds shall transfer to said registrar, by assignment, in trust, all first mortgages and bonds which are to be held by said registrar as collateral security, said assignment providing for the right of redemption at any time by payment as provided in this Act and reserving the right of substitution of other mortgages qualified under sections twelve, fifteen, and sixteen of this Act. Said mortgages and bonds shall be deposited in such deposit vault or bank as the Federal Farm Loan Board shall approve, subject to the control of said registrar and in his name as trustee for the bank issuing the farm loan bonds and for the prospective holders of said farm loan bonds.

(4) Mortgages acceptable as collateral security.

No mortgage shall be accepted by a farm loan registrar from a land bank as part of an offering to secure an issue of farm loan bonds, either originally or by substitution, except first mortgages made subject to the conditions prescribed in said sections twelve, fifteen, and sixteen.

(5) Limiting amount of issue to collateral security; United States bonds or cash in lieu of mortgages withdrawn.

It shall be the duty of each farm loan registrar to see that the farm loan bonds delivered by him and outstanding do not exceed the amount of collateral security pledged therefor. Such registrar may, in his discretion, temporarily accept, in place of mortgages withdrawn, United States government bonds or cash.

(6) Additional collateral.

The Federal Farm Loan Board may, at any time, call upon any land bank for additional security to protect the bonds issued by it. (39 Stat. 376.)

FORM OF FARM LOAN BONDS

§ 9835k. (Act July 17, 1916, c. 245, § 20.) (1) Denominations; minimum and maximum periods; interest coupons; rate of interest.

Bonds provided for in this Act shall be issued in denominations of $25, $50, $100, $500, and $1,000; they shall run for specified minimum and maximum periods, subject to payment and retirement, at the option of the land bank, at any time after five years from the date of their issue. They shall have interest coupons attached, payable semiannually, and shall be issued in series of not less than $50,000, the amount and terms to be fixed by the Federal Farm Loan Board. They shall bear a rate of interest not to exceed five per centum per annum.

(2) Rules and regulations relating to payment of bonds.

The Federal Farm Loan Board shall prescribe rules and regulations concerning the circumstances and manner in which farm loan bonds shall be paid and retired under the provisions of this Act.

(3) Delivery of bonds to banks.

Farm loan bonds shall be delivered through the registrar of the district to the bank applying for the same.

(4) Preparation of bonds; custody of plates, dies, etc.; expenses of preparation; exchange for registered bonds; reexchange for coupon bonds.

In order to furnish farm loan bonds for delivery at the Federal land banks and joint stock land banks, the Secretary of the Treasury is hereby authorized to prepare suitable bonds in such form, subject to the provisions of this Act, as the Federal Farm Loan Board may approve, such bonds when prepared to be held in the Treasury subject to delivery upon order of the Federal Farm Loan Board. The engraved plates, dies, bed-pieces, and so forth, executed in connection therewith shall remain in the custody of the Secretary of the Treasury. Any expenses incurred in the preparation, custody, and delivery of such farm loan bonds shall be paid by the Secretary of the Treasury from any funds in the Treasury not otherwise appropriated: Provided, however, That the Secretary shall be reimbursed for such expenditures by the Federal Farm Loan Board through assessment upon the farm land banks in proportion to the work executed. They may be exchanged into registered bonds of any amount, and reexchanged into coupon bonds, at the option of the holder, under rules and regulations to be prescribed by the Federal Farm Loan Board. (39 Stat. 377.)

SPECIAL PROVISIONS OF FARM LOAN BONDS

§ 9835*l*. (Act July 17, 1916, c. 245, § 21.) (1) Land banks bound by acts of officers and Federal Farm Loan Board in issue of bonds.

Each land bank shall be bound in all respects by the acts of its officers in signing and issuing farm loan bonds and by the acts of the Federal Farm Loan Board in authorizing their issue.

(2) Liability of land banks for bonds.

Every Federal land bank issuing farm loan bonds shall be primarily liable therefor, and shall also be liable, upon presentation of farm loan bond coupons, for interest payments due upon any farm

loan bonds issued by other Federal land banks and remaining unpaid in consequence of the default of such other land banks; and every such bank shall likewise be liable for such portion of the principal of farm loan bonds so issued as shall not be paid after the assets of any such other land banks shall have been liquidated and distributed: Provided, That such losses, if any, either of interest or of principal, shall be assessed by the Federal Farm Loan Board against solvent land banks liable therefor in proportion to the amount of farm loan bonds which each may have outstanding at the time of such assessment.

(3) Record on minutes of liability for bonds.

Every Federal land bank shall by appropriate action of its board of directors, duly recorded in its minutes, obligate itself to become liable on farm loan bonds as provided in this section.

(4) Signing and attesting bonds; certificate to.

Every farm loan bond issued by a Federal land bank shall be signed by its president and attested by its secretary, and shall contain in the face thereof a certificate signed by the Farm Loan Commissioner to the effect that it is issued under the authority of the Federal Farm Loan Act, has the approval in form and issue of the Federal Farm Loan Board, and is legal and regular in all respects; that it is not taxable by National, State, municipal, or local authority; that it is issued against collateral security of United States Government bonds, or indorsed first mortgages on farm lands, at least equal in amount to the bonds issued; and that all Federal land banks are liable for the payment of each bond. (39 Stat. 377.)

APPLICATION OF AMORTIZATION AND INTEREST PAYMENTS

§ 9835m. (Act July 17, 1916, c. 245, § 22.) (1) Notice to farm loan registrars of interest, amortization, etc., payments on collateral security for farm loan bonds; crediting payments; cancellation of mortgages on payment in full.

Whenever any Federal land bank, or joint stock land bank, shall receive any interest, amortization or other payments upon any first mortgage or bond pledged as collateral security for the issue of farm loan bonds, it shall forthwith notify the farm loan registrar of the items so received. Said registrar shall forthwith cause such payment to be duly credited upon the mortgage entitled to such credit. Whenever any such mortgage is paid in full, said registrar shall cause the same to be canceled and delivered to the proper land bank, which shall promptly satisfy and discharge the lien of record and transmit such canceled mortgage to the original maker thereof, or his heirs, administrators, executors, or assigns.

(2) Withdrawal of collateral security and substitution of other security therefor.

Upon written application by any Federal land bank, or joint stock land bank, to the farm loan registrar, it may be permitted, in the discretion of said registrar, to withdraw any mortgages or bonds pledged as collateral security under this Act, and to substitute therefor other similar mortgages or United States Government bonds not less in amount than the mortgages or bonds desired to be withdrawn.

(3) Place and mode of payment of farm loan bonds or interest thereon; cancellation on payment.

Whenever any farm loan bonds, or coupons or interest payments of such bonds, are due under their terms, they shall be payable at the land bank by which they were issued, in gold or lawful money, and upon payment shall be duly canceled by said bank. At the dis-

cretion of the Federal Farm Loan Board, payment of any farm loan bond or coupon or interest payment may, however, be authorized to be made at any Federal land bank, any joint stock land bank, or any other bank, under rules and regulations to be prescribed by the Federal Farm Loan Board.

(4) Withdrawal of collateral security on surrender of farm loan bonds.

When any land bank shall surrender to the proper farm loan registrar any farm loan bonds of any series, canceled or uncanceled, said land bank shall be entitled to withdraw first mortgages and bonds pledged as collateral security for any of said series of farm loan bonds to an amount equal to the farm loan bonds so surrendered, and it shall be the duty of said registrar to permit and direct the delivery of such mortgages and bonds to such land bank.

(5) Interest payments on hypothecated first mortgages.

Interest payments on hypothecated first mortgages shall be at the disposal of the land bank pledging the same, and shall be available for the payment of coupons and the interest of farm loan bonds as they become due.

(6) Face value of bonds or interest coupons to holders.

Whenever any bond matures, or the interest on any registered bond is due, or the coupon on any coupon bond matures, and the same shall be presented for payment as provided in this Act, the full face value thereof shall be paid to the holder.

(7) Amortization, etc., payments on principal of first mortgages to constitute trust fund.

Amortization and other payments on the principal of first mortgages held by a farm loan registrar as collateral security for the issue of farm loan bonds shall constitute a trust fund in the hands of the Federal land bank or joint stock land bank receiving the same, and shall be applied or employed as follows:

(I) Application of trust fund in cases of federal land banks.

In the case of a Federal land bank—

(a) Payment of farm loan bonds at maturity.

(a) To pay off farm loan bonds issued by said bank as they mature.

(b) Purchase of farm loan bonds.

(b) To purchase at or below par farm loan bonds issued by said bank or by any other Federal land bank.

(c) Loans on first mortgages on farm lands.

(c) To loan on first mortgages on farm lands within the land bank district, qualified under this Act as collateral security for an issue of farm loan bonds.

(d) Purchase of United States bonds.

(d) To purchase United States Government bonds.

(II) Application of trust fund in case of joint stock land banks.

In the case of a joint stock land bank—

(a) Payment of farm loan bonds at maturity.

(a) To pay off farm loan bonds issued by said bank as they mature.

(b) Purchase of farm loan bonds.

(b) To purchase at or below par farm loan bonds.

(c) Loans on first mortgages.

(c) To loan on first mortgages qualified under section sixteen of this Act.

(d) Purchase of United States bonds.

(d) To purchase United States Government bonds.

(8) Deposit of trust fund with farm loan registrars as substituted collateral security.

The farm loan bonds, first mortgages, United States Government bonds, or cash constituting the trust fund aforesaid, shall be forthwith deposited with the farm loan registrar as substituted collateral security in place of the sums paid on the principal of indorsed mortgages held by him in trust.

(9) Notice to farm loan registrars of disposition of payments on principal of mortgages.

Every Federal land bank, or joint stock land bank, shall notify the farm loan registrar of the disposition of all payments made on the principal of mortgages held as collateral security for an issue of farm loan bonds, and said registrar is authorized, at his discretion, to order any of such payments, or the proceeds thereof, wherever deposited or however invested, to be immediately transferred to his account as trustee aforesaid. (39 Stat. 378.)

RESERVES AND DIVIDENDS OF LAND BANKS

§ 9835n. (Act July 17, 1916, c. 245, § 23.) (1) Reserves; amount; making good impairment; debit to reserve account of defaults in payment of interest, etc.

Every Federal land bank, and every joint stock land bank, shall semiannually carry to reserve account twenty-five per centum of its net earnings until said reserve account shall show a credit balance equal to twenty per centum of the outstanding capital stock of said land bank. Whenever said reserve shall have been impaired, said balance of twenty per centum shall be fully restored before any dividends are paid. After said reserve has reached the sum of twenty per centum of the outstanding capital stock, five per centum of the net earnings shall be annually added thereto. For the period of two years from the date when any default occurs in the payment of the interest, amortization installments, or principal on any first mortgage, by both mortgagor and indorser, the amount so defaulted shall be carried to a suspense account, and at the end of the two-year period specified, unless collected, shall be debited to reserve account.

(2) Dividends on balance of net earnings; investment of reserves.

After deducting the twenty-five per centum or the five per centum hereinbefore directed to be deducted for credit to reserve account, any Federal land bank or joint stock land bank may declare a dividend to shareholders of the whole or any part of the balance of its net earnings. The reserves of land banks shall be invested in accordance with rules and regulations to be prescribed by the Federal Farm Loan Board. (39 Stat. 379.)

RESERVE AND DIVIDENDS OF NATIONAL FARM LOAN ASSOCIATIONS

§ 9835o. (Act July 17, 1916, c. 245, § 24.) (1) Reserves; amount.

Every national farm loan association shall, out of its net earnings, semiannually carry to reserve account a sum not less than ten per centum of such net earnings until said reserve account shall show a credit balance equal to twenty per centum of the outstanding capital stock of said association.

(2) Reserves; making good impairment.

Whenever said reserve shall have been impaired, said credit balance of twenty per centum shall be fully restored before any divi-

such association insolvent and appoint a receiver and require of him such bond and security as it deems proper: Provided, That no national farm loan association shall be declared insolvent by said board until the total amount of defaults of current interest and amortization installments on loans indorsed by national farm loan associations shall amount to at least $150,000 in the Federal land bank district, unless such association shall have been in default for a period of two years. Such receiver, under the direction of the Federal Farm Loan Board, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, with the approval of the Federal Farm Loan Board, or upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like approval or order, may sell all the real and personal property of such association, on such terms as the Federal Farm Loan Board or said court shall direct.

(2) Insolvency of national farm loan associations; receivers; payments to Treasurer of United States.

Such receiver shall pay over all money so collected to the Treasurer of the United States, subject to the order of the Federal Farm Loan Board, and also make report to said board of all his acts and proceedings. The Secretary of the Treasury shall have authority to deposit at interest any money so received.

(3) Insolvency of federal land banks and joint stock land banks; receivers; powers and duties.

Upon default of any obligation, Federal land banks and joint stock land banks may be declared insolvent and placed in the hands of a receiver by the Federal Farm Loan Board, and proceedings shall thereupon be had in accordance with the provisions of this section regarding national farm loan associations.

(4) Insolvency of national farm loan associations; cancellation of stock held in federal land banks; application of payments on such stock to payment of debts of association; reduction of capital stock of federal land banks; certificate of.

If any national farm loan association shall be declared insolvent and a receiver shall be appointed therefor by the Federal Farm Loan Board, the stock held by it in the Federal land bank of its district shall be canceled without impairment of its liability and all payments on such stock, with accrued dividends, if any, since the date of the last dividend shall be first applied to all debts of the insolvent farm loan association to the Federal land bank and the balance, if any, shall be paid to the receiver of said farm loan association: Provided, That in estimating said debts contingent liabilities incurred by national farm loan associations under the provisions of this Act on account of default of principal or interest of indorsed mortgages shall be estimated and included as a debt, and said contingent liabilities shall be determined by agreement between the receiver and the Federal land bank of the district, subject to the approval of the Federal Farm Loan Board, and if said receiver and said land bank can not agree, then by the decision of the Farm Loan Commissioner, and the amount thus ascertained shall be deducted in accordance with the provisions of this section from the amount otherwise due said national farm loan association for said canceled stock. Whenever the capital stock of a Federal land bank shall be reduced, the board of directors shall cause to be executed a certificate to the Federal Farm Loan Board, showing such reduction of capital stock, and, if said reduction shall be due to the insolvency of a national farm loan association, the amount repaid to such association.

(5) Voluntary liquidation; consent of Federal Farm Loan Board; consolidation of national farm loan associations.

No national farm loan association, Federal land bank or joint stock land bank shall go into voluntary liquidation without the written consent of the Federal Farm Loan Board, but national farm loan associations may consolidate under rules and regulations promulgated by the Federal Farm Loan Board. (39 Stat. 381.)

STATE LEGISLATION

§ 9835u. (Act July 17, 1916, c. 245, § 30.) (1) Examination of state laws relating to conveying and recording land titles, mortgage foreclosures, and homestead and other exemptions.

It shall be the duty of the Farm Loan Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, and the foreclosure of mortgages or other instruments securing loans, as well as providing homestead and other exemptions and granting the power to waive such exemptions as respects first mortgages, are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages.

(2) First mortgages ineligible as basis of issue of farm loan bonds, when; assistance in examinations by Attorney General or special counsel.

Pending the making of such examination in the case of any State, the Federal Farm Loan Board may declare first mortgages on farm lands situated within such State ineligible as the basis for an issue of farm loan bonds; and if said examination shall show that the laws of any such State afford insufficient protection to the holder of first mortgages of the kinds provided in this Act, said Federal Farm Loan Board may declare said first mortgages on land situated in such State ineligible during the continuance of the laws in question. In making his examination of the laws of the several States and forming his conclusions thereon said Farm Loan Commissioner may call upon the office of the Attorney General of the United States for any needed legal advice or assistance, or may employ special counsel in any State where he considers such action necessary.

(3) Statements as when and why act can not be complied with under state laws.

At the request of the Executive of any State the Federal Farm Loan Board shall prepare a statement setting forth in what respects the requirements of said board can not be complied with under the existing laws of such State. (39 Stat. 382.)

PENALTIES

§ 9835v. (Act July 17, 1916, c. 245, § 31.) (1) False statements in applications for loans; willful overvaluation of land by loan committees or appraisers; acceptance of loan or gratuity by land bank examiners.

Any applicant for a loan under this Act who shall knowingly make any false statement in his application for such loan, and any member of a loan committee or any appraiser provided for in this Act who shall willfully overvalue any land offered as security for loans under this Act, shall be punished by a fine of not exceeding $5,000, or by imprisonment not exceeding one year, or both. Any examiner appointed under this Act who shall accept a loan or gratuity from any land bank or national farm loan association examined

by him, or from any person connected with any such bank or association in any capacity, shall be punished by a fine of not exceeding $5,000, or by imprisonment not exceeding one year, or both, and may be fined a further sum equal to the money so loaned or gratuity given, and shall forever thereafter be disqualified from holding office as an examiner under the provisions of this Act. No examiner, while holding such office, shall perform any other service for compensation for any bank or banking or loan association, or for any person connected therewith in any capacity.

(2) Falsely making, forging or counterfeiting, etc., bonds or coupons; passing, etc., false, etc., bonds or coupons; falsely altering, etc., bonds or coupons.

Any person who shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any bond, coupon, or paper in imitation of, or purporting to be in imitation of, the bonds or coupons issued by any land bank or national farm loan association, now or hereafter authorized and acting under the laws of the United States; or any person who shall pass, utter, or publish, or attempt to pass, utter, or publish any false, forged, or counterfeited bond, coupon, or paper purporting to be issued by any such bank or association, knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering any such bond, coupon, or paper, or shall pass, utter, or publish as true any falsely altered or spurious bond, coupon, or paper issued, or purporting to have been issued, by any such bank or association, knowing the same to be falsely altered or spurious, shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

(3) Officers, directors, attorneys or employé of national farm loan association, federal land bank, or joint stock land bank receiving unauthorized fee, commission, etc.; federal land bank or national farm association charging or receiving unauthorized fee, commission, etc.; examiner disclosing names of borrowers.

Other than the usual salary or director's fee paid to any officer, director, or employee of a national farm loan association, a Federal land bank, or a joint stock land bank, and other than a reasonable fee paid by such association or bank to any officer, director, attorney, or employee for services rendered, no officer, director, attorney, or employee of an association or bank organized under this Act shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank. No land bank or national farm loan association organized under this Act shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized. No examiner, public or private, shall disclose the names of borrowers to other than the proper officers of a national farm loan association or land bank without first having obtained express permission in writing from the Farm Loan Commissioner or from the board of directors of such association or bank, except when ordered to do so by a court of competent jurisdiction or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this paragraph shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both.

(4) Embezzlement, etc., of moneys, funds, etc., of national farm loan associations, federal land banks, or joint stock land banks by persons connected therewith, or defrauding same, or aiding and abetting therein.

Any person connected in any capacity with any national farm loan association, Federal land bank, or joint stock land bank, who embezzles, abstracts, or willfully misapplies any moneys, funds, or credits thereof, or who without authority from the directors draws any order, assigns any note, bond, draft, mortgage, judgment, or decree thereof, or who makes any false entry in any book, report, or statement of such association or land bank with intent in either case to defraud such institution or any other company, body politic or corporate, or any individual person, or to deceive any officer of a national farm loan association or land bank or any agent appointed to examine into the affairs of any such association or bank, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

(5) Deceiving, defrauding, etc., or attempting to deceive, defraud, etc., by false pretenses as to character, etc., of farm loan bonds or coupons.

Any person who shall deceive, defraud, or impose upon, or who shall attempt to deceive, defraud, or impose upon, any person, firm, or corporation by making any false pretense or representation regarding the character, issue, security, or terms of any farm loan bond, or coupon, issued under the terms of this Act; or by falsely pretending or representing that any farm loan bond, or coupon, issued under the terms of this Act by one class of land banks is a farm loan bond, or coupon, issued by another class of banks; or by falsely pretending or representing that any farm loan bond, or coupon, issued under the terms of this Act, or anything contained in said farm loan bond, or coupon, is anything other than, or different from, what it purports to be on the face of said bond or coupon, shall be fined not exceeding $500 or imprisoned not exceeding one year, or both.

(6) Arrest, etc., of violators of act by Secret Service Division of Treasury Department.

The Secretary of the Treasury is hereby authorized to direct and use the Secret Service Division of the Treasury Department to detect, arrest, and deliver into custody of the United States marshal having jurisdiction, any person or persons violating any of the provisions of this section. (39 Stat. 382.)

GOVERNMENT DEPOSITS

§ 9835w. (Act July 17, 1916, c. 245, § 32.) Deposits for temporary use with federal land banks; certificates of indebtedness therefor; redemption; aggregate of deposits.

The Secretary of the Treasury is authorized, in his discretion, upon the request of the Federal Farm Loan Board, to make deposits for the temporary use of any Federal land bank, out of any money in the Treasury not otherwise appropriated. Such Federal land bank shall issue to the Secretary of the Treasury a certificate of indebtedness for any such deposit, bearing a rate of interest not to exceed the current rate charged for other Government deposits, to be secured by farm loan bonds or other collateral, to the satisfaction of the Secretary of the Treasury. Any such certificate shall be redeemed and paid by such land bank at the discretion of the Secretary of the Treasury. The aggregate of all sums so deposited by

the Secretary of the Treasury shall not exceed the sum of $6,000,000 at any one time. (39 Stat. 384.)

ORGANIZATION EXPENSES

§ 9835x. (Act July 17, 1916, c. 245, § 33.) Appropriation for expenses.

The sum of $100,000, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Federal Farm Loan Board, for the purpose of carrying into effect the provisions of this Act, including the rent and equipment of necessary offices. (39 Stat. 384.)

LIMITATION OF COURT DECISIONS

§ 9835y. (Act July 17, 1916, c. 245, § 34.) Effect of partial invalidity of Act.

If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. (39 Stat. 384.)

REPEALING CLAUSE

§ 9835z. (Act July 17, 1916, c. 245, § 35.) Acts repealed; time of taking effect of act; amendment, etc., of act.

All Acts or parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect upon its passage. The right to amend, alter, or repeal this Act is hereby expressly reserved. (39 Stat. 384.)

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[END OF VOLUME 9]

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